

FOR IMMEDIATE RELEASE

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## COURT URGED TO REJECT CHALLENGE TO RECESS APPOINTMENT OF JUDGE PRYOR (*Stephens v. Evans*)

The Washington Legal Foundation (WLF) this week asked the U.S. Court of Appeals for the Eleventh Circuit in Atlanta to reject a challenge -- brought by U.S. Senator Edward Kennedy and others -- to President Bush's recess appointment of former Alabama Attorney General William Pryor to a seat on the Eleventh Circuit.

In a brief filed in *Stephens v. Evans*, WLF argued that the constitutionality of such recess appointments raises a political question that is not justiciable by the courts. WLF argued alternatively that the appointment fully complies with the Constitution.

"Senator Kennedy's challenge to Judge Pryor is a blatantly political move," said WLF Chief Counsel Richard Samp after filing WLF's brief. "He had nothing but praise for President Clinton when Clinton made similar recess appointments during his administration. The court should recognize this challenge as the political move that it is and refuse to inject itself into a dispute between the President and a handful of Senators," Samp said.

President Bush nominated Pryor for a seat on the Eleventh Circuit on April 9, 2003. Although the nomination was approved by the Senate Judiciary Committee and has the support of a majority of the Senate, Democratic Senators to date have successfully filibustered the nomination. On February 20, 2004, while the Senate was in an 11-day recess, President Bush gave Pryor a temporary "recess" appointment to the court, an appointment that will last through the end of 2005.

Senator Kennedy and others, including the Sierra Club, contend that the recess appointment exceeded President Bush's constitutional powers; they have brought a series of challenges to Judge Pryor's right to sit on Eleventh Circuit cases. Most of those challenges have been dismissed on procedural grounds. But it appears likely that the Court will be required to address the constitutional issue directly in one of those cases, *Stephens v. Evans*, which considers the scope of police officers' immunity from suits alleging violations of the Fourth Amendment's ban on unreasonable searches and seizures. Judge Pryor has been assigned to hear the case. Unlike the parties in other cases in which Senator Kennedy has attempted to raise the disqualification issue, the plaintiffs in *Stephens* have also asked the Court to kick Pryor off the case.

Some legal commentators contend that the President's recess appointment powers do not include the right to appoint federal judges. However, on both occasions on which that issue has been raised in the federal appeals courts, the courts have upheld the President's right to make recess appointments to the federal bench. Accordingly, Senator Kennedy is raising a more limited challenge to the Pryor appointment. He concedes that the President has the power to make recess appointments during inter-session recesses (recesses occurring at the end of the year, after the end of one session of Congress and before the beginning of the next). But he insists that the President may not make such appointments during *intra*-session recesses, such as the 11-day Presidents' Day recess during which Judge Pryor received his recess appointment.

WLF decided to get involved in the case on Judge Pryor's side once it became apparent that the constitutionality of his appointment had been placed squarely at issue in the case. In its brief, WLF argued that the disqualification motion raises a nonjusticiable political issue because the Constitution does not provide any judicially discoverable and manageable standards for distinguishing between recesses during which recess appointments are permissible and recesses during which such appointments are not permissible. WLF argued that such issues are best left for resolution by the President and Congress, the two branches of government assigned a role in the judicial appointment process by the Constitution.

WLF also argued alternatively that, if the Court decides to reach the merits of the controversy, it should uphold Judge Pryor's appointment. WLF noted that history is on the side of President Bush -- Presidents have been making recess appointments to the federal judiciary throughout American history, beginning with George Washington. Indeed, many Supreme Court justices, including Earl Warren and William Brennan, first reached the High Court by means of recess appointments. WLF also noted that many of the judicial recess appointments were made during intra-session recesses, and that intra-session recess appointments have been extremely common in recent decades.

WLF filed its brief solely to address the plaintiffs' motion to disqualify Judge Pryor. WLF's brief emphasized that WLF takes no position on the qualified immunity issues being litigated in the case.

WLF is a nationwide public interest law and policy center, with supporters in all 50 states. WLF devotes a considerable portion of its resources to efforts to limit unwarranted judicial interference with the powers of the elected branches of government, including the President's power to appoint judges and other federal officers.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, [www.wlf.org](http://www.wlf.org).