Del Valle Respondent Brief Gajda, Kumpfbeck and Lanzetta

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Cited Table of Authorities

Letter from Samuel Adams to Arthur Lee
Letter of Cato July 3, 1789
THE FUTURE OF RECESS APPOINTMENTS IN LIGHT OF NOEL CANNING V. NLRB (http://about.bloomberglaw.com/practitioner-contributions/the-future-of-recess-appointments-in-light-of-noel-canning-v-nlrb/)
For Senate Tax Cut Stopgap, Odds in House Are Uncertain (http://www.nytimes.com/2011/12/18/us/politics/extension-of-payroll-tax-cut-passes-senate.html)
US Constitution, Article II Section 2
What's a 'Recess' Appointment? (http://takingnote.blogs.nytimes.com/2014/01/14/recess-appointments-in-the-eye-of-the-beholder/?_php=true&_type=blogs&_r=0)

Summary

We the respondents believe that the executive's ability to make recess appointments limited to the time in between enumerated sessions of the Senate. While we do not believe, as some do, that the President can only fill vacancies that open during the recess, we do not believe that pro forma sessions are real recesses, limited the President's authority to make appointments during these periods.

Argument

The President's ability to make recess appointments, like any enumerated power, is not without its exceptions. For this reason, many politicians deem it extremely controversial because it can aggrandize the power of the executive branch; however, because the government is divided, the Senate usually attempts to diminish the President's authority over recess appointments, making the need for recess appointments ever more enticing. Currently, the problematic question that persists is when the Senate is actually in recess. It contends with the cemented notion of the Constitutional era that the President cannot fill a vacancy which happens during the session of the Senate. Similarly, according to Judge Sentelle's panel, the late 18th century understanding of "recess" "[refers] only to the period of adjournment between two sessions of Congress" (The Future of Recess Appointments in Light of Noel Canning v. NLRB). Thus, this Constitutional era principle mandates that a "recess" is only the hiatus between enumerated sessions of Congress. Analyzing the

constitution as a living document only reaffirms this definition of a Senate recess, making it illegal for the President to appoint executive officials without the Senate's check of Advice and Consent. For example, "... because the second session of the 112th Congress convened on Jan. 3, 2012, the court reasoned that appointments made on Jan 4 were impermissible 'intrasession' appointments" (The Future of Recess Appointments in Light of Noel Canning v. NLRB). Following examples of State Governors' recess powers, many governor's were only allowed to make recess appointments in the face of near total representative absence of a General Assembly, like in Massachusetts (Letter from Samuel Adams to Arthur Lee (Oct. 31, 1771)). Massachusett was also one of the most liberal states upon the founding of the United States, so our adoption of this principle has strayed probably farther than we could have known. The stipulation of waiting until all Senators have left Washington has no place as they have wide means of transportation. Therefore, the only way to interpret the Constitution and keep the intended meaning of the law is to limit such recess appointments to the time between enumerated sessions of the Senate. In Samuel Adams' letter, the "whole Number of Councillors present... is adjourned from week to week during the Session of the Assembly till it is over." In the face of the Massachusetts Assembly, although brief adjournments coexisted within its session, the session was considered to be "continuous"—the brief adjournments were not considered recesses. This kept the power of the assembly, its consent, much like the Advice and Consent power of the Senate that checks this Presidential power, germane. (Letter from Samuel Adams to Arthur Lee (Oct. 31, 1771)) Judge Sentelle offers the same reasoning: "The court insisted that its strict reading of the Recess Appointments Clause was necessary to preserve the Senate's critical confirmation role in the process of appointing officers of the United States, and to create a bright-line rule susceptible to objective judicial enforcement." (The Future of Recess Appointments in Light of Noel Canning v. NLRB). This court maintains the establishment of the system of checks and balances between the President and the Senate. Generally, in the face of a disagreeing Executive branch and the Senate, the President often waits for the recess to appoint chosen officials to enforce his political beliefs. Such an action is extremely unpopular now as it was during the Constitutional era. During a recess the president is, as Cato records, "without Constitutional council in their recess- he will therefore be unsupported by proper information and advice... and a council of the state will grow... the most dangerous council in a free country." (Letter of Cato July 3, 1789). Thus, the extension of the enumerated recess to include brief adjournments only further entices the President to make spiteful and baseless recess appointments as a divided government tends to reduce the power of the president, leading to what Republicans call a "power-grab," which was meant to be constricted. To keep this Executive power in terms with the founders' intent, adhereing to the Constitution, and satisfying the demands of checks and balances, the illegality of recess appointments in adjournments in enumerated sessions of Congress is no question at all. They are unquestionably illegal.

As stated in the constitution, "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate." The wording in this clause is somewhat ambiguous, as there are two ways that this could likely be interpreted: one, which is that the President may make appointments to replace any vacancies that exist when the Senate is not in session, and two, which is that the President may make appointments to replace vacancies that occurred when the Senate was not in session, and not necessarily without Senate advice and consent, either. This very small difference of interpretation can mean the difference between the President acting lawfully or unlawfully, and this difference ultimately will be the deciding factor, in the future, of the President's role in filling vacancies. Traditionally, the word "happen" has been interpreted loosely, meaning that the President can fill vacancies regardless of when they occurred. However, as of more recently, with advances in transportation and communication, it is becoming increasingly more difficult to determine when the Senate is and is not in session, thus calling into question the relevancy of this provision in the Constitution. As of now, the Senate's rules are not stated in such a way that would allow the Senate to approve or deny appointments without being physically present during a Senate session; however, with the introduction of technologies such as video chat, it is plausible that sometime in the future the Senate could be called to session without all Senators even be present on Capitol Hill. This would essentially cancel out the President's ability to make appointments during recess, but on the other hand, the President's recess appointments still require advice and consent from the Senate anyway. So, as the situation currently stands, the President should be able to fill vacancies regardless of when they the vacancies appeared, but in the future, it seems that the President's ability to make recess appointments may become obsolete.

In a time of gridlock, it is unfortunate that the Senate takes its time in giving its advice and consent. For the nation, this means some important seats remain unfilled: both in the courts and on boards such as the NLRB. However, congressional intransigence does not give the President the authority to bend or change to law, no matter the negative consequences.

Today, the petitioner would like to have the Senate pro forma sessions–when a senator simply takes a role call and then calls the session adjourned–counted as a recess. Yet, President Obama's administration used a pro forma session just three years ago in 2011 to extend a pressing payroll tax cut in time for the holidays. This hypocrisy demonstrates the lengths to which the Obama administration will to go to bend the rules to its advantage. It is also the argument of some scholars: that the Senate could act in pro forma sessions, but in most instances chooses not to. This is entirely different than equating a pro forma session to a recess (For Senate Tax Cut Stopgap, Odds in House Are Uncertain). However, in this example under the Obama administration, the pro forma session is treated as a continuation of a session of Congress. Although the United States Constitution has no mention of a pro forma session, it provides the time restrictions that would end a Senate Session and begin a

recess, which would essentially govern ensuing pro formas sessions. Article I Section III of the Constitution states " Neither House, during the Session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting." Thus, Obama's actions in extending a payroll tax cut during pro forma sessions is coherent with the Constitution. Moreover, adhering to this interpretation of pro forma sessions or brief adjournments has been done since the Constitution has been written and even before it under the rules of State Constitutions. For example, Samuel Adams detailed that the Massachusetts General Assembly's "...Capacity of Advisors to the Governor is adjourned from week to week during the Session of the of the Assembly until it is over." The adjournment of the Assembly from week to week can be seen as an early form of a pro forma session as a brief of adjournment of one to two days. Therefore, the only difference between that practice then and now is the length of the adjournment of a pro-forma session. The Senate's convening every three days sits at the cusp of the allotted time for adjournment without House approval, but its adjournment length does not require the need for House approval. This means that the Senate is still in session during pro-forma sessions and under Article II Section II, prohibiting non-recess appointments, the President's action of trying to fill a vacancy during one of these sessions is utterly illegal because it infringes on the limits written in the Constitution.

In the face of NLRB v Noel Canning, the President's exercise of the recess appointment clause while the Senate was convening in pro-forma sessions can only be construed as illegal. Furthermore, this action of President Obama goes against the limits clearly stated in the Constitution. The correct sequence of action would be for Obama to wait until the pro-forma sessions are over to make recess appointments. However, such an action would still receive wide criticism from politicians, even those within his party. When Bush made a recess appointment of John Bolton to the U.N. after an enumerated session of Congress, an appointment previously filibustered in the Senate, Harry Reid denounced the course of action as an "end run around the Constitution" (What's a 'Recess' Appointment?) So, it looks like any President or official may never escape depreciation with any consideration of a recess appointment.
