Nos. 12-3120 & 12-3258

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Big Ridge, Inc.,

Petitioner/Cross-Respondent,

v.

National Labor Relations Board,

Respondent/Cross-Petitioner.

On Petition for Review and Cross-Application
for Enforcement of an Order of the National Labor Relations Board

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REPLY BRIEF OF PETITIONER,
Big Ridge, Inc.

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ARGUMENT

I. THE BOARD LACKED A QUORUM

A. The Recess Appointment Clause Is Limited to Intersession Recesses

The Board raises three arguments in its challenge to the Company's argument that the Recess Appointments Clause ("Clause") is limited to intersession breaks between annual Senate sessions: (1) there is "no" textual support for that interpretation; (2) there is a "long settled and established practice" of intrasession appointments; and (3) secondary sources equate "recess" with "adjournment." The Board is mistaken in each instance.

1. The Intersession Interpretation Has Abundant Textual Support

In Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013) ("Canning"), the D.C. Circuit held the Clause applies only to intersession breaks. Canning's interpretation rests on the Clause's use of the phrase "the Recess" rather than "adjournment." If the Framers meant the Clause to apply to "any adjournment," they simply would have used "any adjournment" instead of "the Recess."

The Framers' word choice is significant in light of their use of "adjournment" and "adjourn" in five other clauses. U.S. Const. art. I, § 5, cl. 1 (Day-to-Day Adjournment Clause); art. I, § 5, cl. 4 (Adjournment Clause); art. I, § 7, cl. 2 (Presentment Clause); art. I, § 7, cl. 3 (Orders Presentment Clause); art. II, § 3 (Presidential Adjournment Clause). Their use of "the Recess" reflects a deliberate choice not to use "adjournment," thereby connoting that "the Recess" means something different. Holmes v. Jennison, 39 U.S. 540, 571 (1840) (different words in different clauses of the Constitution "cannot be construed as synonymous with one another; and still less can either of them be held to mean the same thing"); see also Wright v. United States, 302 U.S. 583, 588 (1938) (referring to Holmes' interpretive rule as "the first principle of constitutional interpretation").

That distinction is deepened, Canning explains, by the definite article "the" before, and capitalization of, the word "Recess." No use of "adjournment" in the Constitution is preceded by a definite article, nor does the Clause refer to any "recess" as the Board suggests. As the Supreme Court has long admonished, "[e]very word [in the Constitution] appears to have been weighed [by the Framers] with the utmost deliberation" and courts cannot "disregard" their "deliberate choice of words." Wright, 302 U.S. at 588. Reading the Clause in harmony with Wright's instruction "points to the inescapable conclusion" the Framers meant something definite by "the Recess," and "it was something different than a generic break in proceedings." Canning at 500. The Framers' word choice is "not an insignificant distinction. In the end it makes all the difference." Id.

The Constitution's structure makes plain what that different meaning is—"the Recess" refers to breaks between enumerated sessions of Congress, not to all adjournments. Canning at 500; see also 23 Op. Att'y Gen. 599, 604 (1901)("[*T]he recess* means the period after the final adjournment of Congress for the session, and before the next session begins"). Indeed, the Framers intended the ***Appointments*** Clause to provide the "ordinary" and "general mode" for appointments. The Federalist No. 67 (C. Rossiter ed. 2003). Recess appointments were viewed as "nothing more than a supplement" or "auxiliary" to that ordinary process. Id.

The Board fails to acknowledge the Appointments Clause is part of the checks and balances that are a defining hallmark of the Constitution. Freytag v. CIR, 501 U.S. 868, 882 (1991) ("The principle of separation of powers is embedded in the Appointments Clause"). Recess appointments are an exception to that norm. The Clause therefore should be construed narrowly to minimize its undermining of the Appointments Clause. Otherwise, "the 'auxiliary' ability to make recess appointments could easily swallow the 'general' route of advice and

consent" and "wholly defeat the purpose of the Framers in the careful separation of powers structure reflected in the Appointments Clause." Canning, 705 F.3d at 504. See also Mistretta v. United States, 488 U.S. 361, 381 (1989) ("[T]he greatest security against tyranny" is a "carefully crafted system of checked and balanced power within each Branch").

A recess appointment expires at the end of the "next Session" of the Senate. Thus, a recess appointment made between Senate sessions lasts only a single session. An intrasession appointment, however, would last the remainder of that session ***plus*** the whole next session. Nothing in the Constitution's structure suggests the Framers intended this disparate outcome.[1]

The circumstances surrounding the Constitution's enactment validate Canning's interpretation as well. "The manipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power, because the power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism." Freytag, 501 U.S. at 883. The question of where to repose the appointment power thus was of vital concern to the Constitutional Convention, and it proved especially difficult to resolve. Some members favored vesting the power in the President. Others favored the Senate. The intensity of opposing views prevented resolution of the matter for months. See J. Harris, The Advice and Consent of the Senate 20-22 (1953); C. Warren, The Making of the Constitution 642 (rev. ed. 1937).

The logjam was not broken until near the Convention's end when, after much debate, the Framers devised a compromise—vesting the appointment power in the President and Senate

[1]Madison described recess commissions as expiring "at the end of the ensuing session." The Federalist No. 67. In order for a recess commission to expire at the end of an "ensuing" session, it "seems likely to the point of near certainty that recess appointments were being made at a time when the Senate was not in session – that is, when it was in 'the Recess.'" Canning at 500-01.

jointly. The Federalist Papers relate the importance the Framers attached to the Senate's role in the appointment process:

> [Advice and consent] would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connections, from personal attachment, or from a view to popularity.

The Federalist No. 76 (C. Rossiter ed. 2003).

The Recess Clause was agreed to only after the last minute compromise on the Appointments Clause, and it was added without objection or recorded debate. See The Debates in the Several State Conventions on the Adoption of the Federal Constitution 292 (J. Elliot 2d ed. 1836-1845) [hereafter, J. Elliot]; 2 The Records of the Federal Convention of 1787, at 46 (M. Farrand 2d ed. 1937); J. Madison, Notes of Debates in the Federal Convention of 1787, at 599 (1966).

The Clause likewise was not controversial in the state ratifying conventions. It was mentioned on few occasions and in contexts that manifest a clear understanding that the power it confers on the President is an extraordinary method of appointment not intended as a co-equal power that could compete with (and swallow) the powers of the Appointments Clause. E.g., 2 J. Elliot at 513 (Pennsylvania convention: statement of J. Wilson); 3 id. at 409-10 (Virginia convention: statement of J. Madison); 4 id. at 135 (North Carolina convention: statement of A. Maclaine).

It defies logic then that the Framers included a provision that enables the President to evade readily the Senate's advice-and-consent role. It is inconceivable the Convention would have labored for months to reach the compromise in the Appointments Clause, only to negate it through a last minute provision allowing the President to make intrasession appointments. It is equally incredible, given the intensity of feelings on the issue, that such a provision would not

have drawn heated objections from the faction favoring the Senate. And even if it could be believed the Clause's import somehow slipped past the watchful eyes of the Convention delegates, certainly the Constitution's opponents in at least one of the state conventions would have sounded the alarm.

Ignoring this support for Canning's interpretation, the Board argues the word "recess" can be used as a synonym for "adjournment" and that the word "the" sometimes refers to a class of things rather than a single thing. The Board misses the point. The issue is not whether, as a theoretical matter of grammar, those words could bear the meaning the Board advocates. Rather, the issue is the meaning of "the Recess" in the specific context of the Constitution's structure, including the Framers' decision not to use the word "adjournment" in the Clause. Limiting "the Recess" to intersession breaks is the most natural—and structurally sound—reading.

It is the Board's expansionist reading that lacks a textual basis. The Board maintains the Clause applies to ***all*** adjournments – whether they occur intrasession or intersession – but then says that "extremely short break[s]" that "do not genuinely render the Senate unavailable to provide advice and consent" are not "recesses." (Board Brief p. 47) What is the textual basis for that distinction? What, exactly, determines how long the Senate must be absent to be "genuinely unavailable?" How much more than the "extremely short" three-day period described in the Adjournments Clause is "substantial" enough to constitute a recess? Is four days long enough? Five? The Board cannot answer these questions because the answers have no grounding in the Constitution.

Merely posing these questions reveals the unworkable nature of the Board's interpretation. But a ruling in favor of the Board on intrasession appointments would necessitate answers. Canning recognized that debating the limits of the Board's muddy reading of the

Clause is a fool's errand when an eminently more rational interpretation is available. Canning at 504 ("Some undefined but substantial number of days-break is not a plausible interpretation of 'the Recess'").

Unlike the Board's subjective approach, the intersession reading conforms to the Supreme Court's direction that the separation of powers doctrine "is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 (1995). It is not "how long" that counts. It is the "type" of adjournment that matters. It is easy to determine when the Senate ends its sessions; it says as much in its adjournment order. Adjournment *sine die* terminates the Senate's annual session and happens only once per session. It is a ***definite*** event, befitting the Framers' use of the definite article "the." The intersession interpretation requires no guesswork and is not susceptible to the whim of a particular President eager to seat a preferred slate of officers.

2. The Recent Use of Intrasession Appointments Does Not Alter the Constitution

The Board's assertion of a "long-standing" practice of intrasession appointments is a mirage. Most notable in this regard is the history the Board does not cite. The appointments at issue are unprecedented. No previous President ***ever*** made an appointment during a three-day adjournment during a Senate session.

Intrasession appointments, regardless of their length of adjournment, are a distinctly recent phenomenon. No President made an intrasession appointment before the Civil War. Only three such appointments are documented thereafter until 1947. Canning, 705 F.3d at 501-02. The vast majority—by the Board's count at least 329 of the 400 appointments—date from the Reagan Administration or later. As Canning understood, "the practice of a more recent vintage

is less compelling than historical practice dating back to the era of the Framers," Canning at 502. This Court's inquiry should be "sharpened rather than blunted by the fact that" Presidents have begun making intra-session recess appointments "with increasing frequency." INS v. Chadha, 462 U.S. 919, 944 (1983).

Chadha concerned the constitutionality of "one house" legislative vetoes. In defense of that practice, it was noted that Congress used such provisions in statutes some 295 times since 1932. It was contended this "history" supported the constitutionality of the device and that legislative vetoes were important means for Congress to secure the accountability of executive and independent agencies. The Supreme Court disagreed: "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." Id. at 944-45.

As in Chadha, it matters not here that a political branch seeks to employ a political invention it considers expedient. That is not the measure of constitutionality. The Court has an obligation to exercise independent judgment in interpreting the Constitution. The Court would not perform that duty if it simply fell in line with any historical practice the political branches deemed expedient. Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 487 (1989) ("[A]s to the particular divisions of power that the Constitution does in fact draw, we are without authority to alter them, and indeed we are empowered to act in particular cases to prevent any other Branch from undertaking to alter them").

The salient history here is the ***absence*** of intrasession appointments for nearly a century after the Constitution's enactment. That more than anything reveals the intended meaning of the Clause. If the Clause were as expansive as the Board advocates, it is inconceivable that

Presidents during the Framers' generation would not have used it in that manner. Their failure to do so—indeed, even to discuss the issue—dispels any potential doubt on the clause's meaning.

As Canning held, "[t]he dearth of intrasession appointments in the years and decades following ratification of the Constitution speaks far more impressively than the history of recent presidential exercise of a supposed power to make such appointments." 705 F.3d at 506. "[T]he infrequency of intrasession recess appointments during the first 150 years of the Republic 'suggests an assumed *absence* of [the] power' to make such appointments." Id. at 502, quoting Printz v. United States, 521 U.S. 898, 908 (1997).

The Board seeks to explain away the absence of intrasession appointments during most of the Nation's history by noting that intrasession adjournments were relatively uncommon and mostly brief before the 20th Century. That only reinforces the conclusion that intrasession appointments are disallowed. Because intrasession adjournments were expected to be rare when the Constitution was adopted, that is all the more reason the Framers did not intend for the Clause to apply to those breaks. Their concern was directed to the breaks between sessions, which were expected to last many months, if not most of the year.

The lack of intrasession appointments for most of the Nation's history also belies the Board's contention they are necessary. The Nation survived the Civil War, two World Wars and the Great Depression—just to name a few of the challenges our country has confronted—without intrasession recess appointments.

Intrasession appointments are not critical even now. The Senate confirmed over 3,500 civilian nominees in just the first session of the 112th Congress. That number swells to nearly 20,000 when military nominees are included. Cong. Rec. Daily Digest (Jan. 3, 2012) at D3. The number is exponentially greater when all four sessions of Congress during President Obama's

first term are considered. In contrast, President Obama made only 26 intrasession appointments during his first term. H. Hogue et al., The Noel Canning Decision and Recess Appointments Made from 1981-2013, at 4 (Congressional Research Service Feb. 4, 2013). These statistics show the Appointments Clause is hardly preventing execution of the laws.

3. The Board's Secondary Materials Are Unpersuasive

The Board's use of secondary materials to support its expansionist reading of the Clause is "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, concurring). The Board has scoured the annals of history and found a half dozen or so "friends" scattered about. It offers these as definitive guides to the Clause's meaning, while ignoring the throng of contrary "guests" crowded about who have something different to say.

To take an example of especial significance, the Board all but ignores the Framers' only known discussion of the Clause—Federalist Papers Nos. 67 and 76. Both papers consistently use the term "the recess of the Senate" in discussing when the President can make appointments without the Senate's advice and consent. Neither uses the term "adjournment," even though Federalist Papers discussing other provisions use that term. See The Federalist Nos. 69 & 77 (C. Rossiter ed. 2003). This confirms "the Recess" was intended as something other than a generic reference to "adjournment."

Also ignored by the Board are myriad instances in which early Congresses and Presidents used "recess" to refer exclusively to the period between enumerated sessions of Congress. The very first Senate used "adjournment" to refer to their intrasession breaks and reserved "recess" to the break that ended their first annual session. Compare, e.g., Sen. Journal (Mar. 4, 1789) (noting that Senate "adjourned" until March 11) with id. (Sept. 28, 1789) (discussing resolution

to "recess" the Senate to end its session); see also Evans v. Stephens, 387 F.3d 1220, 1228 n.2 (11th Cir. 2004) (en banc) (Barkett, J. dissenting) (collecting additional authorities).

The Board proceeds as if these do not exist, but they are a "critical tool of constitutional interpretation." They reflect the "public [] understanding" of the text by the Framers' generation (as opposed to, say, a comptroller general in 1948 on whose opinion the Board relies). District of Columbia v. Heller, 554 U.S. 570, 583, 601-605 (2008); Alden v. Maine, 527 U.S. 706, 743-44 (1999) ("early congressional practice" provides "weighty" evidence of the Constitution's meaning).

In a similar vein, the Board calls attention to the Revolutionary-era constitutions of two States that allegedly used "recess" in a manner that encompassed intrasession adjournments. The Board does not explain why its examples are more significant than other state constitutions that used "recess" in a restrictive manner limited to intrasession breaks. E.g., Mass. Const. of 1780, pt. 2, ch. 2, 1, art. V; N.C. Const. of 1776, sec. XX. The Board's silence is perplexing in light of the fact the Massachusetts constitution was a blueprint for much of the Constitution, and the North Carolina constitution apparently inspired the Clause. Canning, 705 F.3d at 501 (discussing North Carolina constitution); Michael Rappaport, The Original Meaning of the Recess Appointment Clause, 52 U.C.L.A. L. Rev. 1487, 1552 (2005) [hereafter, Rappaport] (discussing Massachusetts constitution).

In addition to turning a blind eye to contrarian guests, the Board reads too much into the few "friends" it has selectively chosen from the crowd. The Board cites, for instance, a letter from George Washington to John Jay that uses the phrase "the recess." That letter does not discuss the Clause nor explain what the Framers meant by "the Recess" rather than "adjournment" in that specific context. The letter may show that "recess" has sometimes been

used as a synonym for "adjournment" in other contexts, but it does not explain the particular usage of "the Recess" in the specific context of the Clause. The Board erroneously extrapolates the intent of the entire Constitutional Convention and all the state ratifying conventions from this isolated letter. That is an unsustainable leap in logic even if the letter had discussed the Clause, as opposed to making casual use of "recess" with nary a thought to its meaning in the Constitution.

Another example of the Board's overzealous reading of history is the New Jersey Governor's appointment of Franklin Davenport to the Senate. As Canning notes, "[n]othing in the Annals of Congress establishes that the Senate considered or even knew that the appointment was made during an intrasession recess of the legislature." 705 F.3d at 506. This appointment reflects, at best, the "understanding of one state governor, not a common understanding of 'the Recess' as used in the Recess Appointments Clause." Id. Moreover, the Board's citations make no reference to the Governor's understanding of the Senate Vacancies Clause. It is unknown whether he even thought about this issue when making the appointment, much less what he thought "the Recess" meant.

The Board's selective frolic through the annals of history also includes citation to a British parliamentary practice manual. Suggesting the Framers intended to adopt the parliamentary practices of a monarchy they had just crossed an ocean to escape is befuddling, to say the least. The Constitutional Convention deliberately deviated from British parliamentary practice. Parliament sessions ended by order of the monarch (a process called prorogation) or by dissolution (at the end of seven years). There was nothing called a "recess" that ended a parliamentary session. There were "adjournments," but those were breaks during a session that

did not end the session. British parliamentary practice, with its different terms and vastly different context, lends no support to the Board. See Rappaport at 1550-51.

There is also a profound problem with its "friends." The Board cites various dictionaries, letters and ephemera for the proposition that "recess" means "adjournment." However, the Board concedes that "the Recess" does not mean ***all*** adjournments. "Extremely short breaks" are excluded. With one exception, the Board's secondary sources do not draw the distinction the Board advocates. These sources, therefore, offer no support for the Board's "some, but not all" position.

The one exception is an opinion by Attorney General Daugherty from 1921. See 33 Op. Att'y Gen. 20 (1921). The Board claims his opinion is authoritative, but altogether ignores a contrary opinion from Attorney General Knox in 1901. He concluded:

> The recess means the period after the final adjournment of Congress for the session, and before the next session begins . . . . There have always been two sittings, sessions or assemblings of each Congress . . . . The interval between these two sessions is the recess.

23 Op. Att'y Gen. 599, 601-604 (1901). The Board does not explain why Daugherty's opinion matters but Knox's does not. The answer, of course, is that neither opinion controls the Constitution's meaning. Their weight, if any, comes from their power to persuade, based on the thoroughness and soundness of their reasoning. Daugherty's opinion fails on that score. See Harris County Comm'rs Court v. Moore, 420 U.S. 77, 87 n.10 (1975) (state attorney general opinion in conflict with earlier ones should be given "close scrutiny").

Daugherty's opinion is results-oriented. Not using terminology in the Constitution, he opined the President can make recess appointments whenever the Senate is "unavailable" to advise and consent. According to Daugherty, that occurs "when [the Senate's] members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive

communications from the President or participate as a body in making appointments." 33 Op. Att'y Gen. 20.

That formula is rudderless. Under his interpretation, the Senate is in "the Recess" ***every single time it leaves the Chamber***. The Senators "owe no duty of attendance" when they adjourn for the weekend on Friday afternoons. The "Chamber is empty" during lunch breaks. During those times, the Senators undeniably are "absent" and cannot "participate as a body in making appointments." There is no lower limit to Daugherty's subjective standard.

Highlighting the completely subjective nature of his opinion, Daugherty acknowledged his interpretation would mean "the [recess] power exists if an adjournment for only 2 . . . days is taken." Id. But fearing the implications of that outcome, he urges a "practical" result and declares that "no one" would "for a moment contend" that a two-day break constitutes a "recess," nor would he view an adjournment of "5 or even 10 days" to be "the recess intended by the Constitution." Id.

This is not constitutional interpretation; it is a flight of fancy. Daugherty's conclusion that a several day break that satisfies all the hallmarks of his litmus test ***does not*** constitute a "recess," while a similar break of longer duration ***does***, is based on nothing besides his personal opinion.

Daugherty's rationale illuminates the fallacy of the Board's position. The Clause is not triggered by the passage of time, but by the occurrence of an event – the *sine die* adjournment. A reading that allows intrasession appointments, therefore, literally applies to ***all*** breaks, even lunch breaks. The Board runs from this interpretation because of the implications. But as discussed above, its chosen alternative – "extremely short breaks" do not count – is adrift in a sea of uncertainty. And its only lifeboat is Daugherty's farcical "standard." See Rappaport at 1549

(intrasession interpretation "cannot derive a workable standard from the language of the Constitution"). This Court should be guided instead by Knox's—and Canning's—common sense understanding of the Framers' intent and the plain meaning of the Constitution. "The Recess of the Senate" describes intersession breaks, not any intrasession adjournment.

B. The Recess Appointments Clause Is Limited to Vacancies that Arose During the Recess

The Board concedes Canning's second holding—that the President cannot make recess appointments for vacancies that arose before the recess in question—is a grammatically proper reading of the Clause. It nonetheless asks the Court to ignore that plain reading because it is expedient for the President to fill vacancies whenever he chooses. As discussed above, expediency cannot overcome the Constitution's restrictions. Chadha, 462 U.S. at 959.

The Board also concedes its reading requires the Court to treat as surplusage the phrase "that may happen." If the Framers intended the Clause to allow the filling of all vacancies, they would have written it to read that the President shall have the power "to fill up all Vacancies during the Recess of the Senate." They instead wrote that the President shall have the power "to fill up all Vacancies *that may happen* during the Recess of the Senate." As discussed above, ignoring words in the Constitution violates the Supreme Court's command to give meaning and purpose to every word in the Constitution. Wright, 302 U.S. at 588. Remarkably, the Board disregards that principle and urges the Court to excise "that may happen" from the Clause based, among other things, on a field order of General Washington from 1776.

Besides contradicting the Framers' early interpretation of the Clause, the Board's view would "eviscerate the primary mode of appointments," the Appointments Clause. Canning at 508. As Canning noted, there would have been no need to require the Senate's advice and consent "if the secondary method would permit the President to fill up all vacancies regardless of

when the vacancy arose." Id. The "exist" reading would empower the President to avoid the Senate altogether: "[h]e could simply wait for a 'recess' (however defined) and then fill up all vacancies." Id. Thus, the Board again ignores the clear lines the Framers' drew when creating the appointment powers.

The Board's treatment of history on this point is likewise flawed. It concedes the first Attorney General, Edmund Randolph, one of the Framers, opined the Clause does not permit the President to fill vacancies that arise during a Senate session. See Edmund Randolph, Opinion on Recess Appointments (July 7, 1792), reprinted in 24 The Papers of Thomas Jefferson 165 (1990). His opinion should be given weight. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884) ("[t]he construction placed upon the Constitution … by the men who were contemporary with its formation … is of itself entitled to very great weight"). But the Board casts him as a lone wolf, standing isolated against supposedly uniform executive practice and congressional acquiescence. Nothing could be further from fact. Support for his view pervaded all three branches of Government.

President Washington and the Congresses during his Administration, for instance, apparently viewed the Clause in the same way as Randolph. If vacancies occurred while the Senate was in session but were not filled when the session was ending, President Washington would nominate someone to fill the position (sometimes without their knowledge) and obtain Senate confirmation *before* the recess. Then, if the individual turned down the appointment – thus creating a second vacancy in the office, but this time one that would have "happen[ed] during the Recess" – Washington would fill it with a recess appointee. Rappaport at 1522, n.97 (discussing practice).

As Canning observes, "if President Washington and the early Senate had understood the word 'happen' to mean 'happen to exist,' this convoluted process would have been unnecessary." 705 F.3d at 508. That they obviously felt the need to employ this measure thus corroborates Canning's conclusion. The Board—and the Eleventh Circuit majority in Evans—misinterprets this practice. Consequently, a key component of their "exist" rationale is mistaken.

Additionally, from the beginning Congress passed legislation authorizing the President to fill vacancies of various inferior offices while they were in the recess following their sessions. E.g., Act of Mar. 3, 1791, 1 Stat. 199, 200. The legislation would have been unnecessary if the President already had the power to fill all vacancies during the recess.

Subsequent Presidents among the Framers' generation likewise avoided making appointments to vacancies that arose during the session. President Madison alone appears to have attempted several such appointments. But the Senate at times considered censuring the President over the issue. 26 Annals of Cong. 652-658 (Mar. 4, 1814). Such a record hardly shows support for the Board's position. See Rappaport at 1518-1538 (noting early support for "exist" view limited to a single "inconclusive" decision from Jefferson administration and one "attempted" recess appointment during Madison administration).

Even the letters between President Adams and Secretary of War James McHenry that the Board cites support the "arise" view. The letters concerned positions in the military that had been created (but left unfilled) during a Senate session. President Adams initially expressed the view that he could fill the positions through recess appointments, but did not carry through on that. Acknowledging "there appears a difference of opinion concerning the construction of the constitution and the law," Adams suspended the appointments, "perhaps till the meeting of the

Senate." Letter from John Adams to James McHenry (May 16, 1799), reprinted in 8 Adams Works, at 647-48.

Editorial notes to the letter indicate McHenry consulted with Alexander Hamilton and with then-Attorney General Charles Lee, all of whom disagreed with Adams' interpretation. Id.; see also Letter from Alexander Hamilton to James McHenry (May 3, 1799), reprinted in 23 The Papers of Alexander Hamilton 94 (Harold C. Syrett ed., 1976) ("It is clear, that independent of the authority of a special law, the President cannot fill a vacancy which happens during a session of the Senate").

Commentators on the Constitution also supported Randolph's view. This included no less an authority than Joseph Story, who wrote the first comprehensive treatise on the Constitution. He rejected the "exist" interpretation. In the context of offices created by law during a Senate session, Story observed the President "cannot appoint to such offices during the recess of the senate, because the vacancy does not happen during the recess of the senate." 3 J. Story, Commentaries on the Constitution §1553 (1833). See also Heller, 554 U.S. at 608 (citing Story as authoritative source).

For certain, Attorney General William Wirt issued a contrary opinion in 1823, and several subsequent Attorneys General in the 19th Century issued opinions adhering to his position. ***By his own admission***, however, Wirt departed from the Constitution's plain meaning. He conceded the "most natural sense" of the term "happen" is "to chance – to fall out – to take place by accident." 1 Op. Att'y Gen. 631 (1823). Wirt's reading therefore is in admitted conflict with the Clause's text.

And far from making the issue settled, the subsequent Attorney General opinions indicate just the opposite. As was noted in Case of District Attorney of United States, 7 F. Cas. 731, 738

(E.D. Pa. 1868)—a case the Board fails to mention—the court noted "the number of such official opinions may even detract from their weight." As the court explained, the need for several Attorneys General to address the issue suggested it was unsettled:

> [I]f the same question has been repeatedly stated anew, and renewals of the former opinions of attorney-generals upon it have been obtained from their successors, this may indicate that ***no settled administrative usage had been understood to be established under the former opinions.***

Id. (emphasis added); see also Miller v. Washington, 17 F. Cas. 357 (D.C. Cir. 1857) (rejecting contrary opinions of Wirt, Taney, Legare, and Mason).

Congressional discontent over the power asserted in these Attorney General opinions also persisted. For instance, the Senate drafted a resolution declaring unconstitutional President Jackson's appointment of Samuel Gwin to a vacancy that arose while the Senate was in session. 23 Annals of Cong. 338 (Dec. 31, 1832). Congress additionally passed statutes denying pay to recess appointees if the vacancy they filled existed when the Senate was in session. See Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. 642, 646. Such a statute remains on the books, 5 U.S.C. § 5503, and though Congress amended it to allow pay if the appointee's nomination was pending when they went into the recess, the fact remains that the statute expresses congressional disapproval of the "exist" interpretation. Congress's repeated willingness to use its "power of the purse" in this manner reflects its "resistance to executive aggrandizement." Canning, 705 F.3d at 510.

Finally, the Board relies on Evans, 387 F.3d 1220; United States v. Woodley, 751 F.2d 1008 (9th Cir. 1985) (en banc); and United States v. Allocco, 305 F.2d 704 (2d Cir. 1962). Canning explains why they are not persuasive. 705 F.3d at 505-06, 509-11.

In sum, there is no settled accommodation on this issue between the President and Senate. There certainly is no long settled and established practice dating back to the first days of the Republic that justifies the Board's invitation to nullify the Appointments Clause.

C. The Senate Was Not in "Recess" on January 4, 2012

Even if the Constitution permits the President to make intrasession appointments to vacancies that did not arise during a recess, the Senate was not in "recess" on January 4, 2012. It did not formally declare a recess, nor did it obtain House approval for an adjournment of more than three days as required by the Adjournments Clause. Instead, the Senate held pro forma sessions every three days between January 3-23, 2012.

No President in history has regarded three-day Senate adjournments as a "recess." The Board ***itself*** concedes in its response brief—as it conceded in Canning—that "extremely short breaks" like those contemplated by the Adjournments Clause are ***not*** a "recess" under the Clause. Yet, the President made these appointments during just such a three-day break. The Court can hold the Board lacked a quorum on this basis alone.

Trapped by its own rudderless intrasession standard, the Board falls back to contending the Senate's "recess" actually spanned 20 days—from January 3-23, 2012. None of the Board's secondary materials support the notion that ***a*** "recess" excludes "extremely short breaks," but includes longer breaks of a similar nature. Accepting the Board's contention regarding pro forma sessions means they do not "count" for purposes of the Clause, even though they "count" for purposes of the Senate's obligations under the Adjournments Clause. This argument has no basis in the Constitution's text. In that regard, the Congressional Research Service ("CRS") has noted:

> [T]he term pro forma describes the reason for holding the session, it does not distinguish the nature of the session itself . . . a pro forma session is not materially different from other Senate sessions . . . While . . . the Senate has customarily

> agreed not to conduct business during pro forma sessions, no rule or constitutional provision imposes this restriction.

Christopher M. Davis, Certain Questions Related to Pro Forma Sessions of the Senate, reprinted in 158 Cong. Rec. S5954 (Aug. 2, 2012).

The Board also advances the mistaken contention that the President may override the Senate's determination and unilaterally decide the Senate is not in session when he feels the body is "unavailable" to advise and consent. But the Constitution gives the President no such power. An amicus brief submitted by a group of Senators in Canning states this succinctly:

> The Senate's explicit determination that it was holding sessions—not in a period of "Recess" (requiring the House's consent)—should control unless it exceeded the chamber's authority. It did not. The Constitution does not dictate how long Senate sessions may or must last or how much business must be conducted.

Brief for Amici Curiae Senate Republican Leader Mitch McConnell and 41 Other Members of the United States Senate, Noel Canning v. NLRB.

The Board's arguments ultimately rest on the false premise that the Clause gives the President more than the mere auxiliary power the Framers intended. If the President could unilaterally declare that the Senate is not in session and that its pro forma sessions are a "sham," his recess appointment power would be limitless. What else could he decide unilaterally?

The Board tries to mask the implications of its position by fretting that allowance of the Senate's pro forma sessions would all but eliminate the President's recess power. But the Senate has been able to do that all along. No one argues the Senate's right to reject, or refuse to consider, every single one of the President's nominees. The Appointments Clause gives the Senate an absolute veto over Executive officers. If anything, the Senate's use of the pro forma

session signifies its displeasure with the recent practice of Presidents from ***both*** political parties of making recess appointments during intrasession adjournments of shorter and shorter duration.[2]

The Senate's attempt to preserve its role in the appointment process through pro forma sessions is precisely what the Framers intended. Unglamorous though they may be, the Senate's actions reflect the separation of powers principles in action. The President's answer to the Senate is to do what the Board itself recognizes the Executive and Legislature have done in the past—compromise on nominees. It is not to sidestep the Senate altogether by reading into the Constitution an Executive power that does not exist.

In the end, the Board's invitation to avoid potential inefficiencies in the appointment process by construing the Constitution so broadly is tone deaf to the "crystal clear" reality that "the Framers ranked other values higher than efficiency." Chadha 462 U.S. at 959. The "hard choices" embodied in the text of the Constitution "were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked." Id. A ruling in favor of these appointments would remove any limiting principle to the President's recess appointment power and undermine the Senate's advice and consent role. The Board's contrary assertions are simply "argument from inconvenience, like the argument against a power because of its possible abuse," which cannot "be admitted to obscure the true principles and distinctions ruling the point." 23 Op. Att'y Gen. 599, 604 (1901).

II. WALLER'S TERMINATION DID NOT VIOLATE SECTION 8(A)(3)

While the majority of the Board's brief is nothing more than a spin on Waller's behavior—justifying his actions while diminishing their severity where convenient—a few

[2]See, e.g., 153 Cong. Rec. S14,609 (daily ed. Nov. 16, 2007)(statement of Sen. Reid)("Mr. President, the Senate will be coming in for pro forma sessions during the Thanksgiving holiday to prevent recess appointments"). The President's affront is to the Legislative Branch, not a particular party.

points are worth mentioning. First, the Board still fails to locate one shred of evidence that either 1) ties the decision makers, Benner and Gossman, to the alleged anti-union animus, or 2) substantiates a causal connection between the Company's alleged anti-union animus and Benner and Gossman's decision to terminate Waller. Second, while the Board argues that the ALJ's finding is well supported by circumstantial evidence, this "evidence" is based on nothing more than half-truths and unreasonable inferences.

A. No Record Evidence Supports a Finding that the Decision Makers Were Motivated by Anti-Union Animus

As an initial matter, the Board attempts to dodge the relevant inquiry into the decision makers' motives by arguing that the "Company" had anti-union animus and the "Company" committed certain actions. However, the focal point of the inquiry into Waller's termination must be on the decision makers—Benner and Gossman. See NLRB v. Louis A. Weiss Memorial Hosp., 172 F.3d 432, 443-44 (7th Cir. 1999). Tellingly, the Board's brief fails to acknowledge that the ALJ never made any finding of antiunion animus with respect to either Benner or Gossman and, in fact, specifically rejected allegations of unlawful promises by Benner. (JA0021-22.)

Sidestepping this gaping void, the Board instead argues that Benner and Gossman's simple *knowledge* of Waller's union activity coupled with the "Company's" alleged mischaracterization of the flagging incident demonstrates that the decision to discharge Waller was unlawfully motivated. However, no record evidence exists to support a finding that either Gossman or Benner "fabricated" or "twisted" the evidence before them regarding Waller's behavior. Nor does the evidence show that either Gossman or Benner considered Waller's Union support when they made the decision to terminate his employment. Instead, the record evidence unequivocally demonstrates that Benner and Gossman, in deciding to terminate Waller,

reasonably relied on all of the evidence collected by Gossman, via first-hand witnesses. (Company's Brief p. 41-42.)

In light of the Company's burden to show only that its decision makers had a reasonable belief that the employee committed the offense (instead of proving that the employee did in fact commit the offense), the Board argues that neither Benner nor Gossman really believed that Koerner was actually threatened by Waller's actions. In support of this argument, the Board twists a few minor pieces of evidence, such as Waller's ram car was not moving at the time of the incident—a fact that has no bearing on the Company's finding that Waller intentionally ignored the feeder watcher's directive to stop. Moreover, the Board tellingly makes no mention of three vital pieces of undisputed evidence that show, as a direct result of his run-in with Waller, Koerner was afraid for his safety: (1) Koerner immediately reported the incident to his shift leader and changed his work pattern for the remainder of the night; (2) the day following the incident, Koerner, still scared to go underground, reported the incident to the mine manager and was moved to a different above ground position; and (3) Koerner suffered two severe anxiety attacks, one which required immediate on-site EMT attention and another that required him to be admitted to the hospital and treated for anxiety and depression. (JA0532-33.) Given this undisputed evidence, coupled with the accounts of no less than seven witnesses, Benner and Gossman were entitled to reasonably believe that Waller had engaged in the dangerous and threatening behavior of which he was accused.

B. The Circumstantial Evidence on which the Board Relies Is Based on Unreasonable Inferences and Not on the Substantial Record Evidence

Because no record evidence exists that either Gossman or Benner harbored anti-union animus, or that alleged anti-union animus played a role in their decision to terminate Waller, the Board attempts to rely on circumstantial evidence to justify the ALJ's 8(a)(3) finding. Yet this

alleged circumstantial evidence, even if it does exist, does not reasonably lead to an inference that Waller was unlawfully terminated.

1. The Company Did Not Present "Shifting" or "Fabricated" Reasons for Terminating Waller

A constant theme of the Board's brief is that Big Ridge has presented inconsistent reasons for discharging Waller and therefore these "shifting" explanations support the ALJ's finding of unlawful termination. However, as recounted in detail in the Company's opening brief, both Gossman and Benner testified that all of the instances evidenced in Gossman's written statements, and as reported to Benner, formed the basis for the decision to terminate Waller. They both testified that, in light of all the evidence before them, they were most concerned 1) about the flagging incident and 2) that the complaints about Waller were not limited to one isolated event but were based on multiple events that appeared to be escalating. (JA010-92, JA0215, JA0595-99, JA0616.)

The Board further argues that these reasons are nothing more than the Company's post hoc attempt to justify Waller's termination. The Board, citing Jet Star, Inc. v. NLRB, 209 F.3d 671 (7th Cir. 2000), supports this argument by arguing that the Company failed to investigate the allegations against Waller, failed to get his side of the story or to warn him about the potential consequences of his misconduct, and instead summarily terminated him. However, the record evidence shows just the opposite. At the outset, Lawrence immediately spoke with Waller about his behavior. Not only did Lawrence give Waller an opportunity to explain his side of the flagging incident, but he also warned Waller about his behavior. (JA0072.) In fact, when Lawrence presented Waller with the opportunity to explain his side of the story, Waller reaffirmed the complaints against him by dismissing the severity of his actions and by becoming so loud and agitated with Lawrence that Lawrence had to instruct Waller to calm down.

(JA0088, JA0331, JA0579.) Lawrence reported to Gossman what occurred during his meeting with Waller. (JA0228, JA0577.)

Furthermore, Gossman conducted his own investigation into the multiple reports he had received concerning Waller and in doing so interviewed and/or took written statements from at least seven witnesses, including Lawrence. (JA167-72, JA0178-89, JA199-00, JA0228.) Gossman then presented this evidence to other Company officials including Benner. (JA0140-41, JA0159-60.) The decision to terminate Waller was not pre-determined as suggested by the Board. Based on all of the evidence presented by Gossman, Benner instructed Gossman to interview Waller regarding the reports of his threatening and unsafe behavior and that unless Waller revealed any new information to Gossman, other than the flat out denial he gave Lawrence, Gossman was to terminate Waller's employment. (JA0616.) When Waller failed to provide Gossman with any new information, Gossman terminated Waller's employment as instructed by Benner. (JA016, JA1023.)

2. Other Employees Cited by the Board Were Not "Comparators"

The Board further argues that Big Ridge's failure to punish more serious misconduct by other employees likewise supports the ALJ's findings with respect to Waller's discharge. However, the Board's characterization of Waller's misconduct is self-serving and supported by neither the record evidence nor common sense. First, the Board claims that Waller's conduct was not as severe as that of other employees. Yet, the record evidence is undisputed that these instances of threats were isolated—in other words, the perpetrators had no previous record of making such threats, nor was there any evidence that they did so again. Moreover, unlike the Board's "comparators," Waller not only repeatedly threatened his fellow co-workers but did in fact follow through on the one threat deemed to be the most alarming to both Benner and

Gossman—that "[Koerner] could flag him as much as [he] wants, [he's] not going to stop" and that "he wouldn't stop for nothing." (JA0515-19.)

However, the Board contends that "while BRI may be technically correct that employees may not 'ignore feeder signals,' BRI's workplace reality belies any suggestion that doing so is a basis for discharge." (Board Brief p. 68.) Unlike the behaviors cited by the Board in its brief, Big Ridge had no latitude to condone Waller's behavior; it was a direct violation of a mandated MSHA safety procedure and had potentially catastrophic consequences, of which the Company was all too aware. Furthermore, there is no record evidence to suggest there is anything "technical" about Big Ridge's contention that ram car operators may not "ignore feeder signals" – it is an absolute duty of the position. (JA0201, JA0551.)

3. Waller's Length of Service in the Coal Industry and Willingness To Work Overtime Has No Bearing on His Present Behavior

The Board also contends that because the ALJ found Waller to be "hard-working, experienced, dependable, well-liked and willing to fill in on his days off," the Company is more likely to have terminated Waller for an unlawful reason. (Board Brief p. 61.) However, this contention glosses over the reason for Waller's termination. While some record evidence may support the ALJ's finding as to Waller's employment history in general, Waller was not terminated for work performance, lack of experience, or for his unwillingness to earn overtime. Instead, shortly before he was terminated, Waller started down a path of confrontational and dangerous conduct; the record is replete with uncontradicted evidence, including admissions by Waller himself, that he engaged in such conduct. Also, the record shows that the more Waller confronted his fellow employees, the more egregious his behavior became. To advocate that Waller is untouchable now because of his once "hard working" reputation garners a result that is neither logical nor supported by legal precedent. Indeed, in none of the cases cited by the Board

do the courts advocate automatic immunity for an employee's dangerous behavior simply because he was an experienced miner and worked overtime.

4. The Company's Decision Not To Petition this Court for Review on Other Charges Has No Bearing on the Petition before this Court

Finally, the Board contends that it is more likely than not Big Ridge unlawfully terminated Waller because it did not challenge, in this proceeding, the ALJ's finding of guilt on other unfair labor practice charges alleged against it. However, such an argument illogically presumes that the Company's decision not to challenge the adverse ruling was based on the Company's assumption of guilt. Yet, such a presumption is irrational. Big Ridge contested the Union's allegations surrounding the Company's pre-election conduct to the Regional Director, the ALJ and in its exceptions to the Board. In fact, the Company lodged its own objections to the Union's election conduct and vehemently pursued these allegations through the Board process as well. Only when the Company was faced with an adverse ruling by the full Board, did it make a calculated *business* decision that the best interests of both the Company and its employees would better be served by moving forward with the Union in an effort to begin the building of a productive working relationship. Incredulously, the Board's theory penalizes the Company for doing exactly what the Board ordered it to do.

Contrary to the election objections, the Company simply could not allow the Board's decision with respect to Waller's termination go unchallenged. The Company has steadfastly maintained that Waller's behavior directly threatened the safety of its employees and greatly compromised its legal obligations under MSHA. To have turned a blind eye to Waller's misconduct in the face of a legal challenge would have put the employees' safety and the Company's regulatory obligations at significant risk, as well as send a dangerous message to its employees about its tolerance for such conduct.

Moreover, if this Court is to view this petition "through the lens" of the ALJ's findings, then it must consider the fact that the ALJ specifically found that Benner, one of the two decision makers in the Waller termination, did not make unlawful promises as alleged by the Union in its objections. (JA0021-22.) Following the Board's logic, given the Board's failure to challenge the ALJ's finding with respect to Benner, coupled with the ALJ's lack of findings with respect to Gossman, it is more likely than not that Benner and Gossman did not unlawfully terminate Waller.

III. CONCLUSION

For the reasons cited herein and in its opening brief, Big Ridge's Petition for Review should be granted and the Board's Cross-Application should be denied.

Respectfully submitted,

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No. 12-3120 & No. 12-3258
Big Ridge, Inc. v. National Labor Relations Board

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th of April, 2013, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following CM/ECF users:

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