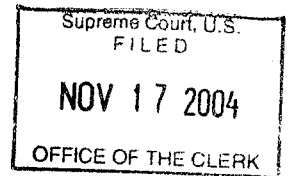


No. 04-5858



IN THE SUPREME COURT OF THE UNITED STATES

CHARLES FRANKLIN, PETITIONER

v.

UNITED STATES OF AMERICA

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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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 247(c), which prohibits "intentionally defac[ing], damag[ing], or destroy[ing] any religious real property because of the race, color, or ethnic characteristics of any individual associated with that religious property," is a permissible exercise of Congress's power to enforce the Thirteenth Amendment.

2. Whether the Recess Appointments Clause 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. A) is unreported, but the judgment is noted at 104 Fed. Appx. 150 (Table). The opinion of the district court denying petitioner's motion to dismiss Count Two of the indictment (Pet. App. D) is unreported.

JURISDICTION

The opinion of the court of appeals was issued April 30, 2004. On July 23, 2004, Justice Kennedy granted petitioner an extension of time in which to file a petition for a writ of certiorari to and including September 13, 2004. The petition for a writ of certiorari was filed on August 13, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted of intentionally damaging religious real property because of the race, color, and ethnic characteristics of individuals associated with that property, in violation of 18 U.S.C. 247(c) and (d)(3). He was sentenced to 27 months of imprisonment, to be followed by three years of supervised release. Pet. App. A at 8. The court of appeals affirmed. Pet. App. A.

1. On March 25, 2002, petitioner intentionally drove his truck into the Islamic Center of Tallahassee Mosque in Tallahassee, Florida, causing structural damage to the building. Pet. App. A at 3; Gov't C.A. Br. 4. Afterwards, petitioner said that he had damaged the mosque to retaliate against "Arabs" because of the terrorist attacks of September 11, 2001. Pet. App. A at 5-6.

2. On June 21, 2002, petitioner was charged in a two-count indictment with intentionally damaging religious real property with a dangerous weapon because of the religious character of the property, and that the offense was in or affected interstate and foreign commerce, in violation of 18 U.S.C. 274(a)(1) and (d)(3) (Count One); and with intentionally damaging religious real property with a dangerous weapon because of the race, color, and ethnic characteristics of individuals associated with that property, in violation of 18 U.S.C. 274(c) and (d)(3) (Count Two). Petitioner initially pleaded guilty to Count One of the indictment, but he was permitted to withdraw the guilty plea after a decision

by a panel of the court of appeals cast doubt on whether the offense had an effect on interstate commerce, as required by Section 247(a). See United States v. Ballinger, 312 F.3d 1264 (11th Cir. 2002), vacated on reh'g en banc, 369 F.3d 1238 (11th Cir. 2004). Count One of the indictment was then dismissed, and petitioner proceeded to trial on Count Two.

Before trial, petitioner moved to dismiss Count Two, contending that the enactment of Section 247(c) exceeded Congress's enforcement authority under Section 2 of the Thirteenth Amendment. Pet. App. B. The district court denied the motion. Pet. App. D. The district court held that Section 247(c) "falls squarely within the power of Congress to legislate under the Thirteenth Amendment," finding that "[t]he destruction of places of worship because of the race, color, and ethnic characteristics of the individuals associated with it, is intimately connected to a system of slavery and involuntary servitude." Id. at 5 (collecting authorities). The district court rejected petitioner's contention that it should apply a more restrictive view of Congress's authority under the Thirteenth Amendment, derived from decisions construing congressional authority under Section 2 of the Fourteenth Amendment, because "[n]one of these Fourteenth Amendment cases * * * even purport to speak to the long line of cases broadly applying Section 2 of the Thirteenth Amendment." Id. at 4.

After a jury trial, petitioner was convicted. The district court sentenced petitioner to 27 months of imprisonment, to be followed by three years of supervised release. Pet. App. A at 8.

3. Petitioner appealed, and the case was assigned to a panel composed of Circuit Judges Rosemary Barkett, Stanley Marcus, and William H. Pryor Jr. On April 30, 2004, the court of appeals affirmed in an unpublished per curiam decision, holding that Congress had not exceeded its enforcement authority under the Thirteenth Amendment by enacting Section 247(c). Pet. App. A. The court of appeals noted that this Court had held that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation." Pet. App. A at 10 (quoting Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440-441 (1968) (emphasis omitted)). The court of appeals observed that Jones established that the Thirteenth Amendment authorized Congress to "protect the right to sell, purchase, and hold property." Id. at 11. In enacting Section 247(c), the court of appeals noted, "Congress found that destruction and damage to religious property 'pose[d] a serious national problem,' and that there had been an increase in the arson 'of places of religious worship that serve predominantly African American congregations.'" Ibid. The court concluded that those findings were sufficient to support the "rational determination as to the badges and the incidents of slavery," ibid., and that therefore Congress had validly acted to protect "interfere[nce] with the ability of citizens to hold or use religious property without fear of attack" by persons "motivated by race, color, or ethnicity." Ibid.

4. On April 9, 2003, the President nominated William H. Pryor Jr. to fill a vacancy on the United States Court of Appeals for the Eleventh Circuit. 149 Cong. Rec. S5101 (daily ed. Apr. 9, 2003). On July 23, 2003, the Senate Judiciary Committee favorably reported his nomination to the full Senate. See Judiciary Committee Report on Nominees 14 (last modified Sept. 20, 2004) <http://judiciary.senate.gov/noms/108/committee_report.pdf>. On February 20, 2004, while the Senate was in recess, see H.R. Con. Res. 361, 108th Cong., 2d Sess. (2004), 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.

ARGUMENT

I. Petitioner contends (Pet. 13-22) that Congress exceeded the scope of its enforcement power under the Thirteenth Amendment when it enacted 18 U.S.C. 247(c). Petitioner notes that this Court has recognized limits on Congress's authority to enforce the provisions of the Fourteenth, Fifteenth, and Eighteenth Amendments, see Pet. 13-16, and has held that the ability to enforce a right does not authorize Congress "to define the substantive constitutional right it seeks to enforce." Pet. 16. Noting particularly the limits this Court has recognized on enforcement power in the Fourteenth Amendment context, see, e.g., City of Boerne v. Flores, 521 U.S. 507 (1997), petitioner contends that the

court of appeals erred by not applying similar limitations to the Thirteenth Amendment's enforcement clause to hold Section 247(c) unconstitutional. Pet. 13, 17, 21-22. The decision of the court of appeals is correct, and further review is not warranted.

Section 247(c) prohibits the intentional defacement, damage, or destruction of religious real property "because of the race, color, or ethnic characteristics of any individual associated with" that property. That provision was enacted as part of the Church Arson Prevention Act of 1996 (CAPA), Pub. L. No. 104-155, 110 Stat. 1392. In enacting CAPA, Congress made statutory findings that incidents of damage and destruction of religious property "pose a serious national problem," "especially in the context of places of worship that serve predominantly African-American congregations," and that "the problem is sufficiently serious, widespread, and interstate in scope to warrant Federal intervention to assist State and local jurisdictions." Pub. L. No. 104-155, § 2, 110 Stat. 1392. In enacting Section 247(c), Congress invoked its power under Section 2 of the Thirteenth Amendment to prevent "interfere[nce] with the ability of citizens to hold or use religious property without fear of attack" by persons "motivated by race, color, or ethnicity." 110 Stat. 1392.

Section 1 of the Thirteenth Amendment provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States." Section 2 of the Amendment grants Congress the "power to enforce this article by appropriate

legislation." Section 2's "enforcement powers are broad." Oregon v. Mitchell, 400 U.S. 112, 127 (1971) (opinion of Black, J.). Under Section 2, "the varieties of private conduct that [Congress] may make criminally punishable or civilly remediable extend far beyond" the conduct directly prohibited by Section 1 of the Amendment. Griffin v. Breckinridge, 403 U.S. 88, 105 (1971).¹ The Court has interpreted Section 2 to "clothe[] 'Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.'" Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) (quoting The Civil Rights Cases, 109 U.S. 3, 20 (1883)). The provision "[s]urely" grants to Congress "the power * * * rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation." Id. at 440. This Court repeatedly has recognized that the power granted Congress under Section 2 is not limited to preventing discrimination against African-Americans, but permits Congress "to legislate in regard to every race." McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 288 n.18 (1976); cf. Saint Francis College v. Al-Khazraii, 481 U.S. 604, 613 (1987) (holding that prohibition of discrimination in

¹ See, e.g., Jones, 392 U.S. at 439 (holding that Section 2 empowers Congress "to eliminate all racial barriers to the acquisition of real and personal property"); Griffin, 403 U.S. at 105 (concluding that Section 2 authorizes Congress to "creat[e] a statutory cause of action for Negro citizens who have been the victims of * * * racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men"); Runyon v. McCrary, 427 U.S. 160, 179 (1976) (holding that Section 2 authorizes Congress to prohibit racial discrimination in the making and enforcement of contracts).

statute enacted under Thirteenth Amendment encompasses discrimination against Arabs).

The court of appeals correctly concluded that Congress had ample authority under the Thirteenth Amendment to enact Section 247(c). As this Court noted in Jones, "whatever else they may have encompassed, the badges and incidents of slavery--its 'burdens and disabilities'--included restraints" on the ownership and enjoyment of property on the same terms as "white citizens." 392 U.S. at 441 & n.78. This Court in Jones upheld Congress's authority under the Thirteenth Amendment to legislate to protect property rights from racial discrimination. Id. at 438-439 (upholding Congress's authority to enact 42 U.S.C. 1982, which protects from racial discrimination the right "to inherit, purchase, lease, sell, hold, and convey real and personal property"). It stands to reason that if Congress has the authority to protect the right to "hold" property from racial discrimination, it also has the authority to protect the right to hold property for religious purposes free of racially or ethnically motivated attacks.

Section 247(c) was an appropriate exercise of Congress's Thirteenth Amendment enforcement powers in light of the long history of religious suppression as a "badge and incident" of slavery. Suppression of slaves' religious freedom was a common practice before adoption of the Thirteenth Amendment. As early as 1715, southern states passed laws curtailing the religious practices of slaves. C. Eric Lincoln, Race, Religion and the Continuing American Dilemma 45 (1984). Such laws became more

widespread during the first half of the Nineteenth Century because of fears that the assembly of slaves for whatever reason, including religious worship, would encourage rebellion. As such, "black churches were considered dangerous to established white interests, and in every Southern state they were forbidden, suppressed, or severely regulated by law until the Civil War." Id. at 32. Beginning in 1800, numerous southern states enacted statutes that "forbade Negroes to assemble, even with whites present, between sunset and sunrise, 'for the purpose of * * * religious worship.'" Albert J. Raboteau, Slave Religion: The "Invisible Institution" in the Antebellum South 147 (1978) (South Carolina; Virginia); Vincent Harding, "Religion and Resistance Among Antebellum Slaves 1800-1860," in African American Religion: Interpretive Essays in History and Culture 118 (Timothy E. Fulop & Albert J. Raboteau, eds., 1997) (Mississippi); George M. Stroud, A Sketch of the Laws Relating to Slavery in the Several States of the United States of America 92 (1827), reprinted in 1 Slavery, Race and the American Legal System 1700-1872, Ser. No. 7, 1 Statutes on Slavery: The Pamphlet Literature 248 (Paul Finkelman, ed., 1988) (Georgia); id. at 250 (Mississippi); Race, Religion and the Continuing American Dilemma, supra, at 45 (North Carolina).

During Reconstruction, "[i]nstitutions like churches * * * frequently became targets" of the Ku Klux Klan, which viewed them as "embodiments of black autonomy." Eric Foner, Reconstruction: America's Unfinished Revolution 1863-1877 428 (1988); J. Clay Smith, Jr., In Freedom's Birthplace, 39 How. L.J. 201, 235 n.114

(1995); Church Burnings: Hearing before the Senate Comm. on the Judiciary 104th Cong., 2d Sess. 64 (1996). During the 1950s and 1960s, "[t]he burning of black churches was a commonly used tool of intimidation." Church Fires in the Southeast: Hearing Before the Subcomm. on the Constitution of the Senate Committee on the Judiciary, 104th Cong., 2d Sess. 16 (1996) (statement of Rep. Earl F. Hillard); Church Burnings, *supra*, at 30 (statement of Sen. Howell Heflin). In light of that history, Congress reasonably concluded that "[t]he racially motivated destruction of a house of worship is a 'badge or incident of slavery.'" H.R. Rep. 621, 104th Cong., 2d Sess. 7 (1996).²

This case does not present an appropriate occasion to consider petitioner's claim (Pet. 13) that the limitations this Court has recognized on the enforcement power granted Congress under the Fourteenth Amendment, see, e.g., City of Boerne v. Flores, 521 U.S. 507 (1997), should be applied to Section 2 of the Thirteenth Amendment. To begin with, contrary to petitioner's claim, the court of appeals did not "reject[]" the application of [City of Boerne] (Pet. 17) to the Thirteenth Amendment. As petitioner concedes, *ibid.*, the court of appeals did not "even cit[e] [City

² Petitioner cites no decision of any other court addressing the constitutionality of 18 U.S.C. 247(c). The other cases cited by petitioner (Pet. 17-18) uphold other statutory provisions under Section 2 of the Thirteenth Amendment. See United States v. Allen, 341 F.3d 870, 883-884 (9th Cir. 2003) (holding that Congress had authority under Thirteenth Amendment to enact 18 U.S.C. 245(b)(2)(B), which prohibits interference with the receipt of state-administered benefits, services, or facilities on the basis of race), cert. denied, 124 S. Ct. 1876 (2004); United States v. Nelson, 277 F.3d 164, 190-191 (2d Cir.) (same), cert. denied, 537 U.S. 835 (2002).

of] Boerne," much less hold that its limitations were inapplicable in the Thirteenth Amendment context.

In any event, petitioner has not demonstrated that Section 247(c) would be invalid under City of Boerne. That decision emphasized Congress's "[b]road * * * power" to enforce the guarantees of the Fourteenth Amendment (521 U.S. at 536) and the "wide latitude" it enjoyed to enact enforcement legislation. Id. at 520. In light of the long history of official suppression of religion among slaves and the use of private violence against places of worship to force a position of inferiority on African-Americans, it cannot be said that Section 247(c) is so "[l]acking" in proportionality with the "injury to be prevented or remedied" that it is properly considered a substantive redefinition of the rights protected by the Thirteenth Amendment. City of Boerne, 521 U.S. at 520. The narrowly targeted legislation--which prohibits damaging or destroying only a specific class of property ("religious real property") when undertaken with a specific and limited purpose ("because of the race, color, or ethnic characteristics" of individuals associated with it)--is entirely reasonable when "judged with reference to the historical experience it reflects." Tennessee v. Lane, 124 S. Ct. 1978, 1988 (2004). Section 247(c) compares favorably with the types of legislation this Court has upheld under City of Boerne analysis. See, e.g., Lane, 124 S. Ct. at 1994 (upholding Title II of the Americans with Disabilities Act as appropriate enforcement of the Due Process Clause's protection against discrimination by providing access to

the courts); Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721, 738 (2003) (upholding the Family and Medical Leave Act as appropriate enforcement of the Equal Protection Clause's protection against gender discrimination in family leave benefits).³

II. Petitioner contends, for the first time in any court, that the presence of Judge Pryor on the panel that decided his appeal created a "'plain defect in the composition of the panel' * * * , which can be corrected only by 'fresh consideration of [the] appeal[] by a properly constituted [appellate] panel.'" Pet. 38 (quoting Nguyen v. United States, 539 U.S. 69, 81, 83 (2003)) (brackets in original). He contends that Judge Pryor's appointment violated both Article III of the Constitution and the Recess Appointments Clause, U.S. Const. Art. II, § 2, Cl. 3. Petitioner claims (Pet. 26-32) that the Recess Appointments Clause permits the President to make appointments only during recesses between sessions of Congress ("inter-session recesses"), and does not permit the making of appointments during recesses within a session of Congress ("intra-session recesses"). Petitioner also claims (Pet. 33-39) that the President may not make recess appointments to Article III courts. The President's power to appoint Article III

³ Nothing in United States v. Kozminski, 487 U.S. 931 (1988), requires a narrower view of congressional authority. That case involved the interpretation of the phrase "involuntary servitude" as used in 42 U.S.C. 241. The Court held that, based on its decisions construing the Thirteenth Amendment, the term included only physical or legal coercion and not psychological coercion. That decision did not, however, address the scope of Congress's enforcement power under Section 2 of the Thirteenth Amendment, nor did it call into question the established principle that Congress's enforcement powers "extend far beyond" the prohibitions of Section 1 of the Amendment. Griffin, 403 U.S. at 105.

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.⁴

A. Review should be denied because the constitutionality of intra-session judicial appointments was not raised or passed upon below. "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." Youakim v. Miller, 425 U.S. 231, 234 (1976) (per curiam). The fact that petitioner states (Pet. 12-13) that he did not learn that Judge Pryor would be on the panel until after his case was decided may explain his failure to raise the claim before the court's decision below. Petitioner could, however, have raised the issue in seeking panel rehearing or rehearing en banc once Judge Pryor's participation came to light.

Review is not warranted for two other reasons. First, the issue has not divided the lower courts. See generally Sup. Ct. R. 10. As petitioner concedes (Pet. 25), 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.

⁴ This issue has been raised in another petition now pending before the Court, see Miller v. United States, No. 04-38, pet. for cert. filed (June 24, 2004), and petitioner acknowledges that his discussion of recess appointments "is substantially identical" to that in the Miller petition. Pet. i n.1.

1962), cert. denied, 371 U.S. 964 (1963), and the en banc Eleventh Circuit recently--and overwhelmingly--upheld the validity of Judge Pryor's intra-session recess appointment. See Evans v. Stephens, No. 02-16424, 2004 WL 2300457 (11th Cir. Oct. 14, 2004).

Second, the issues raised by petitioner 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. App., infra, at 25a. 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 recess appointments is more modest still. Although both petitioner (Pet. 24-25) and amicus (Br. 3 n.4; see also Br. 10-11) claim that Presidents have "increasingly" made intra-session recess appointments in recent years, amicus concedes that virtually all such appointments involved executive-branch officials and that "Judge Pryor's is the first such appointment of a federal judge in the past fifty years." Amicus Br. 3-4 n.4. By comparison, President Truman alone made nine intra-session appointments of Article III judges. Congressional Research Service, Intrasession Recess Appointments 9-16 (Apr. 23, 2004).

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). Petitioner proposes 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). 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 also 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 (1926). 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. App., infra, at 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. 452, 456 n.1 (1899) (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 App., infra, at 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 App., infra, at 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. Id. at 25a-26a. 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 App., infra, at 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 our calculation, the Senate has confirmed at least 271 of the 304 known recess appointments made to Article III courts. See App., infra, at 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. Petitioner contends (Pet. 36) that "there is an inherent inconsistency" between the Recess Appointments Clause and 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. at 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. 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 clearly indicating that it applies to all vacancies and includes judges among the officers eligible to receive recess appointments.

Nor can it be seriously maintained that judicial recess appointments undermine the "central role of life tenure in protecting the independence of the federal judiciary." Amicus Br. 19. 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, petitioner's legal claims were rejected both by a district judge with a lifetime appointment and two circuit judges serving lifetime appointments; had petitioner sought rehearing en banc, he would have been able to present his claims to eleven circuit judges serving lifetime appointments. In addition, petitioner has 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. Petitioner contends that the Recess Appointments Clause applies only to inter-session, not intra-session, recesses. Pet. 26-32. Petitioner offers three arguments in support of that claim. First, he contends, the Recess Appointments Clause "refers to the singular 'Recess' * * * which could only mean the single recess that occurs between sessions of Congress (the 'inter-session recess')." Pet. 27. Second, reading the Clause to apply to intra-session recesses would result in appointments of varying length and would give an individual who is appointed during an intra-session recess more than a single session of Congress in which to be confirmed, which petitioner claims is "irrational." Pet. 29. Third, petitioner contends (Pet. 29-30) that the Constitution draws a consistent distinction between intra-session breaks, which it

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 did not consider the constitutionality of having judges serving under recess appointments hear and decide cases.

terms "adjournments," and inter-session breaks, which it denominates "recess[es]." Those claims are without merit. The language of the Clause, its purpose, and historic practice refute petitioner's proposed distinction.

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; 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."). Indeed, amicus concedes (Br. 14) that the "popular" meaning of "recess" encompasses intra-session breaks. The distinction petitioner proposes 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 Journal of the Senate, July 24, 1789 ("The committees requested a recess, to give opportunity to perfect their reports. Adjourned until 11 o'clock to-morrow.") <[http://memory.loc.gov/cgi-bin/query/D?hlaw:1:./temp/~ammem_bNSK:.](http://memory.loc.gov/cgi-bin/query/D?hlaw:1:./temp/~ammem_bNSK:;)>. While petitioner (Pet. 31 n.5) and amicus are correct (Br. 14 n. 12, 16) that 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

⁶ See letter of James Duane to Robert R. Livingston, Jr., Dec. 20, 1775 ("we shall have a Recess about Christmas") <[http://memory.loc.gov/cgi-bin/query/D?hlaw:3:./temp/~ammem_uOFO:.](http://memory.loc.gov/cgi-bin/query/D?hlaw:3:./temp/~ammem_uOFO:;)>; cf. letter of Benjamin Franklin to the President of Congress, Nov. 1, 1783 (referring to Parliament's "recess for the Christmas holidays") <[http://memory.loc.gov/cgi-bin/query/D?hlaw:5:./temp/~ammem_uOFO:.](http://memory.loc.gov/cgi-bin/query/D?hlaw:5:./temp/~ammem_uOFO:;)>.

used the terms "recess" and "adjournment" interchangeably. See, e.g., 24 Annals of Cong. 1279, 1314-1316, 1334-1342, 1347-1353 (1812).⁷ 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 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. Petitioner errs in contending (Pet. 27) that the use in the Recess Appointments Clause of the definite article "the" and

⁷ Contrary to the claims of petitioner (Pet. 31 n.5) and amicus (Br. 12 n.14) that early Congresses typically used "adjournment" only to refer to intra-session breaks, it routinely used the term to describe inter-session recesses. See, e.g., Journal of the House of Representatives, Sept. 29, 1789 (noting that the Speaker had "adjourned the House until" the next session of Congress); Senate Journal, Sept. 29, 1789 (the Vice President "did adjourn the Senate" until the next session); Journal of the House of Representatives, Aug. 12, 1790 (the Speaker "adjourned the House until" the next session).

the singular form "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.⁸ Similarly, other provisions of the Constitution

⁸ 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

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."⁹

3. Petitioner contends (Pet. 30; see also Amicus Br. 15) that the Constitution uses the term "adjourn" to refer to breaks within a session of Congress, citing Article I, Section 5, Clause 4 (quoted above). That argument is without merit. "Adjourn" and "Recess" cannot be neatly cabined, with the former applying to intra-session breaks and the latter to inter-session breaks. "Adjourn" (like "Recess") encompasses both inter-session and intra-session breaks. In construing the Pocket Veto Clause of the Constitution, which applies when "Congress by their Adjournment prevent" the President from returning a bill (U.S. Const. Art. I,

Archives 655, 673 (M. St. Clair Clarke & Peter Force eds., 1844) (1776); Ch. 716, 8 Pa. Stat. 456 (1770-1776).

⁹ The early statutes cited by amicus (Br. 16) confirm that understanding. For example, Congress provided that employees of Congress would be paid a specified amount both "during the session" and "during the sessions" of Congress, Act of Sept. 22, 1789, Ch. 17, §§ 4,5, 1 Stat. 71 (emphasis added), indicating that the term simply meant when Congress was "in session."

§ 7, Cl. 2), this Court made clear that an "Adjournment" includes both "the final adjournment of the Congress" at the end of a session and other "interim adjournment[s]" during sessions. The Pocket Veto Case, 279 U.S. 655, 680 (1929). "Adjournment" must include inter-session recesses, because it is undisputed that the Pocket Veto Clause applies at least to such breaks. This Court has used the terms interchangeably in the context of the clause petitioner cites. See Wright v. United States, 302 U.S. 583, 589 (1938) (describing the one-House, three-day, intra-session adjournment permitted by Art. I, § 5, Cl. 4 as a "recess"). The same understanding is reflected in Jefferson's parliamentary manual, which explained that Congress may separate in "two ways only": either through "dissolution by the efflux of their time" or through "adjournment." Jefferson Manual, *supra*, § LI. Jefferson described this latter type of break as "recess by adjournment." Ibid.

4. Petitioner asserts that it would "make[] no sense" for recess appointments to last almost two years, from near the beginning of one session until "the End of th[e] next Session" (U.S. Const. Art. II, § 2, Cl.3), which, he claims, demonstrates that the Framers must have intended the Clause to apply only to inter-session recesses. Pet. 28-29. Neither the potential length of the term nor its variability renders application of the Clause to intra-session recesses "irrational." Pet. 29. The variability stems from the fact that the Framers chose a single term that would apply well in various circumstances. And there is nothing unique

about the variable length of intra-session recess appointments. Recess appointments made during either intra-session and inter-session recesses will vary in length depending on the number and duration of sessions Congress determines to hold.

5. 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. at 689. For as long as Congress 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 recess appointments during that recess, including the appointment to the district court of Samuel Blatchford (who later served on this Court for 11 years). See Congressional Research Service, Intrasession Recess Appointments 5 (Apr. 23, 2004). 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.¹⁰ See 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, supra, at 3. Although historical records are incomplete, at least 12 Presidents have made at least 285 intra-session recess appointments since 1867, including 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). And contrary to the claims of amicus (Br. 10-11), the length of the recess during which Judge Pryor was appointed was not unduly brief by historical standards. Many Presidents have made intra-session recess appointments during

¹⁰ 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.

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, supra, at 3-4; cf. Recess Appointments to Article III Courts, supra, at 671 (noting that Presidents Lyndon Johnson and Taft made recess appointments of judges during seven- and eight-day recesses).

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. 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. 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 23-24.¹¹

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

¹¹ Petitioner (Pet. 12) and amicus (Br. 4, 8, 11) err in claiming support from Attorney General Daugherty's analysis of the minimum break that could constitute a recess for constitutional purposes. The Attorney General first concluded that a 28-day intra-session break clearly did constitute a recess for purposes of the Recess Appointments Clause. See 33 Op. Att'y Gen. at 20-24. Then, citing Article I, Section 5, Clause 4, he stated "unhesitatingly" that a break "for only 2 instead of 28 days" did not constitute such a recess. 33 Op. Att'y Gen. at 24. Finally, he stated more equivocally, "[n]or do I think an adjournment of 5 or even 10 days can be said to constitute the recess intended by the Constitution." Id. at 25. The opinion went on to suggest, however, that courts cannot enforce any minimum duration requirement other than the one specifically set forth in Article I, Section 5, Clause 4. It stressed that "the line of demarcation can not be accurately drawn," that the President must have "large, though not unlimited" discretion in making appointments, and that "[e]very presumption is to be indulged in favor of the validity of whatever action he may take." Ibid. In any event, using traditional measures, Judge Pryor's appointment came during an 11-day recess (February 12-23, 2004), rather than a ten-day recess, as petitioner claims (Pet. 12). See, e.g., 13 Op. Off. Legal Counsel at 271 (setting forth method of measuring recesses); 16 Op. Off. Legal Counsel at 16 (same); 33 Op. Att'y Gen. at 21, 24 (same).

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. Contrary to petitioner's assertion (Pet. 31) that the permissibility of intra-session recesses has "been the subject of debate for over one hundred years within the Executive Branch itself, without satisfactory resolution," Attorney General Daugherty's conclusion has been repeatedly reaffirmed in at least six formal opinions. See p. 30, supra.¹²

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

¹² The claim of amicus that "for the first 132 years of * * * interpretation by the Executive, the Recess Appointments Clause was not treated as though it authorized intra-session appointments" (Br. 8; see generally Br. 5-12) is unfounded. Presidents did not make recess appointments during intra-session recesses during the early years of the Republic only because Congress took such recesses rarely, if at all. See Congressional Directory 512-517. Amicus's argument that Attorney General Daugherty's opinion was "at odds with the Executive practice and understanding over the preceding 132 years" (Br. 8) overlooks that fact, and ignores at least 14 intra-session recess appointments made by President Johnson. When Congress began taking frequent intra-session recesses, there was a corresponding increase in intra-session recess appointments, without objection from Congress. That "few [intra-session] appointments [were made] in the decades after 1921" is a function of the fact that Congress rarely took intra-session recesses (other than during the winter holidays) between 1921 and 1943. See Congressional Directory 517-518. When Congress took intra-session recesses in 1943 and 1944, President Roosevelt made recess appointments. See Intrasession Recess Appointments 8.

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. 18, 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 have uniformly upheld the practice. See 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.").

6. There is no merit to the suggestion that the Clause was intended narrowly to prevent a crisis in vacancies, and that intra-session recesses would not implicate the purposes of the Clause. That was not the Framers' understanding. As Hamilton explained, the Clause empowers the President to address vacancies "which it might be necessary for the public service to fill without delay." The Federalist No. 67, supra, at 410; see also 3 Commentaries on the Constitution, supra, § 804, at 574 (stating that Clause was

intended to achieve "convenience, promptitude of action, and general security"). Nothing in those formulations suggests restricting the power to emergency situations. See Staebler v. Carter, 464 F. Supp. 585, 597 (D.D.C. 1979) ("there is nothing to suggest that the Recess Appointment Clause was designed * * * to be used only in cases of extreme necessity"). Inter-session and intra-session recesses equally implicate the concerns and purpose of the Clause. In neither type of recess is the Senate sitting as a body able to provide its advice and consent.

Nor is there any 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. 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"). 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, supra, at 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 be "irrational" (Pet. 29) and 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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