51 Louisiana Avenue, N.W.
Washington, D.C. 20001.2113
Telephone: +1.202.879.3939
Facsimile: +1.202.626.1700

Direct Number: (202) 879-5485
njfrancisco@jonesday.com

[ORAL ARGUMENT HELD ON DECEMBER 5, 2012]

January 23, 2013

VIA CM/ECF

Mark Langer, Clerk
U.S. Court of Appeals for the District of Columbia Circuit
333 Constitution Ave., NW
Washington, DC 20001

Re: *Noel Canning v. NLRB* (Nos. 12-1115 & 12-1153)

Dear Mr. Langer:

This responds to the Government's recent letter. Foremost, embracing history dooms the Government's position. Other than Andrew Johnson, no President attempted intrasession recess appointments until 1921, and even then they were very rare until the Carter Presidency. *See Note – Recess Appointments*, 92 Mich. L. Rev. 2204, 2212-14 (1993-1994); *Kennedy v. Sampson*, 511 F.2d 430, 441-42 (D.C. Cir. 1974) (practice never occurring "prior to 1867" is "relatively modern phenomenon" deserving no weight). Against this, the Government cites two examples that involve a different constitutional provision and that occurred decades before even the Executive endorsed intrasession recess appointments. *See The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487, 1547 (2005).

The Pay Act, moreover, was a Congressional attempt to resist Executive aggrandizement by curbing the worst abuses of the Clause. *Id.* at 1543-46. Resistance is hardly acquiescence. Besides, separation-of-powers protects individual rights. The political branches cannot bargain those protections away. *See Kennedy*, 511 F.2d at 441-42 ("consistent practice cannot create or destroy an executive power").

Further, Petitioner challenges the Board's quorum generally and thus challenges the general validity of the "recess" appointments. Petitioner proposed a narrow basis to invalidate these appointments. If the Court declines to adopt that basis, however, then it must determine whether intrasession appointments to fill preexisting vacancies are constitutionally sound. They are not. Both the intersession and "happen during" limitations on the recess appointments power were fully briefed by the parties and amici, were discussed extensively at argument, and are thus "presented to the Court for decision." (Or.Arg.Tr.13.)

Finally, the Government has conceded that if "the Constitution gives the President this authority only in intersession" then "we lose." (Or.Arg.Tr.45.) That is correct. *See* Petitioner's Opening Brief at 72. Indeed, if "the January break was part of an intersession recess beginning in December," it would mean (1) the December 23, 2011 legislation is invalid; (2) the Senate has repeatedly violated the Adjournment Clause; and (3) each "recess" appointee's term expired on January 2, 2013, such that all have served unlawfully since that day. That is precisely why the Government has expressly foresworn this position.

Very truly yours,

/s/ Noel J. Francisco
Noel J. Francisco

/s/ Gary E. Lofland
Gary E. Lofland

cc: All counsel (via CM/ECF)

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2013, I e-filed the foregoing with the CM/ECF system. Service will be made automatically on counsel for all parties through the CM/ECF system.

/s/ Noel J. Francisco
Noel J. Francisco