

## Petitioner Brief Smithtown High School West Zachary Paiva

### Table of Cited Authorities:

- Federalist Paper # 67
- St. George Tucker, Blackstone's Commentaries
- United States Constitution

### Statement of Argument:

The NLRB appointments by the President are valid and the decision of the NLRB enforceable, contrary to the decision of the Court of Appeals as it is within the scope of the President's power to make such appointments. Even if pro forma sessions are taking place every three days the President has the power to make appointments in between Senate sessions. The President may not, however, make appointments if the Senate taking an intra session break(to resume the session within the next 24 hours), instead, the President have the advice and consent of the Senate to confirm the appointments the President desires.

### Argument:

There is strong evidence in favor of the broad interpretation of the appointment power starting with the Federalist Papers. U.S. founder Alexander Hamilton wrote in Federalist

Paper # 67 that, “The ordinary power of appointment is confided to the President and Senate jointly, and can therefore only be exercised during the session of the Senate; but ...as vacancies might happen in their recess ...the succeeding clause is evidently intended to authorise 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.’” In these lines Hamilton explicitly states the intention of the clause was to allow the President to make appointments to allow the continued fulfillment of the many duties of the federal government.

The many members of the Senate are not expected to be assembled at all times so it was only reasonable of the founders to keep the federal government running until the Senate could next be assembled to make a decision on the appointments. Practically the President needs to be able to fill in vacancies during a recess of the Senate whether the vacancy occurs before or during the Senate recess. This is because a suitable replacement for the position may not have been found from one Senate meeting to the next or the President, busy with his duties, did not have time to consider or make appointments. Furthermore, the President may be so preoccupied while the Senate is having unusually frequent meetings that the President is not informed of the vacancy in time to consider appointments to submit to the Senate.

Now, concerning whether the President may make recess appointments during a recess within a session of the Senate, I find that the answer has little bearing on the result. If the President does make a such an appointment during a recess within a session, then the Senate will eventually resume and after they end the session the President’s short lived commission will end. After this happens the President could then simply reappoint the same person. This makes the action of the President trying to make appointments during breaks within a session to gain any more power a futile cause. Even if the President can not make such appointments the President would only need to wait for the end of the session to make a desired appointment which would be either considered or ignored by the Senate in their next session. This reasoning is supported by U.S. legal scholar, St. George Tucker: “ in case such a disagreement between the president and the senate, if the president should persist in his opinion, and make no other nomination, the person appointed by him during the recess of the senate would continue to hold his commission, until the end of their session: so that the vacancy would happen a second time during the recess of the senate, and the president consequently, would have the sole right of appointing a second time; and the person whom the senate have rejected, may be instantly replaced by a new commission.”

The Senate holds pro forma sessions every three days because Article I, Section 5 of the U.S. Constitution states, “Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days,” allowing the House to stop the Senate from adjourning. Current tradition has used this section of the Constitution to set the minimum number of days the Senate must go without meeting for them to be in recess to be four days. However, this convention does not draw upon any actual legal ground as the Constitution does not explicitly or implicitly set this standard. There is no actual legal binding that exists to stop the President from making appointments during pro forma sessions. It is a completely arbitrary minimum set by a section of the Constitution that does not concern the ability for the President to make appointments. The legitimacy of claims against the President’s power is further undermined by the questionable legitimacy of pro forma sessions, since they are nothing more than a call to order by a single senator. Doing such is akin to confirming one’s presence at their place of work and then not fulfilling their duties there. It makes a pro forma session a waste of time that could instead be spent considering appointments made by the President and giving him/her their advice and possible consent. Or if not considering appointments then at least other problems. There will always be other duties the Senate needs to be fulfilling.

## Conclusion

It is in the the best interest and the legal obligation to follow a broad interpretation of the President’s appointment powers to allow for the smooth operation of the federal government. Since many agencies now exist under the executive branch that help run the government and provide the various services required of them the ability to fill in vacancies in a timely manner is vital. As such the President uses his appointment power when the Senate is in a recess, making them unavailable for advice and consent until their next session. This is supported by Hamilton’s writing in Federalist Paper # 67 that the power is intended to allow vacancies to be filled while the Senate was out of session. The opposition of the President’s appointment power suggests that pro forma sessions do not allow the President to make appointments, but as stated above the arbitrary minimum days convention and the results of using it to impede appointments are futile and not legally binding as the Constitution has no such provision concerning the appointment power. Furthermore, it is only practical that the President be able to fill vacancies during a recess whether or not the vacancy happened during a recess or that particular recess. Following an interpretation as

described and supported in this essay, the appointment power can be used effectively to keep the federal government running until the Senate has a chance to give consideration, as it was intended by the founders.

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