

NLRB V. Noel Canning Brief (Baye and Logan)

Brief in Favor of the Noel Canning Corporation for the Supreme Court case of The National Labor Relations Board (NLRB) vs. Noel Canning Corporation

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The National Labor Relations Board V. Noel Canning Corporation Brief

Table of Cited Authorities:

Supreme Court of the United States Blog, Brennan Center for Justice, Bloomberg Law, United States Constitution, Letter from Samuel Adams to Arthur Lee (October 31st, 1771), The Harlan Institute

Statement of the Argument:

President Obama filled three spots on the NLRB within recess appointments, after the Senate used the filibuster rule. The president should not have the power to fill the vacancies after the recess-appointments are over. The president's recess-appointment power is an abuse of power by not gaining the approval of the Senate first. With the House of Representatives not being involved, the President has to go through the Senate primarily in order for the recess-appointment process to be valid.

Argument:

The Senate is comprised of two representatives from each state, and makes decisions based on the well being of their state and the nation as a whole. They make up part of Congress, and their opinions on situations are valued to the highest degree.

The President's recess appointment powers essentially overpower all of the state's representatives, as they are not allowed to veto the President's decisions while in recess. The recess appointment power is an antiquated form of governing, as it was originally intended to be used during a time when getting the Senate together took days, even weeks, because there was no technology to quickly communicate like there is today.

This power is not only ethically reprehensible, but is outdated because communications technology today is more advanced.

The Presidents of the past and the United State's current one, Barack Obama, have abused the power to have their own representatives appointed, and completely ignoring the Senate. This power was recently abused when President Obama nominated labor attorney Craig Becker to the NLRB on July 9th, 2009. The Senate Republicans subsequently filibustered the nominee's appointment vote, and Craig Becker was blocked from holding the position. However, eight months later, on March 28th, 2010, President Obama appointed Becker to the NLRB via his recess appointment powers, completely bypassing any Senate vote. This power is wholly undemocratic, and concentrates an extreme amount of power into the executive branch's hands. With recess powers, the President is likely to take an undemocratic clearly shown by President Obama's most recent recess appointment, when even though the Senate clearly voiced their disapproval, the President went ahead and made the appointment regardless.

In a letter from Samuel Adams to Arthur Lee, Adams explains that Massachusetts postpones executive business until the sessions have concluded. Part of the letter stated, "With regard to the Council, it is hardly possible for any one at a distance to ascertain their political Sentiments from what they see of their determinations published [sic] here in general, for it has been the practice of the Governor to summon a general Council at the Time when the Assembly is sitting & of Course the whole Number of Councilors [sic] is present—but in their Capacity of Advisers to the Governor they are adjourned [sic] from week to week during the Session of the Assembly & till it is over when the Country Gentlemen Members of Council return home. Thus the general Council being kept alive by Adjournments, the principal & most important part of the Business of their executive department is done by seven or eight who live in & about the Town, & if the Governor can manage a Majority of s small a Number, Matters will be conducted according to his mind. I believe I may safely affirm that by far the greater Number of civil officers have been appointed at these adjournments; so that it is much the same as if they were appointed solely by our ostensible Governor or rather by his Master, the Minister for the time being." This letter is proof that the Governor and officials would take certain measures and make appointments, so that they don't have to worry about being disapproved by the Senate. In the full-length letter, Adams explained briefly his opinions on their appointments and how they directly relate to the recess-appointments. In sum, this shows that the president, nor officials, should be able to make recess appointments past the point of the allowed time period. The senate has an important role in the recess-appointment process. The website had a expert from the Constitution that stated, "[The President] shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be

established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”, again this was to show that the president must gain the approval of the senate before the appointment is final. Also, it is important to understand that the House of Representatives have no power in the appointment process. The Senate is the only part of the government that has the right to be involved in the recess process. In Alexander Hamilton’s Constitutional Convention of 1787, him and his delegates made decisions and met to arrange the current appointment process. The Federalist No. 77, which Hamilton took a role in adding to, said “A body so fluctuating, and at the same time so numerous, can never be deemed proper for the exercise of that power. Its unfitness will appear manifest to all . . . All the advantages of the stability, both of the executive and of the senate, would be defeated by this union; and infinite delays and embarrassments would be occasioned. The example of most of the states in their local constitutions encourages us to reprobate the idea.” This exemplifies the point additionally that the recess appointment ends right after the session, which further explains that Obama doesn’t have the right to appoint officials after the session is over. Though there are many more examples and historical letters from president’s that connects to the point of the Senate’s power, the Letter of Cato IV on July 3rd, 1789 is important. This letter explains the president’s power in the legislature and the recess process. The small excerpt from the letter states, Though the president, during the sitting of the legislature, is assisted by the senate, yet he is without a constitutional council in their recess- he will therefore be unsupported by proper information and advice, and will generally be directed by minions and favorites, or a council of state will grow out of the principal officers of the great departments, the most dangerous council in a free country...” This portrays the idea that, yet again, the president will not be supported if Obama doesn’t present the proper information or give advice. If he doesn’t succeed in his power, then the council (Senate) will simply override his power and he won’t be recognized in the country. From these last excerpts, it seems to all sum up that whatever Obama moves forth with, he will not please the country, government officials, and won’t follow the exact regulations of the recess appointment process. Additionally, in 1789, George Washington wrote a letter to William Drayton informing the people in the district of South Carolina about the appointment process. Washington stated numerous times that he had confidence in the recess process, and that when the Senate returned to session, the process would return to commissions and make time-preserved decisions. The letter basically stated, ““Sir. The Office of Judge of the district Court in and for South Carolina District having become vacant; I have appointed you to fill the same, and your Commission therefore [sic] is enclosed. You will observe that the commission, which is now transmitted to you, is limited to the end of the next Session of the Senate of the United States. This is rendered necessary by the Constitution of the United States, which authorizes the President of the United States to fill up such vacancies [sic] as may happen during the recess of the Senate—and

appointments so made shall expire at the end of the ensuing Session unless confirmed by the Senate; however there cannot be the smallest doubt but the Senate will readily ratify and confirm this appointment, when your commission in the usual form shall be forwarded to you.” Again, the letter shows that the recess process is “ratified” and confirms the appointment process, which now connects back to Obama’s actions. Lastly, Edmund Randolph had a specific opinion on the recess appointments for President Jefferson. This occurred on July 7th, 1792. The opinion stated, “The question is, whether the President can, constitutionally, during the new recess of the Senate, grant to a chief Coiner a Commission which shall expire at the end of their next session. Is there a vacancy in the office of chief Coiner? An office is vacant when no officer is in the exercise of it. So that it is no less vacant when it has never been filled up, that it is upon the death or resignation of an incumbent. The office of Chief Coiner is therefore vacant. But is the vacancy one, which has happened during the recess of the Senate? It is now the same and no other vacancy, than that, which existed on the 2nd of April 1792. It commenced therefore on that day or may be said to have happened on that day. The Spirit of the Constitution favors the participation in the Senate in all appointments. But as it may be necessary oftentimes to fill up vacancies, when it may be inconvenient to summon the senate a temporary commission may be granted by the President...For though’ [sic] I am well aware, that a chief Coiner for satisfactory reasons could not have been nominated during the last session of the Senate; yet every possible delicacy ought to be observed in transferring power from one order in government to another.” This states that the president has the ability to fill the position, if the senate hasn’t made a nomination prior to the recess appointments.

Conclusion:

Based on the law, the president is responsible for appointing officials to a various amount of positions. President Obama appointed officers, but he failed in seeking the approval of the Senate, in order for the nominees to hold the position permanently. Obama believed that he could appoint an official during the recess appointment time periods and have that official stay in that spot even when the recess is over. Since the Republicans filibustered the rule immediately, Obama couldn’t place the officials, because there was no approval. Under the US Constitution, “[The President] shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” This explains that the president is given the power to nominate, but has to gain the approval and consent of the Senate, as well. While this law is currently constitutional, it was not designed for the modern world. It’s undemocratic and focuses far too much power into the executive branch, which is a violation of the checks and balances

system, which makes it partially unconstitutional in that regard. Although the President is allowed to appoint officials during the recess period without the interference of the Senate, the Senate almost always voice their disapproval, and sometimes filibuster whomever is appointed. This shows that the system is clearly broken, and needs to be amended, before any prolonged appointments occur. The President's recess appointment powers should be removed, and the Senate should vote all nominees based on that.

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