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**

## *AMICUS CURIAE* BRIEF OF PROFESSOR VICTOR WILLIAMS IN SUPPORT OF PETITIONER AND URGING REVERSAL

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## INTEREST OF THE *AMICUS CURIAE*

Victor Williams, of Catholic University of America's Columbus School of Law, writes, in support of the Petitioner.[1] Professor Williams was granted leave to appear below as *amicus* in *Noel Canning v. NLRB* to raise a nonjusticiability alternative theory. He has also appeared as *amicus* in related cases before the Third Circuit and Seventh Circuit. Professor Williams has researched and published in the area of constitutional law and the federal appointments process for twenty-two years. *Amicus'* published scholarship and popular commentary has strongly supported the appointment prerogatives of four Presidents without regard to their party affiliation. *Amicus* has warned of worsening cycles of Senate confirmation dysfunction, and has been particularly critical of the recent purposeful appointment obstruction orchestrated by partisan factions of both the House and Senate. Throughout 2011, Professor Williams advocated for President Barack Obama to use his Article II, Section 2, Clause 3 appointment authority to challenge the appointment obstruction and insure legal authority for the National Labor Relations Board (NLRB) and Consumer Financial Protection Bureau (CFPB). *Amicus* seeks to prompt a nonjusticiability inquiry

[1] All parties have consented. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation or submission of this brief. *Amicus'* institutional affiliation is provided only for identification purposes.

and argues for reversal of the court of appeals. An earlier version of this *amicus* brief was lodged in support of the Petition for a Writ of Certiorari.[2]

## SUMMARY OF ARGUMENT

Without duplication, *amicus* fully endorses Petitioner's reasons for this Court to reverse the court below. *Amicus* offers an alternative theory: Noel Canning's (hereafter "Respondent") challenge to the President's discretionary exercise of his recess appointment powers is a nonjusticiable political question.

Article II, Section 2, Clause 3 is a textual commitment of exclusive authority to the President. This textual commitment recognizes that only the Executive has the institutional competence to know when such discretionary appointment action is required to meet his Article II, Section 3 obligation: "[H]e shall take Care that the Laws be faithfully executed, and

[2] This updated and expanded amicus brief differs from the certiorari stage brief primarily in the Summary of Argument (additional paragraphs added at the end), part IV (additional part added advancing Alexander Bickel's abstention theory), and part VI (additional part added alternatively arguing for judicial invalidation of confirmation filibusters and holds). It removes reference to Oliver Wendell Holmes, Jr.'s appointment to the Supreme Court. Although President Theodore Roosevelt tendered Holmes a recess appointment, Holmes retained his Chief Justice post on the Massachusetts Supreme Judicial Court until after his Senate confirmation.

shall Commission all the Officers of the United States."

The textual commitment of authority grants the Executive both the responsibility to determine Senate unavailability and the discretion to sign temporary commissions. Alexander Hamilton explained in *Federalist 67* that Clause 3 is "intended to authorize the President *singly* to make temporary appointments." *The Federalist No. 67,* at 455 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis in original).

If this Court goes beyond the textual commitment of exclusive authority to the President, it will find itself entering the densest of modern political thickets. Cycles of partisan appointment obstruction and subsequent partisan payback have worsened over each of the past four presidencies. During the first years of the Obama Administration, partisan confirmation obstruction by minority factions reached unprecedented intensity.[3] The political and economic harm of appointment obstruction is significant. Executive departments critical to economic and national security interests have suffered years without leadership. Regulatory agencies have long-standing vacancies and the independent judiciary

[3] *See* Victor Williams and Nicola Sanchez, *Confirmation Combat*, Nat'l L.J. 34 (Jan. 4, 2010).

struggles with many empty benches and caseload emergencies.[4]

The express goal of the minority obstruction, particularly as directed against the 2011 NLRB and CFPB nominees, was nullification: Extinguish the independent agencies' legal authority by preventing timely appointments.[5] The Senate's ongoing internal conflict has so escalated, and the lodging of holds and filibusters is so frequent, that Majority Leader Harry Reid publicly praises the President for his recess appointments and requests that the President "recess appoint all" nominees being denied up-or-down votes by minority factions.[6]

If this Court's review goes beyond the exclusive textual commitment of authority to the President, it must also examine the constitutionality of the underlying obstruction. It would be a strange justice "to let a *minority* of the Senate escape judicial review of

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[4] *See* Russell Wheeler, *Is Our Dysfunctional Process for Filling Judicial Vacancies an Insoluble Problem?,* ACS Issue Brief, Jan. 24, 2013, http://www.acslaw.org/sites/default/files/Wheeler_-_Filling_Judicial_Vacancies.pdf.

[5] *See* Ylan Q. Mui, *McConnell To Block 'Any Nominee' for Top CFPB Job*, Wash. Post, June 10, 2011, at A12; *see also*, Victor Williams, *NLRB and CFPB Recess Appointments: Obama's New Year's Options*, Huffington Post (Dec. 28, 2011), http://www.huffingtonpost.com/victor-williams/nlrb-and-cfpb-recess-appo_b_1169657.html.

[6] Seung Min Kim, *Senate Gridlocked Over Nominations, Again*, Politico, Feb. 17, 2012, http://www.politico.com/news/stories/0212/73038.html.

its arguably unconstitutional obstruction, while subjecting to judicial review the President's response – acquiesced in by the Senate majority – to that obstruction."[7] When a minority of just one Senator lodges a hold or a filibuster threat, the Appointment Clause's simple-majority Senate vote requirement is effectively amended to compel a predicate super-majority cloture vote.[8]

This Court would need to also examine the House majority and Senate minority scheduling collusion designed to withhold adjournment consent to the upper chamber for the purpose of keeping the Senate in pro forma sessions. With obstructionists promoting the myth that a three-day recess minimum was needed to trigger Clause 3 authority, prior sham Senate sessions had been used to bluff the Executive out of using the temporary appointment authority.[9] The specific objective of the 2011 scheduling gimmick was to block the President from responding to the

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[7] Edwin Meese, III, et al., En Banc Amici Brief in *Evans v. Stephens*, 2004 WL 3589823, 9 (emphasis in original).

[8] *See generally*, Tom Harkin, *Filibuster Reform: Curbing Abuse to Prevent Minority Tyranny in Senate*, 14 N.Y.U. J. Legis. & Pub. Pol'y 1 (2011); Aaron-Andrew P. Bruhl, *The Senate: Out of Order?*, 43 Conn. L. Rev. 1041 (2011); and John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 Harv. J. L. & Pub. Pol'y 181 (2003).

[9] *See* Victor Williams, *Pro Forma Follies: Obama's Recess Appointment Authority Not Limited by Sham Sessions*, Nat'l L.J. 51 (Oct. 11, 2010); Victor Williams, *Averting a Crisis: The Next President's Appointment Strategy*, Nat'l L.J. 14 (Mar. 10, 2008).

prolonged confirmation tribulation of NLRB nominee Craig Becker. The President called the obstructionists' bluff, recess commissioned three Board members, including a replacement for Becker – thus restoring the legal authority of the NLRB.[10]

This adjudication is a direct continuation of the ongoing political conflict. In a bold frontal assault, congressional obstructionists appeared as *amici* and participated in oral argument below. This action attempts to draft the judiciary to actively participate in the political combat.

If this Court's review goes beyond the exclusive textual commitment to the President, it will find no judicially manageable standards to resolve the escalating campaign of appointment obstruction or to measure the deference due to the Senate, if any, when the President signs temporary appointments.[11] Judicial review of the President's recess appointment

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[10] *See* Laurence H. Tribe, *Games and Gimmicks in the Senate*, N.Y. Times, A25 (Jan. 5, 2012) ("The Constitution that has guided our Republic for centuries is not blind to the threat of Congress's extending its internal squabbles into a general paralysis of the entire body politic, rendering vital regulatory agencies headless and therefore impotent. Preserving the authority the president needs to carry out his basic duties, rather than deferring to partisan games and gimmicks, is our Constitution's clear command.").

[11] A recent challenge to the Senate's use of the filibuster was analyzed as presenting a nonjusticiable political question based on the three *Baker* criteria argued in this brief. *Common Cause v. Biden*, 909 F. Supp. 2d 9 (D.D.C. 2012).

discretion is also disrespectful and conflictive; the judiciary should not be the final arbiter of the appointment method by which Presidents have strategically benched judges in order to transform courts.

If the Court is not moved to a nonjusticiability determination after applying its own political-question precedent, *amicus* asks that it consider a less "domesticated" abstention perspective; "something greatly more flexible, something of prudence, not construction and not principle." Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962). And, if the Court ultimately rejects both precedent and prudence to reach the merits of the challenge, the predicate congressional appointment obstruction – including the use of confirmation holds and filibusters – must be reviewed.

Respondent Noel Canning opened the door wider for such an expanded review by requesting the additional question presented regarding the Senate pro forma sessions. *Amici* Mitch McConnell and all other Senate Republican Conference members, supporting the Respondent, similarly advocated review of all aspects of the controversy. *Amici* Senators argued that the Court "should consider that question in its entirety, with all antecedent and subsidiary issues on the table." Sen. Republican Leader Mitch McConnell and 44 Other Senators Certiorari *Amicus* Br. 5.

This Court should *either* determine the Respondent's challenge to be nonjusticiable; *or* fully reach all aspects of the merits to *both* reaffirm the Executive's

recess appointment power and invalidate Senate confirmation holds and filibusters requiring unconstitutional supermajority cloture votes.

## ARGUMENT

### Introduction: Political – Not Legal – Questions

Chief Justice John Marshall provided early guidance[12] regarding political-question nonjusticiability: "By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." *Marbury v. Madison*, 5 U.S. 137, 165 (1803). Marshall continued: "Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Id.* at 170. Throughout our Republic's history, this Court has recognized that some constitutional questions are committed by the Constitution to the discretion of the

[12] Three years before his *Marbury* opinion, Congressman John Marshall provided earlier guidance when explaining to his House colleagues that some constitutional questions should only be answered by the elected political Branches. Without such a jurisdictional limit, the political departments "would be swallowed up by the judiciary." Speech of the Honorable John Marshall (Mar. 7, 1800), 18 U.S. app. note I, at 16-17 (1820) (cited by *The Political Question Doctrine and the Supreme Court of the United States* (Nada Mourtada-Sabbah and Bruce E. Cain eds., 25 n.10, 2007)).

elected political Branches. *See, e.g.*, *Luther v. Borden*, 48 U.S. 1 (1849); *Pacific States Tel. Co. v. Oregon*, 223 U.S. 118 (1912); *Coleman v. Miller*, 307 U.S. 433 (1939); *Gilligan v. Morgan*, 413 U.S. 1 (1973).

Associate Justice Sonia Sotomayor most recently reiterated the fundamental jurisdictional principle as it has been developed in such modern cases as *Baker v. Carr*, 369 U.S. 186 (1962); *Goldwater v. Carter*, 444 U.S. 996 (1979) and *Nixon v. United States*, 506 U.S. 224 (1993). She described how "[t]he political question doctrine speaks to an amalgam of circumstances in which courts properly examine whether a particular suit is justiciable – that is, whether the dispute is appropriate for resolution by courts." *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1431 (2012) (Sotomayor, J., concurring). In agreeing with the Court's holding that interpretation of a statute merely regulating a passport's contents did not present a political question, Justice Sotomayor focused on *Baker v. Carr* to emphasize the "demanding" inquiry required in a non-justiciability analysis.

*Baker* serves as a helpful doctrinal guide for such inquiry as it numerates both classical and prudential strains of judicial abstention. The "separation of power function" is identified "as the common element among the many possible formulations of a political question." 369 U.S. at 210. *Baker* identified six characteristics "[p]rominent on the surface of any case held to involve a political question," including, as most relevant here, "a textually demonstrable constitutional commitment of the issue to a coordinate

political department." 369 U.S. at 217. The doctrine also precludes judicial review of an issue where there is a "lack of judicially discoverable and manageable standards for resolving it," or when it is impossible for the court to undertake "independent resolution without expressing lack of the respect due coordinate branches of government." *Id.*

*Nixon v. United States* applied *Baker* by instructing that a political question analysis begins with determining "whether and to what extent the issue is textually committed." 506 U.S. at 228.

The drafting, ratification, and structural logic of Article II, Section 2 prove that the textual commitment of temporary appointment discretion to the Executive is absolute. Additional interrelated prudential factors strongly support that nonjusticiable determination.

## I. Textual Commitment to Executive Alone: Recess Appointment Power was Capstone of Framers' Design for Presidential Predominance in Appointments

Framing the 1787 Philadelphia debate regarding appointments were the unhappy experiences of most of the independent states, which had constitutions mandating that state legislatures appoint officials and judges. "The appointing authority which in most constitutions had been granted to the assemblies had become the principal source of division and faction in the states." Gordon Wood, *The Creation of*

*the American Republic, 1776-1787*, 407 (1969). The Convention's delegates repeatedly considered, and ultimately rejected, all proposals to give the Congress as a whole, or, alternatively, the Senate alone, significant appointment authority. *See Freytag v. Commissioner*, 501 U.S. 868, 904-08 (1991) (Scalia, J., concurring.); *Buckley v. Valeo*, 424 U.S. 1, 129 (1976) (per curiam).

### A. Presidential Predominance in Appointments

As the state legislature appointment processes "had fallen easy prey to demagogues, provincialism, and factions," the 1787 Philadelphia Convention delegates "quickly accepted the desirability of a significant Presidential role in making federal appointments." Michael J. Gerhardt, *The Federal Appointments Process: A Constitutional and Historical Analysis,* 18 (2003).

The Convention's final summer judgment was to grant the President a predominant authority over appointments while restricting the Senate to an advisory consent vote to principal officer nominations. The term "Advice" should be read as conjoined with its companion term "Consent"; the Senate advises the President only by its final consensual vote. Such a final vote remains only advisory as the President

retains absolute discretion to decide whether to sign the commission.[13]

Obvious by the Recess Appointment Clause's structural logic and functional purpose, the Senate was to have no role in, or interference with, the signing of recess commissions.[14] A Senate unavailable to render advisory consent is unavailable to advise as to its availability. The two appointment clauses which separately issue a "shall have Power" charge to the President are the method for his Article II, Section 3 "take Care" and "Commission all officers" obligation.

In *Federalist* writings, Alexander Hamilton favorably described – with "particular commendation" – the creation of a strong appointment authority in the Executive "to promote a judicious choice of men for filling the offices of the Union." *The Federalist No. 76*, at 510-11 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). In explaining the Convention's final

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[13] Contrary to a significant quantity of commentary arguing for an enlargement of the Senate's role beyond this textual grant, Professor John McGinnis supports an accurately narrow reading of "Advice and Consent" by both textual analysis and reference to early practice. *See* John O. McGinnis, *The President, the Senate, the Constitution and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 Tex. L. Rev. 633 (1993).

[14] Just as with temporary appointments for principal officers, the Senate has no advisory consent function regarding "inferior Officer" appointments once legislation vests appointment authority "in the President alone, in the Courts of Law, or in heads of Departments."

decision to restrict the Senate's role to a ratification vote, Hamilton explained that any legislative assembly's "systematic spirit of cabal and intrigue" was incompatible with appointment power. *Id.* at 510.

Hamilton contrasted appointment by a "single well-directed" person who would not "be distracted and warped by that diversity of views, feelings, and interests, which frequently distract and warp the resolutions of a collective body." *Id*. at 511. While Hamilton promised that the Senate's advisory consent would serve as an "excellent check" on improper presidential favoritism, he too optimistically assumed "Senate co-operation" done in a "silent operation." *Id.*

Hamilton affirmed that the House of Representatives should have no appointment role. In *Federalist No. 77*, Hamilton felt obliged to take notice of a "scheme" advocated by "just a few" to give the House influence in the appointment process. *The Federalist No. 77* at 519 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Hamilton accurately predicted that House appointment involvement would manifest "infinite delays and embarrassments." *Id.*

### B. Recess Appointment Authority as the Capstone of Presidential Predominance in Appointments

The capstone of the Philadelphia Convention's design to give the President a predominant authority

in appointments came from North Carolina Delegate Richard Dobbs Spaight.[15] During the most critical day of the long summer's many debates regarding appointments, the final accord was struck for ordinary appointments by restricting the Senate's role to simple-majority vote ratification. Spaight then moved to grant the President unilateral appointment authority when the Senate was unavailable to attend to its advisory consent duty. The delegates immediately and unanimously accepted the grant of exclusive term appointment authority for the President. 2 *The Records of the Federal Constitutional Convention of 1798*, 539 (Max Farrand ed., 1966).

Spaight's motion prompted no additional Convention debate; it was integral to the delegates' structural and functional design for Executive appointment authority. The appointment authority would remain vested and operable at all times for all purposes – regardless of the Senate's attendance to its duties. It was a "power of appointment lodged in a President . . . to be exercised independently, and not pursuant to the manipulations of Congress." *Freytag v. Commissioner*, 501 U.S. at 907 (Scalia, J., concurring).

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[15] Richard Spaight is better known to legal history for communicating with James Iredell urging judicial restraint and judicial deference to the political Branches. *See Letter from Richard Dobbs Spaight to James Iredell* (Aug. 12, 1787), in 2 Life and Correspondence of James Iredell, at 168, 169-70 (Griffith J. McRee ed., 1858).

### C. Framers' Functional Efficiencies and Structural Limitations for Temporary Appointments: Allowing "Play in the Joints"

The core purpose of the 1787 Convention was to redesign the central government to better address the problems of a new nation. The Framers sought to remedy the chief institutional defect in the Articles of Confederation by formally separating executive authority from the Congress. Edmund S. Morgan, *The Birth of the Republic: 1763-89*, 129-44 (3d ed. 1992). The Confederation Congress had failed badly in its attempts to administer the new Republic. Neither specially-constituted congressional committees nor congressionally-appointed administrators had been successful in executing the law. *Id.* at 123-28. Article II, Section 2 was drafted to provide effective and practical governance through a strong Executive with predominate authority over all principal officer and judicial appointments, and a sole temporary commissioning authority to always insure a fully staffed government and judiciary.

The Framers gave the Clause 3 appointment option generous functional efficiencies which are dependent on no Senate role and which allow no Senate interference. The temporary appointment lasts until the end of the next session without Senate ratification needed, or Senate revocation allowed, during that period. The Framers did not prohibit

successive recess commissions.[16] Nor did they restrict the function or power of temporary officials.

The Framers did not include specificity to restrict the duration or type of Senate unavailability, or the timing of a vacancy occurrence necessary for the authority to be triggered. Rather, they charged the President with a broad authority to insure that the federal appointment method would always remain *adequate* to keeping a fully staffed government. Alexander Hamilton explained that the unilateral Executive authority was for those "cases to which the general method was inadequate." *The Federalist No. 67*, at 455 (Cooke ed., 1961).

With such functional efficiencies, it is also important to consider limiting principles inherent in Clause 3's operation. Such limitation is first found in the duration of the appointment. A temporary term of up to 24 months, while significant, is less than a several-years' term of a confirmed departmental office, the many-years' term of an independent agency posting, or the life-tenure office and salary of a confirmed Article III judge. Other limitations are found in possible Senate pushback (e.g., strategically

[16] Presidents have not infrequently made re-recess appointments. *See* 15 *Op. Off. Legal Counsel* 98 (1991) ("It is well-established that the President may make successive recess appointments to the same person.") (quoting Memorandum from William P. Barr, Assistant Attorney General, Office of Legal Counsel, to C. Boyden Gray, Counsel to the President, at 2 (Nov. 28, 1989)).

terminating its current session or withholding of confirmation cooperation). The Congress has many other ways and means of checking the President in the dynamic relationship between the political Branches. *See Zivotofsky v. Clinton*, 132 S. Ct. at 1441 (Breyer, J., dissenting). As a most recent and relevant example of the dynamic relationship, President Obama, in July 2013, agreed to withdraw the pending nominations of two recess-commissioned NLRB members in exchange for Senate obstructionists' pledge to allow simple-majority confirmation votes for replacement nominees.

The wisdom of the Framers' final judgment on temporary appointments was that the Clause's efficiencies and limitations work together to allow what Associate Justice Oliver Wendell Holmes, Jr. described as a requirement for constitutional government: "We must remember that the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. of Texas v. Pension*, 282 U.S. 489, 501 (1931).

## II. *Nixon v. United States*: Applying *Baker*'s Classical and Prudential Factors

In *Nixon v. United States*, the Court rejected, as nonjusticiable, a debenched federal judge's challenge to the Senate's questionable exercise of its Article I, Section 3, Clause 6 "sole" duty to "try" all impeachments.

### A. No Textual Limit: Refusing to Define "try" (or "the Recess")

The *Nixon* Court refused to review a procedurally problematic Senate impeachment trial process by "evidence committee." Only 12 Senators heard live testimony while 88 Senators avoided jury duty in favor of later having access to a cold record. All 100 Senators then voted – thumbs up or down. Hardly the Framers' vision of the upper legislative chamber transformed into the nation's High Court of Impeachment. Nevertheless, the Court determined that the textual commitment of authority to the Senate was absolute.

The Court refused to play sematic games: "[T]he word 'try' in the Impeachment Trial Clause does not provide an identifiable textual limit on the authority which is committed to the Senate." *Nixon*, 506 U.S. at 239. Similarly, the terms "the Recess" and "Vacancies that may happen" in the Recess Appointment Clause of Article II, Section 2, do not provide an identifiable textual limit on the exclusive authority which is committed to the President. The Recess Appointment Clause's textual commitment of exclusive authority to the President is of the same non-reviewable quality as that of the Impeachment Trial Clause to the Senate.

This Court should also readily determine that "there is no separate provision of the Constitution that could be defeated" by allowing the President "final authority" to utilize his temporary appointment authority. *Id*. at 237. It is important to underline that

no individual rights claims are, or could be, presented by the Respondent's challenge.[17]

### B. Conflicted-Out: Judiciary as Final Arbiter of "Important Constitutional Check" on Judiciary

Respondent's challenge presents a significant conflict-of-interest for the judiciary. Although the instant challenge involves agency appointments rather than judicial, the nonjusticiability standard should be uniform as to all temporary appointments; the Framers chose not to have a distinct appointment process for judges and other officers. The Executive has frequently used the unilateral authority to fill Article III judgeships. More than 300 justices and judges have risen to the federal bench by recess commission, including such notable jurists as Augustus Hand, Earl Warren, William Brennan, Potter Stewart, and Griffin Bell. George Washington used recess commissions to fill judgeships created by the first Judiciary Act. Thomas Jefferson recess appointed ten federal judges and thirty Justices of the Peace – including twenty-five jurists whom John Adams had nominated and the Federalist Senate had earlier confirmed as "midnight" judges.[18] The Republic's first

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[17] It remains an open question whether Judge Nixon's lawyer should have emphasized his individual rights claims (due process or attainder).

[18] The doubly-disappointed William Marbury received neither delivery of his ordinary commission from Adams, nor a

(Continued on following page)

five Presidents recess appointed over thirty federal judges, including five Supreme Court justices.

The *Nixon* opinion prudently acknowledged: "Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counter-intuitive because it would eviscerate the 'important constitutional check' placed on the Judiciary by the Framers." *Nixon*, 506 U.S. at 235 (citations omitted). The majority cautioned that Judge Walter Nixon's "argument would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate." *Id.* Similarly, the judiciary should be conflicted-out of being the final arbiter of the uniform process by which judges are strategically and most efficiently benched.

The appointment of new judges serves as an "important constitutional check" on the *status quo* of a given court and the judiciary as a whole.[19] The Executive's use of the authority to bench judges has a

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recess commission from Jefferson. *See* David F. Forte, *Marbury's Travail: Federalist Politics and William Marbury's Appointment as Justice of the Peace*, 45 Cath. U. L. Rev. 349, 400 (1996).

[19] Vacancies on an appellate bench obviously increase the *en banc* voting power and panel influence of the incumbent judges. The power of incumbent judges is significantly increased when bench vacancies are prolonged and numerous, such as the D.C. Circuit has experienced for over a decade. Judges should not be final arbiters of the President's most efficient appointment method to "regulate" bench vacancies.

uniquely transformative history.[20] "Presidents have long used the recess appointment power to ease the way for putting well-qualified and distinguished judges from underrepresented groups on the federal bench." Diana Gribbon Motz, *The Constitutionality and Advisability of Recess Appointment of Article III Judges*, 97 Va. L. Rev. 1665, 1680 (2011). William McKinley recess commissioned Jacob Trieber to a trial bench in Arkansas as the nation's first Jewish federal judge. Woodrow Wilson recess appointed Samuel Alschuler as one of the first Jewish federal appellate jurists. Harry Truman utilized a recess commission to place the first African-American on the U.S. Court of Appeals, William Hastie. Four of the first five African-American federal appellate judges secured the bench by recess commission.

Seeking bench transformation during a period of reactionary Senate obstruction by regional factions of his own party, John F. Kennedy recess-appointed over twenty percent of his judges (with each winning subsequent confirmation). President Kennedy recess-commissioned seventeen judges on just one day – October 5, 1961. Thurgood Marshall was named to the Second Circuit on that day, providing the NAACP lawyer with much-needed protection for future harsh Senate confirmation ordeals. The first two women to rise to a federal district court were recess commissioned, including Sarah Hughes to a trial bench in

[20] *See* Victor Williams, *Estrada: Do a Recess Appointment*, Nat'l L.J. 12 (March 10, 2003).

Dallas, Texas. The only woman to administer the presidential oath of office, Judge Hughes, swore-in Lyndon Johnson at Dallas's Love Field inside Air Force One.[21]

President Johnson recessed appointed African-American judicial legends Spottswood Robinson, III and A. Leon Higginbotham. William Jefferson Clinton placed the first African-American on the Fourth Circuit after being blocked for years from making a permanent appointment. On the eve of the 21st Century, President Clinton recess commissioned Roger Gregory "in the grand tradition of Presidents of both parties, dating all the way back to George Washington, who have used their constitutional authority to bring much needed balance and excellence to our Nation's courts."[22]

## III. Dense Political Thicket: Court's Review Beyond Textual Commitment to Executive Requires Judicial Review of Appointment Obstruction – Holds, Filibusters, and House-Senate Scheduling Schemes

The instant adjudication is a continuation of an intense political conflict over Barack Obama's

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[21] *See* Mary L. Clark, *One Man's Token is Another Woman's Breakthrough? The Appointment of the First Women Federal Judges*, 49 Vill. L. Rev. 487, 514 (2004).

[22] 36 Weekly Comp. of Pres. Doc. 3180 (Dec. 27, 2000), http://www.gpo.gov/fdsys/pkg/WCPD-2001-01-01/html/WCPD-2001-01-01-Pg3180.htm.

appointments and governance. If this Court is to review the President's exercise of recess appointment authority, it should also review the constitutionality of Senate minority confirmation obstruction – including holds and filibusters – that directly caused the emergency need for temporary appointments.

### A. Review of Obstruction that Led to Temporary Commissions

*Amicus* respectfully asserts "Senate inaction" fails to adequately describe how and why Craig Becker's NLRB nomination was withdrawn, and a replacement recess commissioned. *See* Pet. Br. at 2. Forceful, repeated Senate obstructionist action led to the Becker withdrawal. As with many other Barack Obama nominees, Becker, in his multiple nominations, faced months and years of very active confirmation tribulation. Arcane procedural hurdles, extreme slow walking, committee hearing tribulations, hundreds of written interrogatories, floor speech defamations, extortion holds, and silent filibusters are the regular order of Senate confirmation business. At the end of nominee Becker's first confirmation travail, he received 52 favorable votes; a simple-majority constitutionally sufficient for Senate confirmation, but not the super-majority tabulation required for filibuster cloture.

Almost immediately after the President's January 2012 appointments, the political conflict was

moved to federal court fora. Battles began in jurisdictions all across the nation, and congressional obstructionists mounted a frontal attack in the instant action. Forty-two members of the Senate minority and the House Speaker filed *amici* briefs below to formally support the Respondent's challenge. The 42 Senators also participated in oral argument below.

### B. No Judicially Manageable Standards and No Respect Due

Once deep in the political thicket, however, the Court will find no manageable standards to define "recess," to resolve the congressional interference with the Executive's appointment obligation, to supervise the internal conflict among congressional factions, nor to measure how much deference is due the Senate when the President signs recess commissions, if any. This Court should not create or adopt a recess standard that would distinguish different types of Senate unavailability and that would attach constitutional weight to those various types of Senate breaks. *Nixon* explained that "the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch." *Nixon*, 506 U.S. at 228.

Judicial inquiry will necessarily focus on the 2011 congressional scheduling scheme to force the

Senate to hold pro forma sessions every three days. A House freshmen faction orchestrated the stratagem with the express motive to "prevent any and all recess appointments by preventing the Senate from recessing for the remainder of the 112th Congress."[23]

It is unlikely that this Court could undertake "independent resolution" of the obstruction and the President's recess commission response "without expressing lack of the respect due coordinate branches of government." *Baker*, 369 U.S. at 217. Outside adjudication, disrespect for the partisan confirmation dysfunction is past due.[24]

### C. Third Circuit's *New Vista* and Fourth Circuit's *Enterprise* Create Non-justiciability Conflict with Eleventh Circuit's *Evans*

When rejecting a challenge to President George W. Bush's recess appointment of Judge William Pryor, the *en banc* Eleventh Circuit ruled that the "controversial"

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[23] Victor Williams, *House GOP Can't Block Recess Appointments*, Nat'l L.J. 39 (Aug. 15, 2011) (quoting Representative Jeff Landry, Letter to the Speaker of the House John Boehner, et al. (June 15, 2011).

[24] *See* Hon. John G. Roberts, *Year-End Report on the Federal Judiciary 8* (2010) ("Each political party has found it easy to turn on a dime from decrying to defending the blocking of judicial nominations, depending on their changing political fortunes."); *see* Oskar Garcia, *Kennedy: Judges' Senate Confirmation Too Political*, A.P. The Big Story, Aug. 15, 2012, http://bigstory.ap.org/article/kennedy-judges-senate-confirmation-too-political.

aspect of the "blocked" confirmation "presents a political question." *Evans v. Stephens*, 387 F.3d 1220, 1227 (11th Cir. 2004), cert. denied, 544 U.S. 942 (2005). The Eleventh Circuit refused to create a standard to measure "how much Presidential deference is due to the Senate when the President is exercising the discretionary authority that the Constitution gives fully to him." *Id.*

Two prior challenges to recess appointed judges were rejected by lower courts fully *on the merits*. *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985), cert. denied, 475 U.S. 1048 (1986) and *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962), cert. denied, 371 U.S. 964 (1963). Neither case, however, involved appointments with any degree of underlying confirmation conflict as here. And, unlike in *Evans*, neither opinion addressed nonjusticiability.

Recently, the Third Circuit created a direct conflict with the Eleventh Circuit's nonjusticiability determination in *Evans* when deciding another challenge to Barack Obama's NLRB recess appointments. *NLRB v. New Vista Nursing & Rehabilitation*, 719 F.3d 203 (3d Cir. 2013). The court considered and rejected various political question arguments lodged by this *amicus*. *Id.* at 215-19. The panel majority ruled that judges – not the President – have final authority to dictate "when" the President may make a recess appointment. *Id.* at 216.

After rejecting Article II, Section 2's textual commitment of the issue to the President, the two-judge panel majority minimized the relevance of this

Court's *Nixon* ruling, dismissed prudential concerns, and proclaimed discovery of "several manageable standards" for resolution.[25] The majority conceded, however, that "there is no likely judicially manageable standard" to be found if the question is framed "as the *amicus* has" to include the underlying congressional obstruction that led to the NLRB commissions. *Id.* at 217-18.

Declaring a question to be narrowly-framed does not make it so. Denying the breadth and context of the political question being asked does not alter the power usurpation of the answer. Nor does such judicial denial limit the answer's disruptive political effects. By revoking the March 2010 recess appointment of Craig Becker, the court fouls every intrasession recess commission ever signed by any President – 329 such appointments made since 1981. The court taints unknown-thousands of official acts and judgments made by those officers and judges as *ultra vires*.

Most recently, in July 2013, the Fourth Circuit added to the circuit split by rejecting a political question determination and adopting the flawed semantics of the D.C. and Third Circuit panels. *NLRB v. Enterprise Leasing Company Southeast, LLC,* 722 F.3d 609 (4th Cir. 2013). Although the Fourth Circuit

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[25] A detailed dissent, which forcefully rebutted the whole of the majority's merits opinion, also explained why the majority's chosen intersession-only recess standard was "unworkable and not judicially manageable."

panel denied this *amicus'* motion for leave to raise nonjusticiability via a lodged brief, the majority nevertheless framed the political-question issue as a hypothetical: "The Board does not suggest that we should decline to address the meaning of the term 'the Recess' because it is a non-justiciable political question. However, if the Board raised such an argument, we would reject it." *Id.* at 660 n.28 (citations omitted).

The Court should be noticed that the Seventh Circuit has a related adjudication pending decision in which this *amicus* was granted leave to raise the alternative political-question theory. The case was heard and taken under advisement on May 31, 2013. Motions to stay the proceeding, based on this Court's grant of *certiorari* in the instant action, were denied on July 15, 2013. *Big Ridge, Inc. v. NLRB*, No. 12-3120 (7th Cir. *decision pending*).

## IV. Abstention *A Fortiori*: Alexander Bickel's Prudential Plea

As noted, this *amicus'* political question arguments did not fair well in courts below. Perhaps less "domesticated" abstention advocacy is needed; "something greatly more flexible, something of prudence, not construction and not principle." The purest prudential strain of nonjusticiability incubates in Alexander Bickel's *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962). In unmatched

aesthetic, Bickel offers a theoretical foundation for abstention instead of criteria:

> "In a mature democracy, choices such as this must be made by the executive . . . " Such is the foundation, in both intellect and instinct, of the political-question doctrine: the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ("in a mature democracy"), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.

*Id.* at 184. Worsening partisan obstruction and ideological appointment rancor – resulting in critically important federal offices and benches remaining vacant for years at a time – certainly satisfy Bickel's (a) "strangeness of the issue" and intractable resolution description. Stranger still is the reality that partisans and ideologues reacted to the President's response to their appointment obstruction by lodging scores of lawsuits in various jurisdictions across the nation. Having lost the political appointment fight, the obstructionists sued. The popular media captured well the (b) "sheer momentousness" of the recess appointment response that was needed to resurrect the independent labor agency's authority. And commentators were quick to expose the "unbalance[d]

judicial judgment" of the D.C. Circuit's *Noel Canning*, Third Circuit's *New Vista* and Fourth Circuit's *Enterprise* rulings.

Much more analysis will be needed to understand the broader effects of each panel's majority ruling which, if not (c) "ignored" by all, effectively canceled hundreds of past intra-session recess appointments of both officials and judges, and renders *ultra vires* unknown thousands of their actions and judgments. Perhaps the judges below believed the full effect of their rulings would be, or should be, "ignored."

The Solicitor General has named names. In Appendices A and B of the Petitioner's merits brief, the Court is provided with the names, offices, and appointment dates of hundreds of the officials and judges whose commissions were effectively revoked by courts below. Pet. Br., Appendices A and B. It is not as if the Third, Fourth and D.C. Circuit adjudications were merely ideological thought-exercises developed for a conference break-out session of the Federalist Society or the American Constitution Society. The full legal effects of the rulings below cannot be "ignored" by this Court.

Every official act, signature, decision, opinion, memorandum and judgment of every official or judge – listed in Appendices A and B – is subject to challenge unless such contest is time-barred. In an age of federal fiscal sequestration and budgetary dysfunction, the U.S. Treasury Department's obligation to attempt a claw-back of the salaries and benefits paid

to those listed officials and judges should certainly not be "ignored" if the "judicial judgment" below is to be taken seriously.

The final part (d) of Bickel's prudential foundation fully captures the complex absurdity of "electorally irresponsible" edicts coming from appointed judges who only exponentially worsen the destructive effects of appointment obstruction by our elected officials. Especially as the judiciary has "no earth to draw strength from," it should steadfastly resist being pulled into the political mud-fight of modern appointments.

## V. Finality in Appointments

The nation's extreme need for finality in appointment practice weighs heavily in favor of a broad political-question determination.

### A. Extreme Need for Finality

When *Nixon* was below, Judge Steven Williams wrote: "Although the primary reason for invoking the political question doctrine in our case is the textual commitment . . . , the need for finality also demands it." *Nixon v. United States*, 938 F.2d 239, 245-46 (D.C. Cir. 1991) (citations omitted). The cost is chaos: "[T]he intrusion of the courts would expose the political life of the country to months, or perhaps years, of chaos." *Id.* at 246. The many challenges to the 2012 NLRB and CFPB commissions have already resulted in both

political and economic disruptions. The intended and unintended consequences of the rulings below promise exponential chaos. As Judge Williams reasoned: "If the political question doctrine has no force where the Constitution has explicitly committed a power to a coordinate branch and where the need for finality is extreme, then it is surely dead." *Id.*

### B. *Goldwater v. Carter*'s Expedient Example

Barry Goldwater led a group of nine Senators and sixteen House members in suing President James Earl Carter for his controversial abrogation of a treaty with the Republic of China (Taiwan). A district judge escalated the conflict by ruling that the President needed approval of two-thirds of the Senate, or a congressional majority, to abrogate the Mutual Defense Treaty. Amid increasing political turmoil, the *en banc* D.C. Circuit reversed on the merits. The congressional delegation immediately sought *certiorari* review and the Solicitor General's response raised political question nonjusticiability – albeit in the alternative. Without allowing merits briefing and without scheduling oral argument, the Court issued a one-sentence summary order: "Certiorari granted, judgment vacated, and case remanded with directions to dismiss the complaint." 444 U.S. 996 (1979). The high court process took all of ten days.

In a lead concurrence, then-Associate Justice William Rehnquist explained: "[T]he basic question

presented by the Respondent in this case is 'political' and therefore nonjusticiable." *Id*. at 1002. "Here, while the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty." *Id.* at 1003. More so here, "while the Constitution is express as to the manner in which the Senate shall participate" in the confirmation of a permanent appointment, its next clause negates "that body's participation" in the President's signing of a temporary commission.[26] *Goldwater* sets the example for this Court's prudent withdrawal from this ongoing political conflict.

## VI. Unconstitutional Confirmation Filibusters: The Framers v. "A Little Group of Willful Men"

*Amicus* respectfully acknowledges that this Court may well choose to reach the merits of the Respondent's challenge. Perhaps our democracy is too immature to allow the Court's embrace of Alexander Bickel's robust restraint; the past decade of puerile Senate confirmation games and gimmicks certainly do not testify to a "mature democracy." If the Court

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[26] *See* Patrick Hein, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 Calif. L. Rev. 235, 265-69 (2008) (referencing Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1273 (1995)).

allows itself to be drawn into the dense political thicket, *amicus* then alternatively argues that it must fully accept the responsibility to clear a constitutional path back to a fully-functional federal appointments process. If the Court reaches this adjudication's merits, the foundation of modern appointment obstruction – confirmation holds and filibusters – should be directly subject to judicial review and invalidated.

### A. Exposing the "Little Group of Willful Men"

"A little group of willful men, representing no opinion but their own, have rendered the great government of the United States helpless and contemptible." When Woodrow Wilson condemned the Senate filibuster in 1917, he could not have imagined the exponential filibuster shame of our present age. *See* Thomas E. Mann and Norman J. Ornstein, *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track,* 37 (2006). The proliferation of the filibuster as obstructionist weapon is telling: Senate Majority Leader Lyndon Johnson faced one filibuster during his tenure, Majority Leader Bill Frist dealt with over 100 filibusters, and Majority Leader Harry Reid has called over "400 cloture votes on issues and nominations to try to end debate and move to action." Norman Ornstein, *Senate Minority Party Wields the Filibuster as a Weapon of Mass Obstruction*, Nat'l J., July 17, 2013, http://www.nationaljournal.

com/columns/washington-inside-out/senate-minority-party-wields-the-filibuster-as-a-weapon-of-mass-obstruction-20130717.

Recent Senate confirmation reform efforts have failed or fizzled. As they debate the "constitutional option" (a/k/a "nuclear option") for reform, Senators openly acknowledge that the confirmation filibuster/cloture operation is unconstitutional. *See* Jay R. Shampansky, *Constitutionality of a Senate Filibuster of a Judicial Nomination*, Cong. R. Serv., Dec. 6, 2004 (RL32102).

### B. Framers' Design for Simple-Majority Confirmation Votes

Seeking to "jettison the supermajority system of the Articles of Confederation," 1787 Philadelphia Convention delegates explicitly rejected general supermajority vote requirements. *Skaggs v. Carle*, 110 F.3d 831, 841-42 (D.C. Cir. 1997) (Edwards, C.J., dissenting). The Framers allowed only five explicit exceptions to Senate simple-majority rule: expelling members, ratifying treaties, overriding presidential vetoes, convicting/disqualifying on impeachments, and proposing constitutional amendments.

James Madison, in *Federalist 58*, explains that a general supermajority vote requirement reverses "the fundamental principle of government . . . It would be no longer the majority that would rule: the power would be transferred to the minority." *The Federalist No. 58*, at 397 (James Madison) (Jacob E. Cooke ed., 1961). And, in *Federalist 22*, Alexander Hamilton

described how a supermajority requirement distorts governance as "the smaller number will overrule that of the greater." *The Federalist No. 22*, at 141 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Hamilton further explained a supermajority vote "[in] its real operation," has potential to be used by the few to "embarrass the administration, . . . destroy the energy of government," and hold governance hostage to "the . . . caprice or artifices of an insignificant, turbulent, or corrupt junto." Hamilton was unreserved in his warning:

> In those emergencies of a nation, in which the goodness or badness, the weakness or strength of its government, is of the greatest importance, there is commonly a necessity for action. The public business must, in some way or other, go forward. If a pertinacious minority can control the opinion of a majority, respecting the best mode of conducting it, the majority, in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will overrule that of the greater, and give a tone to the national proceedings. Hence, tedious delays; continual negotiation and intrigue; contemptible compromises of the public good.

*Id.* at 140-41. Presciently addressing our age of obstruction and nullification, Hamilton warns of a time when even compromise is blocked by a minority:

> And yet, in such a system, it is even happy when such compromises can take

> place: for upon some occasions things will not admit of accommodation; and then the measures of government must be injuriously suspended, or fatally defeated. It is often, by the impracticability of obtaining the concurrence of the necessary number of votes, kept in a state of inaction. Its situation must always savor of weakness, sometimes border upon anarchy.

*Id.* at 141.

### C. Invalidating Supermajority Confirmation Processes

Additional party briefing is perhaps apposite. The Court will independently find, however, a rich popular and academic literature discussing the non-constitutional history of the Senate filibuster and the unconstitutional supermajority operation of the cloture rule. *See, e.g.,* Steven Calabresi, *Pirates We Be*, Wall St. J., A14 (May 14, 2003). The Court's inquiry might best begin with Emmet Bondurant's 2011 article briefing six direct ways in which filibusters are unconstitutional. Emmet J. Bondurant, *The Senate Filibuster: The Politics of Obstruction*, 48 Harv. J. on Legis. 467 (2011). The Court should extend its examination to review all appointment obstruction games and gimmicks such as confirmation "holds" (anonymous, tag-team, rolling, blanket, and extortion). Whatever its form, the hold is a *de facto* filibuster and necessitates an unconstitutional supermajority cloture vote as a predicate for confirmation.

Professor Edward Corwin, decades ago, discussed perversion of the confirmation process, in a related context:

> May the Senate attach conditions to its approval of appointment, as it frequently does to its approval of a treaty? The entire record of practice under the Constitution negatives the suggestion, as also does that of opinion. Madison, Hamilton, Jefferson, and Story all expressed themselves to the effect that the Senate's role in relation to appointments is only that of rejecting or confirming nominations without condition.

*See* Edward S. Corwin, *The President: Office and Powers,* 92-93 (1948). Do the extorting conditions of a Senator's confirmation filibuster or hold not also "invade the powers of the office" and "limit the officer's tenure?" *Id.* at 93. In direct condemnation of the filibuster which "extorts special favors for its authors," Professor Corwin lamented the "indefensible concessions which a small block of so-called 'Silver Senators' have been able to wrest." *Id.* at 348. No longer the rarely-invoked prerogative of the few "Silver Senators," the modern silent filibuster is now as common as it is destructive. The frequency of the confirmation filibuster makes real Edward Corwin's concern as to whether the Senate will "retain its intended purpose in the constitutional system." *Id.*

## CONCLUSION

For the foregoing reasons, *amicus* urges that the court of appeals be reversed. The Court should *either* determine Respondent's challenge to be nonjusticiable; *or* fully reach all the merits of the appointment adjudication to *both* reaffirm the Executive's recess appointment power and invalidate Senate confirmation holds and filibusters which require unconstitutional supermajority cloture/confirmation votes.

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