No. 04-828

IN THE
Supreme Court of the United States

Peter Evans and Detree Jordan,
Petitioners,

v.

Denis Stephens,
Respondent,
and
United States of America,
Intervenor-Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONERS

Dovre Christian Jensen
Clark E. Gulley
FOSTER, JENSEN & GULLEY, LLC
1447 Peachtree Street, NE
Suite 1009
Atlanta, GA 30309

Thomas C. Goldstein
(*Counsel of Record*)
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

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This is one of four petitions for certiorari that presents a fundamental question regarding the separation of powers between the Executive and Congress that only this Court can resolve. The President asserts the power to make "Recess Appointments" of Article III judges during any break of the Senate – including, literally, even a break for lunch. That unprecedented conception of the Recess Appointments power obviously vitiates the cardinal authority of the Senate to pass on the President's nominees. Particularly given the significant consequences of such a broad assertion of power upon the third branch of government, this Court's intervention to decide the question is warranted.

To the extent that the Court concludes that none of the four cases now pending is an appropriate vehicle to decide the question presented, it should be aware that a fifth case – in which the petitioner will have moved at the earliest opportunity in the court of appeals to remove Judge Pryor from the panel – is likely to be filed soon. And that case will have been finally decided by the court of appeals.

I. This Case Is The Best Vehicle In Which To Decide The Scope Of The President's Authority To Make Recess Appointments Of Article III Judges.

1. The particular vehicle that this Court uses to decide the question presented makes a practical difference only insofar as the Court agrees with the Solicitor General that a challenge to the constitutionality of a judicial appointment can be presented here only if it was preserved in the court of appeals. The Solicitor General has thus urged the Court to deny the previously filed petitions for certiorari on this issue. On that view, this case – in which the issue was preserved below – is the best vehicle to decide the question presented. The Solicitor General relegates the issue to a footnote to the Brief in Opposition in this case, stating that "it is unclear how much weight *petitioners* intend this Court to give that consideration." BIO 6 n.3 (emphasis added). In fact, it is not

unclear at all: petitioners believe that the constitutionality of the court's composition goes to the court's power to decide a case and thus is not subject to waiver, particularly when the parties to the case did not know the court's composition (and thus could not have objected) until after the case was decided. But because it was the *government* that argued to the contrary, *it* cannot now be heard to deny that this case is in that respect a more appropriate vehicle to decide the question.

The Court also has demonstrated a preference for deciding issues in the context of the particular vehicle that presents the most developed appellate opinion. In that respect, this case is a superior vehicle as well.

2. The Solicitor General opposes review on the ground that the case is interlocutory. BIO 7-10. Preliminarily, it is essential to recognize that the government is making a prudential – rather than jurisdictional – point. The government does not in any respect dispute that the case falls squarely within the Court's jurisdiction.

Certiorari should be granted because, even accepting the Solicitor General's premise that some prudential considerations militate against review in this particular case, other contrary considerations are simply more significant. In particular, if the Court does conclude that a challenge to the composition of an appellate panel must have been preserved below to be vindicated here, then this case is the *only* pending vehicle to decide the important question presented. And, as noted, the Court has demonstrated a prudential preference for deciding questions in the particular case that presents the most developed appellate opinion.

The prudential factor cited by the Solicitor General – that the case is interlocutory – is moreover not particularly significant. Although this case – like many that the Court reviews each year – has not been finally decided, the relevant point is that the *question presented* has been finally decided.

To be sure, the case is unusual in that it remains pending in the court of appeals. But the Court has reviewed cases in

that posture when – as here – the question, by its very nature, will govern how those lower court proceedings are conducted. Thus, in *International Union* v. *Scofield*, 382 U.S. 205 (1965), the Court reviewed the court of appeals' denial of a motion to intervene while the case remained pending on appeal. Petitioners are unquestionably affected more by the ongoing consideration of their case by a judge who was not constitutionally appointed than was the union in *Scofield*, which the court of appeals allowed to participate on appeal as an amicus. Even if petitioners prevail on appeal, Judge Pryor no doubt will play a role in the disposition of the case (whether as a member of the majority or as a dissenter). In particular, if petitioners prevail, the case will be remanded, and the breadth of the court of appeals' opinion will determine the scope of that remand.

The government moreover notably does not contend that the posture of the case would have *any* actual consequence for this Court's review, for it does not doubt that the Eleventh Circuit would stay further proceedings while this Court reviewed the constitutionality of the appellate panel. Nor does the government dispute petitioners' standing to seek review of the panel's composition *now*, for if petitioners are correct that Judge Pryor was not constitutionally appointed to the Eleventh Circuit, then he cannot lawfully participate in the court of appeals' ongoing consideration and disposition of the case.

The government does note that a district judge's refusal to recuse himself is not subject to an immediate appeal. BIO 6-7. But it completely ignores the reason for that rule: by statute, an appeal may be taken from a district court to a court of appeals only upon entry of a "final decision[]." 28 U.S.C. 1291. The same rule does *not* apply to petitions for certiorari from the federal courts of appeals – in contrast to state courts – to this Court. See Pet. 1.

The Solicitor General further omits that the authorities on which it relies recognize that it is frequently *essential* that

orders denying recusal be reviewed immediately, rather than after the final disposition of the case. Given the final judgment rule, review is simply undertaken by mandamus. See, *e.g.*, 12 James W. Moore, *Moore's Federal Practice* § 63.71[1] (3d ed. 2004) (stating, immediately after the sentence quoted by the government that appeals are not permitted, BIO 6-7: "However, litigants may attempt to remove a judge who has denied their recusal motion by seeking a writ of mandamus from the court of appeals."). As Judge Posner has written, "[a] judge's refusal to recuse himself in the face of a substantial challenge casts a shadow not only over the individual litigation but over the integrity of the judicial process as a whole. The shadow should be dispelled *at the earliest possible opportunity* by an authoritative judgment either upholding or rejecting the challenge." *Union Carbide Corp.* v. *U.S. Cutting Serv.*, 782 F.2d 710, 712 (CA7 1986). "In recognition of this point, [the courts of appeals] have been liberal in allowing the use of mandamus to review orders denying motions to disqualify." *Ibid.* (collecting authorities). Because no final judgment rule applies to this Court's review in this case, resort to mandamus is unnecessary. But even if that were not so, as the petition explained (at 1-2 n.1), this Court could simply grant mandamus itself.

II. Judge Pryor Was Not Constitutionally Appointed To The Eleventh Circuit Court Of Appeals.

The Recess Appointments Clause, art. II, § 2, cl. 3, authorizes the President to unilaterally "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 court of appeals held that the President can exercise this extraordinary power: (i) *any time the Senate "tak[es] a break*," Pet. App. 8a, no matter how short, *id.* 9a; (ii) even to fill a vacancy on an Article III court with a judge who is not protected by life tenure, *id.* 3a-7a; and (iii)

regardless whether the vacancy in question actually "happen[ed]" while the Senate was in recess, *id.* 10a-12a.

Although the proper function of the Recess Appointments Clause is merely to act as an "auxiliary" to the Appointments Clause, art. II, § 2, cl. 2, on those infrequent occasions when "the general method [is] inadequate," *The Federalist No. 67*, at 408 (A. Hamilton) (C. Rossiter ed., 2003), the court of appeals' interpretation would give the President carte blanche to circumvent the operation of the Appointments Clause whenever he deems it convenient to do so – even when the Senate is fully capable of giving full consideration to the President's nominees, and thus when the "general method" is unarguably adequate to the constitutional task. Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause* 51-54, at http://ssrn.com/abstract=621381 (Oct. 2004).

This breathtaking new understanding of the President's Recess Appointments power will surely only exacerbate a very troubling and very *recent* practice, whereby Presidents have seen fit to make intra-session appointments during exceedingly brief intra-session breaks and shortly before the resumption of Senate business, see Kennedy *Amicus* Br. No. 04-5858, *Franklin* v. *United States* 9-10[1] – circumstances under which the Department of Justice had long conceded that the use of the Recess Appointments power would be unconstitutional.[2] Here, petitioners reply to the few arguments that have not been addressed in the briefing in the

[1] The United States boldly asserts that the duration of the recess during which the President appointed Judge Pryor is "well within historical standards," but, tellingly, the only comparable examples the Government cites are appointments by President Clinton. BIO 22 n.9.

[2] The Government makes a parenthetical suggestion that there may be a "single arguable exception of *de minimis* breaks of three days or less." BIO 11. But the only authority the Government cites is the Adjournment Clause, art. I, § 5, cl. 4, which is, at best, inapposite to the Government's half-hearted effort to lessen the absurdity of the court of appeals' interpretation. See Kennedy *Franklin* Br. 12-13 n.10.

other petitions for certiorari in which the same question is presented.

1. The United States argues, BIO 20-22, that "longstanding historical practice" "substantiate[s]" the application of the Recess Appointments Clause to intra-session breaks. This turns the history on its head.

During the first 132 years of constitutional practice, from 1789 until 1921, the Senate suspended business *thousands* of times (including, of course, most nights and weekends), and yet Presidents made unilateral appointments during only *one* such break (in 1867). To be sure, most of the adjournments during this period lasted fewer than three days, including almost every evening and weekend. But each of those breaks was, in the view of the court below, a "Recess" for purposes of the Recess Appointments Clause; and, in any event, and as the Government's own brief demonstrates (*e.g.*, BIO 21 n.8), there were numerous occasions (at least sixty by petitioners' count) prior to 1921 when the Senate adjourned for a period lasting between three days and several months. See U.S. Gov't Printing Office, *2003-2004 Official Congressional Directory: 108th Cong.* 512-17 (2004).

2. The intra-session recess appointment at issue here is of particular constitutional concern because it established a *temporary* commission on an Article III court, where Judge Pryor sits without the protections of life tenure. Such an appointment presents the "extraordinary situation" of "a direct conflict between two provisions of the Constitution" – the Recess Appointments Clause and the Good Behavior Clause of Article III, Section 1. *United States* v. *Woodley*, 751 F.2d 1008, 1017 (CA9) (en banc) (Norris, J., dissenting), cert. denied, 475 U.S. 1048 (1986).

The Government somewhat surprisingly argues, BIO 15, that there is "no tension" between the two clauses – a theory that even the court of appeals declined to endorse. See Pet. App. 5a (acknowledging "some tension between Article III and the recess appointment of judges to Article III courts").

The Government's far-fetched rationale is that even though recess-appointed judges do not enjoy the protections of life tenure, the Good Behavior Clause protects them from the extremely hypothetical risk of presidential removal during their relatively short term on the bench. Of course, this argument simply ignores the Framers' view that "permanency in office" may be "justly regarded as an indispensable ingredient in [the judiciary's] constitution, and, in a great measure, as the citadel of the public justice and the public security." *The Federalist No. 78*, at 465 (A. Hamilton).[3]

Without the protection of life tenure, federal judges would be subject to "'potential domination by other branches of government.'" *CFTC* v. *Schor*, 478 U.S. 833, 848 (1986) (quoting *United States* v. *Will*, 449 U.S. 200, 218 (1980)). This concern is especially acute in a case such as this, in which the judge in question must refrain from acting in any way that will disappoint the President or the Senate, lest he jeopardize his chances of being reappointed and confirmed to a permanent judgeship. Cf. Declaration of Independence para. 11 (listing grievance against King George III that "HE has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries."); U.S. Br. 22, *Nguyen* v. *United States*, 539 U.S. 69 (2003) (Nos. 01-10873, 02-5034) ("a decision by Congress to populate Article III courts with non-Article III judges would likely violate the separation of powers by enhancing Congress's influence and control over the decisionmaking of Article III courts, thereby diminishing the authority and independence of such tribunals").

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[3] By contrast, the Government told this Court in *Nguyen*: "[T]he government agrees with petitioners that the performance by a non-Article III judge of Article III functions on an 'inferior Court[]' exercising general federal jurisdiction would violate Article III of the Constitution," and "Article III specifies that judges on such courts must enjoy Article III's protections of life tenure and guaranteed salary." U.S. Br. 22, *Nguyen* v. *United States*, 539 U.S. 69 (2003) (Nos. 01-10873, 02-5034).

The Government pursues an even more untenable fallback argument, BIO 16: noting that only "a tiny fraction" of federal judges are sitting by virtue of recess appointments, the Government contends that such appointments do not undermine "the integrity of judicial decisionmaking" because the ultimate power of any *particular* court of appeals judge is dependent upon the actions of other judges who *are* protected by life tenure. For instance, the Government reasons, the trial judge in this case, and eleven of the twelve judges hearing petitioners' appeal, and each of the Justices on this Court (who can review Judge Pryor's actions) serve without fear or favor because of life tenure. This Court has repeatedly determined, however, that an appellate panel's decisions are impermissibly tainted – and thus void – if the panel included *any* ineligible participating judges. *E.g.*, *Nguyen*, 539 U.S. at 82 (citing cases). Indeed, a panel that contains an illegitimate adjudicator is "virtually no court at all." *William Cramp & Sons Ship & Engine Building Co.* v. *International Curtiss Marine Turbine Co.*, 228 U.S. 645, 652 (1913); see also *Moran* v. *Dillingham*, 174 U.S. 153, 158 (1899). The Government seeks to distinguish the *Nguyen* line of cases, BIO 16 n.5, on the ground that the participation of judges in those cases violated *statutory* restrictions. But the same result must obtain a fortiori when the composition violates a *constitutional*, rather than a statutory, guarantee of judicial independence.[4]

[4] The court of appeals relied upon a similarly startling argument, Pet. App. 6a – that although a lack of judicial independence would be "intolerable, if prolonged," the Framers must have concluded that such a threat to independence "was acceptable for a relatively short while," during the limited term of a recess appointment. Of course, for a litigant whose case is determined by a judge lacking the independence conferred by life tenure, it is small solace that future litigants will not be so burdened. See *Schor*, 478 U.S. at 848 (the guarantee of independence provided by the provisions of Article III, § 1 "serves to protect primarily personal rather than structural, interests").

CONCLUSION

For the reasons stated above and in the petition for certiorari, the petition for certiorari should be granted.

Respectfully submitted,

Dovre Christian Jensen
Clark E. Gulley
FOSTER, JENSEN & GULLEY, LLC
1447 Peachtree Street, NE
Suite 1009
Atlanta, GA 30309

Thomas C. Goldstein
(*Counsel of Record*)
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

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