No. 12-1281

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

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NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP.,

*Respondent.*

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On Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit

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# BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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## QUESTION PRESENTED

Can the president decide when the Senate is in session?

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## INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

Executive interference with the internal functioning of the legislature is a founding grievance of this country. *See The Declaration of Independence* para. 6 (U.S. 1776) ("He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures."); *id.* at para. 7 ("He has dissolved Representative Houses repeatedly."). Although the cast of characters has changed, this Court is asked here to condemn similar usurpations.

This case arises from President Obama's unprecedented attempt to appoint three members to the National Labor Relations Board during a three-day intrasession recess of the Senate.[2] He did this only one day after Congress was constitutionally required to be in session in order to comply with the Twentieth Amendment.[3] No other president has exercised the recess-appointment power during such

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[1] Pursuant to Rule 37.2(a), all parties were timely notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored any part of this brief and that only *amicus* made a monetary contribution to its preparation or submission.

[2] *See* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487, 1483 (2005) (defining "intrasession" as a "typically shorter recess taken during a session" of Congress, while an "intersession" one is "the recess between two sessions of a Congress").

[3] U.S. Const. amend. XX, § 2 ("The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.").

a brief Senate break,[4] and no other president has granted himself the power to define a Senate "session." The government concedes that a break of less than four days is "effectively *de minimis*" and "would not trigger the President's recess-appointments authority," Pet. Br. 18, so the Senate's Jan. 3 session must be defined out of existence if the president's Jan. 4 appointments are to be valid.

This case can thus be decided by answering one question: Who decides whether the Senate is in session? That question is the lowest common constitutional denominator for this case, and it is all that this Court needs to rule for the Respondent.

The Cato Institute was established in 1977 as a nonpartisan policy research foundation dedicated to advancing individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was founded in 1989 to restore the principles of government that protect liberty. To that end, Cato host conferences and publishes the annual *Cato Supreme Court Review*. This case concerns Cato because it addresses the scope of executive power and the incredible claim that the president can determine when the Senate is in session.

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[4] The government concedes that the president cannot make recess appointments during *intra*session breaks of three days or less. Cert. Pet. at 21; *see also Executive Power-Recess Appointments*, 33 Op. Att'y Gen. 20, 8-9 (1921) ("[D]oes it not necessarily follow that the power exists if an adjournment for only 2 instead of 28 days is taken? I unhesitatingly answer this by saying no . . . ."); Henry B. Hogue & Maureen Bearden, Cong. Research Serv., R42329, *Recess Appointments Made by President Barack Obama* 12 (2012) (In the last 30 years, "the shortest intrasession recess during which a President made a recess appointment was 10 days.").

## SUMMARY OF THE ARGUMENT

While this is a case of first impression for this Court, it is also a constitutional endgame for the Recess Appointments Clause. Two hundred years of opinions from attorneys general have whittled the Clause to a wispy rule untethered from constitutional text, structure, or history. The "rules" expressed in the government's brief—10-plus days is okay; three days not quite; sometimes the president can decide otherwise—should be recognized for precisely what they are: the culmination of a string of self-serving opinions from the executive branch seeking to increase the president's power. Now is the time to say "no." Either the president has essentially unreviewable discretion in determining what constitutes a "real" Senate session, or the Recess Appointments Clause is an enforceable provision that provides more than political constraints.

Indeed, any theory of governance under a system of checks and balances would leave each branch's internal rules to the discretion of that branch, even if that discretion is used for purely "political" obstructionism. The Constitution contemplates politics, of course, so the frustrations of the political branches should not be permitted to undercut a wise and necessary element of the separation of powers.

The executive—which the legislative branch must "check and balance"—cannot be trusted to decide whether the Senate is "actually" in session. For the same reasons, this Court should not decide what constitutes a Senate session. Such a decision would only create an ad hoc list of vague criteria with no basis in either the Constitution or good governance.

Although *amicus* endorses the original public meaning of the Recess Appointments Clause as expounded by the D.C. Circuit—that recess appointments can be made only during *inter*session recesses, and only to fill vacancies that arise during such recesses—the Court need not go that far to hold the president's appointments unconstitutional.[5]

Moreover, to allow the president the power he seeks here would sever the appointments process from *any* meaningful ties to the Constitution. If the president's actions are not reversed, the Senate will increasingly have to jump through hoops of the president's creation to perform its constitutional duty to provide advice and consent on presidential nominees. It will be forced to examine not whether it is in session according to its own rules—a straightforward question—but whether the president, in his or her discretion, will consider the body to be "actually" in session.

This Court should affirm the judgment of the court of appeals to prevent the complete evisceration of the Recess Appointments Clause.

## ARGUMENT

### I. THE SEPARATION OF POWERS DEMANDS THAT THE SENATE BE ALLOWED TO DETERMINE WHEN IT IS IN SESSION

In early colonial times, King Charles I famously "abridged the liberties of English subjects" when he

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[5] The parties' briefs discuss at length the relative validity of intersession versus intrasession appointments. Regardless of the Court's views on that issue, President Obama's Jan. 4, 2012, appointments are too broad an assertion of executive power.

"did not call Parliament into session for eleven years" merely because Parliament was being uncooperative. Kathleen A. Keffer, *Choosing a Law to Live by Once the King is Gone*, 24 Regent U.L. Rev. 147 (2012). While President Obama's intrusions on congressional operations do not rise to the level of King Charles I's "11-years' tyranny," *id.*, his use of the recess-appointment power does purport to trump the Senate's determination of when it is in session.

Yet it is well established that the president lacks the authority to change the Senate's internal rules. It would thus flout fundamental principles of separation of powers to allow the president to determine the operating procedures of another branch, one that checks executive power.

In order to guard against the corrupting effects of accumulated power and prevent a strong executive from dominating the rest of the new federal government, the Founders allocated power among three independent branches. As James Madison explains in *The Federalist No. 51* (Clinton Rossiter ed., 1961): "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." This Court is called upon to do precisely that in the context of executive interference with legislative prerogatives.

### A. The Constitution gives the Senate the power to set its own rules.

The president may not change the Senate's internal procedures. U.S. Const. art. I, § 5 ("Each House may determine the Rules of its Proceedings."). The Founders understood that "[e]ach house of

Congress possesses this natural right of governing itself," including "fixing its own times and places of meeting." Thomas Jefferson, Constitutionality of Residence Bill of 1790 (July 15, 1790), *reprinted in* 2 The Founders' Constitution, art. I, § 5, c. 1-4, Doc. 14.

This Court has long affirmed that clear and basic constitutional rule. In *United States v. Ballin*, 144 U.S. 1 (1892), for example, the Court evaluated a House rule allowing non-voting members to be included when determining the presence of a quorum. The Court held that the power of each house to make its own rules is "absolute and beyond the challenge of any other body or tribunal," *id.* at 5, and thus held the House rule to be valid. The Court thus refused to micromanage those House rules:

> Neither do the advantages or disadvantages, the wisdom or folly, of such a rule present any matters for judicial consideration. With the courts the question is only one of power. The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights . . . . 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.

*Id.*

Under this framework, *neither* the judiciary and *nor* the executive can challenge the internal rules of either house. The Rulemaking Clause "clearly reserves to each House of the Congress the authority to make its own rules, and judicial interpretation of

an ambiguous House Rule runs the risk of the court intruding into the sphere of influence reserved to the legislative branch under the Constitution." *United States v. Rostenkowski*, 59 F.3d 1291, 1306 (D.C. Cir. 1995); *see also Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892) (There is "respect due to a coordinate branch of the government.").

It would be shocking if any branch were given the power to determine the internal rules of another branch that serves as a check on its power. Ceding too much authority to one branch unbalances the Framers' careful constitutional structure.

### B. The separation of powers demands a clear division between the executive and legislative branches.

The Framers understood that maintaining distinct spheres of government was "essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361 (1989). At its core, "[t]he doctrine of separation of powers is concerned with the allocation of official power among the three co-equal branches of our Government. The Framers 'built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" *Clinton v. Jones*, 520 U.S. 681, 699-700 (1997) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)). This Court has recognized that "even when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Loving v. United States,* 517 U.S. 748, 757 (1996).

The functioning of checks and balances depends on the separation of powers. Before one branch can check another's expansive tendencies, the branches must be separated and the divisions between them scrupulously maintained. At the very least, the internal procedures which are the prerogative of each branch cannot be usurped by another.

The Appointments Clause, U.S. Const. art. II, § 2, cl. 2, is a "checks and balances" clause within the separation-of-powers system. During the Constitutional Convention, the Framers extensively debated the proper method to appoint executive officers and judges. See Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 Harv. J.L. & Pub. Pol'y 103, 110-23 (2006). That debate centered on advice and consent being the "normal" method of appointment. *Id.* The delegates feared that if one branch had too much power over appointments, then "intrigue and partiality" would result. *Id.* at 111 (quoting James Wilson).

In short, recess appointments were never meant to be an expansive constitutional power. To the contrary, it is a mere "auxiliary method of appointment, in cases to which the general method [is] inadequate." *The Federalist No. 67*, at 409 (Hamilton) (Clinton Rossiter ed., 1961). "The ordinary power of appointment is confided to the President and Senate *jointly*," with the advice and consent function providing "an excellent check upon a spirit of favoritism in the President." *Id.*

The government's argument that the president can undercut the Senate's determination that it was in session demonstrates that the Framers' fears were

justified. Such a view smacks of the tyrannical executive power that Thomas Jefferson once warned would "come in its turn, but at a more distant period." Arthur M. Schlesinger, Jr., *The Imperial Presidency* 377 (Houghton Mifflin Co., 4th ed. 2004) (quoting a letter from Thomas Jefferson to James Madison). Madison also warned of the gradual accumulation of power in one branch: "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." *The Federalist No. 51* (Madison) (Clinton Rossiter ed., 1961). Although the president has the constitutional duty to keep the government running, that job does not grant him unbounded discretionary power to override internal legislative determinations.

In *Clinton v. City of New York*, Justice Kennedy emphasized that the "[s]eparation of powers helps to ensure the ability of each branch to be vigorous in asserting its proper authority" because a "concentration of power in the hands of a single branch is a threat to liberty." 524 U.S. 417, 450-52 (1998) (Kennedy, J., concurring). Indeed, historical evidence demonstrates that the executive power was never meant to be an unbridled power concentrated in the hands of one person.

As Justice Frankfurter explained in *Youngstown Sheet & Tube Co. v. Sawyer*, "[t]he example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in

his image." 343 U.S. 579, 641 (1952) (Frankfurter, J., concurring). These restraints should not be ignored today. As James Madison put it in *The Federalist No. 51*, "[a]mbition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government." It is through the tensions between competing interests that the necessary balance of power is preserved—and upon which the indispensable individual liberties of a free society depend.

### C. The Senate's prerogative to make its own rules allows for political obstruction and ideological impasses.

The Framers were certainly aware that politics can get messy. They were also aware that the appointments process would have the potential for obstructionism and political intrigue. In fact, they designed it that way by including it as part of a system of checks and balances. Of all the branches of government, this Court is best positioned to see through political grandstanding and to enforce a non-political, constitutionally grounded rule—namely, that the Senate decides if it is in session.

Despite the complaints of modern presidents and pundits, political impasses are not an unforeseen and modern innovation. The Founding generation saw politics at its worst—for example, the beating of Rep. Matthew Lyon by Rep. Roger Griswold on the floor of Congress on Feb. 15, 1798, *Representative Roger Griswold of Connecticut Attacks Matthew Lyon of Vermont on the House Floor*, History, Art, & Archives of the U.S. House of Representatives, available at

http://history.house.gov/HistoricalHighlight/Detail/35645 (last visited Nov. 19, 2013). Nevertheless, the Framers still included the advice and consent requirement for appointments. Holding up appointments, or even refusing to vote on them, is not a bug in the Constitution, but a feature. Presidents are free to complain about that feature and to try to bring the scorn of the people upon the legislature, but they are not free to ignore it.

President George W. Bush complained that he needed to make recess appointments to overcome the supposed "unprecedented filibuster that Senate Democrats" used to block nominees. *Bush Uses Recess Appointment to Put Nominee on the Court*, Feb. 20, 2004, CNN.com, http://www.cnn.com/2004/LAW/02/20/bush.pryor. President Obama similarly complained that "a minority in the Senate" is "put[ting] party ideology ahead of the people they were elected to serve." Jennifer Liberto, *Obama Recess Appoints Consumer Bureau Chief*, Jan. 4, 2012, CNN.com, http://money.cnn.com/2012/01/04/news/economy/consumer_bureau_cordray. These statements are pure politics and have no place in constitutional analysis.

Obstructionism has always been part of politics, and the Senate is under no constitutional duty not to obstruct nominees, nor to give every nominee an "up or down vote." White, *Toward the Framers' Understanding of "Advice and Consent," supra*, at 145-48. A president can be understandably frustrated that the Senate is refusing to approve nominees but, at bottom, that is a frustration with the Constitution. Many Framers would probably say that if the president is frustrated, then their system of checks and balances is doing its job.

So what is a president to do when faced with a recalcitrant Senate? The answer is imbedded in the Constitution: compromise. Checks and balances is a system designed to elicit compromise. To allow the president the power he seeks here would further undercut this aspect of good governance.

## II. IN PRESUMING THAT HE CAN DEFINE A SENATE RECESS, THE PRESIDENT CREATED AN ARBITRARY, DANGEROUS, AND UNPRECEDENTED STANDARD FOR DETERMINING WHAT IS A "REAL" SESSION

1. After the president appointed the NLRB members at issue, the Office of Legal Counsel issued a memo explaining when the president can determine whether the Senate is in session. See, *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. _ (Jan. 6, 2012) ("OLC Memo"). Understanding that it was breaking new ground, the OLC tried to avoid the impression that the president could arbitrarily define whether the Senate is in session. The government's brief here takes a similar tactic. Pet. Br. 44-64. Both documents fail to cabin the president's claim of arbitrary power.

The OLC offered a bright-line rule for the president to follow in determining if the Senate is "actually" in session: namely, when the Senate "expressly provides that there is to be 'no business conducted' . . . the President may properly rely on the public pronouncement . . . in determining whether the Senate remains in recess." *Id.* at 21 (slip op.); *see also* Pet. Br. 44. At the time the president made the appointments here, the Senate schedule expressly

provided that the Senate would "convene on Tuesday, January 3, at 12 p.m. for a pro forma session only, with no business conducted, and that following the pro forma session the Senate adjourn and convene for pro forma sessions only, with no business conducted." 157 Cong. Rec. S8783-8784 (Dec. 17, 2011) (Sen. Wyden).

Under the government's approach, three words—"no business conducted"—confer the incredible power to make recess appointments even when the Senate is convening every three days. Even if such magic words had magic constitutional significance, however, the OLC memo establishes broad presidential discretion not cabined by the Senate's pronouncements. "[E]ven absent a Senate pronouncement that it will not conduct business, there *may be circumstances* in which the president could *properly conclude* that the body is not available to provide advice and consent of a *sufficient* period to support the use of his recess appointment power." OLC Memo at 21 (emphasis added). What those "circumstances" may be, and what is a "sufficient period," is left to the president's discretion. In other words, even if the record does not say "no business conducted," the OLC claims that the president may still exercise the recess-appointment power by unilaterally declaring the Senate not to be in session.

2. Although *amicus* believes it irrelevant to the central question of *who* decides whether the Senate is in session, it is worth noting that on December 23, a Senate that was in recess according to the OLC and the government's brief, Pet. Br. 44-64, passed an extension of the payroll-tax cut, which the president then signed into law. 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). And only four months earlier, the

government's idea of a "recessed" Senate passed the Airport and Airway Extension Act during a *pro forma* session. *Id.* at S5297 (daily ed. Aug. 5, 2011). The Senate has also used many *pro forma* sessions to satisfy its constitutional duty, under U.S. Const. art. I, § 5, cl. 4, not to adjourn for more than three days without the House's permission. *See*, *e.g.*, 95 Cong. Rec. 12,586 (Aug. 31, 1949); 95 Cong. Rec. 12,600 (Sept. 3, 1949); 97 Cong. Rec. 2898 (Mar. 26, 1951).

Moreover, even when the Senate is in an "actual" session—at least according to the government—it is possible for it to "go through the motions" and accomplish little or no business. During quorum calls, for example, defined in the Senate glossary as a "call of the roll to establish whether a quorum is present," *see*, *U.S. Senate Glossary*, available at http://www.senate.gov/reference/glossary_term/quorum_call.htm, a clerk will often call names of senators for hours.[6] But the quorum calls are a "sham." David A. Fahrenthold, *Senate Legislation May Slow, But Quorums Continue*, Wash. Post, June 9, 2011, available at http://articles.washingtonpost.com/2011-0609/politics/35266240_1_senate-floor-quorum-formal-adjournment. "The Senators aren't coming. Nobody expects them to." *Id.* During 2011, such quorum calls took up 33 percent of the first 153 days of the session. Such activity could certainly satisfy the Latin definition of "pro forma," or "as a matter of form." Dictionary.com, Definition of "Pro Forma," http://dictionary.reference.com/browse/pro+forma.

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[6] C-SPAN junkies will have noticed that "Mr. Akaka," the long-serving but recently retired senator from Hawaii, has now been replaced as the first name in the roll with "Mr. Alexander," the senior senator from Tennessee.

So *pro forma* sessions can fulfill constitutional duties and pass legislation, while "actual" sessions may do neither. Yet President Obama has given himself the authority to determine whether the Senate is actually in session and the OLC has affirmed this self-grant of power—stating that the president's actions are meant to ensure that *pro forma* sessions are not "used to prevent the President from exercising his constitutional authority to make recess appointments when *he determines* that the Senate is unavailable to provide advice and consent." OLC Memo at 19 (emphasis added). According to the OLC, what distinguishes other *pro forma* sessions is that they are used for "parliamentary purposes" and, unlike those uses, there is "no evidence of a tradition" in using *pro forma* sessions to block nominees. *Id.* In other words, the president has vested himself with the ability to decide whether a session is being held for "parliamentary purposes," even if the session is otherwise required by the Twentieth Amendment or used to pass legislation. In addition, President Obama has allowed himself to determine what is and is not legislative "tradition."

In essence, the OLC opinion gives the president carte blanche to override the Senate's own determination that it is in session. This is plainly wrong. The president was never meant to have the unlimited authority to bypass the Senate's advice and consent function; the latter was meant to be a "check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters form State prejudice, from family connection, from personal attachment, or from a view to popularity." *The Federalist No. 76*, at 456 (Hamilton) (Clinton Rossiter ed., 1961). Indeed,

"[t]he manipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power, because the power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism." *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 883 (1991) (internal quotation marks and citation omitted).

The government's brief tactfully avoids raising the OLC's astounding affirmation of executive discretion. (Has the government abandoned that position for this litigation?) Yet it is telling that, when litigation seemed unlikely, the executive branch did not feel obliged to adopt any meaningful constitutional standard. Such legerdemain fits into a historical pattern of executive self-aggrandizement via the Recess Appointments Clause.

This Court, by affirming the clear constitutional rule that the Senate decides when and if it is in session, can forestall the inevitable debates over the "circumstances" when the Senate is available or what constitutes a "sufficient period" of time. Those future arguments are predictable: What does it mean to be "unavailable" in a time of video conferencing and air travel, not to mention unforeseen future technologies? What are the features of a presidentially determined "crisis" that requires an appointment during a recess of less than three days?

One simple rule will avoid having the Recess Appointments Clause eviscerated by the minutiae of unprincipled political chatter: The Senate alone decides when and if it is in session.

## III. THE SLOW EROSION OF THE RECESS APPOINTMENTS CLAUSE HAS REACHED A CONSTITUTIONAL ENDGAME SUCH THAT THIS COURT MUST PREVENT THE CLAUSE'S COMPLETE EVISCERATION

The Recess Appointments Clause has endured 200 years of constitutional erosion that threatens to thwart the senatorial check on the president's appointment power. Most legal opinions on the Clause been written by attorneys general or the Office of Legal Counsel. Almost always, the occasion for these opinions was a president's attempt to appoint a nominee during a slightly shorter recess than had been attempted before. Unsurprisingly, the opinions generally concluded that the appointment was permissible. The cumulative effect of these opinions has been the redefining of a Senate "recess" *by the executive* into shorter and shorter periods. It has also resulted in a reconceptualization of the recess-appointment power as an executive prerogative that the Senate often infringes rather than a limited exception to the constitutionally prescribed joint-appointment process.

The first major opinion that broadened the Recess Appointments Clause was written by Attorney General William Wirt during the Monroe administration. Wirt argued that vacancies can undermine the "[s]ubstantial purpose of the constitution," which was "to keep these offices filled," and thus "powers adequate to this purpose were intended to be conveyed." 1 Op. Att'y Gen. 631, 632 (1823). He did not see any danger in the possibility that presidents might use a broadened appointment power to circumvent the Senate. He also understood, howeverm that the power might be regarded as

dangerous and thus offered reassuring words that "[t]he construction which I prefer is perfectly innocent," and it "cannot possibly produce mischief."

But mischief not only occurred, it continues. Over the next 200 years, the drift of AG and OLC opinions continually redefined a Senate "recess" to increase executive power and narrow Senate power. Wirt's writing opened the door to an avalanche of opining that relied on his basic reasoning. *See*, 2 Op. Att'y Gen. 525 (1832) (Taney), 4 Op. Att'y Gen. 523 (1846) (Mason), 7 Op. Att'y Gen. 186 (1855) (Cushing), 10 Op. Att'y Gen. 356 (1862) (Bates), 11 Op. Att'y Gen.179 (1865) (Speed), 12 Op. Att'y Gen. 32 (1866) (Stanbery), 12 Op. Att'y Gen. 449 (1868) (Everts), 16 Op. Att'y Gen. 522 (1880) (Devens), 18 Op. Att'y Gen. 29 (1884) (Brewster), 19 Op. Att'y Gen. 61 (1889) (Miller), 30 Op. Att'y Gen. 314 (1914) (Gregory), and 33 Op. Att'y Gen. 20 (1921) (Daugherty).

The final opinion cited above, from President Harding's Attorney General Harry Daugherty, opened the door to further growth of executive power by expanding the definition of "recess" to include—for the first time—*intra*session recesses. Daugherty argued that the key question was whether the Senate was in a "real and genuine recess." 33 Op. Att'y Gen. at 25. Now, of course, the question is not even whether there is a "real and genuine recess," but whether there is a "real and genuine session."

Since Daugherty's opinion, the arguments made by the attorneys general or the OLC have been predictable: if previous opinions determined that an intrasession recess of 18 days satisfied the Recess Appointments Clause, then why is 17 days not also acceptable? And if 17 days is acceptable, why not 16?

And so on. President George H. W. Bush made several appointments during intrasession recesses of 12 days. Michael A. Carrier, Note, *When is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 Mich. L. Rev. 2204, 2210 (1994). President Clinton made a controversial appointment during a 10-day recess. Lee Davidson, *Hatch Ruffled over Gay Revelry at Swearing-In of Ambassador*, Deseret News, June 30-July 1, 1999, at A5. President George W. Bush followed suit. Geoff Earl, *Kennedy Eyes Suit on Pryor*, The Hill, Feb. 26, 2004. The government's concession that a recess of three days or fewer would be a *de minimis* exception, Pet. Br. 18, is similarly not rooted in any constitutional principle.

The appointments process has thus endured constitutional erosion since General Wirt's 1823 opinion. Because courts have largely stayed out of appointments controversies, this erosion predictably springs from one branch of government defining the scope of its own power. President Obama's appointments of NLRB members created a new baseline for unconstitutional encroachment on senatorial power that will surely expand.

Due to the president's partial reliance on "public pronouncements of the Senate," 36 O.L.C. at 21, what will predictably follow from this new baseline will be an attempt by the Senate to preserve its constitutional authority by redefining how business is done—or, more specifically, how it *says* business will be done. But the Senate should not have to resort to such linguistic cat-and-mouse games to preserve its constitutionally delegated powers. Moreover, as discussed *supra*, the president has not wedded himself to reliance on "public

pronouncements of the Senate," thus guaranteeing that the cat-and-mouse game will continue until a third party of competent jurisdiction resolves the dispute with clarity and authority.

This Court is presented with an opportunity to check the president's dangerous assertion of power. As Justice Frankfurter acknowledged in the Steel Seizure Case: "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring). Without this Court's intervention, nearly 200 years of a constitutional slippery slope will quickly become a constitutional precipice.

## CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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