MEMORANDUM

TO: **Jay Alan Sekulow**

FROM: **Joe Creed & Shawn Lillemo**

RE: **Summary of *Evans v. Stephens***

DATE: **October 14, 2004**

ORDER OF THE COURT.

The court began with the rather obvious point that recess appointments to Article III courts are authorized by Article II, Section 2, Clause 3 of the Constitution. The court noted that "beginning with President Washington, over 300 recess appointments to the federal judiciary (including fifteen to the Supreme Court) have been made."[1] The court rejected the argument that Article III's requirement "that judges serve during 'good Behaviour' and without a diminished salary somehow trumps the Recess Appointments Clause."[2] The court also explained that recess appointed judges enjoy the full authority of their offices during the limited time of their appointments.

The court next found that the Senate break during which the President appointed Judge Pryor constituted a "recess" within the Recess Appointments Clause. The court stated the arguments that Judge Pryor was not appointed during a constitutional recess "are not so strong as to persuade us that the President's interpretation is incorrect. . . . given the words of the Constitution and the history, we are unpersuaded by the argument that the recess appointment power may only

[1] *Evans v. Stephens*, No. 02-16424, at 5 (11th Cir. October 14, 2004).

be used in an intersession recess, but not an intrasession recess."[3]

Next, the court found that "vacancies" need not arise during the recess in order to be filled. The court concluded that, in context, the Appointments Clause empowers the President to fill "vacancies that 'happen' to exist during a recess . . . . [a] view [that is] consistent with the understanding of most judges that have considered the question, written executive interpretations from as early as 1823, and legislative acquiescence."[4]

Finally, the court addressed the plaintiff-appellee's argument that Judge Pryor's appointment, in particular, "circumvented and showed an improper lack of deference to the Senate's advice-and-consent role."[5] The court found that this argument presented a non-justiciable political question. The court thus concluded,

> We are not persuaded the President exceeded his constitutional authority in a way that causes Judge Pryor's judicial appointment to be invalid. We conclude that Judge Pryor may sit with this Court lawfully and act with all the powers of a United States Circuit Judge during his term of office.[6]

BARKETT, Circuit Judge, dissenting.

Judge Barkett began by stating the "first rule of constitutional interpretation is to look to the plain meaning of the Constitution's text."[7] Thus "when a vacancy must occur admits of very little ambiguity. Accordingly, the plain meaning rule compels the conclusion that the Constitution means what it says: the recess appointment power of Article II is good only for those vacancies that happen while the Senate is in recess."[8]

On the basis of purpose, Barkett then criticized the majority's holding because it "gives a President the power to repeatedly circumvent the Senate's advice-and-consent role <u>even when the</u>

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[2] *Id*. at 6.
[3] *Id*. at 9, 11-12.
[4] *Id*. at 12.
[5] *Id*. at 15.
[6] *Id*. at 16.
[7] *Id*. at 20.
[8] *Id*. at 24.

Senate is not disabled from exercising that role but is, instead, perfectly capable of exercising it."[9] On the basis of structure, Judge Barkett stated that "the Senate's refusal to consent to a presidential nomination does not justify the President in circumventing the text and structure of the Constitution."[10] He contended that the majority's holding allows "a President to side-step the Senate's advice-and-consent role even where the Senate is not disabled from fulfilling that role."[11]

Judge Barkett further explained that he rejects the reasoning of the two other circuit courts that have interpreted the Appointments Clause in the same as the *Evans* majority. He also argued that the majority was wrong to dismiss 5 U.S.C. § 5503 as a statute referring only to "salary requirements." Judge Barkett concluded his dissent by asserting that the plaintiff-appellee's argument against the President's use of his authority does not present a political question. Judge Barkett argued that "we cannot shirk our duty to resolve this matter simply because it may have some political consequences."[12]

WILSON, Circuit Judge, dissenting.

Judge Wilson found that the court was not obligated to address this challenge to Judge Pryor's appointment. He argued that the court should have declined to address the case because it should avoid addressing constitutional questions whenever possible, and he views it as inappropriate for the judges to decide the legitimacy of the appointment of a colleague on their court. Thus, Judge Wilson concluded, "[i]n light of the unique – indeed, unprecedented – circumstances of this motion to rule on the legitimacy of a colleague's presidential appointment, the most prudent course for us to take is to decline to reach the merits of the motion . . . . [and] certify the question to the Supreme Court."[13]

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[9] *Id.* at 27.
[10] *Id.* at 31.
[11] *Id.*
[12] *Id*. at 39-40.
[13] *Id*. at 48.