No. 06-1396

In the Supreme Court of the United States

DAVID A. SCHOLL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Federal Claims had jurisdiction under the Tucker Act, 28 U.S.C. 1491(a)(1), over a former bankruptcy judge's claim based on a federal court of appeals' decision not to reappoint him upon expiration of his term in office.

2. Whether the court of appeals erred in granting mandamus relief to the government where the Court of Federal Claims clearly lacked jurisdiction, the government had twice unsuccessfully sought leave to file an interlocutory appeal, and the government faced imminent harm from discovery concerning the internal deliberations of Article III judges regarding the reappointment of a judicial officer.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A24) is reported at 463 F.3d 1328. The opinions and orders of the Court of Federal Claims denying the government's motions to dismiss (Pet. App. A48-A58, A59-A91) are reported at 61 Fed. Cl. 322 and 54 Fed. Cl. 640.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2006. A petition for rehearing was denied on December 8, 2006 (Pet. App. A1). The petition for a writ of certiorari was filed on March 7, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Bankruptcy judges serve as judicial officers of the federal district courts. 28 U.S.C. 151. A bankruptcy

judge is appointed for a 14-year term by the court of appeals with jurisdiction over the relevant district. 28 U.S.C. 152(a)(1). If a majority of judges of the court of appeals cannot agree on an appointee, the chief judge has the power to make the appointment. 28 U.S.C. 152(a)(3). The court of appeals may appoint any person "whose character, experience, ability, and impartiality qualify such person to serve in the Federal judiciary." Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA), Pub. L. No. 98-353, § 120(a)(1), 98 Stat. 345 (28 U.S.C. 152 note). The judicial council of each circuit assists the court of appeals by evaluating potential nominees and transmitting a short list to the court. BAFJA § 120(b)-(c), 98 Stat. 345 (28 U.S.C. 152 note). The court of appeals may consider reappointing incumbent bankruptcy judges under procedures prescribed by regulations issued by the Judicial Conference of the United States. Federal Courts Improvement Act of 1996 (FCIA), Pub. L. No. 104-317, § 303(1), 110 Stat. 3852 (28 U.S.C. 152 note).

In 1986, the United States Court of Appeals for the Third Circuit appointed petitioner as a bankruptcy judge for the Eastern District of Pennsylvania; petitioner's term was due to expire in 2000. At that time, the Judicial Conference's regulations (which had not been formally adopted by the Third Circuit) set out a three-step process for the reappointment of an incumbent bankruptcy judge, whereby a court of appeals could first vote on whether the judge appeared to merit reappointment, then solicit comments from the bar and the public, and finally vote definitively on reappointment. The regulations further stated that "[r]eappointment should not be denied unless the incumbent has failed to perform the duties of a bankruptcy judge according to

the high standards of performance regularly met by United States bankruptcy judges." Pet. App. A4-A5 (quoting Regulations of the Judicial Conference of the United States for the Selection, Appointment, and Reappointment of United States Bankruptcy Judges § 5.01(b) (Mar. 1997) (Judicial Conference Regulations)).

On December 29, 1999, petitioner informed Chief Judge Edward R. Becker of the Third Circuit of his interest in seeking reappointment. Consistent with the Judicial Conference regulations then in effect, the Third Circuit held a preliminary vote on whether petitioner appeared to merit reappointment; a majority of the court's active judges voted in favor. The court then solicited comments from the public and submitted questionnaires to attorneys and bankruptcy trustees who had appeared before petitioner. Approximately 300 questionnaires were returned to the court. Petitioner was provided with copies of the comments and summaries of the questionnaire responses and was given the opportunity to respond. After considering the comments, questionnaire responses, and petitioner's own response, the court of appeals voted 11-1 not to reappoint petitioner. Pet. App. A5-A6, A60.

2. Shortly after his term expired, petitioner brought suit against the United States in the Court of Federal Claims, alleging that, by failing to reappoint him, the Third Circuit violated his constitutional right to due process and his rights under the Judicial Conference's regulations. Petitioner sought "lost compensation and damages" and "restoration to office." He invoked the court's jurisdiction under the Tucker Act, 28 U.S.C. 1491(a)(1). Compl. 1-3, 12.

The government initially moved to dismiss the action for lack of jurisdiction under the Tucker Act, on the

ground that petitioner had no entitlement to reappointment to the bankruptcy court. The Court of Federal Claims denied the motion. Pet. App. A59-A91. The court construed the Judicial Conference's regulations to confer on petitioner "a firm right to be reappointed as a judge, absent the showing that he had failed to perform according to high standards." *Id.* at A88. Several months later, the government moved to dismiss the action on the ground that the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, precluded petitioner's claim. The Court of Federal Claims denied that motion as well. Pet. App. A48-A58. The court held that "the CSRA was not meant to foreclose judicial review of [petitioner's] claims." *Id.* at A57. The court subsequently denied the government's motion to certify its rulings for interlocutory appeal under 28 U.S.C. 1292(b). Pet. App. A37-A47.

Petitioner then served the government with document requests and interrogatories. The government responded to some of those requests, but resisted others on the ground that they sought internal Third Circuit documents and information protected by the judicial-function, attorney-client, and work-product privileges. The Court of Federal Claims ordered the government to submit the withheld documents for in camera review, and also ordered the government to make disclosures concerning the identity of its trial witnesses and the nature of their testimony. Pet. App. A31-A34. In addition, the court denied the government's renewed motion to certify its earlier rulings for interlocutory appeal. *Id.* at A30-A31.

3. Faced with imminent deadlines for complying with the Court of Federal Claims' discovery orders, the government filed a petition for a writ of mandamus with

the United States Court of Appeals for the Federal Circuit. The court of appeals stayed proceedings in the Court of Federal Claims pending its disposition of the mandamus petition. After briefing and oral argument, the court of appeals granted the mandamus petition and ordered the Court of Federal Claims to dismiss petitioner's complaint. Pet. App. A2-A24.

a. At the outset, the court of appeals noted that the Tucker Act merely confers jurisdiction on the Court of Federal Claims and does not create any substantive rights to money damages. Pet. App. A13. Accordingly, the court explained, "a Tucker Act plaintiff must assert a claim under a separate money-mandating constitutional provision, statute, or regulation": *i.e.*, a provision that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Id.* at A13-A14 (citation omitted).

The court of appeals then considered, and rejected, both of the bases for Tucker Act jurisdiction offered by petitioner. Pet. App. A15-A22.[1] First, the court rejected petitioner's reliance on 28 U.S.C. 153(a), the statute establishing the salary for bankruptcy judges. Pet. App. A15-A17. The court reasoned that, while "Section 153(a) clearly is a money-mandating statute, * * * [its] money-mandating command only benefits an individual

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[1] The court of appeals summarily rejected petitioner's reliance on the Due Process Clause, reasoning that, "because the Due Process Clause is not money-mandating, it may not provide the basis for jurisdiction under the Tucker Act." Pet. App. A17 n.5; see *Hamlet* v. *United States*, 63 F.3d 1097, 1107 (Fed. Cir. 1995), cert. denied, 517 U.S. 1155 (1996). Although petitioner seemingly contends (Pet. 21-23) that the Judicial Conference's regulations gave rise to a constitutionally protected property interest, he does not contend in the petition that the Due Process Clause served as a basis for Tucker Act jurisdiction.

who actually holds the position of bankruptcy judge." *Id.* at A15. Thus, "[o]nce [petitioner's] term as a bankruptcy judge ended, he no longer was entitled to the pay mandated by [S]ection 153(a)." *Ibid.*

Second, the court of appeals rejected petitioner's reliance on the Judicial Conference's regulations. Pet. App. A17-A22. The court of appeals indicated that it "d[id] not agree with the Court of Federal Claims that [the regulations] provided [petitioner] with a firm right to be reappointed unless 'he had failed to perform according to high standards.'" *Id.* at A20. Instead, the court of appeals reasoned, the regulations "simply provided circuit courts with guidance in the process for the reappointment of incumbent bankruptcy judges." *Ibid.* Nothing in the language of the regulations, the court continued, indicated that they "w[ere] intended to provide incumbent bankruptcy judges with the benefit of a firm right to reappointment." *Ibid.* In any event, the court of appeals concluded that, even assuming that the Third Circuit had failed to comply with the regulations, "there is nothing in the language of the [regulations] that can be accurately characterized as money-mandating." *Id.* at A21. The court therefore held that the regulations did not support Tucker Act jurisdiction. *Id.* at A22.[2]

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[2] Because it agreed with the government that petitioner had no legally protected interest in reappointment and no substantive right to money damages, the court of appeals did not address the government's alternative arguments that, because the Judicial Conference's regulations did not constitute "regulation[s] of an executive department," 28 U.S.C. 1491(a)(1), they could not serve as the basis for jurisdiction under the Tucker Act, see Pet. App. A19 n.6, and that the CSRA in any event precluded petitioner's claim.

b. The court of appeals then stated that it had "no difficulty concluding that the government is entitled to issuance of a writ of mandamus." Pet. App. A22-A24. The court of appeals explained that the criteria for mandamus relief set out by this Court most recently in *Cheney* v. *United States District Court*, 542 U.S. 367 (2004), had been satisfied. Pet. App. A22-A23. First, the court of appeals reasoned, the government had no other adequate means to attain the relief it desired. *Id.* at A23. The court of appeals asserted that "[t]he principal relief that the government desires in this case is preventing [petitioner] from obtaining discovery from judges and employees of the United States Court of Appeals for the Third Circuit with respect to the court's decision not to reappoint him as a bankruptcy judge," and noted that the district court had denied the government's initial and renewed motions for certification for interlocutory appeal. *Ibid.* Second, the court of appeals reasoned, the government's right to issuance of the writ was clear and indisputable, because "the Court of Federal Claims clearly erred by not dismissing this case." *Ibid.* Finally, the court of appeals reasoned, issuance of the writ was appropriate under the circumstances, because "the internal deliberations of the Third Circuit could be subject to discovery," which "would cause a concrete and imminent harm that cannot be remedied after the fact." *Ibid.* The court emphasized that "[t]he circumstances of this case—clear error in the exercise of jurisdiction, combined with the specter of discovery into the deliberations of a federal appeals court relating to the reappointment of a bankruptcy judge—are unique." *Id.* at A24 n.9.

ARGUMENT

Petitioner contends (Pet. 17-23) that the court of appeals erred by holding that the Court of Federal Claims lacked jurisdiction over his claim, and further contends (Pet. 14-16) that, even if the Court of Federal Claims did lack jurisdiction, the court of appeals erred by granting the government's mandamus petition. The court of appeals' decision is correct in both respects and is of limited significance in light of changes in the applicable Judicial Conference regulations. Further review is not warranted.

1. Contrary to petitioner's contention (Pet. 17-23), the court of appeals correctly held that the Court of Federal Claims lacked jurisdiction over his claim challenging the Third Circuit's failure to reappoint him as a bankruptcy judge. As the court of appeals explained, the Tucker Act "is itself only a jurisdictional statute" and "does not create any substantive right enforceable against the United States for money damages." Pet. App. A13 (quoting *United States* v. *Testan*, 424 U.S. 392, 398 (1976)). Accordingly, the Tucker Act "merely confers jurisdiction upon [the Court of Federal Claims] whenever the substantive right exists." *Testan*, 424 U.S. at 398; see *Fisher* v. *United States*, 402 F.3d 1167, 1172-1173 (Fed. Cir. 2005). In order to establish jurisdiction under the Tucker Act, therefore, it was insufficient for petitioner merely to allege the violation of a legally protected interest; instead, petitioner was required to identify a constitutional provision, statute, or eligible regulation that "c[ould] fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Testan*, 424 U.S. at 400 (citation omitted).

The court of appeals correctly concluded that petitioner had failed to show even that he had a legally protected interest in being reappointed as a bankruptcy judge—much less that there was a provision that mandated compensation for any damage caused by the failure to reappoint him. See Pet. App. A19-A21. As a preliminary matter, the statutes governing the appointment of bankruptcy judges make clear that such judges have no substantive entitlement to reappointment. Indeed, those statutes indicate that, at least with regard to bankruptcy judges (such as petitioner) who were initially appointed after 1984, the courts of appeals are not even obligated to *consider* such judges for reappointment, but "may" do so under procedures prescribed by the Judicial Conference's regulations. See FCIA § 303, 110 Stat. 3852 (28 U.S.C. 152 note). Consistent with that approach to reappointment, the statutes afford broad discretion to the courts of appeals in making appointment decisions more generally. See BAFJA § 120(a)(1), 98 Stat. 344 (28 U.S.C. 152 note).

In arguing that he nevertheless had a legally protected interest in being reappointed as a bankruptcy judge, petitioner cites (Pet. 21-23) the Judicial Conference's regulations then in effect concerning reappointment: specifically, the regulation providing that, where an incumbent judge was applying for reappointment, "[r]eappointment should not be denied unless the incumbent has failed to perform the duties of a bankruptcy judge according to the high standards of performance regularly met by United States bankruptcy judges." Pet. App. A4 (quoting Judicial Conference Regulations § 5.01(b) (Mar. 1997)). As the court of appeals explained, however, that language "simply provided circuit courts with guidance in the process for the reappoint-

ment of incumbent bankruptcy judges." *Id.* at A20. The term "should" is often precatory in nature, and petitioner's contrary reading is undercut in this context by the broad and generalized nature of the inquiry that the regulation contemplates: *i.e.*, whether the incumbent judge has failed to perform "according to the high standards of performance regularly met" by other bankruptcy judges. *Id.* at A4 (quoting Judicial Conference Regulations § 5.01(b) (Mar. 1997)). It is also undercut by the overall structure of the regulations, which merely set out *procedures* for reappointment—and, in so doing, confirm that the courts of appeals have the discretion to decide both whether to consider incumbent judges for reappointment in the first place and ultimately whether to reappoint them. See *id.* at A4-A5.

Even assuming, moreover, that the Judicial Conference's regulations conferred a protected interest in reappointment, the Court of Federal Claims would still have lacked jurisdiction, because no constitutional provision, statute, or eligible regulation mandated compensation for an appointment that petitioner did not receive. As the court of appeals noted (Pet. App. A21), "there is nothing in the language of [the Judicial Conference's regulations] that can be accurately characterized as money-mandating"—and, even if there were, the Judicial Conference's regulations could not serve as the basis for jurisdiction under the Tucker Act, because they do not constitute "regulation[s] of an *executive* department." 28 U.S.C. 1491(a)(1) (emphasis added); see Pet. App. A19 n.6 (reserving issue).

Petitioner seemingly relies (Pet. 2) not on the Judicial Conference's regulations, but on 28 U.S.C. 153(a), the statute establishing the salary for bankruptcy judges. That statute, however, merely requires pay-

ment of a specified salary to a bankruptcy judge as "full compensation for his services." *Ibid.* Once petitioner's fixed term expired, he was no longer a bankruptcy judge, and was no longer performing any "services" for which he was entitled to compensation under the terms of Section 153(a). No statute mandates the payment of retroactive salary to petitioner as if he had been appointed to a new term. Nor can petitioner avail himself of the Court of Federal Claims' Tucker Act jurisdiction simply by asserting that, if he had been reappointed, he would have been entitled to receive a salary under Section 153(a) (or that the failure to reappoint him was the functional equivalent of a wrongful discharge). In *Testan*, this Court rejected a similar argument, on the ground that "[t]he established rule is that one is not entitled to the benefit of a position until he has been duly appointed to it." 424 U.S. at 402. Because petitioner is not contending that he "has been denied the benefit of the position to which he was appointed," *ibid.*, but is instead contending only that he should have been *reappointed* to that position, Section 153(a) cannot serve as the money-mandating provision that supplies Tucker Act jurisdiction over his claim.

Notably, permitting an incumbent bankruptcy judge to bring a damages action challenging a court of appeals' adverse decision on reappointment could raise serious constitutional concerns. Under the Appointments Clause, bankruptcy judges are inferior officers whose appointment, if not made by the President subject to Senate confirmation, must be vested "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. Art. II, § 2, Cl. 2; see *Freytag* v. *Commissioner*, 501 U.S. 868, 880-882 (1991). Congress has vested the power to appoint bankruptcy judges in

the courts of appeals, see 28 U.S.C. 152(a)(1), and the exercise of that power is not subject to further review. See, *e.g.*, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 166-167 (1803) (explaining that the appointment of an inferior officer is a "political power" and that "there exists, and can exist, no power to control that discretion"). Moreover, bankruptcy judges are judicial officers, see 28 U.S.C. 151, and permitting disgruntled candidates to sue in the Court of Federal Claims—an Article I court, see 28 U.S.C. 171—could contravene the separation of powers by allowing a single Article I judge with no bankruptcy expertise to interfere with an Article III court's exercise of control over bankruptcy judges (and thereby undercut the effective functioning of the Judicial Branch). Cf. *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 466-467 (1989) (noting that applying open-meeting requirements to a committee that prepared confidential evaluations of potential nominees for Article III judgeships would raise serious constitutional concerns).

Finally, even assuming that the Court of Federal Claims would have jurisdiction under the Tucker Act over a damages action challenging a court of appeals' adverse decision on reappointment, such an action would be foreclosed by the CSRA, which comprehensively regulates the appointment of federal officials. See C.A. Pet. for Mandamus 20-24. In the CSRA, Congress provided a mechanism for certain Executive Branch employees to challenge adverse employment actions before the Merit Systems Protection Board, see 5 U.S.C. 7501-7514 (2000 & Supp. IV 2004), but did not provide a corresponding mechanism for Judicial Branch employees (or for high-level Executive Branch officials). See 5 U.S.C. 2102, 7501(1), 7511(a)-(b). In light of Congress's considered

judgment to exclude the latter employees from the remedial provisions of the statute, it would make little sense to permit them to bring challenges to adverse employment actions in the Court of Federal Claims. Cf. *United States* v. *Fausto*, 484 U.S. 439, 443, 448-449 (1988) (holding that officials with no right of action under the CSRA could not obtain Tucker Act review in the Claims Court based on the Back Pay Act of 1966, 5 U.S.C. 5596). Even if petitioner could show both that he had a legally protected interest in being reappointed as a bankruptcy judge and that there was a provision that mandated compensation for any damage caused by the failure to reappoint him, therefore, the court of appeals correctly held that the Court of Federal Claims should have dismissed his claim.

2. Petitioner also contends (Pet. 14-16) that, even if the Court of Federal Claims did lack jurisdiction, the court of appeals erred by granting the government's mandamus petition. That contention lacks merit. As this Court has repeatedly recognized, three conditions must be satisfied before the writ of mandamus can issue: (1) the petitioner must have no other adequate means to attain the desired relief; (2) the petitioner must show that the right to issuance of the writ is clear and indisputable; and (3) the issuing court must be satisfied that issuance of the writ is appropriate under the circumstances. See *Cheney* v. *United States Dist. Ct.*, 542 U.S. 367, 380-381 (2004); *Kerr* v. *United States Dist. Ct.*, 426 U.S. 394, 403 (1976). In this case, the Court of Federal Claims clearly erred by holding that it had jurisdiction over petitioner's claim, for the reasons stated above. In addition, as the court of appeals explained (Pet. App. A23), the government had no other adequate means to attain the relief it desired, insofar as the government

was subject to discovery orders that would have required it imminently to make disclosures concerning the internal deliberations of Article III judges regarding the reappointment of a judicial officer (and the government had twice unsuccessfully sought leave to file an interlocutory appeal). As the court of appeals also explained (*ibid.*), the government would have suffered irreparable harm if the writ were not granted, because any disclosures concerning the internal deliberations of the Third Circuit (whether to the Court of Federal Claims or to petitioner) could not be remedied once made. All three conditions for issuance of the writ were therefore satisfied.

This Court has repeatedly recognized that mandamus jurisdiction is appropriately exercised where, as here, the petition implicates a substantial interbranch conflict. In *Cheney*, this Court reviewed the legality of discovery orders served upon the Vice President, even before any specific privileges had been asserted, where the orders threatened the Vice President's ability to provide confidential advice to the President. Cf. 542 U.S. at 382 (noting that "[a]ccepted mandamus standards are broad enough to allow a court of appeals to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities"). Similarly, in *Ex parte Peru*, 318 U.S. 578 (1943), the Court prohibited a district court from adjudicating a case that the Executive Branch had concluded was barred by foreign sovereign immunity. See *id.* at 587 (reasoning that "it is of public importance that the action of the political arm of the Government taken within its appropriate sphere be promptly recognized, and that the delay and inconvenience of a prolonged litigation be avoided by prompt termination of the proceed-

ings in the district court"). Because this case presents similar separation-of-powers concerns to *Cheney* and *Peru*, the court of appeals' exercise of mandamus jurisdiction was entirely proper.[3]

3. Finally, further review is unwarranted because the court of appeals' decision is of limited prospective importance. In 2001, in order to clarify that incumbent judges have no "presumption of reappointment," the Judicial Conference amended its regulations by deleting the "[r]eappointment should not be denied" provision on which petitioner primarily relies. See *Report of the Proceedings of the Judicial Conference of the United States* 9 (Mar. 14, 2001) <http://www.uscourts.gov/judconf/01-mar.pdf>. In the wake of that amendment, there is no longer any colorable argument that the Judicial Conference's regulations confer a legally protected interest in reappointment as a bankruptcy judge. More generally, we are aware of no other currently pending case in which a bankruptcy judge has challenged a court of appeals' adverse decision on reappointment. The Federal Circuit's decision in this case therefore presents no recurring issue of broader significance that warrants this Court's review.

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[3] Petitioner contends (Pet. 15) that this case is analogous to *Kerr*, which affirmed the denial of a petition for mandamus where the defendants were seeking to prevent the disclosure of privileged material. In *Kerr*, however, the defendants asserted only that the material at issue was qualifiedly privileged; therefore, in camera review would have alleviated any concern about public disclosure. See 426 U.S. at 404. In this case, by contrast, the material at issue was absolutely privileged, and even in camera review would have raised serious constitutional concerns.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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