Del Valle High School Petitioner's Brief

Petitioner Brief Del Valle High School
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Table of Cited Authorities
6 Jan. 2012, Office of Legal Counsel Memorandum
11th Circuit Court of Appeals Evans v. Stephens , 2004
14th Amendment
CNN News
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New Process Steel v NRLB 2010
The Federalist Number 67 Alexander Hamilton
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Statement of Argument:
The petitioner will argue that it's the President's ability to perform his constitutionally granted abilities; the role of the Senate is their ability to advise and consent; the ability of the President to meet Supreme Court required minimum numbers of the NLRB; the Founding Fathers original intent of Separation of Powers; as well as the very concept of Checks and Balances of all the three branches of government are at stake here. It is vital therefore for this Court to overturn the lower court's ruling for the following eight specified reasons.

Argument:
First, Constitutional Powers of the President must be upheld for this President and all future people who hold that office. Constitution Article II, Section 2, Clause 3 which allows the President at his discretion to exercise his recess appointment power, the President's power here is to check on a Senate who is not doing their job. This is a matter of the U.S. Constitution not a matter for the court. After all it is a matter of pure politics- plain and simple and a case of double standard. The Senate can't claim their checks and balance on the President with their advice and consent argument without recognizing that the President can use his check against a Senate that refuses action by his check – recess appointments. The beautiful thing about checks and balances is that it works in both directions not just one.
Article II, Section 2, Clause 3 grants the exclusive authority to the President to make recess

appointments. . The Constitution recognizes that only the Executive has the institutional competence to know when such discretionary appointment action is required to meet his Article II, Section 3 obligation: "[H]e shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States."

Second, there is the matter of the Supreme Court ruling in National Steel v NLRB 2010. In this ruling the Court said that there needed to be a minimum of three people on the NLRB Board. All President Obama was trying to do was his job. He turned names into the Senate to be confirmed. The Senate drug their feet via filibusters and pro forma sessions. The Executive Department must be in charge of executing the laws passed by Congress (NLRB ACT) and the rulings handed by the Court (National Steel v NLRB 2010) .

Third, what was the Founding Fathers' intent for the Constitution? At this point this can become confusing, the respondent is arguing that you if you don't like a ruling from a duly established NLRB Board, you can go to court and not grieve the fairness of the ruling but the try to get out of the ruling simply by offering a red herring argument. Do you think the Founding Fathers would have fallen for this? For this to be the case then this creates a slippery slope to have everyone sue in any matter that they want until they get the entire Constitution ether overturned or thrown out as Unconstitutional. Sounds farfetched-exactly what we say, yet it is exactly what happened in this case and who is to stay if allowed to stand this ruling wouldn't generate many more cases just like this one. This was not what the Founding Fathers envisioned for our country or our Constitution. The clause in question here clearly grants the President both the responsibility to determine the Senate's unavailability as well as the discretion to sign temporary commissions. Alexander Hamilton explained about this in the Federalist Paper, " Clause 3 is intended to authorize the President singly to make temporary appointments." **The Federalists No. 67, 455 (Alexander Hamilton).** Hamilton later went on to explain that the design of the appointments process in these terms: "[O]ne man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment." Clearly from this we can see that the Senate had several years to make appointments and this was enough time to consent if they wanted to do so.

Fourth, in the Constitution it specific lays out different powers , checks and balances. One of the greatest checks the Senate has over the Executive branch is that ability to offer their advise and consent on Presidential appointments. However in the past several years this has become more of political battle than a battle over advice or consent. Here, the respondent calling for President of the United States not to have his Constitutionally guaranteed power under Article II, Section 2, Clause 3 at the same time stating their Constitutional

grounds of the power of consent has created a logical fallacy of cherry picking of facts. It was the Senate who chose to use the super majority under their own rules (rules that should be noted have been recently changed) that has caused the Senate not to live up to their Constitutional duties of consent. It was the rules of the Senate, not the Constitution, that allows the Senate to quote "Stay in Session" with only one or just a few Senators calling the session in order only to close it down minutes later. The only reason to do this is to delay consent even longer and to actually not allow the President to exercise his Constitutional Rights of his office. It was Congress passed laws that require certain agencies to be staffed and certain regulatory agencies to be up and running on an ongoing basis. Congress did their duty when they passed the law, now it is up to the President to do his duty and enforce the provisions of the law. This essentially is a struggle over power. This strategy was first designed by the Democrats who gained control of the Senate in 2007, they began a practice of conducting so-called "pro forma sessions" during those recesses that occur within sessions of Congress. These pro forma sessions typically last only a couple of minutes, if that, during which the only business conducted, often by a single senator, is simply a call to order and adjournment until the next pro forma session. Senate Majority Leader Harry Reid (D-Nev.), now a supporter of the contested Obama appointments, originally took the position that such pro forma sessions converted otherwise lengthy recess into shorter adjournments, each of which would be too brief to trigger the president's recess appointments power. Although apparently advised by the Justice Department that his recess appointments power remained intact President George W. Bush declined to challenge the Reid strategy. Between Dec. 17, 2011 and Jan. 23, 2012, the Senate again met only during ten pro forma sessions—but this time, not at the Democrats' behest. Article I, Section 5 of the Constitution provides that "[n]either House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days ... ." The evident purpose of this clause is to enable each House to keep the other in town in order to assure that business between them may be conducted. House Republicans used this clause to deny the Senate permission to adjourn for more than three days between the end of the first and the start of the second session of the 112th Congress. The intent, once again, was to block presidential recess appointments. Against this contentious partisan political background, the President faced a late 2011 administrative crisis involving two federal agencies. The Executive Branch had nominated labor attorney Craig Becker to the NLRB on July 9, 2009. When Senate Republicans filibustered Becker's confirmation vote, the President 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. As a result of these filibusters in the Senate, the NLRB was facing a calamity brought on by the Supreme Court's 2010 decision in a case called New Process Steel v. NLRB. In this ruling the Court said that the National Labor Relations Act

required three lawfully participating members to be in place in order for the NLRB to act. The expiration of the 2010 Becker recess appointment threatened to reduce the Board's membership to two. Thus, on Dec. 14, 2011, the President withdrew the Becker nomination and forwarded to the Senate nominations for Sharon Block and Richard F. Griffin Jr. When the Senate predictably did not act on these nominations by the end of the first session of the 112th Congress, the President granted recess appointments to Block and Griffin—and to Terrence F. Flynn—on Jan. 4, 2012. Throughout this process, it has been the Senate who has refused to their job of consent. On multiple occasions, the Senate in neglecting their duties have put laws that they actually passed in jeopardy. Now they are even putting rulings from this Court in jeopardy also.

Fifth, The U.S. Senate has changed their very rules that caused this problem and not longer require a super majority to offer consent. The Senate changed their rules to making consent a 51 vote – or simple majority instead of a 60 vote or super majority. This simple change of rules actually proves that folly of their position in this case. They have admitted that their rules were not workable and their position was not Constitutional. Senator Harry Reid of Nevada, the Senate Majority Leader told CNN on Dec. 13, 2013, "It is hard to imagine a more pointless exercise than spending an entire day waiting for a vote whose outcome we already know," Reid said about the Pillard nomination. "But Republicans insist on wasting time simply for the sake of wasting time. It's no wonder Americans overwhelmingly support the changes Democrats made to the rules last month in order to make the Senate work again." These are the words of the Senate Majority Leader, It's no wonder Americans overwhelmingly support the changes Democrats made to the rules last month in order to make the Senate work again.

Sixth, it is virtually impossible now since the Senate has admitted it was working previously that they are the injured party in this law suit. The Senate had plenty of time to advise the President on each and every one of these appointees. The respondent's argument creates a cause and effect logical fallacy. The Senate is trying to say that they didn't get a change to offer their consent to person that the President appointed. However, who is to blame for this? You can't blame the President for the Senate's inactivity. Now the respondents are trying to defend this inaction and trying to justified it by questioning the President's ability to appoint recess appointments. Logically, how can you have a respondent who was actually responsible for the dragging their feet on appointments then try to argue that by dragging their feet they did not time for consent? This is not logical and their own argument falls apart within their main argument against the petitioner. You can't have it both ways. You had time to consent.

Seventh, this entire case is nothing more than judicial overreach. A panel of three judges found that President Obama's recess appointments were not valid and to make matters worse the only recess appointments the President could make would be appointments that

came about during the recess itself. The Presidents have consistently asserted authority to make intrasession appointments since 1921. As noted earlier, intrasession recess appointments have been as common since the first Reagan administration as intersession appointments. The Eleventh Circuit upheld their legality in Evans v. Stephens , 2004. In making his January, 2012 appointments, the President 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 cannot receive communications from the president or participate as a body in making appointments. This would have included the time in questioned in this case. OLC observed in its 2012 opinion that the Senate's 2011 and 2012 pro forma sessions were conducted pursuant to a unanimous consent resolution that had provided there would be "no business conducted" during those sessions. As viewed, therefore, by Obama, the pro forma sessions left unchanged the reality that the Senate was unavailable from Jan. 3 to Jan. 23, 2012 to act on nominations. The pro forma sessions left the "recess" intact.

Eighth, without the idea of checks and balances our government would have failed. The Constitution attempted to limit the power of central government through intricate checks and balances. A key principle was separation of powers: those who make laws, enforce laws, and interpret laws should be substantially independent and capable of limiting each other's power. The two houses of Congress provide a check on each other. The President can veto legislation, but he can be overruled by a two-thirds majority in both houses. The judiciary can strike down laws considered unconstitutional. Proposed amendments become part of the Constitution when approved by two-thirds of Congress and by legislatures in three-quarters of the states. In this case- the lower court's ruling needs to be overturned because it allows the legislative to actually take away the check that Executive Office has over them when they are not diligent on the job and this was done through a Constitutional amendment or the consent of the people but through a panel of three lower court judges. Bring back the Constitution, right the ship, and straighten our course to destiny with our Constitution once again in tack. Overturn the lower court's ruling on this case.

Conclusion

In conclusion the Court should support the petitioner's argument eight reasons we clearly laid out today. However , you might not believe us when we told these so we are going to conclude with the words of the Senate Majority Leader Harry Reid of Nevada, "But

Republicans insist on wasting time simply for the sake of wasting time. It's no wonder Americans overwhelmingly support the changes Democrats made to the rules last month in order to make the Senate work again." The Senate knew that the system was broke when President Obama did the only Constitutionally available thing for him to do- a recess appointment. The Senate could or wouldn't change their old rules to actually do their job. You can't blame the President for doing his job and cross apply that the U.S. Senate in November of 2013 did their job by changing the rules so consent would be the 51 vote threshold eliminating a great deal of the problems that caused this entire case in the first place. Do not bring back more Constitutional gridlock and allow this lower case ruling to stand. The future of our nation and our government are in your hands.
