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., *ET AL.*,
Respondents.

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

BRIEF OF THE COUNCIL ON LABOR LAW EQUALITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT NOEL CANNING

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Nat'l Labor Relations Board, *Board Decisions*, http://www.nlrb.gov/cases-decisions/board-decisions.......................... 18

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BRIEF OF THE COUNCIL ON LABOR LAW EQUALITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT NOEL CANNING

INTEREST OF THE *AMICUS CURIAE* [1]

The Council on Labor Law Equality (COLLE) is a trade association founded over 30 years ago for the purpose of monitoring and commenting on developments in the interpretation of the National Labor Relations Act (NLRA). Through the filing of amicus briefs and other forms of participation, COLLE

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), *amicus* states that letters reflecting the parties' blanket consent to the filing of amicus briefs have been filed with the Clerk's office.

provides a specialized and continuing business community effort to maintain a balanced approach in the formulation of national labor policy on issues that affect a broad cross-section of American industry. COLLE is the nation's only brief-writing association devoted exclusively to issues arising under the NLRA and in recent decades has filed amicus briefs in nearly every significant labor case before the NLRB, the federal courts of appeals, and the U.S. Supreme Court.

COLLE represents employers in virtually every business sector, all of whom are subject to the NLRA. COLLE members have a vital interest in the proper functioning of the NLRB.

Respondent Noel Canning's brief provides compelling reasons to affirm the judgment of the D.C. Circuit. The purpose of this brief is to provide additional background information emphasizing the third argument presented – Separation of Powers, which precludes the President from overriding the expressed will of the Senate not to recess but to remain in pro forma sessions every three days. Allowing the President the unchecked authority to impose the will of the Executive Branch by ignoring the advice and consent function of the Senate would lead to future abuse of the recess-appointment power. As set forth below, COLLE has a vital interest consistent with its charter and underlying purpose to help ensure that appointments to the NLRB are fair, balanced, and carefully considered by the Senate.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case rests solely on the basis of what constitutes "the Recess" under the Recess Appointments Clause of the Constitution. The D.C. Circuit ruled below that for purposes of the Recess Appointments

Clause, "the Recess" means only those recesses that occur between enumerated sessions of the Senate, i.e., so-called "intersession" periods between the close of one session and the opening of the next session.[2] The D.C. Circuit also ruled that the vacancies to be filled by recess appointments must arise during the recess. While COLLE agrees with those rulings and the arguments advanced by Respondent Noel Canning supporting those rulings, COLLE submits that the President's recess appointments in question are invalid for a far simpler and more compelling reason. The Senate was in session, not in recess, at the time the recess appointments were made. A decision that upholds the rule that Separation of Powers prevents the President from unilaterally declaring the Senate in "recess" against its will, in contrast, could render resolution of those broader questions unnecessary here.

In addition to the textual limitations on the Recess Appointments Clause, it is fundamental that the Senate must actually be in recess when recess appointments are made. The January 4, 2012 appointments did not meet this fundamental requirement and contravened longstanding Executive Branch practice that a break of less than three days is not "the Recess" mandated by the Recess

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[2] Subsequently, the Third Circuit reached the same conclusion regarding an earlier recess appointment to the Board, holding that intra-session appointments are unconstitutional and explicitly rejecting the Government's contention that the President may unilaterally disregard pro forma sessions of the Senate. *See NLRB. v. New Vista Nursing & Rehab.*, 719 F.3d 203, 218-244 (3d Cir. 2013). Subsequently, the Fourth Circuit agreed with the *Noel Canning* and *New Vista* courts that the President's recess appointments were constitutionally invalid. *NLRB v. Enter. Leasing Co. Southeast, LLC*, 722 F.3d 609 (4th Cir. 2013).

Appointments Clause. As the Government conceded in its petition, "the Executive has long understood that [three day] intra-session breaks . . . do not trigger the President's recess-appointment authority." Pet. 21. Indeed, the Executive Branch has long abided by that simple rule as expressed in the Constitution that the Recess Appointments Clause empowers the President to make recess appointments only if, at a minimum, the Senate "adjourn[s] for more than three days" under the Adjournment Clause. U.S. Const. art I, § 5, cl.4. This longstanding rule should be dispositive.

At the time the recess appointments in question were made, the Senate had convened the day before to commence the Second Session of the 112th Congress, and convened again two days later. Clearly, the Senate was not in recess and was available to consider the nominations of the President's choosing. Therefore, by any measure the President's January 4, 2012 appointments were invalid. The President may not simply ignore the Senate's attestations that it is in session on certain days because in his view it is "unavailable to act." The Government's arguments to the contrary are without merit. Its alternative test – that the President had the authority under his obligation to fully execute the laws of the United States - would eviscerate the Senate's advice and consent power, and would authorize him to make recess appointments whenever he chose. That cannot be so.

Affirming the decision of the D.C. Circuit below on these grounds would eliminate the Government's concern that restricting recess appointments to only inter-session periods or only when vacancies arise during the recess would lead to a constitutional crisis. Indeed, it would merely affirm what the Government

already concedes – that the Senate must be in a recess of longer than three days to trigger the President's recess appointment authority. It would re-establish a bright line standard for recess appointments which originates from the Founders and would prevent future attempts by the Executive Branch to usurp the Senate's advice and consent power by overriding internal Senate rules and procedures to satisfy the unyielding desire of the President to insist upon his nominees. It may even result in achieving one of the objectives of the "advice and consent" function – encouraging negotiation and compromise in the selection of nominees where the Senate is not in accord with the President's selection. The Government's position would eliminate the President's incentive to negotiate and compromise. Also, as history demonstrates, affirming the D.C. Circuit on these grounds would not unduly disrupt the operations of the NLRB. According to the Board's own website, following this Court's ruling in *New Process Steel*, the Board, which was then comprised of three Board members, issued new decisions in approximately 100 cases out of approximately 550 two-member Board decisions the vast majority of which were decided within a few months. (*See* http://www.nlrb.gov/news-outreach/fact-sheets/background-materials-two-member-board-decisions). Here, the Board's review would be of significantly fewer cases, and it will have the advantage of a confirmed full five-Member complement of Board Members along with a newly confirmed General Counsel.

If the President lacked the power (and he did) to override the Senate's decisions regarding its own internal procedures without violating the constitutional Separation of Powers and the parameters of the

Recess Appointments Clause, the appointments to the NLRB on January 4, 2012 were unconstitutional, and the Board's actions in this case were *ultra vires* since the Board lacked a quorum.

ARGUMENT

I. THE PRESIDENT'S EXERCISE OF RECESS-APPOINTMENT POWERS OVERRIDING THE RULES OF THE SENATE WHEN THE SENATE, BY UNANIMOUS CONSENT, WAS IN *PRO FORMA* SESSIONS MEETING EVERY THREE DAYS, VIOLATES THE SEPARATION OF POWERS AND IS CONSTITUTIONALLY INVALID.

The Appointments Clause of the U.S. Constitution requires the President to obtain the advice and consent of the Senate before making appointments to certain high-ranking positions in the Executive Branch. U.S. Const. art. II, § 2, cl. 2. The Framers, wary of potential "manipulation of official appointments" by the Executive, *Freytag v. Comm'r*, 501 U.S. 868, 883 (1991) (citation omitted), deliberately withheld from the President the ability to appoint officers unilaterally – except for certain inferior officers, and then only with Congress's consent. As the Court stated in *Freytag*, "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." *Id*. at 804. *See The Federalist* No. 76, at 455-56 (A. Hamilton) (Clinton Rossiter ed., 2003). Requiring the Senate's advice and consent for appointments, they recognized, would "serv[e] both to curb Executive abuses of the appointment power and 'to promote a judicious choice of [persons] for filling the

offices of the union." *Edmond v. United States*, 520 U.S. 651, 659 (1997). The Framers thus gave the Senate an absolute veto over appointments, making its Advice and Consent a condition precedent to a commission. U.S. Const. art. II, § 2, cl. 2.

The Recess Appointments Clause immediately follows the Appointments Clause and authorizes the President "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." U.S. Const. art II, § 2, cl. 3. That power has limits, one of which is that the Senate must be in recess for more than three days – in other words, actually in recess – before recess appointments are available. U.S. Const. art. I, § 5, cl. 4. In that regard, the Adjournments Clause is a constraint on the Recess Appointments Clause. Even the Executive has urged that it makes "eminent sense" to apply the three-day requirement in construing the Recess Appointments Clause. *See* Reply Br. for Intervener United States at 21, *Evans v. Stephens*, 407 F.3d 1272 (11th Cir. 2005) (en banc) (No. 02-16424), 2004 WL 3589822. *See also Wright v. United States*, 302 U.S. 583, 589-90 (1938) (Pocket Veto Clause).

That bedrock principle has very deep roots, and has never been questioned by the Executive until now. Indeed, Attorney General Daugherty scoffed at the notion that anyone would contest it. As Daugherty wrote: If the Senate has not adjourned for more than three days, "no one … would for a moment contend that the Senate is not in session." *Executive Power – Recess Appointments*, 33 Op. Att'y Gen. 20, 25 (1921). The current Administration reiterated that view three years ago in this Court. *See* Letter from Elena Kagan, Solicitor General, to William K. Sutter, Clerk, Supreme Court of the United States 3 (Apr. 26, 2010),

New Process Steel, L.P. v. NLRB, 560 U.S. 674 (2010) (No. 08-1457) (Senate "may act to foreclose [recess appointments] by declining to recess for more than two or three days at a time over a lengthy period.").

This case arises from the President's disputed "recess" appointment of three nominees to the National Labor Relations Board[3] on January 4, 2012 without the advice and consent of the Senate and without the Senate being in recess. On January 3, 2012, the first session of the 112th Congress closed. At that time, the tenure of earlier NLRB "recess appointee" Craig Becker ended automatically with the close of the session.[4] The expiration of his term left the Board with only two members, thus lacking a quorum. The next day, January 4, 2012, the President announced the appointment of Board Members Sharon Block, Terence Flynn, and Richard Griffin. At the time, the Senate was in session. The Senate had neither sought nor received the consent of the House to recess or adjourn, since it was the Senate's intent to remain in pro forma session meeting every three days.

Article I empowers "[e]ach House" of Congress to "determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. The Senate's discretion to determine

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[3] At the same time, on January 4, 2012, the President announced the appointment of Richard Cordray to the Consumer Financial Protection Bureau.

[4] The Third Circuit joined the D.C. Circuit in holding that the Recess Appointments Clause does not allow "intra-session" recess appointments, and therefore Member Becker's March 2010 intra-session recess appointment was unconstitutional. *See New Vista,* 719 F.3d at 244. Subsequently, the Fourth Circuit agreed with the *Noel Canning* and *New Vista* courts that the President's recess appointments were constitutionally invalid. *Enter. Leasing*, 722 F.3d 609.

its own rules and, subject to few limitations,[5] how and when to schedule its own sessions is absolute. *See, e.g.*, Thomas Jefferson, *Opinion on Constitutionality of the Residence Bill* (July 15, 1790), reprinted in *17 The Papers of Thomas Jefferson 194*, 195 (1965). In fact, as a noted commentator observed, even the "humblest assembly of men is understood to possess this power; and it would be absurd to deprive the councils of the nation of a like authority." *2 Joseph Story, Commentaries on the Constitution of the United States* § 835, at 298 (1833). *See Plaut v. Spendthrift Farm, Inc*., 514 U.S. 211, 239 (1995). Article I clearly provides that "[n]either House, during the Session of Congress, shall, without the 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.

From December 17, 2011, to January 23, 2012, the Senate met in "pro forma"[6] sessions every three days to satisfy the constitutional requirement under the

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[5] The only constraints on the Senate's scheduling are specifically enumerated: It must meet once a year on January 3 (or another date Congress chooses) U.S. CONST. amend. XX, § 2, and when called into special session by the President, *id*. art. II, § 3. And, once convened, the Senate cannot adjourn for more than three days (or to another place) without the consent of the House. *Id*. art. I, § 5, cl. 4.

[6] "Pro forma" sessions generally refer to the requirements of the Adjournments Clause, such that "the term pro forma describes the reason for holding the session, [but] does not distinguish the nature of the session itself. . . . A pro forma session is not materially different from other Senate sessions." 158 Cong. Rec. S5954 (daily ed. Aug. 2, 2012) (Statement of Sen. McConnell, incorporating Christopher M. Davis, *Cong. Research Serv*., Certain Questions Related To Pro Forma Sessions Of The Senate (Mar. 8, 2012)).

Adjournments Clause that it not adjourn for longer than 3 days without the consent of the House of Representatives. *See* U.S. Const. art I, § 5, cl. 4. Although the Senate's scheduling order of December 17, 2011 provided that there would be "no business conducted" at these sessions, 157 Cong. Rec. S8783-84 (daily ed. Dec. 17, 2011), in fact the Senate did conduct business during these sessions: at the President's request, on December 23, 2011, the Senate passed a bill extending the payroll tax cut for two months, *id*. at S8789-03 (daily ed. Dec. 23, 2011). And the President signed the bill. Indeed, the day before the President announced the "recess" appointments, the Senate convened to start the second session of the 112th Congress as required by the Twentieth Amendment. *See* 158 Cong. Rec. S1-01 (daily ed. Jan. 3, 2012).[7]

A basis on which the Executive has impugned the will of the Senate to remain in session[8] is that the order scheduling the three day sessions labeled them "pro forma . . . with no business conducted." 157 Cong. Rec. S8783-07. The Government's brief makes much of that language in the Senate's scheduling order, but

[7] The Twentieth Amendment requires that "[t]he Congress shall assemble at least once in every year, and such meeting shall begin at noon on the third day of January, unless they shall by law appoint a different day." U.S. CONST. amend XX, § 2.

[8] It is worthy of note, that during the presidency of George W. Bush, the Senate, under the direction of Senate Majority Leader Harry Reid, refused to recess the Senate for over two years in order to block recess appointments from the Executive. Indeed, the President did not attempt to arrogate the rules of the Senate by simply making recess appointments. *See*, *e.g*., 154 Cong. Rec. S8077-04 (daily ed. Aug. 1, 2008). Senate Majority Leader Reid made clear that the Senate was not entering a recess. 154 Cong. Rec. S7554-02 (daily ed. July 28, 2008) ("[T]here will be no recess. We will meet every third day pro forma.").

that description is not dispositive as the Government would have the Court believe. In fact, it bears only on the Senate's *intentions* whether to do business, not its *ability* to do so. The Senate could have chosen to conduct business even "without notice." Senate Rule V(1), *Senate Manual*, S.Doc. No. 112-1, at 5 (2011). And, in fact, the Senate had done so during identical pro forma sessions five months before the January 4 appointments and again during the January 3 and 6 meetings, at the President's own request.[9] It was not the "unavailability" of the Senate to act which motivated these recess appointments, it was the President's reluctance to accept the Senate's likely answer.

Article I empowers "[e]ach House" of Congress to "determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. As this Court has long held, the choice of each Chamber's rules and procedures is for the members of that House alone. *United States v. Ballin*, 144 U.S. 1, 5 (1892). The Senate not only may prescribe when it will meet, but also has the final authority to determine whether it has done so. The attestation of the presiding officer that it has done so is controlling. *See Marshall Field & Co. v. Clark*, 143 U.S. 649, 670-80 (1892). Here, the Senate itself determined that it would meet on the record on January 3, 6, and other days, 157 Cong. Rec. at S8783 – 84, and its records confirm that it did so, *see e.g.*, 158 Cong. Rec. at S1-01 (2012). The President's

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[9] *See* 157 Cong. Rec. S5297-03 (Aug. 5, 2011) (passing Public Law No. 112-27, 125 Stat. 270 (2011)); 157 Cong. Rec. S8789-03 (Dec. 23, 2011) (passing Public Law No. 112-78, 125 Stat. 1280 (2011)); *see also* Daily Comp. Pres. Docs. 2011 DCPD No. 00962, at 1-2 (Dec. 22, 2011) (urging Senate, which had already commenced pro forma sessions, to pass Public Law No. 112-78).

determination that those sessions were "nullities" is belied by the Senate's account of its own actions.

Indeed, when the President announced these recess appointments, he had waited less than three weeks for Senate approval of two of the nominees before resorting to recess appointments (*see* 157 Cong. Rec. S8691-05 (Dec. 15, 2011)(receiving nominations of Sharon Block and Richard Griffin, Jr. to the NLRB)). The President demonstrated his impatience by announcing another recess appointment also on January 4, 2012, not for the reason that the Senate was unavailable, but because it had announced its opposition to his selection and he "refuse[d] to take no for an answer." Daily Comp. Pres. Docs. 2012 DCPD No. 00004 at 3 (Jan. 4, 2012). His decision to announce his recess appointments of a controversial slate of NLRB nominees on January 4, 2012, ostensibly was based on his unilateral determination that the Senate was "unavailable" simply to rubber-stamp his nominations.[10]

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[10] As if the President's actions were not enough to render his recess appointments unconstitutional, the Executive has made clear that it considers the court of appeals' decision in this case merely advisory, even with respect to the Board itself. Statements and actions of the President's Press Secretary Jay Carney and those of NLRB Chairman Pearce following the decision of the D.C. Circuit below ignore the impact of the decision. Both said that the decision below, ruling that the President's recess appointments are unconstitutional, "applies to only one specific case" and has no bearing on the Board's ability to act in others outside the D.C. Circuit. Therefore, the Board ignored the *Noel Canning* decision and kept digging the hole deeper by deciding cases with an unconstitutional Board. *See* Statement by NLRB Chairman Pearce on Recess Appointment Ruling (Jan. 25, 2013) *available at* http://www.nlrb.gov/news-outreach/news-releases/statement-chairman-pearce-recess-appointment-ruling (Pearce Statement); White House, Press Briefing by

The President was advised, poorly as it turns out, that regardless of Senate rules and procedures, and the lessons of history dating back to the Founders, he alone had the absolute unilateral power to decide entirely within his sole and unfettered discretion when the Senate was in "recess" incapable of receiving and acting on his nominations, even where by unanimous consent the Senate had decided to remain in "pro forma" sessions meeting every three days. *See Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. __ (Jan. 6, 2012) *available at* http://www.justice.gov/olc/memoranda-opinions/index.php. But this cannot be so. Otherwise, by giving the President absolute power to evade the Recess Appointments Clause by deter-mining unilaterally, at his discretion, when the Senate is in recess and unavailable to receive nominations – authority which the Constitution clearly withholds and which no President has ever tried in the past – would undermine constitutional separation of powers.

Neither is the Government's argument convincing that the Senate was "functionally" in recess when the Senate itself had unequivocally declared that it was in session. In fact, the Senate confirmed a number of presidential nominees by unanimous consent the same day that it scheduled the pro forma sessions in question here. 157 Cong. Rec. S8769-03 (daily ed. Dec. 17, 2011). Thus, it is clear that the Senate can (and has) fulfilled

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Press Secretary Jay Carney (Jan. 25, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/ 01/25/press-briefing-press-secretary-jay-carney-1252013 (D.C. Circuit's decision "does not have any impact. . . on [the Board's] operations or functions, or on the board itself"). The Executive should not now be heard that there is a burden in reconsidering previously issued invalid decisions. *C.f. New Process Steel*, 560 U.S. 674.

its advice and consent function during pro-forma sessions, just as it can fulfill other core legislative functions.

Finally, the contention that the President's recess appointments were valid in order to fulfill the Take Care Clause, U.S. Const. art. II, § 3, would allow the President to define the scope of his own appointment powers which the D.C. Circuit said would eviscerate the Constitution's Separation of Powers. *See* Pet. App. 29a. *See also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Under the National Labor Relations Act, the Board is to "consist of five . . . members, appointed by the President by and with the advice and consent of the Senate." 29 U.S.C. § 153(a). The Board is required to have three validly appointed members to have a quorum. *Id.* § 153(b). Absent a quorum, the Board is without power to act. *New Process Steel,* 560 U.S. at ___, 130 S.Ct. at 2644-45.

Here, the Executive circumvented the Senate's advice and consent function by making putative recess appointments which were constitutionally invalid. The result, as earlier in *New Process Steel*, was that the Board lacked a quorum to act and hence its decisions were ultra vires and invalid.

To uphold these recess appointments, whether on the basis of textual interpretations of the term "the Recess" in the Recess Appointments Clause, or on the basis that the Executive has the unchecked discretion to circumvent the will of the Senate and override its rules, would convenience the President, but would do serious harm to the Founders' concept of Separation of Powers. It would allow the President to usurp two powers that the Constitution confers explicitly and

exclusively on the Senate – the absolute veto power over appointments with the advice and consent of the Senate and the authority to set its own rules. The result would severely and irreparably undermine the doctrine of separation of powers. *See Plaut,* 514 U.S. at 239 ("The doctrine of separation of powers is a . . . prophylactic device, establishing high walls and clear distinctions."). *See also 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.").

The constitutional text, structure, and history of recess appointments make clear that the decision of the D.C. Circuit below, and the subsequent decisions of the Third and Fourth Circuits, were correct. In this regard, it is unnecessary to decide this case on the basis of textual interpretations of the constitutional definition of "the Recess" or whether recess appointments only are available for vacancies that arise during "the Recess," although COLLE supports Respondent Noel Canning's arguments in that regard. Rather, COLLE urges the Court to uphold the Constitutional doctrine of Separation of Powers by declaring that the President cannot unilaterally determine that the Senate is in a "functional" recess when, in fact, it has determined under Senate rules that it is in session - pro forma or otherwise. A contrary ruling would open the floodgates for the Executive to announce recess appointments and end run the Senate, usurping its role of advice and consent whenever the Executive is dissatisfied with the response of the Senate to its nominations.

II. AFFIRMING THE DECISION OF THE D.C. CIRCUIT BASED ON SEPARATION OF POWERS WILL NEITHER CREATE A CONSTITUTIONAL CRISIS NOR UNDULY DISRUPT THE FUNCTIONS OF THE NATIONAL LABOR RELATIONS BOARD.

The Government contends that affirming the D.C. Circuit's decision would "threaten[] a significant disruption" to NLRB operations "call[ing] into question every final decision of the Board since January 4, 2012." Pet. 30. The Government's assertion is specious, ignoring its own recent history and expeditious handling of returned decisions following this Court's ruling in *New Process Steel*.

The Board's website contains discussion of statistics related to the two-member Board decisions that were at issue in *New Process Steel*. (*See* http://www.nlrb.gov/news-outreach/fact-sheets/background- materials-two-member-board-decisions). Specifically, the Board's website provides, as follows:

> From January 2008 to March 2010, the Board operated with three of its five seats vacant. The two remaining members . . . issued about 550 decisions . . . Dozens of the decisions were appealed to federal courts on the grounds that the two-member Board did not have the authority to act. On June 17, 2010, a divided Supreme Court ruled in *New Process Steel vs. the NLRB* that the two-member Board lacked authority to decide cases. *About 100 two-member decisions were returned to the Board, either by the federal courts or by the parties themselves, and new decisions were issued*. . . .[N]early all of the remaining cases have closed through the Board's normal processes.

Id. (emphasis added)

Of the approximately 100 decisions that were returned to the Board once it attained a third member, approximately 75% were ratified or "rubber-stamped" endorsements of the prior two-member decision. The ratified cases contain the following refrain (or something very similar to it):

> The Board has considered the judge's decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order to the extent and for the reasons stated in the decision reported at . . . , which is incorporated by reference.

See, e.g., *ADF, Inc.*, 355 NLRB No. 62 (2010); *Trump Marina Associates*, LLC, 355 NLRB No. 107 (2010); *The New York Presbyterian Hospital*, 355 NLRB No. 126 (2010).

It is also important to note that in approximately 90% of the returned cases, the three-member Board issued new decisions within five months.[11]

With this history in mind, there is no reason to doubt that should this Court affirm the D.C. Circuit's decision below, the current confirmed full five-Member Board also should have no problem quickly issuing new decisions. There have been approximately 436 published and unpublished decisions issued by the invalidly recess-appointed Board since January 4, 2012. (*See*

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[11] The Board's discussion on its website of the disposition of the two-member Board decisions following the *New Process Steel* decision contains links to the respective dockets for each of those decisions. A review of the dockets reveals that of the approximately 100 returned two-member Board cases, 56 new decisions were issued in August 2010 and 32 new decisions were issued before the end of December 2012. As stated above, approximately 75% of those decisions were short form "rubber stamp" adoptions of the Board's earlier decisions.

http://www.nlrb.gov/cases-decisions/board-decisions).[12] The number of such cases is significantly fewer than the number of published decisions invalidated following *New Process Steel*.

Also, the Government should not now benefit from its own intransigence by ignoring the ruling of the D.C. Circuit below. The invalid recess Board simply continued to issue decisions when it was on notice that those decisions would be *ultra vires*. It should not be now heard to justify its actions based on the inconvenience of having to reconsider those decisions.

Likewise, the Executive's argument that to affirm the D.C. Circuit's decision would create a constitutional crisis based on its extensive citation of previous inter-session recess appointments is unavailing. This Court's ruling simply that recess appointments – whether intra-session or inter-session – must at minimum be made during a recess declared by the Senate, would be consistent with the

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[12] This number was determined based on a count of the published and unpublished decisions on the Board's website for the period January 2012 (when the challenged recess appointments were made) through July 30, 2013 (when the current five-member Board was properly appointed and confirmed by the Senate). *See also* www.chamberlitigation .com/recess-appointments-litigation-resource-page. The Board's number of cases dating back to the unconstitutional recess appointment of former Board member Craig Becker may be greater. In its petition, the Government contended: "because many of the Board's members have been recess-appointed during the past decade, [the D.C. Circuit's decision] could also place earlier orders in jeopardy. The National Labor Relations Act places no time limit on petitions for review and allows such petitions to be brought in either a regional circuit *or* the D.C. Circuit . . . .Thus, the potential effects of the decision below are limited by neither time nor geography." Pet. 30. There is no need to consider that period of invalidity in the context of this case.

views of the Founders on separation of powers, and would reaffirm the bright line test for all future recess appointments.

CONCLUSION

For all of the reasons set forth above and in Respondent Noel Canning's brief, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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