Del Valle Respondent Brief Angel

Respondent Brief Del Valle High School Angel Montoya and Felipe Abonza

Cited Table Of Authorities

Argument Summary

We the respondent's totally concur with the lower court rulings and would like to submit that when interpreting the text of the Constitution, we conclude that every word in the Constitution has independent meaning, "that no word was unnecessarily used, or needlessly added." **Wright v. United States, 302 U.S. 583, 588 (1938)**. Moreover, we must bear in mind in our evaluation of the constitutional provisions at issue that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."

In **New Process Steel,** the Supreme Court held that § 3(b)'s three-member-composition requirement mandated that a delegate group maintain a membership of three in order to exercise the delegated authority of the Board.

130 S. Ct. at 2639-42. Such a requirement is a threshold limitation on the scope of the Board's delegated power under the NLRA, and, therefore, underlying aspect of the case before the court today is if in fact or indeed the following three points of law were abided by.

(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 several 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.
To establish our case we present six vital reasons to support the lower court's ruling on this case.

Argument

First, the Appointments Clause of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the [S]upreme Court, and all other Officers of the United States . . . ." U.S. Constitution. Article. II, § 2, cl.2.15 The shared responsibility between the President and the Senate was created to act as a "check upon a spirit of favoritism in the President," and to prevent the appointment of "unfit characters." The Federalist No. 76, at 392 (Alexander Hamilton) (Carey and McClellan ed., 1990). The Recess Appointments Clause was created to supplement the Appointments Clause. The Federalist No. 67, at 350 (Alexander Hamilton). The clause states that the President "shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Constitution. Article. II, § 2, cl.3. Clearly from this we can conclude that Recess appointment were only as good as the length of the recess at best and were never meant to take a full time position without advise and consent of the Senate.
Second, The Recess Appointments Clause has two important features relevant here. First, it was designed to ensure that the government would remain in operation during times when the Senate would be unable to advise and consent

to a nomination. Id. at 2062-63. When the Constitution was written, intersession recesses regularly lasted between six and nine months. Like many other things since then, this is no longer the same. Consequently, in the absence of a recess appointments provision, there was a genuine possibility that an important government position, for example, a cabinet post, would remain vacant for a long period of time. Again this is not the case now, because recalling the Senate, U.S. Constitution Article. II, § 3, was not an easy task considering the slow transportation of the late 1700s. Second, and more importantly, the Recess Appointments Clause was designed to prevent the President from unilaterally exercising appointment power, thereby preserving the separation of the powers between the Legislative and Executive Branches, which is what makes American government what it is today. **Freytag v. C.I.R., 501 U.S. 868, 884 (U.S. 1991)** The Framers understood, however, that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people. Appointments Clause "bespeaks a principle of limitation by dividing the power to appoint the principal federal officers—ambassadors, ministers, heads of departments, and judges—between the Executive and Legislative Branches. It is the way the framers of the Constitution had to make sure all aspects of the government and actually worked together in a shared balance of power.
Third, there was no debate surrounding the inclusion of the Recess Appointments Clause into the Constitution, and the clause was included in the Constitution without a single dissenting vote. Moreover, it is clearly established that the phrase "End of [the Senate's] next Session," U.S. Constitution. Article. II, § 2, cl.3, means "the end of the session following the final adjournment of the current session of Congress. Thus, an appointment made during the first session of a particular Congress will not expire until the end of the second session of that Congress. Under the Adjournments Clause, "neither [chamber], during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days." U.S. Constitution Article. I, § 5, cl.4.16 An adjournment of more than three days by one chamber of Congress thus requires the consent of the other chamber. Such an adjournment usually is accomplished through the passage of concurrent resolutions permitting such adjournment. Clearly using the Constitutional definition, the Senate was not adjourned pursuant to the Adjournments Clause when the President made the three 2012 recess appointments to the Board.

Fourth, the implied argument is that the appointments were necessary due to the fact that there were not enough people on the Board. In all reality this is clearly a

logical fallacy- it is a justification to break the law. You don't have enough people on the board and you are tired of doing it the right way to you decide to circumvent the process and do it yourself. The problem with this to fix the law you break the law and you end up not fixing it all but only make it much worse. The Take Care Clause requires the President to "take Care that the Laws be faithfully executed." U.S. Constitution Article. II, § 3. This clause's application here is subtle. On the one hand, it may be said that the Take Care Clause requires the President to ensure that the laws of the United States, such as the NLRA, be faithfully executed and that the use of pro forma sessions prevents such execution. On the other hand, it may be said that the use of pro forma sessions ensures that the President will seek the advice and consent of the Senate in exercising his appointment power. You can't claim something that doesn't exist to get your way. This is clearly what the petitioners have done to circumvent the Constitution. In **Noel Canning,** the D.C. Circuit held that the President's three January 4, 2012 appointments to the Board were invalid under the Recess Appointments Clause. **705 F.3d at 499-51**4. In its decision, the court first tackled the meaning of the term "the Recess" as used in the Recess Appointments Clause. The court concluded that the term "the Recess" refers to the intersession break of the Senate, that is, the period between sessions of the Senate when the Senate is by definition not in session, therefore unavailable to receive and act upon nominations from the President. The court relied on several key points to support its conclusion.

First, the court in Noel Canning emphasized that the use of the definite article 'the' suggested "specificity." According to the court, as a "matter of cold, unadorned logic, it makes no sense to adopt the Board's proposition that when the Framers said 'the Recess,' what they really meant was 'a recess.'" In support of its definite/indefinite article distinction, the court in Noel Canning observed that on six occasions the Constitution uses some form of the verb "adjourn" or the noun "adjournment" to refer to breaks in the proceedings of one or both houses of Congress, and in each case, an indefinite article is used. In contrast, the two uses of "Recess" (once in the Recess Appointments Clause and the other in the original Senate Vacancies Clause, U.S. Constitution Article. I, § 3, cl.2, superseded by id. Amend. XVII) contain a definite article ("the"). According to the court, this "points to the inescapable conclusion that the Framers intended something specific by the term "'the Recess,' and that it was something different than a generic break in proceedings." Second, the Noel Canning court looked to the structure of the Recess Appointments Clause. The court noted that the clause "sets a time limit on recess appointments by providing that those commissions shall expire 'at the End of their [the Senate's] next Session.'" The

court observed that the structure of the clause was such that there was a difference between the term "'the Recess'" and the term "'Session.'" Accordingly, "[e]ither the Senate is in session, or it is in the recess. If it has broken for three days within an ongoing session, it is not in 'the Recess.'" Third, the Noel Canning court observed that its interpretations of the terms "the Recess" and "Session" was supported by constitutional history. The court cited to The Federalist No. 67, where Alexander Hamilton noted that recess appointments would expire at the end of the ensuing session of Congress. Id. For there to be an ensuing session, the court stated, recess appointments must be "made at a time when the Senate was not in session—that is, when it was in 'the Recess.'" Fourth, the Noel Canning court noted that historical practice supported its interpretation of the term "the Recess." The court observed that there were no intrasession recess appointments for the first eighty years following the Constitution's ratification, id. at 501, and there were only three documented intrasession recess appointments prior to 1947. Id. at 502. According to the court, the "infrequency of intrasession recess appointments during the first 150 years of the Republic suggests an assumed absence of the power to make such appointments." Fifth, the Noel Canning court indicated that the Constitution's overall appointments structure provided additional support for its position. According to the court, the Framers emphasized that the "recess appointment power served only as a stopgap for times when the Senate was unable to provide advice and consent." The court quoted from Hamilton's The Federalist No. 67, where Hamilton observed that advice and consent "'declares the general mode of appointing officers of the United States,' while the Recess Appointments Clause serves as 'nothing more than a supplement to the other for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate.' Such a structure was important to the Framers, the court observed, because appointments made pursuant to the advice and consent of the Senate under the Appointments Clause served to prevent Presidential favoritism and the appointment of the unqualified. Sixth, the court in Noel Canning observed that there was no other plausible interpretation of the term "the Recess." The term could not refer to all breaks, otherwise the President could make an appointment during a Senate lunch break. Id. The court also noted that this interpretation could not "explain the use of the definite article 'the,' the singular 'Recess' in the Clause, or why the Framers used 'adjournment' differently from 'Recess.'" The next interpretation addressed by the Noel Canning court was that the term "the Recess" refers to some substantial passage of time. This interpretation was adopted by Attorney General Harry Daugherty in 1921. In an opinion, Attorney General Daugherty argued that "[t]o give the

> word 'recess' a technical and not a practical construction, is to disregard substance for form." 33 Op. Att'y Gen. 20, 22 (1921). In this opinion, Attorney General Daugherty did not put an exact time on these arguments. However, Attorney General Daugherty rejected the proposition that an adjournment for five or ten days met his definition, though he did conclude that a break of twenty-eight days did.The Noel Canning court rejected Attorney General Daugherty's vague alternative in favor of the clarity of the intersession interpretation. According to the court, "the inherent vagueness of Daugherty's interpretation counsels against it," because "the Framers would not likely have introduced such a flimsy standard."

Fifth, the District Court rejected the President's legal Council argument. The Noel Canning court also rejected an interpretation adopted by the Office of Legal Counsel in 2012. Under this interpretation of the term "the Recess," the President has discretion to determine when the Senate is in recess. See Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 **Mem. Op. O.L.C. 1, 23 (2012)** ("[T]he President therefore has discretion to conclude that the Senate is unavailable to perform its advise-and-consent function and to exercise his power to make recess appointments."). The court in Noel Canning rejected this interpretation because to allow the President to define the scope of his own appointments power would eviscerate the Constitution's separation of powers. The checks and balances that the Constitution places on each branch of government serve as "self-executing safeguard[s] against the encroachment or aggrandizement of one branch at the expense of the other." Buckley v. Valeo, 424 U.S. 1, 122, 96 S. Ct. 612, 46 L. Ed. 2d. 659 (1976). An interpretation of "the Recess" that permits the President to decide when the Senate is in recess would demolish the checks and balances inherent in the advice-and-consent requirement, giving the President free rein to appoint his desired nominees at any time he pleases, whether that time be a weekend, lunch, or even when the Senate is in session and he is merely displeased with its inaction. This would lead to a Constitutional Crisis and great grab for power on the behalf of the Executive Department.

Sixth, the Noel Canning court rejected the analysis of the Eleventh Circuit's of the Eleventh Circuit's decision in Evans. The court observed that the Evans court's analysis failed to recognize one of the important purposes of the Recess Appointments Clause, that is, that the clause allows the President to fill a vacancy only when the Senate cannot provide advice and consent. The Noel Canning court also rejected the implication of the Evans court's analysis–that the term "the Recess" applies to any recess. Id. Finally, the Noel Canning court observed that the court in Evans failed to distinguish between "adjournment" and

"recess," "rendering the latter superfluous and ignoring the Framers' specific choice of words." Summarizing its holding concerning the meaning of the term "the Recess," the court in Noel Canning stated: "Finally, we would make explicit what we have implied earlier. The dearth of intrasession appointments in the years and decades following the ratification of the Constitution speaks far more impressively than the history of recent presidential exercise of a supposed power to make such appointments. Recent Presidents are doing no more than interpreting the Constitution. While we recognize that all branches of government must of necessity exercise their understanding of the Constitution in order to perform their duties faithfully thereto, ultimately it is our role to discern the authoritative meaning of the supreme law."

As Chief Justice Marshall made clear in Marbury v. Madison, "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each." In Marbury, the Supreme Court established that if the legislative branch has acted in contravention of the Constitution, it is the courts that make that determination.

Conclusion

We must now look at the correct structure of the Constitution to support which side is right in this case. The lower court previously noted that it "would have made little sense to make the primary method of appointment the cumbersome advice and consent procedure contemplated by that Clause if the secondary method would permit the President to fill up all vacancies regardless of when the vacancy arose." Otherwise, as the lower court indicated, the President would be able to sidestep the Appointments Clause altogether by simply waiting for a recess.

Therefore we pray that you support the lower court ruling and find in favor of the Constitution and the Respondents in these three matters.

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- Clearly the Constitution, and the Founding Fathers support this concept of Advise and Consent do not allow the petitioners rewrite the Constitution and do recess appointments in a lunch break or filibuster.
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. The

Lower Court clearly showed that the President's power was limited in this matter. However, this ruling on this point is moot because the Senate was in session. Therefore no ruling has to be made on this point.

3. Whether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro forma sessions. The Lower Court's ruling on pro-forma sessions showed that when the Senate is not allowed to adjourn because of the House not allowing to it can go into a pro-forma session and it would count as doing business. If the petitioner wins this point it will change the power structure of Executive Branch and lead to the overreach of the President into every aspect of Government. Support the Constitution and support the Lower Court Ruling.

We pray that you support the Lower Court and the respondent in this case.
