

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3
4 NOEL CANNING, A DIVISION OF THE
5 NOEL CORPORATION,

6 Petitioner,

No. 12-1115, et al.

7 v.

8 NATIONAL LABOR RELATIONS BOARD,

9 Respondent.

10
11 Wednesday, December 5, 2012

12 Washington, D.C.

13 The above-entitled matter came on for oral
14 argument pursuant to notice.

15 BEFORE:

16 CHIEF JUDGE SENTELLE AND CIRCUIT JUDGES
17 HENDERSON AND GRIFFITH

18 APPEARANCES:

19 ON BEHALF OF THE PETITIONER:

20 NOEL J. FRANCISCO, ESQ.

21 ON BEHALF OF THE AMICI MCCONNELL, ET AL.:

22 MIGUEL A. ESTRADA, ESQ.

23 ON BEHALF OF THE RESPONDENT:

24 BETH S. BRINKMANN, ESQ.

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P R O C E E D I N G S

THE CLERK: Case Number 12-1115, et al., Noel Canning, a Division of the Noel Corporation, Petitioner v. National Labor Relations Board. Mr. Francisco for the Petitioner; Mr. Estrada for the Amici McConnell, et al.; Ms. Brinkmann for Respondent NLRB; Ms. Heaney for Respondent NLRB; Mr. Coppess for Intervenor.

JUDGE SENTELLE: Good morning, Counsel.

ORAL ARGUMENT OF NOEL J. FRANCISCO, ESQ.

ON BEHALF OF THE PETITIONER

MR. FRANCISCO: Good morning, Chief Judge. Chief Judge Sentelle, may it please the Court. It has long been established that the President cannot make intrasession recess appointments where the Senate convenes into sessions every three days. That is precisely what it did here.

JUDGE GRIFFITH: Established by who?

MR. FRANCISCO: Your Honor, ever since Attorney General Daugherty issued the Executive Branch opinion that there were such a thing as an intrasession recess appointments --

JUDGE GRIFFITH: That establishes the law?

MR. FRANCISCO: I would say it's established between --

JUDGE GRIFFITH: I don't think you want to start with the Executive Branch view of it's established because the

1 Executive Branch was all over the place.

2 MR. FRANCISCO: That's a good point, Your Honor.

3 Let me start this way, no President has ever made an
4 intrasession recess appointment when the Senate had not recess
5 for, when the Senate had held sessions for every three days.
6 It's a power that's never been exercised. Here, the Senate
7 actually held sessions every three days. It said it was going
8 to hold those sessions; it actually held those sessions; and
9 we know that those were actual sessions during which the
10 Senate was capable of conducting business because --

11 JUDGE GRIFFITH: Can I ask you sort of a background
12 question?

13 MR. FRANCISCO: Yes, Your Honor.

14 JUDGE GRIFFITH: We have, the D.C. Circuit, over the
15 years has assiduously stayed away from separation of power
16 disputes in general whenever we can, and from recess
17 appointment clause disputes in particular. We just, we really
18 haven't weighed in on this because we assumed, I guess, that
19 like in *McCalpin*, that we'll leave this up to the thrust and
20 parries of the political branches. Why isn't your remedy here
21 to, or why isn't the remedy of the Senate here to use the
22 tools that have been afforded them by the Constitution and
23 fight back that way, why drag us in it?

24 MR. FRANCISCO: Because, Your Honor, this is not
25 just a dispute between the Senate and the President, this is a

1 dispute between the Noel Canning Corporation and the National
2 Labor Relations Board. The federal law gives Noel Canning the
3 right to come to this Court to challenge the order entered --

4 JUDGE SENTELLE: That raises another question that
5 we'll go back to the others in a minute. I cannot for the
6 life of me figure out why this intervention question was ever
7 raised. Your side caused this by trying to intervene, as you
8 just said, Noel Canning had a live dispute, a good clean
9 lawsuit, the issue would have been squarely before us, so
10 you've got all of these extra pages, all of this extra
11 briefing, argument, no doubt legal fees to insert an
12 Intervenor which can't possibly change the outcome of the
13 case. Why should we say the intervention is proper?

14 MR. FRANCISCO: You're absolutely correct that --

15 JUDGE SENTELLE: Okay, good.

16 MR. FRANCISCO: -- you need to address the issue
17 regardless of whether you grant the motion for intervention.
18 We think intervention is proper because we satisfied the
19 standards for intervention under Rule 15(v). Regardless of
20 whether, how you resolve that issue, however --

21 JUDGE GRIFFITH: You got to end up writing the
22 briefs anyway, right?

23 MR. FRANCISCO: Excuse me, Your Honor?

24 JUDGE GRIFFITH: You got to end up writing the
25 briefs anyway.

1 MR. FRANCISCO: At a minimum we did get to do that.

2 JUDGE GRIFFITH: Yes.

3 MR. FRANCISCO: And regardless of how you resolve
4 that question the Court will need to wrestle with the
5 difficult recess appointments question, and I think it is a
6 justiciable question because this is a dispute between Noel
7 Canning and the National Labor Relations Board --

8 JUDGE SENTELLE: Right.

9 MR. FRANCISCO: -- just as in the *Zivotofsky* case
10 it's precisely the type of question that courts are called
11 upon to resolve. And when you look at the applicable
12 standards here, here we know for certainty that the Senate
13 actually held sessions every --

14 JUDGE GRIFFITH: But did it do any work between
15 December 23rd and January 23rd? Did the Senate do any work?

16 MR. FRANCISCO: Well, it convened on January 3rd --

17 JUDGE GRIFFITH: I know it convened, the question is
18 did it do any work?

19 MR. FRANCISCO: I would say it convened on January
20 3rd, that's the one piece of work that it did during that
21 period --

22 JUDGE GRIFFITH: That's the work.

23 MR. FRANCISCO: -- but that cannot be the test. The
24 test cannot be how busy is the Senate during the sessions that
25 it is actually conducting.

1 JUDGE GRIFFITH: No, I understand, that's a
2 different question. But my simple question is did they do any
3 work? And you're saying the only work they did between
4 December 23rd and January 23rd --

5 MR. FRANCISCO: But we --

6 JUDGE GRIFFITH: -- is convening for the pro forma
7 sessions?

8 MR. FRANCISCO: Yes, Your Honor. But we know for
9 certainty that throughout the entire period during which it
10 was subject to this German order and convening in actual
11 sessions every three days, those were in fact actual sessions
12 during which it was capable of conducting business because it
13 conducted business on December 23rd when it passed a major
14 law, and it passed another law --

15 JUDGE GRIFFITH: On January 23rd the leader gets up
16 and says welcome everybody back from our long break, we're now
17 going to take up some of these issues that we've put off,
18 we've got a nomination for Judge Girard, I can't, I'm probably
19 getting the name wrong, we're going to take that up, that all
20 suggests that they weren't doing anything.

21 MR. FRANCISCO: But they had the capability of doing
22 things, they were actually in sessions. That's the key test
23 here; were they in session. The Government wants you to look
24 behind the fact that they were actually gavelling into session
25 and to conclude that those sessions were shams during which

1 the Senate was incapable of conducting any work. We know that
2 that's not the case because they conducted work during these,
3 during some of these sessions, at least on December 23rd and
4 August 11th, and I would submit that that session was no
5 different than the others. There were two members present on
6 December 23rd, it lasted a minute and 25 seconds.

7 JUDGE GRIFFITH: See, that's why I asked between
8 December 23rd and January 23rd. Take December 23rd out of it
9 and you've got a problem.

10 MR. FRANCISCO: And there's no magic line between
11 December 23rd and January 23rd, and December 17th when the
12 adjournment order was entered and December 23rd. The Senate
13 on December 17th scheduled a single adjournment order, it said
14 we are going to hold sessions, actual sessions every three
15 days. It then held those sessions, and that's the line
16 between recess and not recess, were they holding sessions, not
17 were they busy. I would submit to you if you flip on C-Span
18 on any given day you will often see a Senate that is not
19 particularly busy.

20 JUDGE GRIFFITH: Well, they're doing other things.

21 MR. FRANCISCO: Perhaps. Perhaps.

22 JUDGE GRIFFITH: No, they do a lot of other things.

23 MR. FRANCISCO: But if you look at the Senate floor
24 there's usually --

25 JUDGE SENTELLE: I'll go to the former Senate

1 Counsel on that question.

2 MR. FRANCISCO: Yes, Your Honor. If you look at the
3 Senate floor there's usually a presiding Senator accompanied
4 by a full compliment of staff, maybe, maybe one or two other
5 Senators. That's precisely, I would submit, if you looked at
6 any of these sessions --

7 JUDGE GRIFFITH: Besides the action on the floor was
8 there any other work that was going on in the Senate between
9 December 23rd and January 23rd?

10 MR. FRANCISCO: Your Honor, not that I am aware of,
11 other than convening on January 3rd to meet the constitutional
12 obligation under the Twentieth Amendment.

13 JUDGE GRIFFITH: So, to your knowledge the only work
14 being done by the Senate between December 23rd and January
15 23rd were the pro forma convenings. No committees were
16 meeting, nothing like that? No hearings being held?

17 MR. FRANCISCO: Your Honor, not that I am aware of.
18 They were doing work in the --

19 JUDGE GRIFFITH: Right.

20 MR. FRANCISCO: -- sense that they were gavelling
21 open; a full compliment of Senate staff was available to
22 assist if needed; and they were fully capable of conducting
23 work. I would submit that it's no different than if President
24 Obama pencils into his calendar I'm taking Saturday off, no
25 business to be conducted. That doesn't give Vice-President

1 Biden the power to seize the reigns of the Federal Government
2 because President Obama nonetheless is capable of doing work
3 and available if he wants to.

4 JUDGE GRIFFITH: Why aren't you arguing that recess
5 appointment clause applies, it gives the President power only
6 over, only to make intersession recess, why aren't you making
7 that argument?

8 MR. FRANCISCO: Well, Your Honor, we think that this
9 is a narrower ground upon which you can dispose of the case
10 and accord us full relief. We have briefed that issue.

11 JUDGE GRIFFITH: So, what's the principle? I mean
12 intersession versus intrasession, that's a nice, neat
13 principle.

14 MR. FRANCISCO: Sure.

15 JUDGE GRIFFITH: Happens to have the advantage of
16 comporting with the text in the history, what's the principle
17 that you identify?

18 MR. FRANCISCO: It's a very neat principle, I would
19 suggest. Once you jump the, once you make the leap into
20 intrasession recesses it's necessary to establish some kind of
21 constitutional floor, otherwise you do descend --

22 JUDGE GRIFFITH: Right.

23 MR. FRANCISCO: -- into absurdity, lunch breaks when
24 the court stepped out for a minute; to allow the court to come
25 in.

1 JUDGE GRIFFITH: Well, what's the constitutional
2 floor?

3 MR. FRANCISCO: The constitutional floor is the one
4 found in the adjournment clause.

5 JUDGE GRIFFITH: And where does that come from?

6 MR. FRANCISCO: Well, Your Honor, sure --

7 JUDGE GRIFFITH: A coincidence the adjournment
8 clause talks about --

9 JUDGE SENTELLE: The adjournment clause which you
10 don't put in the statutory sections at the back of your brief.

11 MR. FRANCISCO: I apologize, Your Honor. We quoted
12 it extensively in the brief, and that was an oversight, if
13 that was the case.

14 JUDGE SENTELLE: A lot easier to find if you comply
15 with the practice of putting the ones you rely on in the brief
16 at the back.

17 MR. FRANCISCO: Yes, Your Honor. But the
18 adjournment clause, the recess appointments clause, there of a
19 piece with four different clauses in the Constitution, all of
20 which turn on constitutional availability and unavailability,
21 you've got the adjournment clause; Twentieth Amendment; pocket
22 veto clause; recess appointment.

23 JUDGE GRIFFITH: So, you're suggesting that the
24 framers thought that the recess appointments clause was
25 informed by the adjournment clause?

1 MR. FRANCISCO: Well, Your Honor, yes, I do,
2 actually. I think that at the time the recesses that they
3 were grappling with were very long intersession recesses, so
4 they didn't really need to directly confront three days versus
5 five days versus 10 days; but I do believe that they thought
6 that this was something that was quite substantial.

7 JUDGE GRIFFITH: They used the adjournment clause if
8 they needed to take a break, right?

9 MR. FRANCISCO: They used the adjournment clause
10 when they needed to take a break of longer than three days.

11 JUDGE GRIFFITH: All right.

12 MR. FRANCISCO: Essentially what the purpose,
13 though, is is to prevent them from taking extended breaks and
14 absenting themselves from capability of conducting business
15 without the joint consent of both houses. Frankly, it's the
16 same purpose as the recess appointments clause. The recess
17 appointments clause is meant to say that if you take an
18 extended break and render yourself unavailable to do business
19 that's when a special power kicks in, the recess appointment
20 power, much like the pocket veto clause. When the Congress
21 renders itself unavailable to do business, unavailable to
22 receive a bill from the President, the President gets a
23 special power.

24 JUDGE GRIFFITH: So, the narrowest holding you're
25 looking for is three days, right? You want --

1 MR. FRANCISCO: The narrowest holding that we're
2 looking for --

3 JUDGE GRIFFITH: There's a constitutional --

4 MR. FRANCISCO: -- yes, Your Honor --

5 JUDGE GRIFFITH: -- principle --

6 MR. FRANCISCO: -- is that these particular recess
7 appointments are unconstitutional because the Senate was
8 meeting every three days. We have briefed the other issues,
9 they are in the briefs, they're presented to the Court for
10 decision. We think you can decide this on a much narrower
11 ground by concluding that no President has ever made a recess
12 appointment where Congress or the Senate was actually holding
13 sessions every three days which it was doing here.

14 JUDGE GRIFFITH: But pro forma session, that's a new
15 device, I mean, it's a fairly new device. I mean, apparently
16 Senator Byrd discussed it with President Reagan, but it hasn't
17 been used until just the last couple --

18 MR. FRANCISCO: Well, Your Honor, I think that
19 reflects the fact that the aggressive use of intrasession
20 recess appointments is a fairly new device. Prior to 1945
21 there are only three times where an intrasession recess
22 appointment was made, once by Andrew Johnson during the Civil
23 War --

24 JUDGE GRIFFITH: And he doesn't have a real good
25 record on appointments clause.

1 MR. FRANCISCO: Exactly.

2 JUDGE GRIFFITH: Yes. Right.

3 MR. FRANCISCO: Exactly. And then Warren Harding
4 made one. Calvin Coolidge made one. After 1945 it started to
5 be used intermittently. It wasn't until during the Carter and
6 Reagan administrations, however, that Presidents started using
7 it aggressively to do end runs around Senate advice and
8 consent. So, it makes perfect sense that that is precisely
9 when Senator Byrd stepped forward and pushed back using the
10 Senate's tools.

11 I think it's important to look at the flip side.
12 Congress has been using these types of pro forma sessions
13 since the 1920s; the House, I believe, since 1929; the Senate
14 since 1949, for a variety of legislative purposes. And
15 throughout that time we have been unable to disclose even a
16 single instance of the President treating these pro forma
17 sessions as if they were recesses, and that's because the line
18 is, is the Senate holding sessions every three days. Frankly,
19 it's not up to the Executive Branch to look behind that to
20 determine whether or not these are in fact sham sessions. But
21 if you did, if you did look behind that to ask whether or not
22 they are sham sessions you would easily conclude that they are
23 not. That's precisely why the Senate was able to pass major
24 legislation on December 23rd and August 11th by unanimous
25 consent, which by the way, is how the Senate confirms the vast

1 majority of nominees that come before it, and pass the vast
2 majority of legislation that comes before it.

3 JUDGE SENTELLE: Not every nominee.

4 JUDGE GRIFFITH: Not everyone, unfortunately.

5 MR. FRANCISCO: Not every nominee, Your Honor, but
6 some of them. Some of them --

7 JUDGE SENTELLE: Not every nominee on this bench was
8 confirmed --

9 MR. FRANCISCO: -- have been confirmed by unanimous
10 consent.

11 JUDGE SENTELLE: -- by unanimous. A majority of the
12 people on this bench.

13 MR. FRANCISCO: I didn't say all.

14 JUDGE GRIFFITH: Let's move on.

15 MR. FRANCISCO: I would like to reserve three
16 minutes for rebuttal, but I'm happy to answer whatever --

17 JUDGE SENTELLE: You don't get to right now.

18 MR. FRANCISCO: All right.

19 JUDGE SENTELLE: You reminded us at the beginning of
20 this something that seems to have been forgotten, and that is
21 that there is an actual dispute here between Noel Canning and
22 the NLRB.

23 MR. FRANCISCO: Yes, Your Honor.

24 JUDGE SENTELLE: You're supposed to be representing
25 Noel Canning, you said as it stands nothing on their behalf.

1 Is there anything in their position that isn't dependent upon
2 us applying state law to govern the contract?

3 MR. FRANCISCO: Yes, absolutely, Your Honor, the
4 substantial evidence test. I would submit to you that even if
5 you accept all of the Union's testimony as true here it
6 establishes two things, that on December 8th the parties
7 allegedly entered into a tentative oral agreement on one
8 thing, and then on December 15th when the Union voted on that
9 thing it voted on something that was different than what was
10 tentatively agreed to, even on their own testimony, on
11 December 8th, and so there was no meeting of the minds. So,
12 we don't think that the Board's order is supported by
13 substantial evidence. Regardless, however, I think that Noel
14 Canning has a very distinct interest in the recess
15 appointments question here.

16 JUDGE SENTELLE: There's no question but what Noel
17 Canning has that interest. Nonetheless, this is an NLRB
18 administrative review proceeding that we're sitting on
19 today --

20 MR. FRANCISCO: Yes, Your Honor.

21 JUDGE SENTELLE: -- and I did not want that to get
22 completely lost. You understand it isn't guaranteed that
23 you're going to win on recess appointment? If you don't win
24 on recess appointment then we have to decide the labor law
25 case.

1 MR. FRANCISCO: I fully understand what --

2 JUDGE SENTELLE: That's why Mr. Coppess is over here
3 at the table.

4 MR. FRANCISCO: And that's why we briefed it, that's
5 why I'm prepared to answer any questions on it, and we think
6 it's a very strong argument for the reasons that I just
7 articulated.

8 JUDGE HENDERSON: Can I ask you about something you
9 haven't briefed, and I don't think any other party has, too,
10 and that's our jurisdiction.

11 MR. FRANCISCO: Yes, Your Honor.

12 JUDGE HENDERSON: Because this issue was not brought
13 before the NLRB, which is jurisdictional, and are you relying
14 obviously on the -- well, what are you relying on?

15 MR. FRANCISCO: Well, two things, Your Honor, one,
16 it's well established that you don't have to raise before an
17 administrative agency something they have no authority to
18 resolve, and the NLRB itself in the *Center for Social Change*
19 case, the one that got dropped out --

20 JUDGE SENTELLE: After this case was brought.

21 MR. FRANCISCO: Yes. The *Center for Social Change*
22 clarified that pursuant to its usual standard it actually has
23 no authority to second guess the President's decision on this,
24 so we don't have to bring before the Board something they have
25 no authority to resolve, the Board obviously doesn't have the

1 power to overrule their boss, the President, on whether or not
2 the recess appointments are valid. And relatedly, you don't
3 have to raise futile issues before the Board. I would suggest
4 here that there is a huge cloud hanging over the National
5 Labor Relations Board proceedings right now. This case is
6 fully briefed, the prudent thing for this Court to do would be
7 to remove that cloud one way or the other. If I can just have
8 four seconds --

9 JUDGE SENTELLE: On that are you relying on the
10 language of the statute that refers to, I believe, exceptional
11 circumstances that --

12 MR. FRANCISCO: Excuse me?

13 JUDGE SENTELLE: You look like you're surprised.
14 The statute makes this jurisdictional, it says we're not to
15 hear it unless, except in, what, exceptional circumstances or
16 something to that effect?

17 MR. FRANCISCO: Yes, Your Honor.

18 JUDGE SENTELLE: Okay. I'm not sure why this would
19 take you by surprise, but --

20 JUDGE HENDERSON: Well, he's -- and that's what
21 you're relying on?

22 MR. FRANCISCO: Yes, Your Honor.

23 JUDGE SENTELLE: Okay.

24 MR. FRANCISCO: Yes.

25 JUDGE SENTELLE: Thank you. Do you have further

1 question, or -- seeing no further questions then your time is
2 up, we'll give you back a couple of minutes for rebuttal.

3 MR. FRANCISCO: Thank you, Your Honor.

4 ORAL ARGUMENT OF MIGUEL A. ESTRADA, ESQ.

5 ON BEHALF OF THE AMICI MCCONNELL, ET AL.

6 MR. ESTRADA: Good morning. Thank you, Your Honors.
7 Chief Judge Sentelle, may it please the Court. The
8 fundamental question to offer a somewhat different
9 perspective, though, I think I largely agreed with a lot of
10 what Mr. Francisco said --

11 JUDGE SENTELLE: You won't need to talk long then,
12 will you?

13 MR. ESTRADA: My somewhat different perspective on
14 the fundamental question in this case is whether the Senate is
15 empowered to provide for its own internal operating procedures
16 by a unanimous consent resolution on December 17th, then from
17 that date --

18 JUDGE GRIFFITH: There's no question the Senate
19 under the rules clause gets to make the rule of its own
20 proceedings, but where has the Senate made the determination
21 that what the word recess means for purposes of the recess
22 appointments clause? There's nothing in the standing rules of
23 the Senate, right?

24 MR. ESTRADA: No, but the question --

25 JUDGE GRIFFITH: There's nothing in Riddick's about

1 it, and the Senate isn't here to tell us what their view is,
2 they've chosen for whatever reason not to appear as an Amicus.
3 So how do we know what the Senate's view is about the meaning
4 of recess in terms of the recess appointments clause? We
5 don't.

6 MR. ESTRADA: Well, we know two things that are
7 highly probative, and I think virtually established, you know,
8 the answer that the Senate has to give to that. One of them
9 is that by the order that I just cited the Senate declared
10 that it would hold sessions every three days between December
11 17th --

12 JUDGE GRIFFITH: But that's not answering the
13 question of whether the Senate considers that to be a recess
14 under the recess appointments clause or not.

15 MR. ESTRADA: No, but I think it is widely
16 understood on the part of the Senators, including the current
17 majority leader who so stated in 2007 in providing for a pro
18 forma session precisely to prevent the then incumbent
19 President from making recess appointments.

20 JUDGE GRIFFITH: So, is that how we figure out what
21 the Senate thinks of something, we look at statements by the
22 majority leader in the congressional record? There's a
23 mechanism, there's a statutory mechanism for the Senate to
24 present its views of the rules of its own proceedings in
25 court, right? It's statutory.

1 MR. ESTRADA: Right. But the mere --

2 JUDGE GRIFFITH: It's Title 2, and they haven't done
3 that here, so what is there for us to defer to?

4 MR. ESTRADA: Well, what is there to defer is two
5 issues, the Senate by unanimous consent, that is to say the
6 entirety of the Senate said that it would be in session, which
7 I think is the polar opposite of being in recess. And --

8 JUDGE GRIFFITH: Perhaps. Perhaps. But is that the
9 Senate addressing this issue, the meaning of being in session
10 for terms of the recess appointment clause?

11 MR. ESTRADA: Well, I think it is necessarily the
12 Senate dealing with that very same question, Judge Griffith,
13 because --

14 JUDGE GRIFFITH: Why isn't the Senate here? Why
15 didn't they appear to brief this issue?

16 MR. ESTRADA: I don't believe the legal counsel has
17 sought authorization, which would then be a voteable
18 proposition. I don't think that the presence of the Senate is
19 necessary. One of the issues why --

20 JUDGE GRIFFITH: I mean, the implication is there
21 are not enough votes to get a Senate resolution to do so, so
22 what does that tell us about the Senate's view of this issue?

23 MR. ESTRADA: I don't think it tells us anything
24 about the motivations of individual Senators.

25 JUDGE GRIFFITH: No, no, I'm not talking about

1 motivations of individual Senators, because those are
2 irrelevant. We're talking about, you want us to defer, under
3 the rules of its own proceedings clause, and you're right, we
4 have to defer to the Senate's view of its own proceedings, and
5 I'm saying where is that? It's not here.

6 MR. ESTRADA: Well, it is --

7 JUDGE GRIFFITH: You're trying to glean it from
8 floor statements and by indirection.

9 MR. ESTRADA: I don't think that it is fair to say,
10 Judge Griffith, that I am arguing from indirection when the
11 Senate provided for the sessions every three days for the
12 purpose of complying with constitutional requirements,
13 including the adjournment clause and the Twentieth Amendment.

14 JUDGE GRIFFITH: Was that part of the unanimous
15 consent?

16 MR. ESTRADA: Well, what was part of the unanimous
17 consent was two things, that the Senate will hold sessions
18 every three days, and that those sessions during that period,
19 business of the Senate could be conducted only by unanimous
20 consent. And the argument that we make here is that that
21 necessarily means that the Senate declared itself by unanimous
22 consent to be available for business; that it stated expressly
23 that it was in session --

24 JUDGE GRIFFITH: Let me give you a hypothetical.
25 Let's imagine that the Senate finishes its work on Labor Day,

1 but then goes into a series of pro forma sessions that last
2 until January 2nd, that's the only thing that's taking place
3 in the Senate between Labor Day and January 2nd, does that
4 preclude the President from making an appointment in November
5 or December?

6 MR. ESTRADA: Yes. And I think one of the --

7 JUDGE GRIFFITH: There's absolutely nothing
8 happening in the Senate, there are no hearings, no one's in
9 town, the, you know, the buildings are dark except for every
10 three days the junior Senator has to come in and gavel them
11 in, right? And that's the only thing that's happening.

12 MR. ESTRADA: Judge Griffith, I am answering your
13 question yes, but I am also taking issue with the supposition,
14 which I think was also implicit in your question to my
15 colleague that that was what was occurring here, because --

16 JUDGE GRIFFITH: I understand.

17 MR. ESTRADA: -- what the resolution in this case
18 said was that business could be conducted by unanimous
19 consent, and that means the enactment of legislation or
20 business that requires a vote of the Senate as a whole. It
21 does not mean that nothing was happening, and in fact, the
22 legislative record affirmatively refutes the supposition that
23 something was happening, that nothing was happening, because
24 if you look at the congressional record, for example, on
25 January 23rd at page S-41 you could see that under the

1 authority of the very same resolution the reports of a number
2 of committees that have been working during this period --

3 JUDGE GRIFFITH: I see.

4 MR. ESTRADA: -- of time were actually tendered.

5 And so, the whole proposition that this is in some respect
6 different from how legislative business is conducted in the
7 ordinary course is simply false. And in most cases where you
8 deal with sessions such as you describe, as a matter of
9 principle I think that deference to the role of the Senate in
10 the constitutional process, and the primacy of the advice and
11 consent function as the primary and not an auxiliary method
12 for the appointment of officers it means that the Court must
13 defer to the Senate calling its work a session in the absence
14 of the most affirmative evidence that this is the clearest
15 subterfuge. Where the Supreme Court said in the *Ballin* case
16 which there was a quorum rule of another House was that even
17 if somebody were prepared to come in and say there was nobody
18 in the chamber, and under the House rules people were sent to
19 look to see if somebody was in the building, that was for the
20 House to determine whether quorum was present.

21 JUDGE GRIFFITH: That's right. But the difference
22 there is there was some form of certification that was made by
23 the body itself. We don't have that here. We might be able
24 to infer that from statements that are made, but it's not --

25 MR. ESTRADA: I don't think that that's actually

1 fair, Judge Griffith, because the certification is inherent in
2 the act --

3 JUDGE GRIFFITH: Okay.

4 MR. ESTRADA: -- that the Senate was gavelled into
5 session officially as the Senate, not as two guys in a bar,
6 every three days, you know, the parliamentarian were there,
7 everybody who is needed to conduct the legislative business of
8 the people was there.

9 JUDGE GRIFFITH: So, why have you not advanced the
10 original public meaning argument of the recess appointments
11 clause, that there is the recess, there's a single recess?

12 MR. ESTRADA: We have not disputed two things --

13 JUDGE GRIFFITH: Kind of faint-hearted, aren't we?

14 MR. ESTRADA: Well, if you had offered me --

15 JUDGE SENTELLE: I also might ask why all the
16 litigants --

17 MR. ESTRADA: -- twice as many words I would have
18 been happy.

19 JUDGE SENTELLE: Well, I also might ask why all the
20 litigants were so reluctant to make that clause easier to find
21 in your briefs.

22 MR. ESTRADA: I'm sorry, Judge Sentelle?

23 JUDGE SENTELLE: I also don't understand why neither
24 side, neither litigant, no litigant here makes the clause easy
25 to find in the briefs. Nobody put it in the section on the

1 back of a statutory appendix. Contrary to what your co-
2 counsel said it isn't laid out very plainly at the beginning
3 of their brief. We have to hunt the clause that everybody's
4 relying on. Excuse me. Go ahead.

5 MR. ESTRADA: Well, that is (indiscernible) --

6 JUDGE SENTELLE: I'm just being a curmudgeon, my
7 usual role of curmudgeon. Excuse me, go ahead.

8 MR. ESTRADA: Well, and I think, you know, we all
9 owe you an apology for that. But the basic point is that the
10 Senate as a body officially gavelled into session with
11 everybody who worked with the Senate on hand, and ready to
12 conduct the business of the people if the business that was
13 consensual enough to warrant unanimous consent was tendered
14 for resolution. And the issue here is not that the Senate was
15 not available as the Executive would have you think, but that
16 the Senate adopted a special super majority rule for this
17 period of time to consider only certain things. If you accept
18 the government's so-called functional view, which keeps
19 evolving with each successive and affirmative gravel, of the
20 power of the Senate the next argument is going to be the
21 closure rule, means that the Senate is not available for
22 nominations; or that the invocation of the so-called Thurmond
23 Rule in an injunction, in an election year means that the
24 Senate is not available for business.

25 JUDGE SENTELLE: (Indiscernible.)

1 MR. ESTRADA: The reason we did not think necessary
2 to make the arise argument and the, you know, the reasons of
3 the Senate argument is that although we agree and we do not
4 disavow those arguments this wolf comes as a wolf. If you
5 accept this invocation of executive power you have turned the
6 auxiliary process for filling of the appointments on a
7 somewhat of an emergency basis. What the framers put in, like
8 break glass in case of emergency part of the Constitution, and
9 you have turned it into the background rule that would allow
10 the President to evade the primary role of the Senate in
11 securing advice and consent of his nominees, which is the main
12 route for elimination and confirmation. And --

13 JUDGE SENTELLE: And we have reached and passed the
14 end of your allotted time, so unless my colleagues have
15 further questions --

16 MR. ESTRADA: Thank you, Your Honor.

17 JUDGE SENTELLE: -- thank you, Counsel, we'll hear
18 from the Respondent. The first Counsel for Respondent.

19 ORAL ARGUMENT OF BETH S. BRINKMANN, ESQ.

20 ON BEHALF OF THE RESPONDENT

21 MS. BRINKMANN: May it please the Court, Beth
22 Brinkmann from the Department of Justice appearing on behalf
23 of the National Labor Relations Board, along with my -- and
24 I'll be addressing the recess appointments clause --

25 JUDGE SENTELLE: Let me say at the outset that I am

1 going to arbitrarily and capriciously and without consulting
2 with my colleagues raise the time limits on both of the other
3 counsel to five minutes apiece because this started out after
4 all in their bailiwick, and three and a half and one and a
5 half is not much time to talk in, so you can be thinking about
6 saying more than you had previously planned to say.

7 MS. BRINKMANN: Thank you very much. My colleague
8 from the NLRB Elizabeth Heaney will be addressing the labor
9 issues.

10 I'd like to turn first back to the recess
11 appointments clause, which is the provision of the
12 Constitution that vested the President with the authority to
13 make these appointments, and I'd like to look at the text of
14 that clause which uses the term recess.

15 JUDGE SENTELLE: Uses the term the recess.

16 JUDGE GRIFFITH: The recess.

17 MS. BRINKMANN: The recess.

18 JUDGE SENTELLE: Yes.

19 MS. BRINKMANN: That's right, Your Honor.

20 JUDGE SENTELLE: Don't cut it short, please,
21 Counsel.

22 MS. BRINKMANN: Absolutely. The recess. The recess
23 has a common ordinary meaning, it means a break --

24 JUDGE SENTELLE: Yes, it does, and it's a definite
25 article. It does not say a recess or recess, it says the

1 recess.

2 MS. BRINKMANN: Let me turn to the intrasession
3 question then, I guess, to begin with, although I'd very much
4 like to get back to the core meaning of recess. But we take
5 great issue with the characterization of the history of this
6 text in the Constitution.

7 JUDGE GRIFFITH: When was the first time the
8 Executive took the view that the recess appointment clause
9 gave the President power to make intrasession recesses?

10 MS. BRINKMANN: Well --

11 JUDGE GRIFFITH: Other than Andrew Johnson.

12 MS. BRINKMANN: Since that time there have been 285,
13 and certainly --

14 JUDGE GRIFFITH: It was 1921.

15 MS. BRINKMANN: But if I can go before that, Your
16 Honor --

17 JUDGE GRIFFITH: Okay, go.

18 MS. BRINKMANN: -- I would counter with the Senate's
19 position which dates back to 1798. This same language, the
20 recess, appeared in Article 1, Section 4, which was the first
21 provision that defined how Senators were selected. It's now
22 been overtaken by the Seventeenth Amendment, but we go back to
23 that original language, and it allowed the State Executives to
24 fill vacancies, and it used the same language. In 1798 the
25 New Jersey Executive, there was a vacancy, and he filled that

1 senatorial vacancy which had, during the intrasession of the
2 New Jersey legislature, unlike Congress that was not engaging
3 in intrasessions at that time, the New Jersey legislature was,
4 and we explain this in our brief, and the Senate accepted that
5 commission. There was a meaning of the recess, it included
6 intrasession recesses.

7 JUDGE SENTELLE: How strong is that as precedent for
8 the meaning of the recess in the appointments clause?

9 MS. BRINKMANN: It's the exact same text
10 contemporaneously drafted by the same individuals to serve the
11 same purpose, vacancies, temporary, and it was a temporary
12 appointment. It was completely analogous to the recess
13 appointments clause.

14 JUDGE SENTELLE: That was at a time when the states
15 controlled, subject to the Constitution, the senatorial
16 selection process.

17 MS. BRINKMANN: That's -- you're right.

18 JUDGE SENTELLE: But once the state has made that
19 decision does it mean anything more than deference on the part
20 of the Senate that they accepted that with reference to the
21 state legislature?

22 MS. BRINKMANN: We think it's very sound, and the
23 most contemporaneous history we have about what the drafters
24 of the Constitution meant about, used those exact words.

25 JUDGE GRIFFITH: But why wasn't it ever used for

1 that until so long after? I mean, it's not likely that
2 Executives don't take advantage of power that's given to them,
3 I mean, we've sort of learned that in history, but you're
4 saying here is a power that was given to the Executive and
5 wasn't used until, again, with the exception of Andrew
6 Johnson, 1921. That seems --

7 MS. BRINKMANN: Well, a couple of --

8 JUDGE GRIFFITH: -- implausible to me.

9 MS. BRINKMANN: -- a couple of things, Your Honor.
10 Historically there weren't long intrasession recesses just as
11 a fact of Congress as opposed to the state legislature example
12 we give. And we would also point out that --

13 JUDGE SENTELLE: But there were intersession
14 recesses, they went to lunch --

15 MS. BRINKMANN: Not long.

16 JUDGE SENTELLE: -- they took weekends, they had
17 holidays.

18 MS. BRINKMANN: But since 1921 the Attorney
19 General's opinion has made clear that this is an
20 interpretation that has been embraced. Subsequently the
21 Eleventh Circuit en banc has also reached this conclusion, and
22 there have been 285 appointments. And we think under the
23 Supreme Court's directive --

24 JUDGE GRIFFITH: But in 1901, let's trade, in 1901
25 the Executive took the view that there were no intrasession,

1 right? So, I mean, the Executive's track record on this has
2 been checkered at best, right?

3 MS. BRINKMANN: Well, we now have nearly 100 years,
4 Your Honor, and I think under the Supreme Court's command of
5 *Mistrud* (phonetic sp.) and similar cases where it teaches us
6 that the traditional ways of conducting government do inform
7 constitutional interpretation, that is something to be taken
8 into heart here. This would be significantly --

9 JUDGE GRIFFITH: Well, that's a stronger argument on
10 the arising, on the happens, right? Because that goes, you go
11 back to what, 1823 or so, and maybe even George Washington,
12 but this one is a little more temporary. But you're saying
13 1921 is enough.

14 MS. BRINKMANN: I think that, Your Honor, the
15 disruption --

16 JUDGE GRIFFITH: And we have three Presidents who
17 didn't do, what, J.F.K., L.B.J., and Ford wouldn't do
18 intrasessions.

19 MS. BRINKMANN: But there are various reasons, as
20 Your Honor well knows, why there might or might not be
21 appointments at certain times. The fact of the matter is in a
22 well reasoned opinion from 1921, Attorney General Daugherty
23 made clear the reasoning that has been carried forward; the
24 Eleventh Circuit en banc in addressing Judge Pryor's
25 appointment agreed with this conclusion, and the command of

1 looking at the practice of conducting government is a
2 significant factor to be weighed there.

3 I would like to go back to the text of the word
4 recess, and to talk about that common ordinary meaning that we
5 are taught to use --

6 JUDGE SENTELLE: I'm not sure you're going to get
7 far with that without going to the term the recess.

8 MS. BRINKMANN: And Your Honor, we think that with a
9 century of precedent, and the --

10 JUDGE SENTELLE: Forget about a century of
11 precedent, go back to the Constitution, that's where you said
12 you were going. Go back to the text, you said you were going
13 there.

14 MS. BRINKMANN: Yes, the --

15 JUDGE SENTELLE: Now, the recess, I do not see how
16 you can read that without taking that to mean a specific
17 recess, as opposed to the generality of recess.

18 MS. BRINKMANN: Well, Your Honor, Attorney General
19 Daugherty discussed this, and when you look at the recess --

20 JUDGE SENTELLE: He wasn't around at the time.

21 MS. BRINKMANN: Well, when --

22 JUDGE SENTELLE: You said you were going back to the
23 text, that was --

24 MS. BRINKMANN: When you look at the --

25 JUDGE SENTELLE: -- 100 and some odd years before

1 Daugherty.

2 MS. BRINKMANN: When you look at the recess we
3 already know it doesn't mean a single recess in the suggestion
4 that, of your interpretation that you're suggesting of the
5 because there are at least two annual sessions for each
6 Congress, so there are recesses even if you're only looking
7 at --

8 JUDGE SENTELLE: Yes.

9 MS. BRINKMANN: -- intersession --

10 JUDGE SENTELLE: Between those sessions there is the
11 recess.

12 MS. BRINKMANN: But for one Congress there is more
13 than one recess, even under that interpretation, Your Honor.
14 And when we --

15 JUDGE GRIFFITH: Is it the example of the New Jersey
16 legislature that you're relying on?

17 MS. BRINKMANN: Yes, it is.

18 JUDGE GRIFFITH: Any other examples?

19 MS. BRINKMANN: And the New Jersey -- that's the one
20 we found from 1798 which we think is --

21 JUDGE GRIFFITH: Because the typical practice for
22 state legislatures at the time was to have a single, you know,
23 a short session, single recess, right? The same practice as
24 with the National Congress.

25 MS. BRINKMANN: And this is contemporaneous evidence

1 of the exact same language in a different provision of the
2 Constitution for the same purpose.

3 JUDGE GRIFFITH: Speaking of purpose, I mean, so
4 *Federalist 67* and *Story* tell us what the purpose of the recess
5 appointment clause was, right? And the -- it was actually an
6 accommodation to the Senators. Here they're given this advice
7 and consent function in the appointment clause, they have to
8 go home, the President has to be here 365 days a year, the
9 Executive Power needs to keep going on, he needs to fill
10 vacancies, as an accommodation to the Senate they get to go
11 home and he gets to exercise this power, that was the purpose
12 behind this, right?

13 MS. BRINKMANN: In our --

14 JUDGE GRIFFITH: What's it being used for now? It's
15 being used now when a President is frustrated by what the
16 Senate's doing, right? The purpose has changed dramatically.

17 MS. BRINKMANN: Your Honor, we would say that our
18 position is the consistent and maintains the balance of powers
19 that Your Honor invoked at the beginning. The design of the
20 recess appointment --

21 JUDGE GRIFFITH: I want you to talk about purpose.
22 You've done text, so now --

23 MS. BRINKMANN: The purpose --

24 JUDGE GRIFFITH: -- the --

25 MS. BRINKMANN: The purpose of the recess

1 appointments clause is to ensure that the appointment
2 authority is vested at all times somewhere.

3 JUDGE GRIFFITH: Right.

4 MS. BRINKMANN: Under the Petitioner's view they
5 create an appointment vacuum. Under their view during this
6 20-day break from business in January they claim the President
7 is not authorized to exercise his recess appointments --

8 JUDGE SENTELLE: Right.

9 MS. BRINKMANN: -- authority.

10 JUDGE SENTELLE: That's what the law says.

11 MS. BRINKMANN: But at the same time --

12 JUDGE GRIFFITH: But Ms. Brinkmann, I think the
13 problem I have with that argument is it's a, you're missing
14 the forest through the trees argument. The forest here is
15 that Presidents, not just this one, Presidents have become
16 frustrated at the way the Senate has treated their
17 nominations, right? These are nominations that are presented
18 to the Senate and not acted upon quickly enough by the
19 President, and so the President, the Executive Branch resorts
20 to these almost metaphysical arguments about the recess
21 appointments clause, that's not what the recess appointments
22 clause was about, it was not a chance to give the President a
23 second chance to confirm his folks, it was about a chance to
24 give the Senate an opportunity to go home and the President to
25 carry on his business. It's not a two bites of the apple --

1 MS. BRINKMANN: Well, historically --

2 JUDGE GRIFFITH: -- circumstance.

3 MS. BRINKMANN: -- Your Honor, I would say there are
4 very old examples of Presidents using recess appointments to
5 appoint officers who had already been nominated, whose
6 nominations had not been acted on, as is the situation here.
7 But I want to go even more to the balance of powers --

8 JUDGE GRIFFITH: They were all done intersession,
9 though. You're --

10 MS. BRINKMANN: Well, I want to go to the balance of
11 powers here --

12 JUDGE GRIFFITH: Okay.

13 MS. BRINKMANN: -- Your Honor, because at the same
14 point when you look at the President's authority here,
15 Congress, the Constitution says it's a limited authority, it's
16 a temporary appointment, and at all times the Senate retains
17 its authority to provide advice and consent.

18 JUDGE GRIFFITH: It's a temporary appointment, under
19 your theory, how long will these appointees be in their
20 office?

21 MS. BRINKMANN: Until the end of the session --

22 JUDGE GRIFFITH: How long is that?

23 MS. BRINKMANN: -- in January.

24 JUDGE GRIFFITH: How long is that?

25 MS. BRINKMANN: It would be --

1 JUDGE GRIFFITH: Two years.

2 MS. BRINKMANN: -- two years.

3 JUDGE GRIFFITH: That's temporary?

4 MS. BRINKMANN: That's correct, Your Honor.

5 JUDGE GRIFFITH: That's temporary?

6 MS. BRINKMANN: The Senate can act in the meantime,
7 they can --

8 JUDGE GRIFFITH: Is that temporary? Your view, two
9 years is temporary?

10 MS. BRINKMANN: That's only if the Senate does not
11 provide advice and consent. In the scenario you're posing is
12 where the Senate wants to provide advice and consent, and they
13 can reject --

14 JUDGE GRIFFITH: Well, they're providing --

15 JUDGE SENTELLE: Would you say that during that --

16 MS. BRINKMANN: They can reject the nominee.

17 JUDGE GRIFFITH: They're providing their advice and
18 consent by slow walking it --

19 MS. BRINKMANN: Right.

20 JUDGE GRIFFITH: -- and it frustrates everybody --

21 MS. BRINKMANN: And they can --

22 JUDGE GRIFFITH: -- they get to do that.

23 MS. BRINKMANN: -- they can reject --

24 JUDGE GRIFFITH: That's the thrust and parry that we
25 talked about in *McCalpin*.

1 MS. BRINKMANN: That's right, Your Honor.

2 JUDGE GRIFFITH: And it's frustrating to everyone.

3 MS. BRINKMANN: And it's maintained here, Your
4 Honor, on the one hand the President has the recess
5 appointment authority, and the Senate has the ability to act
6 on the nominations (indiscernible) --

7 JUDGE SENTELLE: Yes, but the Senate does not have a
8 two-sided opportunity, they can't remove that person from
9 office during that two years, can they?

10 MS. BRINKMANN: They can reject the nomination, and
11 under the Pay Act they don't pay that officer. But let's take
12 the Senate at their word here. If we just take the Senate at
13 their word here, you were asking before what indication is
14 there, this is not a disagreement with the Senate; the Senate
15 has nowhere issued a rule, a certification anywhere that this
16 was not a recess for recess appointment purposes. To the
17 contrary, we have an order that provides and directs that no
18 business will be conducted during this 20-day period in
19 January --

20 JUDGE SENTELLE: Without unanimous consent.

21 MS. BRINKMANN: Yes. And quite significantly, Your
22 Honor, no communications from the President are laid before
23 the Senate during that time. There is no way the Senators
24 would even have been informed that the President made a
25 nomination, those presidential messages include nominations.

1 One presidential message that was sent was a report that the
2 President sent on I believe it was January 12th, that was not
3 laid before the Senate until they returned from their 20-day
4 recess on January 23rd.

5 JUDGE SENTELLE: I don't want to let this end
6 without raising the happen question. Unless the framers
7 intended that this, the recess appointment power extended only
8 to those vacancies that arise during the recess, why did they
9 use any verb at all? Why didn't they just say the President
10 shall have the power to fill up vacancies, rather than saying
11 vacancies that may happen during the recess? Because it would
12 seem that unless they meant those that arise at that point
13 there's no purpose in that part of the sentence at all.

14 MS. BRINKMANN: I think Attorney General Wirt made a
15 very good observation in 1823, that this language was not
16 clear. It does not use the term originate, and my colleague,
17 Mr. Estrada, referred --

18 JUDGE SENTELLE: The term happen, and unless happen
19 means occur, means come into being, means originate, why did
20 they put anything other than the President shall have the
21 power to fill up all vacancies if they intended for him to
22 have the power to fill up vacancies that pre-existed the
23 recess why is that clause in there?

24 MS. BRINKMANN: Well, Attorney General Wirt
25 analyzed --

1 JUDGE SENTELLE: Don't tell me about the Attorney
2 General, tell me an answer to that question. Why would it be
3 in there unless they intended it to apply only to a certain
4 category of vacancies?

5 MS. BRINKMANN: Because they wanted to ensure that
6 the vacancies that happen to exist during a recess could be
7 filled by the President --

8 JUDGE SENTELLE: If you leave out that clause they
9 have power to fill not only those vacancies but all vacancies.

10 MS. BRINKMANN: Your Honor, if you read it a
11 different way --

12 JUDGE SENTELLE: That clause limits, it does not
13 expand, and why did they put that limitation in there unless
14 they intended to create a limitation?

15 MS. BRINKMANN: Let me posit another reading of it,
16 Your Honor, that reinforces its ambiguity. If you take the
17 clause --

18 JUDGE SENTELLE: No, answer my question as to why
19 they would put it in there unless they intended to limit.

20 MS. BRINKMANN: I'm going to, Your Honor, because --

21 JUDGE SENTELLE: Okay.

22 MS. BRINKMANN: -- they could have put it in there
23 to explain and limit the period during which the President
24 could make the appointments. If you --

25 JUDGE SENTELLE: Fill up all vacancies that may

1 happen during the recess of the Senate?

2 MS. BRINKMANN: Right. And if you limit --

3 JUDGE SENTELLE: That doesn't say when the President
4 is limited, that says --

5 MS. BRINKMANN: That's right.

6 JUDGE SENTELLE: -- that it modifies vacancies.

7 MS. BRINKMANN: And you suggested that during the
8 recess just modifies the vacancies then the President could
9 fill a vacancy that arose during a recess at any time, even
10 during a session. So, it is ambiguous, and we have to look --

11 JUDGE SENTELLE: That is not what the modifies. Go
12 back to your diagraming of sentences when you were in grammar
13 school. That clause that may happen during the recess of the
14 Senate modifies vacancies.

15 MS. BRINKMANN: That's correct, Your Honor.

16 JUDGE SENTELLE: Not the power, not the time of the
17 President.

18 MS. BRINKMANN: In your diagraming paradigm if you
19 put that on the diagonal line for the modification of that
20 noun you have nothing to modify the appointment power of the
21 President --

22 JUDGE SENTELLE: You have vacancies --

23 MS. BRINKMANN: -- which suggests --

24 JUDGE SENTELLE: -- to modify. You have vacancies
25 to modify.

1 MS. BRINKMANN: So, if there is a vacancy that
2 arises at --

3 JUDGE SENTELLE: That may happen during the recess
4 is a clause --

5 MS. BRINKMANN: And then the President --

6 JUDGE SENTELLE: -- modifying something.

7 MS. BRINKMANN: And then the President could fill
8 that at any time, not just during a recess. I really think we
9 need to look at the centuries of interpretation we have of
10 this provision, and the congressional acquiescence, Your
11 Honor --

12 JUDGE GRIFFITH: What is the narrowest possible
13 holding that will get you what you want?

14 MS. BRINKMANN: We believe that taking the Senate at
15 its word and looking at this 20-day period in January where by
16 order no business was conducted, no communications were laid
17 before the Senate, there was no duty of attendance, the Senate
18 itself on December 17th when it issued this, there are two
19 other unanimous consent orders on that same page that refer to
20 it a recess.

21 JUDGE GRIFFITH: What's the holding? I understand
22 the factual argument, what's the holding, what's the principle
23 holding?

24 MS. BRINKMANN: That for purpose of the recess
25 appointment clause that was a 20-day recess because under the
26 functional interpretation, the plain language of recess, which

1 this --

2 JUDGE GRIFFITH: We have to walk into the Capitol
3 and see what's going on.

4 MS. BRINKMANN: No, the Senate has told you this
5 from 1905. The Senate in their report --

6 JUDGE GRIFFITH: The Senate did not tell us that in
7 1905, a committee of the Senate --

8 MS. BRINKMANN: True.

9 JUDGE GRIFFITH: -- told you.

10 MS. BRINKMANN: True enough.

11 JUDGE GRIFFITH: There's a big difference between
12 those two.

13 MS. BRINKMANN: Yes, Your Honor, but it's been
14 embraced by the Comptroller General, a legislative official,
15 and it's been embraced by Riddick's on the Senate's
16 proceeding. So, in addition to Attorney General Daugherty
17 pointed to that report as the most significant analysis that
18 he was relying on in his Attorney General opinion. So, when
19 you look at that you look at what the Senate did, no business,
20 no communications, no duty of attendance, no one's there, it's
21 empty. Those are the exact factors that the Senate report and
22 Attorney General Daugherty talk about.

23 JUDGE GRIFFITH: If we disagreed with you, and if we
24 thought that intrasession recess appointments are
25 unconstitutional how should we decide the case then? You

1 would have to find some way to argue that this is an
2 intersession appointment, could you do that?

3 MS. BRINKMANN: I don't believe it is under the
4 adjournment that the Senate --

5 JUDGE GRIFFITH: So, there's no way --

6 MS. BRINKMANN: -- applied it.

7 JUDGE GRIFFITH: -- that this is an intersession
8 appointment?

9 MS. BRINKMANN: Well, when you look at the Twentieth
10 Amendment it dictates that the new session of Congress began
11 at noon on January 3rd --

12 JUDGE GRIFFITH: Okay.

13 MS. BRINKMANN: -- and we don't rely on that pro
14 forma session for that at all, that is --

15 JUDGE GRIFFITH: I see.

16 MS. BRINKMANN: -- erroneous.

17 JUDGE GRIFFITH: That's an independent, okay.

18 MS. BRINKMANN: That is not at all. We rely on the
19 text of the version because --

20 JUDGE GRIFFITH: If we decide that the Constitution
21 gives the President this authority only in intersession then
22 you lose.

23 MS. BRINKMANN: Well, we lose, and --

24 JUDGE GRIFFITH: Okay.

25 MS. BRINKMANN: -- the Court goes into direct

1 conflict with the Eleventh Circuit's en banc opinion on Judge
2 Pryor's --

3 JUDGE SENTELLE: We don't mind going into conflict
4 with others.

5 MS. BRINKMANN: In Judge Pryor's --

6 JUDGE SENTELLE: You've been around long enough to
7 know that that doesn't --

8 JUDGE GRIFFITH: Judge Pryor --

9 JUDGE SENTELLE: We don't lay awake at night
10 worrying.

11 JUDGE GRIFFITH: -- is a good friend, he'll
12 understand.

13 MS. BRINKMANN: And 284 other intrasession recesses,
14 so I think that --

15 JUDGE SENTELLE: Counsel --

16 MS. BRINKMANN: -- that would be an extraordinary
17 (indiscernible) --

18 JUDGE SENTELLE: -- at the risk of prolonging this
19 still further, what's going to cut off the possibility of a
20 President then making appointments during a weekend recess, a
21 holiday recess --

22 JUDGE GRIFFITH: Lunch?

23 JUDGE SENTELLE: -- a lunch recess for that matter?

24 MS. BRINKMANN: We are not taking that position at
25 all. The Petitioner --

1 JUDGE SENTELLE: That's not what I asked you, what's
2 going to cut that off? You may not be taking it today, but
3 what is going to --

4 JUDGE GRIFFITH: Teddy Roosevelt's great-great-
5 grandson may become President and try something like that
6 again.

7 JUDGE SENTELLE: Yes.

8 MS. BRINKMANN: Attorney General Daugherty
9 addressed --

10 JUDGE SENTELLE: Attorney General Daugherty can't
11 stop you. What --

12 MS. BRINKMANN: We addressed that, and --

13 JUDGE SENTELLE: -- is it that's going to stop, he's
14 dead, and he got in trouble before he died, I think, didn't
15 he?

16 JUDGE GRIFFITH: The *OLC* opinion doesn't, won't
17 identify any lower limit, why not? Why not?

18 MS. BRINKMANN: There is --

19 JUDGE GRIFFITH: It's because once you remove
20 yourself from the principle that's set forth in the
21 Constitution itself, intersession versus intrasession, you are
22 adrift, and we come up with these explanations that really are
23 metaphysical, and somebody has to try and tie it to the
24 adjournment clause.

25 MS. BRINKMANN: No, Your Honor. It's not tying it

1 to the adjournment clause, it's looking to see what a de
2 minimis, what a de minimis break would be, and no one has
3 suggested that lunch or a weekend would meet that requirement,
4 and that's where various analyses have looked to the
5 adjournment clause kind of as a de minimis, not as an absolute
6 minimum threshold.

7 JUDGE GRIFFITH: What's the basis for arriving at
8 that de minimis level? What's the principle that gets you
9 there, that says three days, okay, nothing under three days,
10 we, you know, we may be able to go to three days, but there's
11 a constitutional difference between three days and two days?
12 What's the constitutional difference between three days and
13 two days?

14 MS. BRINKMANN: It's looking at the functional
15 practicality of the recess appointment clause, which has been
16 done for such a long time to understand that lunches --

17 JUDGE SENTELLE: When was the last time we --

18 MS. BRINKMANN: -- weekends --

19 JUDGE SENTELLE: -- decided the constitutional
20 distinction on functional practicality?

21 MS. BRINKMANN: I'm talking about the shared
22 understanding of the Executive and Legislative Branch for more
23 than a century, Your Honor. It is the Senate's report, the
24 Comptroller General, the Attorney General's opinions, all of
25 these that realize --

1 JUDGE GRIFFITH: And if we are of the view, not
2 saying we are, if we are of the view that in your explanation
3 both parties got it wrong, that the Executive for whatever
4 reason was misreading the recess appointments clause, and the
5 Senate for whatever reason was misreading it, what duty do we
6 do then as a court? Do we have any duty? Do we get out of
7 it? Do we --

8 MS. BRINKMANN: I think you look to the ordinary and
9 common usage of the term recess, Your Honor, and we win on
10 that, and you look at what the Senate --

11 JUDGE SENTELLE: You still --

12 JUDGE GRIFFITH: The recess --

13 JUDGE SENTELLE: -- have the recess.

14 MS. BRINKMANN: What the Senate --

15 JUDGE SENTELLE: You're trying to (indiscernible) --

16 MS. BRINKMANN: -- itself said --

17 JUDGE SENTELLE: -- the language, Counsel.

18 MS. BRINKMANN: If I could, Your Honor, I'd like to
19 address the happens argument.

20 JUDGE SENTELLE: You've got another two minutes.
21 I'm adding back two minutes, arbitrary and capricious.

22 MS. BRINKMANN: Okay. I would like to point both on
23 the intra and the happens argument. Petitioners actually do
24 not present them here for decision, although they do suggest
25 that their briefs do not do that, they simply put in this

1 historical framework, with which we disagree. And one thing
2 that in the happens argument that Attorney General Wirt
3 brought to bear when he was analyzing the ambiguous --

4 JUDGE SENTELLE: You state he meant arising, right?

5 MS. BRINKMANN: Well, he was -- no, he said happens
6 to exist during the recess, and he was looking at this
7 ambiguous language of the happens term and said let's look at
8 it, would this make any sense back in 1823 to have a vacancy
9 arise on the last day of the session and then have to sit for
10 a very long period of time during the recess? Attorney
11 General Wirt was advising one of the founders himself,
12 President Monroe, and I would commend to you Professor
13 Hartnett's Law Review article both Petitioner and their Amici
14 cite, which makes quite a case if there's reasonably both the
15 Presidents, President Adams and Jefferson also filled
16 vacancies that happened, that arose during the session before
17 the recess. Three circuits, the en banc eleventh, the en banc
18 ninth, and the second have all joined that. And most
19 significantly here, Congress has acquiesced in that in the Pay
20 Act, at 5 U.S.C. 5503, Congress specifically provides for the
21 payment of officers who are appointed to vacancies that arise
22 during a session before a recess that happen to exist during
23 the recess. Again, you have a coalescence of --

24 JUDGE GRIFFITH: Is there any argument that they
25 have acquiesced on intrasession appointments?

1 MS. BRINKMANN: Certainly there have been 285 of
2 them that have, you know, been confirmed by the Senate. I
3 think that that is part of the *Mistretta* point we make. This
4 is a long, long history that would be disrupted, and we
5 believe also disrupt the balance of powers. And I just, the
6 one point I want to make here is under Petitioner's view there
7 is no one who has this appointment authority during this 20-
8 day recess.

9 JUDGE SENTELLE: That's exactly correct.

10 MS. BRINKMANN: But that can't be right.

11 JUDGE SENTELLE: I mean, there isn't any question
12 that's not only their view, but it's a very possible result of
13 this lawsuit. It's like --

14 MS. BRINKMANN: But that is --

15 JUDGE SENTELLE: -- you've come back to that, when
16 you parade a horrible by it has to look horrible.

17 MS. BRINKMANN: But I'm going to Judge Griffith's
18 question about the purpose. That was not the purpose of the
19 framers to leave voids and vacuums of time. The Executive has
20 a constitutional duty to take care that the laws be faithfully
21 executed. The NLRB was left without a quorum on January 3rd.

22 JUDGE SENTELLE: Yes.

23 MS. BRINKMANN: You can certainly --

24 JUDGE SENTELLE: Yes, the NLRB was without a quorum
25 during much of the Bush administration.

1 MS. BRINKMANN: Right. But you can certainly
2 posit --

3 JUDGE SENTELLE: And tried to act anyway, and we
4 told them they couldn't, and the Supreme Court agreed with us.

5 MS. BRINKMANN: But you can certainly posit a
6 national security scenario, to think that there is a period of
7 a vacuum that Petitioners suggest because during this period
8 of time they were not available.

9 JUDGE GRIFFITH: Ms. Brinkmann, the reality of it is
10 that going back over several administrations it's the Senate's
11 way of telling the Executive we don't like the nominees.

12 MS. BRINKMANN: But let me just say this --

13 JUDGE GRIFFITH: That's exactly what it is.

14 MS. BRINKMANN: And that goes to your thrust and
15 parry of the political branches --

16 JUDGE GRIFFITH: Right. Right, right, right.

17 MS. BRINKMANN: -- but our position maintains that,
18 and the last point I would make I think is, Your Honor, is
19 that any recess, recesses that are undisputed recesses, the
20 Senate can come back, in fact they can come back more easily
21 to take action than here because those joint, the concurrent
22 resolutions allow for their leadership to call it back, a much
23 easier task than unanimous consent. Thank you, Your Honors.

24 JUDGE SENTELLE: I'm sorry, Counsel.

25 ORAL ARGUMENT OF ELIZABETH HEANEY, ESQ.

1 ON BEHALF OF THE RESPONDENT

2 MS. HEANEY: That's all right. Good morning, Your
3 Honors. My name is Elizabeth Heaney, I'm representing the
4 National Labor Relations Board, which is seeking enforcement
5 of its order against Noel Canning. I'll be addressing the
6 Association's standing to intervene, as well as the underlying
7 merits. And I think that Chambers counsel hit the nail on the
8 head here when he said that this is a dispute between Noel
9 Canning and the National Labor Relations Board, and any
10 interest that the Chamber has in this dispute between a
11 company and an Agency can certainly be brought to this Court's
12 attention in the well-accepted and very reasonable format of
13 an Amicus.

14 JUDGE SENTELLE: In a sense I don't blame you for
15 objecting to their coming in, but does it really matter? I
16 mean, as long as you have one party with standing to raise the
17 issues in the case, which Noel Canning unquestionably does,
18 does it matter to you whether there's another party in there
19 or not? We still have to decide the issue for or against you,
20 the same with or without the futative Intervenor, don't we?

21 MS. HEANEY: I agree that with or without, whether
22 or not the Associations are Intervenors this Court has to
23 decide the issues before it. But it matters very much so to
24 the Board that the Association not be attributed party status.

25 JUDGE SENTELLE: Why?

1 MS. HEANEY: Because they lack --

2 JUDGE SENTELLE: That's really what I'm asking you,
3 why does it matter to the Board?

4 MS. HEANEY: Well, the Association lacks Article 3
5 status, and the Board would like to prevent Intervenors from
6 coming in, in future --

7 JUDGE SENTELLE: Okay, so precedent is your interest
8 here, which is legitimate, I'm not suggesting it's not.

9 MS. HEANEY: The fact that Noel Canning itself has
10 standing here does not mean that the Association has standing
11 to be here.

12 JUDGE SENTELLE: Certainly not. And I, as you may
13 have gathered I have some real question about their standing,
14 but I just wondered why the Board gave a darn.

15 MS. HEANEY: Well, as you had stated earlier, Your
16 Honor, that if you're going to parade a horrible it needs to
17 look like a horrible, and I think that if you continue to, if
18 Associations are allowed to intervene whenever a member has
19 standing that will be a horrible to the Agency, and also to
20 this Court's docket.

21 JUDGE SENTELLE: Thank you, Counsel.

22 MS. HEANEY: If you --

23 JUDGE SENTELLE: Go on.

24 MS. HEANEY: Okay. If you don't have other
25 questions on standing I'll certainly address the merits of the

1 underlying *ULP* case, which involves the Noel Canning's failure
2 to bargain in good faith with the Union by refusing to sign a
3 written contract that embodied the terms to which the parties
4 had orally agreed. And the Board disagrees with Chamber
5 counsel that substantial evidence shows there was not a
6 meeting of the minds, quite frankly the substantial evidence
7 shows there was a meeting of the minds as to the formation of
8 a contract. When you look at the parties' behavior right at
9 the conclusion of the December 8th negotiation session, and
10 then the parties' behavior the day following it shows that the
11 parties for all intents and purposes had come to an agreement.

12 JUDGE SENTELLE: What do you say to Counsel's
13 argument that the Union actually voted on a different
14 proposition than the one allegedly agreed to?

15 MS. HEANEY: I say that substantial evidence shows
16 otherwise. I say that the agreement that the parties came to
17 on December 8th is exactly what was given to the employees to
18 vote on December 15th. The affidavit that I believe Counsel
19 is referring to where the Union's bargaining representative,
20 Mr. Corner (phonetic sp.), had said he was going to give the
21 employees the proposals that they had agreed to on December
22 8th noting different is an absolutely nonsensical
23 interpretation, and quite frankly, actions speak louder than
24 words, and the very proposal that was given to the employees
25 is the exact proposal that the employees had agreed to on

1 December 8th.

2 And as for any contention that the Board improperly
3 applied state law, I mean improperly applied federal law as
4 opposed to state law, this Court has no jurisdiction to
5 consider that issue, Your Honors; the Company failed to raise
6 that in exceptions to the Board, and the Board did not
7 consider it. And in any event, it's 60-year-old precedent
8 that the Board applied. If there are no further questions as
9 to the merits or the standing of the Association.

10 JUDGE SENTELLE: Seeing none I thank you, Counsel.
11 We'll hear from Mr. Coppess.

12 MS. HEANEY: Thank you.

13 ORAL ARGUMENT OF JAMES B. COPPESS, ESQ.

14 ON BEHALF OF THE INTERVENOR

15 MR. COPPESS: May it please the Court, I'm Jim
16 Coppess for Local 760 of the Teamster's Union. In its brief
17 to the NLRB, which is, what I'm going to quote is from
18 Appendix 100, the Noel Canning Company said this to the Board,
19 an employer violates Section 8(a)(1) and (5) by refusing to
20 execute a collective bargaining agreement incorporating all of
21 the terms agreed upon by the parties during negotiations.
22 That's the first legal issue they tried to re-argue in this
23 Court. There's no doubt at all that that's precisely what
24 happened here, and indeed, the Company's excuse, prior excuse
25 for not agreeing to the agreement was different than Mr.

1 Francisco's. It was not that a different agreement had been
2 voted, but rather an insistence that an agreement hadn't been
3 reached, and the evidence is overwhelming on that point.

4 The main point of this case is that the Company
5 wants to escape enforcement of the NLRB by challenging the
6 appointments to the panel that decided this case. The
7 President has an obligation to take care that the laws be
8 faithfully executed, and that's precisely what he did by
9 filling the Board slots, and getting this case decided. The
10 enforcement of the law is a matter of great importance to the
11 employees in this bargaining unit because effectively the
12 Company's stretching this out has meant not only were they
13 denied the benefit of their bargain for the last two years,
14 but now the Company is relying on its non-compliance with the
15 law to refuse to bargain going forward, which means from this
16 point on there will be no compensation increases in this
17 bargaining unit until this is decided.

18 We submit that the Court should not allow Noel
19 Canning to escape enforcement of the law, and that it should
20 enforce the decision of the NLRB, the panel as appointed by
21 the President. If there are no questions.

22 JUDGE SENTELLE: Seeing none, thank you --

23 MR. COPPESS: Okay. We thank you very much.

24 JUDGE SENTELLE: -- Counsel. I'm sure he was out of
25 time, wasn't he? Okay, we'll give you two minutes for

1 rebuttal, if you need it.

2 ORAL ARGUMENT OF NOEL J. FRANCISCO, ESQ.

3 ON BEHALF OF THE PETITIONER

4 MR. FRANCISCO: Thank you, Your Honor. First, as to
5 the purpose of the appointments clause and the recess
6 appointments clause, the President always has the appointments
7 power, the Senate always has the power of advice and consent,
8 that is the power to block appointments unless it renders
9 itself unavailable to provide to serve that function for an
10 extended period of time. That reflects the subsidiary rule
11 that the recess appointments clause plays. That's not a
12 problem, that's what the Constitution is meant to do.

13 To the extent paralysis is an issue, that's not the
14 recess appointments clause, that's the quorum requirement, and
15 the fact that there are no acting Board members, much like
16 there are acting officials in other agencies. That's a
17 different problem not meant to be solved by the appointments
18 clause.

19 JUDGE GRIFFITH: Do you have a response to Ms.
20 Brinkmann's point about the New Jersey legislature?

21 MR. FRANCISCO: Yes, Your Honor, I do. First of
22 all, it's a single legislature; second, if they want to
23 embrace the Senate --

24 JUDGE GRIFFITH: I thought you were going to say
25 first of all, it's New Jersey. That's entirely -- you were

1 going to be reprimanded if you had said that.

2 MR. FRANCISCO: Second, Your Honor -- no, so a
3 single legislature. Second, if they want to embrace the
4 Senate vacancies clause they fail on the arise prong. In 1794
5 the Senate refused to sit a Senator appointed pursuant to the
6 Senate vacancy clause because the vacancy arose while there
7 was a session taking place as opposed to during the recess.

8 JUDGE GRIFFITH: Yes, but they really are --

9 MR. FRANCISCO: So, it kills them on that.

10 JUDGE GRIFFITH: -- the historical treatment of them
11 really is different, the arise clause is in a much different
12 footing than a (indiscernible) --

13 MR. FRANCISCO: Well, you know, I think the arise
14 clause is a stronger textual argument on our favor --

15 JUDGE SENTELLE: (Indiscernible.)

16 MR. FRANCISCO: -- but the major point though is
17 that's one legislature from one state as against the very
18 first Attorney General opinion that addressed the issue in
19 1901 going the other way by an Agency that has every interest
20 in expanding power. Here you had them go the other way. The
21 fact that until 1945 this almost never happened, three
22 occasions, and then happened only intermittently up until the
23 Carter administration. Your Honor, there's a good Law Review
24 article by Michael Carrier in the Michigan Law Review that
25 does a good job of tracing the history of this.

1 Third, they have the same duty of attendance in
2 these sessions as in every other. Judge Griffith, you may
3 recall, it's governed by Senate Rule 6, no distinction
4 whatsoever between these sessions and any other, the exact
5 same duty of attendance.

6 Finally, Your Honor, on standing, I would just urge
7 the Court to take --

8 JUDGE GRIFFITH: Did someone suggest the absence of
9 a quorum on --

10 MR. FRANCISCO: Nobody suggested the absence of a
11 quorum.

12 JUDGE GRIFFITH: But could they?

13 MR. FRANCISCO: They could have, and they didn't
14 need unanimous consent to do it. Any Senator could have
15 walked onto that floor and demanded a quorum. If a quorum, if
16 it were established --

17 JUDGE GRIFFITH: Wouldn't he need a unanimous
18 consent to do that?

19 MR. FRANCISCO: No, Your Honor, he would not. He
20 could have walked onto that floor and demanded a quorum. If
21 there were no quorum established then whoever was there, a
22 majority of whoever was there --

23 JUDGE GRIFFITH: He was going to come back from the
24 west coast to do it.

25 MR. FRANCISCO: Absolutely. They could have

1 discharged the Sergeant of Arms just like in any other
2 session, no distinction whatsoever. On standing I'd urge the
3 Court to take a close look at *Alabama against FERC*, 300 F.3d
4 877. We would submit it's on all fours with this case.

5 JUDGE SENTELLE: Now, wait a minute, I hate to
6 prolong this, but I'm not sure what you just said about
7 *Alabama v. FERC*.

8 MR. FRANCISCO: *Alabama against FERC* involved a
9 trade association that sought to intervene under Rule 15(d) in
10 a petition for review from a FERC order. The Court allowed
11 the trade association to intervene because it satisfied two
12 things. First, it satisfied the Rule 15(d) requirements,
13 which this Court has already held that we satisfy; and second,
14 it satisfied Article 3 standing, not prudential standing --

15 JUDGE SENTELLE: Is that in your brief?

16 MR. FRANCISCO: Excuse me?

17 JUDGE SENTELLE: Is that in your brief?

18 MR. FRANCISCO: Yes, it is, Your Honor.

19 JUDGE SENTELLE: It is.

20 MR. FRANCISCO: This is cited in our briefs. Yes,
21 it is. And just to be clear, 300 F.3d 877. And here we
22 establish Article 3 standing because we have at least two
23 members, Noel Canning and Goya Foods. Noel Canning which is
24 in this case, and Goya Food, which had a case pending before
25 the Board when we filed this, and thus faced imminent action

1 by a quorum of this Board. Since we meet Rule 15(d) and we
2 meet Article 3 standing we would submit that just as in
3 *Alabama against FERC* --

4 JUDGE SENTELLE: (Indiscernible) Article 3 standing?

5 MR. FRANCISCO: Excuse me?

6 JUDGE SENTELLE: What is your harm, as an
7 Association here, that can be remedied in this case?

8 MR. FRANCISCO: Well, first of all, we have a
9 member, Noel Canning, that is --

10 JUDGE SENTELLE: Never mind that. Forget Noel
11 Canning's standing, they have standing. I want your
12 associational standing, how are --

13 MR. FRANCISCO: Sure.

14 JUDGE SENTELLE: As an association how are you
15 harmed?

16 MR. FRANCISCO: Two things, Your Honor. One, we are
17 harmed whenever a member is harmed, and Noel Canning is a
18 member; two, we're also harmed through other members like Goya
19 Foods who have cases pending before the Board and are facing
20 imminent action.

21 JUDGE SENTELLE: Each of those is litigable in its
22 own case. We cannot enter any order affecting Goya. I mean,
23 we don't even know about them.

24 MR. FRANCISCO: No so, Your Honor, that's controlled
25 by *Teva Pharmaceuticals*. And *Teva Pharmaceuticals* --

1 JUDGE SENTELLE: Quite so, Counsel, we can't enter
2 an order affecting another proceeding before the Board.

3 MR. FRANCISCO: No, but you can enter an order
4 declaring that the general rule that the Board adopted here
5 regarding a quorum is unlawful. That is a binding ruling in
6 the D.C. Circuit. Every NLRB --

7 JUDGE SENTELLE: If we're going to create a
8 precedent that, precedent is enough to give standing aren't we
9 going to be inundated?

10 MR. FRANCISCO: It's not just precedent, NLRB is a
11 party here. They are bound --

12 JUDGE SENTELLE: They are a party here --

13 MR. FRANCISCO: They are --

14 JUDGE SENTELLE: -- and --

15 MR. FRANCISCO: Yes, Your Honor.

16 JUDGE SENTELLE: -- so is Noel Canning a party.

17 You're not a party.

18 MR. FRANCISCO: And the NLRB --

19 JUDGE SENTELLE: And your interest is the one I'm
20 talking about, and the precedent is what you're claiming.

21 MR. FRANCISCO: Not just the precedent. The NLRB
22 would be bound by this. In the D.C. Circuit, all of our
23 members are facing imminent action by the exact same Board.
24 It would be bound by that ruling in future litigation, so it
25 wouldn't be able to exercise that power in any case appealable

1 to the D.C. Circuit, which by the way, is every single one.

2 JUDGE SENTELLE: Because of the precedent we would
3 have entered.

4 MR. FRANCISCO: Excuse me, Your Honor?

5 JUDGE SENTELLE: Because of the precedent we would
6 have entered.

7 MR. FRANCISCO: Because a precedent is binding on
8 the --

9 JUDGE SENTELLE: Right.

10 MR. FRANCISCO: -- National Labor Relations Board.

11 JUDGE SENTELLE: The precedent is all you're
12 claiming --

13 MR. FRANCISCO: And in addition as a party --

14 JUDGE SENTELLE: Precedent is all you're claiming as
15 your harm, right?

16 MR. FRANCISCO: I don't think so, Your Honor. I
17 think it's more than that.

18 JUDGE SENTELLE: Well, tell me what more than
19 precedent it is.

20 MR. FRANCISCO: It's the fact that if we are granted
21 intervention we have a binding ruling that is res judicata or
22 collateral estoppel against the Board as between the Chamber
23 and the Board.

24 JUDGE SENTELLE: But the Chamber is not a party to
25 any of those other NLRB proceedings either.

1 MR. FRANCISCO: Well, it could be, but it's binding.
2 The fact of the matter is that it would solve the problem of
3 the imminent quorumless action that our members are facing.

4 JUDGE SENTELLE: Honestly, Counsel, I've never seen
5 an Association appear on the management side, if you would, of
6 a labor dispute, and I've only been here 25 years. That may
7 have happened. But do you know of any precedent where we've
8 allowed an Association to come in, in an NLRB proceeding,
9 because one of their members was the employer?

10 MR. FRANCISCO: Not NLRB, but in *Alabama against*
11 *FERC* --

12 JUDGE SENTELLE: No, let's talk about NLRB.

13 MR. FRANCISCO: Right. Not in NLRB, but in *Alabama*
14 *against FERC*, it's the exact same thing. It's a FERC order.

15 JUDGE SENTELLE: No it isn't.

16 MR. FRANCISCO: So --

17 JUDGE SENTELLE: No it isn't the exact same thing.

18 MR. FRANCISCO: I mean, FERC --

19 JUDGE SENTELLE: What was the proceeding in FERC?

20 MR. FRANCISCO: There was a dispute between a
21 utility company over a rate-making order; they lost. It came
22 up that there was a petition for review --

23 JUDGE SENTELLE: So, it was a rate-making order.

24 MR. FRANCISCO: -- a petition for review where a
25 trade association representing, you know, consumers came in

1 and said we want to intervene on appeal under Rule 15(d), they
2 hadn't properly done what was necessary to participate
3 (indiscernible) --

4 JUDGE SENTELLE: We're not going to go into how
5 distinguishable that is from this because we have taken more
6 time than --

7 MR. FRANCISCO: Sure, Your Honor.

8 JUDGE SENTELLE: -- it should be allowed.

9 MR. FRANCISCO: I only meant to alert you to the
10 case.

11 JUDGE SENTELLE: You're not quite pacing, you're not
12 quite keeping a straight face while you make that *Alabama*
13 argument.

14 MR. FRANCISCO: I don't think so, Your Honor. I
15 just wanted to bring the case to the Court's attention because
16 it is --

17 JUDGE SENTELLE: Okay.

18 MR. FRANCISCO: -- the best precedent we have on
19 that.

20 JUDGE SENTELLE: You brought it to our attention,
21 and it is the best you have, and that's your problem. Give
22 us -- I'm sorry, does either of my colleagues have anything
23 further? Nothing further from either colleague, then the case
24 is submitted.

25 MR. FRANCISCO: Thank you very much.

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(Recess.)

DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



Paula Underwood

December 8, 2012

DEPOSITION SERVICES, INC.