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 OF AMICUS CURIAE SENATOR EDWARD M. KENNEDY IN SUPPORT OF PETITIONER ON THE SECOND QUESTION PRESENTED

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## QUESTION PRESENTED

In this brief, *amicus* Senator Edward M. Kennedy will address the second question presented by the petition for a writ of certiorari: whether the Recess Appointments Clause, U.S. Const. art. II, sec. 2, cl. 3, authorizes the President to make a "recess" appointment of a judge to an Article III court *during* a session of Congress.

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## INTEREST OF THE AMICUS[1]

*Amicus* Edward M. Kennedy has been a United States Senator from the Commonwealth of Massachusetts since 1962. He is the second-most senior member of the Senate and has served on its Committee on the Judiciary continuously since 1962, serving as Committee Chairman from 1979 to 1981. In the Committee and on the Senate floor, he has participated in the Senate's constitutional "advice and consent" function with respect to the appointment of virtually every federal judge since the start of the First Session of the 88th Congress.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

Judge William Pryor, Jr. is the only judge in the past half-century to have received a recess appointment to an Article III position *during* a session of Congress. This is the second petition for certiorari challenging the constitutionality of that appointment. *Amicus* previously submitted a brief in support of the first of those petitions, *Miller v. United States*, No. 04-38. At the time *amicus* submitted his brief in *Miller*, the Government had not articulated any constitutional defense of Judge Pryor's appointment. Subsequently, the Government has filed briefs defending that appointment in *Miller* and in an en banc case now pending before the U.S. Court of Appeals for the Eleventh Circuit in which a motion to disqualify Judge Pryor has been filed, *Stephens v. Evans*, No. 02-16424. In this brief, *amicus* addresses the Government's new arguments.

The court of appeals is scheduled to hear oral argument on the underlying merits in *Stephens* on October 26, 2004. That court will very likely rule on the constitutionality of Judge Pryor's appointment, and might issue one or more opinions discussing the issue, before that oral argument. If the court of appeals denies the motion in *Stephens*, or conducts oral

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[1] No person other than *amicus* and his counsel participated in the writing of this brief or made a financial contribution to the brief. Letters signifying the parties' consent to the filing of this brief are on file with the Court.

argument on the merits with the participation of Judge Pryor – whichever comes first – this Court should grant the first-filed petition in *Miller* and hold this case pending disposition of *Miller*. If, on the other hand, the court of appeals in *Stephens* grants the motion to disqualify Judge Pryor prior to the October 26th oral argument, this Court should grant certiorari in both *Miller* and this case, vacate the judgments below, and remand both cases to the court of appeals for reconsideration in light of that court's disqualification of Judge Pryor in *Stephens*.[2]

* * * *

Petitioner was convicted of using a dangerous weapon to damage religious property – the Islamic Center of Tallahassee Mosque – because of the race, color or ethnic characteristics of individuals associated with that property, in violation of 18 U.S.C. § 247(c), which was enacted as part of the Church Arson Prevention Act of 1996, Pub. L. No. 104-155, § 3(3), 110 Stat. 1392. An Eleventh Circuit panel affirmed the judgment without oral argument. In an unpublished opinion, the panel rejected all of petitioner's arguments, including the argument that Congress lacked power under section 2 of the Thirteenth Amendment to enact 18 U.S.C. 247(c). In his petition for certiorari, petitioner challenges both the power of Congress to enact Section 247(c) and the constitutionality of the participation of Judge William Pryor, Jr. on the panel that affirmed his conviction.

The court of appeals correctly concluded that Congress had power under the Thirteenth Amendment to enact Section 247(c).[3] And there is no other reason for the Court to grant certiorari on the first question presented.

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[2] *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam); *cf. Arizona v. Gant*, 124 S. Ct. 461 (2003) (mem.) (vacating judgment and remanding case to state court of appeals for reconsideration in light of intervening decision of state supreme court).

[3] Pursuant to section 2 of the Thirteenth Amendment, Congress not only may act to prevent the actual imposition of slavery or involuntary servitude, but also may enact legislation rationally related to the goal of eradicating and preventing all of the badges, incidents, and relics of slavery or involuntary servitude. *See Griffin v. Breckinridge*, 403 U.S. 88, 105 (1971); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440-43

Nevertheless, petitioner was entitled to have that question decided by an appellate panel composed entirely of Article III judges who have been appointed in a constitutionally prescribed manner. *See Nguyen v. United States*, 539 U.S. 69, 78 (2003) (when judge was "incompetent" to sit on Article III panel, "'the decree in which he took part was unlawful, and perhaps absolutely void'") (quoting *American Constr. Co. v. Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372, 387 (1893)). The panel below included a judge whom the President appointed without Senate confirmation just one business day before the Senate reconvened after a ten-day, holiday adjournment *during* a session of Congress. Whether such an appointment is constitutional – the second question presented – is a serious question that has recently assumed increased importance, as Presidents of both parties have dramatically increased the use of their alleged recess appointment power, in circumstances in which their predecessors had long understood that the recess appointment power was unavailable, in order to circumvent the ordinary and proper operation of the Appointments Clause, art. II, sec. 2, cl. 2.

*Amicus* thus agrees that the Court should grant certiorari on the recess appointment question, even though the particular question understandably has not divided the lower courts.[4] The

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(1968). This authority supports legislation proscribing many forms of racial, ethnic, and national origin discrimination, not limited to discrimination against African-Americans. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285-96 & n.18 (1976) (Congress authorized to prohibit private discrimination against whites as well as nonwhites); *see also Saint Francis College v. Al-Khazraii*, 481 U.S. 604, 613 (1987) (prohibition of discrimination in Thirteenth Amendment enforcement statute extends to discrimination against Arabs). If, as this Court held in *Jones*, Congress may use its section 2 authority to prohibit private discrimination in real property transactions, it follows that Congress may, as it has done in Section 247(c), prohibit racial discrimination taking the form of *intentional damage* to real property.

[4] In recent years, Presidents have increasingly made unilateral appointments of officers during intra-session Senate breaks, but Judge

Court in analogous circumstances has granted certiorari "to resolve the important questions the litigation raises about the Constitution's structural separation of powers." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 873 (1991) (reviewing whether special trial judges may participate in the Tax Court consistent with the Appointments Clause); *see also Clinton v. Jones*, 520 U.S. 681, 689 (1997); Pet. for Cert. of the U.S., No. 03-475, *Cheney v. U.S. Dist. Court* 6 (certiorari warranted to resolve "fundamental separation-of-powers questions").[5]

Since *amicus* filed his brief in *Miller*, the Government has filed two briefs in *Stephens* and has filed a brief in opposition in *Miller*. Those briefs reveal a recent Executive branch interpretation of the Recess Appointments Clause, art. II, sec. 2, cl. 3, vastly broader than the readings that governed Executive practice for more than 200 years. This breathtaking new understanding of the President's recess appointment power helps to explain why recent Presidents have felt emboldened to sharply increase their use of that power to make intra-session appointments during very brief intra-session breaks and shortly before resumption of Senate business, *see infra* at 10-11 – circumstances under which the Department of Justice had long conceded that the use of the recess appointment power is unconstitutional.

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Pryor's is the first such appointment of a federal judge in the past fifty years.

[5] Because petitioner first learned of the panel's composition when the court issued its opinion rejecting his appeal, he did not object below to Judge Pryor's participation. That should be no obstacle to this Court's review, especially if and when the court of appeals specifically addresses the issue in *Stephens*. *See, e.g.*, *Nguyen*, 539 U.S. at 77-83 (vacating court of appeals judgment despite petitioner's failure to object below to participation of territorial judge on Article III panel); *id.* at 88 (Rehnquist, C.J., dissenting) (explaining that even though the Court should not reverse judgment under plain-error analysis, "the Court's opinion properly makes clear to the Courts of Appeals that [the territorial judge's] participation constituted plain error"); *Glidden v. Zdanok*, 370 U.S. 530, 535-37 (1962) (plurality opinion of Harlan, J.).

The Recess Appointments Clause 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." Petitioner and *amicus* contend that "the Recess" refers to the legislative break that the Senate takes *between* its "Session[s]." By contrast, the Government now advances the remarkable view that the phrase "the Recess" means *any* suspension or remission of Senate business. *See* U.S. *Miller* Opp. 18, 21; *see also* Brief for the Intervenor United States Supporting the Constitutionality of Judge Pryor's Appointment as a Judge of This Court, *Stephens v. Evans*, No. 02-16424 at 7 [hereinafter "U.S. *Stephens* Br."]. Under this novel reading, the President may make a "recess" appointment whenever the Senate takes *any* intra-session break, even for a period as short as a half-hour. *See* U.S. *Miller* Opp. 18 (relying upon 1828 dictionary definition of "recess" that provides specific example of a half-hour suspension of legislative business).

The Government asserts that its understanding is supported by "longstanding historical practice," *id.* at 23, such that Judge Pryor's appointment "fits comfortably within [a] settled constitutional tradition" that is "measured not in decades, but centuries under the Recess Appointments Clause," U.S. *Stephens* Br. 9, 31. Nothing could be further from the truth. In fact, both Judge Pryor's appointment and the Government's novel legal interpretation break with over two centuries of Executive branch practice under, and Department of Justice interpretations of, the Recess Appointments Clause. Under *either* of the two competing historical understandings of the phrase "the Recess" that guided Executive practice from 1789 until approximately 1993, Judge Pryor's appointment is unconstitutional.

Nor can the Government's novel reading be reconciled with the language, structure, or purposes of the Recess Appointments Clause. Indeed, that reading would permit the President routinely to circumvent the Senate's advice and consent function, thereby vitiating the Framers' determination to "divid[e] the power to appoint the principal federal officers . . .

between the Executive and Legislative branches." *Freytag*, 501 at 884.

The Executive's dramatic break with historical practice and understanding demonstrates why the Court should address this issue now. Judge Pryor's appointment is merely the most egregious example of a recent trend that, left unchecked, would permit presidential aggrandizement of a power that the Constitution insists be shared between the Executive and the Senate. Because this Executive practice is rapidly becoming commonplace rather than extraordinary, the need for judicial inquiry is "sharpened rather than blunted." *INS v. Chadha*, 462 U.S. 919, 944 (1983).

## ARGUMENT

### I. Certiorari is Warranted Because Recent Presidential Recess Appointment Practice, Based Upon the Government's New Constitutional Interpretation, Sharply Departs from More Than 200 Years of Historical Practice.

The Government's argument crucially depends upon the notion that the recent appointments of Judge Pryor and other officials during very short intra-session Senate adjournments are business as usual, substantiated by "longstanding historical practice." U.S. *Miller* Opp. 23. But the Government's account of history is selective and misleading. In fact, under *either* of the two DOJ interpretations of the Recess Appointments Clause that governed Executive practice for *the first 204 years* of practice under the Constitution, such appointments would be unconstitutional.

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

From 1789 until 1921, Presidents frequently made recess appointments *between* sessions of Congress. Tellingly, however, Executive practice was dramatically different during the thousands of instances when the Senate ceased or suspended business *during* its sessions over the course of those 132 years. Most of those adjournments were for periods of fewer than three days, including almost every evening and weekend; but on at

least sixty occasions the Senate also adjourned for more than three days. *See* U.S. GOV'T PRINTING OFFICE, 2003-2004 OFFICIAL CONGRESSIONAL DIRECTORY: 108TH CONG. 512-17 (2004) [hereinafter CONGRESSIONAL DIRECTORY]. On the Government's current view, each of these intra-session breaks was "the Recess" for purposes of the Recess Appointments Clause, during which the President could have made unilateral appointments. However, with only a single known exception, Presidents did *not* make recess appointments during these breaks.[6]

It was not until a 1901 opinion of Attorney General Philander Knox that the Executive Branch specifically considered the constitutionality of intra-session recess appointments. And then the Attorney General's view was unequivocal: "The conclusion is irresistible to me," he wrote, "that the President is not authorized to appoint an appraiser at the port of New York during the current [intra-session] adjournment of the Senate." 23 Op. Att'y Gen. 599, 604 (1901). Knox explained that in contrast to the Constitution's use of the broader term "adjourn[ment]," the term "the Recess" refers to "the period after the final adjournment of Congress for the session, and before the next session begins." *Id.* at 601. An "intermediate temporary adjournment" during the session, "although it may be a recess in the general and ordinary use of that term," is not "the recess during which the President has

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[6] President Johnson made a series of appointments during a two-and-a-half-month Senate adjournment in 1867, Henry B. Hogue, Cong. Res. Serv., *Intrasession Recess Appointments* 5 (Apr. 23, 2004) [hereinafter 4/23/04 CRS Report], and 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). Apparently the Executive branch did not seriously consider the constitutionality of these 1867 appointments until 1901, when the Attorney General concluded in retrospect that "[t]he public circumstances surrounding this [1867] 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).

power to fill vacancies by granting commissions which shall expire at the end of the next session." *Id.*

The Executive practice of not making recess appointments during a Session of the Senate continued for a further 20 years following Knox's opinion,[7] meaning that for the first 132 years of constitutional practice and interpretation by the Executive, the Recess Appointments Clause was not treated as though it authorized intra-session appointments.

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

Executive understanding of the Clause changed in 1921, when Attorney General Harry Daugherty adopted a novel interpretation that was at odds with the Executive practice and understanding over the preceding 132 years. Daugherty, unlike Knox, did not rely upon the plain language, structure, or history of Article II. In the case of a proposed intra-session appointment, Daugherty reasoned, the "real question" was "whether *in a practical sense* the Senate is in session *so that its advice and consent can be obtained*." 33 Op. Att'y Gen. 20, 21-22 (1921) (emphasis added). He concluded that an intra-session adjournment could be deemed "the 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. Notably, however, Daugherty "unhesitatingly," *id.* at 24, rejected the argument – pressed by the Government in its recent briefs – that the President may make a recess appointment during any pause in Senate business. "[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," and added that even an adjournment "for 5 or even 10 days" could not satisfy his "practical" test. *Id.* at 25.

Subsequent opinions from the DOJ uncritically followed the 1921 Daugherty Opinion. *See* U.S. *Miller* Opp. 25 (citing

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[7] *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.").

opinions). 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 could make intra-session recess appointments only when it was as a "practical" matter "impossible," 33 Op. Att'y Gen. at 25, to obtain the Senate's advice and consent.[8] Because this test is rarely met, Presidents acting in accord with it understandably made few such appointments in the decades after 1921. *See* Kennedy *Miller Amicus* Br. 13-14. In particular, 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).[9]

And, from all that appears, Executive practice followed this legal advice for many decades: Prior to 1982, Presidents virtually *never* made intra-session recess appointments during Senate adjournments of shorter than one month, *see* 4/23/04 CRS Report at 5-23 – the two isolated exceptions being solitary intra-session appointments that Presidents Harding and Coolidge made in 1921 and 1928, respectively, *id.* at 7. Moreover, the relevant time period for purposes of Daugherty's "practical test" – which asks whether the Senate cannot as a practical matter participate in its ordinary "advice and consent" function – should not be the length of the Senate's adjournment as such, but instead the length of time between the appointment and the Senate's scheduled resumption of business. Before 1982, there had been only one occasion (in 1928) on which a President had

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[8] *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).

[9] 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).

made an intra-session recess appointment fewer than nine days before the Senate's return. *Id.* at 7.

**1993-2004 – The Suspension-of-Senate-Business Test**

More recently, however, there has been a sea change in Executive practice and constitutional understanding. In a district court brief in 1993, the Executive branch first broke with the 204-year-long tradition reflected in the Knox and Daugherty Opinions, and argued instead for a rule allowing recess appointments during *any* remission or suspension of Senate business, however short. *See* Defendants' Motion for Summary Judgment on Count II of the Amended Complaint at 14, 16, *Mackie v. Clinton*, 827 F. Supp. 56 (D.D.C. 1993) (No. 93-0032). The Government has reasserted that same argument in *Miller* and in *Stephens*, and presumably will do so in this case, as well.

In accord with that groundbreaking constitutional interpretation, Executive appointment practice has changed dramatically over the past two decades. Before 1982, Presidents virtually *never* made intra-session recess appointments during Senate adjournments of shorter than one month. But since 1982, there have been 66 such appointments – 15 made by President Reagan, five by the first President Bush, 14 by President Clinton, and 32 by the current President. *See* 4/23/04 CRS Report 23-32; Henry B. Hogue, Cong. Res. Serv., *Intrasession Recess Appointments by President George W. Bush, April 23-October 4, 2004*, at 2-4 (Oct. 5, 2004) [hereinafter 10/05/04 CRS Report]. Before the final day of President Clinton's first Term, no President had *ever* made an intra-session recess appointment during a Senate break of fewer than 13 days. But President Clinton made eight appointments in recesses lasting from nine to eleven days, *see* 4/23/04 CRS Report at 27-29; and President Bush has made 21 unilateral appointments during 10-day (*i.e.*, one-business-week) adjournments in the past eight months alone, *see id.* at 32; 10/05/04 CRS Report at 2-4. Perhaps most alarmingly, of the 60 occasions in our history on which a President has made an intra-session recess appointment fewer than nine days before the Senate's return, *59* of those appointments (all save one appointment in 1928) have been

made since 1982 – and each of those 59 appointments has been made within six days of the Senate's return. *See* 4/23/04 CRS Report at 7, 23-32; 10/05/04 CRS Report at 2-4.

As explained below, and in *amicus*'s brief in *Miller*, the text, structure, purpose, function, and pre-1921 history of the Recess Appointments Clause all confirm Knox's "irresistible" conclusion that the President may not make "recess" appointments during intra-session Senate breaks; therefore, Daugherty's "practical" test misinterprets the Clause. This Court need not choose between Knox and Daugherty, however, to hold that Judge Pryor's appointment was unconstitutional, or, more to the point, to determine that certiorari is warranted. It suffices for present purposes to recognize that Judge Pryor's appointment, and the many other recent appointments like it, would be unconstitutional under *either* test.

Even assuming arguendo that appointments made long before the Senate is to return from adjournments of "substantial" length – such as toward the outset of a month-long summer adjournment – would satisfy the Daugherty test, surely Daugherty was correct that appointments made at the close of a ten-day adjournment do not.

The Framers intended that the Recess Appointments Clause would *supplement* the Appointments Clause when "the general method was inadequate," THE FEDERALIST NO. 67, at 408 (A. Hamilton) (C. Rossiter ed., 2003). But the Executive branch's new understanding and implementation of that Clause threaten to undermine the constitutionally required appointments process altogether. The Pryor nomination is a case in point: The President appointed Judge Pryor on the final business day of a 10-day holiday adjournment. Surely, it would be folly to suggest that the weekend between Friday, February 20, 2004 and Monday, February 23, 2004, was a period "protracted enough to prevent [the Senate] from performing its functions of advising and consenting to executive nominations." 41 Op. Att'y Gen. 463, 466 (1966). It is manifest that what prompted this recess appointment was not the concern reflected in the Daugherty test that the Senate could not "participate" in the nomination during

the pertinent (weekend) break, but rather the President's design to bypass the Senate's constitutional role.

As this extreme example demonstrates, the Executive's new interpretation and practice would convert the Recess Appointments Clause into an absolute power to appoint – a unilateral power the Framers rejected by "divid[ing] the power to appoint the principal federal officers . . . between the Executive and Legislative Branches." *Freytag*, 501 U.S. at 884. On the Government's new reading, unless the Senate were to stay continuously in session throughout an entire session of Congress, there would be countless, *daily* opportunities for the President to make unconfirmed "recess" appointments that would last until the end of Congress's *next* session. It is absurd to imagine that the Framers drafted the Recess Appointments Clause to provide the President such a power, to be exercised during intra-session Senate breaks lasting a fortnight, or a weekend, or overnight. *See* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause* 62-63, at http://papers. ssrn.com/sol3/papers.cfm?abstract_id=601563.[10]

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[10] Tacitly acknowledging that the Framers could not have intended the term "the Recess" to refer to any and all suspensions of Senate business, the Government has argued in the court of appeals that 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 other, adjourn for more than three days" – creates a three-day "*de minimis* exception" to the President's powers *under the Recess Appointments Clause*. Reply Brief for the Intervenor United States Supporting the Constitutionality of Judge Pryor's Appointment as a Judge of This Court, *Stephens v. Evans*, No. 02-16424 at 20-21. In this Court, the United States obliquely hinted that it would "discuss[] below" a similar "arguable" three-day exception, U.S. *Miller* Opp. 10; but tellingly, the Government never actually discussed any such exception – and for good reason.

The purpose of the Adjournment Clause 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. That function is completely inapposite to the question of recess appointments; indeed, the House of Representatives' lack of any role in confirming presidential appointments renders its

This Court should grant the petition in *Miller* to decide whether the Constitution authorizes so radical a departure from over 200 years of practice.

## II. Each Relevant Source of Construction Supports the Conclusion That Judge Pryor's Appointment Was Unconstitutional.

### A. Constitutional Text and Structure

The Government offers scant textual support for its novel interpretation of the phrase "the Recess," relying principally upon stray references to the term "recess" in the British Parliament, and upon a pair of dictionary definitions of the word "recess." U.S. *Miller* Opp. 18-19. The two definitions the Government cites (from 1755 and 1828) hardly justify its reading of the Recess Appointments Clause. If anything, the dictionary evidence at the time of the Framing tends to call into question that interpretation.[11] But the textual difficulty with the Government's proposal is much more fundamental than that.

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presence or absence irrelevant for purposes of appointments. Furthermore, a "three-day break" exception would not only be inconsistent with the Knox Opinion, but would also directly contradict Attorney General Daugherty's reasoning, which governed Executive practice from 1921 until at least 1993. *See* 33 Op. Att'y Gen. at 25 ("Nor do I think an adjournment for 5 or even 10 days can be said to constitute the recess intended by the Constitution.").

The Adjournment Clause *does*, however, demonstrate two important things that are relevant here: *First*, that when the Framers wished to refer to a cessation of legislative business that could occur *during* a congressional session, they used the term "adjourn," rather than the term "the Recess." *See infra* at 15. *Second*, 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 *did not* do in the Recess Appointments Clause.

[11] Samuel Johnson's definitions of "recess" as meaning "[d]eparture into privacy" and "[r]emission or suspension of any procedure" were the fifth and sixth definitions he provided; his *first*-listed definition was "[r]etirement; retreat; withdrawing; secession." SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE 249 (7th ed. 1785). By contrast, he defined the word "adjournment" as "[a]n

Although certainly the word "recess" *can* take the colloquial or popular meaning of a simple cessation of procedure of business, legislators at the time of the Founding almost never used it in that way.[12] More importantly, the Recess Appointments Clause does not refer to "a recess"; nor did the Framers opt for the plural form "recesses" – even though they did use the plural form "vacancies" in the same clause. This textual clue demonstrates that "the Recess" in question is a *particular* legislative break – namely, one that separates two sessions of Congress.

The Government stresses that there is more than one Session *per Congress*, and sometimes even more than one Session *per year* – so that there can be more than one inter-session recess in any given period. U.S. *Miller* Opp. 20. This 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 *per session of Congress*. The term "the Recess" is juxtaposed in the Recess Appointments Clause with the command that the appointee's commission "shall expire at the End of [the Senate's] next Session." As Hamilton explained, "[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

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assignment of a day, or a putting off till another day," *id.* at 5, suggesting that "adjournment" was the preferred term for a brief and intermittent interruption, while "recess" connoted something more permanent, such as a retirement or secession. Other dictionaries of the era drew a similar contrast.

[12] 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, 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.

the sense of the provision." THE FEDERALIST NO. 67, at 408 (A. Hamilton) (emphasis added); *see also* Rappaport, *supra*, at 62.

Of equal importance, 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. *See*, *e.g.*, U.S. Const. art. I, § 5, cl. 1 (less than a majority of each House "may adjourn from day to day"); *id.* art. I, § 7, cl. 2 (a bill not signed by the President shall not become law if "the Congress by their Adjournment prevent its Return"). 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 refers to a particular *sort* of "adjournment" – the break between sessions of the Senate.

The Government emphasizes that when the word "Adjournment" appears in the Constitution, it "encompasses both inter-session and intra-session legislative breaks." U.S. *Miller* Opp. 21-22. This is true,[13] but unresponsive. The pertinent point is that each time it appears in the Constitution, the term "adjourn" or "Adjournment" refers to an *intra-session* cessation of business, even when it may also encompass inter-session breaks. Thus, when the Framers wished to describe a legislative break that could occur *either during or between* Sessions of Congress, they consistently used the term "adjournment," rather than the term "the Recess." *See* 23 Op. Att'y Gen. at 601; Rappaport, *supra*, at 51-54.

**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"

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[13] *See The Pocket Veto Case*, 279 U.S. 655, 680 (1929) (word "Adjournment" is used in the Constitution to refer not only to the final adjournment at the end of a Congress, but also, *e.g.*, to adjournments "from day to day").

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, for use when "it might be necessary for the public service" to fill without delay certain vacancies that "might happen in [the Senate's] recess." The Recess Appointments Clause was added 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) (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."

The practice of the First Congress – which contained twenty members who had been delegates to the Philadelphia Convention, see *Bowsher* v. *Synar*, 478 U.S. 714, 724 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 . . . 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.* § 4, 1 Stat. at 200 (emphasis added); *see also* Act of Sept. 22, 1789, Ch. 17, § 4, 1 Stat. at 71 (authorizing payment to Senate 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*") (emphasis added).[14]

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[14] The Government emphasizes that the modern Congress sometimes denominates certain intra-session breaks as "recesses," and that even in 1812 some legislators used the word "recess" to refer to a proposed intra-session break. U.S. *Miller* Opp. 19-20. What it fails to note is that at the time of the Founding, legislators regularly used the word "recess" to refer specifically to a break *between* sessions, and the term "adjournment" to refer to intra-session breaks. *See supra* note 12.

Moreover, even the modern congressional distinction between a "recess" and an "adjournment" simply reflects *a matter of Senate procedure* to indicate differences in parliamentary consequences. For

### C. Constitutional Purpose and Function

The Government argues that there is no "*inherent* difference" between intra-session and inter-session recesses that would explain a decision by the Framers to limit application of Recess Appointments Clause to the latter. U.S. *Miller* Opp. 28-29. Even so, there were very significant practical, functional reasons for the Framers to draw such a line. The Framers contemplated that breaks *between Sessions* of Congress would typically span prolonged periods[15] during which the Senate would be unable to perform its "advice and consent" function. These 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), *see* CONGRESSIONAL DIRECTORY at 512, during which communications and transportation barriers would have made reconvening the Senate to consider nominations impracticable.

By contrast, there is no evidence that the Framers thought it necessary to empower the President to make unilateral

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example, particular legislative "morning business" that is mandated upon convening after an "adjournment" need not occur following a "recess." *See* RIDDICK'S SENATE PROCEDURE, S. Doc. 28, 101st Cong., 2d Sess. 14, 918-23 (A. Frumin ed., rev. ed. 1992); *see also id.* at 1080. The distinction in nomenclature is not intended to have any constitutional significance, and certainly does not reflect any Senate understanding about the meaning of the specialized phrase "the Recess" in the Recess Appointments Clause.

Thus, it would not have made any constitutional difference had the Senate denominated the February 2004 break in question here a "recess." But for what it is worth, the United States is simply wrong when it states, U.S. *Miller* Opp. 20, that the Congress "expressly described" that break as a "recess." Although the Concurrent Resolution *authorized* the Senate to recess *or* adjourn, the break in question here was, as a matter of Senate procedure, an "adjournment," *not* a recess. *See* 150 CONG. REC. S1415 (statement of Sen. Frist) (daily ed. Feb. 12, 2004) ("I ask unanimous consent that the Senate stand in adjournment under the provisions of H. Con. Res 361.").

[15] *See 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).

appointments while the Senate was adjourned *within* its session for short periods. And the early history confirmed this expectation: For the first 78 years under the Constitution, Congress did not adjourn during a session for longer than two weeks during the Christmas holidays. *See id.* at 512-15. The Framers would not have contemplated any need to eschew the ordinary Appointments Clause method during breaks such as these – let alone during the breaks that occur every evening and weekend.[16]

Accordingly, the Framers' assumption that recess appointments might be necessary between congressional sessions, but rarely if ever during inter-session breaks, made a great deal of sense. *See generally* Rappaport, *supra*, at 54-59.[17] What is inconceivable as a matter of original intent is that the Framers would have given the President the power to circumvent the Senate's role under the Appointments Clause during any Senate break, no matter how short – yet that is the logic of the Government's new argument, without which Judge Pryor's appointment would be unconstitutional.

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[16] Moreover, a recess appointee's commission lasts until the end of the Senate's "next Session." There is no reason to think that the Framers would have designed a scheme in which intra-session appointments last longer than inter-session appointments – *i.e.*, 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. *See* Rappaport, *supra*, at 59-62.

[17] Furthermore, even today it is difficult to imagine *any* case in which the public interest would require a seat on the federal bench to be filled during an intra-session recess, especially one lasting only a weekend. The work of the Senate continues during intra-session breaks, see Kennedy *Miller Amicus* Br. 11-12 & n.5; and statutes such as the Federal Vacancies Reform Act, see 5 U.S.C. § 3345, provide a variety of mechanisms to temporarily fill vacancies. In the unlikely case of an actual emergency requiring an immediate *vote* by the Senate, the Senate can reconvene expeditiously; and the Constitution itself (art. II, § 3) empowers the President, "on extraordinary Occasions," to "convene both Houses, or either of them."

## III. Recess Appointments to Article III Judgeships Raise Serious Constitutional Questions That Must Be Considered Under Any "Practical" Test.

To the extent the Court decides to apply Attorney General Daugherty's "practical" construction of the Recess Appointments Clause, the resulting functional calculus must reflect whether the nomination in question raises any other serious constitutional questions. Inter-session recess appointments to Article III judgeships at the very least raise such questions, *see* Kennedy *Miller Amicus* Br. 14-20, because a recess appointment to an Article III court presents the "extraordinary situation" of "a direct conflict between two provisions of the Constitution," *United States* v. *Woodley*, 751 F.2d 1008, 1017 (CA9) (en banc) (Norris, J., dissenting), *cert. denied*, 475 U.S. 1048 (1986) – the Recess Appointments Clause and the Good Behavior Clause of Article III, Section 1.[18]

Remarkably, the Government asserts (U.S. *Miller* Opp. 17) that there is "no tension" at all between the two constitutional requirements, because even though recess appointees to the bench are denied the protections of lifetime tenure, the Good Behavior Clause protects them from presidential removal during the term of their appointment! This argument simply ignores the central role of life tenure in protecting the independence of the federal judiciary, and 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).

The Government would subordinate this constitutional "citadel of the public justice and the public security" to Article II's statement that the President has the power "to fill up *all* Vacancies that may happen during the Recess of the Senate." Perhaps it can be argued that that is the proper resolution of the

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[18] Petitioner and *amicus* have not specifically urged this Court to hold that all recess appointments to Article III judgeships are necessarily unconstitutional, although *amicus* believes the dissent in *Woodley* demonstrated the infirmities of such appointments.

constitutional conflict. But at the very least, it raises a very profound question. And if, as the Executive Branch insisted from 1921 to 1993, the President's power to make a particular recess appointment depends upon "practical" judgments, then surely one aspect of that practical judgment must be to heed Hamilton's 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." *Id.* at 469.

## CONCLUSION

For these reasons, as well as those outlined in *amicus*'s brief in *Miller*, the Court should grant the petition in *Miller* and hold this case pending the Court's disposition of *Miller*. If the court of appeals grants the pending motion to disqualify Judge Pryor in *Stephens*, the Court should grant certiorari in this case, vacate the judgments below in this case and in *Miller*, and remand both cases to the court of appeals for reconsideration in light of *Stephens*.

Respectfully submitted,

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