Brief in favor of Petitioner for NLRB v. Noel Canning

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NLRB v. Noel Canning Brief

Brief in favor of Petitioner for the Supreme Court case of the National Labor Relations Board v. Noel Canning

Table of Cited Authorities:

Brennan Center for Justice

Bloomberg Law

Debate in North Carolina Ratifying Convention, Speech of Archibald Maclaine

U.S. Constitution art II, § 2, cl. 3.

Eleventh Circuit case of Evans v. Stephens

Supreme Court Case of New Process Steel v. NLRB (2009)

Quote by President George W. Bush

The Harlan Institute

Joseph Story, Commentaries on the Constitution §1551 (1833)

Statement of Argument:

In deciding that the Senate was not in recess while President Obama appointed three officials to the National Relations Board to fill vacancies in January 2012, The United States Court of Appeals for the District of Columbia Circuit failed to maintain the system of the checks and balance system that is utilized in the federal government by undermining the authority of the executive branch and therefore the President, denying him his

constitutional right under Art II, § 2, Clause 3. to make appointments to fill vacancies while the Senate is in recess. The District of Columbia Court of Appeals egregiously erred by defining the word "Recess" in an overly strict and narrow frame. The Circuit Court only looked at the definition in terms of the years immediately following the Constitution, not considering the increased amount of sessions, and in particular pro forma sessions (where the Senate is not adjourned for more than three days), that are present in the modern Senate. These pro forma sessions occur solely to try and deprive the President of his recess appointment power. The current ruling is a decision based on archaic premises and is detrimental to the well-being of the federal government. Therefore, the United States Court of Appeals for the District of Columbia Circuit's decision should be overturned in whole by the Supreme Court to protect the President's right to make recess appointments under the United State Constitution.

Argument:

In filing a petition against the NLRB, the Noel Canning Company was arguing that the NLRB did not have enough standing members to conduct business, and thus was not allowed to interfere with the company's labor negotiations with its employees. The big issue at hand is whether Presidents are able to make recess appointments not only between sessions but also during intrasessions (or pro forma sessions)? As the petitioner, the National Labor Relations Board believes that President's Obama's three recess appointments to maintain a quorum in the board were valid under the Recess Appointments Clause of the United States Constitution, which means that the National Labor Relation Board was able to be involved with negotiations at Noel Canning Company. In Article 2, Section 2, Clause 3 ("Recess Appointments Clause") the Constitution states: "The President shall have Power to fill all vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the end of their next Session." Recess, being loosely defined, is any time that Senate not in session even during pro forma sessions

Looking historically, "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. Therefore the executive ought to make temporary appointments, as well as receive ambassadors and other public ministers. This power can be vested nowhere but in the executive, because he is perpetually acting for the public; for, though the Senate is to advise him in the appointment of officers, ., yet, during the recess, the President must do his business, or else it will be neglected; and such

neglect may occasion public inconveniences" This quote by Archibald Maclaine during the North Carolina Ratifying Convention express the necessity of the President being allowed to fill vacancies as needed, despite if the Senate is not in session. The President serves the public and it is his duty to ensure that his departments are able to function, meaning they have all the tools they need to fill their role. "The expiration of the 2010 Becker recess appointment threatened to reduce the Board's membership to two. President Obama, in turn, withdrew Becker's nomination and forwarded to the Senate two new nominations. The Senate failed to act on these nominations by the end of the first session of the 112th Congress. On January 4, 2012, President Obama appointed three NLRB nominees as recess appointments." When President Obama was attempting to fill these vacancies, he was trying to comply with the Supreme Court's decision in New Process Steel v. NLRB (2009), which required the NLRB to have three members to conduct business. In line with Archibald Maclaine's quote, President Obama was making these appointments for public convenience and to ensure his departments are able to function properly.

According to Bloomberg Law, well over 300 federal officials since 1981 have received such appointments during congressional sessions, ones that were not during the Senate's "official" recess. The District of Columbia Court of Appeals, in its current decisions, sets a dangerous precedent that goes largely against previous appointments, and is detrimental to the national security of the federal government. In a quote from President George W. Bush which state,"The Constitution, on its face, does not establish a minimum time that an authorized break in the Senate must last to give legal force to the President's appointment power under the Recess Appointments Clause, it is clear that the Constitution does not define the length of time in which the Senate must be out of session for a President to make a recess appointment. With the District of Columbia Court of Appeals making such a narrow interpretation, using the word "the" to define "the Recess" as only between official recesses, the Appeals Court is essentially adding to the Constitution with its decision. The Recess Appointments Clause is a part of the Constitution to protect the power of the executive branch and to ensure that federal appointments are completed in a timely manner.

"In making his January, 2012 appointments, Obama acted under Justice Department advice memorialized in a Jan. 6, 2012, Office of Legal Counsel memorandum that relied, in turn, on earlier institutional precedents. In an official 1921 opinion for President Harding, Attorney General Harry M. Daugherty adopted a functional view of "recess," derived from a 1905 Senate committee report; the 2012 OLC memo follows the same approach. The Senate committee asserted: "'The word 'recess' is one of ordinary, not technical signification,

and it is evidently used in the constitutional provision in its common and popular sense." The report went on describe the Senate as being in recess when "its members have 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." With the Department of Justice supporting President Obama's intrasessions appointments based on earlier Senate and Congress decisions, it is clear that President Obama made these appointments believing that he was not going against the Constitution. When the Senate is not able to speak with or communicate with the President, then that should be considered a recess and therefore the President should be able to make appointments.

If intrasession appointments and the legality of them under the Constitution is considered in modern days, one would have to realize that Presidents have consistently asserted authority to make intrasession appointments since 1921. Intrasession recess appointments have been as common since the first Reagan administration as intersession appointments (Bloomberg Law). Additionally, in Evans. v. Stephens, the Eleventh Circuit, in an en banc decision, [held that the Constitution permitted both intrasession recess appointments and recess appointments to fill vacancies that "happened" prior to, rather than during, the congressional recess. It is clear that the circuits are divided on the opinion over whether intrasession recess appointments are valid. However, when considering the fact that pro forma sessions have come to be a common tactic to deprive the President the ability to make appointments, it is clear that intrasession appointments need to be upheld. The President is given the power to make federal appointments and that right should not be deprived from him. However, the District of Columbia Court of Appeals failed to look and define the word "recess" in a modern way. They made their decision based off of the 18th century when the Constitution has passed. The National Labor Relations Board needed members to maintain a quorum and President Obama had to make swift appointments to fulfill that need and to protect America. Instead, during this very critical point, the Senate decided to work once every three days and in doing so, were not interested in approving any appointments, which put the NLRB and President Obama with a huge problem. With the NLRB protecting American employees, it was necessary for President Obama to ensure that they could do what they needed to do.

The District of Columbia Court of Appeals made their decision in an overly narrow interpretation of the Constitution and turned a blind eye to the modern days of the executive and legislative branches of the government, failing to protect the national security of America. They have, in their decision, severely limited the President's power to make recess appointments.

Conclusion:

Joseph Story once said that "there was but one of two course to be adopted; either, that the senate should be perpetually in session, in order to provide for the appointment of officers; or, that the president should be authorized to make temporary appointments during the recess…the former course would have been at once burdensome to the senate, and expensive to the public. The latter combines convenience, promptitude of action, and general security." In granting power to the President to make appointments to fill all vacancies while the Senate is in recess, the Constitution was protecting the executive branch and maintaining the checks and balance system of the federal government, as well as the national security of America. However, with the recent decision by the District of Columbia Court of Appeals, that stated that intrasession appointments by Presidents are invalid and that they can only make appointments during official Senate recesses, this Presidential Power has become seriously limited and is detrimental to the country. Under this decision, the power to make appointments has seemed to shift to Senate rather than the president. The Circuit Court based its decision off of the early days of American government in which intrasessions were not nearly as common, and the speed with which appointments were needed was not as critical. As all know, times have drastically changed and the need for the clause to be interpreted with a modern context is absolutely imperative. With the Senate taking an increased number of pro forma sessions, in which they are on break but convene at least once every three days, they have utilized them as a way to block the President's appointments. However, for the protection of the nation and the balance of power between the three branches of government in the United States, the President needs the ability to make appointments and get them swiftly approved. If the Senate wants to break during this critical time period, then the President should be able to make such intrasession appointments. The President is in office to serve the public and maintain the executive branch of the federal government. Maintaining the executive branch includes ensuring that all federal departments or bureaucracies are properly functioning. When President Obama was trying to make his appointments to the NLRB, he was trying to rectify a situation in which a department was not properly able to function, and the only way to do so was through an intrasession appointment. Now, the respondent may point out that appointments are only to be made during official breaks, or recesses, of the the Senate. However, as previously noted, the Constitution does provide a specific time length for which the Senate must be in recess for the President to be able to make appointments. Whether one is for a strict interpretation of the Constitution or a loose interpretation of the Constitution is irrelevant. When strictly interpreting the Constitution, the President should be able to make intrasession appointments due to the fact that there is no set time length. When loosely interpreting the Constitution, "Recess" should be defined to include all breaks of the Senate. For all of the aforementioned reasons, The United States Court of

Appeals for the District of Columbia Circuit's decision should reversed in full by the United States Supreme Court of the United States.
