NLRB v. Noel Canning Harlan Institute

Brief in favor of the Petitioner for the Supreme Court case of NLRB v. Noel Canning

By: Colin Ellis, and Austin Pascarelli

NLRB v. Noel Canning

Table of Cited Authorities:

George Washington Quotes; Brennan Center For Justice; Court of Appeals for the 11th Circuit ruling on Evans v. Stephens; Politico.com, Senators ask John Boehner to block Obama Recess appointments; HarlanInstitute.org

Statement of argument:

The United States Court of Appeals for the D.C. Circuit's decision stating that the recess appointments to the NLRB by the Obama Administration were unconstitutional should be reversed. The D.C. Circuit's narrow interpretation of the Recess Appointments Clause upsets the checks and balances between the Executive branch and the Senate in the appointments process. Since the senate can now use obstruction tactics such as filibusters and the pro-forma sessions, they can now successfully stop the President from appointing people altogether. Therefore, to modernize the Recess Appointments Clause, the Court's decision should be reversed so that the President can appoint people during these pro-forma sessions.

Argument:

In the 2005 Court of Appeals for the 11th Circuit Case dealing with recess appointments by the President during intrasession recess states in an en banc decision that "The President can fill vacancies with with appointments made absent consent of the Senate during short

intrasession "recesses." This quote from the Court of Appeals basically states and confirms that the Constitution permitted both intrasession recess appointments and recess appointments to fill vacancies that "happened" prior to, rather than during the congressional recess.

Our Constitution was ratified in 1788 making all the laws that would apply to the people of the United States at that time. However, our nation has changed drastically since the years of our founding fathers. No longer are the days of "smoke filled rooms," or quick get-to-the point debates. We are in a time where our politics are driven by long, drawn out debates, filibusters that last 14 hours overnight, and strict protocol in the court room. Times have changed. Our country is run by something that isn't even strictly in the Constitution, the two-party system. Even though our founding fathers were very suspicious of parties, and George Washington even quoted one time, "Political Parties may now and then answer popular ends, they are likely.. to become potent engines, by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people, and usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust dominion." It is one of those things that is so deeply ingrained in our society nowadays, that even though our founding fathers warned us against them, we couldn't even begin to imagine our political process without them.

Furthermore, there are a few things in congress especially that aren't outlined in the constitution, but are used anyways by everyone because it is a tradition. One of those things are filibusters. People can effectively block a ruling in session of congress simply by standing up and talking. Such as Ted Cruz, who brought his running shoes to session that day, and actually stood up for 14 hours straight to block a ruling, and even read Green Eggs and Ham by Dr. Seuss. Another effective way for congress to "block" things effectively is the use of Pro-forma sessions, which are sessions at which no formal business is expected to be done at. These are used to fulfill the obligation in the Constitution"that neither chamber can adjourn for more than three days without the consent of the other." They have also largely been used to prevent the President pocket-vetoing bills, or calling the congress into special session. This is what the current case is currently about, Can the practice of blocking recess appointments be constitutional?

We as a group believe that the constitutional law regarding the recess appointments by the President was made to meet the requirements of the country regarding that time. However, as we mentioned before, the times have changed drastically, and as new things have come up for members of Congress to use, we believe that so should things come up that the President can do that he used to not be able to do. If the Congress of the United States can effectively used these filibusters and pro-forma sessions to block the duties of the President's, which has been happening a lot in the last couple of decades, than the President needs to be able to have some type of power to level the playing field. With these new "implied powers" of Congress, the upper hand has significantly swung in favor of the Legislative branch over the Executive branch in terms of power. This upsets the balance that our nation had under our checks and balances system. If the balance of power in our nation is upset, than everything that this country has worked so hard for to keep it in balance will have been lost. That is why this cannot be allowed to continue.

Under Article 2, Cl. 2 of our Constitution, it states, "The President shall have power to fill up all vacancies that may happen during the Recess of the Senate."This is what it says. But, how can the President be expected to do his Constitutional duty of appointing these people, if he is never given the chance to? Since the definition of the Recess in the political world is perceived as an adjournment from session for four days minimum, the people of Congress can successfully use the pro-forma sessions tactic to block all appointments made by the President. And if they do get appointed, they can filibuster the appointment, just as the Republicans filibustered Craig Becker,one of the original people nominated to fill up one of the vacant positions on the NLRB, which is what spawned this whole debate because President Obama had to rush out his appointments in hope that they would be there to actually accomplish something.

"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 constitution, encourages us to reprobate the idea." Federalist NO. 77. Basically, in this federalist paper, Hamilton is arguing that the House of Representatives was to have NO role in the appointment process, in order to ensure that no branch would have unitary control over the power. Hamilton was a very smart man, and could always see the bigger picture, and now it sometimes seems like he could predict the future too. He knew

that should the House be able to play a role in the appointment process, it would be bad news.

However, the House can become involved in said process. The house can influence the Senate's action by withholding its Power of Consent over the Senate's ability to adjourn for a recess. And this is what forces the pro-forma sessions that are the big controversy in the case of NLRB v. Noel Canning. One example of this is at the beginning of this case, a group of twenty Conservative Senators went to the current Speaker of the House, John Boehner, to try to block President Obama from making any recess appointments for the remainder of his entire presidency. They sent him a letter basically stating that all he needs to do is "refuse to adopt any resolution that would allow the senate to adjourn for more than three days." The conservatives are stating that Obama appoints people that have "views that are so far from mainstream that they can't possibly win confirmation from the senate and that many of them use their power to implement policies that destroy jobs and infringe upon the freedom of the American People." Although, many Political Scientists have studied this and believe that the main reason that the conservatives want to block Obama's appointments are because in 2007 when the Senate was controlled by Bush, the democrats effectively blocked President Bush from making any recess appointments.

In the Case of NLRB v. Noel Canning, the constitutionality of the recess appointing by The President could not be a more crucial decision. This ruling will basically be a precedent for all questions that will be brought up about this topic, and will further solidify whatever ruling is made to follow. The President needs to be able to appoint people during intrasession recesses. It is the only logical way to keep the system in the correct balance of power.

Conclusion:

As the great John Adams once said, " Whenever there is an office that is not full, there is a vacancy… All such appointments, to be sure, must be nominated to the Senate at their next session, and subject to their ultimate decision. I have no doubt that it is my right and duty to make these appointments." Adams Letter to his secretary of war, James McHenry, 1799." Adams believed that it is his duty to perform these appointments. If he cannot

accomplish these "duties" than whoever is preventing him from doing these duties should be held responsible and the methods they are using should be deemed unconstitutional. That is why the President should be allowed to fill vacancies during intrasession recesses of Congress, because otherwise, Congress can stall him from making any appointments almost indefinitely. The times have since changed. It's time for the Executive branch to be on par with the Legislative branch in this instance. The strength and success of our Government lies with our checks and balances system. We, as Americans have for many generations, have put all our faith into this system praying that it works and continues to serve it. The moment that one branch is allowed significant power over another one when they used to have the same power on this topic, is the moment that our checks and balances system fails.

The NLRB needed those appointments by President Obama in order to make rulings. If nobody is appointed because of the Legislatures blockage of this from happening, than the NLRB is pretty much useless, as the debate is saying now that without at least three members on the NLRB, they cannot possibly make a good decision, and the decision they made with two members is void. The D.C. district court ruled that there cannot be intrasession recess appointments, even though this has been practiced before, and that they can only fill vacancies that come up DURING the recess, and not during the prior session. So what this means is that if someone becomes vacant during a session of Congress, and the Congress wants to stall the appointments until the end of Obama's presidency, than that vacant position will remain vacant for this whole time. That is ridiculous and completely usurps the power of the Executive branch on this topic, and prevents the branch from governing the people.

The President is in a sticky situation when vacancies arise and he is unable to fill those vacancies because of the Legislatures doing. That is why there has to be a change made. The President should be allowed to make appointments during intrasession recesses because that is the best chance he will get in todays world, where the practice of filibustering and pro-forma sessions are so commonplace. If he cannot do this, than the balance of power domino effect has already begun. If he is not allowed to fill vacancies that arose during the session of Congress, than many important things, like decisions that are huge, won't be able to be completed. The Senate is currently allowed to use the pro-forma sessions whenever they can get the house to not allow them to convene for a recess. This is upsetting the balance, and therefore unconstitutional as it undermines the President's powers in the appointment process, thus giving the upper hand to Congress. Therefore, since Congress is allowed to use pro-forma sessions to block the President's power, than the President should be allowed

to make appointments during intrasession recesses, and the United States Court of Appeals for the D.C. Circuit's decision in NLRB v. Noel Canning should be reversed to ensure that the President has the power given to him by the Constitution and so that he can govern his country to full effectiveness.

© 2021 The Harlan Institute. All rights reserved.