

NLRB vs Noel Canning

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Position

- That the President's recess appointment power can be exercised at any time in order to ensure proper facilitation of governmental and federal positions, whether or not the Senate has immediate say in approval. The President may appoint people to vacant positions during a recess that exist during said recess. States that the president has the right to appoint officers to positions in a recess of the Senate, and that they are to be approved upon during the next session.
- In general, the Senate has the power to approve candidates for an open position. However, in the event of an unforeseen circumstance, North Carolina Constitution, Art. XX states that these positions may be filled by the President, using his recess appointment power, and that he may do so with the knowledge that the Senate, in the next session, may approve or disapprove of said position.
- The National Labor Relations Board is a governmental organization that is crucial to the system of American labor.
- Response to the *Federalist 77*: However, should the House want to indirectly involve itself in the appointment process, it can influence the Senate's action by withholding its power of consent over the Senate's ability to adjourn for a recess. (Article I, Section 5).
 - Pro-forma session appointments should be allowable under the fact that these said appointments are temporary and rely solely on the fact that the President does so with full knowledge of this.

Documents in support of our argument:

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*****Narrow Interpretation Documents from Packet*****

Letter from Samuel Adams to Arthur Lee (Oct. 31, 1771)

In the first narrow document, Samuel Adams is arguing the morality at which the Governor of Massachusetts makes his decisions to appoint people only when the Senate of MA is out

of session. In this situation, the Governor is manipulating the recess appointment power to make it in his favor so that he could appoint whom he wanted to without opposition from the Senate. In the current situation with President Obama and the NLRB recess appointments, President Obama did not wait until the Senate was in recess to appoint people. He suggested many candidates for the position prior to the recess appointments and the Senate either turned down or ignored his suggestions. Because of this, when the Senate went into recess, he was able to finally appoint people to the position so that the NLRB could continue to get work done. Although the Governor of Massachusetts did his appointments in correct, but also immoral manner, President Obama's recess appointments are not only correct, but moral as well.

Letter of Cato IV (July 3, 1789)

Here, Cato is stating that without the proper checks and balances of the president to appoint positions, he or she could appoint radical positions and completely overpower the other two branches of government. However, the Senate, once it resumes from its recess, has the power to double-check the president's decision and either keep the appointment in place or overthrow it (The Federalist No. 67). Because the Senate didn't overthrow the decision that the President made to appoint three new NLRB members, the appointments are valid.

Letter from George Washington to William Drayton

Once again, the letter from George Washington is stating that the Senate had the power to overthrow his decision in appointing a new judge to the South Carolina District Court. Washington states "This [for the president to appoint vacancies during recesses of the Senate] is rendered necessary by the Constitution of the United States, which authorizes the President of the United States to fill up such vacancies [sic] as may happen during the recess of the Senate-and appointments so made shall expire at the end of the ensuing Session unless confirmed by the Senate". This is stating that the Senate had the power to confirm the President's recess appointments during their next session which stops the appointments from expiring before the end of their session. In the case at hand, President Obama had requested a person to fill the position on the NLRB before the recess, but the Senate denied him. Then, he chose two new people for the position which the Senate also ignored. During the recess of the Senate he chose to fill the position. It was necessary for him to do this because the operations of the NLRB needed to continue and for it to continue the positions needed to be filled. George Washington's argument does not hold in the current situation because if the Senate did not confirm the appointments, they expire before the end of the Senate session. The Noel Canning decision was made before that session expired. Therefore, the appointments were still valid and so was their decision against Noel Canning Corporation.

Edmund Randolph, Opinion on Recess Appointments for President Jefferson (July 7, 1792)

In this argument Randolph's side is that vacancy is equal when a position did not exist and when it existed and needs to be filled. However, he is asking: should the president have been able to fill a vacancy without the Senate? This article is merely confusion among the people of the early constitution. Today, the recess appointment power is clear. When the Senate is in a recess, should a position need to be filled, the president has the power to do so. With the position of Washington and Chief Coiner, the position had been made and filled while the Senate was in recess. Therefore, it was still just as vacant as any other position and Washington was correct in appointing someone to fill it without the guidance of the Senate. President Obama had vacant positions open on the NLRB when the Senate went into recess and like Washington did, he was correct in filling those positions as well.

Letter from Alexander Hamilton to James McHenry (May 3, 1799)

In this article, the bias of Alexander Hamilton on any of John Adams' decisions is apparent. Hamilton is arguing that vacancy means no new positions can be made by the president's appointment power during a recess of the Senate. This is arguing against a situation similar to the one present in Edmund Randolph's opinion of President Jefferson. Hamilton is saying that the president does not have the power to make a new position, only to fill an old one. He says that vacancy is not that of which was not there before, but was there and is now empty. President Obama did not make new position on the NLRB, he simple filled three old positions that had been empty.

Letter from Gouverneur Morris to W. H. Wells (February 2, 1815)

In this letter Gouverneur Morris is stating that The Constitution intended for the President to get a little leeway when appointing people to positions by avoiding opposition of the Senate and being able to appoint whom he wants at his own free will. He also states that it is an unfair advantage of power for the President to be able to create a position during a recess for a position to fill. Either by making a new position, or firing someone in an old position, it is an unfair use of his power. However, in President Obama's situation, he uses that leeway to his advantage. He did not avoid filling the position until the recess because he had requested people to fill the position while the Senate was in session. He simply filled what the Senate had ignored during the recess. He is using the system fairly and to his advantage. In this way, President Obama had the right to appoint the new members to the NLRB when and how he did.

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*****Broad Interpretation Documents from Packet*****

Debate in North Carolina Ratifying Convention, Speech of Archibald Maclaine
Archibald Maclaine supported the notion that the Recess Appointment Clause is justifiable

in all senses of a Senate recess. He validates the political practice that the Senate is not always in session, and as such, in order to effect change and functionality in the government, the President need not limit appointments to the Senate's schedule. This diction can be supported in relation to this case through the realization that the Noel Canning appointment was made to ensure functionality of the Labor Relations, an integral part of the federal system. In the North Carolina Ratifying Convention, Maclaine confirms that the recess appointments are in fact temporary. He states that these temporary appointments are usually unforeseen, thus garnering a social necessity that may arise during or around a recess of the Senate.

The Federalist No. 67 (Alexander Hamilton)

Alexander Hamilton further confirms in The Federalist 67 that the temporary recess appointments are not only necessary due to the previously mentioned circumstances, but they are also a supplement to the pre-existing Appointments Clause, in which the joint power of Senate and President is outlined. Hamilton goes on to detail in his paper that the temporary appointments shall expire when the Senate reconvenes in their next session. The fact that the appointment in this case did not expire after the recess of the Senate is not representative of the faults in the Recess Appointment power of the President. Rather, it is a legislative flaw, that the Senate lacked in their review of the appointment is not relative to when the appointment was made, as the Senate had the opportunity to approve or deny said temporary individual.

Letter from John Adams to James McHenry, April 16, 1799

John Adams described his power of Recess Appointments that occurred during a session of the Senate. He conveyed to his Secretary of War that his power of Appointment is need-based, and that he need not worry about the validity of the power. He states that, by his interpretation of the Constitution, where and when there occurs a vacancy, it is the job of the President to appoint someone to said position, whether temporary or permanent. This is a valid point for any case regarding the President's Appointment Powers, as the Constitution does state the previous statement. This statement relates to any federal or government-operated position, and as such, is relevant to the case at hand. Adams goes on to state that this power of appointment extends from military positions to any other governmental position. He acknowledges the previous realization that these provisional appointments are to be made with the knowledge that they are made temporarily for the Senate to then confirm.

Joseph Story, Commentaries on the Constitution §1551 (1833)

In this statement, it is confirmed that the ultimate decision on appointment should be made by the President, and that the Senate need only to be a supplemental figure in the decision. The position of this statement represents the concern that difference of opinions on appointment should not be disputed, but should be left to the President. In addition, this statement confirms that those offices that are under dispute because of Senate and

Presidential disagreement differ from offices that become vacant during or outside of the sessions of the Senate. The only time an office should be kept vacant is during the period of expiration and debate of an appointment. This statement further explains that the Recess Appointment power is valid in its proper uses, and that the real conflict in cases such as the one at hand is between the President and the Senate over the specific appointment, not of the actual power of the President to appoint.

St. George Tucker, *Blackstone's Commentaries* (1803)

This final documentation is a logical resolution to the previous statements. This document features the resolute opinion that the Recess Appointment Power of the President allows the Senate to recess. This affords not only a well-deserved break for the legislators, but it also provides economically to the people of the country. Socially, politically, and economically, the power of appointments during recess of the Senate is a beneficial asset to the United States as a whole. This conclusion is purely logical when considering the temporary weight that the Recess Appointment Power holds, but more than that, it logically concludes that the only choice besides the power of appointment is one that will cause more downturn than benefit in the long run. This assessment of the law as it is stated in the Constitution confirms that the power of the President to appoint individuals particularly in this case, is logically warranted as to avoid further governmental conflict, as well as to improve the society that the President must command, whether this be temporary or permanent. No where in the law does the time constraint of these appointments entail that they are for the President to decide. These appointments are to be held for the interim of Senate actions. Therefore, these powers are logically and conclusively valid.

Conclusion:

In conclusion, President Obama had the right to appoint people to the NLRB because:

1. A recess is any break that occurs between sessions of the Senate, including breaks in the middle of large sessions of the Senate.
2. President Obama did fill positions that became vacant before the recess of the Senate, but he had a right to fill them to let the NLRB continue the work that needed to be done.
3. Pro-Forma recesses occur in the sessions of the Senate and are not specifically stated to not be allowed to appoint at that time in the Constitution. His time to appoint was correct.