IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-16424
Denis STEPHENS,
Defendant-Appellant,

v.

Peter EVANS and Detree JORDAN,
Plaintiffs-Appellees.

REPLY BRIEF OF PLAINTIFFS-APPELLEES AND *AMICUS CURIAE,* UNITED STATES SENATOR EDWARD M. KENNEDY, PRO SE, IN SUPPORT OF PLAINTIFFS-APPELLEES' MOTION TO DISQUALIFY MEMBER OF THE COURT ON THE GROUND THAT HIS RECESS APPOINTMENT IS INVALID

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INTRODUCTION

The Recess Appointments Clause, U.S. Const. art. I, § 2, cl. 3, authorizes the President "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." Plaintiffs and amicus Senator Kennedy contend that "the Recess" refers to the legislative break that the Senate takes *between* its "Session[s]." By contrast, the Department of Justice ("DOJ"), on behalf of the United States, now asserts that "the Recess" means any "recess" in the colloquial sense – i.e., *any* remission or suspension of Senate business or procedure, DOJ Br. 7, such that the President may make a "recess" appointment whenever the Senate takes *any* intra-session break – e.g., each evening, or for the weekend.

DOJ claims that history supports its position: It argues that the President's recess appointment of Judge Pryor, just one business day before the Senate reconvened after a ten-day, intra-session holiday adjournment, "fits comfortably within [a] settled constitutional tradition" under the Recess Appointments Clause, DOJ Br. 31 – a tradition that, according to DOJ, is "measured not in decades, but centuries," *id.* at 9. Nothing could be further from the truth. In fact, both Judge Pryor's appointment and the Department's novel legal interpretation break with over 200 years of Executive Branch practice under, and DOJ interpretations of, the Recess Appointments Clause. Under *either* of the two competing historical

understandings of the phrase "the Recess" – (i) the bright-line rule that "the Recess" refers solely to *inter-session* recesses, which was the accepted understanding for the first 132 years under the Constitution, or (ii) the "practical" test, developed in 1921 by Attorney General Daugherty, that informed Presidential practice for the next 72 years – Judge Pryor's appointment is unconstitutional.

History is not the only obstacle to DOJ's novel interpretation. Its reading also cannot be reconciled with the constitutional language or structure, or with the manifest and acknowledged purposes of the Recess Appointments Clause. Indeed, DOJ's position would permit the President to circumvent the Senate's constitutionally assigned function of advice and consent, and would thereby vitiate the Framers' determination to "divid[e] the power to appoint the principal federal officers . . . between the Executive and Legislative branches." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 883, 111 S. Ct. 2631, 2641 (1991).

ARGUMENT

I. Judge Pryor's Appointment and DOJ's Novel Construction of "the Recess" Are Inconsistent with Executive Branch Practice and Legal Interpretations During the Constitution's First 204 Years.

DOJ's argument relies almost entirely on a highly stylized historical account. In truth, under *either* of the two DOJ interpretations of the Recess Appointments Clause that governed Executive practice *for the first 204 years of*

the lifespan of the Constitution, that appointment is invalid – and DOJ does not seriously argue to the contrary.

1789-1921 – A Bright-Line Rule Prohibiting Intra-Session Recess Appointments

DOJ contends that "[f]or as long as Congress has scheduled frequent intra-session recesses, Presidents have made intra-session recess appointments." DOJ Br. 10. The facts, however, tell quite a different story. From the 1789 ratification of the Constitution until 1921, the President frequently made recess appointments *between* Sessions of Congress. The practice was dramatically different, however, during the Senate's *intra-session* breaks – which literally numbered in the thousands – over the course of those first 132 years. Because each of these intra-session breaks involved a suspension of Senate business, each was, on DOJ's view here, a "Recess" for purposes of the Recess Appointments Clause. Most of those adjournments were for periods of fewer than three days, including almost every evening and weekend, but on sixty occasions the Senate also adjourned for more than three days. U.S. Gov't Printing Office, *2003-2004 Official Congressional Directory: 108th Cong.* 512-17 (2004) [hereinafter *Congressional Directory*]. However, with only one anomalous exception, Presidents *never* made recess

appointments during these breaks.[1] Moreover, in the nineteenth century Attorneys General issued "many elaborate opinions" discussing "the right of the President to make recess appointments," without once being confronted with any question of an actual or proposed intra-session appointment, 23 Op. Att'y Gen. 599, 602 (1901); indeed, those opinions typically understood "the Recess" to be a period that was *outside* the "Session" of the Senate.[2]

It was not until a 1901 opinion of Attorney General Philander Knox – more than a century after ratification of the Constitution – that the Executive Branch specifically considered the question of intra-session recess appointments. The Attorney General answered the question unequivocally: "The conclusion is *irresistible* to me," he wrote, "that the President is *not* authorized to appoint an

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[1] President Johnson made a series of appointments during a two-and-a-half-month adjournment of the Senate in 1867. Henry B. Hogue, Cong. Res. Serv., *Intrasession Recess Appointments* 5 (Apr. 23, 2004) [hereinafter 4/23/04 CRS Report]. President Johnson also appointed an Army paymaster in October of that year, during a four-month Senate adjournment. *See Gould v. United States*, 19 Ct. Cl. 593 (1884). There is no indication that the Executive Branch seriously considered the constitutionality of these appointments when they were made. When the Attorney General *did* first consider them, in retrospect, he concluded that "[t]he public circumstances surrounding this state of affairs were unusual and involved results which should not be viewed as precedents," and that the appointments were contrary to "the uniform practice of the Executive and the various opinions of my predecessors." 23 Op. Att'y Gen. 599, 603 (1901).

[2] *See, e.g.*, 12 Op. Att'y Gen. 32, 38-39 (1866) ("[T]he public exigency which requires the officer may be as cogent, and more cogent, during the recess than during the session. . . . [W]here the vacancy exists in the recess, whether it first occurred in the recess or in the preceding session, the power to fill is in the President alone.").

appraiser at the port of New York during the current [intra-session] adjournment of the Senate." *Id.* at 604 (emphasis added). Knox emphasized the distinction, found in the Constitution itself and "in ordinary language," between "the Recess" and a legislative "adjournment":

> This distinction is familiar in ordinary language, and the Constitution and laws make it clear that in our legislative practice an adjournment during a session of Congress means a merely temporary suspension of business from day to day, or, when exceeding three days, for such brief periods over holidays as are well recognized and established and as are agreed upon by the joint action of the two Houses; whereas the recess means the period after the final adjournment of Congress for the session, and before the next session begins. Congress "adjourns" in either case, but in the one temporarily, so as merely to suspend an existing session for a short time; and in the other, finally, so as to terminate the existing session. It is this period following the final adjournment for the session which is the recess during which the President has power to fill vacancies by granting commissions which shall expire at the end of the next session. Any intermediate temporary adjournment is not such recess, although it may be a recess in the general and ordinary use of that term.

Id. at 601. Moreover, Knox noted, his conclusion was consistent with the virtually "uniform practice," *id.* at 603, of the Executive Branch before 1901. That uniform practice continued for a further twenty years following Knox's opinion.[3] Thus, during the entire first 132 years of operation of the Recess Appointments Clause, there was *no* contrary legal interpretation. This truly was a "settled" constitutional tradition (one that, in our view, adopted the *proper* construction of the phrase "the

[3] *See, e.g.*, 29 Op. Att'y Gen. 598, 602 n.1 (1912) ("The usual holiday recess is not an adjournment ending a session within Const., Art. II, sec. 2, par. 3.").

Recess"); if this tradition is followed, Judge Pryor's intra-session appointment is invalid.

1921-1993 – Attorney General Daugherty's "Practical" Test

In 1921, Attorney General Harry Daugherty took issue with Attorney General Knox's 1901 Opinion and adopted a novel interpretation of the Recess Appointments Clause that was inconsistent with the Executive practice and understanding over the preceding 132 years – albeit an interpretation that DOJ does not defend here because, under it, Judge Pryor's appointment is *also* unconstitutional. 33 Op. Att'y Gen. 20 (1921). Daugherty, unlike his predecessor, did not rely upon the plain language, structure, or history of Article II. In the case of a proposed intra-session appointment, the "real question," in Daugherty's view, was "whether *in a practical sense* the Senate is in session *so that its advice and consent can be obtained*." *Id.* at 21-22 (emphasis added). He concluded that an intra-session adjournment could be deemed a "recess" for purposes of the Recess Appointments Clause only when the Senate is "absent so that it can not receive communications from the President or participate as a body in making appointments." *Id.* at 25. However, Daugherty strongly and "unhesitatingly," *id.* at 24, rejected the argument – pressed by DOJ in this case – that the President may make a recess appointment whenever Senate business ceases. "[L]ooking at the matter from a practical standpoint," he reasoned that "*no one* . . . would for a

moment contend that the Senate is not in session when an adjournment [of two or three days] is taken." *Id.* at 25 (emphasis added). He added that even an adjournment "for 5 or even 10 days" could not meet the appropriate, "practical" test. *Id.*

Subsequent DOJ opinions uncritically followed the 1921 Daugherty Opinion. Kennedy Opening Br. 15. Accordingly, Daugherty's "practical" construction of the Recess Appointments Clause – more expansive but still imposing some measure of constraint – governed Executive Branch practice for at least 72 years. Under that test, the President may make intra-session recess appointments only when it is as a "practical" matter "impossible," 33 Op. Att'y Gen. at 25, for him to obtain the Senate's advice and consent because the Senate cannot receive presidential communications and "participate" in its constitutionally assigned functions.[4] Presidents acting in accord with the Daugherty test in the following years understandably made few such appointments, and those that they did make presumably comported with Daugherty's "practical" standard. President Harding made one intra-session appointment immediately after the Daugherty Opinion; President Coolidge also made one; and President Roosevelt made six during long intra-session Senate adjournments during the Second World War. 4/23/04 CRS Report, *supra*, at 7-8. None of these appointments was to an Article

[4] *See, e.g.*, 41 Op. Att'y Gen. 463, 467 (1966); 16 Op. Off. Legal Counsel 15, 15-16 (1992); 20 Op. Off. Legal Counsel 124, 161 & n.102 (1996).

III judgeship. Between 1947 and 1960, Presidents Truman and Eisenhower made greater use of the practice, during intra-session Senate adjournments lasting from five to twenty-one weeks. *Id.* at 9-20.

Only in the 1970s did intra-session recess appointments become a recurrent, rather than a sporadic and extraordinary, practice. *Id.* at 21-32. Even then, DOJ "generally advised that the President not make recess appointments, if possible, when the break in continuity of the Senate is very brief." 6 Op. Off. Legal Counsel 134, 149 (1982).[5]

In our view Attorney General Daugherty was mistaken: The text, structure, purpose, function, and pre-1921 history of the Recess Appointments Clause all confirm Attorney General Knox's "irresistible" conclusion that the President may not make recess appointments during intra-session Senate breaks. Moreover, Knox's Opinion is entitled to unusual respect because it is a rare example of an Attorney General opinion that *constrains* the prerogatives of his superior, the President. *Cf.* FED. R. EVID. 804, Advisory Committee's Notes ("The circumstantial guaranty of reliability for declarations against interest is the

[5] So, for example, the Office of Legal Counsel, "in light of" Daugherty's Opinion, advised President Nixon against recess appointments during the Senate's week-long winter holiday recess in 1970, *see* 3 Op. Off. Legal Counsel 314, 315-16 (1979), and "cautioned" President Reagan against an appointment during an 18-day recess in 1985, *see* 13 Op. Off. Legal Counsel 271, 273 n.2 (1989). *But cf.* 16 Op. Off. Legal Counsel 15, 15-16 & n.1 (1992) (reasoning that an 18-day recess is a sufficient period when, except for a brief formal session on a single day, the Senate would actually be absent for 54 days).

assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true.").

But in all events, Judge Pryor's appointment would be unconstitutional *regardless* of whether Knox or Daugherty had the better of the argument, because it flunks both tests.[6] Even assuming arguendo that Senate adjournments of "substantial" length – such as a month-long summer or election-related adjournment – would satisfy the Daugherty test,[7] surely Daugherty was correct that a ten-day adjournment does not suffice. It would be folly to suggest that such a recess is "protracted enough to prevent [the Senate] from performing its functions

[6] DOJ suggests that the Court should defer to the Attorney General and OLC Opinions on the topic of intra-session recess appointments. DOJ Br. 11-13. Such deference would not help DOJ here, both because such opinions have "a checkered background," 3 Op. Off. Legal Counsel 314, 315 (1979), and because the Pryor appointment would be unconstitutional under the rationale of any of those opinions. In any event, the plea for deference is inapt. If courts deferred to DOJ's views on disputes concerning separation of powers, the Executive Branch would always prevail, because it is the longstanding practice of the Department, when the Executive and Legislative branches are at odds, to protect presidential prerogatives where reasonable arguments can be made on their behalf. *See, e.g.*, Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1084 (2001).

[7] *See, e.g.*, 3 Op. Off. Legal Counsel 311, 313 (1979); 3 Op. Off. Legal Counsel 314, 316 (1979); 6 Op. Off. Legal Counsel 585, 586 (1982); 13 Op. Off. Legal Counsel 271, 271-73 (1989). As we explain *infra* at pp. 19-20, in the modern Senate, even prolonged intra-session recesses would not have the disabling "practical" effect that Attorney General Daugherty feared, because the Senate can receive presidential nominations (or intentions to nominate) during adjournments, and Senate committees can and do commence or continue the advice-and-consent process during such adjournments.

of advising and consenting to executive nominations." 41 Op. Att'y Gen. 463, 466 (1966); *see also id.* at 469.

Moreover, the relevant time period for purposes of Daugherty's "practical test" should not be the length of the Senate's adjournment as such, but the length of time between the proposed appointment and the Senate's resumption of business.[8] In the case of the Pryor appointment, the President acted on *the final business day* before resumption of Senate business. Surely, the difference between Friday, February 20, 2004, and Monday, February 23, 2004, had no impact whatsoever on the Senate's ability to perform its constitutional function – nor on the ability of this Court to adjudicate cases over that same weekend.

Indeed, the notion that the February adjournment somehow hamstrung the Senate's advice-and-consent functions (or the functions of this Court) is even more untenable than that. The Pryor nomination had reached the Senate ten months earlier, was the subject of Judiciary Committee inquiries, hearings, and action, was debated on the Senate floor twice, and had twice failed to obtain enough votes to go forward under Senate rules. The President could at any time have designated

[8] Thus, it is odd that DOJ quibbles about whether the adjournment in question here was for ten days or for eleven. DOJ Br. 29 n.4. The Daugherty test is a "practical" one; it does not depend on some magic cut-off number. For what it is worth, the President's Day adjournment at issue here lasted ten days, fifteen hours, and eleven minutes, *see* 150 CONG. REC. S1415 (daily ed. Feb. 12, 2004) (statement of Sen. Frist); *id.* at S1417 (Feb. 23, 2004), encompassing five business days, and the Congressional Research Service considers it a ten-day break, *see* 4/23/04 CRS Report, *supra*, at 32.

another nominee who was more likely to be expeditiously confirmed. What prompted this recess appointment was not any concern that the Senate could not "participate" in the nomination during the pertinent weekend last February, but rather the President's design to bypass the Senate's constitutional role. Therefore, DOJ notably does not even attempt to defend that nomination under Attorney General Daugherty's "practical" test, which governed Executive practice for at least seventy-one of the past eighty-three years.[9]

1993-2004 – A Cessation-of-Senate-Business Test?

In a district court brief filed in 1993, DOJ first broke with the 204-year-long traditions reflected in the Knox and Daugherty Opinions, and argued instead for an unlimited rule allowing recess appointments during *any* remission or suspension of Senate business, no matter how short. *See* Defendants' Motion for Summary Judgment on Count II of the Amended Complaint at 14, *Mackie v. Clinton*, 827 F.

[9] DOJ argues that under Daugherty's Opinion the President "must have 'large, although not unlimited' discretion in making appointments," DOJ Br. 30, and hints that such discretion is not subject to judicial review. What Daugherty wrote, however, was that "the President is necessarily vested with a large, although not unlimited, discretion *to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate*," and specifically warned that "there is a point, necessarily hard of definition, where palpable abuse of discretion *might subject his appointment to review*." 33 Op. Att'y Gen. 20, 25 (1921) (emphasis added). Here, DOJ does not even attempt to argue – nor could it – that the February adjournment made it impossible for the President to receive the advice and consent of the Senate. If Judge Pryor's appointment is not a "palpable abuse of discretion" with respect to the terms of the Daugherty test, it is hard to imagine what would be.

Supp. 56 (D.D.C. 1993) (No. 93-0032) [hereinafter DOJ *Mackie* Br.] ("[T]he Recess Appointments Clause does not require that the Recess of the Senate last for any minimum length of time."); *id.* at 16 ("The length of a recess is not a ground upon which the Court may distinguish between and among recesses."). DOJ reasserts that argument here.

Notably, however, it appears that DOJ maintains that position only as a matter of litigation strategy. The Office of Legal Counsel has recently reaffirmed Daugherty's "practical construction" test, 20 Op. Off. Legal Counsel at 161, and has lauded an OLC Opinion applying the Daugherty test as "an exemplary model of the approach this Office should take in interpreting the Constitution," *id*. at 128 n.12 (referring to 3 Op. Off. Legal Counsel 314 (1979)).

* * * *

In sum, history does not support DOJ's position here. Intra-session appointments were practically unheard-of in the first 132 years of practice under the Constitution, despite thousands of intra-session Senate breaks, including more than sixty of longer than three days. The one time the President ignored that tradition, the Attorney General repudiated that aberration as unlawful and nonprecedential (and explained it as having been produced by an "unusual" state of affairs), 23 Op. Att'y Gen. at 603; and the only Executive Branch legal analysis of the question concluded unambiguously that intra-session recess appointments were

unconstitutional, *id.* Although the 1921 Daugherty Opinion permitted intra-session appointments in limited circumstances, there were very few such appointments before 1947. Appointments since that time have been governed by the Daugherty "practical" test, application of which "has proven a difficult task." 20 Op. Off. Legal Counsel at 161. Neither the 1789-1921 rule barring intra-session recess appointments nor the post-1921 "impossibility" analysis of the Daugherty rule provides the sort of historical pedigree that would validate Judge Pryor's appointment. Indeed, the recent but increasingly common practice of intra-session recess appointments during ever-shorter Senate adjournments – of which the Pryor appointment is thus far the most extreme example, being the very rare instance in which such an appointment has been made to a federal judgeship – demands that judicial inquiry be "sharpened rather than blunted." *INS v. Chadha*, 462 U.S. 919, 944, 103 S. Ct. 2764, 2781 (1983); *see also Kennedy v. Sampson*, 511 F.2d 430, 441-42 (D.C. Cir. 1974) ("relatively modern phenomenon" of intra-session pocket vetoes, which had "gained new significance in recent years," does not justify court deference to purportedly "consistent executive practice").

II. Each Relevant Source of Construction Supports the Conclusion That Judge Pryor's Appointment Violates the Constitution.

In addition to history, constitutional text and structure, the Framers' understanding, and the purpose and practical functioning of the Recess Appointments Clause all demonstrate that the Clause's reference to "*the Recess*" of

the Senate refers to inter-session Senate breaks, *not* to any and every suspension of Senate business.

A. Constitutional Text and Structure

Apart from its unpersuasive historical argument, DOJ provides scant *affirmative* support for its dubious reading of "the Recess." Other than three stray references to the term "recess" in the British Parliament (none more recent than 1705), DOJ relies entirely on two dictionary definitions of the word "recess." DOJ Br. 7.

The two definitions DOJ cites (from 1755 and 1828) hardly justify its reading of the Recess Appointments Clause. Indeed, the dictionary evidence at the time of the Framing is far more equivocal than DOJ suggests; if anything, it tends to call into question DOJ's interpretation.[10] And the Congress at the time of the

[10] It is true that Samuel Johnson's dictionary defined "recess" to mean, inter alia, "[d]eparture into privacy," and "[r]emission or suspension of any procedure." But those were the fifth and sixth definitions Johnson used in his 1785 dictionary, published just before the Constitutional Convention. The *first* definition Johnson offered was "[r]etirement; retreat; withdrawing; secession." SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE 249 (7th ed. 1785). By contrast, Johnson defined the word "adjournment" as "[a]n assignment of a day, or a putting off till another day." *Id.* at 5. This suggests that "adjournment" was the preferred term for a brief and intermittent interruption, while "recess" connoted something more permanent, or pronounced, such as a retirement or secession. Other oft-cited dictionaries of the era draw a similar contrast. *See, e.g.*, THOMAS SHERIDAN, COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1796) (defining "adjournment" as "[a] putting off to some other day" and "recess" as "[r]etirement; retreat"); NATHAN BAILEY, UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (26th ed. 1789) (defining "adjournment" in Common Law as "the putting off of

Framing did not use even the stand-alone word "recess" to refer to intra-session breaks. *See infra* pp. 14-16 and note 18. But the textual difficulty with DOJ's proposal is much more fundamental than that.[11]

We do not dispute that, at the Framing as now, the word "recess" *can*, in certain circumstances, take the colloquial or popular meaning of a simple cessation of procedure of business. But the Recess Appointments Clause does not refer to "a recess"; nor did the Framers opt for the plural form "recesses" – even though they

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any Court or Meeting, and appointing it to be kept again at another Time or Place," and "recess" as "a retreating or withdrawing, a Place of Retreat or Retirement"); NOAH WEBSTER, COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE (1806) ("Adjournment: a putting off for a time, a delay."; "Recess: a retirement, retreat, secret place.").

[11] Moreover, the Recess Appointments Clause applies only to "Vacancies that may *happen during* the Recess of the Senate." Although the vacancy on this Court that Judge Pryor filled obviously did not in any meaningful sense "happen during" the Senate recess in February 2003, the Executive Branch has, since 1823, adopted the view that the word "happen" must be construed to mean "exist." *See* 1 Op. Att'y Gen. 631, 632-33 (1823). Although supporters of this argument "must, in candor, admit that their construction is not conformable to either the literal or the ordinary import of the words 'may happen,'" *Case of Dist. Attorney of United States*, 7 F. Cas. 731, 735 (E.D. Pa. 1868) (No. 3924), it is sometimes said – as DOJ asserts here, *see* DOJ Br. 5-6 n.1 – that courts have "unanimously" rejected the plain meaning of the verb "happen." But that is decidedly not the case, as demonstrated by Judge Cadwalader's comprehensive and learned opinion to the contrary in *Case of the District Attorney*, *id.* at 734-44; *accord Schenck v. Peay*, 21 F. Cas. 672, 674-75 (C.C.E.D. Ark. 1869) (No. 12,451); *see also In re Yancey*, 28 F. 445, 447, 450 (C.C.W.D. Tenn. 1886) (dicta of district judge and circuit judge); William Ty Mayton, *Recess Appointments and an Independent Judiciary*, 21 CONST. COMM. (forthcoming 2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=542902. If this Court concludes that "happen" does, indeed, mean "happen," then it must also conclude that Judge Pryor's appointment was unauthorized.

did use the plural form "vacancies" in the same clause. Instead, the Framers employed the singular phrase "the Recess," and they did so in conjunction with the command that the appointee's commission "shall expire at the End of their [the Senate's] next Session." As Senator Kennedy has previously explained, Kennedy Br. 7-9, such textual clues demonstrate that "the Recess" in question is one that separates two sessions of Congress (including, of course, the recess that separates the last Session of one Congress from the first Session of the next).

DOJ attempts to rebut this argument by stressing that there is more than one Session *per Congress* (at least one per year, as required by Article I, Section 4, Clause 2), and sometimes even more than one Session *per year* – so that there can be more than one *inter-session* recess in any given time period. DOJ Br. 17-19. This response simply misses the point. The text does not suggest that there is one "Recess" per year, or per Congress. Instead, it indicates that there is only one recess – "the Recess" – *per Session of Congress*. And that is the frame of reference that matters, because the phrase "the Recess" is juxtaposed in the Recess Appointments Clause with the phrase "the End of their [the Senate's] next Session." As Hamilton explained, in the Framers' only known discussion of the Clause, "[t]he time within which the power is to operate, 'during the recess of the Senate,' and the duration of the appointments, 'to the end of the next session' of

that body, *conspire to elucidate the sense of the provision*." *The Federalist* No. 67, at 408 (A. Hamilton) (Clinton Rossiter ed., 2003) (emphasis added).

Equally important, the Constitution repeatedly uses a different and more inclusive term – "adjourn," or "Adjournment" – to refer to those parliamentary breaks that could occur either after *or during* a Session of Congress. Article I, Section 5, Clause 1 provides that less than a majority of each House "may adjourn from day to day." The Pocket Veto Clause, U.S. Const. art. I, § 7, cl. 2, provides that a bill not signed by the President shall not become law if "the Congress by their Adjournment prevent its Return."[12] Most tellingly, Article I, Section 5, Clause 4 specifically provides that "*during the Session of Congress*" neither House may "adjourn for more than three days" without the "Consent of the other" (emphasis added). By contrast, "the Recess" appears only once in the Constitution in relation to congressional breaks: in the Recess Appointments Clause, where it

[12] The Supreme Court held in *The Pocket Veto Case* that the word "Adjournment" in this clause is not limited to the final adjournment at the end of a Congress, but instead can include daily adjournments, or adjournments of three or fewer days. 279 U.S. 655, 680, 49 S. Ct. 463, 466 (1929). Amicus Washington Legal Foundation asserts that the court of appeals in *Kennedy v. Sampson* held that the word "Adjournment" in the Pocket Veto Clause refers only to the period between sessions of Congress, and not to intra-session breaks. WLF Br. 21. That is simply wrong. The court in *Sampson* held merely that an intra-session adjournment does not "prevent the return of a bill by the President," and thus a bill does not become law under the Pocket Veto Clause, "where appropriate arrangements have been made for receipt of presidential messages during the adjournment." 511 F.2d at 442.

refers to a particular *sort* of "adjournment" – the break between Sessions of the Senate.[13]

DOJ responds by pointing out that the word "Adjournment" in the Pocket Veto Clause "plainly encompasses *both* inter-session and intra-session legislative breaks." DOJ Br. 20. And so it does. But that recognition is non-responsive to our textual argument. The pertinent point is that in all three instances where it appears in the Constitution, the term "adjourn" or "Adjournment" manifestly denotes *intra-session* cessations of business, even where it may also encompass inter-session breaks.[14] Thus, whenever the Framers wished to describe a legislative break that could occur *either during or between* Sessions of Congress, they used a consistent term, distinct from the term "the Recess." As Attorney General Knox explained, 23 Op. Att'y Gen. at 601, the Constitution's disparate use of the distinct terms "the Recess" and "adjournment" reveals that the former describes a more specific *subset* of the latter: "Congress 'adjourns' in either case, but in the one temporarily, so as merely to suspend an existing session for a short time; and in the other, finally, so as to terminate the existing session. It is this

[13] Article I, Section 3, Clause 2 similarly refers to "the Recess" of *state* legislatures – "if [U.S. Senate] Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies." The Seventeenth Amendment superseded this provision.

[14] Indeed, the bicameral consent requirement of Article I, Section 5, Clause 4 by its terms refers to *only* to specified *intra-session* adjournments.

period following the final adjournment for the session which is the recess during which the President has power to fill vacancies by granting commissions which shall expire at the end of the next session. Any intermediate temporary adjournment is not such recess, although it may be a recess in the general and ordinary use of that term."

B. The Framers' Understanding

The Framers' only known discussion of the Recess Appointments Clause confirms their understanding that the term "the Recess," when used in relation to a reference to a "Session" of Congress, signifies the break *between* such Sessions. In *Federalist* No. 67, Hamilton explained that the recess appointment power was designed "to be nothing more than a supplement to" the Appointments Clause, art. II, § 2, cl. 2, for use where "it might be necessary for the public service" to fill without delay certain vacancies that "might happen in their [the Senate's] recess." The Recess Appointments Clause was added, explained Hamilton, because "[t]he ordinary power of appointment is confined to the President and Senate *jointly*, and can therefore only be exercised *during the session of the Senate.*" *The Federalist* No. 67, at 408 (A. Hamilton) (Clinton Rossiter ed., 2003) (latter emphasis added).

The clear implication, of course, is that recess appointments would be "necessary," and thus permissible, only *outside* the "session of the Senate."[15]

The practice of the First Congress – containing twenty members who had been delegates to the Philadelphia Convention, *see Bowsher v. Synar*, 478 U.S. 714, 724 n.3, 106 S. Ct. 3181, 3186 n.3 (1986) – further confirms this understanding. For example, the Act of March 3, 1791, ch. 15, 1 Stat. 199, authorizing appointment of duties inspectors, provided "[t]hat if the appointment of the inspectors of surveys, or any part of them, shall not be made *during the present session of Congress*, the President may, and he is hereby empowered to make such appointments *during the recess of the Senate*, by granting commissions which shall expire at the end of their next session." *Id.* sec. 4, 1 Stat. at 200 (emphasis added). Similarly, in the Act of Sept. 22, 1789, Congress authorized payment to the Senate's engrossing clerk of "two dollars per day *during the session*, with the like compensation to such clerk while he shall be necessarily employed *in the recess*."

[15] DOJ asserts (DOJ Br. 24) that Jefferson, in his Manual of Parliamentary Procedure, "himself explained that an intra-session adjournment *or recess* 'is no more than a continuance of the session from one day to another, or for a fortnight, a month, &c ad libitum.'" (emphasis added). In his Manual, Jefferson was not discussing the Recess Appointments Clause, let alone the meaning of the constitutional term "the Recess." (Indeed, in that particular passage of the Manual, Jefferson was referring to the British Parliament, not to Congress. *See McGrain v. Daugherty*, 273 U.S. 135, 181 (1927).) And, contrary to DOJ's representation, Jefferson referred only to "adjournment," not to "an intra-session adjournment *or recess*." THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE: FOR THE USE OF THE SENATE OF THE UNITED STATES, sec. LI (1812), *available at* http://www.constitution.org/tj/tj-mpp.htm.

Ch. 17, sec. 4, 1 Stat. at 71 (emphasis added). In these statutes, the phrase "the recess" obviously referred to the interval *between* sessions of the Senate, not to each period during a session when the Senate was adjourned.[16]

The practice of the Continental Congress, many of whose members were delegates to the Constitutional Convention, also confirms this construction of the Recess Appointments Clause. Articles IX and X of the Articles of Confederation provided for establishment of a committee of delegates from each state to appoint officers and to execute other assigned powers "in the recess of Congress." Practice under these Articles shortly before the Constitution's drafting reflects the understanding that "the recess" referred to the lengthy intervals between the sessions of the Continental Congress, not to short, interim adjournments. Thus, for instance, the Continental Congress designated an appointments committee to sit during its five-month recess between sessions in 1784. *See* 26 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 295-96 (G. Hunt ed. 1928). In contrast, there is no record of such a committee during the Continental Congress's intra-

[16] More generally, legislators in the early Congresses regularly used the term "recess" to refer specifically to breaks *between* sessions. A computer search of congressional proceedings in the first three Congresses reveals that of the 93 uses of the word "recess," all but one referred to inter-session breaks, including *all of the 45 mentions of the phrase "the Recess."* *See* Library of Congress, *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774-1875*, at http://memory.loc.gov/ammem/hlawquery.html. By contrast, legislators used some form of the word "adjourn" more than 1700 times during that same span, most often to denote a cessation of business overnight or for the weekend.

session adjournments of several days or weeks. *See, e.g.*, 24 *id.* at 410 (four-day adjournment in 1783); 25 *id.* at 807, 809 (twenty-one-day adjournment in 1783); 27 *id.* at 710 (seventeen-day adjournment in 1784-85).[17]

C. Constitutional Purpose and Function

DOJ argues that the distinction between intra-session and inter-session recesses is "entirely irrelevant" to the purposes of the Clause. DOJ Br. 23. The thrust of this argument, *see id.* at 23-28, is that because "there is no constitutional connection between the *type* of recess (inter-session or intra-session) and its *duration*," *id.* at 28 – both types of recess can be of any length, long or short – there is, therefore, "no apparent reason why the Framers might wish to permit recess appointments in the one case but not the other," *id.* at 24.

But there were very good functional reasons for the Framers to draw such a distinction. First, the Framers contemplated that breaks *between Sessions* of Congress would typically span prolonged periods during which the Senate would be unable to perform its advice-and-consent function. As the D.C. Circuit has noted, historical evidence "indicate[es] that the Framers envisioned that Congress

[17] DOJ asserts that at the time the Constitution was drafted, the phrase "in the recess" (or "during the recess") was "widely used" to refer to intra-session recesses. DOJ Br. 19. In support of this proposition, however, DOJ tellingly cites only a *single* procedural reaction of the New York legislature, in 1775, to a recommendation of the Continental Congress that used the phrase "in the recess of [the colonies'] assemblies." That stray, ambiguous example hardly amounts to evidence of "wide[]" use.

would convene its annual session, complete its business within several months, and adjourn for the remaining three-fourths of the year." *Barnes v. Kline*, 759 F. 2d 21, 38-39 (D.C. Cir. 1985), *vacated on other grounds sub nom. Burke v. Barnes*, 479 U.S. 361 (1987). The Framers' expectations were borne out: The first ten inter-session congressional recesses averaged over *five-and-a-half months* in length, including a recess of almost nine months in 1793[18]; and during those long recesses, communications and transportation barriers would have made reconvening the Senate to consider nominations impracticable.

By contrast, DOJ offers no evidence that the Framers thought it necessary to empower the President to make unilateral appointments while the Senate was adjourned *within* its Session for a matter of only hours, days, or even weeks.[19] And the early history confirmed this judgment, too: For the first seventy-eight years under the Constitution, Congress did not adjourn during a Session for longer than a week or two during the Christmas holidays. *See Congressional Directory* at 512-15.

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[18] *See Congressional Directory* at 512.

[19] For the proposition that "the Framers would have been familiar with long intra-session recesses," DOJ Br. 24, DOJ cites only a pair of intra-session recesses of the Maryland General Assembly – in 1681 and 1683. The latter of those recesses ended almost 22 years before the oldest Framer of the Constitution (Benjamin Franklin) was *born*. The Framers would have had to have been *very* devoted students of obscure and relatively ancient Maryland legislative practice for this isolated seventeenth-century precedent to serve as the template for the Recess Appointments Clause.

Although it is not directly relevant to the question of the Framers' understanding, it bears noting that the distinction they drew *continues* to make functional sense, as manifested in the "Sessions of Congress" chart in the *Congressional Directory*. The vast majority of inter-session recesses have lasted at least a month, sometimes much longer. By contrast, except for the summer break taken in recent decades, exceedingly few intra-session breaks last as long as a month, whereas there are countless shorter intra-session adjournments, including almost every evening and weekend while the Senate is in session, and holiday breaks that typically last one or two weeks – during which Senate business can easily resume, if necessary, owing to modern communications and transportation. The Framers obviously could not have intended to permit the President to make unilateral appointments in all of these countless short Senate breaks – yet that is the logic of DOJ's argument.

Second, a recess appointee's commission lasts until the end of the Senate's "next Session." The Framers had no reason to permit such an appointment to last throughout the remainder of a Session, one *additional* inter-session recess, and the *entire subsequent Session* – a period that often, as in this case, could last almost

two years. One full Session, of course, ordinarily provides ample opportunity to determine whether a nomination will succeed or fail.[20]

DOJ contends that it would be "capricious" to permit recess appointments during a one-day inter-session recess, but not during a three-month intra-session break. DOJ Br. 25. Because of the typical differences in length of intra- and inter-session recesses, such anomalies will likely be rare.[21] But there is no denying that there might be *some* cases in which the distinction does not reflect the Framers' purposes for drawing the line where they did. This is not unusual, however: That is the cost of *any* bright-line rule – *including* DOJ's own proposed "cessation of Senate business" rule.

On rare occasion there may be, as DOJ hypothesizes, important reasons to fill vacant offices during extended intra-session adjournments, something the President may not do unilaterally under a proper reading of Article II. That

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[20] In response, DOJ states that an appointment lasting between one and two years is "relatively modest compared to the term of office that most Executive Branch or Judicial Branch appointees could expect to serve upon Senate confirmation," DOJ Br. 23 – a point that is irrelevant – and argues that the Constitution "merely ensures that a recess appointee may hold office for at least one, but less than two, full sessions of the Senate," *id.* DOJ does not explain *why* the Framers would have wished to "ensure" that temporary appointees hold office for *more* than one session of the Senate.

[21] We note that DOJ's hypothesized contrast also assumes a President who would contravene the *spirit*, or purpose, of Article II by making recess appointments even during short (or near the end of long) inter-session recesses, when the Senate will soon be available to perform its constitutional function.

unhappy prospect is probably what prompted Attorney General Daugherty to develop his "practical," functional test for use in such rare cases. As Attorney General Knox explained, however, this "argument from inconvenience, like the argument against a power because of its possible abuse, can not be admitted to obscure the true principles and distinctions ruling the point." 23 Op. Att'y Gen. at 603.

In any event, in the modern Senate there will rarely (if ever) be an intra-session recess that prevents advice and consent respecting a vacancy "which the public interests require to be *immediately* filled." 1 Op. Att'y Gen. 631, 632 (1823). The Secretary of the Senate may be authorized at *any* time during the Congress (including during recesses or adjournments) to receive messages from the President, including nominations, for referral to the appropriate committees. *See, e.g.*, 149 CONG. REC. S8 (daily ed. Jan. 7, 2003). During intra-session breaks, Senate Committees can and do continue to conduct executive appointment business, *see, e.g.*, 147 CONG. REC. D23-24, D-28 (daily eds. Jan. 22, 23, 2001) (recording several intra-session committee hearings of persons whom President-Elect Bush had announced an intention to nominate); and the staffs of the Senators and the Senate Committees continue to work. Thus, there is no real obstacle to the ordinary operation of the Senate's advice-and-consent function during intra-session breaks.

Moreover, unforeseen vacancies typically do not require immediate advice and consent, because statutes such as the Federal Vacancies Reform Act, *see* 5 U.S.C. § 3345, provide a variety of mechanisms for the temporary filling of vacancies on an "acting" or "holdover" basis. *See* Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204, 2244-46 (1994). Furthermore, it is difficult to imagine *any* case (short of multiple Supreme Court vacancies in the middle of a Term) in which the public interest would require a seat on the federal bench to be filled during an intra-session recess – let alone during a weekend.[22] And in the unlikely event of a true emergency demanding an immediate *vote* by the Senate on a nominee, the Senate can reconvene in a matter of days, if not hours.[23] As we have seen this past

[22] *See United States v. Woodley*, 751 F.2d 1008, 1024 (9th Cir.) (en banc) (Norris, J., dissenting) ("Because district and circuit judges are largely interchangeable, interdistrict or intercircuit assignments provide an expedient and effective way of dealing with a short term problem."), *cert denied*, 475 U.S. 1048 (1985); *see also* 106 CONG. REC. 18,142-43 (1960) (statement of Sen. Ervin) (explaining why no purpose of the Recess Appointments Clause is served by recess appointments to the bench).

[23] *See, e.g.*, 150 CONG. REC. S1413 (daily ed. Feb. 12, 2004) (concurrent resolution for President's Day recess providing that "[t]he Speaker of the House and the Majority Leader of the Senate, or their respective designees, acting jointly after consultation with the Minority Leader of the House and the Minority Leader of the Senate, shall notify the Members of the House and the Senate, respectively, to reassemble at such place and time as they may designate whenever, in their opinion, the public interest shall warrant it"). And, the Constitution itself (art. II, § 3) empowers the President, "on extraordinary Occasions," to "convene both Houses, or either of them."

month with the spate of hearings relating to the 9/11 Commission Report, modern communications and transportation make this a very practical option.

Even more importantly, the practical implications of *DOJ*'s proposed reading of "the Recess" demonstrate why that interpretation is much more untenable as a *functional* matter than the bright-line rule that the Framers intended and that the Executive Branch followed for 132 years. DOJ defends Judge Pryor's appointment on the ground that *no* adjournment of the Senate could be too abbreviated for the President to make *unilateral* recess appointments. Under this theory, the President could make recess appointments, as he did here, at the very end of short adjournments – on the Sunday night of a weekend break; at sunrise during an overnight adjournment; during brief lunchtime breaks for party caucuses.[24] Indeed, as one of DOJ's own selected authorities expressly notes with respect to *a House of Congress*, a "recess" in the sense proposed by DOJ can be a remission or suspension of business for as little as "half an hour." 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 51 (1828) (quoted in DOJ *Mackie* Br. 8). Indeed, the Senate can (and occasionally does) adjourn for a few minutes, for ten seconds – even for *two seconds*. *See* Riddick's Senate Procedure,

[24] *See* 150 CONG. REC. S8431 (daily ed. July 20, 2004) (statement of Sen. Craig) (reminding the Senate that consideration of a nomination for a court of appeals judgeship will be interrupted by a "recess from 12:30 to 2:15 to allow the weekly party luncheons to meet"); *id.* at S8459 (noting that the Senate recessed for 103 minutes that day).

S. Doc. 28, 101st Cong., 2d Sess., at 14-16 (A. Frumin ed., rev. ed. 1992) [hereinafter Riddick's].

If courts approved this virtually unlimited construction of the Constitution, a President could largely avoid Senate advice and consent for important offices. He could, for example, use the Inauguration break to grant recess appointments to his entire Cabinet, along with numerous Article III judges and other officials requiring Senate confirmation. When such appointments expired almost *two years later* with the end of that Congress, the President could repeat the process using a second round of recess appointments, such that the positions in question – including Article III judgeships – would be filled for virtually his entire Presidency, without any Senate confirmation.[25]

More ominously, whenever the President meets any Senate resistance to any of his nominees, he would need only to wait until a holiday, or a weekend, or the early morning hours of any day the Senate is sitting, to appoint that nominee, thereby circumventing the Senate's advice-and-consent function. Indeed, the President could, as he did here, delay such a recess appointment so that it occurs during an intra-session recess, rather than during an inter-session recess, and

[25] *See* 15 Op. Off. Legal Counsel 91, 92-93 (1991) (approving grant of "successive recess appointments if the Senate fails to act on their nominations by the end of its current session"); 2 Op. Att'y Gen. 525 (1832) (arguing that the President can offer repeated recess appointments to officials whom the Senate rejected for a permanent appointment).

thereby extend the evasion of the Senate's constitutional function for almost two years, until the conclusion of the next Session of Congress.

Such an interpretation would substantially convert the President's qualified authority to make recess appointments into a virtually absolute power to appoint – a unilateral power the Framers unambiguously rejected. Unchecked executive power to appoint was "one of the American revolutionary generation's greatest grievances against executive power," because such power was "deemed 'the most insidious and powerful weapon of eighteenth century despotism.'" *Freytag*, 501 U.S. at 883, 111 S. Ct. at 2641 (quoting GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 143 (1969)). Therefore, the Framers, in the Appointments Clause, "divid[ed] the power to appoint the principal federal officers – ambassadors, ministers, heads of departments, and judges – between the Executive and Legislative Branches." 501 U.S. at 884, 111 S. Ct. at 2641.

The purpose of the Recess Appointments Clause was simply to *supplement* the Appointments Clause in cases "to which the general method was inadequate," *The Federalist* No. 67, at 408 (A. Hamilton) (Clinton Rossiter ed., 2003). Under DOJ's reading, however, the Clause would be transformed into a device through which the President could *routinely* deprive the Senate of its constitutional role with respect to nominees – or, at the very least, circumvent the Senate's role in cases (such as this one) in which the Senate does not provide its consent.

Nor can one take comfort in the hope that no President is likely to abuse the recess appointment power in such a way, as this very case starkly demonstrates.[26] Throughout most of the Nation's history, Presidents used the recess appointment power for "early" appointments of prospective nominees whom the Senate was likely to confirm upon its return. Only recently, beginning in the 1970s and accelerating in the 1980s, have Presidents increasingly used the recess appointment power to fill offices with persons the Senate was unlikely to confirm, in order to *avoid* the constitutionally assigned role of the Senate. *See* Carrier, *supra*, at 2213-15.[27] This recent evolution in presidential practice starkly demonstrates the "'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.'" *Mistretta v. United States*, 488 U.S. 361, 382, 109 S. Ct.

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[26] The ten-day adjournment at issue here is by far the shortest intra-session break during which a President has ever appointed a judge. *See* Kennedy Br. 20 & n.6. No President before 1996 had ever made an intra-session recess appointment of any kind during a recess of fewer than eleven days – but President Clinton did so twice, and President Bush has made at least five such appointments. 4/23/04 CRS Report at 27-28, 32. More importantly, before the Reagan Administration, a President had only once found it appropriate to make an intra-session appointment with the Senate scheduled to return in less than one week. *Id.* at 7. But since 1982 there have been forty-two such intra-session appointments within a week of the Senate's return. *Id.* at 23-29.

[27] Surprisingly, DOJ goes to great lengths to demonstrate that the Senate historically has confirmed the majority of judges whom the President had earlier appointed during a recess. DOJ Br. 38-40. Virtually all of the appointments in question were made during *inter-session* recesses, of presumably uncontroversial, easily confirmable nominees.

647, 660 (1989) (quoting *Chadha*, 462 U.S. at 951, 103 S. Ct. at 2784).[28] Construing "the Recess" to mean any suspension of Senate business, as DOJ urges here, would only exacerbate that "hydraulic pressure."

It is impossible to believe that the Framers would have intended such a prospect.[29] If DOJ's proposed reading were correct, then unless the Senate were to stay continuously in session, twenty-four hours a day, seven days a week, throughout an entire Session of Congress, there would be opportunities every day in which the President could make unconfirmed "recess" appointments that would

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[28] The Supreme Court has stressed the need for courts to be "vigilan[t]" against assertions of power that seek to "accrete to a single Branch powers more appropriately diffused among separate Branches." *Id.*

[29] *See Case of Dist. Attorney of United States*, 7 F. Cas. at 735:

> [S]o broad an extension of the presidential power in question . . . if established, would enable the president to do indirectly, what the constitution does not allow him to do directly. His appointments during recesses of the senate might be so made and renewed that they could not properly be called temporary. They might, moreover, be withdrawn from the consideration of the senate. Thus he might, though the senate were in session when the vacancy first occurred, or had sat since it thus occurred, appoint, in the recess, an officer who would be objectionable to the senate if in session, – and might, in disregard or defiance of the senate, continue him in office indefinitely. This might be done by successive appointments and re-appointments of him at the commencement of every recess until the end of the next ensuing session of the senate. There is nothing in the political experience of our country to warrant her security against such temporary appointments being thus made again and again with such results. The senate, where vacancies existed, would thus be unable to oppose any effectual check to the president's power of appointment.

last until the end of the Senate's *next* Session. In light of the important checking role for the Senate that the Framers designed, the absurdity of such a result is manifest. *Cf. Frame v. Sutherland*, 327 A.2d 623, 625-26 (Pa. 1974) (plurality) (making this point with respect to a parallel recess-appointment clause of the Pennsylvania Constitution, and thus concluding that "the recess of the Senate" "refers only to the final sine die adjournment at the end of the [Senate] session").[30]

Being no doubt aware that reading "the Recess" to include any suspension of Senate business or procedure would lead to absurd results the Framers would have rejected, DOJ hints in passing at an alternative interpretation of "the Recess." DOJ vaguely suggests that perhaps the Adjournment Clause of *Article I* imposes a lower limit on the term "the Recess" in the Recess Appointments Clause found in Article II. Under this view, the Adjournment Clause, art. I, § 5, cl. 4, which provides that "[n]either House, during the Session of Congress, shall, without the Consent of the

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[30] DOJ argues (DOJ Br. 27-28) that even if the Framers drafted the Recess Appointments Clause primarily to provide a mechanism to avoid exceptional crisis situations in which the ordinary Appointments Clause process would not work, they did not restrict the Clause to those cases, or make the President's unilateral appointment power turn "on a case-by-case assessment of the particular circumstances surrounding individual appointments." We agree. That is why we think Attorney General Knox was correct in reaching the "irresistible" conclusion that "the Recess" occurs only between Sessions. 23 Op. Att'y Gen. at 604. DOJ's basic disagreement here is not with us, but with Attorney General Daugherty's "practical" test, which depends *precisely* "on a case-by-case assessment of the particular circumstances surrounding individual appointments," and which generated no cry of "crippling uncertainty" (DOJ Br. 28).

other, adjourn for more than three days," "arguably suggests that a legislative break of three days or less is not an adjournment or recess of constitutional significance," thus perhaps creating a "three-day exception" to DOJ's proposed rule that the President can make appointments whenever there is a suspension of Senate business. DOJ Br. 29.

DOJ quite understandably does not go so far as to actually urge this Court to adopt such a three-day rule, for such an argument has nothing to recommend it, and is subject to several serious objections.

Most fundamentally, the Adjournment Clause simply has no such relationship to the Recess Appointments Clause. The purpose of the former is to facilitate the constitutional system of *bicameralism* by enabling either House to insist on the presence of the other to perform duties requiring bicameral action.[31] That provision thus is not designed to speak to the question of recess appointments; indeed, the House of Representatives' lack of any role in confirming presidential appointments renders its presence or absence irrelevant for purposes of appointments. *Cf. Barnes*, 759 F.2d at 40 (for purposes of Pocket Veto Clause, DOJ's proposed "choice of three days as a bright line thus appears to have no

[31] The purpose of the three-day limitation was, in Madison's words, "[t]hat it would be very exceptionable to allow the senators, or even the representatives, to adjourn, without the consent of the other house, at any season whatsoever, without any regard to the situation of public exigencies." 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 368 (J. Elliot, ed., photo. reprint 1974) (2d ed. 1836).

textual grounding at all," because "we cannot agree that any special connection exists between the pocket veto clause and the clause governing adjournments by one house"). It therefore is no accident that the Adjournment Clause does not even contain the term "the Recess," let alone suggest how that term should be construed in Article II.

Further, the Adjournment Clause demonstrates that when the Framers wished to refer to an intra-session cessation of business, they used the term "adjourn," rather than the term "recess" or "the Recess." Moreover, far from drawing a line between legislative breaks that constitute an "adjournment" and those that do not, the Adjournment Clause plainly reflects the constitutional understanding that a House can "adjourn" for more than three days – *or* for less.

The Adjournment Clause also demonstrates that when the Framers intended a constitutional rule to turn on the particular *duration* of a legislative break, they knew how to say so expressly – something they conspicuously *did not* do in the Recess Appointments Clause.

Finally, a three-day intra-session break rule under the Recess Appointments Clause would be flatly inconsistent not only with the Knox Opinion and the first 132 years of practice under the Constitution, but also with the Daugherty test that prevailed, under DOJ's own interpretation, from 1921 until at least 1993. Referring *specifically* to the three-day adjournment mentioned in Article I,

Daugherty wrote that "looking at the matter from a practical standpoint, *no one*, I venture to say, would for a moment contend that the Senate is not in session when an adjournment of the duration just mentioned [two or three days] is taken[,] [n]or do I think an adjournment for 5 or even 10 days can be said to constitute the recess intended by the Constitution." 33 Op. Att'y Gen. at 25.

III. The Courts and Congress Have Not Affirmed or Acquiesced in DOJ's Novel and Radical Interpretation

DOJ attempts to demonstrate that the other two branches have endorsed its unprecedented construction of the Recess Appointments Clause. This, too, is mistaken.

There is no pertinent judicial authority. DOJ cites only two cases in which the Court of Claims (in 1884) and the Court of International Trade (in 2002) are said to have "held" that intra-session recess appointments can be constitutional. DOJ Br. 15-16. Neither decision would be binding on this Court, but more importantly, neither contains any analysis of the question that might bear on this Court's decision, and both "holdings" are dicta.[32]

[32] In *Gould v. United States*, 19 Ct. Cl. 593 (1884), the Court of Claims stated (without analysis) that President Johnson could fill an Army office during a four-month intra-session adjournment in 1867. The court conceded that this conclusion was dicta, because for purposes of the question presented in that case it was "immaterial whether the claimant was legally in office or not." *Id.* at 596. The Attorney General later concluded that the appointment in *Gould* was impermissible and should not be treated as a precedent. 23 Op. Att'y Gen. at 602-03. In *Nippon Steel Corp. v. U.S. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367 (Ct. Int'l Trade

DOJ also attempts to demonstrate that Congress has agreed that intra-session breaks can be "the Recess" to which the Recess Appointments Clause refers. This argument would be unavailing even if it were accurate, because the judiciary's responsibility to independently review the constitutionality of actions by one branch does not cease even if the other branch has acquiesced in the practice. "Neither Congress nor the Executive can agree to waive this structural protection. . . . The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic." *Freytag*, 501 U.S. at 880, 111 S. Ct. at 2639 (citing *Chadha*, 462 U.S. at 942 n.13, 103 S. Ct. at 2779 n.13).

2002), the Court briefly discussed intra-session appointments, *id.* at 1375 n.13, but only after having already held that the appointment in question had occurred during an *inter-session* Senate recess, on January 3, 2001, *id.* at 1373-74. Moreover, although the court's footnote on intra-session recesses purported to respond to an argument of the plaintiffs that the Senate was not in recess for purposes of the Recess Appointments Clause during an *intra*-session break on January 18, 2001, the court misrepresented the plaintiffs' contentions. The plaintiffs argued that the appointment was invalid because, *inter alia*, it was not completed while the Senate was in *any* kind of recess; they did *not* argue that the appointment was invalid because it occurred during an *intra-session* recess, or that the appointment would have been unconstitutional had it actually occurred on January 18, 2001. *See, e.g.*, Memorandum in Support of Plaintiffs' Motion for Summary Judgment, *Nippon Steel Corp. v. United States* at 26-29 (Ct. Int'l Trade, No. 01-00103) (Mar. 29, 2002); Plaintiffs' Memorandum in Reply, *Nippon Steel Corp. v. United States* at 12-13 (Ct. Int'l Trade, No. 01-00103) (May 14, 2002) (plaintiffs' arguments with respect to whether a valid appointment was made during the intra-session recess on January 18).

In any event, DOJ has distorted the facts. First, it points to congressional usage of the word "recess" – primarily, a Government Printing Office document that defines a "recess" as any period of three or more days when either House is not in session, DOJ Br. 8. That GPO document uses the word "recess," however, not to make any constitutional point, but merely "[f]or the purposes of this table." *Congressional Directory* at 526.

DOJ also misleadingly suggests that the Senate itself used the word "recess" to refer to the February break at issue here. DOJ Br. 1, 8. In fact, the Senate February break in question here was, technically, an "adjournment," *not* a recess. *See* 150 CONG. REC. S1415 (statement of Sen. Frist) (daily ed. Feb. 12, 2004); *see also id.* at S1413 (earlier Senate agreement to Concurrent Resolution 361, referring to "when the Senate recesses *or adjourns*"). The more fundamental point, however, is that although the Senate does sometimes denominate certain intra-session breaks as "recesses" rather than as "adjournments," that distinction simply reflects *a matter of Senate procedure* in order to indicate differences in parliamentary consequences.[33] It has no constitutional significance (e.g., for

[33] For example, particular legislative "morning business" that is mandated upon convening after an "adjournment" need not occur following a "recess." *See* Riddick's, *supra*, at 14, 918-23; *see also id.* at 1080 ("Legislative measures on the Calendar of General Orders, as well as those that have gone over, under the rule, do not mature for consideration if the Senate recesses at the end of its daily business. Those measures require an intervening adjournment of the Senate before they are eligible for consideration, unless unanimous consent is granted.").

purposes of Article I, both Houses must consent to certain breaks, whether the Legislature denominates them "recesses" or "adjournments"), and certainly does not reflect any Senate understanding about the meaning of the specialized phrase "the Recess" in the Recess Appointments Clause.[34]

DOJ also relies upon a 1905 Senate Judiciary Committee Report and a 1948 Comptroller General Opinion. DOJ Br. 13-15. Neither source, however, reflects a Senate view that intra-session recess appointments are ever constitutional, let alone in the extreme circumstances presented here.

The 1905 Committee Report was a response to President Roosevelt's assertion that he could make a recess appointment at the hypothetical instant separating two contiguous Sessions of Congress, during a so-called "constructive" recess (i.e., when there was no actual recess at all). Rejecting that notion, the Committee explained that the constitutional phrase "the Recess" meant "something real, not something imaginary; something actual, not something fictitious." S. Rep. No. 58-4389, at 2 (1905), *reprinted in* 39 CONG. REC. 3823 (1905). The

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[34] DOJ presumably does not mean to suggest that the recess appointment power depends upon whether *the Senate itself technically denominates* a particular break as a "recess" rather than an "adjournment." As we note in the text, that would mean that Judge Pryor's appointment, for example, was unauthorized. *See also, e.g.*, 41 Op. Att'y Gen. at 463 (opining that a recess appointment was constitutional during the Senate's "temporary adjournment"); 6 Op. Off. Legal Counsel at 585 (similar).

Committee was not confronted with the question of intra-session recess appointments, because such appointments were unheard of at the time and had, in fact, been condemned as unconstitutional by Attorney General Knox just four years earlier. Moreover, the Committee's reasoning quite directly *rebuts* DOJ's position in this case:

> [The Recess Appointments Clause] is essentially a proviso to the provision relative to appointments by and with the advice and consent of the Senate. It was carefully devised so as to accomplish the purpose in view, without in the slightest degree changing the policy of the Constitution, that such appointments are only to be made with the participation of the Senate. Its sole purpose was to render it certain that at all times there should be, whether the Senate was in session or not, an officer for every office, entitled to discharge the duties thereof.
>
> It can not by any possibility be deemed within the intent of the Constitution that *when the Senate is in position to receive a nomination by the President*, and therefore, to exercise its function of advice and consent, the President can issue, without such advice and consent, commissions which will be lawful warrant for the assumption of the duties of a Federal office.
>
> The framers of the Constitution were providing against a real danger to the public interest, not an imaginary one. They had in mind a *period of time* during which it would be *harmful* if an office were not filled . . . .

S. Rep. No. 58-4389, 39 CONG. REC. at 3824 (first emphasis added).[35] In this case, of course, the Senate was able to receive the Pryor nomination – indeed, it already

[35] DOJ emphasizes a single sentence in the Committee Report; but to the extent that sentence can be said to bear on the intra-session recess question, it is at best ambiguous. The Committee wrote that the word "recess" means, "in this connection," "the period of time when the Senate is *not sitting in regular or extraordinary session as a branch of Congress*." *Id.* (emphasis in original). This could easily be understood to refer to those periods *apart from* a "session" of

had done so – and no one could seriously contend that it would have been "harmful" not to fill the judgeship on this Court for the period between Friday, February 20, 2004, and Monday, February 23, 2004.

Nor does the 1948 Comptroller General opinion, 28 Op. Comp. Gen. 30 (1948), buttress DOJ's case. The Comptroller General was answering a *statutory*, not a constitutional, question, concerning the relationship between the phrases "the termination of the session of the Senate" and "the preceding recess of the Senate" in Act of July 11, 1940, ch. 580, 54 Stat. 751, revised and renumbered by Act of Sept. 6, 1966, 80 Stat. 378. The Comptroller General explained that, if the "session" in that statute referred to a Senate session *in the constitutional sense*, then "the recent adjournment of the Senate" – what we would refer to as in "intra-session" adjournment – "was *not* a 'termination of the Senate." 28 Op. Comp. Gen. at 34 (emphasis added). The Comptroller General rejected this plain-meaning interpretation, however, because the pertinent amendment to the statute had been proposed *by the Attorney General*, *id.* at 36-37; because the intent of the Attorney General appeared to be to provide payment for all recess appointees, *id.* at 37; and because, as the Comptroller General noted, "it appears to be the accepted view – at least since the [Daugherty] opinion . . . – that a period [during an intra-session

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Congress, i.e., *inter-session* breaks, although, in fairness, the Committee was not contemplating the particular question at issue here, or attempting to express any view on such distinctions.

adjournment] is a recess during which an appointment properly may be made," *id.* at 34. In other words, the Comptroller General was invoking the Daugherty Opinion simply to describe (correctly) the view of the Attorney General as to the scope of the Recess Appointments Clause, for the purpose of construing a statute that the Attorney General had proposed – a statute in which, according to the Comptroller General, the term "session" therefore does *not* mean what it means in the Recess Appointments Clause itself.[36] Nothing in the 1948 opinion indicates the Comptroller General's concurrence in Daugherty's conclusion; but even if there were, it would not help DOJ here because, as we have explained, under the Daugherty Opinion Judge Pryor's appointment was unconstitutional.[37]

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[36] *Accord* 41 Op. Att'y Gen. at 477.

[37] DOJ also argues that the Senate has "long acquiesced in the practice of intra-session recess appointments." DOJ Br. 13. Even if this would have any constitutional significance, DOJ does not fairly describe the historical record. The Senate had no need to raise objections when the practice was rare and did not threaten to undermine the Senate's role. As Presidents have become more aggressive in the practice, Senators *have* raised strong objections. *E.g.*, S. Exec. Rep. No. 99-1, at 11-17 (1984) (views of seven members of Senate Banking Committee objecting to President's recess appointment of Federal Reserve Board Governor during 23-day intra-session adjournment), *reprinted with revisions in* 130 CONG. REC. 22,778-80 (1984). And, in 1993, a majority of the Senate was prepared to authorize the Senate Legal Counsel to file a brief in the *Mackie* litigation specifically arguing that intra-session recess appointments are unconstitutional. *See* 139 CONG. REC. S8544-S8549 (daily ed. July 1, 1993) (Sen. Mitchell). (The Senate Republican minority blocked the resolution authorizing the Senate Legal Counsel to file the brief. *Id.* at S8544.)

IV. Recess Appointments to Article III Judgeships Raise Serious Constitutional Questions That Must Be Considered Under Any "Practical" Test of the Constitutionality of Intra-Session Recess Appointments

Plaintiffs-Appellees and Senator Kennedy have not specifically urged this Court to hold that all recess appointments to Article III judgeships are unconstitutional, although we believe the four dissenting judges in *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1048, 106 S. Ct. 1269 (1986), compellingly demonstrated the constitutional infirmities of such appointments. And this Court need not even address that question if it holds, as we have argued, that "the Recess" refers only to the Recess between Sessions of the Congress, for such a ruling would apply without regard to the office that an appointee has filled.

However, if the Court decides to apply Attorney General Daugherty's "practical" construction of the Recess Appointments Clause, then surely the equitable and functional calculus of that test must take heed of whether the nomination in question raises any other serious constitutional questions. As explained in Part III of Senator Kennedy's amicus brief, recess appointments to Article III judgeships at the very least raise such serious constitutional questions, because recess appointees to Article III judgeships are empowered to adjudicate cases without the judicial independence that Article III guarantees.

DOJ denies that there is even a serious Article III question, contending that the Recess Appointments Clause "plainly permits the appointment of Article III judges." DOJ Br. 32. With one exception, however, DOJ does not articulate any arguments that the dissenters in *Woodley* did not already powerfully and thoroughly address. It suffices for present purposes to rely principally upon that dissenting opinion, and on the arguments in Senator Kennedy's initial brief, to demonstrate that the constitutional concerns are serious, and thus must be considered if the Daugherty approach is used, whatever one might think the ultimate answer should be.

One of DOJ's arguments, however, is novel and warrants specific attention. As Judge Norris noted in his *Woodley* dissent, a recess appointment to an Article III court presents the "extraordinary situation" of "a direct conflict between two provisions of the Constitution." 751 F.2d at 1017. Even the majority in *Woodley* acknowledged that the *text* of Articles II and III provides no basis for favoring one over the other in attempting to reconcile a conflict between two clauses that are "equally specific" in their commands. *Id.* at 1010. DOJ, however, denies that there is such a conflict, because it contends that the Good Behavior Clause of Article III, Section 1, "has meaningful application to judicial recess appointees," even though such appointees are denied the protections of lifetime tenure. DOJ Br. 43. And what is that "meaningful application?" According to DOJ, the Good

Behavior Clause protects judicial recess appointees from being subject to the President's "implied power to remove them" during their "fixed" term of office, i.e., until the conclusion of the next Senate Session. *Id.* at 44.

The notion that such "tenure" protection – from the implausible prospect of presidential removal – "gives meaningful impact" to the Good Behavior Clause as applied to judicial recess appointees, *id.*, demonstrates remarkable disdain for the central role of life tenure in protecting the independence of the federal judiciary. DOJ virtually derides the protection of life tenure as a mere "implication" of the Good Behavior Clause, *id.* at 45.

This perspective inexplicably 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) (Clinton Rossiter ed., 2003). Hamilton's warning of the risks of a judiciary without such guarantee of permanency is especially pertinent here:

> That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either . . . .

Id. at 469-70.

DOJ would subordinate this constitutional "citadel of the public justice and the public security" to the statement in Article II that the President has the power "to fill up *all* Vacancies that may happen during the Recess of the Senate." Whether that priority as between two constitutional commands is or is not correct, it surely raises a very profound question. If, as DOJ until recently insisted, the President's power to make a particular recess appointment depends upon "practical" judgments, including whether it is "necessary for the public service to fill [the vacancy] without delay," *The Federalist* No. 67, at 408 (A. Hamilton) (Clinton Rossiter ed., 2003), then one must at the very least, in making such judgments, consider whether it is "necessary for the public service" to fill a particular judicial vacancy (here, on the last business day of a Senate adjournment). And, insofar as that accounting for the "public service" is to have a role in deciding whether the appointment is valid, it would be a grave mistake to fail to heed the warning "[t]hat inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission." *The Federalist* No. 78, at 469 (A. Hamilton) (Clinton Rossiter ed., 2003).

V. The Question is Justiciable

DOJ obliquely suggests that courts cannot apply a functional test such as the one proposed by Attorney General Daugherty, in which the constitutionality of any particular appointment depends upon whether constitutional objectives are served, because that is a "political question" that is not susceptible to "'judicially discovered and manageable standards.'" DOJ Br. 48 (quoting *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 71 (1962)). Of course, this Court need not even address that suggestion if it holds, as we have urged, that Attorney General Knox was correct that "the Recess" refers to the break between Sessions of the Senate.

In any event, Attorney General Daugherty himself did not believe that application of his practical test was impervious to judicial review. *See* 33 Op. Att'y Gen. at 25 ("[T]here is a point, necessarily hard of definition, where palpable abuse of discretion might subject [the President's] appointment to review."). The Daugherty test is no less lacking in judicially manageable standards than is the similar functional analysis the Supreme Court applies to separation-of-powers cases, in which the Court assesses "the extent to which [a provision of law] prevents [one] Branch from accomplishing its constitutionally assigned functions," and, if it is, evaluates "whether that impact is justified by an overriding need to

promote objectives within the constitutional authority of Congress."[38] Indeed, as Acting Attorney General Walsh noted, *see* 41 Op. Att'y Gen. at 469, the Daugherty test is strikingly analogous to the test that courts have traditionally used to determine whether a particular congressional adjournment "prevents" the President's return of a bill to the House where it originated, under the Pocket Veto Clause, U.S. Const. art. I, § 7, cl. 2.[39] It is clear, therefore, that the Daugherty test is judicially manageable.[40]

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[38] *See Mistretta v. United States*, 488 U.S. 361, 383 & n.13, 409-11, 109 S. Ct. 647, 661 & n.13, 674-76 (1989); *Morrison v. Olson*, 487 U.S. 654, 695-96, 108 S. Ct. 2597, 2621-22 (1988); *Nixon v. Administrator of Gen'l Servs.*, 433 U.S. 425, 443, 97 S. Ct. 2777, 2790 (1977).

[39] *See Pocket Veto Case*, 279 U.S. at 683-85, 49 S. Ct. at 467-68; *Wright v. United States*, 302 U.S. 583, 589-93, 58 S. Ct. 395, 397-99 (1938); *Kennedy v. Sampson*, 511 F.2d at 439-42; *Barnes v. Kline*, 759 F.2d at 35-38.

[40] One amicus argues that even deciding whether to draw such a bright line between "categories of congressional recesses" would be a nonjusticiable political question because of an absence of judicially discoverable and manageable standards. WLF Br. 9-10. In other words, amicus argues that courts are incapable of construing the term "the Recess." Amicus is obviously mistaken. The fact that a constitutional provision may be arguably ambiguous is no reason for courts to avoid interpreting it. *See, e.g.*, *United States v. Munoz-Flores*, 495 U.S. 385, 395-96, 110 S. Ct. 1964, 1971 (1990) (rejecting argument that there are no judicially manageable standards for determining, under Article I, Section 7, whether a bill is "for raising revenue," and where a bill "originates": "Surely a judicial system capable of determining when punishment is 'cruel and unusual,' when bail is '[e]xcessive,' when searches are 'unreasonable,' and when congressional action is 'necessary and proper' for executing an enumerated power is capable of making the more prosaic judgments demanded by adjudication of Origination Clause challenges."); *see also Chadha*, 462 U.S. at 940-43, 103 S. Ct. at 2778-80. The

Finally, DOJ notes that the Senate has "effective responses," in the form of "political controls," that it can use if and when it concludes that the President has overstepped constitutional limitations. DOJ Br. 49; *see also* WLF Br. 15-16. DOJ does not, however, suggest that such potential responses should affect this Court's constitutional judgment, and for good reason: The Supreme Court rejected precisely such an argument in *United States v. Munoz-Flores*, 495 U.S. 385, 110 S. Ct. 1964 (1990), in which it explained that "the fact that one institution of Government has mechanisms available to guard against incursions into its power by other governmental institutions does not require that the Judiciary remove itself from the controversy by labeling the issue a political question." 495 U.S. at 393,

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Supreme Court has construed countless constitutional provisions more ambiguous than "the Recess." *See Made in the USA Foundation v. United States*, 242 F.3d 1300, 1316-17 (11th Cir.) (canvassing many of these cases), *cert. denied sub nom. United Steelworkers of America v. United States*, 534 U.S. 1039, 122 S. Ct. 613 (2001). (In *Made in the USA Found.*, this Court distinguished those cases on the ground that "none took place directly in the context of our nation's foreign policy, and in none of them was the constitutional authority of the President and Congress to manage our external political and economic relations implicated." *Id.* at 1317. This case raises no such questions concerning the power of the political branches to conduct foreign policy.) In particular, the Court has on several occasions construed amorphous distinctions in the Appointments Clause, such as "[t]he line between 'inferior' and 'principal' officers," a distinction "that is far from clear," and as to which "the Framers provided little guidance as to where it should be drawn." *Morrison*, 487 U.S. at 671, 108 S. Ct. at 2608; s*ee also, e.g.*, *Edmond v. United States*, 520 U.S. 651, 117 S. Ct. 1573 (1997); *Weiss v. United States*, 510 U.S. 163, 114 S. Ct. 752 (1994); *Freytag*, *supra*; *Buckley v. Valeo*, 424 U.S. 1, 124-43, 96 S. Ct. 612, 684-93 (per curiam) (1976). Interpretive questions under the Recess Appointments Clause are no less judicially manageable than questions about the meaning of the Appointments Clause.

110 S. Ct. at 1970. Indeed, "[i]n many cases involving claimed separation-of-powers violations, the branch whose power has allegedly been appropriated has both the incentive to protect its prerogatives and institutional mechanisms to help it do so. Nevertheless, the Court adjudicates those separation-of-powers claims, often without suggesting that they might raise political questions." *Id*.

The Framers did not insist upon divisions of responsibility and power between the Executive and the Legislature for the benefit of individuals serving in those political branches at any given time. Rather, "'the Constitution diffuses power the better to secure liberty.'" 495 U.S. at 394, 110 S. Ct. at 1970 (quoting *Morrison*, 487 U.S. at 694, 108 S. Ct. at 2620). The structural interests protected by the Recess Appointments Clause, like those protected by the Appointments Clause itself, "are not those of any one branch of Government but of the entire Republic." *Freytag*, 501 U.S. at 880, 111 S. Ct. at 2639.

Thus, it would be inappropriate to abdicate judicial responsibility in the expectation that a particular Senate at a particular time might be able to police the President's constitutional role, because the issue here does not simply concern the preservation of Senate prerogatives for their own sake. Constitutional concerns for *individuals'* rights are especially salient in this case, because the appointment here implicates the independence of the federal judiciary, which must be preserved "to safeguard *litigants'* 'right[s] to have claims decided before judges who are free

from potential domination by other branches of government.'" *CFTC v. Schor*, 478 U.S. 833, 848, 106 S. Ct. 3245, 3255 (1986) (quoting *United States v. Will*, 449 U.S. 200, 218, 101 S. Ct. 471, 482 (1980)) (emphasis added).

CONCLUSION

For the foregoing reasons, as well as those set forth in Senator Kennedy's opening brief, the Court should hold that Judge Pryor was unconstitutionally appointed and may not sit as a member of this Article III tribunal.

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