

## PRESIDENT'S AUTHORITY CLEAR ON RECESS APPOINTMENT OF JUDGES

by  
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In April 2003, President Bush nominated then-Alabama Attorney General William H. Pryor, Jr. to the U.S. Court of Appeals for the Eleventh Circuit. A minority of Senators, however, was able to prevent the nomination from an up-or-down vote for the nomination; the 53-44 vote in favor of limiting debate fell short of the 60 votes Senate rules require. With the nomination stuck in Senate limbo, President Bush on February 20, 2004, used his recess appointment power to seat Attorney General Pryor on the court until the first session of the 109th Congress ends in late 2005.

In May 2004, the Sierra Club — which had opposed the Pryor nomination — moved the court to disqualify Judge Pryor from a Clean Air Act case. The Sierra Club argued in its motion that Judge Pryor's appointment was unlawful because recess appointments can be made only during the recess *between* sessions of Congress, and Judge Pryor was appointed during a recess *within* a session. It also contends that the recess appointment of an Article III judge is not permissible at any time.

The Recess Appointment Clause of Article II, Section 2 gives the President the power “to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” The Sierra Club argued that the singular term “the Recess” refers to an inter-session recess. It contrasts this language with Article I, Section 5, which states that neither the House nor the Senate “during the Session of the Congress, shall, without the Consent of the other, *adjourn* for more than three days” (emphasis added). According to the Sierra Club, the Framers used the term “adjournment” when referring to a break within a “Session of Congress” and deliberately avoided that term in the Recess Appointment Clause.

The Sierra Club's textual analysis, although not implausible, is not conclusive either. First, the ordinary meanings of “recess” and “adjourn” in the context of deliberative bodies are the same — the suspension of business — and historically those terms have been used interchangeably. And there are other places in the Constitution where the Framers used two terms for the same thing: thus, Article I, Section 8 authorizes the creation of “*Tribunals* inferior to the supreme Court” while Article III, Section 1 speaks of “the supreme and inferior *Courts*” (emphases added).

Second, although the Recess Appointment Clause refers to “the” recess, it is not clear that the Framers' use of the definite article carries any significance, as the phrase “the Recess of the Senate” can be read to mean “the absence of the Senate.” In the clause of Article I, Section 5 on which the Sierra Club relies, the Framers referred to “the Session” in the singular, even though they elsewhere provided for multiple congressional sessions. (Article I, Section 2 obliges Congress to “assemble at least once in every Year.”) If

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the Framers had wanted to permit only inter-session recess appointments, they could have empowered the President to fill vacancies “between the Sessions of the Congress.”

The purpose of the Recess Appointment Clause also resists the Sierra Club’s narrow interpretation. In *The Federalist* No. 67, Alexander Hamilton wrote that the Clause was needed because “it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers” and “vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay” (original emphasis). When critical positions must be filled in the Senate’s absence, it makes no difference whether the Senate is on an intra-session or inter-session recess. The Sierra Club’s position could have dire consequences in the event of a national emergency during an intra-session recess. If, for example, a crippling terrorist attack occurred during the Senate’s usual month-long summer recess, and the Senate was unable to quickly assemble a quorum to confirm nominees through the advice and consent process, the President would be unable to fill vacant national and homeland security positions immediately with recess appointments.

The Sierra Club’s position is also contrary to the longstanding view of the Justice Department. Although Attorney General Knox had concluded in 1901 that recess appointments are permissible only during an inter-session recess, that view was rejected in 1921 by Attorney General Daugherty, who advised the President that a recess appointment could be made during a 28-day intra-session adjournment that year. The “real question,” Attorney General Daugherty opined, “is whether in a *practical* sense the Senate is in session so that its advice and consent can be obtained.” (original emphasis).

Under the Justice Department’s approach, the Senate is in recess for purposes of the Recess Appointment Clause whenever it adjourns for a “substantial” length of time. Although General Daugherty volunteered that he thought an adjournment “for 5 or even 10 days” would not be long enough, a 1992 Office of Legal Counsel opinion advised the White House that an 18-day recess would be. James Hormel was appointed Ambassador to Luxembourg during a 10-day Senate break in 1999, and the Department filed a brief in 1993 taking the position that any break lasting longer than three days might suffice.

Judge Pryor was appointed while the Senate was on a 10½-day recess for the 2004 President’s Day holiday, a recess that began at the close of business on February 12 and ended at noon on February 23. Thus, his appointment is consistent with recent precedents and positions and would appear to meet even the Daugherty dictum.

The Sierra Club argues that the Recess Appointment Clause should be narrowly construed because it is “largely obsolete in the modern era,” noting that, unlike early Congresses, which often met for less than five months a year, today Congress is available to confirm nominees almost year round. But the Pryor nomination itself demonstrates the Clause’s continued relevance. More than ten months after the President nominated Pryor to a seat identified as a judicial emergency, the Senate still had not voted on the nomination. Thus, the recess appointment counterbalanced the Senate’s failure to discharge its duty either to give or deny its advice and consent to the nomination. The Pryor recess appointment, moreover, was the catalyst for a political accommodation between President Bush and Senate Democrats under which the President pledged not to recess appoint any other lower federal judges during the remainder of his current term and the Senate leadership agreed to take up-or-down votes on a list of stalled judicial nominees.

The Sierra Club’s alternative argument — that Article III judges may never be recess appointed — is based on the notion that having judges who are appointed on a temporary basis and who may still desire Senate confirmation is inconsistent with the provisions of Article III, Section 1 that seek to ensure judicial independence through life tenure and salary protection. The high importance of judicial independence cannot be doubted, but Article II, Section 2 gives the President the power to fill “all Vacancies” through recess appointments, and that language comes on the heels of the provision outlining the regular process for appointing “Judges of the supreme Court, and all other Officers of the United States.” Thus, the text of Article II seems clearly to contemplate the recess appointment of judges. And if there is any conflict between Article II and Article III as to the permissibility of judicial recess appointments, the former should control because it deals with the process *for appointing* judges whereas the latter deals with protections judges enjoy *after appointment*. Finally, the Sierra Club’s position on this issue flies in the face of history. Presidents have recess appointed more than 300 federal judges, including 15 Supreme Court Justices.