[ORAL ARGUMENT NOT YET SCHEDULED]

CASE NOS. 12-1115, 12-1153

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Noel Canning, A Division of Noel Corporation,
Petitioner,

-vs.-

National Labor Relations Board,
Respondent,

International Brotherhood of Teamsters
Local 760,
Intervenor

ON PETITION FOR REVIEW FROM A DECISION OF THE NATIONAL LABOR RELATIONS BOARD

AMICUS CURIAE BRIEF OF THE SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, JOHN BOEHNER, IN SUPPORT OF PETITIONER

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Dated: September 26, 2012

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties, Intervenors and Amici.

Pursuant to District of Columbia Circuit Rule 28(a)(1), the undersigned counsel certifies that, to the best of his knowledge, all parties, intervenors and amici appearing before this Court are listed in Brief of the Petitioner, Noel Canning, set forth at pages i through ii, and are incorporated by reference herein.

B. Ruling Under Review.

Undersigned counsel further certifies that, to the best of his knowledge, the ruling under review is also set forth in the Brief of the Petitioner, Noel Canning, and is incorporated by reference herein.

C. Related Cases.

Undersigned counsel further certifies that, to the best of his knowledge, all related cases are set forth in the Brief of the Petitioner, Noel Canning, and are incorporated by reference herein.

D. Grounds for Filing Separately.

Finally, undersigned counsel certifies that the separate-brief requirement set forth in Circuit Rule 29(d) does not apply to a governmental entity.

/s/ Jay Alan Sekulow

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INTEREST OF AMICUS

Amicus Curiae, John Boehner, is the Speaker of the United States House of Representatives. As Speaker of the House, he represents the House of Representatives' interest in upholding the Constitution. The Speaker has a unique constitutional role in protecting the House's institutional prerogative in setting legislative recesses and adjournments. The President's determination that Congress was in recess on January 4, 2012, was in error and violated the separation of powers because it tread upon Congress's authority under Article I, §5, cl. 2 ("the Rulemaking Clause") to determine its own rules of meeting. Executive interference with the House of Representatives' powers under the Rulemaking Clause threatens the House's ability to function as an independent branch of government, and it is therefore Amicus' duty to resist such interference.

BACKGROUND

By unanimous consent on December 17, 2011, the United States Senate scheduled a series of pro forma sessions[1] between December 17, 2011 and January 23, 2012, in order to comply with its constitutional obligation not to adjourn for more than three days during a congressional session without the consent of the House of Representatives. The House and the Senate then met in periodic sessions

[1] The term "pro forma session" is a vernacular term with no constitutional significance. Legislative business is conducted in the same manner during "pro forma" session days as it is on any other Legislative Day.

through January 23, 2012, during which legislative business was conducted. During this period, the House remained in session on the following days: December 19, 20, 21, 23, 27, and 30, 2011, and January 3, 6, 10, 13, 17, 18, 19, and 23, 2012. The Senate remained in session on the following days: December 17, 20, 23, 27, and 30, 2011, and January 3, 6, 10, 13, 17, 20 and 23, 2012.

During those sessions, eighty-three bills and twenty-four resolutions were introduced. Forty-one reports were filed, and committees met for eight hearings.[2] On December 23, 2011, both the Senate and the House held sessions during which legislative business was conducted. The House agreed by unanimous consent at that session to pass H.R. 3765, the Temporary Payroll Tax Cut Continuation Act of 2011 ("to extend the payroll tax holiday, unemployment compensation, Medicare physician payment, [and] provide for the consideration of the Keystone XL pipeline . . .") [hereinafter "payroll tax cut extension"]. Additionally, two public

[2] *See* 157 Cong. Rec. D1388 (daily ed. Dec. 19, 2011); 157 Cong. Rec. D1392 (daily ed. Dec. 20, 2011); 157 Cong. Rec. D1395 (daily ed. Dec. 21, 2011); 157 Cong. Rec. D1398 (daily ed. Dec. 23, 2011); 157 Cong. Rec. D1401 (daily ed. Dec. 27, 2011); 157 Cong. Rec. D1404 (daily ed. Dec. 30, 2011); 158 Cong. Rec. D2 (daily ed. Jan. 3, 2012); 158 Cong. Rec. D5 (daily ed. Jan. 6, 2012); 158 Cong. Rec. D7 (daily ed. Jan. 10, 2012); 158 Cong. Rec. D9 (daily ed. Jan. 13, 2012); 158 Cong. Rec. D12 (daily ed. Jan. 17, 2012); 158 Cong. Rec. D16 (daily ed. Jan. 18, 2012); 158 Cong. Rec. D19 (daily ed. Jan. 19, 2012); 158 Cong. Rec. D24 (daily ed. Jan. 23, 2012). Six of the reports during this period were filed on days the House was not in session, but committees nonetheless had been given authorization by the House to file on non-legislative days.

bills were introduced, eight reports were filed, and the Speaker appointed five additional conferees on H.R. 3630, the Middle Class Tax Relief and Job Creation Act of 2011. During the Senate's session on that same day, it passed the same payroll tax cut extension by unanimous consent.

Thus, the President's claim that Congress does not conduct business on "pro forma" session days is wholly belied by the fact that he signed into law the payroll tax cut extension passed during such a session.

On January 3, 2012, the House and Senate met in "pro forma" sessions to comply with the constitutional requirement that Congress meet on that date every year unless they appoint a different date.[3]

The next day, January 4, 2012, the President made four recess appointments, filling three vacancies[4] on the National Labor Relations Board and naming a Director[5] to the Consumer Financial Protection Bureau.

[3] U.S. Const. amend. XX, § 2.

[4] The President appointed Sharon Block, Terence Flynn, and Richard Griffin to the National Labor Relations Board.

[5] Richard Cordray.

ARGUMENT

I. Under the Separation of Powers Doctrine, the Executive and Legislative Branches of Government Are Co-Equal Bodies and the President Has No Authority to Overrule Congress's Determination that It Is in Session.

The stability of our Constitutional government rests in large part on the doctrine of the separation of powers. The Constitutional Convention of 1787 adopted the doctrine "not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

The Framers' rationale for the separation of powers derived from their observations of human nature and its tendency to accrete power. James Madison wrote:

> This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each

> may be a check on the other—that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.

Federalist No. 51 at 323-324 (James Madison) (G.P. Putnam's Sons ed. 1908).

The British crown's abuses demonstrated the evils of power concentrated in one sovereign and fueled the Framers' desire to depart from the British model. In the Declaration of Independence, one of the Colonists' grievances was that the King had "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." Thus, although the King had expansive authority to "prorogue or even dissolve the Parliament," the Constitution grants the President very limited power to adjourn Congress "only in the single case of disagreement about the time of adjournment."[6] The Federalist No. 69 (Alexander Hamilton); *Barnes v. Kline*, 759 F.2d 21, 31 n.20 (D.C. Cir. 1984) ("The *only exception* to Congress's control over its own adjournments is in case of a disagreement between the two houses 'with Respect to the Time of Adjournment,' in which case the President 'may adjourn them to such Time as he

[6] Article II, Section 3 of the Constitution states that the President "shall 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; he may, on extraordinary Occasions, convene both Houses, or either of them, *and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper*." U.S. Const. art. II, § 3 (emphasis added).

shall think proper.'" (emphasis added) (quoting U.S. Const. art. II, § 3)) *vacated on other grounds by Burke v. Barnes*, 479 U.S. 361 (1987).

The tripartite government the Framers designed granted largely co-equal powers between the Executive and Legislative Branches. And as Thomas Jefferson wrote, "[e]ach house of Congress possesses th[e] natural right of governing itself, and consequently of fixing its own times and places of meeting, so far as it has not been abridged by . . . the Constitution."[7] The Legislative Branch's interpretation of its own rules is "beyond the challenge of any other body," including the President. *United States v. Ballin*, 144 U.S. 1, 5 (1892) (Court must give great weight to the Legislative Branch's construction of its own rules and the power to determine its own rules is "continuous."). "The respect due to a co-ordinate branch of government," *Marshall Field & Co. v. Clark*, 143 U.S. 649, 673 (1892), requires the President to defer to Congress's determination of when it is in session. The President did not defer to Congress's interpretation of its own rules; he substituted his own views, declaring *ipse dixit* that Congress was not in session. The President's disregard of Congress's determination of when it is in session assails the Framers' design.

[7] Thomas Jefferson, Opinion on the Constitutionality of the Residence Bill of 1790 (July 15, 1790), *available at* http://press-pubs.uchicago.edu/founders/print_documents/a1_5s14.html.

A. As Speaker of the House, it is Amicus' Constitutional Responsibility to Protect the House of Representative's Institutional Prerogative under the Rulemaking Clause to Determine When it is in Session.

Essential to the separation of powers is each branch of government's vigilance against encroachment by the other branches. James Madison wrote:

> the great security against a gradual concentration of the several powers in the same [branch of government], consists in giving to those who administer each [branch] *the necessary constitutional means* and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.

The Federalist No. 51, at 323-324 (James Madison) (G.P. Putnam's Sons ed., 1908).

Addressing executive encroachment upon the Legislative Branch's powers, the United States Supreme Court observed that the "Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). As the House's sole elected leader with constitutional authority over House recesses, Amicus has the constitutional responsibility to resist the President's encroachment on the Legislative Branch's exclusive authority to determine when it is in recess.

B. For Purposes of the President's Recess Appointment Power, a Recess Exists Only When the House and Senate Agree That Congress is in Recess.

As the current Administration argued to the United States Supreme Court, recess appointments are only permissible when Congress is in recess for a period of at least four or more days. Transcript of Oral Argument at 50, *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010) (08-1457).[8] The Office of Legal Counsel has consistently advised the Executive Branch to wait for a recess of at least 10 days before making a recess appointment. *See, e.g.*, *Executive Power—Recess Appointments*, 33 Op. Att'y Gen. 20, 21-22, 25 (1921) ("Daugherty Opinion") (a recess of "even 10 days" cannot constitute the recess intended by Recess Appointments Clause); Memorandum from Jack L. Goldsmith to Alberto Gonzalez, *Re: Recess Appointments in the Current Recess of the Senate* at 3 (Feb. 20, 2004); *Recess Appointments—Compensation (5 U.S.C. § 5503)*, 3 Op. O.L.C. 314, 316 (1979); *Recess Appointments*, 41 Op. Att'y Gen. 463, 468 (1960).

Recess of more than three days requires the consent of both the House and the Senate. "Neither House, during the Session of Congress, shall, without Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting." U.S. Const. art. I § 5 cl. 4. "There are: (1)

[8] *Available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1457.pdf.

adjournments of three days or less, which are taken pursuant to motion; . . . (2) adjournments of more than three days, which require the consent of the Senate; . . . and (3) adjournments sine die, which end each session of a Congress and require the consent of both Houses."[9]

When the House of Representatives and the Senate decide to adjourn for more than three days, each body will pass a concurrent resolution allowing either or both bodies to recess for longer than three days. Neither the House of Representatives nor the Senate passed a concurrent resolution allowing either to adjourn for more than three days during this period. Accordingly, because the House of Representatives and the Senate did not agree to recess, the President lacked the legal authority to declare recess appointments during this period and particularly on January 4, 2012 when he made the appointments in question.

II. The Executive's Unconstitutional Assertion of Control Over Legislative Recesses Threatens the Constitutional Boundaries of the Pocket Veto.

Upholding the President's unconstitutional attempt to declare when Congress is in session would invite a similar effort to usurp Congress's authority over pocket vetoes. Because pocket vetoes are triggered by Congress's decision to

[9] John V. Sullivan, U.S. House of Representatives, 112th Cong., *House Practice: A Guide to the Rules, Precedents, and Procedures of the House* 2 (2011), *available at* http://www.gpo.gov/fdsys/pkg/GPO-HPRACTICE-112/pdf/GPO-HPRACTICE-112.pdf.

adjourn, the President could claim a pocket veto of disfavored legislation with a declaration that Congress has adjourned.

The Constitution provides that any bill not returned by the President "within ten Days (Sundays excepted)" shall become law "unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law."[10] The Framers carefully circumscribed the veto power of the Executive Branch and rejected proposals by James Wilson and Alexander Hamilton for an absolute executive veto.[11]

A pocket veto is within Congress's constitutional authority, occurring when Congress waives its right to reconsider legislation by adjourning before the President returns the bill. H. Rept. No. 93-1021, 93rd Cong., 2nd sess. 2 (1974). In *Wright v. United States*, 302 U.S. 583, 596 (1938), the Court held that an intrasession adjournment of Congress did not prevent the President from returning a bill he disapproved, as long as appropriate arrangements are made by the originating House for the receipt of Presidential messages during the adjournment. The validity of a pocket veto is governed not by the type or length of adjournment

[10] U.S. Const. art. I, § 7.

[11] 1 The Records of the Federal Convention of 1787, 96-104 (Max Farrand ed., New Haven, Conn.: Yale University Press, 1937); available at http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=1057&Itemid=27.

but by whether the conditions of the adjournment impede the actual return of the bill. *Barnes*, 759 F.2d at 30.[12]

The President has attempted to circumvent rules governing pocket vetoes. On December 30, 2009, the President claimed that he "pocket vetoed" House Joint Resolution 64 (hereinafter "H.J. Res. 64"), a short-term continuing resolution of appropriations that was presented to him on December 19, 2009. The President acted on the joint resolution on the ninth day of the ten-day period during which he could approve it. Citing *The Pocket Veto Case*, he returned it to the House with a memorandum of disapproval stating that he wanted to leave no doubt that the joint resolution was being vetoed as unnecessary.[13]

At that point, the House and Senate were "adjourned sine die but with provision for reassembly of the first session and with the certainty of reassembly for the second session. Thus, each body was in a position to reconsider the vetoed measure in light of the President's objections, either in the first or the second session."[14] House rules made the Clerk available to receive his message, and in fact the Clerk did receive his message.[15]

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[12] *See also* House Practice, *supra* note 9 at 916.

[13] 156 Cong. Rec. E941 (daily ed. May 26, 2010) (Extension of Remarks, Pocket Veto Power, Letter from Speaker Pelosi and Rep. Boehner to President Obama).

[14] *Id.*

[15] *Id.*

The President's attempt to force a pocket veto of H.J. Res. 64 was unconstitutional. As explained in a letter from Speaker of the House Nancy Pelosi and Republican Leader John Boehner to the President, the President's return of H.J. Res. 64 with objections "was inconsistent with the most essential characteristic of a pocket veto, to wit: retention of the parchment by the President for lack of a legislative body to whom he might return it with his objections."[16] The President's successful return of H.J. Res. 64 proved that he was not prevented from returning it. "[T]he Constitutional concern that a measure not become law without the President's signature when an adjournment prevents a return veto does not arise when the President is able to return the parchment to the originating House with a statement of his objections."[17]

Other Presidents have also asserted pocket veto authority by employing what is known as a "protective return" veto, whereby a bill is not signed, but returned to Congress with a "memorandum of disapproval."[18] "In such instances, the House

[16] *Id*.

[17] *Id.* On January 13, 2010, the House reconsidered the joint resolution in light of the President's objections and voted by the yeas and nays on the question of overriding or sustaining the veto. The House sustained the President's return veto. *Id*.

[18] House Practice, *supra* note 9 at 917 (2011).

has regarded the President's actual return of the bill without a signature as a return veto and proceeded to reconsider the bill over the President's objections."[19]

In conclusion, the President's pocket veto is wholly contingent on Congress's decision when to adjourn, and the President possesses no independent pocket veto power. To allow the President to decide the conditions for Congressional adjournment would expand the pocket veto to a kind of absolute veto that the Framers had rejected.

[19] *Id*. For a joint letter from Speaker Foley and Minority Leader Michel to the President, and a response thereto by Attorney General Thornburg, on the use of pocket veto authority during an intrasession adjournment, see 101st Cong. Rec. H3 (daily ed. Jan. 23, 1990). For joint letters from Speakers and Minority Leaders reiterating their predecessors' concerns in this area, see 106th Cong. Rec. 18594 (2000); 106th Cong. Rec. 26023 (2000); 110th Cong. Rec. E2197-98 (daily ed. Oct. 2, 2008); 111th Cong. Rec. E914-15 (daily ed. May 26, 2010).

For discussions of the constitutionality of intersession or intrasession pocket vetoes, see Edward M. Kennedy, *Congress, The President, and The Pocket Veto*, 63 Va. L. Rev. 355 (1977); Robert J. Spitzer, *The 'Protective Return' Pocket Veto: President Aggrandizement of Constitutional Power*, 31 Presidential Stud. Q. 720 (2001); and *Hearings on H.R. 849 Before the Subcomm. on the Legislative Process of the House Comm. on Rules*, 101st Cong. 140-42 (1989).

CONCLUSION

Wherefore, Amicus, Speaker of the House of Representatives, John Boehner, requests this Court to hold that the President's January 4, 2012 appointments are unconstitutional.

Respectfully submitted this 26th day of September, 2012.

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CERTIFICATE of compliance under FED. R. APP. P. 32

I certify that the foregoing brief amicus curiae complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). In reliance on the word count feature of the word-processing system used to prepare the brief, Microsoft Word 2007, the brief contains 2,979 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1).

The foregoing brief amicus curiae also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally spaced 14-point Times New Roman typeface.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2012, I caused eight true and correct copies of the foregoing brief amicus curiae to be delivered to Federal Express for next business day delivery to the Clerk of Court's Office, United States Court of Appeals for the District of Columbia Circuit, 333 Constitution Ave., NW, Washington, D.C. 20001.

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In addition, on September 26, 2012, an identical electronic copy of the foregoing brief amicus curiae will be uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

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