Peter Kim and Dante Barnes Petitioner

National Labor Relations Board v. Noel Canning Corporation Brief

Table of Cited Authorities:

* The U.S. Constitution
* Letter from Alexander Hamilton to James McHenry (May 3, 1799)
* Debate in North Carolina Ratifying Convention, Speech of Archibald Maclaine
* Letter from John Adams to James McHenry, April 16, 1799
* Evans v. Stephens, 11th court (2004)
* The Federalist No. 67 (Alexander Hamilton)
* Senate.gov
* Congressional Research Service
* Commentaries on the Constitution §1551, St. George Tucker,
* Blackstone Commentaries
* National Labor Relations Board v. Noel Canning Corporation Lessen Plan
* Chart of Senatorial Recesses 2008-2013

Statement of Argument:

The time has come when we know something is wrong but it can’t be fixed due to a disagreement in our government. The Noel Canning Corporation in Washington D.C. was found guilty of violating the National Labor Relations Act of 1935 regarding a bargaining agreement with their union. When the Noel Canning Company appealed the charge by the NLRB to the District of Columbia Circuit in January 25, 2013 and the court agreed that the NLRA had the legal backing on their decision but stated that the problem could not be addressed because the three recess appointments that President Obama had executed were invalid making the NLRA lack the required quorum. These recess appointments were considered invalid because the President had made the appointments during a recess during an intra-session recess and the constitutionality of intra-session recess appointments are being considered by the Supreme Court. Due to the invalid appointments, the court ruled in favor of the Noel Canning Company. As a Petitioner, we believe that

* The President’s recess-appointment power may be exercised during a recess that occurs within a session of the Senate, meaning intra-recess sessions.
* The President’s recess-appointment power may be exercised to fill vacancies that exist during a recess, meaning pre-existent vacancies.
* The President’s recess-appointment power may be exercised when the Senate is convening every three days in pro forma sessions.

Argument:

The U.S. Constitution gives the President the power to nominate officers into office with the approval of the Senate as stated in Article 2 Section 2 Clause 2. But the President also has the power to fill in vacancies that happen during recess in the Senate as long as the appointment is temporary according to Article 2 Section 2 Clause 3 of the U.S. Constitution. Over the course of history, there have been many extensive arguments and close consideration on the limits of the recess appointment power of the executive leader. A reason for all this arguments is because of the conflicting interpretations of the Clause and the battle between the branches to restrict power from each other, especially the legislative and executive branch.

We believe that the President has the power to make an appointment during a recess that occurs within a session. The Constitution does not expand on the idea of sessions or recesses so therefore the topic of recess appointment is very vague. The Senate.gov website defines recess as “a temporary interruption of the Senate's proceedings, sometimes within the same day...recess also refers to longer breaks, such as the breaks taken during holiday periods, pursuant to concurrent resolution.” Even the Senate themselves defined recess as “a temporary interruption” which includes breaks during a session and therefore allows the President to exercise his recess appointment power during the intra-session recesses. The length of recess using the modern convention is at least four days. And this length has been changed before in the past therefore showing how there is not set length for recess. The President has the ability to appoint an officer to a vacant position; this is factual. As Article II, Section 2, Clause 3 of the United States Constitution states, "The President shall have the power to fill up all vacancies that may happen during the recess Senate, by granting commissions which shall expire at the end of their next session." These appointments are merely temporary, as stated above. They are meant to only keep the government running smoothly; not having anyone appointed to an important position can stall and slow down any progress the federal government needs to make in that particular field. A quorum can only be reached if at least three members of the association or group come together to make a decision. There are no rules saying that one of the members of the quorum have to be permanent officers. The Senate can vote in and approve of the appointee at a later date if they believe that the officer will do a good job in their current field. During debate at the North Carolina Ratifying Convention, Archibald Maclaine, a lawyer and a legislator, conveyed his endorsement for the Recess Appointments Clause. He believed that authorizing the President to appoint during recess was a key part in allowing the President to carry out his job. He noted “Congress are not to be sitting at all times…Therefore the executive ought to make temporary appointments…This power can be vested nowhere but in the executive…During the recess, the President must do his business…” Maclaine was one of many to support a broad interpretation of the clause and he believed that giving the President this power would help him minimize the troubles of the government as the leader of the country. As Maclaine said this, he supported giving the President the means necessary to carry out his duty and appoint officers as necessary which the needs would change as new problems came up. In order for the President to “do his business” as Maclaine said, the President must be given the authority to fill vacancies as they happen even if it is during a session and fill in all vacancies as quickly as possible, intersession or intra-session, to create an effective government. Intra-session recesses have happened in the past with President George W. Bush’s appointment of William H. Pryor to the judgeship on a federal court of appeals. In a court case *Evans v. Stephens*, the court held that the Constitution allowed both intra-session and inter-session recess appointments. The Eleventh Circuit Court emphasized that the President had the power to appoint officers during intra-sessions and that it (intra-session recess appoints) has happened many times recently. The D.C Circuit Court of Appeals, where NCC (Noel Canning Company) appealed to, opposed the intra-session recess appointments of President Obama even though there is a precedent on such appointments in past Circuit Court ruling and the D.C. Court holds that the President does not have the power to do so. Hence, the President has the power to fill vacancies during inter-session recesses and intra-session recesses in the Senate.

We also believe that the President has the powers to appoint officers to fill in vacancies that already exist during a recess. John Adams, a founding father and the president at the time, expressed his steadfast belief that the Constitution authorized him to use the recess appointment powers invested in him to fill in the vacant office. He wrote firmly in his letter to James McHenry, a former Secretary of War, “Whenever there is an office that is not full, there is a vacancy…I have no doubt that it is my right and my duty to make the provisional appointments.” When President Adams said this, he expressed his belief that the executive leader had the right power to fill in any vacancy that existed in order to quickly present a temporary replacement. If there is a vacancy in an office, then the work that comes with that office is not being fulfilled or an action cannot be carried out due to a lack in number therefore creating an obstacle for progress in the government. Adams believed in his right as president to fill in all vacancies, whether recent or not, in order to fulfill his duty as the president. Alexander Hamilton, a founder father of the Constitution just as John Adams, wrote in the Federalist Paper No. 67, “And as vacancies might happen in their recess, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the President singly to make temporary appointments ‘during the recess of the Senate,’”. If a vacancy happens during a recess but for some reason the President doesn’t appoint an officer in replacement, that vacancy can be filled during another recess in the Senate because the vacancy did indeed happen during a recess but the only change being that the vacancy is not new. Hamilton expresses that the President is the only person to make temporary appointment during recess and he himself who opposed recess appointments didn’t put any limits on which recesses he could appoint in and which he could not. Therefore, solely the President has the power to appoint officers to fill in any vacancies disregarding the time of vacancy.

We believe that the President also has the power to exercise his/her recess-appointment power to appoint officers during pro forma sessions. . In recent times, a practice called “pro forma sessions” has been utilized by the Senate. The “pro forma sessions” were created to call a short adjournment in the Senate that would not allow the President to exercise his recess appointment powers. As stated before, the Senate defines recess as a temporary interruption of Senate proceedings and pro forma sessions are breaks where the Senate doesn’t do any work. According to the definition of the Senate, pro forma sessions are a type of recess in which the President may exercise his recess appointment power in. This type of sessions have given more power to the Senate and purposely restricted the President’s constitutional power. The “pro forma session” was a creation of Congress in order to restrict the President from recess appointments. How is it that the Supreme Court doesn’t test the constitutionality of “pro forma session” but they debate over the recess appointment power of the President to appoint during the “pro forma sessions”? The Constitution does not explicitly explain how long a recess needs to be nor does it specify how long a recess has to be in order for the president to enact his recess appointment powers. According to the Congressional Research Service, there are instances of presidents appointing officers during a 3 day recess such as on January 1, 1949 where President Reagan appointed someone in the recess of three days and when President Theodore Roosevelt appointed about 160 military officers during a transition session lasting less than a day on December 7, 1903. As Archibald Maclaine said in his speech, “Congress are not to be sitting at all times; they will only sit from time to time, as the public business may render it necessary.” He meant by saying this that when Congress is not needed to pass bills, confirm nominations, and etc, they will go on recess whether it is in the form of pro forma sessions, intra-sessions, or inter-sessions which during all of these the President may exercise his Recess Appointment Clause power. The power to fill vacancies are also given to the president in Article 1 Section 3 Clause 2 of the Constitution and it states “if Vacancies happen…during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.” As it is written, there are no restrictions on the recess appointment power of the executive leader during a recess of the legislative branch. Thus, the President has the power to exercise his recess appointment power during the three day pro forma sessions of the Senate.

Conclusion:

The President of the United States has quite a few powers, and those powers are kept in check by checks and balances; it is a part of our federalist government. The President rightfully has the power through the Recess Appointment Clause of the Constitution to fill in vacancies and carry out his duty in aiding the government to accomplish goals. The President is the sole holder of the recess appointment power and with that power the president is able to make decisions on who replaces who temporarily and possibly, for the rest of the term. The President has the power to exercise his recess appointment power during a recess that occurs within a session of the Senate, to fill vacancies that are pre-existing during a recess in the Senate, and to appoint officers in replacements during the three days of pro forma sessions of the Senate. For the case at hand, the Supreme Court should declare that the appointments that the President Obama put in during the intra-session are valid and also declare from now on that all intra-session recess appointments, appointments during a “pro forma session”, and appointments to pre-existing vacancies be valid. Once that is done, the NLRB will be able enact their decision on the Noel Canning Company with the required quorum present.