ORAL ARGUMENT NOT YET SCHEDULED

Case Nos. 12-1115 and 12-1153

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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NOEL CANNING, A DIVISION OF THE NOEL CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

_____

On Petitions for Review and Order of the National Labor Relations Board

_____

BRIEF FOR AMICUS CURIAE LANDMARK LEGAL FOUNDATION AND CONNIE GRAY, KAREN MEDLEY, JANETTE FUENTES AND TOMMY FUENTES IN SUPPORT OF PETITIONER NOEL CANNING, A DIVISION OF THE NOEL CORPORATION, FOR REVERSAL OF THE DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

_____

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Landmark Legal Foundation ("Landmark") and Connie Gray, Karen Medley, Janette Fuentes and Tommy Fuentes (as represented by Glenn M. Taubman and William L. Messenger) hereby certify:

(A) Parties and Amicus: The parties who appeared before the National Labor Relations Board ("NLRB") are: Noel Canning, a Division of the Noel Corporation ("Noel Canning"), and Teamsters Local 760. Landmark and Connie Gray, Karen Medley, Janette Fuentes and Tommy Fuentes are amici in this Court, in support of the Petitioner, Noel Canning.

(B) Rulings under Review: The ruling under review is the Decision and Order of the NLRB in Noel Canning, a Division of the Noel Corporation, and Teamsters Local 760, Case No. 19-CA-32872 which is reported at 358 NLRB No. 4 (Feb. 8, 2012).

(C) Related Cases: In addition to the instant case, Counsel know of several other cases that raise the issue of the constitutionality of President Obama's January 4, 2012 recess appointments to the NLRB - D.C. Circuit: *Center for Social Change, Inc. v. NLRB*, Case Nos. 12-1161 and 12-1214; *Milum Textile Services v. NLRB*, Case No. 12-1235; and *Stewart v. NLRB*, Case No. 12-1338; Seventh

Circuit: *Richards v. NLRB*, Case No. 12-1973 and *Lugo v. NLRB*, Case No. 12-1984 (consolidated).

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1, Landmark Legal Foundation, ("Landmark") certifies that no publicly-held company owns 10% or more of it and that it has no parent companies as defined in the Circuit Rule. Landmark is a non-profit, charitable, legal foundation that provides free legal aid to individuals.

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GLOSSARY

"CRS" means Congressional Research Service.

"Landmark" means the amicus, Landmark Legal Foundation.

"Noel Canning" means the Petitioner Noel Canning, a Division of the Noel Corporation.

"NLRB" or "Board" means the National Labor Relations Board.

INTEREST OF AMICI[1]

Amicus Landmark Legal Foundation "Landmark" is a public interest law firm committed to preserving the principles of limited government, separation of powers, free enterprise, federalism, strict construction of the Constitution and individual rights. Specializing in constitutional litigation, Landmark maintains offices in Kansas City, Missouri and Leesburg, Virginia.

Amicus Connie Gray is an individual employee who is the decertification petitioner in a case pending before the National Labor Relations Board ("NLRB" or "Board"), Case No. 25-RD-061324. She has a direct interest in seeing that her decertification case is heard by a properly constituted NLRB with a valid quorum of Members. She filed a Motion for Recusal with the Board to challenge President Obama's January 4, 2012 recess appointments, but that Motion was denied on May 21, 2012.

Amici Karen Medley, Janette Fuentes and Tommy Fuentes are parties to unfair labor practice cases that were pending before the NLRB, Case Nos. 28-CB-7048, 28-CB-7062 and 28-CB-7063, respectively. These Amici filed a Motion for

[1] Pursuant to D.C. Circuit Rule 29, *Amici* report that both the NLRB and Noel Canning consent to the filing of this brief. Additionally, pursuant to Fed. R. App. P. 29(c)(5), Amici state that (1) no party's counsel authored the brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (3) no person - other than the Counsel for the Amici or their employers - contributed money that was intended to fund preparing or submitting this brief.

Recusal with the Board to challenge the recess appointments, but that Motion was denied on July 9, 2012. The Board also ruled against these Amici on the merits of their claims, *Smith's Food & Drug Centers, Inc.*, 358 NLRB No. 66 (July 9, 2012), and their cases are now pending before this Court on a Petition for Review. *Stewart et al. v. NLRB*, D.C. Cir. Case No. 12-1338 (filed Aug. 1, 2012). These Amici's Petition for Review will raise the same challenge to the NLRB recess appointments that is being raised in the instant case, *Noel Canning v. NLRB*. Amici, therefore, have a direct interest in ensuring that this Court reaches the proper result in this case because the decision here will have a strong precedential effect on the outcome of their appeal in Case No. 12-1338. *Judicial Watch, Inc. v. FBI*, 522 F.3d 364, 369-70 (D.C. Cir. 2008) (holding that one panel of this Court cannot overrule the decision of a prior panel).

All Amici support the argument of Petitioner Noel Canning and supporting Intervenors that President Obama's January 4, 2012 recess appointments to the NLRB were unconstitutional, and that the Board ,therefore, lacked a valid quorum to issue decisions in this or any other case. *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010). Amici take no position on the other issues raised by Noel Canning, although they appear meritorious.

ARGUMENT

I. THE BOARD LACKED A QUORUM TO ISSUE THE DECISION AND ORDER IN THIS CASE BECAUSE THE THREE MEMBERS' RECESS APPOINTMENTS WERE UNCONSTITUTIONAL.

A. Introduction And Background

Noel Canning challenges the constitutionality of President Obama's January 4, 2012 recess appointments to the NLRB on two grounds: 1) that the Senate was not in recess at the time of the appointments (Petitioner's Brief at 29); and 2) that the Recess Appointments Clause (U.S. Const. art. II, § 2, cl. 3) does not allow recess appointments for short intra-session adjournments. (Petitioner's Brief at 41.) Amici agree with these points and do not duplicate them. Rather, Amici expand upon these points and add additional material for the Court's consideration as it reviews the text and history of the Recess Appointments Clause and related constitutional provisions.

Under *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), and pursuant to 29 U.S.C. § 153(b), the Board lacks authority to issue orders or decisions absent a quorum of three members. The Board has had no valid quorum since January 3, 2012. Prior to that date, the Board consisted of Chairman Pearce, and Members Becker and Hayes. The remaining two seats were vacant, having been so for a considerable time. One of these seats became vacant in August 2010, when Peter Schaumber's term expired. The other seat became vacant in August

2011, when Wilma B. Liebman left the Board.[2] When Becker's term expired on January 3, 2012, the Board was left without its requisite quorum of three members.[3]

On December 15, 2011, President Obama nominated Sharon Block and Richard Griffin to fill longstanding vacancies on the Board. The Senate has not confirmed those nominees.[4]

On December 17, 2011, the Senate agreed by unanimous consent to remain in session for the period of December 20, 2011 through January 23, 2012. 157 Cong. Rec. S8783-8784 (Dec. 17, 2011) (Sen. Wyden). The Senate simultaneously agreed to conclude the first session of the 112th Congress on December 30, 2011 and begin the second session of the 112th Congress on January 3, 2012 (as required by section 2 of the Twentieth Amendment to the U.S. Constitution). *Id.* This decision to continue in session was necessary to discharge the Senate's constitutional obligations under both the Twentieth Amendment and

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[2] A complete list of Board membership and terms appears on the NLRB's webpage, Members of the NLRB since 1935, http://www.nlrb.gov/members-nlrb-1935 (last visited Aug. 28, 2012).

[3] *White House Announces Recess Appointments of Three to Fill Board Vacancies* (Jan. 4, 2012), http://nlrb.gov/news/white-house-announces-recess-appointments-three-fill-board-vacancies.

[4] White House Office of the Press Secretary, *Presidential Nominations and Withdrawal Sent to the Senate* (Dec. 15, 2011), http://www.whitehouse.gov/the-press-office/2011/12/15/presidential-nominations-and-withdrawal-sent-senate.

Article I, Section 5, Clause 4 of the U.S. Constitution, which prohibits one House of Congress from adjourning for more than three days without consent of the other. The House did not consent to a Senate recess or adjournment of longer than three days.

Nevertheless, only three weeks after sending the Block and Griffin nominations to the Senate – and before the relevant Senate Committee, let alone the full Senate, could take action on their nominations – the President decided to ignore and bypass the Senate's advice and consent responsibilities. On January 4, 2012, he announced his intent to "recess appoint" Block and Griffin, as well as Terence Flynn, as Members of the Board.[5] On January 9, 2012, Block, Griffin and Flynn were sworn in and purported to take office as members of the Board.[6]

The nominations of Griffin, Block, and Flynn were never confirmed by the Senate – i.e., the Senate has never given its advice and consent to their nominations under Article II, Section 2, Clause 2 of the U.S. Constitution.

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[5] White House Office of the Press Secretary, *President Obama Announces Recess Appointments to Key Administration Posts* (Jan.4,2012), http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts.

[6] *New Board Members Take Office, Announce Chief Counsel* (Jan. 10, 2012), http://nlrb.gov/news/new-board-members-take-office-announce-chief-counsels.

B. Recess Appointments Are Only Constitutionally Permissible During Intersession Recesses Of Congress.

The challenged recess appointments are invalid because they did not occur during an intersession recess of the Senate. An "intersession recess" is the break between sessions of Congress, whereas an "intra-session recess" is more akin to a temporary adjournment. The presidential power to make recess appointments is limited in its application to intersession recesses only. As the President attempted to fill these vacancies during a brief adjournment, they are not constitutionally permissible.

The first session of the 112th Congress concluded on December 30, 2011. Congress convened the second session of the 112th Congress on January 3, 2012. 158 Cong. Rec. S1 (Jan. 3, 2012). The Senate continued to hold pro forma sessions through January 20, 2012. 158 Cong. Rec. S11 (Jan. 20, 2012). As President Obama's "recess appointments" of Block, Griffin and Flynn (announced on January 4, 2012) were not made during an intersession recess, they constitute an improper exercise of the recess appointments power.[7]

The Recess Appointments Clause provides, in relevant part, "The President shall have the power to fill Vacancies that may happen during *the* Recess of the

[7] As the Congressional Record indicates, these appointments were not made during any type of recess, inter or intra. Instead, they were made during a period where the Senate was holding regular and periodic pro forma sessions. 158 Cong. Rec. S1 (Jan. 3, 2012).

Senate…" U.S. Const. art. II, § 2, cl. 3 (emphasis added). The preceding clause confers joint appointment power upon the President and the Senate. U.S. Const. art. II, § 2, cl. 2. Envisioned as a joint power to be exercised by both the President and the Senate, the Framers believed it would be dangerous to vest complete appointment power with one person. Even Alexander Hamilton, a proponent of strong presidential authority, acknowledged the benefits of obligating the consent of the Senate: "[the cooperation of the Senate] would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice." Hamilton, *The Federalist No. 76*.[8] He continued, "[giving the Senate a role in making appointments] would be an efficacious source of stability in the administration." *Id.*

Thus, each Branch has a specific role in filling the ranks of the Executive Branch. The division of the appointments power "accomplished two goals: responsibility – from the President's power of nomination ; stability – from the Senate's power of confirmation." Michael A. Carrier, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?* 92 Mich. L. Rev. 2204, 2225 (1994).

[8] *See also*, Hamilton, *The Federalist No. 67* (discussing limitations on the appointments power and stating, "The ordinary power of appointment is confined to the President and the Senate jointly…"

The Framers understood that it would be improper to obligate the Senate to be in continual session. As intersession recesses sometimes lasted as long as nine months, the Framers drafted the Recess Appointments Clause to ensure vacancies would not result in crucial offices being left empty. Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause* 52 UCLA L. Rev. 1487, 1491; *Mackie v. Clinton*, 827 F. Supp. 56, 58 (D.D.C. 1993) ("It is apparent that the purpose of the Recess Appointments Clause was to prevent disruptions in the functioning of the government occasioned by periods in which the Senate is unable to perform its role of advice and consent.")

Indeed, the purpose of the Recess Appointments Clause was not to grant the President a tool to evade the confirmation process. Rather, the power ensured that critical offices would not be left vacant during the long intersession recesses regularly occurring during the Framer's era.[9] Moreover, the Framers intended the recess appointments power "to be nothing more than a supplement to the other, for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate." Hamilton, *The Federalist No. 67*.

Commentators contrast the extensive debates surrounding the general appointments power with the lack of debate regarding the recess appointments

[9] *See The Federalist No. 67*, where Hamilton argues the purpose of the clause was to "fill [appointments] without delay."

power and have logically concluded the recess appointments power to be "auxiliary in nature and that [the Framers] believed it would not affect the Constitution's meticulously developed system of checks and balances." Carrier, 92 Mich. L. Rev. at 2225.[10] If the Framers had intended an expansive reading of the term recess, they would have engaged in more extensive debate concerning the issue. *Id.* ("[To give the President this power] seems unlikely in light of the minimal impact the Framers intended the clause to have on the system of checks and balances.")

In fact, for most of the nation's history, recess appointments were generally limited to intersession recesses. *Id.* at 2210. During the first 150 years of this nation's history, there are only two documented cases of a President making an intra-session recess appointment. *Id.* at 2209. Prior to 1901, the only intra-session recess appointments were during President Andrew Johnson's term – an administration that issued no written opinions arguing for the constitutionality of intra-session recess appointments. Rappaport, 52 UCLA L. Rev. at 1572. In fact, in first addressing the issue, Attorney General Knox held that recess appointments could only be made during intersession recesses. *23 Op. Att'y. Gen. 599,* 1901 U.S. AG LEXIS 1, at *3 (1901).

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[10] *See* Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry,* 29 Harv. J.L. & Pub. Pol'y 103 (2005) for a thorough discussion of the extent to which the Framers drafted, debated and finalized the Appointments Clause.

It was not until the modern era that presidents began to make a significant number of appointments during intra-session recesses. Accordingly, "Frequent presidential use of the recess appointment power during intra-session recesses began in 1947." Carrier, 92 Mich. L. Rev. at 2212. President Eisenhower made "nine intra-session recess appointments, during recesses as short as thirty-five days." *Id.* at 2213. Subsequent presidents "have used, with increasing frequency, the recess appointments power during intra-session recesses of decreasing length." *Id.* at 2216.

Appointing Block and Griffin to the NLRB constitutes an arbitrary use of this power. The President's actions run counter to the text and intent of the Recess Appointments Clause. It is incumbent upon this Court to limit the use of the recess appointment power to intersession recesses to restore the careful balance contemplated by the Framers. Such action ensures both the Senate and the President have an equal role in the confirmation process and respects the integral role of both institutions.

C. The Text Of The Recess Appointments Clause Limits Application Only To Intersession Recesses.

A textual analysis of the Recess Appointments Clause indicates that it applies only to intersession recesses. First, permitting intra-session recess appointments can result in appointments for longer periods, possibly twice as long

as intersession recess appointments, based on Article II's language that recess appointments "shall expire at the End of their *next* Session." U.S. Const. art. II, § 2, cl. 3 (emphasis added). Allowing recess appointments for intra-session breaks makes no sense, as it permits the President to unilaterally appoint federal officers for even longer periods of time than he would otherwise be allowed under the clause. Such a reading undermines the checks and balances built into the process because it provides incentives for the President to bypass the Senate whenever possible.

Second, the singular term recess suggests the Framers intended limiting the use of recess appointments for the intersession recess only. The clause does not provide for use of the power during *recesses*. The Framers understood that Congress would enter recesses during sessions, as evinced by Article I's language pertaining to instances where one "House of Congress adjourns 'during the Session of Congress.'" Carrier, 92 Mich. L. Rev. at 2211. These recesses, however, were comparatively brief and rare. *Id.* at note 36 (citing U.S. Gov't. Printing Office, 1993-1994 Official Directory, 103d Congress at 580-81 (1993)). The Framers did not exercise the option of pluralizing the term and eliminating any question as to whether the power could be used during any and all recesses. Instead, they used the singular "recess" because they were referring to the break between sessions of Congress.

Moreover, the Constitution's use of the terms "recess" and "adjournment" suggests the Framers intended the term recess to mean intersession recess. Appearing in five clauses in the Constitution, the term "adjournment" refers to both intersession and intra-session recesses. For example, the reference to "adjournment" in the presentment clause refers to all recesses as both types could interfere with "the President's constitutional right to take 10 days to return a bill to the Congress." Rappaport, 52 UCLA L. Rev. at 52. Article I, Section 5's language referencing the "Three Day Adjournment" refers to intra-session recesses and can also be applied to intersession breaks. "If a proposed adjournment were to end the session and bring about an intersession recess, that would presumably also be covered by the Clause, as an adjournment 'during the session… for more than three days.'" *Id.*

In contrast, the constitutional clauses referencing recesses do not apply to both adjournments and recesses. "Adjournment" applies to both intersession and intra-session recesses. Unlike the meaning of "adjournment," "recess does not necessarily encompass intra-session and intersession breaks. This indicates the Framers believed recess to apply in a more narrow contest." *Id.* at 54.

Finally, the Recess Appointments Clause's use of the definite article "the" indicates the Framers intended limiting this power to intersession recesses. When advising President Theodore Roosevelt on the propriety of appointing an appraiser

to the port of New York during the December 1901 holiday adjournment, Attorney General Knox noted, "It will be observed that the phrase is 'the recess.'" *23 Op. Att'y. Gen. 599,* 1901 U.S. AG LEXIS 1, at *3. As stated previously, intra-session recesses were rare. Knox, in distinguishing the terms, noted that "adjournment" "means a merely temporary suspension of business from day to day" where "the recess means the period after the final adjournment of Congress for the session, and before the next session begins." *Id.* at *5. He concluded, "[T]his period following the final adjournment for the session which is the recess during which the President has power to fill vacancies by granting commissions which shall expire at the end of the next session." *Id.* at *6. Thus, "any intermediate temporary adjournment is not such recess, although it may be a recess in the general and ordinary use of that term." *Id.*

D. The Vacancies That The President Attempted To Fill Did Not "Happen" When The Senate Was In Recess In Accordance With Article II, Section 2, Clause 3 Of The U.S. Constitution, So There Were No Vacancies For Which Recess Appointments Could Be Made.

The challenged recess appointments are also invalid because the NLRB vacancies the President attempted to fill in January 2012 did not "happen" during a Senate recess, so those pre-existing vacancies could not be filled via recess appointments. The Constitution allows the limited recess appointments power to

be used only when the vacancy actually "happens" or occurs during a recess, not whenever a vacancy "happens to exist" during a recess.

As stated previously, Article II, Section 2, Clause 3 of the Constitution states: "[t]he President shall have Power to fill up all Vacancies *that may happen* during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." (Emphasis added). The clause does not say that the President may fill all "vacancies that may happen to exist" whenever a Senate recess occurs.

Here, "recess" appointee Block was named to a Board seat vacated by a confirmed Board member on December 16, 2004, Flynn was named to a Board seat vacated by a confirmed Board member on August 27, 2010, and Griffin was named to a Board seat that was vacated by a confirmed Board Member on August 27, 2011. None of those vacancies "happened" during a recess of the Senate.

The Constitution's plain text states that a vacancy can only be filled by a recess appointment if the vacancy actually occurred "during the Recess of the Senate," such as through death or resignation of an officeholder. The NLRB vacancies President Obama attempted to fill arose months or longer before the purported Senate recess. As they did not "happen" during any recess, the appointments are unlawful.

While some modern authorities interpret the Recess Appointments Clause to mean that recess appointments are allowed for pre-existing vacancies, i.e, those vacancies that "may happen to exist" at the time of the recess, *United States v. Allocco*, 305 F.2d 704, 709-14 (2d Cir. 1962) (endorsing the "happen to exist" construction); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc), other authorities disagree.[11]

As in other cases, "[t]he words used in the Constitution are to be taken in their natural and obvious sense, and are to be given the meaning they have in common use unless there are very strong reasons to the contrary." *Okanagan v. United States (The Pocket Veto Cases)*, 279 U.S. 655, 679 (1929), citing *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), and *Tennessee v. Whitworth*, 117 U.S. 139, 147 (1886). The words in the Constitution are clear: only "Vacancies *that may happen* during the Recess" can be filled without the Senate's advice and consent.

[11] *Woodley* considered whether the Recess Appointments Clause applied to Article III judicial vacancies. A sharply divided en banc panel of the 9th Circuit held that it did. In dicta, the majority noted that recess appointments may be made to fill any Executive Branch vacancy regardless of when the vacancy occurred. 751 F.2d 1012. Otherwise, it would lead to "the absurd result that all offices vacant on the day the Senate recesses would have to remain vacant at least until the Senate reconvenes" and would result in governmental "paralysis." *Id.* Melodrama aside, the majority's concerns for a fully functioning Executive Branch are not borne out by the modern era of federal agency management. More importantly, as the *Woodley* dissent forcefully pointed out – neither historical practice nor extended vacancies supersede the Constitution: "The fundamental principle of separation of powers must prevail over a peripheral concern for governmental efficiency, and core constitutional values must prevail over uncritical acceptance of historical practice." *Id.* at 1033 (Norris, J., dissenting).

The words do not contemplate the filling of vacancies "that may happen to exist" during a recess.

Indeed, an interpretation of the Recess Appointments Clause that allows the filling of any "Vacancies that may happen to exist" defeats our constitutional system of checks and balances and negates the *joint* power of appointment vested in the Executive and Legislative Branches. A "Vacancies that may happen to exist" interpretation allows a President to wait for an inevitable recess, and then unilaterally appoint nominees *seriatim*, thereby permanently writing the Senate out of the confirmation process.[12] This is something the Framers surely opposed. *See generally Bowsher v. Synar*, 478 U.S. 714, 721-27 (1986) (discussing importance of separation of powers and checks and balances). Precisely because the Framers wanted to diffuse governmental power and ensure the Senate's check on the President's appointments power, they did not grant the President the broad power to fill any vacancies that "may happen to exist" during a recess.[13]

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[12] Here, for example, recess appointee Block was appointed in place of a prior recess appointee, Member Becker, who was himself appointed in place of a prior recess appointee, Dennis Walsh. *Id.*

[13] *See* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487 (2005); *Schenck v. Peay*, 21 F. Cas. 672, 674-75 (E.D. Ark. 1869) (recess appointment unlawful where the vacancy "existed, but did not happen, during the recess of the senate"); *In re Dist. Att'y*, 7 F. Cas. 731, 734-38 (D.C. Pa. 1868) (doubt cast upon such appointments because they defeat the system of checks and balances and allow the Executive Branch to aggrandize power); *but see Allocco*, 305 F.2d at 709-14 ("happen to exist" construction

The constitutional text outlines only two limited circumstances when federal appointments can be made without the Senate's advice and consent: 1) Congress may authorize the appointment of inferior officers by other governmental branches;[14] and 2) the Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3. Precisely because these are *exceptions* to the normal joint power of appointment preferred by the Founders, they must be narrowly construed. Rappaport, 52 UCLA L. Rev. at 1501-46.

The nation's first Attorney General, Edmund Randolph, authored an opinion denying the President's authority to fill vacancies that arose during a Senate session and continued into its subsequent recess. See Edmund Randolph, *Opinion on Recess Appointments* (July 7, 1792), in 24 *The Papers of Thomas Jefferson*, 165-67 (John Catanzariti et al. ed. 1990) (explaining that the Recess Appointments Clause must be "interpreted strictly" because it serves as "an exception to the general participation of the Senate"). Furthermore, Randolph concluded that the power must "be considered as an exception to the general participation of the Senate" because the "[s]pirit of the Constitution favors the participation of the Senate in all appointments." *Id.* Alexander Hamilton likewise believed "[i]t is

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endorsed); *Woodley*, 751 F.2d at 1012-13 (same).

[14] *See* U.S. Const. art. II, § 2, cl. 2; *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868 (1991) (Congress has authority to grant the Chief Judge of the United States Tax Court power to appoint inferior trial judges).

clear [that] … the President cannot fill a vacancy which happens during a session of the Senate." *Letter from Alexander Hamilton to James McHenry* (May 3, 1799), 23 *The Papers of Alexander Hamilton* 94, (Harold C. Syrett ed., 1976).

Justice Joseph Story, the preeminent constitutional scholar of the day, agreed. In his *Commentaries on the Constitution*, Story focused on the causal nature of the word "happen," and whether a newly created post could count as a "vacancy." He stated, "By 'vacancies' they understood to be meant vacancies occurring from death, resignation, promotion, or removal. The word 'happen' had relation to some causality, not provided for by law." Joseph Story, *Commentaries on the Constitution*, § 1553, *available at* http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s58.html. *See also The Federalist No. 67* (Alexander Hamilton) ("vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay").

Other Framers and their disciples agreed that the recess appointments power was limited to vacancies that "happen" during the recess. Rappaport, 52 UCLA L. Rev. at 1518-37, citing, *inter alia*, St. George Tucker and George Washington.

Admittedly, while some modern commentators and courts have approved the broader "vacancies that happen to exist" interpretation, the Supreme Court has never ruled on that issue. *Woodley*, 751 F.2d at 1033 (en banc) (Norris, J.,

dissenting); *Evans v. Stephens*, 387 F.3d 1220, 1228 (11th Cir. 2004) (Barkett, J., dissenting).

In short, a plain reading of the constitutional text and the intention of the Founders supports the narrow interpretation of "vacancies that may happen" urged here. Under this view, President Obama's recess appointments were invalid because the vacancies he attempted to fill pre-dated by many months the existence of the purported Senate recess. Moreover, if the words "vacancies that may happen" in the Recess Appointments Clause are not given their plain meaning, then the Clause swallows the basic rule of joint appointments and allows a president to fill virtually all federal offices via *seriatim* recess appointments, without a shred of advice from, or consent of, the Senate.

E. The Constitution Authorizes The Senate To Make Its Own Rules Of Proceedings, And The President Must Defer To Those Rules. The Senate Was Not In Recess, And The President Was Not Entitled To Disregard The Senate's Pro Forma Sessions.

The President's claim that a Senate recess existed on January 4, 2012 is inconsistent with the Constitution's Recess Appointments Clause, which requires that the Senate actually be in recess when such appointments are made. U.S. Const. art. II, § 2, cl. 3. *See Evans* 387 F.3d at 1224 (en banc) (a "legitimate Senate recess" must exist in order to uphold a recess appointment); *see also Wright v. United States,* 302 U.S. 583 (1938) (concerning "pocket vetoes" and congressional

recesses); and *Kennedy v. Sampson,* 511 F.2d 430 (D.C. Cir. 1974) (intra-session adjournments do not qualify as Senate recesses sufficient to deny the President the authority to veto bills, provided that arrangements are made to receive presidential messages).

Here, the Senate was not in recess, and there exists a fundamental constitutional reason why the President lacked authority to override the Senate's determination that it was not in recess. The Constitution is explicit that "Each House may determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. Accordingly, the Senate has the sole authority to declare when it is, and is not, in session. Relying on this provision, the Supreme Court has long recognized that where "[t]he Constitution has prescribed no method of making [a] determination" as to a question of congressional procedure, *United States v. Ballin*, 144 U.S. 1, 6 (1892), "all matters of method are open to the determination of the house [of Congress in question], and it is no impeachment of the rule [chosen by the House of Congress] to say that some other way would be better, more accurate, or even more just." *Id*. at 5.

In *Ballin*, a party challenged the legality of certain tax legislation, claiming that Congress enacted it without a valid quorum. The Supreme Court noted that the legislation was an "enrolled bill . . . found in the proper office, . . . authenticated and approved in the customary and legal form." *Id.* at 3. Citing Article I, Section 5,

Clause 3 of the U.S. Constitution regarding each House's duty to keep records of its proceedings, the Court held that Congress' official journals "must be assumed to speak the truth" regarding those proceedings, which may not be impeached in any manner. *Id*. at 4. Thus, statements in congressional journals are conclusive evidence of the presence of a quorum and the passage of a bill, notwithstanding the possibility of an error in count. *Id*.

The application of *Ballin* to this case is straightforward. When the Senate votes to remain in session for a period of time, and its official records indicate that it was regularly gaveled into session over that period, that is conclusive evidence that the Senate was in session—and not in recess—for that period. President Obama is not exempt from the ruling in *Ballin*. Entries in the official journals of the Senate and House of Representatives must be accepted by the other branches of government as accurate, and cannot be second-guessed by the courts or the Executive Branch. *Id.*; *see also United States v. Smith*, 286 U.S. 6, 35 (1932) (in a dispute over the effect of the Senate's rules on a nomination, the Supreme Court stated that "It is essential to the orderly conduct of public business that formality be observed in the relations between different branches of the government charged with concurrent duties; and that each branch be able to rely upon definite and formal notice of action by another.").

Thus, "[i]t is for the Senate and not for the President of the United States to determine when the Senate is in session." 158 Cong. Rec. S113 (Jan. 26, 2012) (Sen. Lee). The President gets to decide whether to make a recess appointment, but the Senate gets to decide whether to recess. *See Humphrey's Ex'r v. United States*, 295 U.S. 602, 630 (1935) ("The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there.").

In fact, as recently as August 2, 2012, Senator McConnell introduced into the Congressional Record an analysis conducted by the nonpartisan Congressional Research Service ("CRS") discussing whether "a pro forma session of the Senate might be interpreted as accomplishing some further end in addition to meeting the constitutional requirement that neither chamber recess or adjourn for extended periods without the permission of the other." 158 Cong. Rec. S5954 (Aug. 2, 2012). CRS concludes that "While the primary purpose of a pro forma session of the Senate may be to comply with the constitutional strictures on adjournment, a pro forma session *is not materially different from other Senate sessions*." Id.

Indeed, when Congress makes rules that govern its proceedings, the President must, like the courts, defer to the Legislative Branch. *See Mester Mfg. v. INS*, 879 F.2d 561, 571 (9th Cir. 1989) ("The Constitution . . . requires extreme deference to accompany any judicial inquiry into the internal governance of

Congress."). Courts honor Congress' rules under the enrolled bill rule by treating the attestations of the two houses as "conclusive evidence that [a bill] was passed by Congress," even in the face of evidence demonstrating otherwise. *Public Citizen v. U.S. Dist. Court for Dist. of Columbia*, 486 F.3d 1342, 1343 (D.C. Cir. 2007) (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 673 (1892)); *see also OneSimpleLoan v. U.S. Sec'y of Educ.*, 496 F.3d 197 (2d Cir. 2007). This doctrine reflects "the respect due to a coordinate branch of government," *Marshall Field*, 143 U.S. at 673, and underscores the very limited inquiry courts make where Congress' rules of proceedings are at issue.

For similar reasons, the D.C. Circuit has held that the meaning of ambiguous congressional rules is nonjusticiable; were it otherwise, "the court would effectively be making the Rules—a power that the Rulemaking Clause reserves to each House alone." *United States v. Rostenkowski*, 59 F.3d 1291, 1306-07 (D.C. Cir. 1995).

Here, by unanimous consent recorded in the Congressional Record, the Senate voted to remain in session for the period December 20, 2011 through January 23, 2012. *See* 157 Cong. Rec. S8783-8784 (Dec. 17, 2011) (Sen. Wyden). The Senate's schedule provided for a series of pro forma sessions at three and four day intervals. The Congressional Record indicates that those sessions actually

occurred. *See* 158 Cong. Rec. S1 (Jan. 3, 2012), S3 (Jan. 6, 2012), S5 (Jan. 10, 2012), S7 (Jan. 13, 2012), S9 (Jan. 17, 2012), and S11 (Jan. 20, 2012).

This should end the matter. The Senate, the sole judge of its own proceedings under *Ballin*, unanimously declared itself to be in session. As it was not in "recess," the President had no power to appoint federal officers without the Senate's advice or consent under Article II, Section 2, Clause 2 of the Constitution. The President may have been displeased that the Senate chose to overlook some of his nominations during this period, but that is its prerogative. And the President certainly had no right to declare unilaterally that the Senate's decision not to take up his appointments for a span of a mere few weeks created a recess.

Indeed, if the President has the power to determine for himself when the Senate is in recess, he can declare it in recess on a whim, during any lunch break, weekend, or even when he believes that the Senators' debate has stalled and they are not working efficiently and effectively as a body. That would clearly violate the Constitution, which makes each congressional chamber the master of its own rules. U.S. Const. art. I, § 5, cl. 2. Because the Senate did not declare itself in recess and there exists no evidence that the House granted permission for such a recess, the Senate was not in recess. Therefore, the President's purported NLRB appointments are invalid.

The situation here underscores the Founders' wisdom in giving each House of Congress exclusive authority to make its own rules, precisely to preserve the checks and balances built into the system. Here, the President purported to tell the Senate what it must do to bring itself into session and retroactively declared a series of Senate sessions to be a constitutional nullity for purposes of the Recess Appointments Clause. U.S. Const. art. II, § 2, cl. 3. But the Rulemaking Clause (art. I, § 5, cl. 2) does not permit such Executive Branch interference in the Senate's internal procedures any more than it would permit similar interference by the courts. *Cf. Nixon v. United States*, 506 U.S. 224 (1993). To hold otherwise would threaten Congress' ability to function as an independent branch of government, and undermine the checks and balances that the Founders "built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam). The judiciary has "not hesitated to invalidate provisions of law which violate this [separation of powers] principle," *Morrison v. Olson*, 487 U.S. 654, 693 (1988), citing *Buckley,* 424 U.S. at 123. The same principles must govern here. *See also Bowsher* ,478 U.S. at 714, (discussing importance of separation of powers and checks and balances).

The challenged recess appointments cannot stand. The President improperly arrogated to himself the power to declare the constitutional significance of the

Senate's proceedings, notwithstanding the prerogative to make its own rules. *See* U.S. Const. art. I, § 5, cl. 2. He then exercised that power to improperly declare that the Senate was in recess—even though that declaration would, if valid, have put the Senate in violation of two independent constitutional provisions—namely, its obligations to the House, under Article I, Section 5, Clause 4, and to the nation, under the Twentieth Amendment. These actions violate our Constitution's most fundamental separation of powers principles, which prohibit one branch of government from overriding the determinations of another branch about its own proceedings.

CONCLUSION

The Petitions for Review should be granted. The Board's February 8, 2012 Order should be reversed because the recess appointments to the NLRB were unconstitutional and, therefore, no lawful quorum existed to issue the Order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Richard P. Hutchison, hereby certify that this Brief complies with the type-volume limitations set forth for Amici Curiae briefs in Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6383 words. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Times New Roman 14-point type face.

Respectfully submitted,

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September 26, 2012

CERTIFICATE OF SERVICE

I hereby certify that on 26 of September, 2012, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for District of Columbia Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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