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 *Amicus Curiae* of Citizens United, Citizens United Foundation, U.S. Justice Foundation, Gun Owners of America, Gun Owners Foundation, Lincoln Institute for Research and Education, Abraham Lincoln Foundation, and Conservative Legal Defense and Education Fund in Support of Respondents

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MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

Citizens United, Gun Owners of America, Inc., and The Abraham Lincoln Foundation for Public Policy Research, Inc., are nonprofit social welfare organizations, exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code ("IRC").

Citizens United Foundation, U.S. Justice Foundation, Gun Owners Foundation, The Lincoln Institute for Research and Education, and Conservative Legal Defense and Education Fund are nonprofit educational organizations, exempt from federal income tax under IRC section 501(c)(3).

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law. Each organization has filed numerous *amicus curiae* briefs in this and other courts.

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

1. The Senate's role of "advice and consent" to the Executive's nominees for federal office is a critical component of the Constitution's system of checks and balances. The convention debates confirm that the clause was designed to eliminate the British system of patronage, and ensure that the President did not have a power similar to English kings to appoint nobles to the royal court. In this case, the President clearly seeks to violate that structural limitation on executive power, by unilaterally appointing nominees to the National Labor Relations Board whom the Senate refused to confirm.

The recess appointments power was designed to give the President a very narrow, limited authority, to be used only when there was no convened Senate to consider nominations. This power was especially important during the early years of the republic, when "intersession recesses were regularly six to nine months." However, with the exponential growth of the federal government, there is almost never a time when the Senate is unable to perform its authorities to advise and consent.

While the recess appointments power could be viewed as a relic of a bygone age, it is not within this Court's power of judicial review to disregard the original meaning of the constitutional text. In compliance with established rules of constitutional interpretation, the court of appeals below found that "the recess," referred to in Article II, Section 2, Clause 3 was limited to the singular recess between two

constitutionally-mandated annual sessions of the Senate, as provided by Article I, Section 4, Clause 2. Additionally, adhering to established principles of construction, the court below determined that the recess appointment power was limited to filling only those vacancies that "happen" to occur during an intercession recess, not vacancies that may "happen" to exist during any occasional recess within any particular session.

2. In this case, two of the President's three appointments to the NLRB were to positions that had been vacant for some time. Indeed, the President had already submitted their names to the Senate for confirmation, but the Senate had not consented. Nevertheless, even though the Senate had not formally voted "no," it also had refused to vote "yes." The President was free to make more moderate nominations, which might have been confirmed. Instead, he used the recess appointment power in clear disregard of the will of the Senate, which had chosen to take no action.

The Constitution does not impose upon the Senate a duty to rapidly fill vacancies for the President. Nor does the Constitution confer upon the President the power to determine how or when the Senate should act upon his nominees and to confirm unilaterally any nominee out of necessity. Nor by its inaction has the Senate "acquiesced" to this usurpation of its power by the Executive.

3. This case must be viewed as a backdrop to a larger usurpation and accumulation of power by the

Executive Branch, part of a trend of "gradual concentration of the several powers in the same department" that the founders countenanced against. Not only does this aggrandizement of power in numerous executive departments and administrative agencies lessen the power of the legislative branch, "the people" are harmed "when one branch encroaches on another."

Here, unconfirmed appointees held their offices based on the unilateral decision of one man — and to him alone were beholden. The framers realized that Congress would best represent and protect the people, yet these recess appointees were not vetted by the people's representatives.

ARGUMENT

I. THE POWER OF THE SENATE TO ADVISE AND CONSENT TO SENIOR PRESIDENTIAL APPOINTMENTS IS A VITAL CHECK UPON THE EXECUTIVE POWER.

A. The Power of the Senate to Advise and Consent is a Central Component of the Constitutional System of Checks and Balances.

America's national government is based on the separation of powers, with the Constitution vesting the legislative power in the Congress (Article I, Section 1), the executive power in the President (Article II, Section 1), and the judicial power in a Supreme Court and such other courts as the Congress may establish (Article III, Section 1). At the same time, ours is also a government of checks and balances, with the Constitution delegating a number of specific powers to various branches that restrict powers that would otherwise have been wholly vested in another branch. This system was designed with the end that "public liberty" be secured. *See* 1 Joseph Story, Commentaries on the Constitution § 525, p. 393 (5th ed., Little Brown: 1891). As James Madison observed:

> [Separation of powers] does not require that the legislative, executive, and judiciary departments ... be wholly unconnected with each other. [Rather,] unless these departments be so far connected and blended, as to give to each a constitutional control over

> the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained. [*The Federalist No. 48*, p. 256 (G. Carey & J. McClellan, eds., Liberty Fund: 2001).]

Patterned after the mixed power systems already extant in state constitutions, the United States Constitution contains a number of specific delegations of one or more of the three kinds of powers to one or more of the three different branches. *See The Federalist No. 47* at 249-55. Although there was significant opposition to the specific "mixture of powers" embodied in the federal constitution,[2] Madison defended the chosen system of checks and balances as one that had been carefully calibrated to provide:

> [G]reat security against a gradual concentration of the several powers in the same department, consist[ing] in giving to those who administer each department, the necessary **constitutional means**, and personal motives, to resist the encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of the attack. Ambition must be made to counteract ambition. [*The Federalist No. 51*, at 268 (emphasis added).]

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[2] *See* 1 Story's Commentaries at §544.

The appointments power was the product of a robust debate in Philadelphia. Joseph Story observed in his Commentaries that "[i]n the first draft of the Constitution, the power was given to the president to appoint officers in all cases, not otherwise provided for by the Constitution; and the advice and consent of the senate was not required." 2 J. Story, Commentaries on the Constitution, §1526, p. 351 (5th ed., Little Brown: 1891). In this same first draft, the Senate, not the President, was empowered "to appoint Ambassadors and judges of the Supreme Court." *Id.*

Had this early draft been adopted, the power of the president to choose officers in the executive branch of government would have gone unchecked, and would have resembled "the prerogative of erecting and disposing of offices" exercised by the English kings. *See* 1 William Blackstone, Commentaries on the Laws of England, 262 (U. of Chi. facsimile ed.: 1765). America's founders turned away from this unfettered, monarchical practice, to one that most founders believed to be more fitting of a republican form of government — permitting the President the prerogative only to make nominations, but constraining his power to appoint only those nominees who received the consent of the Senate, except for "such inferior officers, as [Congress] thinks proper." *See* Freytag v. Commissioner of Internal Revenue, 501 U.S. 868, 883-84 (1991).

Even after the Constitution was ratified, John Adams voiced strong objection to "[t]he negative of the senate upon appointments," expressing his opinion that "it lessens the responsibility of the president" and

"introduce[s] corruption of the grossest kinds, both of ambition and avarice...." Letter of John Adams to Roger Sherman (July 1789), reprinted in 4 The Founders' Constitution, at 106-07 (item 45) (P. Kurland & R. Lerner, eds., U. of Chi. Press: 1987). Roger Sherman demurred, contending that:

> the senate, being a branch of the legislature, will naturally incline to have [the laws] duly executed, and, therefore, will advise to such appointments as will best attain that end[,] [whereas] if the president alone was vested with the power of appointing all officers, ... he would be liable to be deceived by flatterers and pretenders to patriotism, who would have no other motive but their own emolument. [Letter of Roger Sherman to John Adams (July 1789), *id.* at 108 (item 46).]

Years later, Story optimistically summed up the Senate check upon the President's appointment power:

> [T]he patronage of the government and the appointments to office are too important to the public welfare not to induce great hesitation in vesting them exclusively in the President. The power may be abused; and assuredly it will be abused, except in the hands of an executive of great firmness, independence and integrity, and public spirit. It should never be forgotten, that in a republican government offices are established and are to be filled, not to gratify private interests and private attachments: not as a means of corrupt influence, or individual

> profit; not for cringing favorites or court sycophants; but for purposes of the highest public good, to give dignity, strength, purity, and energy to the administration of the laws. [2 Story's Commentaries at § 1530.]

B. The Recess Appointments Power Was Not Designed to Allow the President Broad Authority to Bypass the Senate's Power to Advise and Consent.

Article II, Section 2 of the Constitution vests in the Senate the negative power to block certain appointments — by withholding its advice and consent. The affirmative power of the President to "nominate," however, stands constitutionally unfettered. As Story observed in his Commentaries, "[t]he President is to nominate, and thereby has the sole power to select for office; but his nomination cannot confer office, unless approved by a majority of the Senate." 2 Story's Commentaries at §1531. The power of each branch is "complete and distinct," the Senate having no power to "compel [the President] to yield to their appointment," but only to negative the President's nominee. *Id.*

Article II, Section 2, Clause 3 provides for a narrow exception to this rule. It reads:

> 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.

According to the court of appeals below, "[t]he available evidence shows that no President attempted to make an intrasession recess appointment for 80 years after the Constitution was ratified." Canning v. NLRB, 705 F.3d 490, 501 (D.C. Cir. 2013). Indeed, it was generally assumed that the President's recess appointment power "would allow the filling of vacancies 'without delay' [only] during periods of Senate absence." *See* H.B. Hogue, "Recess Appointments: Frequently Asked Questions," p. 1 (CRS: June 7, 2013). "This interpretation," a Congressional Research Service specialist has opined, "is supported by the fact that both houses of Congress had relatively short sessions and long recesses during the early years of the Republic." *Id.* Thus, the court below reported that recess appointments during a session of Congress were "exceedingly rare," observing that "[p]residents made only three documented intrasession recess appointments prior to 1947." Canning, 705 F.3d at 502.

"Throughout the history of the republic," CRS specialist Henry Hogue has observed, "Presidents have ... sometimes used the recess appointment power for political reasons[,] temporarily install[ing] an appointee who probably would not be confirmed by the Senate." Hogue, "Recess Appointments" at 1. However, as the federal government assumed new powers with the New Deal, and as Congress continued the growth of government — proliferating additional commissions, bureaus, and departments and, in the process, adding to the number of appointments needing the Senate's consent — the need arose to find other methods for the temporary filling of vacancies.

See Canning, 705 F.3d at 511. Additionally, as government grew, Congress found itself in session year round, virtually erasing the original need for the President to fill vacancies without the advice and consent of the Senate. Today, there is no real time when the Senate is unavailable, its members typically only hours away from nation's capital. Further, with the growth of the federal government came the multiplication of controversy generated by a wide swath of government programs, leading to threats of filibuster over some of the more controversial nominees.

Yet, even as the need for recess appointments has dwindled, presidents from both parties have used the power far more frequently:

> President William J. Clinton made 139 recess appointments, 95 to full-time positions. President George W. Bush made 171 recess appointments, of which 99 were to full-time positions. As of June 7, 2013, President Obama had made 32 recess appointments, all to full-time positions. [Hogue, "Recess Appointments" at 1.]

Until recently, these presidents and others before them generally have succeeded in a variety of efforts to shuffle their appointments through this constitutional backdoor, even if temporarily. On January 25, 2013, however, the United States Court of Appeals for the District of Columbia Circuit ruled against President Obama's effort to appoint three members of the five-member National Labor Relations Board ("NLRB")

without the advice and consent of the Senate. *See* Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013).

C. The Recess Appointment Exception to the Senate's Advice and Consent Power Is Specifically Defined and Limited by the Constitutional Text.

Rejecting the NLRB's invitation to adopt a practical interpretation of the President's recess appointment power in light of changed conditions, Judge Sentelle chose to employ a textual analysis, summarizing the court's holding, as follows:

> The power of a written constitution lies in its words. It is those words that were adopted by the people. When those words speak clearly, it is not up to us to depart from their meaning in favor of our own concept of efficiency, convenience, or facilitation of the functions of government. [*Id.*, 705 F.3d at 511-12.]

Relying on the Supreme Court's recent decision in the Second Amendment case of District of Columbia v. Heller, 554 U.S. 570 (2008), the court of appeals stated that "[w]hen interpreting a constitutional provision, we must look to the natural meaning of the text as it would have been understood at the time of the ratification of the Constitution." Canning, 705 F.3d at 500. As in Heller, the Canning opinion provides another opportunity for this Court to return to first principles of judicial review to which the courts, like the other two branches of government, are "bound" by the text of the Constitution as it was originally

written." See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-180 (1803).

At issue here is the meaning of Article II, Section 2, Clause 3, which reads:

> 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. [Emphasis added.]

The questions before the Court are transparently textual, requiring an exposition of the meaning of "recess" and "happen."

1. "The Recess."

The NLRB assumes that the word "recess" must be given its ordinary meaning — "a temporary suspension of a session, or a break within a session" — of the Senate. *See* Brief for Petitioner ("Pet. Br.") at 13-14. Thus, according to the term's ordinary meaning, it could be argued that the President may make a temporary appointment any time that the Senate is in recess. To be sure, this contention finds support in the "ordinary meaning rule [which] is the most fundamental semantic rule of interpretation[,] govern[ing] constitutions, statutes, rules, and private instruments." A. Scalia and B.A. Garner, Reading Law 69 (West: 2012). However, as these same commentators have acknowledged, citing Joseph Story's Commentaries, "[e]very word employed in the constitution is to be expounded in its plain, obvious,

and common sense, **unless** the context furnishes some ground to control, qualify, or enlarge it." *Id.* (Emphasis added.)

As Judge Sentelle noted, the word "recess" does not stand alone. It is preceded by the definite article, "the," giving rise to an inquiry whether there is a **specific** "recess" to which the text may be referring. Canning, 705 F.3d at 500. The first clue to the answer to this question is found in the recess appointment clause itself, which provides that any such appointment made by the President is temporary, expiring at "the end of [the Senate's] next session," thereby indicating (i) that the Senate meets in a period called a session and (ii) that there is more than one session in which any particular Senate assembles as a legislative body.

Indeed, Article I, Section 4, Clause 2 (i) mandates that "Congress assemble at least once in every Year," and as modified by the Twentieth Amendment, (ii) requires a biennial Congress[3] to meet in two separate and distinct assemblies, each beginning on January 3 of successive years. Each of these two annual assemblies are referred to by Article II, Section 2, clause 3 as a "session." Between the two sessions there is a recess, required by the Constitution, necessitating a suspension of business of the two houses of Congress. Unlike the "intrasession recesses," which are numerous and within the discretion of two Houses of Congress, the

[3] The members of the House of Representatives and one-third of the Senate being subject to election every two years.

constitutionally prescribed annual "intersession recess" is singular and mandatory. Thus, "the recess" referred to in Article II, Section 2, Clause 3 is the "intersessional" break between the two Sessions mandated by Article I, Section 4, Clause 2.

The drafters of the Constitution insisted that the Congress meet at least once each year "as a check on the Executive department," thereby creating two sessions with one recess between them. *See* Records of the Convention, reprinted in 2 The Founders Constitution at 282-83 (item 3). As Story recounted in his Commentaries:

> Annual parliaments had been long a favorite opinion and practice with the people of England; and in America, under the colonial governments, they were justly deemed a great security of public liberty. The present provision (Article I, Section 4, Clause 2) could hardly be overlooked by a free people, jealous of their rights; and therefore the constitution fixed a constitutional period at which congress should assemble in every year.... Thus, the legislative discretion was necessarily bounded; and annual sessions were placed equally beyond the power of faction, and of party. [1 Story's Commentaries at §829.]

Unquestionably, "the recess" as it appears in Article II, Section 2, Clause 3 is not to be construed according to the ordinary meaning of the unmodified

"recess," but as a parliamentary "term[] of art"[4] describing the constitutionally-mandated recess between the constitutionally-required annual sessions of the Senate.

Further, as the court below noted, if the President could appoint officers whose appointment requires the Senate's advice and consent whenever the Senate was in "a recess," then the exception provided by the recess appointment clause "could easily swallow the 'general' route of advice and consent." Canning, 705 F.3d at 503. Indeed, such interpretation would run afoul of yet another canon — that in "expounding the Constitution ... every word must have its due force, and appropriate meaning...." *See* Holmes v. Jennison, 39 U.S. (14 Peters) 540, 570-71 (1840).

2. "Happen."

According to Article II, Section 2, Clause 3, the President's unilateral recess appointment power extends to "all vacancies that may happen during the recess." According to Petitioner, this language should be construed to extend to any vacancy that exists during a recess, irrespective of when it arose. *See* Pet. Br. at 28-32. In response, Canning contends that the plain meaning of the phrase requires that the vacancy happen, or arise for the first time, during the recess. *See* Brief of Respondent Noel Canning at 7.

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[4] *See* Scalia and Garner, Reading Law at 73.

Unlike "the recess," the word, "happen," appears in the text without a modifier. When interpreted by itself, "happen" is a verb that ordinarily means "to take place," or "to occur." Unlike the meaning of "the recess," the meaning of "happen" is governed by the ordinary meaning canon. Consulting "[d]ictionaries at the time of the Constitution," the circuit court determined that "happen" meant to "fall out; to chance; to come to pass.'" *Id.* at 507. From this point, the court concluded that to "happen" within the meaning of the recess appointment exception, a vacancy must "first arise" during "the recess" between two or more sessions of the Senate, not at some previous time. *Id.* And rightfully so, for in context it appears that the power to make recess appointments is the exception, not the rule, and "happen" is used to limit that power to apply only to the circumstance when a vacancy first occurs in the recess between two annual sessions, not during some other period.

According to the fixed-meaning canon,[5] the definition of "happen" cannot be changed to adapt it to changing times. *See* Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the State of the American Union, 67 (Little Brown, 5th ed. 1883). ("A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable.")

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[5] *See* Scalia & Garner, Reading Law at 78. ("Although courts routinely apply legal instruments to novel situations over time, their meaning remains fixed.")

II. SENATE INACTION ON A PRESIDENT'S NOMINATIONS DOES NOT JUSTIFY THE UNILATERAL USE OF THE RECESS APPOINTMENT POWER.

A. The Constitution Does Not Mandate that Every Executive Office Must Be Filled at All Times.

Presidential pique at Senatorial prerogative can take different forms. In 1997, President Clinton announced William Lann Lee as "acting" Assistant Attorney General for Civil Rights, after the Senate Judiciary Committee had refused to confirm him in a recorded vote.[6] In a fit of Presidential frustration, President Clinton stated that "I have done my best to work with the United States Senate in an entirely constitutional way. But we had to get somebody into the Civil Rights Division." S. Duffield and J. Ho, "The (Still) Illegal Appointment of Bill Lann Lee," 3 TEX. REV. L. & POL. 402 (1998-1999) at 404. Then, in August of 2000, President Clinton again appointed Lee — still not having been confirmed — to the same office as a recess appointment. H. Hogue, "The Noel Canning Decision and Recess Appointments Made from 1981-2013," Congressional Research Service, Feb. 4, 2013, p. 18.

Petitioner's unstated premise in this case seems to be like that of President Clinton — that the President is somehow guaranteed the power to have vacant

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[6] "Clinton Makes Lee Acting Civil Rights Chief," CNN, Dec. 15, 1997, http://www.cnn.com/ALLPOLITICS/1997/12/15/lee/.

positions filled — and if the Senate will not assist him in confirming nominees, then the President should be able to do it himself. Petitioner cites a law review article for the proposition that "'[i]f the [P]resident needs to make an appointment ... *when* the vacancy arose hardly matters; the point is that it **must be filled now**.'" Petition for a Writ of Certiorari ("Pet. Cert.") at 26 (emphasis added). Petitioner argues that the circuit court's opinion "threatens a significant disruption of the federal government's operations...." Pet. Cert. at 30.

But nowhere does the Constitution say that appointees "**must**" be confirmed by the Senate. On the contrary, the Constitution gives the Senate the **discretionary** power to advise and consent to such nominations. The Constitution does not require that power to be exercised. Of course, a President could almost always fill a vacancy quickly — so long as he picks a person that the Senate will confirm, even if not his ideal choice.

If the Constitution intended to guarantee the President a full roster of confirmed nominees, it would not have given the Senate such a broad power over "advice-and-consent" — including the power not to exercise that power through a vote. Although positions might sit empty for some period of time, and though such a result might seem to some to be inefficient or less-than-optimal, the text and structure of the Constitution has granted to the Senate the prerogative to say no.

B. The NLRB Unilateral Intrasession Appointments Were Not Necessary.

Petitioner argues practicalities — that the President must have unilateral intrasession appointment powers, or else there will be "periods of potentially significant duration in which there is no power to fill vacant offices, not even temporarily...." Pet. Cert. at 16. This is a *non-sequitur*. Intrasession adjournments do not, as Petitioner claims, represent times that "the Senate is unavailable to give its advice and consent." Pet. Cert. at 23.

On a date when the Senate was not actually in recess, President Obama made three recess appointments to the NLRB. Only one appointment was necessary to give the NLRB a quorum to do business. Only one of those vacancies, that of Sharon Block, actually occurred during the alleged recess.[7] The other two vacancies, filled by Terence F. Flynn and Richard F. Griffin, had become vacant long before, on August 27, 2010 and August 27, 2011. *Id.*

Moreover, the President had already nominated both Flynn and Griffin to the NLRB more than four months before he made the appointments in question.[8] The Senate had not confirmed these nominees, due to

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[7] As the circuit court notes, "Sharon Block ... filled a seat that became vacant on January 3, 2012...." Canning, 705 F.3d at 498.

[8] http://www.whitehouse.gov/the-press-office/2011/12/15/presidential-nominations-and-withdrawal-sent-senate.

Republican opposition.[9] This political resistance may have caused the Executive some consternation, but it was not a justification to ignore constitutional procedure.

It is not as if the Senate was unaware that the President had made nominations that he wished to be confirmed. Nor was the Senate unaware that it would adjourn for the holidays. The Senate could have chosen to confirm the President's nominations at any time, but it did not do so. Since the Senate did not act on at least two NLRB appointments for months before it adjourned, nothing would be changed by the Senate continuing inaction until it reconvened after the holidays. That was a deliberate choice, not simply an oversight.

The recess appointments power is a constitutional check and balance on the power of the Executive Branch. The President, then, should not be surprised if his appointments power is occasionally checked, as it was here. This case represents the exercise of gamesmanship to thwart political opponents through the illegitimate usurpation of legislative power by the Executive. Only belatedly has this maneuver been defended as a proper exercise of a constitutional power.

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[9] E. Pianin and B. Ehley, "Here's Who Loses in the Filibuster Fight," The Fiscal Times, July 15, 2013, http://www.thefiscaltimes.com/Articles/2013/07/15/Heres-Who-Loses-in-the-Filibuster-Fight. ("But when [the Republicans] have withheld confirmation, it has been for agencies that many of them would prefer to neuter, dismantle, or eliminate.")

C. The Senate's Inaction Here Does Not Open the Door to De Facto Repeal of Article II, Section 2, Clause 5.

In the leading court of appeals decision upholding a broad recess appointment power, Judge Barkett, writing in dissent in Evans v. U.S., 387 F.3d 1220 (11th Cir. 2004), stated that the recess appointments power was for "when the Senate is disabled from acting upon appointments." *Id.*, 387 F.3d at 1232 (Barkett, dissenting). Judge Barkett notes that nowhere is it suggested that "the clause was added to allow the President to appoint someone whom the Senate might refuse to confirm." *Id.* at 1232. This is in line with the circuit court's opinion here, that the President has limited power "when the Senate is by definition not in session and therefore unavailable to receive and act upon nominations from the President." *Id.* 705 F.3d at 499. The recess power "served only as a stopgap for times when the Senate was unable to provide advice and consent." *Id.* at 502. To hold otherwise would be to "allow[] the President to side-step the Senate's advice-and-consent role even where the Senate is not disabled from fulfilling that role...." Evans, 387 F.3d at 1234.

The scenario laid out by Judge Barkett is exactly what happened in this case. The Senate had not confirmed (and likely would have continued to refuse to confirm) the President's nominees. Nevertheless, the President proceeded to appoint them unilaterally. However, by not approving, indeed not even holding a vote on the President's nominees, the Senate had in effect acted. Although the Senate had not formally

voted "yes" or "no," inaction constituted a deliberate choice. As former Library of Congress Senior Specialist in Separation of Powers Louis Fisher explained, citing examples drawn from the administrations of Presidents Ford, Carter, Reagan, Bush, and Clinton, "[t]he mere fact that the President submits a name for consideration does not obligate the Senate to act promptly." L. Fischer, Constitutional Conflicts between Congress and the President, 5th edt., U. Press of Kansas (2007), at 26.

In using a filibuster or threat thereof to hold up a vote, the minority party in the Senate was inviting more acceptable candidates. Contrary to what Petitioner would have this Court believe, this is precisely the process the Constitution intended.

Article I, Section 5, Clause 2 states that "[e]ach House may determine the Rules of its Proceedings." The Senate has done just that in setting forth the rules for the confirmation proceedings, and it is not up to the Executive to bypass those rules when they become inconvenient.[10]

To be sure, a president's effort to make a particular appointment can be frustrated by the

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[10] In fact, in this case the President later withdrew both the Griffin and Block nominations, and made two other nominations to replace them. http://www.politico.com/story/2013/07/white-house-consults- with-afl-cio-head-on-nlrb-picks-94280.html. The Senate then ratified both members, who currently hold their offices pursuant to proper constitutional process. *See* http://www.nlrb.gov/who-we-are/board/nancy-j-schiffer; *see also* http://www.nlrb.gov/who-we-are/board/kent-y-hirozawa.

inaction of Congress. But inaction can serve a legitimate purpose in the advise and consent process. Indeed, failure to vote on a nominee has the same effect as voting down an appointee, but without the same stigma. If the President were empowered to bypass Congress during any period of recess, then it would be the President who sets the Senate agenda, not the Senate, and this would undermine the constitutional object of checking the President's power of appointment. If the President were free to seize upon any time when the Senate is in recess in which to make a controversial appointment that "happened" at any prior date, then the Senate's constitutional role would be thwarted.

Petitioner argues that the Senate has "acquiesced" to Presidents' usurpation of its power over appointments. Pet. Cert. at 18. Petitioner claims that there is "evidence of Congress's acquiescence in the Executive's interpretation and practice...." Pet. Cert. at 28. However, fact that the Senate has kept silent on this issue does not mean it has acquiesced.

Rather, the **minority** party was able to prevent the whole body from voting on the President's nominations. Surely, the **majority** party of the Senate — which would have approved the President's nomination — would have every reason **not** to object to the President's illegitimate use of power to thwart the minority's legitimate use of power permitted by the Senate's rules.[11]

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[11] As for the future, on November 21, 2013, the Senate Democrats exercised the so-called "nuclear option" to amend its rules and

III. THE APPOINTMENTS POWER DISPUTE IN THIS CASE MUST BE VIEWED AS AN IMPORTANT BATTLE IN THE WAR THAT HAS BEEN WAGED BY PRESIDENTS TO USURP LEGISLATIVE POWERS, PUTTING AT RISK THE LIBERTIES OF THE PEOPLE.

While the appointments power issue in dispute in this case has the appearance of an internecine battle between the political branches of government, it is much more than that. Allowing the President to fill senior government positions with persons deemed unqualified by the Senate puts Americans at the very real risk of being subjected to an unchecked power of a President — the very definition of what the founders called "arbitrary power."[12] The appointments process is an essential component of our constitutional republic's structure, designed to protect the individual from the exercise of power emanating from the wishes of one man. As the court of appeals explained:

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eliminate the possibility of filibuster on certain presidential nominations. P. Kane, "Reid, Democrats trigger 'nuclear' option; eliminate most filibusters on nominees" (Nov. 21, 2013), http://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html.

[12] *See, e.g.*, Luther Martin, "Report to the Maryland Legislature," reprinted in R Yates and J. Lansing," Secret Proceedings and Debates of the Federal Convention (U. Press of the Pacific, 2002), pp. 81, 83.

> The Constitution's separation of powers features, of which the Appointments Clause is one, do not simply protect one branch from another..... These structural provisions serve to protect the *people*, for it is ultimately the people's rights that suffer when one branch encroaches on another. [Canning, 705 F.3d at 510.]

In this case, among the many Americans protected by the Constitution's appointments structure was Mr. Canning, who has suffered from the exercise of arbitrary power from an administrative agency neither constituted, nor acting, according to law.

As the court of appeals explained, the "appointments structure" is not a peripheral issue, but one which "forms a major part of the separation of powers in the Constitution...." Canning, 705 F.3d at 504. Indeed, the appointments dispute to be resolved here is an important component of an ongoing battle by Congress to defend itself against presidential forays in pursuit of political dominance. As such, the three recess appointments to the NLRB by President Obama under review here must be viewed in context — not just vis-a-vis earlier presidential exercises of the recess appointment power, but also in the light of other similar and ongoing presidential efforts to assume power at the expense of Congress, and to the derogation of the rights of the American people.

There is no argument from necessity requiring the Senate's consent to vital executive posts to somehow justify the overthrow of constitutional order. Despite

each President's complaints about Senate cooperation on appointments, the numbers do not support the contention. "In the 111th Congress, for example, the President submitted 964 nominations to executive branch positions, and 843 of those were eventually confirmed for an 87% success rate." M. Carey, "Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress" (Oct. 9, 2012), p. 3. Congress has cooperated in other ways as well. On August 10, 2012, the President signed P.L. 112-166, the Presidential Appointment Efficiency and Streamlining Act of 2011, removing the requirement for Senate "advice and consent" on nominations to 163 positions in the executive branch. However, there still remain as many as 1,200 senior positions in the executive branch requiring Senate Confirmation.[13] The Senate's constitutional role in this process must be protected.

A. The Senate's Role of "Advice And Consent" is Among its Most Important Prerogatives.

Senators fully understand the importance of, and highly value their role to advise and consent in the nomination of federal officials. Every Republican member of the U.S. Senate joined an *amicus curiae* brief filed with this Court in support of granting *certiorari*, even though they believed that the case was rightly decided by the court of appeals below. The Senate *amici curiae* explained their interest as follows:

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[13] M. Carey, "Presidential Appointments" at 7.

> As members of the Senate, *amici* have an unparalleled interest in safeguarding the chamber's constitutionally prescribed role in the appointments process, which the Executive here sought to circumvent. Particularly given Senate rules and practices providing members of the minority party a meaningful role in the chamber's consideration of appointments, *amici* have a powerful stake in ensuring that the Executive's assertion of a unilateral power to appoint federal officers—which the Framers deliberately withheld—is repudiated. [Brief of Senate Republican Leader Mitch McConnell and 44 other Members of the United States Senate, p. 1.]

None of the 53 Senate Democrats — and neither of the two Senators who serve as Independents but who caucus with the Democrats — joined in this or any other *amicus* brief at the petition stage. This is not at all surprising, given that the President making the appointment is a Democrat. Indeed, it is not inconceivable that, if a Republican President had made the recess appointments herein, a similar brief would have been filed by all of the Democratic Senators, and no Republican Senators. As Justice Jackson explained, it is entirely natural that the opinions of many "suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote, of confounding the permanent executive office with its temporary occupant." Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, R., concurring). Although the Republican Senators' *amicus* brief reflects the high value that

Senators generally place on their important role in the appointment process, that brief limited itself to the constitutional argument, providing no insight as to why the Senate so highly prizes its prerogatives.

However, Senators well understand how to employ effectively their special constitutional role in the appointment process well before the President nominates — considering it their prerogative to suggest suitable persons to the executive, as part of the "advice" function. The motivation of Senators may vary, with some seeking patronage, or the advancement of their friends and political supporters, or simply the promotion of those who they believe will do a good job for the President. One common desire is to have appointed an officer who will give special emphasis to a particular Senator's agenda.

Nominations are referred to one of the Senate's 20 standing committees,[14] based on each committee's jurisdiction, allowing all 100 Senators to have a meaningful, personal role in the appointment of officials in their areas of responsibility.[15] Appointees are required to fill out detailed questionnaires as to their background, and respond at a hearing and in

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[14] *See* Senate Rule XXXI, http://www.rules.senate.gov/public/index.cfm?p=RuleXXXI. *See also* http://www.senate.gov/pagelayout/committees/d_three_sections_with_teasers/committees_home.htm.

[15] The Senate's website tracks the current nominations being considered by the Senate's various committees. *See* http://www.senate.gov/pagelayout/legislative/one_item_and_teasers/nom_cmtec.htm.

writing to questions posed by Senators. With respect to appointees who are viewed as unqualified by education, experience, or viewpoint, the confirmation process allows the development of a record, a forum for public attention to be focused on the appointment, and a way to wage an effort to block the nomination.[16]

The confirmation process provides Senators with the opportunity to meet personally with the nominee when they are in a position of strength. Senators can seek commitments from the appointee, for example, that certain information will be provided to the Senators, which had been previously withheld from Congress.[17] Senators can urge that their staff

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[16] Ironically, it is Vice President Biden who is credited with developing many of the Senatorial tactics to thwart Presidential nominees during his 27 years in that body. P. Winn, "Conservatives Blast Biden for Role in Bork and Thomas Hearings," CNSnews.com (Aug. 27, 2008). http://cnsnews.com/news/article/conservatives-blast-biden-role-bork-and-thomas-hearings.

[17] Congress continues to have a surprisingly difficult time obtaining important documents from the Executive Branch. Even where the receipt of information is necessary to the legislative process, the withholding of documentation from Congress can be part of a congressional relations strategy. One illustration involves managing congressional review of a totalization agreement — a Social Security treaty negotiated by the Social Security Administration, which would become law in the absence of a resolution of disapproval by at least one House of Congress within 60 legislative days after approval by the President and submission to Congress in accordance with 42 U.S.C. § 433(e)(2). The U.S.-Mexico Totalization Agreement was signed by the Social Security Administration in 2004, but still has not been submitted to Congress, which, like the public, had been kept substantially in

members, or persons from their State, be hired by the agency. And, importantly, Senators can use these meetings to obtain assurances to promote or oppose specific programs administered by the agency in question. *See generally*, L. Fisher, Constitutional Conflicts at 21-47.

The advice and consent role constitutionally-assigned to the Senate is especially applicable to those presidential nominees who have discretionary powers that, if not properly exercised, would intrude upon liberties secured to the people by the Bill of Rights. Of particular interest to two amici — Gun Owners of America, Inc. and Gun Owners Foundation — is the Second Amendment right to keep and bear arms. Under the current administration, as well as other administrations in the recent past, presidents have bypassed Congress, unconstitutionally threatening such rights by executive orders and actions. Such unilateral claims of executive power in the highly controversial area of gun control, if not checked by the advice and consent power of Senate, would open the door to the appointment of ATF and other Justice Department officials who, even though serving temporarily, could misuse their regulatory and administrative powers to lay the foundation for programs such as a national registration of gun

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the dark. Only the efforts of a nonprofit organization, The Senior Citizens League, through a Freedom of Information Act suit caused the signed Agreement to enter the public domain, thereby also being provided to Congress. *See* http://judiciary.house.gov/hearings/printers/110th/36174.PDF (remarks of Rep. Steve King (R-IA) at 48).

owners, or even the confiscation of the people's weapons and ammunition.

Should the constitutional structure by which appointments are made now be negated by judicial fiat, the President would have gained almost unlimited latitude to appoint persons of his own choosing to senior government positions, (i) radically altering the balance of power between the President and the Senate, and (ii) inexorably moving the country to a modern version of monarch of the sort sought after by a distinct minority of the Founders, but opposed by the American people.[18]

B. Presidential Efforts to Usurp Legislative Power Are a Continuing Threat to Constitutional Separation of Powers.

Article I, Section 1 of the Constitution provides that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States...." As Justice Jackson cogently summarized: "The Executive, except for recommendation and veto, has no legislative power."[19] Youngstown Sheet & Tube, 343 U.S. at 565.

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[18] *See generally,* Thomas DiLorenzo, Hamilton's Curse, Crown Forum (2008), pp. 185-87; Luther Martin, "Report," pp. 13-15. The desire of a people to be ruled over by a king would appear to be deeply rooted in the nature of man. *See* I Samuel 8:5.

[19] Article II, Section 3 of the U.S. Constitution sets out the President's duty to "from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient...." The only additional Presidential power which even

Yet, over time, and in different ways, the executive has assumed a greater and greater legislative function, so that it is now difficult to contend that all legislative power is truly "vested" in the Congress. The illustrations are legion.

- President Theodore Roosevelt embraced what has come to be known as the "Trusteeship theory" of the Presidency.[20]

- In his first inaugural address, President Franklin D. Roosevelt warned Congress that if it did not grant him the powers he sought, he would exercise them anyway.[21]

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touches on the legislative power is his authority, "on extraordinary Occasions, [to] convene both Houses, or either of them, and in the Case of Disagreement between them, with Respect to the Time of Adjournment ... may adjourn them to such Time as he shall think proper...." Article I, Section 3.

[20] President Theodore Roosevelt explained: "I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws." Theodore Roosevelt, An Autobiography (New York: Scribner, 1926), pp. 185-86.

[21] "It is to be hoped that the normal balance of executive and legislative authority may be wholly adequate to meet the unprecedented task before us. But it may be that an unprecedented demand and need for undelayed action may call for temporary departure from that normal balance of public procedure. I am prepared under my constitutional duty to recommend the measures that a stricken Nation in the midst of

- In one of his weekly radio addresses, President William J. Clinton issued a warning to Congress that if it did not act on a particular matter, he would.[22]

- Presidents have exercised legislative authority through the use of various types of presidential directives, generally, Executive Orders.[23]

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a stricken world may require. But in the event that the Congress shall fail to take one of these two courses, and in the event that the national emergency is still critical, I shall not evade the clear course of duty that will then confront me." Franklin D. Roosevelt, "First Inaugural Address" (Mar. 4, 1933).

[22] "Congress has a choice to make in writing this chapter of our history. It can choose partisanship, or it can choose progress. Congress must decide ... I have a continuing obligation to act, to use the authority of the presidency, and the persuasive power of the podium to advance America's interest at home and abroad." W.J. Clinton, "Clinton Says He Will Use 'Authority of the Presidency' to Press Agenda," White House Bulletin, July 6, 1998. One of the ways that President Clinton acted was Executive Order 12954 (Mar. 8, 1995), to overturn a 1938 U.S. Supreme Court decision regarding permanent striker replacements. Since Congress had rejected corrective legislation, President Clinton acted, leading to the second time that an Executive Order was struck down, this time by the U.S. Court of Appeals for the D.C. Circuit.

[23] *See generally* J. Carey & M. Shugart, Executive Decree Authority, Cambridge University Press (1998), Chapter 9; W. Olson & A. Woll, "Executive Orders and National Emergencies: How Presidents Have Come to Run the Country by Usurping Legislative Power," Cato Policy Analysis No. 358 (Oct. 28, 1999). http://www.cato.org/pubs/pas/ pa-358es.html; K. Mayer, With the Stroke of A Pen: Executive Orders and Presidential Power, Princeton U. Press (2001); P. Cooper, By Order of the President:

- This Court has sanctioned the *de facto* repeal of the long-recognized Nondelegation Doctrine, permitting the nearly unbridled growth of the Administrative State.[24]

- Relying on their role as Commander in Chief, Presidents of both parties have come to view their authority, particularly during war time, to be nearly unlimited.[25]

- Presidents seek to set the entire legislative agenda for each fiscal year, beginning with the submission of a comprehensive proposed budget for each fiscal year and highlighted by the State of the Union address.[26]

The Use & Abuse of Executive Direct Action, U. Press of Kansas (2002).

[24] This Court's most recent discussion of the vanishing nondelegation doctrine, in Whitman v. American Trucking Associations, Inc., 531 U.S. 457 (2001), permits delegation of legislative power so long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *Id.*, at 472 (citation omitted).

[25] *See, e.g.*, J. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them," Memorandum Opinion for the Deputy Counsel to the President (Sept. 25, 2001). http://www.justice.gov/olc/warpowers925.htm

[26] The President's Budget for Fiscal Year 2014 seeks to set the priorities for the nation. This comprehensive plan for spending and taxing is submitted to Congress, and can only be described as massive. The Government Printing Office sells the four basic

Indeed, Members of Congress have grown so accustomed to responding to Presidential legislative leadership that they actually blame the President when he fails to provide what they consider to be vigorous leadership for Congress.[27]

Even more surprising is that the President has not met more resistance in usurping legislative power, as often it has been unilaterally surrendered by Congress. Congress has granted the President vast, standby powers to act in ways which appear legislative in nature, such as the Presidential declaration of a "national emergency."[28] For example, after 9/11, Congress approved the "Authorization for Use of Military Force," 115 Stat 224 (Sept. 14, 2001) — a virtual delegation of the Congressional war-making power to the President, including the power to determine against whom the nation is at war, and when it would end. Thus, in a development which may well have been completely unanticipated by the

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[27] *See, e.g.,* the criticism directed by Senator John Cornyn (R-TX) against President Obama for failure to lead Congress with respect to an increase in the debt limit and federal spending. Face the Nation (Oct. 6, 2013). http://www.metacafe.com/watch/ cb-2aa7dlI _Urft/cornyn_obama_awol_on_shutdown_ debt_ceiling_debates/.

[28] *See generally*, D. Unger, The Emergency State: America's Pursuit of Absolute Security At All Costs, Penguin Press (2012).

Founders, Congress has failed to jealously guard its legislative prerogatives. However, of all of the powers vested in Congress, Senators of both parties have generally been mindful of the importance of protecting its prerogative to "advise and consent" to the appointment of important federal officials.

CONCLUSION

For the foregoing reasons, the opinion of the circuit court of appeals should be affirmed.

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