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Table of Cited Authorities:

Letter of Cato IV (July 3, 1789)

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

The United States Constitution

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

Letter from George Washington to William Drayton

National Labor Relations Board v. Noel Canning Corporation

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

United States Constitution: 2.2.2

The D.C. Circuit Court of Appeals

The Senate's Role in the Appointments Process

Primary Source: Edmund Randolph, Opinion on Recess Appointments for President Jefferson

Primary Source: Letter from Samuel Adams to Arthur Lee

Argument Summary

During the National Labor Relations Board v. Noel Canning Corporation case President Obama tried to out in three new members to fill in the vacant spots. Since there were only two members to begin with adding three has been questioned to be constitutional. The President and Congress should be able to hear each other's pros and cons, good thoughts and bad thoughts, on the candidate/ representative that is wanted/ decided to be in office. The President cannot do anything that deals with treaties or appointing officials in

office without the consent and the advice from the Senate. The President and the Senate have to work together to get things done while Congress is on recess. The President must learn how to not take the Constitution and twist up the words in the Constitution to make up his own executive branch powers. The President cannot do anything without the Senate and the Senate cannot do anything without the President. The President must also allow the Senate to give him advice on a certain government official that he/ she think they are ready to be in office.

Argument

The President's recess-appointment power should be only exercised between enumerated sessions of the Senate, rather than filling in vacancies during a session. The President should only be able to use his power then so that it will not only be a fresh start for the new members, but it will make sure the new members will know what case they're working on. In a letter from George Washington to William Drayton, Washington says that, "This 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 Senate....". He basically is stating that in the constitution it says that the President should only be able to fill vacancies in an enumerated session rather than during. "The President can only make appointments during a break between sessions." This is saying that the President can only appoint government officials when the Senate term is up and there is ready to be a new session. For example the 112th to the 113th session the President could appoint a government official into office because the 112th session Senators term is over and there is about to be new Senators for the 113th session. The D.C. Circuit Court unanimously decided that "The president can only validly make recess appointments during the period of adjournment between two sessions of Congress, and not during any other mid-session break, or intra-session recess." This quote meaning that the President cannot appoint a government official into office when the Senators are on their recess and about to come back into the building but only when the Senators are leaving their building and a new session is ready to begin. "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." This sentence from the primary source document: Letter from Alexander Hamilton to James McHenry, means that it is obvious that the president cannot fill a vacancy when the Senate is on their recess (intra-session). "I believe I may safely affirm that by far the greater Number of civil officers have been appointed at these adjournments." This quote from the source document: Letter from Samuel Adams to Arthur Lee means that most of the government officials have been appointed when Congress was on their intra-session recess. Thus saying that the President of the United States have made most of his government officials into office by appointing

them when the Senators are on their recess talking to their home states that they represent in the Capital. If the President continuously is filling in vacant spots during any recess that can lead to major problems, it could possibly lead to potential bias from the new members or confusion in the court decision-making process. Also the people the President fills in the spots with are generally from his own party so the Court's decision could end up very biased.

The president should only have the power to fill vacancies when they first arise. Alexander Hamilton believed that, "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 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." Meaning, if he were to just fill in the vacant spot beforehand, it would seem as if the President is filling in the spot because it's actually vacant. Not because he wants to sway the court's decision by adding his own people. Also if he were to fill the spot in from the beginning the new member would understand what was going on in the case, rather than just adding a member in the middle who knows basically nothing. Also, The Senate has the power to provide advice and consent which is granted in to Congress in the Constitution. The Senate serves as an advisory group for the president when it comes to making treaties or appointing government officials. This meaning that the Senate helps with the president decision making when it deals with treaties or appointing government officials. "[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 Supreme Court, and all other Officer of the United States..." Therefore saying that the President cannot make a decision without the Senate approving of whom he thinks shall be in office. The Drafters of the Constitution were wary of skewing power towards any one branch of government. So the drafters divided the power to be able to appoint officers/ candidates into office between the President and the Senate so neither branch would be over powering another branch. This could also be an example of separation of power and checks and balances which is known for two of the six guided principles of the Constitution. Separation of power is power distributed between the three branches, but in this case it will be two branches which are the Executive branch and the Legislative branch. Checks and Balances is that each branch has some control of the other branches which would be demonstrated by the Senate (the legislative branch) having some control over the President (the executive branch) when it comes to making treaties and appointing government officials. "The President can only fill vacancies that arose during the recess." In other words this is saying that the President can only fill vacancies when a government official has left his or her office when Congress was on their intra-session recess. "The Spirit of the Constitution favors the participation in the Senate in all appointments." This sentence from the primary source: Edmund Randolph, Opinion on Recess Appointments for President Jefferson, means that even

though the Senate is on their intra-session recess the Constitution still needs to be followed when they are not in their building. Finally, in the Letter of Cato IV, George Clinton wrote in a letter that he even believed that the president should have the Senate's agreement when filling in vacancies. Clinton wrote that, "Though the president, during the sitting of the legislature, is assisted by the Senate, yet he is without a constitutional council in their recess- he will therefore be unsupported by proper information and advice, and will generally be directed by minions and favorites, or a council of state will grow out of the principal officers of the great departments, the most dangerous council in a free country....". He basically is saying that if the Senate doesn't get the chance to approve of the new member being placed on the council, then, it is unconstitutional. The framers of the United States Constitution stressed about the importance of the checks and balance process, so the President and the Senate should follow the constitution.

The pro forma session is a practice that the Democrats conducted. A pro forma session is when a single senator makes a call to order. Some senators argued that the pro forma sessions ended their recess adjournment earlier than what it was supposed to be. President Obama withdrew Becker's nomination and forwarded two new nominations to the Senate. The Senate did not take any part of the two new nominations that the president gave them by the end of the first session of the 112th Congress. The D.C. Circuit Court of Appeals decided that the president can only make decisions when the Senate is on recess. "It could not be enforced, because President Obama's recess appointments were invalid..." This quote is saying that the D.C. Circuit Court of Appeals denied NLRB's decision because the president's recess appointment decisions were not true based off of what he was saying/telling the Senate. The D.C. Circuit Court of Appeals also agreed that the pro forma session does not count as a recess. The pro forma sessions does not count as a recess because the Senate is not gone for the entire time they were adjourned. The Senate was cut short on their recess because of a single senator made a simple call to order. The president should not be able to fill in a vacancy during a pro forma session. Since the sessions are so small and short there would be no need to fill in a vacancy. Also since there would be very little people in these meetings, to fill in a vacancy would definitely give one side a major advantage over the other very quickly. This is not fair to both sides. Even if a president were to fill in a seat with someone that person would only be there temporary unless the Senate confirms them, even then, the court would still be very biased. Finally, pro forma sessions are designed to happen quickly to make fast decisions, it is Loading...even said that in a session only a small group of people show and just vote and go home. Letting the President fill in any vacancy would just throw the vote off of what it should actually be.

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Conclusion

The President is not allowed to fill in vacancies when the Senate is on their intra-session recess unless an official is leaving their office. The President is also not allowed to appoint any one while the Senate is on their intra-session recess until the Senators session is over and there is about to be an intersession recess. The president does have the sole power to fill up the vacancies; he needs to work with the Senate. Congress and the president always should work together when making a decision, that's how the American government works; it's a bi-partisan legislature. The D.C. Circuit Court decided that the pro forma cannot be counted as a recess. The drafters made sure that one branch doesn't over power another so he gave the Legislative branch and the Executive branch power over treaties and appointments. The Senate has the power to give their advice and consent to the president when dealing with treaties or appointments. The President can only fill a certain vacancy position for a certain official when they leave out of office. The recess appointment power has two of the six guided principles of the Constitution. Checks and Balances and Separation of Power are the two guided principles of the Constitution used when doing treaties and appointing officials into office. Finally, in the National Labor Relations Board v. Noel Canning Corporation case, President Obama places three members in vacant spots during a recess. There were only two other member on the Court while he did this so the President would immediately have the advantage. Congress should end this case by siding with the Noel Canning Corporation. Since they basically almost did in the first place, after studying the constitution they should see the powers very clearly.

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