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COURT REJECTS CHALLENGE TO RECESS APPOINTMENT OF JUDGE PRYOR

(Stephens v. Evans)

The U.S. Court of Appeals for the Eleventh Circuit in Atlanta voted 8-2 today 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.

The decision was a victory for the Washington Legal Foundation (WLF), which filed a brief in the case, *Stephens v. Evans*, in support of Judge Pryor's appointment. The Court agreed with WLF that the appointment did not exceed the President's authority under the Recess Appointments Clause of the Constitution. WLF has pledged to continue its support of Senator Pryor -- a former member of WLF's Board of Legal Advisors -- if Senator Kennedy decides to carry his fight to the Supreme Court.

"Senator Kennedy's challenge to Judge Pryor was a blatantly political move," said WLF Chief Counsel Richard Samp after reviewing the Court's decision. "He had nothing but praise for President Clinton when Clinton made similar recess appointments during his administration. The appeals court appeared to recognize this challenge as the political move that it is and declined 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 were dismissed on procedural grounds. But the appeals court agreed 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* 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 the two prior occasions on which that issue was raised in the federal appeals courts, the courts upheld the President's right to make recess appointments to the federal bench. Accordingly, Senator Kennedy raised a more limited challenge to the Pryor appointment. He conceded 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 insisted 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. The appeals court rejected that argument, agreeing with WLF 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. The court 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.

Only one of the 10 judges hearing the challenge to Judge Pryor, Judge Rosemary Barkett, would have ruled that the Pryor nomination was improper. She based her decision on a ground not raised by Senator Kennedy: she argued that recess appointments are permissible only if the vacancy in a federal office occurs while the Senate is in recess. She conceded that hundreds if not thousands of recess appointments have been made to fill vacancies first created before the start of the recess in question, but she argued that the text of the Constitution requires that the consistent practice of 215 years be rejected. Another judge, Judge Wilson, dissented on the ground that the appeals court should have ducked the issue by asking the Supreme Court to answer it.

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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