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Recess Appointments: A Legal Overview

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• President George W. Bush continued the practice of making appointments during brief intrasession recesses, including six such appointments during a recess ending on April 28, 2003, four during a 10-day recess ending on April 19, 2004, and, perhaps most controversially, the appointment of William H. Pryor, Jr., to the Court of Appeals for the Eleventh Circuit on February 20, 2004, on the seventh day of a 10-day recess ending on February 23, 2004.69

• President Barack Obama has continued the practice of making intrasession recess appointments. Up through the April 2011 recess, the President has made 28 recess appointments in total, almost all of which were during the second session of the 111th Congress (January 5, 2010, to December 22, 2010). Many intrasession recess appointments were made during arguably lengthy recesses of the Senate; however, President Obama made three recess appointments on July 7, 2010, during an 11-day recess ending July 12, 2010.

Litigation challenging the recess appointment of William H. Pryor, Jr., to the Eleventh Circuit was brought, and in upholding Pryor’s appointment, the Eleventh Circuit stated:

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 an intrasession recess 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.70

Authority and Tenure of Recess Appointees

As a fundamental matter, a recess appointee possesses the same legal authority as a confirmed appointee.71 The commission of a recess appointee expires “at the end of [the Senate’s] next Session,” whereas the service of a confirmed appointee continues until the end of the statutory term or at the pleasure of the President, subject to the requirements laid out by Congress in creating the position.72 When the Senate reconvenes after a recess during the same session, this is

69 Information on recess appointments may be obtained in the Weekly Compilation of Presidential Documents.

70 Evans, 387 F.3d at 1225.

71 See also Hogue, supra note 3, at 4; Swan v. Clinton, 100 F.3d 973, 987 (D.C. Cir. 1996) (recess appointment is not an “inferior” procedure to appointment with Senate confirmation); Designation of Acting Solicitor Labor, 2002 WL 34461082 (2002) (distinguishing between an temporary designation under the Vacancies Reform Act and a recess appointment—"An acting official does not hold the office, but only 'perform[s] the functions and duties of the office. [citation omitted] He is not 'appointed' to the office but only 'direct[ed] or authorized to discharge its functions and duties, and thus he receives the pay of his permanent position, not of the office in which he acts. [citation omitted] A recess appointee, on the other hand, is appointed by one of the methods specified in the Constitution itself, [citation omitted]; he holds the office; and he receives the pay.").