

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	JEFFREY T. GREEN, ESQ.	
4	On behalf of the Petitioners	3
5	PATRICIA A. MILLETT, ESQ.	
6	On behalf of the Respondent	24
7	REBUTTAL ARGUMENT OF	
8	JEFFREY T. GREEN, ESQ.	
9	On behalf of the Petitioners	52
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 PROCEEDINGS

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first in Number 01-10873, Khanh Phuong Nguyen versus the
5 United States and a companion case.

6 Mr. Green.

7 ORAL ARGUMENT OF JEFFREY T. GREEN

8 ON BEHALF OF THE PETITIONERS

9 MR. GREEN: Mr. Chief Justice, and may it please
10 the Court:

11 The issue in this case is whether the
12 participation of a non-Article III judge on an improperly
13 constituted panel of the Ninth Circuit Court of Appeals
14 renders the decision of that panel void.

15 The parties are in agreement that the
16 designation of Judge Munson, who sits for a 10-year term
17 on the Ninth Circuit panel, violated the statute
18 pertaining to designations. But that statute does more
19 work than simply govern designations. That statute
20 protects the Article III character of the circuit courts
21 of appeals by ensuring that only Article III judges are
22 designated to sit on the Circuit courts of appeals.

23 QUESTION: Counsel, may I ask you, in this case, is
24 it possible that a quorum of the court would consist of
25 two members of a three-member panel on the court of

1 appeals?

2 MR. GREEN: Yes. A properly constituted
3 quorum -- or a quorum of a properly constituted panel
4 could -- could be two members. But our objection here,
5 Justice O'Connor, is with the participation of a judge
6 who, with all due respect, had no business being there in
7 the first place.

8 QUESTION: Right. Even -- even though the panel
9 was unanimous.

10 MR. GREEN: Even though the panel was unanimous.

11 QUESTION: Now, if -- if we were to agree with
12 you and it went back, could the same two remaining judges
13 constitute a properly arranged panel and decide the case
14 again?

15 MR. GREEN: No, for -- for two reasons.
16 Principally because the rules that govern quorum call for
17 a -- a two-member panel rather than a three-member panel
18 when there's some emergency that's certified or when
19 there's a disqualification or recusal. So I -- I think
20 there --

21 QUESTION: The same two could be on a new panel,
22 however.

23 MR. GREEN: I would maintain not in this case
24 for the simple reason that it appears that there has been
25 some participation in the preparation of respondent's

1 brief by the Chief Judge, as well as Judge Goodwin. So we
2 would maintain, given that involvement, it would be best
3 to send this back to a newly constituted and
4 properly constituted --

5 QUESTION: Is this -- is this a right that can
6 be waived? No objection was made to this.

7 MR. GREEN: It is a right that can be waived,
8 Justice O'Connor. There's -- there -- that's -- that I
9 think is beyond peradventure. But I don't think there was
10 waiver here because there's no record evidence that
11 indicates that there was a waiver. This Court in New York
12 v. Hill, for example, found a waiver --

13 QUESTION: There was no objection.

14 QUESTION: I'm surprised you say that there can
15 be a waiver. So the Ninth Circuit could routinely send
16 out to its litigants a waiver notice waiving participation
17 of non-Article III personnel and there would be no
18 structural objection? I -- I thought --

19 MR. GREEN: Well, I think --

20 QUESTION: I thought the whole point of -- of
21 your -- of your error analysis is this affects the
22 structural integrity of the court and it can't be waived.

23 MR. GREEN: Well, the additional point I was
24 going to make in response to Justice O'Connor's question
25 is that, in fact, even though there may be consent or even

1 though there may be waiver, that has not stopped this
2 Court from considering these important structural
3 limitations in the past.

4 QUESTION: Well, but what -- what is your
5 position? Can the right be waived or not? I mean, if --
6 if you say the right can be waived, then it's just a
7 question of whether or not they knew or should have known
8 or something like that.

9 MR. GREEN: I think that the decision is void,
10 and so the position -- the position would be that although
11 all Article III provisions can be waived, in this instance
12 because of the nature of the structural error, the consent
13 or the waiver would not matter at all.

14 QUESTION: Well, then -- then your -- counsel
15 could have appeared in the Ninth Circuit fully aware that
16 Judge Munson was sitting, go all the way through the
17 argument and the briefing, never mentioning a word about
18 it, and still the counsel would have the ability to void
19 the thing later.

20 MR. GREEN: I -- I think that's -- that's
21 correct. I think that would be the necessary consequence.

22 QUESTION: And not to void if he -- if he won.
23 Right?

24 QUESTION: And not to void it if he won.

25 QUESTION: That's a nice position to be in. You

1 just sit there, don't make any objection. If you win the
2 case, everything is fine, and if you lose the case, you
3 play dog in the manger and -- and come up here and say,
4 oop, this was an improper panel. That doesn't sound to me
5 the -- the -- like the way the system ought to work.

6 MR. GREEN: But, Justice Scalia, I think that
7 relies upon counsel in that situation being confident that
8 this Court would grant a writ of certiorari. I -- I
9 think that that kind of gamesmanship is really quite
10 far-fetched. This Court does not sit as a court of
11 errors. So even though I as counsel know that that might
12 be error below, I would still have to -- I would have to
13 be relying on the -- the equivalent of legal lightning
14 striking, so to speak, in order to -- to be certain that
15 that error would be corrected.

16 QUESTION: Mr. Green, how does Article III --
17 how can Article III be claimed by your client who was
18 tried not before an Article III court, before a
19 territorial court -- your client has no entitlement to an
20 Article III court. So this seems -- you're addressing an
21 abstract question about the proper composition of a Ninth
22 Circuit panel. Yet, your litigant, your client has no
23 entitlement to an Article III tribunal either at trial or
24 on appeal. So I think that there's a serious problem of
25 whether your clients are positioned to raise the proper

1 composition of an Article III court when they are not even
2 entitled to an Article III court.

3 MR. GREEN: That is true as a general matter at
4 the trial court stage. However, it -- it's very much our
5 position here -- and I would disagree with the premise
6 only insofar as you said as to the court of appeals.
7 Congress vested jurisdiction, pursuant to 28 U.S.C.,
8 section 1291, over appeals from the territories in the
9 United States Circuit Court of Appeals.

10 QUESTION: Yes, but it didn't have to. In other
11 words, a case -- an Article III -- a case in which
12 litigants are entitled to an Article III tribunal then
13 must go to an Article III court. Here Congress did
14 designate the Ninth Circuit to hear these appeals from
15 non-Article III trial courts. But your clients --
16 Congress didn't have to do that with respect to your
17 clients. Congress could have given them an Article IV
18 appellate tribunal and that would have been okay.

19 MR. GREEN: No. I -- When Congress vests
20 jurisdiction in the United States courts of appeals, it
21 does so not only to its -- in accordance not only with its
22 plenary power over the territories under Article IV, but
23 also pursuant to Article III. When Congress creates any
24 inferior court and creates a jurisdiction in those courts,
25 we would maintain that -- that Congress is acting pursuant

1 to Article III. And in this instance --

2 QUESTION: But when Congress created the
3 district court for the Northern Marianas, for Guam, what
4 authority was it exercising?

5 MR. GREEN: It was -- it was exercising its
6 plenary authority pursuant to Article IV.

7 QUESTION: I -- I assume you've got a -- maybe
8 I'm wrong, but I assume you've got a fall-back and that
9 is, okay, if you don't accept -- we don't accept the
10 constitutional position, you're still claiming that you
11 have a legal entitlement to the Ninth Circuit and, hence,
12 to a completely Article III court.

13 MR. GREEN: That -- that's exactly correct.

14 QUESTION: And that could be true if Congress
15 was acting under -- under Article IV.

16 MR. GREEN: That -- that's correct. Even if
17 Congress was acting under Article IV, the statute plainly
18 vests jurisdiction, and it -- and it provides for
19 independent -- independent review of these appeals by an
20 Article III court.

21 To -- to -- as respondent suggests, to -- to
22 argue that a panel of the court of appeals could be
23 specially constituted for these appeals would rewrite
24 section 1291. Section 1291 says in very plain terms that
25 jurisdiction shall vest in the court of appeals.

1 QUESTION: Mr. Green, suppose -- suppose I
2 disagree with you that -- that you -- you can sit through
3 a trial and not object with -- with impunity, and -- and I
4 think that you lose here unless you can show plain error
5 and the usual requirements for avoiding the rule about --
6 about contemporaneous objection. Why do you come within
7 the plain error requirements and, in particular, the
8 requirement that -- that there have -- that -- that the
9 mistake seriously affect the fairness, integrity, or
10 public reputation of judicial proceedings? Why -- why is
11 that the case?

12 You acknowledge that your client could have been
13 tried by non-Article III judges. You acknowledge that the
14 judge who sat, although he was non-Article III, was a
15 Federal judge properly appointed. He could have tried
16 your client. So how can I say that this -- that the
17 proceeding -- yes, there was a -- there was a mistake, but
18 did -- was it -- was it a mistake that seriously affected
19 the fairness, integrity, or public reputation of the
20 proceeding? I -- I just don't see that.

21 MR. GREEN: In the following senses, Justice
22 Scalia, it did affect it.

23 First of all, with respect to fairness, the
24 Ninth Circuit is -- is a court of fully independent
25 review, and I would maintain that precisely because the

1 petitioners here were tried by an Article IV court, it
2 makes sense, and it may actually be constitutionally
3 required that in some sense their -- their appellate
4 review is had by an Article III court.

5 But in any event, Congress statutorily vested
6 jurisdiction in a fully independent Article III court, and
7 as a result of doing so, to put Judge Munson who sits for
8 a 10-year term on a panel as a co-equal participant would
9 affect the fairness of the court. We have a unique --

10 QUESTION: Suppose the panel had included a
11 judge who was holding a recess appointment, a Federal
12 judge who was appointed on a recess basis and therefore at
13 that point didn't have secure tenure?

14 MR. GREEN: I -- I think there would be issues
15 of -- of qualification there, and there might even be --
16 where a -- a recess appointment was -- was held in a -- in
17 a qualified sense, then I would say that was an
18 Article III -- an Article III qualification for an
19 Article III court potentially. If there were issues as
20 to the qualification, we might be in the realm of the
21 de facto officer doctrine.

22 QUESTION: But Justice Scalia's question, at
23 least as I understood it, I think meant for you to
24 concentrate on why -- why this would bring the
25 administration of justice into disrepute, so to speak.

1 MR. GREEN: Well --

2 QUESTION: You -- you make your argument that
3 this was improper, what was done, and the Government
4 agrees. But there's an additional requirement here under
5 plain error.

6 MR. GREEN: Yes, and -- and I would add to my
7 response to Justice Scalia that we have an amicus brief
8 here from Judge Moore who sits in precisely the same seat,
9 so to speak, that Judge Munson sits as a territorial judge
10 in the Virgin Islands. The amicus brief of Judge Moore
11 points out very plainly that he views himself as open to
12 question with regard to his impartiality because he is
13 subject to the hostile treatment -- to use Justice
14 Douglas' phraseology, the hostile treatment of the press
15 and the -- and the glowering disfavor of those who have in
16 their hands the power of reappointment.

17 QUESTION: Gee, he -- he should resign if he
18 feels that way, it seems to me.

19 [Laughter.]

20 MR. GREEN: He wants -- he -- he prefers that
21 you convert him to an Article III judge, so --

22 [Laughter.]

23 QUESTION: I'm sure he does. I'm sure he does.

24 QUESTION: I mean, you -- you have a -- a
25 statutory argument.

1 MR. GREEN: Yes.

2 QUESTION: And you have a constitutional
3 argument.

4 MR. GREEN: Yes.

5 QUESTION: All right. Let's assume away the
6 statutory argument for the moment. There you have the
7 problem -- you're -- you're right that it's contrary to
8 the statute, but maybe it isn't plain error. I'm focusing
9 only on the constitutional argument, and from the point of
10 view of the constitutional argument, I would like you to
11 assume the statute says the opposite. The statute says
12 that this judge can sit.

13 All right. So purposes of a constitutional
14 argument, why can't your party waive -- why can't your
15 clients have waived that? My particular thought is that
16 we're just considering a case in which -- a different case
17 in which it's at least arguable -- there are two sides to
18 the argument -- whether two parties can get together and
19 have a magistrate, who is not an Article III judge, try
20 their case. The consent simply consisting of the fact
21 they went ahead without objection. In that case, there's
22 the statute, but for present purposes, we're assuming the
23 opposite statute.

24 So I mean, if it's at least arguable that you
25 could have consent, shown only by the fact they went ahead

1 to a trial before a magistrate and that would be enough to
2 validate constitutionally the magistrate trying the case,
3 why isn't the fact that you went ahead here
4 constitutionally sufficient to show that you agreed to the
5 trial before -- the -- the appeal that included one judge
6 from Guam?

7 MR. GREEN: Because this Court has -- has said
8 that the claims of structural validity, claims that go to
9 the very validity of the tribunal itself, are claims which
10 invoke institutional interests, not just personal
11 interests --

12 QUESTION: Now, I understand that, but my
13 question is, how is that any more true or less true where
14 what they've done is consent through behavior to trial of
15 a case before a magistrate?

16 MR. GREEN: Well, this Court has never -- this
17 Court has never addressed the question of whether you can
18 have --

19 QUESTION: You think that magistrate trials --

20 MR. GREEN: -- a trial --

21 QUESTION: -- through consent are
22 unconstitutional?

23 MR. GREEN: I'm sorry?

24 QUESTION: No, no. Sorry. I didn't mean to
25 interrupt you. I jumped ahead to -- thinking what you

1 were going to say before listening to what you were going
2 to say.

3 [Laughter.]

4 QUESTION: And I want to hear what you're going
5 to say.

6 MR. GREEN: I do that sometimes too.

7 QUESTION: My fault.

8 MR. GREEN: The Court has -- the Court has never
9 before held that it would be permissible for a -- or for a
10 magistrate to conduct a full trial. And that I would
11 maintain because that also might affect institutional
12 interests could also not be subject to waiver or consent.

13 QUESTION: So are you saying --

14 MR. GREEN: That's -- that argument is
15 certainly --

16 QUESTION: -- if we agree with you then, if we
17 agree with you that consent through behavior is not good
18 enough constitutionally, we would also be saying it is
19 unconstitutional to have consent to a trial before a
20 magistrate. You see, that's quite a -- a -- if you're
21 going to say yes to that, that's a problem

22 MR. GREEN: No, I -- I understand that. But
23 again, I'm -- I'm going to go to the dividing line between
24 Article III interests and Appointments Clause interests
25 and those structural limitations and structural

1 protections in the court system which are not quite the
2 same as the kind of structural trial errors that this
3 Court has addressed in -- in Gomez, that this Court
4 addressed last term in Cotton. Those really are errors
5 that go to the validity of the claim, not necessarily to
6 the validity of the -- or to the very validity of the
7 institutional interests.

8 I think the hypothetical that you posit is
9 actually Glidden, and in Glidden, this Court held that
10 even where the designation of the judges from the Court of
11 Claims and the Court of Customs and Patent Appeals was
12 lawful in that sense, the Court took pains to look and see
13 whether the courts from which those judges were designated
14 were Article III courts.

15 QUESTION: Well, Glidden -- really there was
16 no -- no opinion for the Court in that case.

17 MR. GREEN: No, there wasn't, but the Chief
18 Justice and Justice Clark in that case concurred in the
19 result, and the difference that they had with the majority
20 was that they didn't think that Bakelite and Williams
21 should be deemed overruled, only that they had been
22 superseded by subsequent events, including the grant of
23 lifetime tenure to the judges on the Court of Claims and
24 to the -- to the Court of Customs and Patent Appeals.

25 QUESTION: But they -- they didn't join the

1 opinion, did they, of Justice --

2 MR. GREEN: No. No, they did not. But I -- I
3 would maintain that there was a -- a majority of five on a
4 seven-member Court because two of the Justices had recused
5 themselves. A majority of five.

6 QUESTION: In the Government's brief, they
7 mention a conversation with the Chief Judge of the Ninth
8 Circuit by a former lawyer for your client. I'm curious
9 to know, A, whether you disagree with what is said, and B,
10 how did they get in -- how does that get before us?

11 MR. GREEN: I can't answer the second question.
12 To be frank, I'd like to know the answer to the second
13 question as well.

14 But as to the first question, I really would
15 start with the proposition that I don't think it matters.
16 I -- I don't think it matters here. The conversation,
17 even as reported by respondents, would not in -- in my
18 mind and in our position constitute a waiver or consent.
19 The issue of who hears your appeal is probably so
20 important that it's necessary that that be done somehow in
21 the defendant's presence.

22 Respondent relies on Olano. In Olano, the Court
23 took pains to point out that the defendants were present
24 when the discussions of whether the -- the alternate
25 jurors could deliberate or not. Here I would say this

1 is -- this would be the same sort of issue subject to the
2 same sort of waiver and consent requirements.

3 QUESTION: That's odd in a -- in a circuit that
4 has the vast majority of its appeals decided without any
5 oral argument. You said that the defendant has to be
6 there? Your party has to be there?

7 MR. GREEN: I think for -- he doesn't have to be
8 there, but there would have to be some indication on -- on
9 the record, in addition to the conversation that -- that
10 respondents recite, that -- that Petitioner Nguyen
11 understood that there was -- that -- that she was waiving
12 some important right to a fully independent review by an
13 Article III court.

14 And I want to stress, as I say that, that --
15 that this claim that respondents make with respect to
16 waiver and consent really affects only one of the
17 petitioners here. We have to continue with the -- with
18 the case of Petitioner Phan for whom no oral argument was
19 made.

20 QUESTION: But this important right that you --
21 you were relying on, it's her right only because there
22 happens to be a statute that sets up the Ninth Circuit as
23 the appellate forum. You have recognized that she did not
24 have any independent right to that kind of forum. She
25 could have had -- since the court -- the -- the authority

1 at trial is determined by Article IV, similarly for
2 territory authority on appeal.

3 MR. GREEN: But even if she had only a statutory
4 right in that sense, it's -- it is the case that Congress
5 creates jurisdiction and creates the inferior courts
6 pursuant to Article III under a statute. That doesn't
7 mean that constitutional protections and constitutional
8 rights don't attend the statutory grants of jurisdiction
9 and -- and the activities of the courts that are created
10 pursuant to Article III.

11 There are numerous examples of -- of pure
12 statutory rights. Let's take, for example, the right to
13 appeal. That is merely a statutory right. This Court has
14 not held that that's a constitutional right.

15 QUESTION: Yes, but ordinarily statutory rights
16 can be forfeited if you don't assert them at the earliest
17 time when you reasonably could.

18 MR. GREEN: That is -- that is true. But
19 here --

20 QUESTION: And I'm not using the word waiver.
21 It's not a question of a person consenting, but forfeiting
22 by not raising it at the earliest reasonable stage.

23 MR. GREEN: That is true, but this Court has
24 held in cases that involve similar Article III issues and
25 similar issues of the Appointments Clause that -- that

1 issues of consent and waiver are not dispositive. A
2 fortiori then, I think issues of forfeiture would not be
3 dispositive.

4 QUESTION: I have one question on the merits I'd
5 like to ask you. Let's assume we get to the merits of a
6 constitutional question. I assume for that purpose that
7 the statute says, the Ninth Circuit shall travel to Guam
8 and hear appeals and for purposes of this -- for purposes
9 of this voyage to Guam to hear the appeal, the make-up of
10 the panel will be two Article III judges and one Article I
11 judge. All right? That's the statute.

12 Now, why is that unconstitutional? I cannot --
13 it's very unusual, but I cannot think of any due process
14 right of any Guam person who would be hurt, and I cannot
15 think of -- why it's wrong to ask an Article III judge to
16 take on this additional adjudicatory function with an
17 Article I judge sitting next to him. It's purely
18 adjudicatory. It's not handing out radio licenses. It's
19 not doing anything else that's unsuitable to a judge. Why
20 not? That's the merits of the question, and I'm not
21 saying it has an obvious answer, but I want to hear your
22 answer.

23 MR. GREEN: I'm going to give almost the same
24 answer that -- that we would give as to -- as to our
25 claims. It violates the Appointments Clause.

1 QUESTION: The Appointments Clause which wasn't
2 even raised in the reply brief. I mean, that -- that's --
3 or in the cert petition. Is that all? If it's not the
4 Appointments -- I'll go look at that. Sorry. I just
5 hadn't -- I was -- I was -- thought you were going to say
6 something about the structural Article III problem

7 MR. GREEN: Well, I'm going -- I'm going to
8 there as well --

9 QUESTION: Okay.

10 MR. GREEN: -- and -- and say that -- that if
11 the judge was an Article I judge, that -- if that judge
12 had lifetime tenure, then we would be back in the realm of
13 Glidden again, trying to decide whether that court was
14 actually an Article III court.

15 QUESTION: No, no. I say why -- why do you have
16 to -- the Ninth Circuit is an Article III court.

17 MR. GREEN: Correct.

18 QUESTION: My statute says that for purposes of
19 hearing an appeal from Guam, two -- the Ninth Circuit
20 hears it. The panel shall consist of two Article III
21 judges and one Article I judge. Okay? Now, I want to
22 know what in the Constitution forbids that statute. I'm
23 not saying it's obvious one way or the other. I want to
24 know. And it won't help just to say it forbids it. I
25 want to know why it forbids it.

1 MR. GREEN: It -- it forbids it because of the
2 special nature of Article III courts. This Court has
3 frequently noted that Article III courts are independent.
4 They have constitutional independence. They have
5 constitutional salary protection. Article I judges are
6 not independent in the same way.

7 QUESTION: But this statute, in effect, says --
8 if -- if you take that position, the statute, in effect,
9 says, we don't want an Article III court. Let's -- let's
10 concede that with -- with the one Article I judge sitting
11 on it, it ceases to be an Article III court. But that --
12 the statute says that. What's the matter with that?

13 MR. GREEN: Well, we said in our brief that if
14 Congress were acting to -- in accordance with its plenary
15 power, which -- as I think Justice Breyer's hypothetical
16 poses, that might well be constitutional. I think
17 there --

18 QUESTION: So -- so that if Congress said, all
19 right, we're going to have appeals from the territorial
20 courts in a court consisting of one territorial judge and
21 two Article III judges, however selected, no problem with
22 that constitutionally. Right?

23 MR. GREEN: I -- I think that is a very
24 difficult and open question, and I -- and I think there
25 might be a constitutional issue if we to back to Crowell

1 v. Benson, and -- and Crowell's reaffirmation in -- in
2 Northern -- or rather, Thomas. There is a significant
3 issue as to whether you can have territorial judges
4 exercising precisely the same kind of almost Article III
5 jurisprudence that district -- regular Article III
6 district judges have and -- and not have some sort of
7 Article III review from that.

8 QUESTION: So you -- you would -- you would have
9 the same problem if Congress said we're going to set up an
10 Article IV court of appeals consisting of three Article IV
11 judges. You'd have the same problem?

12 MR. GREEN: I think that -- that claim can be
13 made, as I say, on the basis of Crowell and -- and on the
14 basis of Thomas.

15 QUESTION: Well, the claim can be made, but I
16 mean, would you make it? Do you think that is a sound
17 claim?

18 MR. GREEN: I think -- I think I would make it
19 and I think I would make it for the following reasons.
20 Precisely because, as Justice Ginsburg points out, these
21 Article IV judges, in trying cases and interpreting
22 Federal law, are certainly doing the same kinds of work,
23 exercising the judicial power --

24 QUESTION: Yes, but you could make the same
25 argument about trial judges and -- and Article III

1 district judges. They're doing the same kind of work.
2 They're subject to the same pressures and the same
3 concerns, and if it's okay for the district court, why
4 wouldn't it be okay for an appellate court?

5 MR. GREEN: Well, I -- there is certainly
6 Article III review. I'm not sure that -- that Article III
7 review has been constitutionally mandated in that sense.
8 But where there is no Article III protection in the first
9 place with respect to -- to judges who are exercising that
10 authority at the trial court level, *Crowell v. Benson* and
11 I think *Thomas* indicate that -- that there is a -- there
12 is an open question at least as to whether Article III
13 review is mandated. And this Court said the same in
14 *Guam v. Olsen* on -- on precisely the same issue.

15 I'd like to reserve the remainder of my time for
16 rebuttal.

17 QUESTION: Very well, Mr. Green.

18 Ms. Millett, we'll hear from you.

19 ORAL ARGUMENT OF PATRICIA A. MILLETT

20 ON BEHALF OF THE RESPONDENT

21 MS. MILLETT: Mr. Chief Justice, and may it
22 please the Court:

23 There is no dispute in this case that a
24 statutory violation occurred, and there's also no dispute
25 that no challenge was made to that violation below. The

1 narrow question presented is whether these individual
2 defendants are entitled to reversal under the plain error
3 doctrine --

4 QUESTION: May I ask you a question at the
5 outset? And actually two questions. Some years ago I was
6 in London, and I was asked to sit with a British court on
7 the bench. And I -- I didn't do it, but I often thought,
8 well, I wonder if they would have let me participate in
9 the decision.

10 Supposing here, instead of the Article I judge,
11 you had a British judge and they asked him to sit. That
12 would be one question. Would that make it a different
13 case? And secondly, what if they asked the President of
14 the -- of the Guam Bar Association to sit as a third
15 person on the panel? Would that make any difference?

16 MS. MILLETT: The -- there certainly would still
17 be a statutory violation in those cases absolutely.

18 QUESTION: Yes. The same statutory violation
19 you have here.

20 MS. MILLETT: Absolutely.

21 QUESTION: And would you just say that's
22 harmless error?

23 MS. MILLETT: Well, plain error I think is --

24 QUESTION: Plain error.

25 MS. MILLETT: -- a higher standard. I certainly

1 hope someone would object, but if they don't and assuming
2 that it's a case coming out of the territory again, then
3 we would go back to the same analysis and say whether --
4 could Congress create -- if Congress could create a court
5 that consisted of two judges and Guam --

6 QUESTION: They could create a court with two
7 judges and a British judge.

8 MS. MILLETT: -- and a lawyer --

9 QUESTION: Let's assume they could do it.

10 MS. MILLETT: Yes.

11 QUESTION: But with the statute we have now --

12 MS. MILLETT: Yes.

13 QUESTION: -- what would you do in that case
14 that I asked you?

15 MS. MILLETT: The -- I think our position would
16 be the same as it is here.

17 QUESTION: That would be perfectly okay.

18 MS. MILLETT: I'm putting aside any sort of due
19 process concerns that might apply --

20 QUESTION: Well, wait.

21 QUESTION: Well, that --

22 QUESTION: To get -- to get due process, you --
23 you get to -- you get to that portion of the plain error
24 doctrine which says plain error applies if it seriously
25 affects the integrity or fairness of the proceeding. And

1 if you have the President of the Guam Bar Association
2 sitting on the court, doesn't that seriously affect the
3 fairness of the proceeding in a manner that -- that having
4 a -- an Article IV judge does not?

5 MS. MILLETT: Well, in American Insurance
6 Company versus Canter, which was opinion by Chief Justice
7 Marshall at the beginning of this Nation, dealing with
8 territorial cases, it addressed there a court that
9 consisted of a lawyer and five -- I'm sorry -- a notary
10 and five jurors in a territory --

11 QUESTION: But that -- but that didn't -- that
12 was not a court which in -- in other parts of its duties
13 was not an Article III court. You're saying that you can
14 become an -- be an Article III judge one day and Article
15 IV judge the other day. Or an Article III -- I should say
16 an Article III court one day, an Article IV court the next
17 day. There's simply no authority for that proposition
18 that I know of. Tell me if I'm wrong.

19 MS. MILLETT: Justice Kennedy, I think there are
20 difficult constitutional questions that would be raised if
21 Congress were to prescribe this. I think based on the
22 analysis in our brief, it is a statute we could defend.
23 But there would be difficult constitutional questions if
24 that happened.

25 What happened here was a mistake, not a

1 confrontation between the branches with Congress trying to
2 change our --

3 QUESTION: Well, but your position is there --
4 there could be a waiver. I thought your answer to Justice
5 Stevens was that the parties could waive.

6 Suppose -- suppose that we issued this decision
7 and -- and your position prevails. Everybody agrees that
8 this appointment should not have been made. What's to
9 prevent the Ninth Circuit from just asking the parties to
10 please waive their rights under this case?

11 MS. MILLETT: I think, Your Honor, what would
12 prevent them is a decision from this Court declaring
13 limitations on their statutory appointment power. And if
14 this Court -- and if the Ninth Circuit --

15 QUESTION: No. They waive that. But suppose
16 the parties waive it.

17 MS. MILLETT: And if -- and if the Ninth Circuit
18 were to engage, which is not to be presumed by
19 governmental officials, court or executive -- but were to
20 engage in some pattern of violating the statute, I think
21 this Court's supervisory authorities could take care of
22 that.

23 But in an individual case like this, where there
24 was no assertion of the right, this question would still
25 be the same. Did plain error occur that affected the

1 substantial rights of these particular defendants?

2 QUESTION: Yes, but the interesting case
3 under -- leave plain error out. I mean, you may be right
4 on the plain error.

5 MS. MILLETT: I hope so.

6 QUESTION: But there is, I think, in Justice
7 Stevens' question a very important implication. To get
8 the due process part out of it, assume that the people in
9 front of the court are not American citizens. Indeed,
10 assume it's Judge Wald going to be appointed to the
11 International Court. Now, there's no due process problem

12 So can the Congress appoint a sitting Federal
13 judge to go to a foreign place where it's perfectly all
14 right with the foreign people and hear their case? Now,
15 I'm not sure. But that's, I think, what they're arguing
16 is at issue here.

17 MS. MILLETT: I --

18 QUESTION: Not a due process problem --

19 MS. MILLETT: Yes.

20 QUESTION: -- but a question of what kind of
21 function you can give to a sitting Federal judge because,
22 after all, we have our two sitting Federal judges in the
23 Ninth Circuit. They went out to Guam, in principle. They
24 constituted themselves a different sort of tribunal,
25 including the Article I judge, and no one claims that was

1 unfair to anybody in Guam So there's no due process
2 problem

3 Now, what's the answer?

4 MS. MILLETT: I think, Your -- Your Honor,
5 that -- that we would defend that statute, and we think
6 that it would be permissible, assuming -- I mean, the -- a
7 better way to approach it is that the analysis that would
8 be applied would be as this Court did in *Mistretta* versus
9 the United States. And you would focus on -- and a number
10 of cases. You would focus on what is the nature of the
11 job that's being imposed. It's a judicial function. It
12 wouldn't be asked to do some sort of Article I function.
13 And would doing that function so distract or withdraw from
14 the burden -- I'm sorry -- distract or interrupt the
15 judge's -- or court's ability to function as an
16 Article III court. That would be the analysis.

17 Now, to -- to put a finer point on it, in
18 fact -- and the reason I have to take the position it
19 would be okay, is Congress has enacted a statute,
20 28 U.S.C. 297, which authorizes judges of the Ninth
21 Circuit to go sit in the Freely Associated Compact States,
22 which is *Micronesia* and the *Marshall Islands*, which are
23 not --

24 QUESTION: But that -- but that -- you're --
25 you're -- there are two questions. One is can an

1 Article III judge go to another court. That's not this
2 case. This case is whether a non-Article III judge can go
3 to an Article III court so that the Article III court is
4 on some days an Article III court and some days not an
5 Article III court.

6 I -- I assume that the law of the circuit is
7 something the Ninth -- Ninth Circuit is proud of. Is
8 it going to now have under -- under your theory an --
9 an asterisk by the opinions that are written by
10 non-Article III judges so that that's not so much the law
11 of the circuit? I mean, this -- this is the problem
12 what happens to the court, not what happens to the judge.

13 MS. MILLETT: No, I understand, Justice Kennedy.
14 There are two points to your question. I would like to
15 get to them both.

16 The first is, would it violate the Constitution
17 to -- does it violate the Constitution to have someone
18 who's not an Article III judge sit with the Ninth Circuit
19 on a given day? And our position is that Congress could
20 do it and that we would defend that statute based on the
21 analysis I gave --

22 QUESTION: So you think Congress could -- could
23 authorize a State superior court judge to sit on this
24 Court?

25 MS. MILLETT: No, not on this Court. I think

1 this Court has unique status. The Supreme Court has
2 unique status under the Constitution. There shall be one
3 Supreme Court, and its composition is specifically defined
4 by Article I and nobody in Congress has any authority or
5 power to change that.

6 But if you're talking about the territories,
7 could Congress say they have no right to appeal at all?
8 Yes. Could Congress say your appeal will be within the
9 limit -- as long as it doesn't violate due process or a
10 fundamental right, will be to three State court judges?
11 Yes.

12 Now, the more difficult question is, could you
13 have the combination as we had here? And we think under
14 the analysis of *United States versus Mistretta*, that would
15 be okay, but in -- in particular, as to territorial
16 residents. But even if it's not --

17 QUESTION: But, again, *Mistretta* involved the
18 assignment of a judge to a commission. It didn't involve
19 the delegation of duties to a court. And that's what
20 you're -- and that's what you're saying, and that's quite
21 different.

22 MS. MILLETT: Yes.

23 QUESTION: Under your theory -- forget the
24 Supreme Court -- the Ninth Circuit could, if it was
25 authorized by Congress, have a visiting State court judge

1 every day as the visitor of the day.

2 MS. MILLETT: At least in territorial cases.

3 QUESTION: And that would not impair its
4 Article III character. I -- I just find that very
5 difficult to believe.

6 MS. MILLETT: Well, Justice Kennedy, the way we
7 get to this position is two steps. Is first -- there
8 isn't, obviously, clearly on point, but if you add
9 *Mistretta* to *Morrison* versus *Olson*, which had a delegation
10 of non-Article III functions to -- to -- that's the -- the
11 independent counsel case -- to the special division that
12 appoints the independent counsel -- and so you combine
13 that and you combine that with the precedents on sharing
14 of power with magistrate judges -- those together -- and
15 then add to all of that the very limited constitutional
16 rights to -- to a particular form of tribunal accorded to
17 people in the territories.

18 But I also wanted to get back -- we think that
19 it could be defended. But even if the answer is no, we
20 don't think the constitutional violation would be plain
21 error.

22 But to get back to your binding precedent point,
23 which I think is an important one, it's -- there's three
24 things to keep in mind.

25 First of all, whether this is a binding

1 precedent or not has absolutely no effect on the claims of
2 these individual defendants. Their position would be the
3 same if the decision were unpublished. And I think the
4 Ninth Circuit has itself in a difficult position here. It
5 should address, in the first case, the power of this
6 precedent.

7 And it's not an issue this Court has never
8 considered. In Glidden -- the Glidden Company case, the
9 two concurring Justices specifically said -- they -- they
10 agreed that the court was competent at least -- it was an
11 Article III court -- after -- at least after Congress had
12 passed the statute giving them that status. But if those
13 two concurring Justices, which provided the most narrow
14 ground for decisions in that case, specifically said that
15 they would think -- they would uphold the validity of
16 those decisions that were issued prior to Congress'
17 action. And I think this Court's de facto officer
18 doctrine would speak to whether unchallenged --
19 unchallenged opinions should at some point have --

20 QUESTION: Ms. Millett, I'm surprised at the
21 answers that you're giving, that they're not prefaced by
22 what you said -- I thought you said -- in your brief which
23 was that Congress did not enact a statute that allowed the
24 Ninth Circuit to include one of these judges. The Court
25 shouldn't speculate on the constitutionality of a

1 different statute. The statute that Congress, in fact,
2 enacted said that it was wrong to include this judge, and
3 so the only question should be what is the consequence of
4 the Ninth Circuit having failed to follow the statute that
5 Congress enacted instead of speculating on, oh, suppose
6 Congress had, in fact, enacted -- enacted such a statute.
7 But you -- you seem to be engaging in the -- the
8 hypothetical statute that Congress didn't enact to
9 determine whether it would be constitutional.

10 MS. MILLETT: Well, Justice Ginsburg, we
11 absolutely agree. I was trying to be responsive to
12 questions that were posed. But we absolutely agree that
13 this is not the appropriate case to address limitations on
14 congressional power over appellate review in territorial
15 cases.

16 QUESTION: Well, I think it's -- I think it's
17 sometimes not unusual for us to put a hypothetical case to
18 test your proposition. And the proposition we are testing
19 is whether there is a structural deficiency caused by a
20 territorial judge sitting, either by accident or on
21 purpose, if -- if there's such a -- a structural
22 impairment of its constitutional role, of its
23 constitutional integrity that there must be reversal. And
24 the hypothetical is just simply designed to -- to
25 illustrate the point.

1 MS. MILLETT: Right. Well, Justice Kennedy, if
2 we're talking about now reversal under the plain error
3 doctrine, then the types of structural errors in which
4 this Court has found reversal to be appropriate under the
5 plain error doctrine to violate substantial rights or even
6 to make harmless error analysis inapplicable have -- is a
7 very narrow, small class. And those are -- those are
8 errors --

9 QUESTION: I -- I agree with you that that's --
10 that that's a hard point in -- in the case.

11 Let me ask you. Do we focus just on the rights
12 of the -- of the litigant in this case? Or is it
13 appropriate for us to consider the constitutional
14 integrity of an Article III court? In other words,
15 suppose we thought there was damage to the court, not
16 necessarily to the litigant. Can we take account of that
17 in the plain error --

18 MS. MILLETT: The -- the fourth prong of the
19 plain error analysis is whether the -- the error seriously
20 affected the fairness or integrity of judicial
21 proceedings, which would seem to be responsive to -- to
22 your concern, and that would be the appropriate place to
23 put it.

24 But I think it's important to understand that --
25 that the types of errors that are deemed structural under

1 the plain error -- I'm not talking about structure under
2 Article III -- are things that go to -- and I think that
3 would satisfy prong four -- are things that go to whether
4 the court essentially functioned as a court. Does it --
5 is it consistent with the basic precepts that underlie our
6 judicial system? Was there race discrimination? Was it a
7 public trial where they completely denied --

8 QUESTION: But your position, as I understand,
9 is this -- this right can be waived, and I'm not quite
10 clear on why -- supposing we decide with you in this case,
11 why next month the Ninth Circuit might go back and ask for
12 written waivers from all the lawyers in Guam for -- to
13 repeat the process and put on the president of the bar
14 association as the third person on the panel. Why
15 couldn't they do that?

16 MS. MILLETT: Well, Justice Stevens, we're
17 asking this -- in theory that could happen, but I think
18 we're asking this Court to decide this case on the
19 assumption that judges, like executive officers, attempt
20 to comply with the Constitution and don't intentionally
21 file rulings of this Court or statutes --

22 QUESTION: Well, they're complying with the
23 rule --

24 QUESTION: No, but if it's --

25 QUESTION: -- if there's -- if there's a -- a

1 waivable right there, and they say we think it's in the
2 interest of harmony between the judges and lawyers in the
3 Ninth Circuit to let one of the lawyers sit with us and
4 see how we work here a couple of times.

5 MS. MILLETT: But -- right --

6 QUESTION: And they're going to do this.

7 MS. MILLETT: But, Justice Stevens, before this
8 Court would address whether it's waivable, it would say
9 whether it's wrong. This is isn't that something that was
10 just --

11 QUESTION: Well, you've already admitted it's
12 wrong.

13 MS. MILLETT: Right. And so I think it's one
14 thing to have a right that -- that is -- that is, you
15 know, parties can do with one way or the other and the
16 statute or the law doesn't speak to it. But where this
17 Court -- if this Court were to agree with, I think, both
18 of this in this case that this was wrong, that I don't
19 think we would presume that the Ninth Circuit is going to
20 go -- keep doing -- and -- and the Justice Department
21 isn't going to defend it.

22 QUESTION: No. But it's wrong only if you
23 cannot waive it. In the -- the hypothetical is that --
24 that the waiver is right up front, that the person says it
25 would be wrong without the waiver, but I waive.

1 MS. MILLETT: No, Justice -- Justice Souter. I
2 think you can have errors that are wrong, but the question
3 is whether in -- in -- by not objecting to that, they're
4 entitled to relief. That's different --

5 QUESTION: No, but the -- the question I --

6 MS. MILLETT: -- than whether it's a right they
7 can waive.

8 QUESTION: Excuse me. But I think the question
9 was why will this not -- this practice not be perpetuated
10 if it is waivable. It is not an answer to that to say
11 that -- the other courts will not gratuitously engage in
12 unconstitutional action because, if the waiver is
13 effective, there's no unconstitutional action. So it
14 seems to me that on your position you have to face the
15 fact that if it's waivable, it can properly happen again
16 if there's a waiver.

17 MS. MILLETT: No, Justice Souter --

18 QUESTION: Okay. Let me -- let me --

19 QUESTION: The same --

20 QUESTION: -- hear that with -- with what my
21 follow-up question was going to be. And you can answer
22 them both.

23 Why -- instead of getting into waiver, why don't
24 we say, under the plain error doctrine, look, everybody
25 agrees that it was wrong? Everybody agrees that it was

1 plain. And there is, in fact, a serious question about
2 the integrity of the court when the composition of the
3 court is simply illegal.

4 And so, if you want to stick to waiver, I don't
5 know what the answer is to Justice Stevens' problem
6 The -- the alternative to waiver is to face the fact that
7 there's something seriously wrong with a court which is
8 unabashedly illegally constituted.

9 MS. MILLETT: Justice Souter, when we're talking
10 about waiver here, we are talking about something that is
11 unconstitutional, just like someone could waive their --
12 can waive their right to an Article III tribunal, but if
13 Congress passed a statute that violated it, it would still
14 be unconstitutional for the court to sit in that manner.
15 We don't think this is an unconstitutional issue. But
16 waiver is not the same as it's something the parties can
17 freely take or drop because you have to go back and -- to
18 the step before that and say this is wrong and it won't be
19 done and it shouldn't be done.

20 But if we assume that -- we're -- we're in the
21 context of plain error analysis here. That's why the
22 concept of waiver is being discussed. It's not whether a
23 mistake was made or whether these people have the right
24 freely to choose. They don't, under the statute, have the
25 right freely to choose what the composition of the panel

1 will -- will be. We agree with that.

2 But when no objection was made below,
3 proceedings were completed, an appeal was completed
4 without any objection, they fully and freely participated
5 in that, and it was only after the outcome that they
6 turned around to challenge the -- the composition of their
7 court, that's an important value too.

8 QUESTION: It seems to me the waiver would be
9 stronger if it were in advance instead of afterwards. I'm
10 positing a case where everybody agrees in advance we'll
11 let the -- we'll let this director of tourism of our -- of
12 Guam participate as a judge today because that will help
13 the image of the court and so forth. Everybody agrees
14 we'll let them try it. Why isn't that waiver more --

15 QUESTION: The question isn't -- .

16 QUESTION: -- more binding than the one we have
17 here?

18 QUESTION: And -- and Justice Stevens' question
19 is important because this case has consequence --
20 consequences and it tells Congress what might be done.
21 Congress might say, well, we won't put this burden of
22 waiving a statutory right. We'll take away the statutory
23 right and say that Article -- that -- that Article IV
24 judges, territorial judges, can always sit on Ninth
25 Circuit opinions involving Guam. That's -- that's why

1 we're testing whether or not there's a structural error in
2 what occurs here.

3 MS. MILLETT: And I think this Court's clear
4 rules are that constitutional questions should not be
5 decided unnecessarily. And it's not necessary to
6 resolution of this case to say what would happen if there
7 was a full decision by Congress to enact a statute to
8 make it -- to engage a confrontation between the branches
9 and to analyze whether that would be appropriate --

10 QUESTION: Well, I thought --

11 QUESTION: But -- but it is important because
12 you're saying that it's just a statutory right.

13 MS. MILLETT: And even if it's --

14 QUESTION: And I'm -- and I'm suggesting that it
15 might be more than that.

16 MS. MILLETT: And -- and our position will be
17 even -- we don't think it's a constitutional violation not
18 because of what Congress can do or not do, but because
19 even if it violates Article III, that's no injury to
20 people who have --

21 QUESTION: Right.

22 MS. MILLETT: -- no Article III protections.

23 QUESTION: There clearly is no due process
24 problem. I'm mixed up now.

25 MS. MILLETT: Mm-hmm.

1 QUESTION: Suddenly we're talking about waiver.
2 Maybe I put that in as a -- it's a kind of red herring.
3 It's not a question of waiver. It's a question of whether
4 this is plain error which turns into a question of does it
5 seriously affect the fairness, integrity, or public
6 reputation of judicial proceedings.

7 Now, I take it in all these hypotheticals where
8 the Ninth Circuit is deliberately, which I don't think
9 they'd do, defying a congressional statute, getting
10 everybody to have waivers on the record, which are totally
11 contrary to what Congress said, that it would seriously
12 interfere with the integrity. But in a case where nobody
13 even thought of the issue, where they raised it a lot
14 later, it's all come up by accident, et cetera, and --
15 that maybe it wouldn't interfere with the public
16 reputation. So what has waiver to do with it?

17 MS. MILLETT: That -- no, I -- thank you for
18 saying much more articulately than I've been able to
19 what -- what our point is about waiver versus plain error.
20 And I think that's exactly right. And does -- does this
21 affect the judicial -- judicial integrity has to be
22 analyzed in the context of these individual defendants.
23 The decision should not be if this particular error
24 occurred writ large across the Nation by courts, would it
25 violate judicial integrity --

1 QUESTION: Well, in the --

2 MS. MILLETT: -- as to whether this --

3 QUESTION: -- in -- in our Fulminante case, I
4 think we held that even structural error was subject to
5 harmless error review, that it was not simply an automatic
6 reversal.

7 MS. MILLETT: Absolutely, Mr. Chief Justice.
8 And there -- the -- the types of things that are not even
9 subject to harmless error are not whether a mistake was
10 made under Article III. In fact, in Ex parte Ward, this
11 Court under the de facto -- de facto officer doctrine
12 sustained the actions of the -- of a recess appointment
13 judge. But the question is whether it's something that
14 essentially means this wasn't functioning as a court. It
15 is that profound. This is inconsistent with our --

16 QUESTION: May I -- may I ask you a very
17 practical question that -- this case is now here. So it
18 has gotten some notice. What is the Ninth Circuit
19 currently doing with respect to panels that review
20 decisions from Guam, from Samoa, from Northern Marianas?
21 Is the Ninth Circuit continuing to use territorial judges
22 to fill out their panels, or has it stopped doing it?

23 QUESTION: Please don't tell us that they're
24 asking for express waivers.

25 (Laughter.)

1 MS. MILLETT: I'm grateful to say that we at
2 least don't know of that if they are doing it.

3 But as far as we know, this -- this was an
4 isolated incident. The Ninth Circuit sat in the Northern
5 Mariana Islands just last month, February, and had a full
6 complement of Article III judges. It had never
7 happened -- it had happened back in the '50s, but it --

8 QUESTION: It seems it couldn't be pure accident
9 because the -- the Chief Judge of the circuit would have
10 to designate that judge. So that was an advertent act
11 that she designated this territorial judge.

12 MS. MILLETT: No, there's no doubt. And there's
13 no doubt that -- that a conscious decision to appoint this
14 judge was made, but I think the question went to
15 whether -- as I understood it, went to whether there's an
16 ongoing problem or a policy.

17 QUESTION: Right.

18 MS. MILLETT: There is no policy that we're
19 aware of of doing this. It hadn't happened for 50 years.
20 It hasn't happened since this Court granted certiorari.
21 No reason to think it -- that they're going to do it, at
22 least until this Court rules, and on the assumption that
23 this Court will agree with both parties in this case and
24 tell them that it is wrong to do that, that it won't
25 happen again. And that's --

1 QUESTION: Well, we don't usually talk about a
2 statutory violation as being something that's immoral.
3 It's just a violation of the statute.

4 MS. MILLETT: It's wrong.

5 QUESTION: But it's wrong without a waiver.

6 MS. MILLETT: No, I think --

7 QUESTION: So that doesn't decide much in my
8 view.

9 MS. MILLETT: With respect, Justice Kennedy,
10 it's not that it's -- it's right with a waiver. It is
11 still proscribed by statute. It is still unlawful.
12 The -- the waiver issue is only whether when the -- when
13 an objection wasn't made, are -- are the defendants
14 entitled to the extraordinary relief of plain error.
15 That's not a routine type of waiver. That is -- is it was
16 wrong. We all know it's wrong, and -- and -- but do
17 these -- does it -- did it really hurt the interests
18 either of these defendants or, in this particular
19 proceeding, did it offend judicial integrity.

20 And we think because of the narrow context in
21 which this was decided -- it was a territorial case -- to
22 have a territorial judge sitting with two Ninth Circuit
23 judges, statutorily wrong -- maybe there's debate about
24 whether it would be constitutionally permissible. But it
25 did not make this no longer a court. It did not rise to

1 the level of race discrimination or total --

2 QUESTION: Well, Ms. -- Ms. Millett, may I
3 interrupt you there?

4 I mean, you have said -- and -- and I understand
5 what you're getting at. That does not make this no longer
6 a court. But in -- in a way that sort of begs the
7 question because the one thing that is plain is that this
8 so-called court is not the court that the statute calls
9 for. So far as the statutory definition of the
10 appropriate court to hear this appeal, this court is
11 illegally constituted. And don't we -- even if we confine
12 our concern to this one instance, don't we have a reason
13 to find that that fact does go to the integrity of the
14 proceeding for the purposes of the plain error rule?

15 MS. MILLETT: No, Justice Souter. . Our position
16 is that it would not because you had a quorum of Ninth
17 Circuit judges here, and a quorum is sufficient under
18 28 U.S.C., a quorum of two on this panel, to decide --

19 QUESTION: Yes, but the quorum assumes that
20 you've lost one who was also an appropriately constituted
21 member of the court. And you haven't, so --

22 MS. MILLETT: I'm not going to argue that this
23 type of error is not what Congress was anticipating in the
24 quorum provision. But it's not that far, if you think of
25 what happens when a panel sits and then a judge recuses

1 himself after argument, once the case is submitted. And
2 so they have participated. Their -- obviously their name
3 would not be on the opinion. That would be one
4 distinction. But the fact that the judge sat there and
5 participated and could have had some influence -- it would
6 be unknown -- would not go to the power of the court to
7 act.

8 And this Court has made the distinctions in
9 Ex parte Ward, four Justices in the Freytag, and as far
10 back as Martin versus Hunter's Lessee, the power of the
11 court to act, the Ninth Circuit to act with a quorum here,
12 is to be distinguished from the lawfulness which -- with
13 which they acted. In Ex parte Ward, a -- a recess
14 appointment Federal judge, who lacked tenure, by -- by
15 definition lacked salary guarantees, sat.

16 QUESTION: Mm-hmm. Yes. Yes.

17 MS. MILLETT: And this Court said that this
18 court, whichever district court it was -- I forget, I'm
19 sorry -- had jurisdiction. The wrong person being there
20 exercising it goes to the lawfulness with which the court
21 acted.

22 And so I think because we had a quorum here, the
23 Ninth Circuit had power to act. It acted unlawfully in
24 the exercise of that power, but --

25 QUESTION: So long as it -- but -- but if -- if

1 power to act is the criterion, then your answer would have
2 to be the same if the director of tourism had been
3 substituted in this case because the power of the Ninth
4 Circuit would be there to act, a quorum of Article III
5 judges would be sitting, and -- and so I take it your
6 answer would have to be the same.

7 MS. MILLETT: My answer on jurisdiction would be
8 the same. My answer on -- on the --

9 QUESTION: No, but I thought your answer to the
10 plain error question of integrity was essentially an
11 answer that relied heavily on jurisdiction. And the
12 jurisdictional answer was, this is the Ninth Circuit. It
13 has power to act. There's a quorum of Ninth Circuit
14 judges. And that would be the -- that would be the same
15 if the third member were not an Article IV judge but had
16 been the director of tourism.

17 MS. MILLETT: To clarify, Justice Souter, I was
18 talking specifically about power. On prong four, I think
19 we would have a much harder row to -- row to hoe if we had
20 to show that it did not affect integrity to have a
21 director of tourism sit on a panel, but we --

22 QUESTION: Well, I -- I agree --

23 MS. MILLETT: But --

24 QUESTION: -- but -- which is simply to say
25 there are other concerns than the jurisdictional concern.

1 MS. MILLETT: Right. Right, certainly prong
2 four goes far beyond jurisdiction. But what makes this
3 not offend judicial integrity is that territorial
4 residents who have no right to an Article III compliant
5 tribunal had their case heard by three Federal judges. It
6 was heard fairly. They had no disqualifying
7 constitutional due process biases. They rendered a
8 unanimous decision on overwhelming evidence in the face of
9 highly discretionary challenges.

10 And so -- and -- and you have combined with that
11 what Justice Scalia referred to in discussing with -- with
12 counsel for petitioner, the -- the counter-concern that
13 there's a judicial integrity problem with allowing people
14 to proceed before a court and then wait until there's an
15 adverse outcome to challenge who it was that rendered that
16 decision.

17 And so taking all of those factors together in
18 the particular, peculiar context of territorial residents,
19 we don't think this offended judicial integrity or the
20 reputation of these proceedings. They had three judges,
21 not a judge and a layperson, not a judge and a child.
22 They had three judges. There was no unconstitutional
23 bias. There was full consideration of their arguments.
24 They had every opportunity, if they didn't want this
25 panel, to raise an objection, but they didn't. They took

1 it. They went with the judgment, and it's now, under the
2 plain error doctrine, I think too late in the day to
3 object to the composition of the panel.

4 QUESTION: Given how small the community is, the
5 bar is, in Guam and the Northern Marianas, it puts counsel
6 in a somewhat difficult position for the judge to say, oh,
7 do you mind if I sit on this case even though I'm not
8 qualified. So I -- I'm not sure the waiver was all that
9 voluntary. There's nothing in the record on the point.

10 MS. MILLETT: Justice Kennedy, I think defense
11 counsel are frequently -- had to -- have to make difficult
12 decisions. They have to decide whether they want to
13 alienate the jury by objecting to evidence. Do they want
14 to alienate the judge by seeming too obstreperous? Do
15 they want to seem like they're hiding something from the
16 jury? They have to make these difficult decisions, but
17 the whole point of an adversarial system is that defense
18 counsel is charged with doing that and you have to strike
19 balances.

20 And if on balance they decided, which I don't
21 think counsel should think about their own reputation in
22 defending their clients, but if they decided it would be
23 better not to make the panel angry, I'm not going to
24 object, that's a strategic choice that they've made. But
25 at the same time, they may have made the decision, this is

1 a good panel for us. We don't know.

2 There's nothing inherently prejudicial. Unlike
3 most harmless error or plain errors where it's inherently
4 prejudicial to a defendant to admit a confession or
5 suppress evidence about the circumstances of the
6 confession, there's nothing inherently prejudicial
7 ex ante, up front about a particular judge sitting. And
8 so there's important --

9 QUESTION: Thank you, Ms. Millett.

10 Mr. Green, you have 3 minutes remaining.

11 REBUTTAL ARGUMENT OF JEFFREY T. GREEN
12 ON BEHALF OF THE PETITIONERS

13 MR. GREEN: This case was not decided in that
14 kind of narrow context. It is not the case that court of
15 appeals from -- or decisions of the court of -- the Ninth
16 Circuit Court of Appeals from Guam or the Northern Mariana
17 Islands are narrow decisions, or somehow limited. In Cruz
18 versus the United States, the Ninth Circuit decided a
19 question about the transportation of firearms in
20 interstate commerce and -- and created a split on the
21 basis of a Guam appeal with the Sixth Circuit.

22 Judge Munson, in effect, would be deciding cases
23 that would apply to district judges in Montana. I -- I
24 think that is, in part, answer to your question, Justice
25 Breyer, about the -- about the Article I judge.

1 With respect to --

2 QUESTION: Why isn't the answer to that you just
3 treat them like unpublished decisions? They have no
4 precedential value.

5 MR. GREEN: I think actually the Ninth Circuit
6 couldn't do that because of its Article III nature. I --
7 I think that would be a -- an exceedingly odd thing to do
8 for the --

9 QUESTION: But Article III courts do issue
10 unpublished -- quote, unpublished. Of course, they are
11 published, but non-precedential.

12 MR. GREEN: That's true, but we know the issue
13 of -- of unpublished decisions is -- is changing, and
14 nonetheless there may be some knowledge, intra-circuit
15 knowledge, about how these issues were treated. These
16 judges are, as we discussed earlier, interpreting Federal
17 law. This was a case about laws that arose from -- from
18 18 U. S. C.

19 And, Justice Souter, I would point out that with
20 respect to integrity here, I -- I think it would be -- it
21 would have more integrity, oddly enough, for the court to
22 have sat with the director of tourism of Guam. Now, I say
23 that because Judge Moore points out in his amicus brief
24 that -- that he is open to attack on the ground of whether
25 he's impartial to the Government. And -- and here Judge

1 Munson was sitting on a case in which the Government was
2 the opposing party.

3 I would add too that this is the kind of case
4 where the Court can -- can articulate a high wall, a
5 bright line for Congress. When Congress vests
6 jurisdiction in an Article III court, that means
7 Article III review. That decision or that principle is
8 implicit in Glidden, and this case represents the missing
9 piece of that puzzle.

10 If there are no further questions.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Green.

12 The case is submitted.

13 (Whereupon, at 11:02 a.m., the case in the
14 above-entitled matter was submitted.)

15

16

17

18

19

20

21

22

23

24

25