

Jake Schertz/Kevin Moyers (Petitioner)

**Governemnt Supreme Court Partners Brief**

Kevin Moyers and Jake Schertz (Petitioners)

Mrs. Murray

Period 2 AP Government & Politics

3/6/14

### **Table of Cited Authorities**

Article 1, Section 5, Clause 4 of the United States of America's Constitution

Article 2, Section 2, Clause 3 of the United States of America's Constitution

Article 2, Section 1, Clause 3 of the United States of America's Constitution

Debate in North Carolina Ratifying Convention, Speech of Archibald Maclaine

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

**The Federalist No. 67 (Alexander Hamilton)**

### **Statement of Argument**

The United States Court of Appeals' decision in the Noel Canning Corporation v. National Labor Relation Board was unjust and was not supported by the Constitution. They were false in their determination that the nomination of the two members of the NLRB was invalid. This decision denies the President powers given to him in Art II, § 2, Clause 3 of the Constitution. In this argument, the following questions will be addressed:

- (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
- (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.

### **Argument**

I am asking on behalf of the petitioners to overturn the DC Court of Appeals decision. The President is given the power to make the recess appointments in Article II, § 2, Clause 3 of the Constitution. This power has been determined in the Constitution and is being

challenged for purely political means.

Article II, § 2, Clause 3 states “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.” This clearly gives the President sole power to make recess appointments. This clause does not specify that the power only applies to recesses that take place between sessions of Congress, as the respondent has claimed, but recesses in general. In the Senate’s presence, they advise the president. Albeit when the Senate isn’t there, in recess, the president must have some way to carry out his duty as the president and the head of the Executive. This includes filling up vacancies even when the Senate is not present. The choosing of the president is given to the Electoral College, keeping majority influence away from it, just like choosing vacancies in the Senate. The Framers kept the majority influence away from picking our commander and chief as they kept the public opinion from picking vacancies by leaving that to the president whilst the Senate is in recess.

The Senate and the President share the recess appointing powers via the use of checks and balances, but say if one of the parties was in recess. It would be impossible for the President to appoint nominees in the time of vacancies without the Senate. The Framers gave the President the recess appointing in vacancies while the Senate ceases to be there due to being in recess to address this problem. In Federalist No. 67, Alexander Hamilton states “As it would have been improper to oblige this body to be continually in session for the appointment of officers... the succeeding clause is evidently intended to authorize [sic] the President singly to make temporary appointments ‘during the recess of the Senate, by granting commissions which should expire at the end of their next session.’” This clearly states that the President is given the power to make nominations during all recesses, not just those between sessions. The Federalist Papers were used to help make clear of the U.S. Constitution by describing what the Constitution will have in it and what the Framers have in mind to put in it. The papers also got people to like and be in favor of the U.S. Constitution.

In the beginning of the United States, Congress averaged 6 months in office. Therefore, the President would have needed to nominate officers to fill vacancies when the Senate wasn’t around to confirm them. The Senate would vote on the nominees when they returned and if they weren’t confirmed, they would step down at the end of the next session. In a debate at the North Carolina Ratifying Convention, Archibald Maclaine stated “Congress are not to be sitting at all times... Therefore the executive ought to make temporary appointments... This power can be vested nowhere but in the executive, because he is perpetually acting for the public... during the recess, the President must do his business, or else it will be neglected; and such neglect may occasion public inconveniences.” Maclaine never states that recess appointments can only be made during a recess between sessions. As the Senate is not always in session, he believed the President would need to be able to make appointments to help the government run smoothly even when the Senate could not confirm them.

The second major question is whether pro forma sessions are legitimate sessions and whether or not they make the President's nominations invalid. First of all, the use of pro forma sessions to block recess nominations takes away an enumerated power of the President. And, since pro forma sessions take place every three days, the Senate isn't continuously in session and therefore is on a recess. The respondents argue that the Senate must be on a break for more than three days to be a recess. They cite the Adjournments Clause as it states "Neither House, without the consent of the other, shall adjourn for more than 3 days, nor to any place but where they are sitting." However, the original draft of the Adjournments Clause never specifies the amount of days. It is not known when the three day requirement was added as Madison made no note of it in his journal of the Convention. Another challenge to the legitimacy of the respondent's claim is that the fact that the Senate was in session is that no business was conducted during the pro forma sessions. In fact, the orders of procedure explicitly state that no business is to be conducted. One senator standing in an open chamber for a few minutes does not constitute a break in a recess. Also, recesses are not specifically created by the Constitution so the Recess Appointments Clause is referring to any time at which the Senate is not in session and doesn't have the ability to confirm a nomination.

Pro forma sessions were originally meetings of senators during recesses to satisfy the House by getting things done while still going on a recess. However, recently they have evolved as a way for the party other than the President's in the Senate to block the President from making recess appointments. It has become a political weapon. It has also changed from a productive session during a recess to a minute long session of one senator where no business is conducted. While there was a pro forma session on January 3<sup>rd</sup> and January 6<sup>th</sup>, there was a three day recess in between and business hadn't been conducted since December 23<sup>rd</sup>. The Senate claims that it is unfair because they weren't given the chance to confirm the nominee but that is their own fault. They had been given the chance but refused to and also refused to do work in pro forma sessions. Also, their own rules state that a recess is, "when its members owe 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." The Senate was empty on January 4<sup>th</sup> and was only occupied by one member of the Senate on January 3<sup>rd</sup>, so by its own rules the Senate was on a recess when the appointments were made.

The third major question is whether or not the President has the power to make appointments for vacancies that arose before the recess. In a letter to Secretary of War James McHenry, John Adams stated his belief that the Recess Appointments Clause granted him the power to fill vacancies that arose during a session of the Senate. He said "That I ground the claim of an authority to appoint the officers in question, but upon the Constitution itself. Whenever there is an office that is not full, there is a vacancy... To suppose that the

President has power to appoint judges and ambassadors, in the recess of the Senate, and not officers of the army, is to me a distinction without difference...All such appointments, to be sure, must be nominated to the Senate at their next session, and subject to their ultimate decision. I have no doubt that it is my right and my duty to make the provisional appointments.” Adams believed that he would need to make appointments to fill vacancies that arose during a session if those vacancies interfered with the government’s ability to operate well. The following text helps define what a vacancy is and the fact the president has the right to fill recess vacancies is without questioning.

Archibald Maclaine stated in the debate at the North Carolina Ratifying Convention, “During the recess, the President must do his business, or else it will be neglected; and such neglect may occasion public inconveniences.” He is saying that during a recess the President needs to be able to make appointments so that the government is able to run smoothly. If a vacancy is affecting how the government runs during a recess, then the President should have the power to fill it with a temporary commission.

### **Conclusion**

In conclusion the Court should support the petitioner’s argument. The first reason is that the Constitution never states that recess appointments only apply to recesses that take place between sessions of Congress. As this power was intended to help the country run smoothly during the long recesses of Congress during the 1700s, it would be illogical to assume the framers only meant recesses between sessions.

Second, the Senate was on recess at the time so the President has the power to make the appointments. The Senate was not in session on January 4<sup>th</sup> so they could not have confirmed the President’s nominations. While the Senate had been in a pro forma session the day before, business hadn’t been conducted since December 23<sup>rd</sup> and the agenda of the pro forma sessions specifically stated that no business was to be conducted.

The founders considered a recess any break in a session of Congress that interfered with Congress’ ability to function. Congress was not functional of January 4<sup>th</sup> and it therefore counts as a session. There is no evidence that supports that a break must be longer than three days to be a recess, just that they must ask the other house to take a recess longer than three days. Even with this, there is no evidence why the frames chose three and there is no record of any debate about the subjects.

Third, the purpose of the Recess Appointments Clause was to give the President the power to fill vacancies during a recess of the Senate to ensure the government ran efficiently. Therefore, if a vacancy that arose during a session of Congress is affecting the efficiency, then the President needs to be able to fill it. John Adams supported this belief that the President should have the power to fill all vacancy during a recess, regardless of when they arose. When the Senate is unable to be involved in the appointment process when they are on recess, the president must take the responsibility. The Framers gave the president this

power for a reason in order for him to carry out his duties as the head of the Executive Branch.

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