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No. 04-828

# In the Supreme Court of the United States

PETER EVANS AND DETREE JORDAN, PETITIONERS

*v.*

DENIS STEPHENS, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the Recess Appointments Clause, U.S. Const. Art. II, § 2, Cl. 3, authorizes the President to fill judicial vacancies during recesses that occur during a session of Congress.

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 387 F.3d 1220.

### JURISDICTION

The judgment of the court of appeals was entered on October 14, 2004. The petition for a writ of certiorari was filed on December 20, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. On January 22, 1999, respondent Denis Stephens, a police officer for the City of Zebulon, Georgia, stopped the rental car in which petitioners were traveling for speeding. After further investigation, Stephens arrested petitioner Evans for driving under the influence

of alcohol and arrested petitioner Jordan for a suspected parole violation. During booking at the Pike County Jail, both were strip-searched and allegedly subjected to body-cavity searches. Evans later pleaded guilty to a reckless-driving charge. See *Evans* v. *City of Zebulon*, 351 F.3d 485, 487-489 & n.9 (11th Cir. 2003), vacated on grant of rehearing en banc, 364 F.3d 1298 (11th Cir. 2004).

2. Petitioners filed suit under 42 U.S.C. 1983 in the United States District Court for the Northern District of Georgia against respondent Stephens, the City of Zebulon, and the Chief of the Zebulon Police Department, alleging that the defendants had violated their Fourth Amendment rights by arresting them without probable cause and subjecting them to unconstitutional searches. The district court granted the City of Zebulon and the police chief summary judgment on all claims. The district court concluded that Stephens had probable cause to arrest petitioners and granted him summary judgment on petitioners' unlawful arrest claim. The court denied Stephens summary judgment on the search claims, holding that petitioners had alleged an unconstitutional search. *Evans*, 351 F.3d at 489-490. Respondent Stephens filed an interlocutory appeal.

3. A divided panel of the Eleventh Circuit affirmed in part, reversed in part, and remanded. The majority found that the searches were unconstitutional because Stephens did not have reasonable suspicion that petitioners were concealing contraband and because the searches were conducted in an unreasonable manner. *Evans*, 351 F.3d at 491-494. The majority concluded, however, that Stephens was entitled to qualified immunity because in January 1999 "the law was not clearly established that an arrestee could not constitutionally be



strip searched under the conditions alleged" (*id.* at 492), and there were "no materially similar precedents that provided Stephens fair warning of the unconstitutionality of his conduct." *Id.* at 494. District Judge Robert Propst, sitting by designation, dissented in part, concluding that "any reasonable and competent officer" would have known the search was unreasonable. *Id.* at 497.

4. The Eleventh Circuit granted petitioners rehearing en banc. 364 F.3d 1298. The Court's order granting rehearing indicated that Judge William H. Pryor Jr. was participating in the case. *Ibid.* Petitioners moved to disqualify Judge Pryor on the grounds that the President's intra-session recess appointment of Judge Pryor to the Eleventh Circuit was unconstitutional.[1] The Eleventh Circuit granted the government's unopposed motion to intervene for the purpose of opposing disqualification. The parties and amici submitted briefs on the issue.

On October 14, 2004, the en banc Eleventh Circuit rejected petitioners' disqualification motion by a vote of 10-2. Pet. App. 1a-14a. The court held that "both the words of the Constitution and the history of the nation support the President's authority" to appoint judges to Article III courts during intra-session recesses. *Id.* at 3a. The court noted that the Recess Appointments Clause immediately follows the Appointments Clause and that its text provides that "the President may make

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[1] On February 20, 2004, while the Senate was in recess, see H.R. Con. Res. 361, 108th Cong., 2d Sess., the President appointed Judge Pryor to the court of appeals pursuant to the Recess Appointments Clause of the Constitution, Art. II, § 2, Cl. 3. Statement on Appointment of William H. Pryor Jr. (Feb. 20, 2004) <http://www.whitehouse.gov/news/releases/2004/02/print/20040220-6.html>. Judge Pryor was sworn in the same day.

temporary appointments to 'all' of these offices [specified in the Appointments Clause] without Senate advice and consent." *Id.* at 4a. The court noted that "[h]istory unites with our reading to support our conclusion," noting that "over 300 recess appointments to the federal judiciary * * * have been made" since the earliest days of the Republic, including over a dozen to the Supreme Court. *Id.* at 5a. Although noting that judges serving recess appointments do not enjoy life tenure, the court concluded that the framers of the Constitution "tolerate[d], on a temporary basis, some federal judges who lacked Article III protection" in order to keep judgeships full and courts operating. *Id.* at 6a-7a.

The court also concluded that the scope of the Recess Appointments Clause included appointments made during intra-session Senate recesses, Pet. App. 7a-10a, noting that usage of the term "the recess" "refer[s] generically to any one—intrasession or intersession—of the Senate's acts of recessing." *Id.* at 8a. Accordingly, the court concluded that "Judge Pryor may sit with [the Eleventh Circuit] lawfully and act with all the powers of a United States Circuit Judge during his term of office." *Id.* at 13a.[2]

Judge Barkett dissented. See Pet. App. 16a-34a. She did not dispute that the President could use the recess appointments power to appoint judges to Article III courts, but concluded that the Recess Appointments Clause only permitted appointments to seats that became vacant during recesses of the Senate, and did not apply to vacancies that arose while the Senate was in session and continued to exist during the recess of the

[2] Judge Pryor and Judge Ed Carnes recused themselves from considering the disqualification motion. Pet. App. 1a n.*.



Senate. Judge Wilson also dissented. *Id.* at 34a-40a. He did not take a position on the constitutionality of Judge Pryor's recess appointment, but argued that the court of appeals should have certified the issue to this Court for resolution. *Id.* at 34a.

5. On October 26, 2004, the en banc Eleventh Circuit heard argument on petitioners' Fourth Amendment and qualified immunity claims. The court has not yet decided the case.

## ARGUMENT

Petitioners contend that the presence of Judge Pryor on the court that is deciding their appeal—an appeal that is still pending before the court below on the merits—creates a defect in the composition of the court that can be corrected only by "fresh consideration" of their case by a properly constituted court. See Pet. 5 (quoting *Nguyen* v. *United States*, 539 U.S. 69, 81, 83 (2003)). They contend that Judge Pryor's recess appointment violated both Article III of the Constitution and the Recess Appointments Clause, U.S. Const. Art. II, § 2, Cl. 3. Petitioners claim (Pet. 4) that the President may not make recess appointments to Article III courts, and that litigants have a constitutional right "to have only duly appointed Article III judges participate in the consideration and disposition of their case." Although the discussion in their petition is quite brief, it appears that petitioners contend that the Recess Appointments Clause permits the President to make appointments only during recesses between sessions of Congress ("intersession recesses"), and not during recesses within a session of Congress ("intra-session recesses"). See Pet. C.A. Resp. Br., *Stephens* v. *Evans*, No. 02-16424 (11th Cir. filed Aug. 23, 2004). The President's power to

appoint Article III judges during recesses of the Senate (including intra-session recesses) is supported by the text, history, and purpose of the Recess Appointments Clause and centuries of unbroken practice. The issues have not divided the lower courts, and further review is not warranted, especially at this stage in litigation.[3]

A. Review should be denied because petitioners seek review of an interlocutory order in an ongoing case. The court of appeals has not ruled on the merits of the underlying Fourth Amendment and qualified immunity issues that gave rise to the motion whose denial is the subject of the petition. Petitioners' motion in the court of appeals was akin to a motion to recuse a judge from participating in a case. It is well established that "[a]n order denying a motion to recuse is interlocutory and

[3] This issue has been raised in three other petitions now pending before the Court. See *Miller* v. *United States*, petition for cert. pending, No. 04-38 (filed June 24, 2004); *Franklin* v. *United States*, petition for cert. pending, No. 04-5858 (filed Aug. 13, 2004); *Senn* v. *United States*, petition for cert. pending, No. 04-7175 (filed Nov. 5, 2004). Petitioners acknowledge that "the legal question presented by the three petitions is identical." Pet. 4. Although petitioners claim that "this case is arguably a better vehicle to decide the issue," *ibid.*, their only basis for that claim is that the government opposed the grant of certiorari in *Miller*, *Franklin*, and *Senn* on the ground that the petitioners in those cases did not challenge the constitutionality of Judge Pryor's appointment in the court of appeals, and petitioners did. It is unclear how much weight petitioners intend this Court to give that consideration, because petitioners' counsel filed an amicus brief in *Franklin* stating that the failure to raise the validity of Judge Pryor's appointment before the court of appeals is "no obstacle to this Court's review." Br. Amicus Curiae of Sen. Edward M. Kennedy at 4 n.5, *Franklin*, *supra* (No. 04-5858). In any event, the absence of the vehicle problem present in *Miller*, *Franklin*, and *Senn* provides no assurance that this case is an appropriate vehicle for resolution of the issue presented. As noted in the text, it is not.



therefore not immediately appealable." 12 James W. Moore, *Moore's Federal Practice* § 63.71[1] (3d ed. 2004) (collecting authorities); accord, *e.g.*, *Wyatt* v. *Rogers*, 92 F.3d 1074, 1080-1081 (11th Cir. 1996) ("An interlocutory appeal does not lie from the denial of a motion to disqualify a district judge.") (collecting authorities); *Nichols* v. *Alley*, 71 F.3d 347, 350 (10th Cir. 1995); *Nobby Lobby, Inc.* v. *City of Dallas*, 970 F.2d 82, 86 n.3 (5th Cir. 1992); *Thomassen* v. *United States*, 835 F.2d 727, 732 n.3 (9th Cir. 1987). While this Court has not directly addressed whether the denial of a motion to recuse a judge is subject to interlocutory appeal, it has held repeatedly that the denial of a motion to disqualify opposing counsel is not. See *Richardson-Merrell Inc.* v. *Koller*, 472 U.S. 424 (1985); *Flanagan* v. *United States*, 465 U.S. 259 (1984); *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981). In emphasizing that appeal after final judgment was "plainly adequate should * * * concerns of possible injury ultimately prove well founded," *Firestone Tire & Rubber*, 449 U.S. at 378, the Court explicitly likened the denial of motions to disqualify counsel to motions to recuse judges, stating that the burden on a party of waiting until final judgment to appeal "when the denial of its disqualification motion was erroneous does not 'diffe[r] in any significant way from * * * orders denying motions for recusal of the trial judge." *Ibid.* (quoting *Armstrong* v. *McAlpin*, 625 F.2d 433, 438 (2d Cir. 1980), vacated and remanded with instructions to dismiss appeal, 449 U.S. 1106 (1981)).

If the en banc Eleventh Circuit rules in favor of petitioners on the Fourth Amendment and qualified immunity claims, it would afford them all the relief they seek in the court of appeals. Under the circumstances, petitioners would be unable to "claim status as a losing

party for purposes of this Court's review," *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (dismissing cert. as improvidently granted), and it would be doubtful that petitioners could continue to challenge Judge Pryor's appointment in this Court. See generally *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956) ("This Court * * * reviews judgments, not statements in opinions."). Acknowledging that fact, petitioners pledge that, if this Court grants certiorari in this case, they will ask to stay proceedings on the merits in the court of appeals.[4] Pet. 4 n.3. But the need for such extraordinary measures to permit review of the constitutionality of Judge Pryor's appointment only underscores this petition's interlocutory posture, and would reverse the ordinary course of judicial review, under which this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari); accord, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court"). The interlocutory status of this case is "of itself alone" a "sufficient ground for the denial of the [writ]." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). It would be a strange "principle[] of sound judicial administration" (Pet. 4) that would counsel granting review in a case in which the question may be irrelevant to the disposition of the merits (and staying ongoing proceedings below to prevent them from mooting the petition). See *American Constr. Co.* v. *Jacksonville, T. & K. Ry.*, 148 U.S. 372, 384 (1893) (stating general rule that "this [C]ourt should not issue a writ" to review an interlocutory order because "many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters").

[4] Petitioners err in contending (Pet. 4 n.3) that this Court's decision in *International Union* v. *Scofield*, 382 U.S. 205 (1965), provides precedent for granting certiorari and staying ongoing proceedings in the court of appeals. In that case, the Court granted certiorari to review the denial of a union's motion to intervene in a case brought by individual members of the union seeking review in the court of appeals of a decision of the National Labor Relations Board. While the union was permitted to file a brief amicus curiae in the court of appeals, *id.* at 207, denial of party status affected the union's rights regardless of the outcome of the litigation: only "parties" would have had the right to seek certiorari after an adverse judgment on the merits, see *id.* at 209, and parties to the action are afforded preferred status in this Court to defend a favorable judgment below. See Sup. Ct. R. 12.6. In addition, *Scofield*, unlike this case, involved an issue that was the subject of a "conflict among the courts of appeals." 382 U.S. at 207.



Review is not warranted for two other reasons. First, the issue has not divided the lower courts. See generally Sup. Ct. R. 10. The courts that have considered the constitutionality of judicial recess appointments in the past uniformly upheld the practice. See *United States* v. *Woodley*, 751 F.2d 1008 (9th Cir. 1985) (en banc), cert. denied, 475 U.S. 1048 (1986); *United States* v. *Allocco*, 305 F.2d 704 (2d Cir. 1962), cert. denied, 371 U.S. 964 (1963). And the en banc Eleventh Circuit overwhelmingly upheld the validity of Judge Pryor's intra-session recess appointment in this case.

Second, the issues raised by petitioners are not recurring ones. Only four judges have been the subject of recess appointments (both inter-session and intra-session) in the last forty years. See Br. in Opp. App. at 25a, *Franklin* v. *United States*, *supra* (No. 04-5858)

(*Franklin* App.). That is an extremely modest number by historical standards. Presidents Washington, John Adams, Jefferson, Madison, and Monroe together made 28 known recess appointments to Article III courts, see *id.* at 23a-24a, and Presidents Truman, Eisenhower, and Kennedy together made 90. *Id.* at 3a-9a. The number of intra-session judicial recess appointments is more modest still. Virtually all such appointments have involved executive-branch officials. Judge Pryor's is the first such appointment of an Article III judge in almost 50 years. See Congressional Research Service, *Intra-session Recess Appointments* 17-32 (Apr. 23, 2004). By comparison, President Truman made *nine* intra-session recess appointments of Article III judges. *Id.* at 9-16.

Petitioners argue (Pet. 5) that the recess-appointment issue should be addressed now because it theoretically could affect the judgment in the many cases in which Judge Pryor has participated, and will affect more cases if he continues to sit as a judge. But the number of cases potentially affected is likely to plateau as judgments become final without any party seeking certiorari, and notwithstanding petitioners' offhand assertion that some such claims could be brought on collateral review (*ibid.*), the prospects for success in that posture would be quite limited. See *Ex parte Ward*, 173 U.S. 452, 454, 456 (1899) (holding that a recess-appointed judge's "right to exercise the judicial functions[] cannot be determined on a writ of *habeas corpus*" and "cannot be collaterally attacked"). See generally *United States* v. *Frady*, 456 U.S. 152, 167-168 (1982) (discussing cause and prejudice standard).

B. The Appointments Clause 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 Consuls, Judges of the supreme Court, and all other Officers of the United States." U.S. Const. Art. II, § 2, Cl. 2. The Recess Appointments Clause immediately follows and confers on the President the "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." *Id.* Art. II, § 2, Cl. 3. Alexander Hamilton described the Recess Appointments Clause as a "supplement" to the President's appointment power, establishing an "auxiliary method of appointment, in cases to which the general method was inadequate." *The Federalist No. 67*, at 409 (Clinton Rossiter ed., 1961). He further explained that the Clause was needed because "it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers," and it "might be necessary for the public service to fill [vacancies] without delay." *Id.* at 410. Justice Story confirmed that the Clause was intended to achieve "convenience, promptitude of action, and general security," and to avoid requiring the Senate to "be perpetually in session." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 804, at 574 (Ronald D. Rotunda & John E. Nowark eds., 1987).

In permitting the President to "fill up all Vacancies" during "the Recess" of the Senate, the Recess Appointments Clause by its terms encompasses all vacancies and all recesses (with the single arguable exception of *de minimis* breaks of three days or less, see U.S. Const. Art. I, § 5, Cl. 4). Petitioners propose to restrict the Clause to only some recesses (inter-session as opposed to intra-session recesses) and to only some vacancies (of executive as opposed to judicial offices). See Pet. C.A. Resp. Br. 13-46. Those restrictions are unfounded.

1. The Recess Appointments Clause immediately follows the Appointments Clause within the same section of Article II and concerns closely related subject matter. The provisions thus are most naturally construed *in pari materia*, so that the Recess Appointments Clause's reference to "all Vacancies" encompasses any vacancy in any office covered by the immediately preceding Appointments Clause (which includes Article III judges). The Framers' understanding confirms that construction. Hamilton explained that the Clause is "supplementary to" the Appointments Clause, and that "the *vacancies* of which it speaks must be construed to relate to the 'officers' described in the preceding [clause]." *The Federalist No. 67*, *supra*, at 410. It has long been understood that "the mode of appointing judges * * * is the same with that of appointing the officers of the Union in general." *The Federalist No. 78*, at 464 (Alexander Hamilton). See 3 *The Records of the Federal Convention of 1787*, at 123, 127 (Max Farrand ed., 1937) (noting that Edmund Randolph initially opposed ratification in part because the Constitution would permit judicial recess appointments).

The application of the Recess Appointments Clause to judicial vacancies is also confirmed by longstanding practice. See generally *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 412 (1928). Beginning just months after the Constitution became effective, President Washington made ten known recess appointments to Article III courts, including the recess appointment of Thomas Johnson to the Supreme Court in 1791 and of John Rutledge to be the second Chief Justice in 1795. *Franklin* App. 24a. Washington had served as President of the Constitutional Convention, and his Cabinet included Alexander Hamilton and John Jay, both contributors to *The Federalist Papers*, as well as Edmund Randolph. There is no indication that any member of Washington's Cabinet questioned the constitutionality of these appointments. Moreover, when John Rutledge received his recess appointment in 1795, four of the Court's six members (including Rutledge) had signed the Constitution, compare U.S. Const., with Gerald Gunther, *Constitutional Law* App. B, at B1 (12th ed. 1991), and the "members of the [C]ourt acted with [Rutledge] as [Chief Justice] without objection." *Ex parte Ward*, 173 U.S. at 456 n.1 (reporter's note). Judicial recess appointments continued in the ensuing Administrations of Presidents John Adams, Jefferson, Madison, and Monroe, who together made at least 18 judicial recess appointments, including three appointments to the Supreme Court. See *Franklin* App. 23a-24a.



Judicial recess appointments have continued ever since. With the exception of Presidents William Henry Harrison and John Tyler (who together served a single term), every President until President Nixon made at least one judicial recess appointment. See *Franklin* App. 25a-26a. President Truman alone made 38 such appointments; Presidents Eisenhower and Theodore Roosevelt each made 27; and Presidents Kennedy and Coolidge each made 25. In all, at least 37 Presidents have made 304 known judicial recess appointments. *Ibid.* At least 12 Supreme Court Justices have received recess appointments, including Chief Justices Warren and Rutledge, and Justices Brennan and Stewart. See *id.* at 1a; Henry B. Hogue, *The Law: Recess Appointments of Article III Judges*, 34 Presidential Stud. Q. 656, 660-661 (2004).

2. The Senate has acquiesced in and affirmatively approved the practice of judicial recess appointments.

Despite the number and visibility of the recess appointments made by the nation's first five Presidents, no objections appear to have been raised to the practice. Of the 28 known recess appointments during the administrations of the first five Presidents, all but one were confirmed as an Article III judge. See *Franklin* App. 23a-24a, 26a. See generally Note, *Recess Appointments to the Supreme Court—Constitutional But Unwise?*, 10 Stan. L. Rev. 124, 132 (1957) ("During this period, when those who wrote the Constitution were alive and active, not one dissenting voice was raised against the practice."). By the government's calculation, the Senate has confirmed at least 271 of the 304 known recess appointments made to Article III courts. See *Franklin* App. 25a-26a.

Congress has also enacted statutes providing for compensation of recess appointees, without purporting to exclude judicial recess appointees (or intra-session recess appointees) from eligibility for compensation. See 5 U.S.C. 5503(a). Those statutes reflect Congress's "implicit[] assum[ption]" that the President has the power to make such appointments. 41 Op. Att'y Gen. 463, 466 (1960). The Comptroller General, who is an "officer of the Legislative Branch" and therefore "subservient to Congress," *Bowsher* v. *Synar*, 478 U.S. 714, 727, 731 (1986), indicated that judges appointed during an intra-session recess of the Senate had been constitutionally appointed. See 28 Comp. Gen. 30, 34-36 (1948). Even when the Senate has requested that the President make fewer judicial recess appointments, it has acknowledged his authority to make them. For example, Senator Hart, who sponsored such a resolution in 1960, acknowledged that "[t]he President does have such power." 106 Cong. Rec. 18,130 (1960).



3. Petitioners suggest (Pet. 4) that the Recess Appointments Clause is somehow inconsistent with Article III, which provides that judges "shall hold their Offices during good Behaviour." U.S. Const. Art. III, § 1. The Constitution is not internally inconsistent on the question of recess appointments for judges.

The Appointments Clause makes clear that "Judges" are among the "Officers" eligible to receive recess appointments. U.S. Const. Art. II, § 2, Cl. 2. The Recess Appointments Clause clearly provides that the President's power extends to "*all* Vacancies" and that such recess appointees receive a fixed term of office until "the End of" the "next Session" of the Senate. *Id.* Art. II, § 2, Cl. 3 (emphasis added). Those provisions are not inconsistent with judicial tenure in office during "good Behaviour." For non-recess-appointed Article III judges, life tenure is the product of the lack of a constitutionally defined term of office *combined with* the protections of the Good Behaviour provision. Cf. *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839) (stating that the Good Behaviour provision implies life tenure for "offices, the tenure of which is *not* fixed by the Constitution") (emphasis added). But for judicial recess appointees, the Recess Appointments Clause defines their term of office, and the Good Behaviour provision forecloses any possible inference that the President's express power to appoint Article III judges gives rise to an implied power to remove them at will. See *Myers* v. *United States*, 272 U.S. 52 (1926). There is therefore no tension between the two clauses, and certainly no basis for ignoring the unambiguous language of the Recess Appointments Clause, which clearly indicates that it applies to all vacancies and includes judges among the officers eligible to receive recess appointments.

Nor do judicial recess appointments undermine the independence of the federal judiciary. Judges appointed under the Recess Appointments Clause have never constituted more than a tiny fraction of sitting Article III judges. In this case, for example, petitioners' legal claims were considered both by a district judge with a lifetime appointment and (on appeal) by three judges serving lifetime appointments; their claims currently are being considered by eleven circuit judges serving lifetime appointments. In addition, petitioners have been able to seek review from a Supreme Court composed entirely of jurists serving lifetime appointments. There is no reason to believe that the Founders considered that the presence of a small handful of judges serving short and constitutionally specified terms under the expressly authorized "auxiliary method of appointment" (*The Federalist No. 67*, at 409) would undermine the integrity of judicial decisionmaking, much less that it presents such a danger as to warrant ignoring the plain language of the Appointments and Recess Appointments Clauses.[5]

C. Petitioners contend that the Recess Appointments Clause applies only to inter-session, not intra-session, recesses. See Pet. C.A. Resp. Br. 2-36. That argument is without merit. The language of the Clause, its purpose, and historical practice refute petitioners' proposed distinction.

[5] *Nguyen*, *supra*, is not to the contrary. There, the Court emphasized that courts of appeals panels on which non-Article III judges had served were improperly composed under statutes governing the composition of courts of appeals panels. 539 U.S. at 74-76, 82-83. The question here is whether a panel including a recess-appointed judge *is* improperly composed. There is no suggestion here that the composition of the panel in this case violated any statutory requirement, and the Court in *Nguyen* obviously did not consider the constitutionality of having judges serving under recess appointments hear and decide cases.



1. "The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States* v. *Sprague*, 282 U.S. 716, 731 (1931). The ordinary meaning of "Recess" did not denote any distinction between inter-session and intra-session recesses along the lines suggested by petitioners; it was instead a general term for the suspension of business. See, *e.g.*, 2 Samuel Johnson, *A Dictionary of the English Language* (1755) (a "[r]emission and suspension of any procedure"); 2 Noah Webster, *An American Dictionary of the English Language* 51 (1828) ("Remission or suspension of business or procedure; as, the house of representatives had a *recess* of half an hour.").

The distinction petitioners propose also would have been inconsistent with the legislative practices with which the Framers were familiar. Parliament had long used the term "recess" to describe both inter-session and intra-session recesses. Compare 12 H.L. Jour. 649 (1674) (describing intra-session break as "Recess"), with 14 H.L. Jour. 376 (1689) (referring to "Recess at Christmas"), and 17 H.L. Jour. 601 (1704) (referring to the Christmas "Recess now at Hand"). The English Parliament was the most familiar legislative model in that day. See Thomas Jefferson, *A Manual of Parliamentary Practice: For the Use of the Senate of the United States*, Preface (2d ed. 1812), in *Jefferson's Parliamentary Writings: "Parliamentary Pocket-Book" and a Manual of Parliamentary Practice* 355-356 (Wilbur Samuel Howell ed., 1988) (*Jefferson Manual*). Similarly,

delegates to the Continental Congress referred to intra-session breaks as "recesses."[6]

Congress's own usage confirms that the term is not limited to inter-session breaks. The first use of the word "recess" in the Journals of Congress referred to a short break in business rather than the period between sessions of Congress. See 1 Journal of the Senate 44 (July 24, 1789) <http://memory.loc.gov/ammem/amlaw/lwsj.html> ("The committees requested a recess, to give opportunity to perfect their reports. Adjourned to 11 o'clock to-morrow."). While early Congresses often used the term "recess" to refer to the break between sessions of Congress, at the time, Congress ordinarily conducted business every weekday (except holidays) during sessions of Congress, and intra-session breaks were rare. When Congress *did* schedule breaks during sessions of Congress, it denominated them "recesses." In the spring of 1812, for example, Congress debated a proposed intra-session break and, in doing so, referred to it as a "recess" and used the terms "recess" and "adjournment" interchangeably. See, *e.g.*, 24 Annals of Cong. 1279, 1314-1316, 1334-1342, 1347-1353 (1812). A 1905 report of the Senate Judiciary Committee discussing the Recess Appointments Clause emphasized that the term is "used in the constitutional provision in its common and popular

[6] See Letter of James Duane to Robert R. Livingston, Jr., Dec. 20, 1775, in 2 *Letters of Delegates to Congress: September 1775 - December 1775*, at 499 (Paul H. Smith ed., 1977) <http://memory.loc.gov/ammem/amlaw/lwdg.html> ("we shall have a Recess about Christmas"); cf. Letter of Benjamin Franklin to the President of Congress, Nov. 1, 1783, in 6 *The Revolutionary Diplomatic Correspondence of the United States* 721 (Francis Wharton ed., 1889) <http://memory.loc.gov/ammem/amlaw/lwdc.html> (referring to Parliament's "recess for the Christmas holidays").



sense" rather than a "technical" sense. S. Rep. No. 4389, 58th Cong., 3d Sess. (1905), *reprinted in* 39 Cong. Rec. 3823 (1905). The Committee concluded that "recess" refers to "the period of time when the Senate is not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions." *Ibid.* The Senate continues to view that report as authoritative. See *Riddick's Senate Procedure* 947 & n.46 (1992) <http://www.gpoaccess.gov>. To this day, official congressional documents define a "recess" as "any period of three or more complete days—excluding Sundays— when either the House of Representatives or the Senate is not in session." Joint Committee on Printing, *2003-2004 Congressional Directory* 526 n.2 (*Congressional Directory*).

2. Petitioners err in contending (see Pet. C.A. Resp. Br. 16) that the use in the Recess Appointments Clause of the singular form "the Recess" limits its application to inter-session recesses. To begin with, there is no single recess in each Senate to which the phrase "the recess of the Senate" could apply. The Framers had no background understanding that each Congress would sit for only two sessions, nor does the Constitution restrict a term of Congress to only two sessions. To the contrary, the first, fifth, and eleventh Congresses each held three sessions, as did 25 of the first 76 Congresses; the 67th Congress held four sessions. See *Congressional Directory* 512-518. Even in a two-session Congress, there is more than one Senate recess; there is one recess between sessions and another before the next Congress.

At the time of the Framing, phrases such as "during the recess" and "in the recess" were widely used to refer to multiple and intra-session recesses. In 1775, for

example, the Continental Congress recommended that the colonies create committees of safety to address matters "for the security and defence of their respective colonies, *in the recess* of their assemblies." 11 *Journals of the Continental Congress 1774-1789*, at 189 (July 18, 1775) (emphasis added). There is no suggestion that the Continental Congress intended that phrase to limit the recesses during which committees of safety should be used. Indeed, the practice of both New York and Pennsylvania (which appointed committees of safety during two intra-session recesses in 1775) bears this out.[7] Similarly, other provisions of the Constitution demonstrate that use of the definite article does not limit application of a clause to only a single thing. Article I, Section 5, Clause 4 provides that "[n]either House, *during the Session of Congress*, shall, without the Consent of the other, adjourn for more than three days" (emphasis added). Because the Constitution elsewhere requires that Congress "shall assemble at least once in every Year" (Art. I, § 4, Cl. 2), thus requiring at least two sessions per Congress, the phrase "during the Session of Congress" could not limit the Clause to a single Session. Thus, construed in its textual and historical context, the phrase "during the Recess" simply refers to any period during which Congress is in "Recess."

3. The applicability of the Recess Appointments Clause to intra-session recesses is substantiated by longstanding historical practice. See *The Pocket Veto Case*, 279 U.S. 655, 689 (1929). For as long as Congress

[7] See, *e.g.*, Agnes Hunt, *The Provincial Committees of Safety of the American Revolution* 64 (1904); 1 Charles Z. Lincoln, *The Constitutional History of New York* 52 (1906); 5 *Series 4, American Archives* 655, 673 (M. St. Clair Clarke & Peter Force eds., 1844) (1776); Ch. 716, 8 Pa. Stat. 456 (1770-1776).



has scheduled frequent intra-session recesses, Presidents have made intra-session recess appointments. Before 1857, Presidents had virtually no occasion to make such appointments. During that period, Congress scheduled only three brief intra-session recesses, for periods of seven, five, and five days, over the winter holidays of 1800, 1817, and 1828, respectively. See *Congressional Directory* 512-514. Between 1857 and 1867, Congress scheduled seven such recesses (typically over the winter holidays), but none exceeded two weeks. See *id.* at 514-515. In 1867, however, Congress scheduled its first intra-session recess of more than two weeks, which extended from March 30 to July 3. See *id.* at 515. President Johnson made 14 known appointments during that recess, including the appointment to the district court of Samuel Blatchford (who later served on this Court for 11 years). See *Intrasession Recess Appointments* 5. Despite considerable acrimony between President Johnson and Congress over appointments (see generally William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* 212-218 (1992)), Congress appears never to have objected to those appointments.

During the last half of the nineteenth century and the first four decades of the twentieth century, Congress rarely took intra-session recesses other than an approximately two-week recess over the winter holidays.[8] See

[8] In addition to an annual intra-session recess for the winter holidays, which the Senate ordinarily took after 1862, the Senate took a five-day recess in 1865, an approximately three-month recess and an approximately four-month recess in 1867, a three-and-a-half-month recess in 1868, a seven-day recess in 1919, an approximately one-month recess in 1921, a one-month recess in 1929, a seven-day recess in 1936, and an 11-day recess in 1940. *Congressional Directory* 514-518.

*Congressional Directory* 514-518. But as Congress scheduled more frequent intra-session recesses, there has been a corresponding increase in the number of intra-session recess appointments. Presidents Harding and Coolidge made intra-session recess appointments. Presidents Roosevelt, Truman, and Eisenhower made a total of 148 known intra-session recess appointments between 1943 and 1960. See *Intrasession Recess Appointments* 3. Although historical records are incomplete, at least 12 Presidents have made at least 285 intra-session recess appointments since 1867. That group included the appointment of at least 13 Article III judges, see *id.* at 5-32; Congressional Research Service, *Intrasession Recess Appointments to Article III Courts* 2 (Mar. 2, 2004), but petitioners' contentions about intrasession recess appointments are in no way limited to judicial nominees and would suggest that all 285 of those appointments were unconstitutional.[9]

The practice of intra-session recess appointments is supported by a line of Executive Branch precedent dating back to Attorney General Daugherty's 1921 opinion on the issue. See 33 Op. Att'y Gen. 20 (1921); accord, *e.g.*, 41 Op. Att'y Gen. 463, 466-469 (1960); 20 Op.

[9] The making of recess appointments during recesses of the duration at issue in this case is supported by historical practice. Judge Pryor's appointment came during an 11-day recess (February 12-23, 2004). See, *e.g.*, 13 Op. Off. Legal Counsel at 271 (setting forth method of measuring recesses). This is well within historical standards. Presidents repeatedly have made intra-session recess appointments during recesses of comparable duration, including Presidents Coolidge (13 days), Reagan (13 days), George H.W. Bush (17 days), and Clinton (9, 10, 11, and 16 days). See *Intrasession Recess Appointments* 3-4; cf. *Intrasession Recess Appointments to Article III Courts* 671 (noting that Presidents Lyndon Johnson and Taft made recess appointments of judges during seven- and eight-day recesses).



Off. Legal Counsel 124, 161 (1996); 16 Op. Off. Legal Counsel 15, 15-16 (1992); 13 Op. Off. Legal Counsel 271, 272-273 (1989); 6 Op. Off. Legal Counsel 585, 588 (1982); 3 Op. Off. Legal Counsel 314, 316 (1979). Attorney General Daugherty's opinion reasoned that the Constitution does not distinguish between inter-session and intra-session recesses, but instead permits appointments unless "in a *practical* sense the Senate is in session so that its advice and consent can be obtained." 33 Op. Att'y Gen. at 21-22. The Attorney General noted that the purpose of the Recess Appointments Clause was to enable the President to "keep * * * offices filled," and thereby prevent any "interval of time where there may be an incapacity of action" by the government, and he stressed that that purpose would be frustrated if intra-session appointments were deemed categorically impermissible. *Id.* at 22-23. The Attorney General also relied on Congress's understanding (as reflected in the 1905 Judiciary Committee report) and judicial decisions (discussed below). See *id.* at 23-24.

Attorney General Daugherty carefully considered the contrary views previously expressed by Attorney General Knox, who had opined that the President could not make intra-session recess appointments. See 33 Op. Att'y Gen. at 21 (citing 23 Op. Att'y Gen. 599 (1901)). Attorney General Knox acknowledged that an intra-session recess "may be a recess in the general and ordinary use of that term." 23 Op. Att'y Gen. at 602. He also acknowledged that, under his view, the President would be powerless to make any appointments during an intra-session recess of "several months," but he dismissed that concern as a mere "argument from inconvenience." *Id.* at 603. He also acknowledged that his opinion was contrary to judicial precedent, which he

dismissed as not "binding authority." *Ibid.* Attorney General Daugherty, after reviewing those arguments with "more than ordinary care," 33 Op. Att'y Gen. at 21, expressly repudiated the opinion as inconsistent with the text and purpose of the Recess Appointments Clause. *Id.* at 21-24. Attorney General Daugherty's conclusion has been repeatedly reaffirmed in at least six formal opinions. See p. 23, *supra*.

The Senate has long acquiesced in the practice. Notwithstanding some 285 intra-session recess appointments over the last 140 years, the Senate appears never to have raised constitutional concerns about the practice. Indeed, the Comptroller General in 1948 endorsed the "accepted view" (28 Comp. Gen. 30, 34) of the President's power reflected by Attorney General Daugherty's 1921 opinion, indicating that four judges that President Truman had appointed during an intra-session recess had been constitutionally appointed. *Id.* at 34-37. And, as discussed above, see p. 14, *supra*, Congress has enacted legislation providing for the payment of recess appointees without exempting persons appointed during intra-session recesses. The courts that have addressed the constitutionality of intra-session recess appointments also have uniformly upheld the practice. See Pet. App. 4a-6a (language, history, and purpose of the Recess Appointments Clause affirm the legality of Judge Pryor's appointment during an intra-session recess); *Gould* v. *United States*, 19 Ct. Cl. 593, 595-596 (1884) ("We have no doubt that a vacancy occurring while the Senate was thus temporarily adjourned * * * , could be and was legally filled by appointment of the President acting alone."); *Nippon Steel Corp.* v. *United States Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1374 n.13 (Ct. Int'l Trade 2002) ("The long history of the practice * * * without



serious objection by the Senate, * * * demonstrates the legitimacy of these appointments.").

There is no inherent difference in the length of inter-session and intra-session recesses that would explain the inclusion of one and the exclusion of the other. Nothing in the Constitution suggests that intra-session recesses are necessarily short, or inter-session recesses necessarily long. In 2004, for example, Congress took a six-week intrasession recess during July, August, and September, but the inter-session recess during 2004-2005 was less than four weeks. See http://thomas.loc.gov/home/ds/s1082.html; http://thomas.loc.gov/home/ds/s1091.html. Inter-session recesses can be quite short, and indeed, Congress occasionally has eliminated inter-session recesses entirely, as it did in 1867, 1903, and 1941. See *Congressional Directory* 515, 517-518. Founding-era documents indicate an appreciation that intra-session recesses could be lengthy. See *Jefferson Manual* § LI, at 419 (intra-session recess is "a continuance of the session from one day to another, or for a fortnight, a month &c ad libitum"). Petitioners' interpretation of the Recess Appointments Clause would prevent the President from filling critical cabinet posts during a lengthy intra-session recess. Congress routinely schedules intra-session recesses of one month or more, as it has done at least eight times during the Administrations of Presidents Clinton and George W. Bush. See *Intrasession Recess Appointments* 3-4. Moreover, Congress has scheduled a nearly two-month intra-session recess as recently as the Reagan Administration, and two intra-session recesses of more than 100 days as recently as the Truman Administration. See *id.* at 3. A recess appointment power that could be freely invoked during a one-day inter-session recess, but would

be categorically barred during a three-month intra-session recess, would ill serve the purpose of the Clause.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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