No. 02-16424-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DENIS STEPHENS,

Defendant-Appellant,

v.

PETER EVANS and DETREE JORDAN,

Plaintiffs-Appellees.

On Appeal from the
United States District Court
for the Northern District of Georgia

EN BANC BRIEF OF EDWIN MEESE III AND THE AMERICAN CENTER FOR LAW AND JUSTICE AS *AMICI CURIAE* IN OPPOSITION TO PLAINTIFFS-APPELLEES' MOTION TO DISQUALIFY JUDGE WILLIAM H. PRYOR, JR.

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Stephens v. Evans

Eleventh Circuit No. 02-16424-DD

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel hereby certifies that, in addition to the parties and entities identified in the Certificates of Interested Persons which the parties and other amici have submitted, the following may have an interest in the outcome of the proceedings:

American Center for Law and Justice (ACLJ), a public interest law firm which is a nonstock corporation. The ACLJ has no parent corporation, subsidiaries, or conglomerates and neither owns nor is owned by any affiliates. No publicly held company owns 10% or more of its stock.

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INTEREST OF AMICI

Edwin Meese III served under President Ronald Reagan as the seventy-fifth Attorney General of the United States. As such, he was the principal legal advisor to the President under the Constitution and laws of the United States. The position taken by Senator Kennedy as amicus in this case runs contrary to the consistent advice of the United States Department of Justice and would, if accepted by the courts, seriously hamper the ability of the President to address judicial vacancy crises. That, in turn, would jeopardize the ability of our Nation's judiciary to provide prompt justice to all parties.

The American Center for Law and Justice is a public interest law firm that opposes the current obstructive filibuster of judicial nominees undertaken by a minority of Senators, including Senator Edward Kennedy. The ACLJ supports the President's use of the recess appointment power as a means of dealing with the interminable Senate logjam which these obstructive filibusters have created.

SUMMARY OF ARGUMENT

This Court should reject Senator Kennedy's attack on the validity of President Bush's recess appointment of Judge William Pryor to the Eleventh Circuit. Settled constitutional principles, historic practice, and uniform case law all demonstrate that this recess appointment fell within the scope of the President's proper constitutional

authority.

In addition, the validity of Judge Pryor's recess appointment is not a justiciable issue. The Senate is fully capable of responding, in a variety of ways, to any Presidential abuse of the recess appointment power. Judicial intervention is especially inappropriate where, as here, the controversy reflects primarily an intra-Senate dispute between a majority supporting Judge Pryor's confirmation and a minority obstructing a confirmation vote by filibuster. Furthermore, Senator Kennedy's proposed constitutional test for assessing recess appointments is so murky, laden with policy judgments, and dependent on complex political circumstances as to provoke precisely the concerns that underlie the nonjusticiability doctrine.

On the merits, Senator Kennedy's arguments must fail. In particular, his effort to construct a distinction between Article III judges and other recess appointees flies squarely in the face of the constitutional text and uniform precedent. Senator Kennedy's policy objections to the recess appointment of judges, meanwhile, provide no warrant for disregarding the plain commands of the Constitution. Finally, Senator Kennedy's expression of concern about uncertainty for litigants coming before Judge Pryor is not well taken, both because the supposed problem is one of Senator Kennedy's own creation, and because his quibble over the length of a recess does not rise to the level of a jurisdictional defect.

This Court should reject the challenge to Judge Pryor's recess appointment.

ARGUMENT

I. THE RECESS APPOINTMENT OF JUDGE WILLIAM PRYOR IS PLAINLY CONSTITUTIONAL.

While the brief of the United States Department of Justice will doubtless address the point at length, amici wish to note briefly their concurrence in the proposition that settled principles and practice clearly establish the constitutionality of Judge Pryor's recess appointment. See Stuart Buck et al., Judicial Recess Appointments: A Survey of the Arguments (2004); id. at 10 (and authorities cited). See generally United States v. Woodley, 751 F.2d 1008 (9th Cir. 1985) (en banc), cert. denied, 457 U.S. 1048 (1986); United States v. Allocco, 305 F.2d 704 (2d Cir. 1962), cert. denied, 371 U.S. 964 (1963). No case has held to the contrary.

II. THE VALIDITY OF JUDGE PRYOR'S RECESS APPOINTMENT IS A NONJUSTICIABLE ISSUE.

As demonstrated persuasively in the amicus brief of the Washington Legal Foundation (WLF), WLF Br. § I, the validity of Judge Pryor's recess appointment is a nonjusticiable political question. Amici wish in the present brief to highlight several reasons why this conclusion is eminently sensible.

A. The Senate is Fully Capable of Defending Itself Without Judicial Intervention.

First, the Senate is perfectly capable of defending its prerogatives against the President without judicial intervention.

The premise of Senator Kennedy's argument is that the President has ridden roughshod over the Senatorial prerogative of consenting to judicial appointments. In reality, of course, it is a minority of the Senate that has thwarted -- for now -- the prerogative of the majority of the Senate to act upon the President's judicial nominees. It is therefore quite understandable that the Senate, as a body, would not take umbrage at the recess appointment of a judge who apparently enjoys majority support in the Senate.

> The Senate is not without the ability to extract a price if the President abuses his recess appointment power, but there is no reason to expect repercussions if the Senate's majority supports the President's choice of appointees.

Todd Gaziano, Is There a Duty to Make Judicial Recess Appointments?, Engage: The Journal of the Federalist Society's Practice Groups, Vol. 5, Issue 1, at 44, 45 (Apr. 2004) (to be posted at www.fed-soc.org/Publications/Engage/Engage.htm).

But even if Senator Kennedy's premise were correct, and even if the Senate as a body were to object to the recess appointment of Judge Pryor, the Senate is fully capable of fending for itself in such an interbranch dispute.

For example, the Senate can take a variety of political measures against the President, such as: refusing to process other Presidential nominations; refusing to advance legislation the President favors; and even withholding appropriations to the Executive Branch.

In addition, the Senate can take specific measures against the recess appointee. The Senate could vote the nominee down, for example, in retaliation for the recess appointment.[1] Moreover, the Senate could accelerate the ouster of the recess appointee by immediately ending its current Session, beginning a new Session within a couple of days (or hours or even minutes),[2] and then promptly ending that Session, thereby terminating the recess appointment. See U.S. Const. art. II, § 2, cl. 3 (appointments made "during the Recess of the Senate . . . shall expire at the end of their next Session"); Recess Appointments Issues, 6 Op. Off. Legal Counsel 585, 586-87 (1982) (available at 1982 OLC LEXIS 13, *5) ("special session" counts as "Session" for purposes of expiration of recess appointments). See also U.S. Const. art. I, § 5, cls. 1-2 (House and Senate may provide for their respective rules and

[1]Senate rejection of a nominee cuts off the recess nominee's compensation. See Henry B. Hogue, Recess Appointments: Frequently Asked Questions at 5 (Congressional Research Service Report for Congress, Sept. 10, 2002) (available at www.senate.gov/reference/resources/pdf/RS21308.pdf).

[2]The Senate may adjourn, without consent of the House, for up to three days. U.S. Const. art. I, § 5, cl. 4.

adjournments). And as WLF has explained, WLF Br. at 16 & n.3, Congress has already imposed limits on recess appointments through its power to deny compensation to such appointees. E.g., 5 U.S.C. § 5503. If the Senate decides that these limits need tightening, it is free to pursue statutory amendments that would accomplish this.

B. This Court Should Not Interpose Itself in an Internal Senatorial Dispute.

Second, because the current controversy reflects more an intra-Senate dispute than anything else, it would be highly inappropriate for a court to intervene.

In the ongoing nominations battle, a minority of Senators (including Senator Kennedy) is preventing, by filibuster, a majority of Senators from confirming, or even voting on, nearly a dozen judicial nominees.[3]

Thus, the confirmation controversy pits one segment of the Senate against another. Both sides of the dispute invoke legal, political, and constitutional arguments to support their positions. At the center of the debate is the question whether majority support for a nominee on the Senate floor will suffice to provide the "Consent of the Senate," U.S. Const. art. II, § 2, cl. 2, and thus confirmation, or whether instead a

[3]At least ten judicial nominees are currently being filibustered. Bolton, Bush's Judge Picks Flare Up Again as Hot Election Issue, The Hill, July 26, 2004 (available at www.thehill.com/news/072604/judge.aspx).

supermajority will be necessary to overcome a filibuster. See generally Jay Alan Sekulow et al., An End to Nomination Filibusters and the Need for Cloture Motions: Terminating Debate on Confirmation of Judicial Nominees by the Vote of a Simple Majority (2003) (available at www.aclj.org/resources/judconf/Filibusters.pdf).

The Constitution specifies those actions that require a supermajority. E.g., U.S. Const. art. II, § 2, cl. 2 (two-thirds of Senate required to ratify treaties); id. art. I, § 7, cl. 2 (two-thirds of House and Senate needed to override Presidential veto); id. art. V (two-thirds of House and Senate needed to propose constitutional amendments). The confirmation of nominees by the Senate is not listed as one of those items requiring a supermajority. U.S. Const. art. II, § 2, cl. 2 ("Consent of the Senate" is all that is required). Thus, the filibuster of judicial nominees, as with Judge Pryor, is arguably unconstitutional. See Sekulow et al., supra, at 12-13; cf. Fisk & Chemerinsky, The Filibuster, 49 Stan. L. Rev. 181 (1997).

Senator Kennedy, who ironically is one of the leaders of the ongoing minority filibuster of judicial nominees,[4] contends that the President's use of the recess appointment power -- a power the Constitution expressly confers on the President,

[4]Novak, Ted Kennedy's Grand Design, CNN.com Inside Politics (Mar. 3, 2003) (available at www.cnn.com/2003/ALLPOLITICS/02/27/column.novak.opinion.Kennedy/).

U.S. Const. art. II, § 2, cl. 3 -- in Judge Pryor's case is itself unconstitutional. Kennedy Br. §§ II, III.

The Senate will sort out this in-house dispute by itself, either by action (e.g., the "constitutional option," see Bolton, Frist Finger on "Nuclear" Button, The Hill, May 13, 2004 (available at www.thehill.com/news/051304/frist.aspx)), or by inaction (allowing both the filibusters to continue and the recess appointees to remain seated). Just as the constitutionality of the filibuster is presumably nonjusticiable, Sekulow et al., supra page 8, at 17-25, even so the constitutionality of the length or manner of "recess" which qualifies for a recess appointment is nonjusticiable. Both sides have their arguments; neither side has the power to compel the judicial branch to settle its domestic dispute. Indeed, it would be perverse to let a minority of the Senate escape judicial review of its arguably unconstitutional obstruction, while subjecting to judicial review the President's response -- acquiesced in by the Senate majority -- to that obstruction.

C. The Constitutional Test Senator Kennedy Proposes for Deciding which Recesses are "Too Short" Further Aggravates Justiciability Concerns.

Senator Kennedy's constitutional arguments only highlight the nonjusticiability of his challenge. Senator Kennedy suggests, as his remarkably amorphous standard for the constitutionality of recess appointments, that a court should ask whether "the

Senate was disabled from fulfilling its advice-and-consent function," resulting in "a crisis in vacancies." Kennedy Br. at 10. See also id. at 13 (asking whether circumstances "undermine the President's ability to receive the advice and consent of the Senate"). Such an inquiry would require this Court to address

- whether the ongoing filibusters have "disabled" the Senate from fulfilling its advice-and-consent function;
- whether the quantity and duration of "judicial emergency" vacancies have produced a sufficient "crisis";[5] and,
- whether there are alternative means (other than recess appointments) available to further the "specific purpose" of the recess appointment power.

An inquiry of this sort plainly entails, at a minimum,

> a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government . . . .

Baker v. Carr, 369 U.S. 186, 217 (1962).

[5]The Eleventh Circuit seat for which Judge Pryor has been nominated has lacked a permanent judge since Judge Emmett Cox took senior status on December 18, 2000. See www.ca11.uscourts.gov/about/judges.php (click on Judges Cox and Pryor).

III. SENATOR KENNEDY'S ATTEMPT TO READ THE CONSTITUTION DIFFERENTLY FOR RECESS APPOINTMENTS TO DIFFERENT OFFICES IS MERITLESS.

Senator Kennedy, in attacking the validity of Judge Pryor's recess appointment, tries to distinguish between the recess appointment of Article III judges and recess appointments of other officers. Kennedy Br. at 20-28. The Constitution supports no such distinction.

The Constitution treats en masse the Presidential power to nominate and, with Senatorial consent, appoint, a host of officials expressly including "Judges of the Supreme Court"[6] and "all other Officers" not otherwise provided for. The Constitution draws no distinction whatever between Supreme Court Justices, ambassadors, or any other nominees. "No class or type of officer is excluded because of its special functions. The President appoints judicial as well as executive officers." Buckley v. Valeo, 424 U.S. 1, 132 (1976) (per curiam). The subsequent Recess Appointments Clause, in turn, refers even more simply to "all Vacancies," with no suggestion whatsoever that different rules should apply to different offices. U.S. Const. art. II, § 2, cl. 3.

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[6]"Fifteen justices of the Supreme Court -- including two Chief Justices -- were first appointed by recess appointment." Buck et al., supra page 4, at 2 & App. A. Recess appointees have included Chief Justice Earl Warren and Justices William Brennan, Potter Stewart, and Oliver Wendell Holmes. Id.

In short, there is no warrant for Senator Kennedy's attempt to place recess appointments to Article III openings in a separate constitutional category. See also United States v. Allocco, 305 F.2d at 708-09 (rejecting argument that Constitution does not authorize recess appointments of Article III judges); United States v. Woodley, 751 F.2d 1008 (9th Cir. 1985) (en banc) (same); Buck et al., supra page 4, at 4-6 (same).

IV. SENATOR KENNEDY'S CATEGORICAL OBJECTION TO THE RECESS APPOINTMENT OF ARTICLE III JUDGES IS SIMPLY HIS POLICY DISAGREEMENT WITH THE CONSTITUTION ITSELF.

Senator Kennedy devotes several pages to his argument that the recess appointment of Article III judges is, as a matter of policy, a bad idea. Kennedy Br. at 22-25. Kennedy thereby voices his disagreement with the choice the Framers made in authorizing the recess appointment of Article III judges, including the Justices of the Supreme Court. See U.S. Const. Art. II, § 2, cls. 2-3.

If Senator Kennedy considers the Constitution defective on this point, he should pursue a constitutional amendment to disallow the recess appointment of Article III judges. He should not, however, ask this Court to rewrite the text for him.

> Even viewing the recess clause as an unwise constitutional provision, it is not for this court to redraft the Constitution. Changes in that great document must come through constitutional amendment, not through judicial reform based on policy arguments.

United States v. Woodley, 751 F.2d at 1014.

V. SENATOR KENNEDY SHOULD NOT BE HEARD TO COMPLAIN OF PROBLEMS THAT ARE OF HIS OWN MAKING.

Senator Kennedy laments the uncertainty he claims surrounds the validity of Judge Pryor's recess appointment and thus, the jurisdictional validity of decisions in which Judge Pryor participates. Kennedy Br. at 2, 31. This supposed problem, however, is Senator Kennedy's own doing. If the obstructive minority of senators would simply allow an up-or-down vote on the nomination of Judge Pryor, all uncertainty henceforth would disappear upon Judge Pryor's prompt confirmation. It is only because Senator Kennedy and certain of his colleagues insist on keeping this nominee in confirmation limbo, despite his majority support, that Judge Pryor is not now a judge confirmed to a permanent seat on the Eleventh Circuit.

Given that Senator Kennedy is the source of the problem of which he complains, and given that this powerful senator doubtless has the political clout immediately to end the filibuster of Judge Pryor's nomination, Senator Kennedy should not be heard to complain of the supposed uncertainty caused by Judge Pryor's status as a recess appointee.

Furthermore, even the uncertainty Senator Kennedy laments is illusory. The Supreme Court has not even decided whether an Article III court lacks decisional

jurisdiction as a matter of constitutional law when an admittedly non-Article III judge sits thereon. Nguyen v. United States, 539 U.S. 69, 76 n.9 (2003) (declining to address the issue). But Judge Pryor's situation is a far cry even from that extreme case. The President nominated and appointed Judge Pryor to be an Article III judge in an Article III judgeship.

Senator Kennedy claims to have found a procedural footfault in the appointment. But the range of such possible footfaults is endless. Suppose a President were to appoint a first cousin of a sitting judge to that same court, in violation of 28 U.S.C. § 458.[7] Suppose the Senate were to confirm a nominee in alleged violation of any one of the numerous Senate procedural rules and traditions governing committee or floor action.[8] Do such "illegal" appointments mean that these judges lack Article III status,

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[7]In the past, judges who were cousins, brothers, or children of other judges have been appointed to the same federal court. See Memorandum Opinion for the Counsel to the President from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges (Dec. 18, 1995) (available at www.usdoj.gov/olc/willy.fin.32.htm and at 1995 OLC LEXIS 46). The Dellinger Memorandum concluded that § 458 did not forbid such Presidential appointments. Id. Congress subsequently amended the statute expressly to forbid such appointments; however, Congress arguably lacks the constitutional power to constrain the President's appointment authority in this way. Id.

[8]See Betsy Palmer, Evolution of the Senate's Role in the Nomination and Confirmation Process: A Brief History (Congressional Research Service Report for Congress, June 5, 2003) (available at www.senate.gov/reference/resources/pdf/R31948.pdf) (discussing traditions of senatorial courtesy, holds, blue slips, and

and thus that the possibly hundreds of decisions they participate in are void? Surely not: there is a world of difference between an (alleged) impropriety in an appointment and an appointment that is void ab initio because, as in Nguyen, it does not even purport to seat an Article III judge.

As the Supreme Court explained in Nguyen, "the difference . . . is . . . between an action which could have been taken, if properly pursued, and one which could never have been taken at all." 539 U.S. at 79. Here, there is no question that the President could have made a recess appointment of Judge Pryor to this Court at a time that even Senator Kennedy would concede is a "Recess." Senator Kennedy's quibble over the President's timing of the appointment is just that -- a quibble.

CONCLUSION

This Court should deny Senator Kennedy's attack on the validity of Judge Pryor's recess appointment. Amici take no position on the merits of the underlying litigation between the parties.

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filibusters).

Respectfully submitted,

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July 29, 2004

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C), Fed. R. App. P., counsel hereby certifies that this brief complies with the type-volume limitation of Rules 32(a)(7)(B) and 29(d), Fed. R. App. P. The text, headings, and footnotes on the pages beginning with page one (arabic numbers) through the last word of the text of the "CONCLUSION" section together contain 3,058 words.

This brief has been prepared in a proportional typeface using Times New Roman in 14-point size.

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Jay Alan Sekulow

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of July, 2004, I served two copies of the En Banc Brief of Edwin Meese III and the American Center for Law and Justice as Amici Curiae in Opposition to Plaintiffs-Appellees' Motion to Disqualify Judge William H. Pryor, Jr. via Federal Express, next-day delivery, addressed to the following:

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