Petitioner's Brief Del Valle High School NLRB

Del Valle/ Petitioner Brief

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Table of Cited Authorities

Noel Canning v. NLRB
U.S. Constitution (Art II, § 2, Clause 3)
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Evans v. Stephens
National Labor Relations Act (NLRA)
Bloomberg Law

Statement of Argument

The National Labor Relations Board was correct in ruling that Noel Canning's collective bargaining agreement was binding and thus had to be signed. The United States Court of Appeals for the District of Columbia erred not only in its decision to overturn the ruling by the NLRB but also in its decision to grant the appeal against it. The heinous decision by the lower court is a direct discount of the system of checks and balances and thus upsets the system of separation of powers. Under Art II, § 2, Clause 3 of the United States Constitution, "The President shall have Power to fill up all Vacancies that may happen during Recess of the Senate, by granting Commissions which shall expire at the End of their next session." Therefore, the decision was an abridgement of President Obama's constitutionally guaranteed rights, and was in fact an illegal influx of power to Congress, specifically the Senate.

As a result of the lower court's error, the following points must be addressed:

(1) Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate.

(2) Whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess.

(3) Whether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro forma sessions.
This case is one of established legal precedent and must be evaluated based on that fact. We ask that the decision of the lower court be overturned and thus the separation of powers be reinstated. Further, we ask that the system of checks and balances is upheld by affirming President Obama's constitutionally guaranteed rights.

Argument

The clearest application of Article II, Section 2, Clause 3 of the United States Constitution is that it grants the president the ability to fill vacancies in Congress during recesses. This ability guaranteed by the Constitution to the president by definition also grants him an ulterior ability: discernment over what a recess is in Congress. This power is checked by the fact that the president's appointee is only valid until Congress's next session. Therefore, if Congress were to only go in recess for a week, and was subject to recess appointments, then those appointments would only be valid for that week. If Congress had the power to define what a recess is, it would vary the definition based upon its bias current bias. For example, if the majority of Congress is Democrat and the President is Republican, said president's appointees are usually blocked and thus the President's power is mitigated. Such power imbalance has happened many times before in the history of the U.S., most recently with Obama's appointees.

Specifically, as Bloomberg Law put it, "Obama faced a late 2011 administrative crisis involving two federal agencies. Obama had nominated labor attorney Craig Becker to the NLRB on July 9, 2009. When Senate Republicans filibustered Becker's confirmation vote, Obama gave him a recess appointment to the Board over eight months later, on March 28, 2010. He resubmitted the nomination on Jan. 26, 2011, but the Republicans persisted in their filibuster. Republicans also prevented a vote on a second January, 2011 nominee, Terrence F. Flynn." Clearly, the Senate legally abuses its power against the President. Nevertheless, these kinds of tyranny by Congress, and recess appointments, have been used since the dawn of the U.S. government.

Our first President, George Washington, appointed a South Carolinian judge as Chief Justice of the Supreme Court. According to the Congressional Reseach Service, "President Ronald Reaganmade 240 recess appointments, President George H.W. Bushmade 77 recess appointments, President Bill Clintonmade 139 recess appointments. President George W. Bush made 171 recess appointments, and as of January 5, 2012, President Barack Obama had made 32 recess appointments." Further, according to Henry B. Hogue, a member of the Government and Finance Division of the Congressional Research Service, "Recent Presidents have made both intersession (between sessions or Congresses) and intrasession

(during a recess within a session) recess appointments. Intrasession recess appointments were unusual, however, prior to the 1940s." Therefore, regardless of the definition accepted for "recess," intrasession recess appointments have been fully adopted by the U.S. and are constitutionally valid. Evans v. Stephens upheld this conclusion as it found that intrasession recess appointments are permissible under the constitution pending they happened prior to, as opposed to during, a congressional service. Undoubtedly, President Obama appointed his nominees prior to the pro forma sessions, but was filibustered out. Under Evans v. Stephens, he had legal authority to not only select appointees, but to have them authorized by Congress.

New Process Steel v. NLRB reaffirmed the NLRBA in saying that the board must maintain at least three members in order to exercise its delegated authority. It is circular logic by the Respondent to say that the NLRB's ruling was invalid based on that principle. Why? The president did his constitutional duty and appointed members that Congress ignorantly did not accept. Regardless as to the reason why they did not accept, it does not exclude the fact that President Obama literally did all he which he was legally required to do. The president is suppose to appoint during recesses and he did just exactly that. Now the Respondent is trying to say that the NLRB's decision was wrong because it didn't have the required number of members. Next, they blame President Obama for this alleged miscue. However, they fell to realize that Congress is in fact at fault for not appointing the previously nominated members for the original case of Noel Canning v. NLRB. Essentially they blame President Obama for Congress's negligence. If a defense of the definition of "recess" is the basis for the blame, then the past intrasession appointments of previous presidents would have to be withdrawn, which would undermine a preponderance of legal precedent and U.S. history.

Clinton v. City of New York addressed a case in which there was another imbalance of governmental power. Justice Kennedy wrote in his concurring opinion that, "The Constitution's structure requires a stability which transcends the convenience of the moment." This means that the framers, while not aware of the problems that would arise in the future new that the Constitution could still be interpreted for that time.

Contemporarily, the Recess Appointments clause of the Constitution must be interpreted with the modern need of checks and balances. The decision to discredit the president's power only limits the constitution's power as a whole. When one branch of the constitution is made null and void, essentially the entire document is rendered futile. Thus, the decision by the lower court in and of itself is unconstitutional. This overturns the Respondent's argument that the president's decision was somehow unconstitutional. Moreover, the lower court found that there was indeed legal standing in the president's/NLRB's decision. Their ruling to vote against a ruling with legal standing is an act of malfeasance. The only constitutionally proper decision that this court should find is to grant President Obama his constitutional power, thereby reinstating the system of checks and balances our government

requires. The power the Senate receives from the lower court's decision is unnecessary and unreasonable. Further, it allows the Senate to make up the rules of the constitution, something no branch has the power to do. Instead of Congress shifting the blame, it should take responsibility for its actions. If it won't, this court has the power to make it do so.
Formally addressing the three points of legal error:
(1) Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate.
This point is undeniable in the fact that there is no clear cut definition of "recess," but the president has the power to define it. This has been the case for decades. Pro forma sessions are nothing more than an excuse for a recess. Congress cannot be allowed to bend the rules and then say that the president did. That's circular logic and a disruption of the Constitution, separation of powers, and checks and balances. A legal injury such as this clearly dictates that the Senate must be held accountable for its actions and subsequently President Obama must be constitutionally compensated. All things considered, intrasession recess appointments are valid under the constitution and have been previously accepted by Congress. Thus, even if this court where to find that the pro forma sessions denoted that Congress was still in session, President Obama would still have to be allowed to utilize his constitutionally ordained right to appoint.

(2) Whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess.

Evans v. Stephens justifies an exercise of recess appointment power prior to a recess. Moreover, the Respondent's position is inherently flawed. If Congress is allowed that power which is constitutionally guaranteed to the president, then it could practically never have a recess or it would always be in power. If they are allowed to set the parameters, rather than the Constitution, it is guaranteed there will be more NLRB cases that go against the NLRBA because the Senate would again play their constitutionally improper card of pro forma sessions, halting the NLRB's progression. Technically, many NLRB cases would then not be able to be solved or addressed. Not to mention, an affirmation of Congress's actions would set a precedent that not only undermines our government's key tenants (such as separation of powers, checks and balances, and the Constitution), but would induce a complete overhaul of the executive and legislative branches "advice and consent" relationship. This policy is the cornerstone of their co-existence and therefore must be preserved. Specifically, the executive branch is allowed to make decisions based upon prior approval by the legislative branch. Therefore, sense congress has allowed many recess appointments in the past (even during pro forma sessions) and the rulings in Evans v. Stephens, Clinton v. City of New York, (etcetera) have been found constitutional: President

Obama's actions throughout this entire process were completely legally feasible and must be respected by Congress, lest our great nation contradict its fundamental governmental attributes.

(3) Whether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro forma sessions.

Merriam–Webster defines "recess" as "a usually brief period of time during which regular activity in a court of law or in a government stops." There is no argument that congressional activity wasn't halted or stopped. The record clearly states that these pro forma sessions were phone calls that did not exceed duration of five minutes. Under Congress's definition of "recess," a ten second communication would still warrant activity. Frankly, that's absurd. Not only is it impossible for Congress to maintain activity in their feeble duration, it contradicts the founding father's wishes for the executive power to fill Congress's vacancies in matters such as this. Cross apply the fact there isn't anything in the record that proves Congress conducted business in these "sessions." Logically, since business could not be conducted as these sessions, and since there is no argument that they were indeed breaks, Congress was by definition in recess. The president must be able to act under his constitutional authority and discern what a 'recess" is for the purpose of that time. The constitution, while not obviously stating it, clearly gives the president that underlying power. This power is one of divine legal standing and must be preserved for generations to come. Congress cannot be allowed to do the bare minimum and not suffer the consequences. To do so would invoke a constitutional injury. Furthermore, these sessions are undoubtedly Congress's way of not only trying to sneak around the constitution, but the limitation the House has set upon it as well (the House considers an absence of more than three days a recess). Nonetheless, stalling, which pro forma sessions are in every sense of the word, do not fulfill any congressional activity and only manage to undermine the President, House, Constitution, system of checks and balances and separation of powers.

Conclusion

The facts of this case are very clear and easy to follow. Congress made a mistake and is legally required to accept the consequences. We ask that this court uphold not only the recess appointments clause of the Constitution, but the wishes of the Founding Fathers as well. While the Founding Fathers couldn't predict that pro forma sessions would be a thing of today, they wouldn't want them to be a deterrent against following the Constitution. The only legal, fair, and moral thing to do in this case is to uphold the original ruling of the NLRB, the ruling of the District Court of Columbia in saying that there was legal standing by the NLRB, and the system of checks and balances. The separation of powers envisioned

by our Founding fathers would certainly be destroyed if Congress is warranted with this kind of command over the Constitution. For these reasons please overturn the decision of the lower court and affirm that President Obama's actions were indeed constitutional.
