Petitioner's Brief Del Valle High School Riana Rendon

Petitioner's Brief Del Valle High School
Riana Rendon and Brian Munoz

Table of Cited Authorities

6 Jan. 2012, Office of Legal Counsel Memorandum
11th Circuit Court of Appeals Evans v. Stephens , 2004
14th Amendment
New Process Steel v. NRLB 2010
The Federalist Number 67 Alexander Hamilton
United States Constitution

Statement of Argument:

The United States Court of Appeals for the District of Columbia Circuit has 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 , denying the President their constitutional right under Art II, § 2, Clause 3. to make appointments to fill vacancies while the Senate is in recess. By doing the U.S. Court of Appeals for the District of Columbia Circuit Court failed to provide the Office of Presidency:

(1) The ability to have the President's recess-appointment power exercised during a recess of the Senate, and /or limiting it to recesses that occur between enumerated sessions of the Senate

(2) Limited 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) Limited the President's recess-appointment power so that it may be only exercised when the Senate is convening every three days in pro forma sessions.

The District of Columbia Court of Appeals egregiously erred by defining the word "Recess" in an overly strict and narrow frame. This actually goes against the U.S. Constitution and rips at the very threads of society that the President is trying to preserve. We argue that decision was politically motivated and as such is not subject to such one handed strict scrutiny.

Argument

We are asking on the behalf of the petitioners to overturn the District of Columbia Court of Appeals decision. We present the rationale to do so to be clear and concise application of

the Constitution Article II, Section 2, Clause 3 which allows the President at his discretion exercise his recess appointment powers. This is a matter of the U.S. Constitution not a matter for the court. After all it is matter of pure politics- plain and simple and a case of double standard.
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."

This then 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)**

The respondent is calling for President of the United States not to have his Constitutionally guaranteed power under Article II, Section 2, Clause 3 while also stating their Constitutional grounds of the power of consent has created a logical fallacy of cherry picking of facts. First, 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. Second, 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. 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 is what President Barrack Obama did in this case.

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 justify it by questioning the President's ability to appoint recess appointments. Logically, how can you have a respondent who is responsible for the dragging their feet on appointments then try to argue that by dragging their feet they did not have time for consent? This is not logical and their own argument falls apart within their main argument

against the petitioner.

This essentially is a struggle over power. When the Democrats 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 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 met 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.

Because of 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 has put laws that they actually passed in jeopardy. Now they are even putting rulings from this Court in jeopardy also.

The argument the respondent gives why the President cannot do his constitutionally guaranteed right is because the President does not have that power while they are in session. However, prolonging Congressional sessions through trickery or implementation of Senate rules does not trump the Constitution. Article 1 Section 5, Clause 2 states, "Each House may determine the Rules of its Proceedings..." This allows the Senate to make their rules but you can't make rules that take away powers from the Executive Branch by simply passing a law. This would require a Constitutional Amendment- since none has ever been adopted concerning this matter; the President's power to appoint clearly outweighs the Senate's attempt to create a rule to take away that ability. If the Courts allowed this to stand, then the entire basis of our Federal Government with its shared powers and check and balances would be totally stripped down. Effectively, this ruling is unconstitutional and it must be overturned.

To further this argument and to add how this actually goes against the 14th amendment- equal protection under the law; without approving people in a timely manner, the Senate actually complains about them. The respondent, Noel Canning, is Pepsi Cola bottling firm in Yakima, Washington. They sued in DC Court to overturn a NLRB order finding that management had refused to enter into a collective bargaining with the Teamsters Union. 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 to 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 been the exact time in question 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.

Conclusion

In conclusion the Court should support the petitioner's argument for four reasons. First the Constitution intends that the President to take the leading role in staffing the executive branch. Urging New Yorkers to ratify the Constitution, Alexander Hamilton explained 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."

Second, the Senate was given a role in the appointments process not to impede on the President's policy agenda, but as a check on potential corruption: "[The Senate] would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." However, protecting the Senate's confirmation role at the expense of the President's appointments responsibility turns the constitutional design on its head and clearly goes against the Founding Fathers expressed wishes.

Third, if the President's position is rejected, then presidents—who are constitutionally charged to "take Care that the Laws be faithfully executed" could be stymied permanently in the execution of their administrative responsibilities by a Senate minority determined to block appointments. Executive administration could even be blocked by a House of Representatives intent, as was the 2011 House, on disabling a Senate majority from adjourning. Because there is no plausible argument to be made that the House is intended to have a role in the appointments process, this perverse result is a powerful argument that "recesses" do not change their constitutional character because of pro forma sessions or, alternatively, that three-day breaks count as constitutional "recesses" because no business transpires.

Fourth, we have shown that there is consistent and concise evidence that the Founding Generation understood a legislative "recess" to be a break that could occur either within or

between legislative sessions. There is likewise evidence that 18th century readers would have understood the word "happen" to mean "happen to exist." A straightforward reading of the President's power "to fill up all vacancies that may happen during the recess of the Senate" would validate his authority "to fill up, during a period of adjournment either within or between sessions of the Senate, all vacancies that may happen to exist during that period of adjournment." This is plainly the most practical reading of the Recess Appointments Clause, and the D.C. Circuit opinion rejecting it has the feel of semantic cherry-picking. Generally, you can not only follow the laws you would like and not follow the others but here specifically, the respondent is calling for the only the respondent to follow the Constitution and not allow the President to do their job or exercise their Constitutional Duties as prescribed in New Process Steel v. NLRB 2010 when the Court called for at least three people to sit on the NLRB Board. The Court must overturn the lower court ruling and find for the petitioner.
