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## Judicial Recess Appointments: A Legal Overview

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T.J. Halstead  
Legislative Attorney  
American Law Division

# Judicial Recess Appointments: A Legal Overview

## Summary

Article II of the Constitution provides that the President “shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and counsels, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for and which shall be established by law.” As a supplement to this authority, the Constitution further provides that “[t]he President shall have 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 Recess Appointments Clause was designed to enable the President to ensure the unfettered operation of the government during periods when the Senate was not in session and therefore unable to perform its advice and consent function. In addition to fostering administrative continuity, Presidents have exercised authority under the Recess Appointments Clause for political purposes, appointing officials who might be viewed unfavorably by the Senate.

While the President’s exercise of the recess appointment power in any context may give rise to controversy, the use of the Recess Appointments Clause to appoint judges to temporary positions on Article III courts can be particularly politically contentious. Presidents have made over 300 recess appointments to the federal judiciary, including twelve to the Supreme Court, since the first Administration of George Washington. The practice of making such appointments lessened considerably after the Eisenhower Administration, with only four judicial recess appointments having occurred since 1960. Despite the controversy attendant to judicial recess appointments, the President’s authority to make such appointments has been challenged only in a handful of instances, with the most recent litigation arising from President George W. Bush’s recess appointment of William H. Pryor to the Court of Appeals for the Eleventh Circuit on February 20, 2004. This report provides an overview of the legal and constitutional issues pertaining to the recess appointment of judges to Article III courts, with a particular focus on the proceedings involving the appointment of Judge Pryor.

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# Judicial Recess Appointments: A Legal Overview

## Introduction

The Constitution establishes that the President “shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and counsels, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for and which shall be established by law.”<sup>1</sup> As a corollary to this general maxim, the Constitution provides further that “[t]he President shall have 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.”<sup>2</sup> The Recess Appointments Clause was adopted by the Constitutional Convention without dissent and without debate regarding the intent and scope of its terms.<sup>3</sup> In Federalist No. 67, Alexander Hamilton refers to the recess appointment power as “nothing more than a supplement...for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate.”<sup>4</sup> It is generally accepted that the clause was designed to enable the President to ensure the unfettered operation of the government during periods when the Senate was not in session and therefore unable to perform its advice and consent function.<sup>5</sup> In addition to fostering administrative continuity, Presidents have exercised authority under the Recess Appointments Clause for political purposes, appointing officials who might have difficulty securing Senate conformation.

While the President’s exercise of the recess appointment power in any context may give rise to controversy, the use of the Recess Appointments Clause to appoint judges to temporary positions on Article III courts has emerged as a particularly contentious political issue. Additionally, while the text of the Recess Appointments Clause does not differentiate between the appointment of judges and non-judges, the unique status of Article III judges gives rise to an inherent constitutional tension

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<sup>1</sup> U.S. Const., Art. II, §2, cl. 2.

<sup>2</sup> U.S. Const., Art. II, §2, cl. 3.

<sup>3</sup> CRS Report RL31112,, *Recess Appointments of Federal Judges*, by Louis Fisher at 1 (2001).

<sup>4</sup> *The Federalist*, No. 67, at 409-10 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

<sup>5</sup> CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue at 1 (2005).

between the President's recess appointment authority and traditional notions of judicial independence, and has been the subject of recent litigation.<sup>6</sup>

## Textual Issues

Two fundamental textual issues inhere to any consideration of the Recess Appointments Clause. The first point of inquiry in this regard is what constitutes a vacancy “that may happen during the Recess of the Senate.” If the term “happen” is interpreted as referring only to vacancies that occur during a recess, it necessarily follows that the President would lack authority to make a recess appointment to a vacancy that existed prior to the recess. Conversely, if “happen” is construed more broadly to encompass vacancies that exist during a recess, the President would be empowered to make a recess appointment to any vacant position, irrespective of whether the position became vacant prior to or during “the Recess of the Senate.” While this issue was a source of controversy in the late eighteenth and early nineteenth centuries, a long line of Attorney General opinions and judicial decisions have adopted the broader interpretation of the clause. Attorney General William Wirt, serving under President Monroe, concluded that the phrase encompassed all vacancies that happen to exist during “the Recess,” declaring that “[t]his seems to me the only construction of the Constitution which is compatible with its spirit, reason, and purpose.”<sup>7</sup> This interpretation was first adopted by a federal court in the 1880 decision *In re Farrow*,<sup>8</sup> and has adhered in judicial opinions on the issue in the modern era.

Similar interpretive difficulties adhere to the meaning of the phrase “the Recess of the Senate.” An opinion issued by Attorney General Knox in 1901 concluded that the phrase applied only to adjournments between sessions of Congress (commonly referred to as “intersession” recesses). In reaching this determination, Knox placed significant weight on the use of the definite article “the” in the Recess Appointments Clause, emphasizing that “[i]t will be observed that the phrase is ‘*the* recess.’”<sup>9</sup> The opinion further concluded that if recess appointments were allowed during periods other than an intersession recess, nothing would prevent an appointment from being made “during any adjournment, as from Thursday or Friday until the following Monday.”<sup>10</sup>

This position was abandoned in 1921 in an opinion issued by Attorney General Daugherty that declared that an appointment made during a 29 day recess was constitutional. The Daugherty opinion focused on the practical aspects of the recess appointment dynamic, stating that “[i]f the President's power of appointment is to be

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<sup>6</sup> See n.50 and accompanying text, *infra*.

<sup>7</sup> 1 Op. A.G. 631, 633-34 (1823).

<sup>8</sup> 3 Fed. 112, 116 (C.C.N.D. Ga. 1880) (stating that the President has the power to make appointments “notwithstanding the fact that the vacancy filled by his appointment first happened when the senate was in session.”).

<sup>9</sup> 23 Op. A.G. 599, 600 (1901) (emphasis in original).

<sup>10</sup> *Id.* at 603.

defeated because the Senate takes an adjournment to a specified date, the painful and inevitable result will be measurably to prevent the exercise of governmental functions.”<sup>11</sup> Further emphasizing this functional approach, the Daugherty opinion rejected the notion that this broader interpretation would authorize intrasession appointments during brief adjournments, declaring that “an adjournment for 5 or even 10 days [cannot] be said to constitute the recess intended by the Constitution.”<sup>12</sup> The opinion concluded by emphasizing that while “[e]very presumption is to be indulged in favor of the validity of whatever action [the President] may take..., there is a point, necessarily hard of definition, where palpable abuse of discretion might subject his appointment to review.”<sup>13</sup> Subsequent Attorney General and Department of Justice Office of Legal Counsel opinions have continued to support the constitutionality of intrasession recess appointments, with more recent pronouncements on the issue asserting that the clause encompasses all recesses in excess of three days.<sup>14</sup>

## Congressional Action

Since the early history of the Republic, Congress has established a statutory framework designed to protect the Senate’s constitutional role in the confirmation process. For instance, the Federal Vacancies Reform Act of 1998 (which governs the filling of vacancies falling outside the scope of the Recess Appointments Clause) establishes which individuals may be designated by the President to temporarily perform the duties and functions of a vacant office and the length of time a designee may serve.<sup>15</sup> The original version of the Vacancies Act was enacted in 1868,<sup>16</sup> and the legislative roots of such provisions can be traced back to a 1795 enactment limiting the time a temporary assignee could hold office to six months.<sup>17</sup>

Regarding recess appointments specifically, 5 U.S.C. §5503, a successor to a provision originally enacted in 1863, establishes that if a vacancy existed while the Senate was in session a person subsequently appointed to that position during a recess may not receive his salary until he is confirmed by the Senate. Exceptions to this payment prohibition are provided (1) for appointees to vacancies that arise within 30 days of the recess; (2) for appointees to an office for which a nomination was

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<sup>11</sup> 33 Op. A.G. 20, 23 (1921).

<sup>12</sup> *Id.* at 25.

<sup>13</sup> *Id.* at 25.

<sup>14</sup> See *Evans v. Stephens*, No. 04-828, Brief for the United States in Opposition to Petition for a Writ of Certiorari, at 11 (U.S. 2005); *Mackie v. Clinton*, Memorandum of Points and Authorities in support of Defendants’ Opposition to Plaintiffs’ Motion for Partial Summary Judgment, at 24-26, Civ. Action No. 93-0032-LFO (D.D.C. 1993).

<sup>15</sup> 5 U.S.C. §§3345-3349d. The vacancies act provides the exclusive means for authorizing the temporary filling of advice and consent positions unless otherwise expressly provided in law, or unless the President exercises his authority under the Recess Appointments Clause.

<sup>16</sup> Act of July 23, 1868, ch. 227, 15 Stat. 168.

<sup>17</sup> Act of February 13, 1795, ch. 21, 1 Stat. 415.

pending at the time of the recess, so long as the nomination is not of an individual appointed during the preceding recess of the Senate; and (3) for appointees selected to an office where a nomination had been made but rejected by the Senate within 30 days of the recess, and the appointee was not the individual so rejected.<sup>18</sup> Section 5503(b) provides that a nomination to fill a vacancy falling within any of the aforementioned exceptions must be submitted to the Senate not later than 40 days after the beginning of the next session of the Senate. Additionally, a provision has been included in all Treasury and General Governmental Appropriations Acts for over 60 years that prohibits the payment of the salary of any recess appointee whose nomination has been voted down by the Senate.<sup>19</sup>

The provisions governing recess appointments are designed to protect the Senate's advice and consent function by confining the recess appointment power of the President. By targeting the compensation of appointees as opposed to the President's recess appointment power itself, these limitations act as indirect controls on recess appointments, and their constitutionality has not been adjudicated. The court in *Staebler v. Carter* noted in dicta that "if any and all restrictions on the President's recess appointment power, however limited, are prohibited by the Constitution, 5 U.S.C. §5503...might also be invalid."<sup>20</sup> Additional constitutional concerns might arise from the application of these provisions to judicial recess appointees.<sup>21</sup>

## Article III Issues

Presidents have made over 300 recess appointments to the federal judiciary, including twelve to the Supreme Court, since the first Administration of George Washington.<sup>22</sup> The practice of making such appointments lessened considerably after the Eisenhower Administration, with only four judicial recess appointments having occurred since 1960.<sup>23</sup> Despite the controversy attendant to judicial recess appointments, the President's authority to make such appointments has been challenged only in a handful of cases, and the Supreme Court has consistently declined the opportunity to hear the issue.

### ***United States v. Alocco.***

The first legal challenge in this context arose from President Eisenhower's intersession recess appointment on August 17, 1955, of John M. Cashin as a U.S.

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<sup>18</sup> 5 U.S.C. §5503(a)(1)-(3). These exceptions to the broad prohibition on payment of salary to recess appointees were adopted in 1940.

<sup>19</sup> *See, e.g.*, P.L. 108-447, Div. H, Sec. 609; 118 Stat. 3274.

<sup>20</sup> 464 F.Supp. 585, 596 (D.D.C. 1979).

<sup>21</sup> *See* n.68 and accompanying text, *infra*.

<sup>22</sup> Henry B. Hogue, *The Law: Recess Appointments to Article III Courts*, Presidential Studies Quarterly 34, No. 3 at 661 (2004).

<sup>23</sup> CRS Report RS22039, *Federal Recess Judges*, by Louis Fisher at 4 (2005), *see also*, Fisher, n.3, *supra*, at 14-18.

district judge for the Southern District of New York. During his service as a recess appointee, Judge Cashin presided over the trial and conviction by jury of Dominic Allocco. On appeal, Allocco argued that his conviction and sentence should be set aside, on the basis that Judge Cashin was not constitutionally empowered to preside over the trial.<sup>24</sup> In particular, Allocco argued that (a) the President lacks authority to appoint “temporary” judges; (b) if such appointments are permissible, “temporary” judges may not preside over criminal trials; and (c) the President lacks authority to fill vacancies in the judiciary that arise when the Senate is in session.<sup>25</sup>

Addressing these arguments in *United States v. Allocco*, the Court of Appeals for the Second Circuit began its analysis by stating that “[t]he recess power given to the President in Article II, Section 2, is expressly made applicable to ‘all’ vacancies; and the ‘vacancies’ are clearly vacancies in the offices described in the [Appointments Clause], which could otherwise be filled only with the advice and consent of the Senate.”<sup>26</sup> Based upon this construction, the court rejected the notion that judicial vacancies were implicitly excluded from the Recess Appointments Clause by virtue of the tenure and salary protections conferred upon judges in Article III. Accordingly, the court held that since the Recess Appointments Clause empowers the President to make recess appointments of judges, “it necessarily follows that such judicial officers may exercise the power granted to Article III courts.”<sup>27</sup> The court likewise rejected the argument that the President’s recess appointment power does not extend to offices that become vacant while the Senate is in session, declaring that such an interpretation “would create Executive paralysis and do violence to the orderly functioning of our complex government.”<sup>28</sup>

### ***United States v. Woodley.***

In *United States v. Woodley*, the Court of Appeals for the Ninth Circuit considered a challenge to the constitutionality of President Carter’s intersession recess appointment of Walter Heen as a U.S. District judge for the District of Hawaii on December 30, 1980.<sup>29</sup> Noting that “[s]trong arguments can be marshaled both for and against application of the recess appointment clause to the judiciary,” the panel weighed the provisions of Article II in relation to “the institutional protections of article III that the Framers considered essential to judicial independence,” ultimately holding that “only those judges enjoying article III protections may exercise the judicial power of the United States.”<sup>30</sup> In reaching this conclusion, the panel concluded that the “very specific language of article III” took precedence over the

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<sup>24</sup> *United States v. Allocco*, 305 F.3d 704 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963).

<sup>25</sup> *Id.* at 706.

<sup>26</sup> *Id.* at 708.

<sup>27</sup> *Id.* at 709.

<sup>28</sup> *Id.* at 712.

<sup>29</sup> *United States v. Woodley*, 726 F.2d 1238 (9<sup>th</sup> Cir. 1983).

<sup>30</sup> *Id.* at 1330.



“general language of article II,”<sup>31</sup> particularly in light of declarations from the Framers and the Supreme Court emphasizing the need for judicial independence.<sup>32</sup> The panel also rejected the argument that the long history of acceptance of judicial recess appointments by both Congress and the Executive ameliorated any constitutional infirmities adhering to the practice, stating that “[w]hile the members of both the legislative and executive branches are sworn to uphold the Constitution, the courts alone are the final arbiters of its meaning.”<sup>33</sup>

The panel went on to note that a long line of Supreme Court authority indicated that “great weight was to be given to historical practice,” but declared that such reasoning “no longer, however, represents the thinking of the Court.”<sup>34</sup> The panel cited the Supreme Court’s then recent decision in *INS v. Chadha* (striking down the legislative veto) for the proposition that “any practice, no matter how fully accepted or efficient, is ‘subject to the demands of the Constitution which defines powers and...sets out just how they are to be exercised.’”<sup>35</sup> Accordingly, the panel held that while judicial recess appointments were widely accepted and could be seen as contributing to judicial efficiency, they were nonetheless unconstitutional, as “[s]uch appointments...offend the explicit and unambiguous command of article III that the judicial power be exercised only by those enjoying life tenure and protection against diminution of compensation.”<sup>36</sup>

The Ninth Circuit voted to rehear the case *en banc*,<sup>37</sup> ultimately rejecting the determinations made by the panel in a 7-4 decision.<sup>38</sup> Addressing the panel’s conclusion that the specific language of Article III governs the general language of the Recess Appointments Clause, the court espoused the Supreme Court’s declaration that all provisions of the Constitution “are to be deemed of equal validity,”<sup>39</sup> and further noted that “while article III speaks specifically about the tenure of federal judges, article II is equally specific in addressing the manner of their appointment.”<sup>40</sup> Accordingly, the court concluded that “[t]here is no reason...to favor one Article over the other.”<sup>41</sup> In support of this holding, the court explained that Article II “explicitly provides that the President has the power to fill *all* vacancies during the recess of the Senate,” stating that “there is no basis upon which to carve out an

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<sup>31</sup> *Id.* at 1330.

<sup>32</sup> *Id.* at 1331-32, 1334-35.

<sup>33</sup> *Id.* at 1336.

<sup>34</sup> *Id.* at 1337.

<sup>35</sup> *Id.* at 1337 (citing *INS v. Chadha*, 462 U.S. 919 (1983)). At.....

<sup>36</sup> *Id.* at 1338.

<sup>37</sup> *U.S. v. Woodley*, 732 F.2d 111 (9<sup>th</sup> Cir. 1984).

<sup>38</sup> *U.S. v. Woodley*, 751 F.2d 1008 (9<sup>th</sup> Cir. 1985).

<sup>39</sup> *Id.* at 1010 (quoting *Prout v. Starr*, 188 U.S. 537, 543 (1903)).

<sup>40</sup> *Id.* at 1010.

<sup>41</sup> *Id.* at 1010.

exception from the recess power for federal judges.”<sup>42</sup> Additionally, the court gave significant weight to the fact that “[a]pproximately 300 judicial recess appointments have been made in our nation’s history,” as well as the fact that “[t]he Legislative Branch has consistently confirmed judicial recess appointees without dissent.”<sup>43</sup>

The court likewise rejected the panel’s conclusion that the decision in *INS v. Chadha* rendered reliance on historical practice inappropriate. The court specifically noted that the legislative veto was “a recent practice, barely 50 years old,” the use of which “does not reach back to the days of the Framers such as the practice at issue.”<sup>44</sup> The court further stated that the legislative veto is an “impermissible statutory methodology, unsupported by an express grant of constitutional authority.”<sup>45</sup> The court acknowledged that lack of life tenure and protection from diminution of salary subjects a judicial recess appointee “in theory...to greater political pressure than a judge whose nomination has been confirmed,” but concluded that the power bestowed upon the President by Article II compelled it to “therefore view the recess appointee not as a danger to the independence of the judiciary, but as the extraordinary exception to the prescriptions of article III.”<sup>46</sup> The decision in *Woodley* was accompanied by a vigorous four judge dissent that closely mirrored the panel decision in arguing that “the direct conflict” between the Recess Appointments Clause and the tenure and salary provisions of Article III should be resolved in favor of “the fundamental constitutional values of judicial independence and separation of powers,” stating that such principles “must prevail over a peripheral concern for governmental efficiency,” and “uncritical acceptance of historical practice.”

The Supreme Court denied certiorari in *Woodley*, putting an end to formal legal proceedings.<sup>47</sup> Judge Heen’s recess appointment expired at the end of the first session of the 97<sup>th</sup> Congress, and he was not re-nominated for appointment by President Reagan. The next judicial recess appointment did not occur for 20 years, when President Clinton installed Roger L. Gregory as a recess appointee to the Fourth Circuit on December 27, 2000, during an intersession recess.<sup>48</sup> While this appointment gave rise to disapprobation in the Senate, it was not the subject of litigation.<sup>49</sup> Gregory was re-nominated by President George W. Bush and was confirmed by the Senate on July 20, 2001.

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<sup>42</sup> *Id.* at 1010.

<sup>43</sup> *Id.* at 1011.

<sup>44</sup> *Id.* at 1011.

<sup>45</sup> *Id.* at 1011-1012.

<sup>46</sup> *Id.* at 1014.

<sup>47</sup> 467 U.S. 1048 (1986).

<sup>48</sup> See Fisher, n.24, *supra*, at 6.

<sup>49</sup> See Fisher, n.3, *supra*, at 23-24.

***Evans v. Stephens.***

President George W. Bush made two judicial recess appointments in 2004, selecting Charles W. Pickering to serve on the Fifth Circuit on January 16, 2001 during an intersession recess, and appointing William H. Pryor to the Eleventh Circuit on February 20, 2004 on the seventh day of a ten day intrasession recess.<sup>50</sup> In statements accompanying the appointments, the President noted that the selections would fill vacancies that had been designated as “judicial emergenc[ies],” and further pronounced that the appointments were justified in light of “unprecedented obstructionist tactics” in the Senate that were, in the view of the President, “inconsistent with the Senate’s constitutional responsibility,” and injurious “to our judicial system.” While both appointments gave rise to criticism, the Pryor appointment was particularly controversial, having occurred during a brief intrasession recess. While there have been over 300 recess appointments to Article III courts, only fourteen have been intrasession, with the eleven day recess giving rise to the Pryor appointment constituting the shortest period of time in which an intrasession judicial recess appointment has been made. Intrasession recess appointments were rare prior to 1943, when recesses during congressional sessions became more common. It appears that Presidents made intrasession appointments only three times prior to 1943: in 1867 during a 73 day recess, in 1921 during a 27 day recess, and in 1928 during a 13 day recess. Of these, the only intrasession judicial recess appointment occurred during the 1867 recess.<sup>51</sup>

While the appointment of Pickering did not give rise to any litigation, the constitutionality of Judge Pryor’s appointment was considered *en banc* by the Eleventh Circuit in *Evans v. Stephens*.<sup>52</sup> The court began its analysis by analyzing the structure of the Recess Appointments Clause, determining that “[t]he text of the United States Constitution authorizes recess appointments of judges to Article III courts.”<sup>53</sup> As in *Woodley*, the court gave weight to the long history of such

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<sup>50</sup> Pickering’s appointment expired at the end of the second session of the 108<sup>th</sup> Congress on December 8, 2004, and Pickering announced his retirement on December 10, 2004. *See* Hogue, n.5, *supra*, at 6; Fisher, n.24, *supra*, at 6.

<sup>51</sup> *See* Hogue, n.22, *supra*, at 666.

<sup>52</sup> *Evans v. Stephens*, 387 F.3d 1220 (11<sup>th</sup> Cir. 2004), *cert. denied*, 125 S.Ct. 16401 (2005). In *Evans* two individuals alleging a violation of their civil rights in a suit against a police officer had their case appealed to the Eleventh Circuit after the district court denied the officer’s motion for summary judgment on the basis of qualified immunity. The Court of Appeals affirmed in part and reversed in part, and remanded the case, *see Evans v. City of Zebulon, GA*, 351 F.3d 485 (11<sup>th</sup> Cir. 2003), and the Court of Appeals subsequently vacated the opinion and voted to rehear the case *en banc*. *See Evans v. City of Zebulon, GA*, 364 F3d 1298 (11<sup>th</sup> Cir. 2004). Prior to the rehearing, the plaintiff-appellees moved to disqualify Judge Pryor, leading to the court’s consideration of the constitutionality of Pryor’s appointment.

<sup>53</sup> *Evans v. Stephens*, 387 F.3d at 1222. The court likewise held that the clause applies to vacancies that exist during a recess, noting that such a view “is consistent with the understanding of most judges that have considered the question, written executive interpretations from as early as 1823, and legislative acquiescence.” *Evans v. Stephens*, 387

appointments, stating that while historical evidence alone “might not” render them constitutional, “this historical practice — looked at in light of the text of the Constitution — supports our conclusion in favor of the constitutionality of recess appointments to the federal judiciary.”<sup>54</sup> As in *Woodley*, the court acknowledged that there is “some tension between Article III and the recess appointment of judges to Article III courts,” but rejected the argument that the tenure and salary protections of Article III trump the Recess Appointments Clause, stating that “[t]he conflict between these equally important constitutional provisions is not irreconcilable: the temporary judges appointed under the Recess Appointments Clause are an exception to the general rule of Article III.”<sup>55</sup>

The court buttressed this determination with a consideration of the purpose of the Recess Appointments Clause, stating that “it was the intent of the Framers to keep important offices filled and government functioning.”<sup>56</sup> Accordingly, the court declared that while judicial recess appointees lacked the protections enjoyed by confirmed Article III judges, “we accept the Framers thought that what might be intolerable, if prolonged, was acceptable for a relatively short while.”<sup>57</sup>

The court next turned to the question of whether intrasession recess appointments are constitutionally permissible. Declaring that it focused first on the language of the Constitution and then on historical precedent and the purpose of the clause, the court held that “President Bush appointed Judge Pryor during a legitimate Senate recess, that is, during a ‘Recess’ within the meaning of the Recess Appointments Clause.”<sup>58</sup> Acknowledging that historical and textual arguments could be made to the contrary, the court stated that such arguments were not strong enough to persuade it that the President’s interpretation was incorrect, and pronounced that it instead “accept[ed] that ‘the Recess,’ originally and through today, could just as properly refer generically to any one — intrasession or intersession — of the Senate’s acts of recessing, that is, taking a break.”<sup>59</sup> The court was further persuaded by historical precedent establishing that “[t]welve Presidents have made more than 285 intrasession recess appointments,” and by its determination that “[t]he purpose of the

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<sup>53</sup> (...continued)  
F.3d at 1226.

<sup>54</sup> *Id.* at 1223.

<sup>55</sup> *Id.* 1223.

<sup>56</sup> *Id.* at 1224.

<sup>57</sup> *Id.* at 1224.

<sup>58</sup> *Id.* at 1224.

<sup>59</sup> *Id.* at 1224-25. In further support of this determination, the court noted that the Constitution does not limit a term of Congress to two sessions: “[o]ne Congress had four Sessions. And several, including the first, had three Sessions. Therefore, even if the phrase ‘the Recess of the Senate’ meant only recesses between the Sessions of the Congress (which we do not accept), there could easily be more than one such recess per Congress.” *Id.* at 1225, n.7.

Clause is no less satisfied during an intrasession recess than during a recess of potentially even shorter duration that comes as an intersession break.”<sup>60</sup>

The court was likewise untroubled by the brief duration of the intrasession recess giving rise to the Pryor appointment:

The Constitution, on its face, does not establish a minimum time that an authorized break in the Senate must last to give legal force to the President’s appointment power under the Recess Appointments Clause. And we do not set that limit today. Although a President has not before appointed a judge to an Article III court during an intrasession recess as short as the one in this case, appointments to other offices — offices ordinarily requiring Senate confirmation — have been made during intrasession recesses of about this length or shorter. Furthermore, several times in the past, fairly short intrasession recesses have given rise to presidential appointments of judges to Article III courts.<sup>61</sup>

Having determined that the clause allowed for recess appointments to the federal judiciary, even during an intrasession recess, the court concluded its opinion by declaring that it was “not persuaded that the President exceeded his constitutional authority in any 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.”<sup>62</sup>

The decision in *Evans* was accompanied by a dissent from Judge Barkett arguing that the plain meaning of the Recess Appointments Clause mandates a restrictive interpretation of the term “happen.”<sup>63</sup> Analyzing the text of the clause and surveying a series of eighteenth-century dictionaries, Judge Barkett argued that “the question of 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.”<sup>64</sup> Judge Barkett went on to assert that the text of the clause, viewed in light of the purpose of the recess appointment power and separation of powers principles mandated further that the President only be empowered to make appointments during the recess in which they occur.<sup>65</sup> The dissent’s position in *Evans* rendered it unnecessary for it to address the constitutionality of judicial recess appointments or the validity of intrasession recess appointments, given that the vacancy filled by Pryor did not occur during the recess in which he was appointed.<sup>66</sup>

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<sup>60</sup> *Id.* at 1226.

<sup>61</sup> *Id.* at 1225.

<sup>62</sup> *Id.* at 1227.

<sup>63</sup> *Id.* at 1229 (Barkett, J., dissenting).

<sup>64</sup> *Id.* at 1231.

<sup>65</sup> *Id.* at 1233.

<sup>66</sup> Judge Barkett touched upon the issue of intrasession appointments nonetheless, stating  
(continued...)

While Judge Barkett’s dissent does not specifically consider Article III or intrasession appointments, the rationale underlying his dissent is applicable to both contexts. According to Judge Barkett, a literal interpretation of the Recess Appointments Clause was necessitated by the “real, concrete concern that the understanding of the recess appointment power embraced by the majority will allow the President to repeatedly bypass the role the Framers intended the Senate to play in reviewing presidential nominees.”<sup>67</sup> The potential for such injury to the Senate’s prerogatives in this regard is arguably magnified by judicial acceptance of intrasession appointments. Specifically, the broad interpretation of the President’s authority under the Recess Appointments Clause adopted by the Eleventh Circuit could be seen as lending credence to the proposition that congressional restrictions on the President’s recess appointment power are constitutionally impermissible.<sup>68</sup> This determination would arguably be particularly applicable in the judicial recess appointment context in light of Article III’s prohibition on diminution of judicial salary.<sup>69</sup>

If such an interpretation adheres, it could give rise to a dynamic whereby the President would have a legal and constitutional basis upon which to completely bypass the Senate Confirmation process. Specifically, the authority to make intersession or intrasession recess appointments to any position, coupled with the invalidity of the statutory restrictions discussed above, would enable the President to make successive recess appointments during short recesses with the practical effect of enabling an appointee to serve throughout the course of an Administration without submitting to the Senate confirmation process. Such a prospect might be viewed as particularly problematic for Article III purposes, as it would allow successive recess appointments of judges, arguably beyond the “relatively short” period of service deemed appropriate for such appointees by the court in *Evans*.<sup>70</sup> Accordingly, the holding in *Evans* could be seen as implicitly approving the Department of Justice’s assertion that the recess appointment power extends to “all vacancies and all recesses (with the single arguable exception of *de minimis* breaks of three days or less).”<sup>71</sup> Such an interpretation builds upon the maxims delineated in *Allocco* and *Woodley*, and arguably transforms the Recess Appointments Clause from the supplementary and auxiliary mechanism discussed by Hamilton into more significant grant of presidential power.

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<sup>66</sup> (...continued)

that “the text of the Constitution as well as the weight of the historical record strongly suggest that the Founders meant to denote only inter-session recesses.” *Id.* at 1228, n.2.

<sup>67</sup> *Id.* at 1235.

<sup>68</sup> See n.20 and accompanying text, *supra*.

<sup>69</sup> The court appears to contemplate this in *Evans v. Stephens*, stating that “To our knowledge, Congress has never attempted to diminish the pay of a recess-appointed judge while he was in office. Whether such an attempt would be constitutional is itself an open question.” *Id.* at 1224, n.6.

<sup>70</sup> See n.57 and accompanying text, *supra*.

<sup>71</sup> See n.14 and accompanying text, *supra*.

The Supreme Court denied the petitioner's motion for certiorari in *Evans* on March 21, 2005.<sup>72</sup> The denial was accompanied by an opinion by Justice Stevens emphasizing that "a denial is not a ruling on the merits of any issue raised by the petition."<sup>73</sup> While stating that there were "valid prudential concerns supporting the decision to deny certiorari," Justice Stevens declared that "[t]his is a case that raises significant constitutional questions regarding the President's intrasession appointment of [Judge Pryor]."<sup>74</sup> Accordingly, Justice Stevens stressed that "it would be a mistake" to assume that the denial of certiorari constituted a decision on the merits with regard to the President's constitutional authority "to fill future Article III vacancies, such as vacancies on this Court, with appointments made absent consent of the Senate during short intrasession 'recesses.'"<sup>75</sup>

## Conclusion

While the majority opinions in *Allocco*, *Woodley*, and *Evans v. Stephens* validate the President's authority to make recess appointments to the federal judiciary, the contrary arguments forwarded by the original panel in *Woodley* and the dissents from the *en banc* decisions of the Ninth and Eleventh Circuits indicate that there is broad range of opinion among members of the judiciary when considering the Recess Appointments Clause, not only in the context of judicial recess appointments, but with regard to the proper scope of the President's general authority thereunder. The unsettled status of these constitutional issues is brought into further relief by virtue of Justice Steven's opinion accompanying the denial of certiorari in *Stephens*, admonishing observers that "significant constitutional questions" adhere in this context. Thus, despite the outcome of litigation on the issue to date, it would appear that a significant degree of tension remains between the President's recess appointment power and the principles of judicial independence that undergird the provisions of Article III.

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<sup>72</sup> *Evans v. Stephens*, 125 S.Ct. 1640 (2005). On the same day, the Supreme Court likewise denied certiorari in two other petitions asserting that Pryor's appointment was unconstitutional. See *Miller v. United States*, 125 S.Ct. 1636 (2005); *Franklin v. United States*, 125 S.Ct. 1636 (2005). Similar arguments were raised in one additional petition to the Court. See *Senn v. United States*, 125 S.Ct. 1397 (2005). While the court granted certiorari in *Senn*, it did so on grounds unrelated to the appointment of Pryor and made no mention of arguments pertaining thereto.

<sup>73</sup> *Evans v. Stephens*, 125 S.Ct. 2244 (2005) (opinion of Stevens, J.).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*