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## Paired Brief

National Labor Relations Board v. Noel Canning Corporation – Respondent

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Table of Cited Authorities

Cases:

Noel Canning Corporation v. NLRB (2012)

New Process Steel v. NLRB (2010)

New Vista Nursing and Rehabilitation v. NLRB (2013)

United States Constitution:

Recess Appointment Clause (Article 2, Section 2, Clause 2)

Other Sources:

Harlan Institute Website

United States Senate Website

Federalist Paper 76

Federalist Paper 77

Letter from George Washington to William Drayton

Letter from Alexander Hamilton to James McHenry

Statement of the Argument:

In this case there are many questions that need to be answered. The respondent agrees with the lower court's ruling and hopes that the Supreme Court upholds this decision. In this case involving the National Labor Relations Board, the decision was seen as unfair because the board only had two out of five members present. This would prohibit them from making thorough decisions. The president should definitely have the power to make appointments. It is listed in the Constitution and is one of the main presidential powers. The District of Columbia Circuit Court of appeals has said

- The President's recess-appointment power may not be exercised during a recess that occurs within a session of the Senate, and is instead limited to recesses that occur between enumerated sessions of the Senate
- The President's recess-appointment power may not be exercised to fill vacancies that

exist during a recess, and is instead limited to vacancies that first arose during that recess

- The President's recess-appointment power may not be exercised when the Senate is convening every three days in pro forma sessions.

#### Argument:

The President should not have the right to exercise their recess-appointment power during a recess that occurs within a session of the Senate, to fill vacancies that exist during a recess, nor during the time when the Senate is convening every three days in pro forma sessions. The U.S. Constitution Article 2, Section 2, Clause 2, also known as the "Recess Appointments 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." When it comes to nominating officers the President must consult with the Senate for advice and consent, Article 2 Section 2 Clause 2 of constitution says "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States..."

In a letter from Alexander Hamilton to James McHenry the opinion that the president should not make appointments on his own was stated. Hamilton said "In my opinion vacancy is a relative term, and presupposes that the office has been once filled. If so, the power to fill the vacancy is not the power to make an original appointment... It is clear, that independent of the authority of a special law, the president cannot fill a vacancy which happens during a session of the Senate." So not only are we questioning recess appointment power today, but back in the 1700s it was decided as unfair from many individuals opinions as well.

The letter from President George Washington to William Drayton has proven the meaning of the Recess Appointments Clause. Washington stated in the letter "Sir. The Office of Judge of the district Court in and for South Carolina District having become vacant; I have appointed you to fill the same, and your Commission therefore is enclosed. You will observe that the commission which is now transmitted to you is limited to the end of the next Session of the Senate of the United States. This is rendered necessary by the Constitution of the United States, which authorizes the President of the United States to fill up such vacancies 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 letter proves that appointments made during a session is limited and will expire at the end of the session, unless Senate confirms the appointment.

In the National Labor Relations Board v. Noel Canning Corporation case President Barack Obama appointed three members to the three vacant spots on the NLRB. The Noel Canning Corporation is a canning and bottling facility that was announced to being an unfair labor union by the National Labor Relations Board. This led Noel Canning to file a

petition on the presidential appointment powers. The United States Court of Appeals and the D.C. Circuit reviewed this petition and decided that indeed the appointment powers are unconstitutional. The courts also came to the conclusion that the appointments can only be made in-between sessions of Congress and with vacancies that only arrive during Congressional recesses. The D.C. Circuit panel that came to these conclusions was composed of judges David Sentelle, Karen LeCraft Henderson, and Thomas Griffith. In the *New Process Steel v. National Labor Relations Board* case the board was only using two out of five seats. The Court came to the decision that this was illegal and unconstitutional. They also questioned whether they should appoint two new members to the board which is what brought up the confusion of the Appointment Clause. They came to the conclusion that there must be at least three members present in order to make a decision.

The *NLRB v. New Vista Nursing and Rehabilitation* case is another example. New Vista refused to agree with the elected union representatives. A petition was made to review the Third Circuit, a federal court with appellate jurisdiction over courts in the District of Delaware, District of New Jersey, and the eastern, middle, and western districts of Pennsylvania. The Third Circuit decided that the Board lacked members in order to make a decision. The Third Circuit also did not find New Vista's argument persuasive.

In Federalist Paper 77 Hamilton stated that the role of the Senate is to restrain the president in his powers of appointment when necessary. Hamilton is saying the Senate has the authority to prevent the president of his powers of appointment which ties to Article 2 Clause 2 Section 2 saying the President has to consult with the Senate. The President needs the Senate to do things and do them the constitutional way. Federalist Paper No.76 Senate Rule (6) this provides rather strong evidence that the Senate itself considers an adjournment of more than 30 days to be the equivalent of an inter-session recess for purposes of nominations. The President is allowed to fill vacancies during the period of adjournment between two sessions of the Congress, not between intra-session recesses based on the 18th century. "My opinion upon the whole is that the President cannot now grant a temporary commission to a Chief Coiner." (Edmond Randolph) Randolph did not believe the President had the right to fill the vacancy. Senate has to approve of the President's nominee according to the U.S. Constitution.

The President's recess-appointment power may not be exercised to fill vacancies that exist during a recess, and is instead limited to vacancies that first arose during that recess. The President's appointment power is clearly limited to vacancies that first arose during that recess, but there was no recess. Presidents can only call vacancies during adjournment not mid-session break, or intra-session.

Many interpret the U.S. Constitution into their own views and beliefs which will lead to disagreements with other individuals. Making everything broader and extending too many powers will lead a tyranny. This whole case is based on "Separation of Powers". If

petitioners believe that the President should be able to exercise her/his recess-appointment during the pro forma session they are highly incorrect. It is invalid, for the pro forma session is not considered adjournment. The petitioners are giving the President more powers than enumerated by the U.S. Constitution. No one branch should have more power than another according to checks and balances.

#### Conclusion:

The lower court ruling is clearly in support of the Constitution. You cannot base the Constitution off broad thinking or just change it to your point of view. You must narrow it down to find the real meaning so that the three branches powers are not extended too far, in this case the Executive Branch. According to the three questions presented Court should be in favor of the lower court ruling.

The decisions made by the judges on the panel of the D.C. Circuit during the National Labor Relations Board v. Noel Canning Corporation case were all the same. They explain that the presidential appointment powers are unconstitutional when used during a session or when spots are vacant not during a recess. The Recess Appointments Clause explains how this is considered constitutional. This clause is technically a draft created by the Framers that explains how the President is still able to make appointments if the Senate is unable to give approval for it. This violates the checks and balances and separation of powers principles. With this clause, the executive branch has all of the power in making appointment decisions, which is considered unconstitutional. Each of the three cases that involve the National Labor Relations Board took place when only two out of five members were present. Having the president appoint at least two more members would help pull the cases together. However, doing it after the cases have been brought up only delays the result. It also puts more pressure on both sides and the current members of the board.