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.,
and
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 760,
Respondents.

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

REPLY BRIEF FOR RESPONDENT INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 760 IN SUPPORT OF THE PETITIONER NATIONAL LABOR RELATIONS BOARD

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REPLY BRIEF FOR RESPONDENT INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 760 IN SUPPORT OF THE PETITIONER NATIONAL LABOR RELATIONS BOARD

The decision below would, as a practical matter, nullify the Constitution's grant to the President of the power to make recess appointments. The decision does so: first, by reading the Recess Appointments Clause as authorizing the President to fill vacancies only during the period between an adjournment *sine die* that ends one session of the Senate and the commencement of the Senate's next session – a period that, under the Senate's current practice, typically lasts for only a few days and not infrequently for only a few moments; and, second, by further limiting the President's power to filling only those vacancies that first arise during those short intersession breaks. While Noel Canning did not advocate that reading of the Recess Appointments Clause in the court below, the Company now defends that reading. In so doing, the Company fully embraces the radical reduction in the President's recess appointment power effected by the lower court's interpretation, asserting that the Clause is best treated as an historical relic of the era "[w]hen Senators dispersed by horseback across the nation after the Session each year," Noel Canning Br. 1, having no present significance.

The Executive Branch and the Senate have taken a different view of the Recess Appointments Clause. For the past century, the political branches of government that share the appointment authority have structured their relations on the premise that the

Clause allows the President to fill vacancies during any prolonged break in the Senate's proceedings regardless of whether the Senate's adjournment order is *sine die* or to a day certain. And, for the last two centuries, the political branches have expressly agreed that the recess appointment power extends to filling all vacancies regardless of when they first arise. The political branches' interpretation represents a reasonable reading of the constitutional text in its historical context and better fulfills the obvious purpose of the Recess Appointments Clause than the interpretation of the court below. Under the interpretation long embraced by the political branches, the appointments at issue here were valid.

I. THE RECESS APPOINTMENTS CLAUSE GRANTS THE PRESIDENT THE POWER TO FILL VACANCIES DURING ANY RECESS OF THE SENATE THAT IS OF SUBSTANTIAL DURATION REGARDLESS OF THE FORM OF THE ADJOURNMENT ORDER.

The question of whether the President's recess appointment authority turns on the form of the Senate's adjournment order did not arise during the early years of the Republic for the simple reason that during that period practical considerations, such as the difficulty of travel and the peculiarities of the Senate's schedule, dictated that adjournments of any substantial duration be initiated by an adjournment *sine die*, terminating the current session. During the modern era, ushered in by the advent of modern modes of transportation and the adoption of the Twentieth Amendment, the Senate practice changed so that breaks of substantial duration were more commonly

initiated by adjournments to a day certain – which suspend rather than terminate a current session – rather than by adjournments *sine die*. Throughout this century-long period, all Presidents and the Senate have proceeded on the common understanding that the President has authority to fill vacancies during any adjournments of substantial duration, regardless of the form of the adjournment order.

In articulating their interpretation of the Recess Appointments Clause, the Executive Branch and the Senate began from the common understanding that "[t]he word 'recess' is one of ordinary, not technical, signification." S. Rep. No. 4389, 58th Cong., 3d Sess. 1 (1905). Based on that "ordinary, not technical" understanding of the term "recess," the political branches have agreed that

> "the test for determination of whether an adjournment constitutes a recess in the constitutional sense is not the technical nature of the adjournment resolution, i.e., whether it is to a day certain (temporary) or *sine die* (terminating the session), but its practical effect: *viz.*, whether or not the Senate is capable of exercising its constitutional function of advising and consenting to executive nominations," *Recess Appointments*, 41 Op. Att'y Gen. 463, 466-67 (1960).

Rejecting that view, the court below held that "'the Recess' . . . [i]s something different than a generic break in proceedings," Pet. App. 20a, in that the term "refers to a specific state of the legislature," *id.* at 31a, which the Senate can enter only by "conclud[ing] its session[] . . . with an adjournment *sine die*," *id.* at 47a. *See id.* at 50a ("Because the Senate did not adjourn *sine die*, it did not enter 'the Recess' . . . ."). Acting on

that understanding of the term "recess," the court below invalidated the appointments at issue in this case on the ground that the President made the appointments during a break initiated by an adjournment to a day certain rather than by an adjournment *sine die*. *Id.* at 34a-35a.

The "technical" interpretation of the term "recess" adopted by the court below disserves the purpose of the Recess Appointments Clause, which is indisputably to allow the President to fill vacancies while the Senate is away and thus unable to give its advice and consent on nominations. The interpretation of the court below would allow the President to fill vacancies during a "momentary intersession recess," Pet. App. 48a n. 2, even on a day when the Senate is sitting and fully available to take up nominations. At the same time, the lower court's interpretation would deny the President authority to fill vacancies during long breaks in Senate proceedings that do not commence with "an adjournment *sine die*." *Id.* at 47a. There is nothing in the text or history of the Recess Appointments Clause that justifies that result.

As a textual defense of the lower court's reading of the word "recess," Noel Canning argues that the Executive Branch and Senate's interpretation inconsistently "give[s] 'the Recess' its colloquial meaning . . . , while giving 'next Session' its formal meaning." Noel Canning Br. 6. This is a non sequitur. Unlike the term "Recess," the term "Session" appears elsewhere in the Constitution and clearly refers to formal Sessions as opposed to less formal periods of sustained proceedings. *See* Art. I, Sec. 5, cl. 4. Moreover, the established understanding does, in fact, give both terms "a *prac-*

tical sense." *Executive Power-Recess Appointments*, 33 Op. Att'y Gen. 20, 22 (1921) (emphasis in original). The term "Recess" is understood in the "practical" sense as a period of suspended proceedings sufficient in length that the Senate is not sitting "so that its advice and consent can be obtained." *Ibid.* And, the term "Session," is likewise interpreted to ensure a subsequent period of proceedings sufficient in duration for the Senate to consider a permanent replacement for the recess-appointed officer and for that temporary office-holder to perform his or her duties.

Noel Canning's historical argument in support of the technical interpretation of the term "recess" merely confirms that in the era "[w]hen Senators dispersed by horseback," Noel Canning Br. 1, the Senate's practice – dictated entirely by practical circumstances – was to break for long periods between sessions and to meet continuously once a session had begun. There is nothing in the historical materials to suggest that the drafters of the Constitution intended to make the President's recess appointment authority turn on whether the Senate adjourned *sine die* or to a specified date. Nor is there anything to suggest that the drafters intended the President to be able to unilaterally fill vacancies during momentary intersession breaks. In short, the history says nothing about how the recess appointment authority might apply in the modern circumstances of very brief intersession breaks and relatively long intrasession recesses.

The interpretation of the term "recess" in the Recess Appointments Clause that has guided the Executive Branch and the Senate in exercising the appointment authority under the Constitution is en-

tirely reasonable and entitled to deference by this Court.

II. THE PRESIDENT HAS THE POWER TO FILL UP ALL VACANCIES DURING THE RECESS OF THE SENATE, REGARDLESS OF WHEN THOSE VACANCIES FIRST ARISE.

Compounding its error, the majority below read the Constitution's grant to the President of the "Power to fill up all Vacancies that may happen during the Recess of the Senate" as limited to only those vacancies that first arise during the recess. Pet. App. 51a. As Judge Griffith noted in explaining his refusal to join this part of the majority opinion, *id.* at 54a, the majority's interpretation flies in the face of two hundred years of authority from all three branches of government. *See Executive Authority to Fill Vacancies*, 1 Op. Att'y Gen. 631, 632-33 (1823). *Accord*, *Evans v. Stephens*, 387 F.3d 1220, 1226-27 (11th Cir. 2004) (*en banc*); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (*en banc*); *United States v. Allocco*, 305 F.2d 704, 710-12 (2d Cir. 1962); *Appointments – Recess Appointments*, 28 Comp. Gen. 30, 33 (1948).

Noel Canning defends the majority's interpretation by asserting that the established understanding makes the phrase "that may happen" largely superfluous. Noel Canning Br. 34-35. That is not so. The established understanding treats the entire phrase "all Vacancies that may happen" as meaning all vacancies whatsoever. In other words, adding "that may happen" performs a function in the phrase similar to adding the word "all" in front of "Vacancies"; both elaborations may be unnecessary but they do perform

the function of emphasizing that the President may fill all vacancies no matter how they arise.

In an effort to defend the majority's interpretation, Noel Canning asserts that the phrase "during the Recess of the Senate" modifies *both* when "the President shall have Power to fill up all Vacancies" *and* when the relevant "Vacancies . . . may happen." Noel Canning Br. 36 n. 26. But that reading is grammatically impossible, as any attempt to diagram the sentence would reveal. The phrase "during the Recess of the Senate" either describes when the President possesses the power to fill vacancies or it describes the type of vacancies he can fill, but it cannot describe both. Significantly, the majority opinion below does not attempt the ungrammatical reading advanced by Noel Canning and simply relies upon an implied limitation of the President's recess appointment authority to the period of the recess. Pet. App. 51a. In other words, in order to make sense of its interpretation, the majority found it necessary to add an implied limitation that, on its reading, would not appear in the text.

In its attempt to provide historical support for the majority's interpretation, Noel Canning repeats the assertion that President Washington followed a "convoluted process" to create vacancies during a Senate recess. Noel Canning Br. 37. But the Company only cites the usual secondary source for that charge and ignores altogether our demonstration from primary sources that President Washington was not trying to manipulate the creation of vacancies but rather to fill offices with confirmed appointees. IBT Local 760 Br. 20-21 & ns. 6-7.

Noel Canning has failed to advance sufficient tex-

tual or historical grounds for rejecting the established understanding that, "during the Recess of the Senate," the President has the "power to fill up all Vacancies that may happen," not just those vacancies that first arise during a recess.

III. UNDER THE PRESIDENT AND SENATE'S INTERPRETATION OF THE RECESS APPOINTMENTS CLAUSE, THE SENATE WAS IN RECESS ON JANUARY 4, 2012.

Under the "practical construction" of the Recess Appointments Clause first articulated in "the report of the Senate Judiciary Committee presented on March 2, 1905," i.e., S. Rep. No. 4389, *supra*, "the essential inquiry" in determining whether there is a "Recess of the Senate" is the following:

> "Is the adjournment of such duration that the members of the Senate owe no duty of attendance? Is its chamber empty? Is the Senate absent so that it can not receive communications from the President or participate as a body in making appointments?" *Executive Power-Recess Appointments*, 33 Op. Att'y Gen. 20, 25 (1921) ("paraphas[ing] the very language of the Senate Judiciary Committee Report").[1]

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[1] The relevant language from the 1905 Senate Report is:

"It means, in our judgment, in this connection the period of time when the Senate is not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions; when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments." S.Rep. No. 4389, at 2 (emphasis omitted).

From the Senate's "recess or adjournment" on December 17, 2011, 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011), until that body came "back after the long break" on January 23, 2012, 158 Cong. Rec. S13 (daily ed. Jan. 23, 2012), "the Senate [was] absent so that it c[ould] not receive communications from the President or participate as a body in making appointments," 33 Op. Att'y Gen. at 25. By agreeing to a unanimous consent order providing that the Senate would "adjourn and convene for pro forma sessions only, with no business conducted" during that period, 157 Cong. Rec. at S8783, "the members of the Senate [assured that they would] owe no duty of attendance" and that, thus, "its chamber [would be] empty," 33 Op. Att'y Gen. at 25.

In an attempt to refute this characterization of the "long break," Noel Canning asserts that "the Senate was fully capable of doing business at its pro forma sessions," because "the presiding Senator could have sought unanimous consent, heard no objection, and proceeded to pass legislation, confirm nominees, or exercise any other Senate power – just like at any other Senate session." Noel Canning Br. 60. This posit – that the presiding officer would determine "unanimous consent" from the silence of an empty chamber and unilaterally conduct the Senate's business – is so far-fetched as to be self-refuting.

Equally far-fetched is the Company's assertion that the duty of attendance might have been enforced by a Senator suggesting the absence of a quorum at the outset of one of the pro forma sessions for no apparent purpose other than calling the other Senators back to the chamber. Noel Canning Br. 63. As we have

demonstrated, both common sense and the Senate rules tie quorum calls to the conduct of business. IBT Local 760 Br. 25. Thus, during a period when the Senate has bound itself to conduct "no business" and to meet in "pro forma sessions only," the reasonable expectation is that there will be no quorum calls and thus the duty of attendance will not be enforced.

The extremes to which Noel Canning is driven in its attempts to show that during the "long break" the Senate could have conducted business and the duty of attendance could have been enforced only prove the opposite. Every Senator understood that the purpose and effect of the unanimous consent orders agreed to on December 17, 2011 was that the Senate would conduct no business until it reconvened on January 23, 2012 and that the duty of attendance would be unenforced throughout that period. As a result, the Senate was absent for that five week period.

Precisely because of this predictable understanding and result, the *Congressional Directory* – a publication of the Legislative Branch – has consistently characterized such periods of "pro forma sessions" where "no business is conducted" as "recesses." S. Pub. 112-12, *Official Congressional Directory, 112th Congress* 538 n. 2 (2011). The President's determination that he had authority to make recess appointments during such a period of Senate absence is thus entirely reasonable. *See Intrasession Recess Appointments*, 13 Op. O.L.C. 271, 272 (1989) ("[T]he President is necessarily vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate."). *Accord* 28 Comp. Gen. at 36.

CONCLUSION

The decision of the court of appeals should be reversed and the decision of the National Labor Relations Board should be enforced.

Respectfully submitted,

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