UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAREN P. FERNBACH, Regional Director, Region 2, National Labor Relations Board, For and on Behalf of the NATIONAL LABOR RELATIONS BOARD,	
Petitioner,	**Civil Action No. 12-CV-00823-GBD**
v.	**(ECF Case)**
3815 9th AVENUE MEAT and PRODUCE CORP., D/B/A COMPARE SUPERMARKET,	
Respondent.	

BRIEF OF *AMICUS CURIAE*
COALITION FOR A DEMOCRATIC WORKPLACE

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INTRODUCTION

The Coalition for a Democratic Workplace ("CDW") respectfully submits this *amicus* brief to urge the Court to reject the National Labor Relations Board's (the "Board") attempt to unlawfully authorize a Section 10(j) petition for injunctive relief without the required quorum of three constitutionally appointed members. *See* 29 U.S.C. § 153(b); *id.* § 160(j). CDW does not appear in this matter to advance the interests of one party over another. Rather, CDW seeks to highlight the extraordinary and unprecedented nature of the President's unilateral attempt to expand Executive Power far beyond any of his predecessors—and far beyond what the Constitution permits.

Here, the Department of Justice's Office of Legal Counsel ("OLC") issued a lengthy opinion purporting to justify the President's recess appointments.[1] At bottom, however, the OLC Opinion rests entirely on the assertion that the President has the unilateral power to "determin[e]" whether or not the Senate is "available to receive and act on nominations." *OLC Memo* at 1. The OLC argued that a "recess" occurred here because "the President . . . properly conclude[d] that the Senate [was] unavailable for the overall duration of the recess." *Id.* at 9. Because the President made this determination, the Senate was, in the OLC's opinion, in "recess," and, therefore, the President had the power to circumvent the Senate's constitutional authority to provide advice and consent to the appointment of Executive Branch officers.

This assertion, standing by itself, would be extraordinary. Here, it is all the more so because every objective fact confirms that the Senate was, in reality, *not* "unavailable for the overall duration of the [purported] recess." *Id.* To the contrary, it is undisputed that (1) the Senate *did do business* during this time; (2) the Senate could *not* have adjourned for a recess

[1] *See Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, Memorandum Opinion For The Counsel To The President at 1 (Jan. 6, 2012), *available at* http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf [hereinafter *OLC Memo*].

because the House of Representatives had not provided its consent as required by Article I, Section 5, Clause 4; and (3) the Senate *itself*, a coordinate branch of government charged by the Constitution with making and enforcing its own rules, has determined that it was *not* in recess.

In short, although there are hard cases under the Constitution, this is not one of them. The Senate was not, as the President asserts, "unavailable" to act on the President's nominees. Instead, it was *unwilling* to do so, given that two of the nominees were not even nominated until December 15, 2011. The Recess Appointments Clause of the Constitution, however, was not meant to give the President the unilateral power to resolve a *political* dispute with a coordinate branch of government. Accordingly, CDW respectfully urges this Court to hold that the appointments of Ms. Sharon Block, Mr. Richard Griffin, and Mr. Terence Flynn were unlawful and, therefore, that the Board lacked a quorum to authorize the 10(j) petition at issue in this case.[2]

STATEMENT OF INTEREST OF *AMICUS CURIAE*

CDW, consisting of over 600 member organizations and employers, gives its members a voice on a number of labor issues, including non-employee access, an employee's right to have access to organizing information from multiple sources, and unit determinations. CDW's members—the vast majority of whom are covered by the National Labor Relations Act ("NLRA") or represent organizations covered by the NLRA—have a strong interest in the way the NLRA is interpreted and applied by the Board, including, *inter alia*, preventing the Board from taking legally binding actions absent the statutorily-required quorum.

Moreover, CDW's members have a strong interest in the speedy resolution of the legality of the President's recess appointments, since, until this issue is resolved, all actions undertaken by the Board are of questionable validity. For example, many of CDW's members are involved

[2] CDW expresses no opinion on any other issues before this Court.

in matters currently before the Board or are likely to have business before the Board in the very near future, including a large number who face the threat of imminent Board adjudications. In addition, all CDW members who are within the Board's statutory jurisdiction will be subject to the Board's recently promulgated rules changing union election procedures[3] and requiring employers to display Board-designed employee-rights posters.[4] These employers, therefore, face the threat of imminent enforcement actions under these rule as well.

More generally, CDW members will also be subject to a wide range of other potential Board actions, such as Board decisions authorizing the General Counsel to seek Section 10(j) injunctions in unfair labor practice cases and Board decisions denying review of election-related decisions by NLRB Regional Directors. Thus, CDW's members face current and imminent adverse actions against them by the current Board. The uncertainty surrounding the legitimacy of any future Board actions, however, harms CDW's members, who must structure their business operations in accordance with the Board's *lawful* rules and orders.

Accordingly, CDW has a strong interest in assisting this Court in reaching the correct resolution of this issue as quickly as possible.

BACKGROUND

On January 4, 2012, the President purported to recess-appoint Sharon Block, Terence Flynn, and Richard Griffin to serve as Members of the National Labor Relations Board. At that time, their nominations had not been languishing. To the contrary, the President nominated the two Democrat nominees, Ms. Block and Mr. Griffin, on December 15, 2011, less than three

[3] *See* Press Release, National Labor Relations Board, Board Adopts Amendments to Election Case Procedures (Dec. 21, 2011), *available at* https://www.nlrb.gov/news/board-adopts-amendments-election-case-procedures. CDW is currently challenging this rule in a separate case. *See Chamber of Commerce v. NLRB*, 1:11-cv-02262-JEB (D.D.C. filed Dec. 20, 2011).

[4] *See* Press Release, Board issues Final Rule to require posting of NLRA rights (Aug. 25, 2011), *available at* https://www.nlrb.gov/news/board-issues-final-rule-require-posting-nlra-rights. CDW is currently challenging this rule in a separate case as well. *See Nat'l Ass'n of Mfrs. v. NLRB*, 1:11-cv-01629-ABJ (D.D.C. filed Sept. 8, 2011).

weeks earlier, and just two days before the Senate supposedly went into recess. Indeed, on January 4, the President had not yet even transmitted their FBI background files to the Senate, which, as any Senate-confirmed official can attest, is a necessary step before the relevant Senate committee is even in a position to hold a hearing on a nominee. The President nevertheless invoked his extraordinary power to make a recess appointment and thereby circumvent the Senate's constitutional power to provide advice and consent to the appointment of Executive Branch officers. *See* U.S. Const. art. II, § 2, cl. 3.

Set forth below is a summary of the facts and circumstances leading to the present situation.

1. Under the NLRA, the Board is to "consist of five . . . members, appointed by the President by and with the advice and consent of the Senate." 29 U.S.C. § 153(a). While vacancies in the Board generally do "not impair the right of the remaining members to exercise all of the powers of the Board," *id*. § 153(b), "three members of the Board shall, at all times, constitute a quorum of the Board," *id.* Thus, the Supreme Court recently held that the Board cannot exercise its statutory authority during any period in which it has less than three members. *See New Process Steel, LP v. NLRB*, 130 S. Ct. 2635 (2010).

Prior to January 3, 2012, the Board operated with three lawfully-appointed members and therefore had a lawful quorum.[5] In particular, two of the Board's current members, Chairman Pearce and Member Hayes, were nominated by the President on July 9, 2009 and confirmed by the Senate on June 22, 2010.[6] And the third member, Craig Becker, was recess appointed by the

[5] Press Release, National Labor Relations Board, White House Announces Recess Appointments of Three to Fill Board Vacancies (Jan. 4, 2012), *available at* https://www.nlrb.gov/news/white-house-announces-recess-appointments-three-fill-board-vacancies; *see also* Melanie Trottman, *Obama Makes Recess Appointments to NLRB*, Wall St. J., Jan. 4, 2012, *available at* http://online.wsj.com/article/SB10001424052970203513604577141411919 1 5 2318.html.

[6] Press Release, National Labor Relations Board, Brian Hayes, Mark Pearce confirmed by Senate as Board members (June 22, 2010), *available at* http://www.nlrb.gov/news-media/news-releases/archive-news; 156 Cong. Rec. S5217 (daily ed. June 22, 2010).

President on March 27, 2010.[7] Pursuant to the Recess Appointments Clause, however, Mr. Becker's term expired at the end of the First Session of the 112th Congress—at the latest, on January 3, 2012. *See* U.S. Const. art. II, § 2, cl. 3. Consequently, on January 3, 2012, the Board had only two members and, therefore, lacked the statutorily-required quorum to do business.

2. On December 17, 2011, the Senate voted by unanimous consent to remain in session for the period of December 20, 2011 through January 23, 2012. *See* 157 Cong. Rec. S8783-84 (daily ed. Dec. 17, 2011). This was necessary because, under Article I, Section 5, Clause 4 of the Constitution, "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days[.]" And here, the U.S. House of Representatives never consented to a Senate adjournment exceeding three days. (Indeed, the Senate never even sought such consent.) Consequently, the Senate issued a resolution convening *pro forma* sessions every three business days. 157 Cong. Rec. S8783-84 (daily ed. Dec. 17, 2011).[8]

During the December 17-January 23 time period, the Senate then proceeded to conduct two important pieces of business during its *pro forma* sessions. *First*, on December 23, the Senate passed a temporary extension to the payroll tax cut. *See* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). The bill as passed in that session was signed into law by the President on the same day. *Second*, on January 3, the Senate fulfilled its obligation, under the Twentieth

[7] Press Release, White House, President Obama Announces Recess Appointments to Key Administrative Positions (Mar. 27, 2010), *available at* http://www.whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions. The Senate went into a two-week recess on March 26, 2010, before the President recess appointed Mr. Becker. *See* 156 Cong. Rec. S2180 (daily ed. Mar. 26, 2010) (adjourning until April 12, 2010 pursuant to H.R. Con. Res. 257). Thus, unlike the purported appointments at issue here, the constitutionality of Mr. Becker's appointment was never challenged.

[8] *See also* U.S. Senate, Daily Summary, Senate Floor Schedule for Pro Formas and Monday, January 23, 2012 (Dec. 17, 2011), http://democrats.senate.gov/2011/12/17/senate-floor-schedule-for-pro-formas-and-monday-january-23-2012/. This practice of convening *pro forma* sessions every three days to avoid a recess has been used by both parties since 2007. Henry B. Hogue, Cong. Research Serv., RS21308, Recess Appointments: Frequently Asked Questions 9 (2012), *available at* http://www.senate.gov/CRSReports/crs-publish.cfm?pid='0DP%2BP%5CW%3B%20P%20%20%0A. The Democrat-controlled Senate originally employed the procedure to prevent President Bush from making any recess appointments. *Id.* More recently, the Republican-controlled House of Representatives has prevented the Senate from adjourning for more than three days in order to prevent President Obama from making any recess appointments. *Id.*

Amendment to the Constitution, to "meet[] . . . on the 3d day of January." U.S. Const. amend. XX, § 2. To CDW's knowledge, neither the President, the Department of Justice, nor either house of Congress has called into question the validity of either the payroll tax cut extension or the Senate's constitutionally-required January 3 meeting.

3. On January 4, 2012, the day after the Senate's January 3 meeting, the President purported to appoint Ms. Block, and Messrs. Flynn and Griffin pursuant to the Recess Appointments Clause of the Constitution, U.S. Const. art. II, § 2, cl. 3.[9] Over a week later, on January 12, 2012, the Department of Justice's Office of Legal Counsel released an opinion, dated January 6, 2012, explaining the legal rationale underlying the President's action. The OLC Opinion first declared that "the President is [] vested with . . . discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate." *OLC Memo* at 5 (quoting *Executive Power—Recess Appointments*, 33 Op. Att'y Gen. 20, 25 (1921)). Then, it expressed the view that the Senate is in recess whenever the President determines that the Senate was "unavailable . . . to 'receive communications from the President or participate as a body in making appointments.'" *Id.*; *see also id.* at 1, 4, 9, 15. Key to this conclusion was the assertion that "Congress's provision for pro forma sessions . . . does not have the legal effect of interrupting the recess of the Senate for purposes of the Recess Appointments Clause and that the President may properly conclude that the Senate is unavailable for the overall duration of the recess." *Id.* at 9.

4. Since the appointments of Ms. Block, and Messrs. Flynn and Griffin, the Board has acted as if it has the statutorily-required quorum of three or more members. In addition to authorizing the Acting General Counsel's requests to seek temporary injunctions in federal court,

[9] Press Release, The White House, President Obama Announces Recess Appointments (Jan. 4, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts.

as in this case,[10] the Board has also denied requests for review of Regional Directors' decisions and directions of elections[11] and has formally adjudicated unfair labor practice charges through the issuance of published opinions.[12] All of these actions required a quorum of the Board. *See New Process Steel*, 130 S. Ct. at 2644-45. Thus, all of these actions demonstrate that the Board views itself as having the quorum necessary to take these (as well as many other) actions, notwithstanding the President's failure to obtain the Senate's advice and consent to the appointment of these three nominees.

ARGUMENT

The President's assertion of power here is unprecedented and unlawful. The Recess Appointments Clause is meant to authorize the President to make temporary appointments where the Senate is *unable* to do business due to a lawful recess. It is not intended to enable the President to resolve a *political* dispute where the Senate is perfectly *capable* of doing business, but is *unwilling* to do so because, for example, it has had insufficient time to vet the President's nominees (as here) or simply disapproves of those nominees.

Here, the necessary premise of the President's recess appointments rests on the assertion that the Senate was in continuous recess from December 17, 2011, until January 23, 2012.[13] The

[10] *See generally* 10(j) Injunction Activity at the National Labor Relations Board, https://mynlrb.nlrb.gov/portal/nlrb.pt?open=512&objID=220&mode=2.

[11] *See generally* Unpublished Board Decisions, http://www.nlrb.gov/cases-decisions/case-decisions/unpublished-board-decisions.

[12] *See generally* Board Decisions, https://www.nlrb.gov/cases-decisions/case-decisions/board-decisions.

[13] Although the OLC Opinion appears to limit its analysis to the period from January 3, 2012 to January 23, 2012, *see, e.g.*, *OLC Memo* at 1, the Opinion's rationale necessarily implies that the Senate recessed on December 17, 2011, since the only sessions held between December 17 and January 23 were the *pro forma* sessions that OLC asserts "[did] not have the legal effect of interrupting the recess of the Senate for purposes of the Recess Appointments Clause," *id.* at 9. Indeed, the OLC Opinion itself suggests that the entire period "closely resembles a lengthy intersession recess" and offers this as fall-back support for the President's appointments. *Id.* at 15. And consistent with this view, the OLC Opinion identifies the Senate's December 17, 2011 Order, which provided for *pro forma* sessions between December 17 and January 23, as "the pertinent Senate order" for determining whether the Senate was in recess on January 4, 2012. *Id.* at 13; *see also id.* at 21. The White House, moreover, publicly adopted this view when defending the President's January 4 recess appointments. *See* Dan Pfeiffer, White House Communications Director, *America's Consumer Watchdog*, The White House Blog (Jan. 4, 2012, 10:45 AM),

undisputed record, however, establishes that the Senate was *fully capable of* and, in fact, *did conduct business* during this period—including in the *pro forma* session held just one day before the President's recess appointments. At bottom, then, the Government's justification for these appointments turns on the assertion that this Court should defer to *the President's* determination as to whether the *Senate* is in recess, regardless of contrary facts. If anything, this is exactly backwards; it is, after all, Congress that is charged with determining whether or not it is in session. If anybody is owed deference on this issue, then, it is the Senate, not the President. At a minimum, however, such deference is inappropriate where, as here, all objective facts *contradict* the President's "determination" that the Senate was "incapable" of doing business during the time period in question.

Accordingly, this Court should hold that the President's purported recess appointments were unlawful and, therefore, that the Board currently lacks the statutorily-required quorum of three members. And because the Board lacks a quorum, this Court should hold that the Board has no power to authorize preliminary injunction petitions, such as the one at issue in this case, under Section 10(j) of the National Labor Relations Act. *See* 29 U.S.C. § 160(j).

I. THE SENATE WAS FULLY CAPABLE OF CONDUCTING BUSINESS, AND IN FACT DID CONDUCT BUSINESS, DURING THE SO-CALLED "RECESS"

As noted, the necessary premise of the Government's position here is that the Senate was in continuous recess from December 17, 2011, to January 23, 2012. The problem with this premise, however, is that it is demonstrably false. To the contrary, not only was the Senate "available" to do business during this time period; it in fact *did* do business during this time

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http://www.whitehouse.gov/blog/2012/01/04/americas-consumer-watchdog ("The Senate has effectively been in recess for weeks, and is expected to remain in recess for weeks.").

period, including, on the day before the so-called recess appointments, business necessary to fulfill it *constitutional obligations.*

First, it is undisputed here that, on December 23, 2011—six days after the purported "continuous" recess began—Congress passed, and the President signed, a major piece of legislation. The pre-Christmas political wrangling over the extension of the payroll tax cut was widely reported. *See, e.g.*, Jennifer Steinhauer, *House G.O.P. Leaders Agree to Extension of Payroll Tax Cut*, N.Y. Times, Dec. 22, 2011, http://www.nytimes.com/2011/12/23/us/politics/senate-republican-leader-suggests-a-payroll-tax-deal.html?_r=1&hp. After a tense standoff, House Republicans accepted a compromise approach and both the House and the Senate convened to pass the extension legislation. More precisely, in order to resolve this political impasse, the Senate convened a *pro forma* session on December 23 and passed an extension to the payroll tax cut. *See* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). The President proceeded to sign the bill into law on that same day. And to CDW's knowledge, no one—and certainly not the Government here—questions the validity of that legislation.

The Senate's ability to convene at its regularly scheduled time and place to execute such a critical piece of national business demonstrates that the Senate was fully capable of conducting business during its *pro forma* sessions, as the OLC Opinion itself concedes. *See OLC Memo* at 21 ("Conceivably, the Senate might provide advice and consent on pending nominations during a pro forma session . . . ."). More importantly, it undermines the central premise of the Government's position—namely, that the Senate was in continuous recess from December 17 until January 23 because the Senate is "unavailable" to conduct business during *pro forma* sessions.

Second, it is also undisputed that, on January 3, 2012—one day before the purported recess appointments—the Senate conducted business necessary to fulfill its constitutional obligations. In particular, the Twentieth Amendment to the U.S. Constitution expressly provides:

> The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

U.S. Const. amend. XX, § 2. The Constitution, therefore, *required* the Senate to "assemble" and hold a "meeting" on January 3, 2012 (unless a different day was appointed). And the Senate fulfilled the constitutional obligation by holding a *pro forma* session for January 3, 2012. In fact, the Senate resolution expressly states that the purpose of the January 3 *pro forma* session was to convene "the second session of the 112th Congress." 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011); *see also OLC Memo* at 1 ("[O]n January 3, 2012, the Senate convened one such pro forma session to begin the second session of the 112th Congress . . . ." (citing U.S. Const. amend. XX, § 2)). Thus, in addition to passing major legislation during this so-called "recess," the Senate, likewise, conducted business *required by the Constitution*.

The Government, moreover, effectively concedes this fact. The Recess Appointments Clause provides that a recess appointment "shall expire at the End of [the Senate's] next Session." U.S. Const. art. II, § 2, cl. 3. The President apparently is taking the position that the *pro forma* session held on January 3, 2012, was effective in commencing the second session of the 112th Congress and, therefore, that the recess appointments at issue here extend until the end of the first session of the 113th Congress. *See OLC Memo* at 15 ("[W]e have focused in this opinion on the twenty-day intrasession recess at the *beginning of the second session* . . . ." (emphasis added)).[14] If, as the Government appears to concede, the *pro forma* sessions are

[14] *See also*, *e.g.*, Melanie Trottman, *Obama Makes Recess Appointments to NLRB*, Wall St. J., January 4, 2012, *available at* http://online.wsj.com/article/SB10001424052970203513604577141411919152318.html (noting

effective at triggering a *new* session of Congress (and thereby extending the terms of the President's recess appointments), then it necessarily follows that these are legitimate sessions of Congress during which the Senate is *not* in recess. The Government cannot have its cake and eat it too.

Indeed, under the Government's position, this Court would have to accept *either* that (1) the Senate could simultaneously be in "session" for one purpose and in "recess" for another, *or* (2) the President is authorized to make a recess appointment during a two-day break in the action. The first proposition is absurd on its face. And even the Government rejects the second. As he represented to the U.S. Supreme Court in the *New Process Steel* case, via a letter from the Solicitor General of the United States, the President agrees that an adjournment of "more than two or three days" is required to trigger his recess appointment power. *See* Letter from Elena Kagan, Solicitor General, Office of the Solicitor General to William K. Suter, Clerk, Supreme Court of the United States, at 3 (April 26, 2010), *available at* http://www.scotusblog.com/wp-content/uploads/2010/04/SG-letter-brief-NLRB-4-26-10.pdf, *New Process Steel, L.P.*, 130 S. Ct. 2635; *see also* Intervenor United States Reply Br., *Stephens v. Evans*, No. 02-16424, 2004 WL 3589822, at *21 (11th Cir. Sept. 8, 2004) (arguing that "it would make eminent sense," when defining the minimum requirement for a recess, "to apply the three-day rule explicitly set forth in the Adjournment Clause"); *accord* United States Br. In Opp., *Evans v. Stephens*, No. 04-828, 2005 WL 123450, at *11 (U.S. Jan. 19, 2005); *OLC Memo* at 9 n.13 (collecting authorities).[15]

(continued…)

that the President's recess appointments "expire[] at the end of the Senate's next session—in this case at the end of 2013").

[15] At least since the Department of Justice first issued guidance on the question of recess appointments in 1921, no President has attempted to issue a recess appointment during an intrasession recess of less than 10 days. *See* Hogue, *supra* note 9, at 10. (2012). Instead, the Department of Justice has consistently taken the position that the President may make a recess appointment only during a recess of more than three days given the consent requirements of Article I, Section 5, clause 4 discussed above. *See, e.g.*, *OLC Memo*, *supra* note 1, at 9 n.13 (explaining that for 91 years the Department of Justice has consistently concluded on all but one occasion that

In short, the fundamental premise of the purported recess appointments here—that the Senate was incapable of conducting business from December 17, 2011 to January 23, 2012—is demonstrably false. The Government's argument, therefore, boils down to the assertion that this Court should blindly defer to the President's determination notwithstanding these undisputed facts. As explained immediately below, that assertion is equally untenable.

II. THE GOVERNMENT'S ARGUMENT THAT THIS COURT SHOULD BLINDLY DEFER TO THE PRESIDENT'S "DETERMINATION" THAT THE SENATE WAS IN RECESS IS PLAINLY WRONG

The OLC opinion makes clear that it does not conclude, as a matter of fact, that the Senate *was* "unavailable" and, therefore, in continuous recess from December 17, 2011 until January 23, 2012. As explained above, such a factual conclusion would be clearly erroneous. Instead, it seems to assert that the President had the discretion to "determine" that the Senate was in recess and, presumably, that such "determination" is final, unreviewable, and not subject to challenge. Thus, the OLC opinion repeatedly says, "the President is necessarily vested with . . . discretion to determine when there is a real and genuine recess" and that "[e]very presumption is to be indulged in favor of the validity of whatever action the President may take." *OLC Memo* at 5 (quotation and alteration marks omitted). Such a naked assertion of power, however, is constitutionally untenable.

Two constitutional provisions, rather, confirm that *Congress*, not the President, has the power to determine when it is and when it is not in recess except in the most extraordinary

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recesses of less than three days do not trigger the Recess Appointments Clause); *Evans v. Stephens*, No. 04-828, 2005 WL 123450, at *11 (U.S. Jan. 19, 2005) (reiterating position that "the Recess Appointments Clause by its terms encompasses all vacancies and all recesses (with the single arguable exception of *de minimis* breaks of three days or less, *see* U.S. Const. art. I, § 5, cl. 4)"); *Evans v. Stephens*, 387 F.3d 1220, 1224 (11th Cir. 2004) (requiring a "legitimate Senate recess" to exist in order to uphold a recess appointment); *cf. Wright v. United States*, 302 U.S. 583 (1938); *Kennedy v. Sampson*, 511 F.2d 430, 437 (D.C. Cir. 1974) (holding that intrasession adjournments do not qualify as recesses of the Senate sufficient to deny the President the ability to veto bills, provided that arrangements are made to receive presidential messages), *abrogated in part on other grounds by Raines v. Byrd*, 521 U.S. 811 (1997).

circumstances. And here, it is clear that under those provisions, *both* houses of Congress concluded that the Senate was *not* in continuous recess from December 17 to January 23.

First, under Article I, Section 5, Clause 4 of the Constitution, "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days." Thus, each house of Congress is expressly authorized to prevent the other from breaking for more than three days. And here, during the middle of the first session of the 112th Congress, the House made clear that it intended to exercise its constitutional prerogative to prevent the Senate from going into recess for more than three days. In particular, on May 25, 2011, twenty Senators wrote to Speaker of the House John Boehner urging him "to refuse to pass any resolution to allow the Senate to recess or adjourn for more than three days for the remainder of the President's term."[16] The letter expressly provided that the purpose of withholding consent was to prevent a "recess" during which the President could make recess appointments. Seventy-eight Representatives took a similar step by sending a letter requesting that the House take "all appropriate measures []to prevent any and all recess appointments by preventing the Senate from officially recessing for the remainder of the 112th Congress."[17] In fact, "no concurrent resolution of adjournment ha[s] been introduced in either chamber since May 12, 2011."[18] Consequently, pursuant to the authority granted it under Article I of the Constitution, the House of Representatives clearly expressed its intention to prevent the Senate from taking a recess—and thus necessarily held the view that Senate was *not* in recess when the President purported to make the recess appointments to the NLRB.

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[16] Press Release, Senator David Vitter, Vitter, DeMint Urge House to Block Controversial Recess Appointments (May 25, 2011), *available at* http://vitter.senate.gov/public/index.cfm? (Follow "Press Room" hyperlink; then "Press Release" hyperlink; then search "May 2011").

[17] Letter from Jeff Landry, Representative, to John Boehner, the Speaker of the House, et al. (June 15, 2011), *available at* http://landry.house.gov/press-relase/congressman-landry-leads-assault-end-recess-appointments.

[18] Hogue, *supra* note 9.

Second, the Senate never even *sought* to recess between December 17 and January 23. Instead, the Senate used *its* authority under the Constitution to remain in session—as it was required to do, absent House approval of a recess, under Article I, Section 5, Clause 4, *supra*. In particular, under Article I, Section 5, Clause 2, "[e]ach House may determine the Rules of its Proceedings." Thus, the Senate, not the President, determines when it is and is not in recess. And here, the Senate specifically determined that it was *not* in recess, stating, in the pertinent Senate resolution, that it would "convene for *pro forma* sessions" and "adjourn" at the end of each of those sessions. *See* 157 Cong. Rec. S8783-84 (daily ed. Dec. 17, 2011). The use of these terms is telling: the Senate could not, after all, both be in recess and convene for a session, and it would be nonsensical for the Senate to "adjourn" if it was already in recess. As discussed above, moreover, the Senate then proceeded to act accordingly, holding *pro forma* sessions every three days, passing a major piece of legislation on December 23, and meeting on January 3 to commence "the second session of the 112th Congress."

Against these express textual commands and the House and Senate's unequivocal application of them here, the Government can cite *nothing* (other than self-serving Executive Branch opinions) that gave the President the power here to "determine" that the Senate was not in "recess." The Recess Appointments Clause, for example, simply states "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate." U.S. Const. art. II, § 2, cl. 3. It does not, however, state *when* a "Recess of the Senate" occurs. That, rather, is left to Congress to determine, in accordance with the constitutional provisions discussed above. The Constitution thus makes clear that, to the extent that any entity is owed deference here, it is Congress, *not* the President. At a minimum, however, the President cannot, by fiat, dictate the existence of a "recess" where, as here, (1) *both* houses of Congress state they

are *not* in recess, *and* (2) the Senate thereafter proceeds to conduct at least two major items of business. The Government's contrary position would require this Court to suspend reality both as a matter of fact *and* as a matter of law.[19]

Nor can the Government credibly claim that the Senate's position would unduly narrow the President's power to make recess appointments. That power has always been understood as the exception, not the rule. As Alexander Hamilton explained in *The Federalist*, the Recess Appointments Clause provides an "auxiliary method of appointment, in cases to which the general method was inadequate." *The Federalist No. 67*, at 409 (Clinton Rossiter ed., 1961). Thus, the recess appointment power is meant to be used where Congress is *incapable* of acting on the President's nominations—as when, during the founding era, the senators had dispersed to their states on horseback and could not readily be called back. It is not meant to resolve *political* disputes where, as here, the Senate is *unwilling* to act on nominations because it has not yet had an opportunity even to consider them.

The general rule thus remains that, as a critical check on Executive Power, the Senate must provide "advice and consent" to the appointment of all Executive Branch principal officers. U.S. Const. art. II, § 2, cl. 2. The Government's position, however, would gut this rule and

[19] The OLC Memo relies on statements from individual Senators colloquially using the term "recess." *OLC Memo* at 3. Obviously, such casual remarks cannot overcome the Senate's official position, set forth in clear terms, in numerous resolutions, that it was not commencing a continuous, 37-day recess, and it certainly cannot overcome the Senate's actions, which unequivocally establish that the Senate came into session and then adjourned every three days during the relevant time period. *See* 157 Cong. Rec. S8787 (daily ed. Dec. 20, 2011) ("Thereupon, the Senate, at 11 and 38 seconds a.m. adjourned until Friday, December 23, 2011, at 9:30 a.m.); 157 Cong. Rec. S8790 (daily ed. Dec. 23, 2011) ("Thereupon, the Senate, at 9:31 and 46 seconds a.m., adjourned until Tuesday, December 27, 2011."); 157 Cong. Rec. S8791 (daily ed. Dec. 27, 2011) ("Thereupon, the Senate, at 12 noon and 31 seconds, adjourned until Friday, December 30, 2011, at 11 a.m."); 157 Cong. Rec. S8793 (daily ed. Dec. 30, 2011) ("Thereupon, the Senate, at 11 and 34 seconds a.m., adjourned until Tuesday, January 3, 2012, at 12 noon."); 158 Cong. Rec. S1 (daily ed. Jan. 3, 2012) ("Thereupon, the Senate, at 12:02 and 13 seconds p.m., adjourned until Friday, January 6, 2012, at 11 a.m."); 158 Cong. Rec. S3 (daily ed. Jan. 6, 2012) ("Thereupon, the Senate, at 11 and 32 seconds a.m., adjourned until Tuesday, January 10, 2012, at 11 a.m."); 158 Cong. Rec. S5 (daily ed. Jan. 10, 2012) ("Thereupon, the Senate, at 11 and 32 seconds a.m., adjourned until Friday, January 13, 2012."); 158 Cong. Rec. S7 (daily ed. Jan. 13, 2012) ("Thereupon, the Senate, at 12 and 33 seconds p.m., adjourned until Tuesday, January 17, 2012, at 10:15 a.m."); 158 Cong. Rec. S9 (daily ed. Jan. 17, 2012) ("Thereupon, the Senate, at 10:15 and 30 seconds a.m., adjourned until Friday, January 20, 2012, at 2 p.m."); 158 Cong. Rec. S11 (daily ed. Jan. 20, 2012) ("Thereupon, the Senate, at 2 and 40 seconds p.m., adjourned until Monday, January 23, 2012, at 2 p.m.").

render the Senate's "advice and consent" power a mere courtesy accorded it when the President so desires. After all, under the Government's position, the President could declare a "recess" anytime the Senate refused to provide "advice and consent" to a nomination, provided only that the Senate break long enough for the President to issue a declaration that, in his unfettered judgment, the Senate is not, at that moment in time, "available" to act on his nominations. This Court should not countenance such a twisted reading of the constitutional text, constitutional history, and undisputed facts of this case.

CONCLUSION

As a result of the President's unprecedented actions here, a cloud hangs over every action taken by the National Labor Relations Board. CDW therefore respectfully requests that this Court remove that cloud by holding that the appointments of Ms. Block and Messrs. Flynn and Griffin were contrary to law and, therefore, that the Board currently lacks the statutorily-required quorum to authorize Section 10(j) petitions for injunctive relief.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 1, 2012, a copy of the foregoing BRIEF OF *AMICUS CURIAE* was filed by ECF with the Clerk of the Court and served in accordance with the Federal Rules of Civil Procedure and the Southern District's Rules on Electronic Service upon the following parties:

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