Petitioner's Brief Del Valle High School Danielle

Legal Briefs For the Petitioner Del Valle High School
Danielle Thompson and Joaquin Cruz Sanchez

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 failed to maintain the system of checks and balance system that is utilized in the federal government by underestimating the authority of the executive branch and therefore, denying the President his constitutional rights under Art II, § 2, Clause 3. to make appointments to fill vacancies while the Senate is in recess. By doing so 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 made a grave mistake by defining the word "Recess" into a distinct narrow frame. This actually is 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, § 2, Clause 3 which allows the President at his discretion exercise his recesses appointment powers. This is matter of the U.S. Constitution not a matter for the court. It is up to the Constitution which has been set in stone to dictate this decision. It can be concluded that all this is only a matter of pure politcs-plain and simple and a case of double standard.

Article II, § 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 this Article II, § 3 obligation: "[H]e shall take Care of the Laws be faithfully executed, and shall Commission all the Officers of the United States." In other words, it is the President's job 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. Why, even Alexander Hamilton knew of this rule and it fits perfectly today in this case. The Federalist No. 67, 455 (Alexander Hamilton)

The respondent calling for the President of the United States not have his Constitutionally guaranteed power under Article II, § 2, Clause 3 at the same time stating their Constitutional grounds of the power of consent has created a logical fallacy of cherry picking facts. First, it was the Senate who chose to use the super majority under their own rules 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 was doing 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 chance 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. Here's an analogy for a thought; like a group of friends told by their parents to meet up and pick a movie. The friends fail to meet up and thus the parents pick

the movie to see. The friends complain about the choice of movie and say it wasn't fair for the parents to decide as it was their decision. The parents tell them that because they did not meet up and make a decision, they had to choose. The same can be applied to the Senate (group of friends) and the President (the parents). 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 is responsible for dragging their feet on appointments then 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 apparently advised by the Justice Department that 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, § 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 of 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 9th, 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. 26th, 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. 14th, 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 4th, 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.

The argument the respondent gives why the President can not 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, § 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 themselves, something to be seen as hypocritical. 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 judged found out 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 to make intrasession appointments since 1921. As

noted earlier, intrasession recess appointments have been as common since the first Reagan administration as intrasession appointments. The Eleventh Circuit upheld their legality in Evans v. Stephens, 2004. In making his January, 2012 appointments, the President acted under the Justice Department advice memorialized in a Jan, 6th, 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. Daughtery 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 duty of attendance; when its Chamber is empty; while, because of its absence, it can not 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. 3rd to Jan 23rd, 2012 to act on nominations. The pro forma sessions left the "recess" intact.

Conclusion

In conclusion the Court should support the petitomer'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 tje 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," words of the wise, not to be taken lightly. Once again, it is like Alexander Hamilton knew something like this case would happen.

Second, the Senate was given a role in the appointments process not to impede the President's policy agenda, bust 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 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 the the laws be faithfully executed" could be permanently in the execution of their 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 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, one can not only follow the laws one 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 his job or exercise his Constitutional Duties as prescribed in the 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.
