No. 12-1281

IN THE
Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
NOEL CANNING, A DIVISION OF THE NOEL CORP.,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

AMICUS CURIAE BRIEF OF THE SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, JOHN BOEHNER, IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS*

Amicus Curiae, John Boehner, is the Speaker of the United States House of Representatives. As Speaker of the House, he represents the House of Representatives' interest in upholding the Constitution. The Speaker has a unique constitutional role in protecting the House's institutional prerogative in setting legislative recesses and adjournments. The President's determination that Congress was in recess on January 4, 2012, was in error and violated the separation of powers because it tread upon Congress's authority under Article I, § 5, cl. 2 ("the Rulemaking Clause") to determine its own rules of meeting. Executive interference with the House of Representatives' powers under the Rulemaking Clause threatens the House's ability to function independently as an integral part of the Legislative Branch of government, and it is therefore Amicus' duty to resist such interference.

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*Blanket consents to the filing of amicus briefs have been filed by Petitioner and Respondents. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Framers of Constitution intended each of the three branches of government to resist the abuse of power by any one of them. The President's decision to overrule Congress's determination that it was in session on January 4, 2012 is such an abuse of power and the Speaker of the House, on behalf of the House of Representatives, has a constitutional duty to oppose the President's trespass on the Legislative Branch's domain.

The power to set the times of its meetings and adjournments is reserved, with minor exception, to the Senate and the House of Representatives. For purposes of the recess appointments clause, a recess occurs only when the Senate and House agree to pass concurrent resolutions that they are in recess. No such resolutions were passed, and Congress was therefore in session on January 4, 2012.

The President's usurpation of Congress's authority to establish when it is in session threatens the constitutional boundaries of the pocket veto. If the President can unilaterally declare when Congress is in recess, he can also deprive Congress of its constitutional authority over pocket vetoes.

ARGUMENT

I. Under the Separation of Powers Doctrine, the Executive and Legislative Branches of Government Are Co-Equal and the President Has No Authority to Overrule Congress's Determination that It Is in Session.

The stability of our Constitutional government rests in large part on the doctrine of the separation of powers. The Constitutional Convention of 1787 adopted the doctrine "not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

The Framers' rationale for the separation of powers derived from their observations of human nature and its tendency to accrete power. James Madison wrote:

> This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.

Federalist No. 51, at 323-24 (James Madison) (G.P. Putnam's Sons ed. 1908).

The British crown's abuses demonstrated the evils of power concentrated in one sovereign and fueled the Framers' desire to depart from the British model. In the Declaration of Independence, one of the Colonists' grievances was that the King had "called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures." Thus, although the King had expansive authority to "prorogue or even dissolve the Parliament," the Constitution grants the President very limited power to adjourn Congress "only in the single case of

disagreement about the time of adjournment." [1] Federalist No. 69 (Alexander Hamilton) (G.P. Putnam's Sons ed. 1908); *Barnes v. Kline*, 759 F.2d 21, 31 n.20 (D.C. Cir. 1984) ("The *only exception* to Congress's control over its own adjournments is in case of a disagreement between the two houses 'with Respect to the Time of Adjournment,' in which case the President 'may adjourn them to such Time as he shall think proper.'" (emphasis added) (quoting U.S. Const. art. II, § 3)) *vacated on other grounds by Burke v. Barnes*, 479 U.S. 361 (1987).

The tripartite government the Framers designed granted largely co-equal powers between the Executive and Legislative Branches. And as Thomas Jefferson wrote, "[e]ach house of Congress possesses th[e] natural right of governing itself, and consequently of fixing its own times and places of meeting, so far as it has not been abridged by . . . the Constitution."[2] Through the Rulemaking Clause, the Framers delegated to each House of Congress the

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[1] Article II, Section 3 of the Constitution states that the President "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, *and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper*." U.S. Const. art. II, § 3 (emphasis added).

[2] Thomas Jefferson, Opinion on the Constitutionality of the Residence Bill of 1790 (July 15, 1790), *available at* http://press-pubs.uchicago.edu/founders/ print_documents/a1_5s14.html.

authority to "determine the Rules of its Proceedings."[3]

Congress's interpretation of its own rules is "beyond the challenge of any other body," including the President. *United States v. Ballin*, 144 U.S. 1, 5 (1892) (concluding that the Court must give great weight to the Legislative Branch's construction of its own rules and the power to determine its own rules is "continuous."). "The respect due to a co-ordinate branch of government," *Marshall Field & Co. v. Clark*, 143 U.S. 649, 673 (1892), requires the President to defer to Congress's determination of when it is in session. Here, the President did not defer to Congress's interpretation of its own rules; he substituted his own views, declaring by executive *ipse dixit* that Congress was not in session. The President's disregard of Congress's determination that it was in session on January 4, 2012 assails the Framers' design.

A. As Speaker of the House, it is Amicus's Constitutional Responsibility to Protect the House of Representatives' Institutional Prerogative Under the Rulemaking Clause to Determine When it is in Session.

Essential to the separation of powers is each branch of government's vigilance against

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[3] U.S. Const. art. I, § 5, cl. 2.

encroachment by the other branches. James Madison wrote:

> the great security against a gradual concentration of the several powers in the same [branch of government], consists in giving to those who administer each [branch] *the necessary constitutional means* and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.

The Federalist No. 51, at 323-324 (James Madison) (G.P. Putnam's Sons ed., 1908).

Addressing executive encroachment upon the Legislative Branch's powers, this Court observed that the "Framers regarded the checks and balances that they had 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). Although the Constitution divides power over government appointments between the Senate and the President, the structural interests protected by the Appointments clause belong to the entire Republic. *Freytag v. Comm'r*, 501 U.S. 868, 880 (1991). Thus, as the House's sole elected leader, Amicus has the constitutional responsibility to resist

the President's encroachment on the Legislative Branch's exclusive authority to determine when it is in recess.

B. For Purposes of the President's Recess Appointment Power, a Recess Exists Only When the House and Senate Agree That the Senate is in Recess.

Amicus agrees with the court of appeals' holding that the term "the Recess" in the Recess Appointments Clause is properly construed to mean only inter-session recesses, and not intra-session recesses. *Canning v. NLRB*, 705 F.3d 490, 506 (D.C. Cir. 2013). Should this Court determine, however, that intra-session recesses are included within the scope of the Recess Appointments Clause, in keeping with current House rules [4] governing recess and adjournment, the President's recess appointments on January 4, 2012 are still invalid.

As the current Administration argued to this Court, intra-session recess appointments are only permissible when Congress is in recess for a period of more than three days. Transcript of Oral Argument at 50, *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010) (08-1457).[5] The Office of Legal Counsel has consistently advised the Executive Branch to wait for

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[4] *See* House of Representatives Rule 1, Cl. 12(c).

[5] *Available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1457.pdf.

a recess of at least 10 days before making a recess appointment. *See, e.g.*, *Executive Power—Recess Appointments*, 33 Op. Att'y Gen. 20, 21-22, 25 (1921) ("Daugherty Opinion") (a recess of "even 10 days" cannot constitute the recess intended by Recess Appointments Clause); Memorandum from Jack L. Goldsmith to Alberto Gonzalez, *Re: Recess Appointments in the Current Recess of the Senate*, at 3 (Feb. 20, 2004); *Recess Appointments—Compensation (5 U.S.C. § 5503)*, 3 Op. O.L.C. 314, 316 (1979); *Recess Appointments*, 41 Op. Att'y Gen. 463, 468 (1960).

A recess of more than three days requires the consent of both the House and the Senate. "Neither House, during the Session of Congress, shall, without Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting." U.S. Const. art. I, § 5, cl. 4. "There are: (1) adjournments of three days or less, which are taken pursuant to motion; . . . (2) adjournments of more than three days, which require the consent of the Senate; . . . and (3) adjournments sine die, which end each session of a Congress and require the consent of both Houses."[6]

When the House and the Senate decide to adjourn for more than three days, each body will adopt a

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[6] John V. Sullivan, U.S. House of Representatives, 112th Cong., *House Practice: A Guide to the Rules, Precedents, and Procedures of the House* 2 (2011), *available at* http://www.gpo.gov/fdsys/pkg/GPO-HPRACTICE-112/pdf/GPO-HPRACTICE-112.pdf.

concurrent resolution allowing either or both bodies to recess for longer than three days. Here, neither the House nor the Senate adopted a concurrent resolution allowing either to adjourn for more than three days during this period. Accordingly, because the House and the Senate did not agree to recess, the President had no basis to claim that the Senate was in an intra-session recess. He therefore lacked any power to make recess appointments during this period, including on January 4, 2012, when he made the appointments in question.

As the Court of Appeals held, "[a]llowing the President to define the scope of his own appointments power would eviscerate the Constitution's separation of powers." 705 F.3d at 504.

II. The Executive's Unconstitutional Assertion of Authority Over Legislative Recesses Threatens the Constitutional Boundaries of the Pocket Veto.

Upholding the President's unconstitutional attempt to declare when Congress is in session would invite a similar effort to usurp Congress's authority over pocket vetoes. Because pocket vetoes are triggered by Congress's decision to adjourn, the President could claim a pocket veto of disfavored legislation with a declaration that Congress has adjourned.

The Constitution provides that any bill not returned by the President "within ten Days (Sundays

excepted)" shall become law "unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law." [7] The Framers carefully circumscribed the veto power of the Executive Branch and rejected proposals by James Wilson and Alexander Hamilton for an absolute executive veto.[8]

A pocket veto is subject to Congress's constitutional authority, made possible when Congress waives its right to reconsider legislation by adjourning before the President returns the bill. H. Rept. No. 93-1021, 93rd Cong., 2nd sess. 2 (1974). In *Wright v. United States,* 302 U.S. 583, 596 (1938), the Court held that an intra-session adjournment of Congress did not prevent the President from returning a bill he disapproved, as long as appropriate arrangements are made by the originating House for the receipt of Presidential messages during the adjournment. The validity of a pocket veto is governed not by the type or length of adjournment but by whether the conditions of the adjournment impede the actual return of the bill. *Barnes v. Kline*, 759 F.2d 21, 30 (D.C. Cir 1985).[9]

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[7] U.S. Const. art. I, § 7.

[8] 1 The Records of the Federal Convention of 1787, 96-104 (Max Farrand ed., New Haven, Conn.: Yale University Press, 1937), *available at* http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=1057&Itemid=27.

[9] *See also* House Practice, *supra* note 6, at 917.

The President has attempted to circumvent the rules governing pocket vetoes. On December 30, 2009, the President claimed that he "pocket vetoed" House Joint Resolution 64 (hereinafter "H.J. Res. 64"), a short-term continuing resolution of appropriations that was presented to him on December 19, 2009. The President acted on the joint resolution on the ninth day of the ten-day period during which he could approve it. Citing *The Pocket Veto Case*, 279 U.S. 655 (1929), he returned it to the House with a memorandum of disapproval stating that he wanted to leave no doubt that the joint resolution was being vetoed as unnecessary.[10]

At that point, the House and Senate were "adjourned sine die but with provision for reassembly of the first session and with the certainty of reassembly for the second session. Thus, each body was in a position to reconsider the vetoed measure in light of the President's objections, either in the first or the second session."[11] House rules made the Clerk available to receive his message, and in fact the Clerk did receive his message.[12]

The President's attempt to force a pocket veto of H.J. Res. 64 was unconstitutional. As explained in a

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[10] 156 Cong. Rec. E941 (daily ed. May 26, 2010) (Extension of Remarks, Pocket Veto Power, Letter from Speaker Pelosi and Republican Leader Boehner to President Obama).

[11] *Id.*

[12] *Id.*

letter from Speaker of the House Nancy Pelosi and Republican Leader John Boehner to the President, the President's return of H.J. Res. 64 with objections "was inconsistent with the most essential characteristic of a pocket veto, to wit: retention of the parchment by the President for lack of a legislative body to whom he might return it with his objections."[13] The President's successful return of H.J. Res. 64 proved that he was not prevented from returning it. "[T]he Constitutional concern that a measure not become law without the President's signature when an adjournment prevents a return veto does not arise when the President is able to return the parchment to the originating House with a statement of his objections."[14]

Other Presidents have also asserted pocket veto authority by employing what is known as a "protective return" veto, whereby a bill is not signed, but returned to Congress with a "memorandum of disapproval."[15] "In such instances, the House has regarded the President's actual return of the bill without a signature as a return veto and proceeded

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[13] *Id.*

[14] *Id.* On January 13, 2010, the House reconsidered the joint resolution in light of the President's objections and voted by the yeas and nays on the question of overriding or sustaining the veto. The House sustained the President's return veto. *Id.*

[15] House Practice, *supra* note 6, at 917.

to reconsider the bill over the President's objections."[16]

In conclusion, the President's valid exercise of pocket veto authority is contingent on Congress's decision when to adjourn, and the President possesses no independent pocket veto power. To allow the President to decide the conditions for Congressional adjournment would expand the pocket veto to a kind of absolute veto that the Framers rejected.

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[16] *Id.* For a joint letter from Speaker Foley and Minority Leader Michel to the President, and a response thereto by Attorney General Thornburg, on the use of pocket veto authority during an intra-session adjournment, see 101st Cong. Rec. H3 (daily ed. Jan. 23, 1990). For joint letters from Speakers and Minority Leaders reiterating their predecessors' concerns in this area, see 106th Cong. Rec. 18594 (2000); 106th Cong. Rec. 26023 (2000); 110th Cong. Rec. E2197-98 (daily ed. Oct. 2, 2008); and 111th Cong. Rec. E914-15 (daily ed. May 26, 2010).

For discussions of the constitutionality of inter-session or intra-session pocket vetoes, see Edward M. Kennedy, *Congress, The President, and The Pocket Veto*, 63 Va. L. Rev. 355 (1977); Robert J. Spitzer, *The 'Protective Return' Pocket Veto: President Aggrandizement of Constitutional Power*, 31 Presidential Stud. Q. 720 (2001); and *Hearings on H.R. 849 Before the Subcomm. on the Legislative Process of the House Comm. on Rules*, 101st Cong. 140-42 (1989).

CONCLUSION

For the foregoing reasons, Amicus urges this Court to affirm the judgment below.

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