

Kassadi Morris: Petitioner

February 22, 2014

The National Relations Board v. Noel Canning Corporation

Table of Cited Authorities:

The United States Constitution, The Federalist No. 67 (Alexander Hamilton), Letter from James Adams to James McHenry, Debate in North Carolina Ratifying Convention, Speech of Archibald Maclaine, Joseph Story, Commentaries on the Constitution, Brief in Favor of the Petitioner for the Supreme Court case of Fisher v. Texas

Statement of Argument:

The Constitution gives the President the power to appoint officials while the Senate is in a recess. This is called 'The Presidents Recess-Appointment Power'. Even though it is given to the President in the Constitution, it doesn't give the boundaries of the power. In the case of the National Labors Relations Board v. Noel Canning Corporation, this power is thoroughly investigated. In the original case, the Noel Canning Corporation was in violation of a rule; which took them to the U.S. Court of Appeals for the District of Columbia Circuit. The Court of Appeals decided that the National Labor Relations Board was correct, but Obama's appointment was unconstitutional and that the National Labors Relations Board's decision was, in the end, invalid. The National Labors Relations Board then appealed the case to the U.S. Supreme Court. The U.S. Supreme Court now has the job of examining the Constitution to figure out who is correct. With the understanding of the Constitution, by the Supreme Court, three main points are examined and understood. The President can appoint officials between enumerated sessions of the Senate, when a vacancy occurs within a recess, and when the Senate is in a pro forma session.

Argument:

The first point to address is if the President can appoint officials during a recess that is within a session of the Senate or if the President can appoint officials during enumerated sessions of the Senate. The President can appoint officials to the Senate as long as the recesses occur between enumerated sessions. This is saying that the Senate cannot take two recesses and the President appoint an official. In the U.S. Court of Appeals for the District of Columbia Circuit it was decided that "...the 18th century... reading of the phrase 'the recess,' the President can only vavily make recess appointments during the period of adjournment between two sessions of Congress, and to during any other mid-session break or intra-session recess". That is explaining

that the Senate must be in a recess. A mid-session break is when the Senate takes a slight break during a complete session, this is not considered a recess to the Court of Appeals. An intra-session recess is when the Senate takes a break similar to a mid-session break, these are also not considered to be an actual recess either. Archibald Maclaine said "Congress are not to be sitting at all times; they will only sit from time to time, as the public may render it necessary." In that sentence he explained that Congress will have to take recesses. He later goes on to explain that the executive branch is the only one up to the job of appointing officials during recesses. The President can appoint officials as long as Senate has had a completed session before taking a recess. The Senate must take an enumerated session before a recess for the President to use his recess-appointment power and it be constitutional.

The second point to address is when exactly can the president insert his recess-appointment power; if a vacancy occurred during the session or during the recess. The Presidents recess-appointment power may be exercised when a vacancy happens during the recess. In the Constitution (Article 2, Section 2) it states "...to fill up all vacancies that may happen during the recess of the Senate..." This is saying that if Senate is in a recess and a vacancy occurs, the President may appoint an official to fill that vacancy. The Senate does not have to approve of the official, during the recess. Yet when the recess is over; the Senate has to approve of the new official. The Constitution (Article 2, Section 2) addresses this part too "... by granting commissions which shall expire at the end of their next session." On April 16, 1799; John Adams sent a letter to James McHenry. In his letter, John Adams says "It is not upon the act of the 3d of March ultimo, that I ground the claim of an authority to appoint the officials in question, but upon the Constitution itself." Adams is explaining that the power to appoint officials came from the Constitution. John Adams goes on to that when an office is vacant, the Constitution allows him to fill it. He mentions that the Senate must approve the proposed official by the next session. While Adams was explaining what he could do another man explained what would have happened if the framers of the Constitution had not set recess-appointments up the way they did. Joseph Story once wrote "There was but one of two course to be adopted; either, that the senate should be perpetually in session, in order to provide for the appointment of officers; or, that the president should be authorized to make temporary appointments during the recess... the former course would have been at once burthensome to the senate, and expensive to the public." Story was explaining that if the President had not been given the power to appoint officials during a recess that the senate, in turn, would have to constantly remain in session so they may be there to approve the Presidents nominations at once. In the same paragraph Joseph Story is saying that by giving the President the recess-appointment power it is a positive thing for the people. Both John Adams and Joseph Story agreed with the President having the recess-appointment power; yet neither said exactly when it could be used. In The Federalist No. 67, Alexander Hamilton says exactly when it can be used. Alexander Hamilton says "... the President singly to make temporary appointments 'during the recess of the Senate,...'". Alexander Hamilton may be quoting the Constitution, but the Constitution holds the answer to when the President can use his recess-appointment power. The President may make recess-appointments when the vacancy occurred during the recess and the appointment is temporary until the Senate approves of the fill in.

The third and final point to address is if the President may appoint officials if the Senate is in a pro forma session. The entire reason the Supreme Court case *National Labor Relations Board v. Noel Canning Corporation* is going to happen is because when the case was appealed to the U.S. Court of Appeals for the District of Columbia Circuit, the Court found that the original ruling was inconclusive. The Court of Appeals decided that the original ruling was inconclusive because "... President Obama's recess appointments were invalid, and without them the NLRB lacked the necessary quorum to conduct business". This is referring to the 'pro forma sessions' the Senate has been having. The Senate came up with a way to halt the Presidential recess-appointment power. Instead of taking a 'whole recess' (modernly thought of as a 4 day break) the Senate takes 3 day breaks, with one person usually calling to make an order to make it seem like the Senate is still in session and they're only taking a break. The Court of Appeals ruled against the National Labor Relations Board because they believe the President's appointment was unconstitutional. The Court of Appeals believes it is unconstitutional because of the definition of a recess. Today a recess is considered to be at least 4 days long. Yet when the Constitution was written, it did not come with a certain amount of time the Senate must be in break for it to be considered a recess. In 1787 the Constitution was written. In 1787 the framers, the people who wrote the Constitution, did not have the same exact government we do now. The government of 1787 was far more simpler. Something that was also simple was their understanding of language. The framers used the word 'recess' yet did not give a time limit to the word. Today many people think of a recess as a break of at least 4 days. The Senate has been taking pro forma sessions. Pro forma sessions are 3 days, 3 is less than 4. So, in modern thought, the President should not be able to appoint officials during a pro forma session. Yet, the Constitution is not modern. In theory, the Constitution is correct with their time limit; consecutive days on break. If a pro forma session is a recess; it is more than 1 consecutive day on break. With the given information and thoughts that the Constitution was written in 1787 (with the simpler language) the President's appointment was constitutional. The Court of Appeals said "President Obama's recess appointments were invalid..." but only because he did not appoint them during a modern recess. A modern recess, 4 days at least, was not the framers idea of what a recess actually is supposed to be. So, this means the President may use his recess-appointment power during a pro forma session because it is still, technically a recess. It is the framers idea of a recess.

Conclusion:

The Constitution of the United States was written in 1787, almost 230 years ago. Overtime the way the country has been governed has changed dramatically. The Constitution was written in an overall simpler time when technology was not as advanced and people had the same language. Over the years people have improvised their own understandings of the Constitution and its meaning. Since the framers can not tell them exactly what they meant; they go with their own thoughts and beliefs. So, in 1803 the Judicial Branch (the Supreme Court) took over the power of 'reading' the Constitution. The Supreme Court examines the Constitution to attempt to understand what the framers meant by every word, every sentence, every clause, and every

article. In doing this the Supreme Court places the wording of 1787 understanding of the Constitution into that of the present day understanding. This is where things get mostly tricky. The time zone of 1787 is nothing like that of the present. In 1787 everyone understood what the framers meant by the Constitution, it wasn't a guessing game at what they meant. Present day people are playing a guessing game with the meaning of the Constitution.; the language, culture, and understanding have all changed over the evolution of the United States. This is both a good and a bad thing, the understanding of the Constitution can either give or take away certain powers appointed to members of the government. In the terms of the Presidential Recess-appointment Powers it is a good thing because it gives the president the powers that the Constitution allows him to have. The wording of the Constitution (Article 2, Section 2 to be specific) says the President may "... fill up all vacancies that may happen during the recess of the Senate...". That one part of a clause (clause 3 to be exact) gives the president the power to appoint officials between enumerated sessions, when a vacancy occurs during a recess, and if Senate is in a pro forma sessions. Article 2, Section 2, Clause 3 of the United States Constitution, overall gives the President the power to appoint officials into the Senate (within certain circumstances established by the Constitution) without the Senates approval until their next session comes to an end.