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

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF THE RESPONDENT

PETER J. FERRARA
Counsel of Record
2011 Freedom Lane
Falls Church, VA 22043
703-582-8466
peterferrara@msn.com

Counsel for Amicus Curiae American Civil Rights Union

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we are concerned to ensure that the President of the United States is subject to the rule of law.

STATEMENT OF THE CASE

On January 4, 2012, the President named Sharon Block, Terence Flynn, and Richard Griffin to the National Labor Relations Board (NLRB) as "recess" appointees. The Constitution provides for such recess appointments without Senate confirmation in Article II, Section 2, which states, "The President shall have Power 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."

But the fundamental problem was that the Senate was not in recess at the time of the appointments. The Senate had convened the day before to begin the second session of the 112th Congress. The Senate then convened again for business two days later.

Indeed, on December 17, 2011, the Senate, under majority control of the President's own Democrat Party, had adjourned granting unanimous consent under the following adjournment order:

> I ask unanimous consent that when the Senate completes its business today, it adjourn and convene for pro forma sessions only, with no business conducted on [December 20, December 23, December 27, December 30, January 3, January 6, January 10, January 13, January 17, and January 20] . . . and that following each pro

> forma session the Senate adjourn until the following pro forma session."

Pet.App.91a. The Senate did subsequently convene short, formal sessions on those specified days and did conduct some Senate business, such as passage of the Temporary Payroll Tax Cut Continuation Act of 2011. On January 3, 2012, the Senate fulfilled its constitutional obligation under the Twentieth Amendment to meet "at noon on the 3d day of January, unless they shall by law appoint a different day." U.S. Const. Amend. XX, § 2.

The President's NLRB appointments on January 4, 2012 were consequently, in fact, actually the first time in U.S. history that a President purported to make mid-session recess appointments during a three day break in Senate business. On that day, the President unilaterally asserted that the Senate was in recess. Moreover, two of the supposed "recess" appointees – Block and Griffin – had just been submitted to the Senate as nominees for confirmation less than three weeks earlier. Their committee questionnaires and background checks had not even been submitted yet.[2]

The next week, after the President's unilateral declaration that the Senate was in recess, the Office of

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[2] Press Release, U.S. Senate Comm. on Health, Educ., Labor & Pensions, NLRB Recess Appointments Show Contempt for Small Businesses (Jan. 4, 2012), http://www.help.senate.gov/newsroom/press/release/?id=170c9d76-0002-4a7d-b9b3-20185d847bbb.

Legal Counsel of the Justice Department issued a memorandum asserting that the President, in his "discretion," may declare the Senate to be in recess because it is unavailable to "receive communications from the President or participate as a body in making appointments." Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 Op. O.L.C. slip op. at 5 (Jan. 6, 2012). That memorandum further asserted that the Senate has no power to declare that it is not in recess because of pro forma sessions. *Id.* at 9.

Noel Canning is a family-owned soft drink bottling and distribution company in Yakima, Washington. Teamsters Local 760 alleged that Noel Canning had agreed to a collective bargaining agreement with the union regarding the company's employees represented by the union, though there was no formalized written and signed contract. An NLRB Administrative Law Judge nevertheless ruled in September, 2011 that Noel Canning violated the National Labor Relations Act by refusing to execute the alleged agreement. Pet.App.2. Noel Canning filed exceptions to the ALJ ruling with the NLRB for an appeal to the Board. Briefing on that appeal was completed by December 27, 2011, just eight days before the NLRB recess appointments at issue in this case. Resp. C.A. App. A3.

The Board affirmed the ruling of the ALJ against Noel Canning on February 8, 2012, in a panel including two of the recess appointees at issue in this case – Block and Flynn. Noel Canning promptly filed for an appeal to the United States Court of Appeals for

the D.C. Circuit challenging the legality of the recess appointments. Pet.App.2a.

Moreover, the law requires that for the NLRB to take legal action, it must have a quorum of at least three lawfully appointed members. 29 U.S.C. § 153(b); *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2644-45 (2010). But if the three recess appointees to the NLRB at issue in this case were not validly appointed, then on the date of the Noel Canning decision, February 8, 2012, the Board had only two validly appointed members.

The D.C. Circuit held that the President's January 4, 2012 "recess" appointments to the NLRB were not lawfully appointed. Pet.App.18a-52a. The Court held that the recess appointment power in Article II, Section 2 of the Constitution applies only to "the Recess" between the two Sessions of each Congress. That is the only time during which "recess" appointments can be made. Moreover, such "recess" appointments can be made only to fill vacancies that arise during that "Recess." Therefore, the February 8, 2012 ruling of the NLRB against Noel Canning was invalidated.

This Court granted the Writ of Certiorari to review this decision of the D.C. Circuit on June 24, 2013.

SUMMARY OF ARGUMENT

The advice and consent of the Senate for Presidential appointments required by the Constitution's Appointments Clause serves the fundamental Constitutional framework of Separation

of Powers, which was embraced by the framers as the central Constitutional structure for the protection of American liberties. It serves as a powerful check and balance on the concentration of power in the hands of the President, as intended by the framers.

That diffusion of power wisely protects against possible oppression by a runaway President, whose single minded pursuit of his own certitudes in appointment of federal officers might seem imperial to those with minority views, or those holding to shifting opposing public opinions which may have even transformed into new majorities.

If the President may declare at his own discretion when the Senate is in recess, that would destroy the whole Separation of Powers check and balance on the President's Appointment Power. It would empower the President to completely evade the primary Appointments Clause required advice and consent of the Senate whenever, as here, the President fears the Senate will enforce the will of the people against unpopular, radical appointments that would flout even majority viewpoints, let alone any concern over protection for minority views.

By its very terms, the Recess Appointments Power applies to appointments made "during the Recess of the Senate…which shall expire at the End of their next Session." U.S. Const., Article II, Section 2. There is, in fact, only one "Recess of the Senate" during every Congress. That is "the Recess" between the two Sessions of every Congress, one Session taking place during the first year, and another taking place during the second year. Recess appointments consequently

can only be made during "the Recess of the Senate" between the two Sessions of every Congress.

The language of the Recess Appointments Clause also limits recess appointments only to fill vacancies which arise during "the Recess" between the two Sessions of each Congress.

This is how the court below interpreted the Recess Appointment Clause, and how it ruled. Moreover, the original understanding and predominant practice during most of the first 200 years of American history is in accord with that ruling of the court below. Indeed, no prior President has taken the position of the current Administration in asserting that the President can make a recess appointment when the Senate itself says it is not in recess. That strongly raises the specter of abuse of power, which this Court should address, and curb, restoring the original understanding of the power consistently with the language of the Constitution.

For all of these reasons, the ruling of the court below should now be affirmed.

ARGUMENT

I. THE CONSTITUTION'S APPOINTMENTS CLAUSE, REQUIRING THE ADVI CE AND CONSENT OF THE SENATE, IS PART OF THE CONSTITUTION'S SEPARATION OF POWERS, WHICH IS A FUNDAMENTAL BULWARK OF AMERICAN LIBERTIES.

The President's powers of appointment are specified in Article II, Section 2, Clause 2 of the Constitution, which states that the President,

> "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."

The Power of Appointment of federal officials was debated extensively at the Constitutional Convention, concerning "whether the power should be vested in the entire legislature, as proposed in the original Virginia Plan; in the Senate alone; in the president alone; or in the president with the advice and consent of the Senate." Michael J. Gerhardt, The Federal Appointments Process: A Constitutional and Historical Analysis 16-17 (2000).

The Power was assigned "to the President and Senate jointly," The Federalist No. 67, at 409-10, in Hamilton's words, to serve the fundamental Constitutional framework of Separation of Powers, which was embraced by the framers as the central Constitutional structure for the protection of American liberties. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3157 (2010).

The required advice and consent of the Senate serves as a powerful check and balance on the

concentration of power in the hands of the President, as intended by the framers. Federalist 76, at 457 (Requiring Senate consent for appointments provided "an excellent check upon a spirit of favoritism in the President."). That diffusion of power wisely protects against possible oppression by a runaway President, whose single minded pursuit of his own certitudes in appointment of federal officers might seem imperial to those with minority views, or those holding to shifting opposing public opinions which may have even transformed into new majorities.

"This Court has repeatedly emphasized that 'the Constitution diffuses power the better to secure liberty.'" *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) (quoting *Morrison v. Olson*, 487 U.S. 654, 694 (1988)). Madison himself, so central to the framing of the Constitution, warned us that the gravest threat to that Separation of Powers was "a gradual concentration of the several powers in the same department." The Federalist No. 51, at 321 (Madison) (Clinton Rossiter ed., 1961).

The Constitution provides a "general method" of appointment with the advice and consent of the Senate, Federalist 67, at 409, that serves to "check" presidential power. The Federalist No. 76, at 457 (Hamilton) (Clinton Rossiter ed., 1961). The more limited Recess Appointments Clause provides for a more limited "auxiliary method" of Presidential appointments, Federalist 67, at 409, that is by now heavily outdated. The auxiliary method was included to serve functionality in a time of far more limited, indeed, relatively primitive transportation and communications capabilities, when the most advanced

means for Congressional travel was literally the horse and buggy, and even the Pony Express for communication had not been invented yet.

In these circumstances, the more limited, and heavily outdated, auxiliary Recess Appointment Power should be interpreted narrowly to its precise terms and language. As Edmund Randolph, the nation's first Attorney General, explained, the recess-appointment power "is to be considered as an exception to the general participation of the Senate" so "[i]t ought to[] be interpreted strictly." Edmund Randolph, Opinion on Recess Appointments (July 7, 1792), in 24 The Papers of Thomas Jefferson 165, 166 (John Catanzariti et al. eds., 1990).

II. THE RECESS APPOINTMENT POWER APPLIES ONLY WHEN THE SENATE IS IN RECESS, WHICH IS DEFINED BY THE CONSTITUTION, NOT AT THE PRESIDENT'S DISCRETION.

The Recess Appointment Power is defined in Article II, Section 2 of the Constitution, which states, "The President shall have Power 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."

Petitioner NLRB argues that the power to determine when the Senate is in Recess for purposes of this Recess Appointments Clause resides with the President, who may decide that the Senate is in recess because it is unavailable to "receive communications from the President or participate as a body in making

appointments," as the President's Office of Legal Counsel has argued.

But such a blatant misreading of the Constitution would destroy the whole Separation of Powers check and balance on the President's Appointment Power. It would empower the President to completely evade the primary Appointments Clause required advice and consent of the Senate whenever, as here, the President fears the Senate will enforce the will of the people against unpopular, radical appointments that would flout even majority viewpoints, let alone any concern over protection for minority views.

During any holiday, break, or adjournment, the President would have the Constitutional power to declare the Senate in recess for purposes of the Recess Appointments Clause, regardless of what the Senate itself says, as in this case. That would render the required Advice and Consent of the Senate in the supposedly primary Appointments Clause a constitutional nullity whenever it might have the intended effect of restraining the President's power.

But it is the Senate, not the President, who determines when the Senate is in recess. See, e.g., *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."); Laurence H. Tribe, American Constitutional Law § 4-13, at 267 (2d ed. 1988) (on "matters of legislative self-governance . . . the Constitution expressly makes each house a law unto itself"). Indeed, the Rules of Proceedings Clause

empowers each House to "prescribe a method for . . . establishing the fact that the house is in a condition to transact business" and "it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just." *Ballin v. United States*, 144 U.S. 1, 5-6 (1892).

But, ultimately, it is not even the Senate, but the Constitution, that determines when the Senate is in "the Recess" to which the Recess Appointment Power applies. The Constitution itself says that the Recess Appointment Power applies to vacancies that may happen during "the Recess" of the Senate, as quoted above.

By its very terms, the Recess Appointments Power applies to appointments made "during the Recess of the Senate…which shall expire at the End of their next Session." U.S. Const., Article II, Section 2. The use of the article "the" before Recess means that the power does not apply during just *any* recess. There is, in fact, only one "Recess of the Senate" during every Congress. That is "the Recess" between the two Sessions of every Congress, one Session taking place during the first year, and another taking place during the second year. That, in fact, is how the *Congressional Record* is denominated, by the number of the Congress, and by the number of the Session for each Congress.

That reading is consistent with the rest of the Recess Appointments Clause, which specifies that recess appointments "shall expire at the end of their next Session," their referring back to the Senate as the antecedent. The Recess between the two Sessions of

each Congress is, of course, followed by the Second Session of that Congress. That is the "next Session" to which the language refers, further indicating that it is talking about "the Recess" between the two Sessions of each Congress. Federalist 67, at 410 (Hamilton)(recess appointments "expire at the end of the ensuing session of the national Senate," ensuing meaning the appointment occurs during the Recess between the two Sessions of each Congress).

Recess appointments consequently can only be made during "the Recess of the Senate" between the two Sessions of every Congress. That means also that Recess appointments can only last up to one year, during the second Session of each Congress.

The language of the Recess Appointments Clause also limits recess appointments only to fill vacancies which arise during "the Recess" between the two Sessions of each Congress. The language of the Clause says the recess appointment power applies "to fill up all Vacancies *that may happen during* the Recess of the Senate…." U.S. Const., Article II, Section 2.

This is how the court below interpreted the Recess Appointment Clause, and how it ruled. Pet.App.18a-52a.

That interpretation is also consistent with the limited purpose of the Recess Appointments Clause, which is to provide for the government to continue to function during the more extended Recess between the two Sessions of Congress, when Members are more likely to travel home, especially for the holidays. In

horse and buggy days, with communication limited to writings hand delivered by couriers traveling by horse, members could not be contacted by the speed of sound or the speed of light, and fly back the next day, as today. So some alternative means of appointment to keep the government fully functioning during the one known extended Recess of each Congress was necessary.

It is instructive to interpretation that the Recess Appointments Clause does not say the power applies to appointments made during "*a* Recess," which would mean whenever the Senate is in any recess. Such a reading is not only inconsistent with the article "the," but also with the limitation of the period of service of any recess appointee to the end of the next Session of the Senate. If recess is read as any recess, then the next Session would end at the next recess of any sort, such as the end of the next day, or even for a lunch break. That would be an implausibly short, dysfunctional period of service. So that could not be what the Recess Appointments Clause means.

Moreover, if recess appointments were not limited to "the Recess" between the two Sessions of each Congress, then recess appointees could serve until the end of not only the Session during which they were appointed, but until the end of the following Session as well. This would be the result under the language of the Recess Appointments Clause, which provides for recess appointees to serve until "the End of [the] next Session." U.S. Const., Article II, Section 2. That can be as much as two years for a recess appointee, way too long for appointments that bypass the advice and consent of the Senate. Two years is half a presidential

term, a full term for a member of the House, and nearly as long as most Senate-confirmed officers serve. See, e.g., Matthew Dull & Patrick S. Roberts, Continuity, Competence, and the Succession of Senate-Confirmed Agency Appointees, 1989–2009, 39 PRES. STUD. Q. 432, 436 (2009) (Senate-confirmed officers in recent Administrations served for a median 2.5 years).

Moreover, that is not necessary, given the purpose of the Recess Appointment Power to keep the government functioning during the limited time the Senate is not available to provide advice and consent. Once the Senate gets back from "the Recess," there is plenty of time for it to consider and confirm a nominee. 3 Joseph Story, Commentaries on the Constitution of the United States § 1551 (1833)(recess appointments "should expire[] when the senate should have had an opportunity to act on the subject.").

III. THE RULING OF THE COURT BELOW FOLLOWS THE PRACTICE REGARDING THE RECESS APPOINTMENT POWER FOR MOST OF THE FIRST 200 YEARS OF AMERICAN HISTORY.

The original understanding and predominant practice during most of the first 200 years of American history is in accord with the ruling of the court below regarding the parameters of the recess appointment power. Apart from disputed history regarding recess appointments during the immediately post-Civil War Presidency of Andrew Johnson, none of the other 27 Presidents from 1789 to 1921 even tried to make a recess appointment outside the Recess of the Senate

between the Sessions of each Congress. S. Pub. 112-12, Official Congressional Directory, 112th Congress (2011), at 17-18. That strongly suggests the "assumed absence" of the power. *Printz v. United States*, 521 U.S. 898, 908 (1997).

That includes the practice and understanding of federal officials during the Administrations of the first four American Presidents, which reflects the original understanding of the Recess Appointment Power. Randolph Opinion at 166; see also To George Washington from Charles Lee, 7 July 1796, Founders Online, National Archives (similar opinion by Washington's second Attorney General, Charles Lee); Letter from James McHenry to Alexander Hamilton (Apr. 26, 1799), in 23 The Papers of Alexander Hamilton 69, 70 (Harold C. Syrett ed., 1976); Letter from Alexander Hamilton to James McHenry (May 3, 1799), in 23 The Papers of Alexander Hamilton, supra, at 94; Letter from John Adams to J. McHenry (May 16, 1799), in 8 The Works of John Adams 647, 647 n.1 (Charles Francis Adams ed., 1853); Letter from Thomas Jefferson to James Monroe (Feb. 15, 1801), in 9 The Works of Thomas Jefferson 178, 179 (Paul Leichester Ford ed., 1905); Letter from Thomas Jefferson to Tench Coxe (Feb. 11, 1801), in 3 Memoirs, Correspondence, and Private Papers of Thomas Jefferson 459, 459 (1829); James Madison: Paper on relations with Andrew Jackson, December 1823, Founders Online, National Archives, http://founders.archives.gov/documents/Madison/99-02-02-0 103; Letter to Wilson Cary Nicholas (Jan. 26, 1802), in 36 The Papers of Thomas Jefferson 433, 433 (Barbara B. Oberg ed., 2009).

In 1921, Attorney General Daugherty ruled that recess appointments could be made outside the Recess between the two Sessions of each Congress if it was "impossible" to obtain the advice and consent of the Senate for an appointment, due to an extended, longer term, intrasession recess. 33 Op. Att'y Gen. 20, 25. But mid-Session appointments did not become common until the late 1970s and, even then, there was consistent congressional resistance.

No prior President, however, has taken the position of the current Administration in asserting that the President can make a recess appointment when the Senate itself says it is not in recess. That strongly raises the specter of abuse of power, which this Court should address, and curb, restoring the original understanding of the power consistently with the language of the Constitution.

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* American Civil Rights Union respectfully submits that the ruling of the court below should be affirmed.

Respectfully Submitted,

PETER J. FERRARA
Counsel of Record
2011 Freedom Lane
Falls Church, VA 22043
703-582-8466
peterferrara@msn.com
Counsel for Amicus Curiae
American Civil Rights Union

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