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.
RESPONDENTS.

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

BRIEF OF JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT NOEL CANNING

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INTEREST OF THE *AMICI CURIAE*[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan educational organization that seeks to promote transparency, accountability and integrity in government and fidelity to the rule of law. Judicial Watch regularly monitors significant developments in the court systems and the law, pursues public interest litigation, and files *amicus curiae* briefs on issues of public concern. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as an *amicus curiae* in this Court on a number of occasions.

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs as a means to advance its purpose and has appeared as an *amicus curiae* in this Court on a number of occasions.

Amici have an interest in promoting the rule of law and are concerned the President's alleged Recess appointments to the National Labor Relations Board

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici curiae* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters reflecting this blanket consent have been filed with the Clerk.

("NLRB" or "Board") disrupt the deliberate balance of powers intended by the Framers.

The issue before the Court is of great importance to the principles secured by the separation of powers that are engrained in the very fabric of the Constitution. Recess appointments by past Presidents on political whims have created confusion; however, these past abuse are irrelevant because the text is clear as to its meaning. The recess appointment process exceeds political interest of any one administration and requires application consistent with the Framers' intent that the Senate act as a constitutional check on the President's power to appoint.

SUMMARY OF THE ARGUMENT

The President's alleged Recess appointments to the NLRB are unconstitutional for the primary reason that the Senate was in session at the time of the purported appointments. The Senate alone can determine when it will hold session in conformity with its obligations and delegated powers by the Constitution. Its order to convene on the specified dates through January 20, 2012 is within its authority, and the Executive cannot deem the sessions invalid. The principles of separation of powers and checks and balances on which the Constitution was based prohibit it. Additionally, the textual interpretation of Article II, §2 and the Framers' original writings before the ratification of the Constitution demonstrate that the Recess Appointment Clause was intended to preserve the Senate's advice and consent power, rather than limit it, and Recess

appointments are only appropriate during an intersession recess.

ARGUMENT

I. THE CONSTITUTIONAL TEXT IS CLEAR AND CONSISTENT WITH THE FRAMERS' INTENT THAT RECESS APPOINTMENTS ARE RESTRICTED TO *THE RECESS* BETWEEN SENATE SESSIONS.

The Framers debated the appointment power at the constitutional convention, and what checks and balances it should include, if any. In their effort to persuade ratification of the Constitution, the Framers explained their intent to form a government of checks and balances.

> In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; *and in the next place oblige it to control itself*. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. 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 of the subordinate distributions of power, *where the constant*

> *aim is to divide and arrange the several officers 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.*

(emphasis added) The Federalist No. 51 (A. Hamilton or J. Madison). The Framers' regard for checks and balances was similarly evident in the construction of the appointment powers contained in section 2 of Article II. "The ordinary power of appointment is confined to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate." The Federalist No. 67 (A. Hamilton). Alexander Hamilton, who vigorously defended the cause of ". . . an energetic executive," asked "[t]o what purpose then require the co-operation of the Senate?" The Federalist 70 (A. Hamilton); The Federalist No. 76 (A. Hamilton). He further explained:

> It 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, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.

The Federalist 76 (A. Hamilton).

Hence, the question of constitutionality of the President's purported Recess appointments to the NLRB surpasses the interest of a few appointments to the Board. The stakes are high to the public, as well as to the structural principles of separation of powers when presidential appointments attempt to eliminate the constitutional checks and balances established in the appointment clause. As the Court noted in *Freytag v. Commissioner,* "[t]he structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic. 501 U.S. 868 (U.S. 1991); *see also INS v. Chadha*, 462 U.S. 919, 942 (1983); *Bond v. United States*, 564 U.S. __, 131 S. Ct. 2355, 2365 (2011). The President's purported Recess appointments, despite the Senate's unanimous agreement to meet every three days, disturb the constitutional checks that were deliberately inserted by the Framers in the Appointments Clause.

The Constitution defines the President's appointment power as follows in Section 2 of Article II.

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors…and all other Officers of the United States, whose Appointments are not herein otherwise provided for . . .
>
> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Com-

> mission which shall expire at the End of their next session.

U.S. Const., Article II, § 2, clauses 2-3.

Consistent with Alexander Hamilton's discourse on the benefits of having a constitutional check on the Executive's appointment power, the Senate is granted advice and consent power to presidential appointments. The Recess Appointment Clause further provides a limitation on the President's appointment power to temporary commissions for vacancies *that happen during the Recess* and which *shall expire at the End of their next session.* The plain meaning and constitutional history examined through the Framers' writings on the appointment process make it apparent that the Framers intended to preserve the Senate's advice and consent power in the appointment process by confining the Executive's authority to make temporary appointments during inter-session recesses only.

The U.S. Court of Appeals for the District of Columbia Circuit correctly held that the text of the Recess Appointment Clause is clear: Recess appointments are only permissible during Recess between Senate sessions. *Noel Canning, etc., v. NLRB, et al.*, 705 F.3d 490, 507-08 (D.C. Cir. 2013) (*cert. granted,* 2013 U.S. LEXIS 4876 (U.S., June 24, 2013). The Court correctly pointed to the significant distinction of the Framers' use of "the Recess," rather than "a recess." "Then, as now, the word 'the' was and is a definite article…'noting a particular thing.'" *Id.* at 500-01, 503. "As a matter of cold,

unadorned logic, it makes no sense to adopt the Board's proposition that when the Framers said 'the Recess,' what they really meant was 'a recess.'" *Id.* at 500. The use of a definite article limits the validity of temporary appointments or *Commissions* to a specific type of recess that follows each Senate session. The Court's interpretation is correct, as well as consistent with the Framers' intent.

Alexander Hamilton wrote that the intent of the recess appointment power was "to be nothing more than a supplement for the other, for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate." The Federalist No. 67 (A. Hamilton). It is evident the supplemental power was a practical approach to responding to vacancies that arise during the Senate's recess in between sessions. In the words of the U.S. Court of Appeals of the Third Circuit, the purpose for supplementing the appointment clause with the recess-appointment clause is "to preserve the Senate's advice-and-consent power by limiting the president's unilateral appointment power," not to expand it. *NLRB v. New Vista Nursing and Rehabilitation,* 719 F.3d 203, 229 (3d Cir. 2013).

The President's purported Recess appointments to the NLRB were not made during any Senate recess, and certainly not during a recess between sessions. The Senate ended its first session of the 112th Congress on December 30, 2011 and began the second session on January 3, 2012. 157 Cong. Rec. S8783-8784 (Dec. 17, 2011) (Sen. Wyden). Even if the Senate were considered to be in recess, the

President's temporary appointments were made on January 4, 2012, after the Senate began the new session. *Id.* The political agenda that is evident by the President's statement "I will not take no for an answer," led to unconstitutional appointments without the Senate's advice and consent when the Senate was not in Recess. 2012 Daily Comp. Pres. Docs. No. 00003, 3 (Jan. 4, 2012). This type of party politics is not new, as was observed by the Court in *Freytag v. Commissioner,* and therefore commands constitutional accountability to preserve the limitations placed on the President. 501 U.S. at 883-884.

II. THE SENATE DETERMINES ITS OWN RULES AND PROCEDURES.

The President's supposed Recess appointments are unconstitutional because the Senate was in session at the time they were made. Section 5 of Article I empowers each House of Congress to determine the rules of its proceedings. U.S. CONST., Article I, §5, Clause 2.

> The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the

> rule to say that some other way would be better, more accurate or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal."

United States v. Ballin, 144 U.S. 1, 4-5 (1892).

On December 17, 2011, the Senate decided unanimously to convene every three days from December 17, 2011 to January 20, 2012, including on, but not limited to, January 3, 2012 and January 6, 2012. 157 Cong. Rec. at S8783-84. That same day, the Senate also unanimously agreed to conclude the first session of the 112th Congress on December 30, 2011 and start its second session on January 3, 2012. *Id.* All of these decisions and actions taken by the Senate in its December 17, 2011 Order were within its discretion and authority to make under the power delegated to it by Article I of the Constitution.

The President's declaration that these sessions were invalid disregards the Senate's authority to determine and administer its own procedures, including when it will recess and how it will conduct its business. Furthermore, it threatens the fundamental principle of separation of powers embedded in Constitution. The President's position that the

Senate cannot decide for itself when a Recess takes places is a dangerous supposition that the Executive Branch may interfere with or determine what business suffices for the Senate to be in session. For example, during one session, on December 23, 2011, the Senate passed and the President signed a two month extension of the reduced payroll tax, unemployment insurance, TANF and the Medicare payment fix. 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). Additionally, the session held on January 3, 2012 constituted the meeting required by the Twentieth Amendment. U.S. Const., amend. XX, §2. The Constitution does not afford the authority to the Executive Branch to determine what type of business is sufficient to declare the Senate in recess or how it should conduct its business. Only the Senate can declare itself in session and when or whether it will recess by its delegated powers. Therefore, as the Senate declined to recess and convene through January 20, 2012, the so-called Recess appointments are invalid.

III. THE INCONSISTENT APPLICATION OF RECESS APPOINTMENTS IS IRRELEVANT TO THE INTERPRETATION OF THE RECESS APPOINTMENT CLAUSE.

Petitioner, NLRB, relies in part on appointments by previous executives during intra-session recesses to support its argument that they are constitutional. However, the Board cannot deny the dilemma presented by the inconsistent interpretations of prior Presidents, nor can it deny the lack of such temporary appointments for at the least the first eighty

(80) years following the Constitution's ratification. *Brief for the Petitioner*, 21. At best, the Board may argue that the intra-session appointments were more predominately made in modern history.

While the historical application of Recess appointments is irrelevant because the text is clear, a brief summary of the inconsistent application is evidence of how prior appointments on political whim have created confusion and uncertainty. For almost 100 years following the Constitution's ratification, Presidents conformed to the constitutional text and did not make intra-session appointments. *Id.* While Petitioner points to some intra-session appointments made in 1867 and 1868, it could not deny that the President took the opposite view in 1901 when Attorney General Knox concluded that the Recess Appointment Clause did not include intra-session recesses. Again in 1921, the view of the President changed to permit intra-session recess appointments, but only when the Senate adjourned for more than three days. *Id*. at 21-24. In fact, the President had taken the same position when then Solicitor Elena Kagan's letter was filed with the Supreme Court on behalf of Respondent in *New Process Steel, L.P. v. NLRB* stating that "the Senate may act to foreclose the [recess appointment] option by declining to recess" and convening pro forma sessions every three days. *See Respondent's Letter Br., New Process Steel, L.P. v. NLRB,* 130 S. Ct. 2635 (2010) (No. 08-1457). Yet now, the President has taken an even more extreme position in sharp contrast to his earlier 2010 view that recess appoint-

ments are permissible while the Senate convenes every three days.

The constitutional interpretation of the validity of Recess appointments cannot be based on the inconsistent past intra-session appointments politically motivated by one side of the aisle or another. The Framers recognized the risk of political manipulation:

> [M]anipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power, see G. Wood, The Creation of The American Republic 1776-1787, p. 79 (1969) (Wood), because 'the power of appointment to offices' was deemed 'the most insidious and powerful weapon of eighteenth century despotism.' *Id.*, at 143. Those who framed our Constitution addressed these concerns by carefully husbanding the appointment power to limit its diffusion. Although the debate on the Appointments Clause was brief, the sparse record indicates the Framers' determination to limit the distribution of the power of appointment. …The Framers understood, however, that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people.

Freytag, 501 U.S. at 883-884. Consistent with the Framers' intent and the Court's statement above, Recess appointments must conform to the constitutional limitations in order to preserve the structural principles secured by the separation of powers. The alternative is the same unpredictability and inconsistent application and susceptibility to political maneuvering and manipulation.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court affirm the decision of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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