Washington Legal Foundation

On the Merits:

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NOEL CANNING, ET AL.,

Respondents.

No. 12-1281

U.S. Supreme Court

Oral Argument: January 13, 2014

Questions Presented: Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate; whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess; and whether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro forma sessions.

Summary of the Case: The National Labor Relations Board (NLRB) ruled that Noel Canning, a soft-drink bottling company in Yakima, Washington, had committed unfair labor practices under federal law. At the time of the NLRB's ruling, three of its members had been appointed by President Obama under the Recess Appointments Clause. Noel Canning subsequently challenged the NLRB's ruling on the basis that its membership was constitutionally deficient by failing to satisfy the requirements of the Recess Appointment Clause. The U.S. Court of Appeals for the D.C. Circuit agreed, holding that the President can only make a "recess appointment" when the Senate is out of town in the interval between its annual sessions, and that the only vacancies subject to recess appointments are vacancies that arise during the annual recess. Because the President's NLRB appointments did not satisfy either of these requirements, the appointments were unconstitutional and the NLRB lacked a quorum when it issued its ruling against Noel Canning.

On The Merits:
Judgment for Petitioner
Michael W. McConnell
Stanford Law School

The Recess Appointments Clause states that "[t]he 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." U.S. Const. art. II, § 2, cl. 3. The appointments at issue here fail for three independent reasons.

First, the vacancies arose while the Senate was in session. The Clause limits recess appointments to those that "happen" during the recess. Early Presidents all recognized and complied with this limitation. Putting aside the argument that this language is ambiguous, which we find unpersuasive, the Solicitor General rests his defense of recess appointment to vacancies that arose while the Senate was in session on longstanding executive practice, dating back to an opinion of Attorney General William Wirt in 1823.

We would be hesitant to interpret the Constitution contrary to its language even on the basis of longstanding and broadly accepted practice, but in this case the practice has been contested, not accepted, for most of the nation's history. Even after Wirt's opinion, the executive branch did not always accept—and sometimes explicitly repudiated—the view that recess appointments could be made when the President had full opportunity to nominate an officer while the Senate was in session. More importantly, in 1863, the Senate Judiciary Committee investigated and issued a formal report condemning the practice as inconsistent with the "clear" meaning of the Clause. Congress effectuated that constitutional judgment by passing a statute denying compensation to any officer appointed to a vacancy that occurred during a session unless subsequently properly confirmed. That lasted until 1940, and only in recent times have recess appointments to vacancies occurring during the session become commonplace. That is not sufficiently longstanding and uncontested practice to trump the language and evident purpose of the Clause.

Second, we must decide whether "the recess" refers to the periods of time formally denominated as "sessions" in the Journal of the Senate, or whether it refers more informally to any period of time of sufficient length (whatever that may be) when the Senate is not conducting business. Under the latter interpretation, they can be many "sessions" punctuated by many "recesses." Because the constitutional text is uncertain on this point, we look to subsequent interpretation as our guide. For about the first 130 years, executives and Senates employed the former, formal interpretation, under which there were two, and occasionally three sessions, punctuated by one, and possibly two, recesses. Since Attorney General Daugherty's opinion in 1921, executives and Senates have employed the latter approach. Because this is a longstanding and consensual interpretation that does not contradict the text, we accept it.

The Solicitor General, however, would have us interpret the term "recess" to mean any significant cessation in Senate business (greater than three days, though where that limit comes from is unexplained) but interpret the term "session" as referring only to the formal period denominated as such in the Journal. We see no logic in this position. If recess appointments can be made during short "recesses" then they terminate at the end of the next short "session"—and not the full two year period the Solicitor General contends.

Finally and most conclusively, the Senate, which is master of its own rules, *see* Art. I, § 5, cl. 2, regularly employs "pro forma sessions" to satisfy a variety of constitutional requirements. A "pro forma" session is one at which Senators understand that no business will be transacted except by unanimous consent. Only by unilaterally declaring that these sessions are a nullity—for some but not all purposes—can the executive claim that the Senate was "unavailable" and therefore "in recess" on January 4, 2012. Such sessions are, however, uncontroversially treated as legitimate for purposes of the Adjournment Clause (since 1929), the Assembling Clause (since at least 1980—including on January 3, 2012), and the enactment of substantive legislation. On three separate occasions, President Obama has signed legislation adopted by unanimous consent during a pro forma session. The executive branch treats these laws as properly enacted. If the Senate is "available" to pass legislation during pro forma sessions, it is "available"

to act on nominations. And it is essential to the rule of law that the same rules that prevented any previous President from making recess appointments apply to his successor.

There is no consistent method of interpretation that sustains these appointments. We therefore affirm the decision below, holding them constitutionally invalid.

Dissenting View:
Sidney S. Rosdeitcher
The Brennan Center for Justice

The D.C. Circuit incorrectly interpreted the Recess Appointments Clause as restricting a President's recess appointment power to filling only those vacancies arising during an *intersession* recess. As the Government persuasively demonstrates, the text, long historical practice, judicial precedent and the purpose of the Recess Appointments Clause all show that the President has the authority to fill vacancies during both *intrasession* and *intersession* recesses, and regardless of whether the vacancy first arose during the recess.

Moreover, this Court has a special duty to preserve the constitutionally-mandated separation of powers. I am persuaded that the D.C. Circuit's interpretation would facilitate severe infringements of the separation of powers by removing a check on repeated efforts by Senate factions to aggrandize their powers in the appointments process and so subvert the Executive's Article II responsibilities.

In addressing separation of powers issues, this Court must examine the Constitution's clauses, not in isolation, but in light of their role in the constitutional structure. That is especially true here, where the text of the relevant clause is, at best, ambiguous. For almost two centuries prior to the decision below, Presidents and the courts have interpreted the Recess Appointments Clause flexibly, to achieve the overriding purpose of the appointments process of Article II, section 2 to ensure that important executive offices are timely filled to enable the President to fulfill his Article II responsibilities, including his duty "to take care that the laws be faithfully executed." *See* Executive Authority to Fill Vacancies, 1 Op. Att'y Gen. 631, 632-33 (1823) (noting that "[t]he substantial purpose of the constitution was to keep these offices filled" and holding that the President may fill any vacancy that happens to exist during a recess as thereby "the whole purpose of the constitution is completely accomplished."); *see also Myers* v. *United States*, 272 U.S. 52, 163-64 (1926) ("[A]rticle 2 grants to the President the executive power … including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed….").

As a result, the Recess Appointments Clause has operated as a check on tactics by Senate factions that seek to obstruct a President's ability to appoint senior officials through the regular advice and consent process, by providing Presidents with a means to resist such obstruction by temporarily filling vacancies that happen to exist during Senate recesses.

The D.C. Circuit's interpretation eliminates that check. Limiting the Executive's recess appointment power to *intersession* recesses would enable the Senate to eliminate that power by eliminating *intersession* recesses or reducing them to a metaphysical instant—as occurred in this very case. Further, by limiting the recess appointment power to filling only those vacancies that arise during *intersession* recesses, Senate factions can refuse to allow the confirmation process to proceed during regular sessions, knowing that the President cannot fill resulting vacancies during the recess. As a result the President would have no choice but to leave vacancies unfilled or submit to extortionate demands by Senate factions.

The threat to executive powers is not merely hypothetical. In the context of the rise of extreme partisanship over the last several decades, Senate factions of both political parties have obstructed the advice and consent process as a tactic to undermine the ability of Presidents from an opposing party to exercise their Article II responsibilities. These tactics have been a major source of government dysfunction. Majority factions have refused to submit presidential nominations to the confirmation process. Of particular relevance here, Senate minorities of both parties have repeatedly abused the filibuster to prevent the operation of the regular confirmation process, forcing Presidents to resort to recess appointments during both *intersession* and *intrasession* recesses to fill critical vacancies or risk government paralysis. In this case, but for the President's recess appointments, the NLRB would have been paralyzed for three years.

As James Madison explained: "[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." The Federalist No. 51, at 349 (Jacob Cooke ed., 1961). The D.C. Circuit's interpretation would impermissibly deprive the Executive of the means to resist such encroachments on his powers.

For the same reasons, the Senate cannot extinguish the recess appointment power by conducting pro forma sessions when the Senate is simultaneously unavailable to provide advice and consent.

I respectfully dissent.

Michael W. McConnell, a former circuit judge on the U.S. Court of Appeals for the Tenth Circuit, is Richard and Frances Mallery Professor of Law at Stanford Law School, where he serves as Director of the Stanford Constitutional Law Center. **Sidney S. Rosdeitcher**, of counsel with the firm Paul, Weiss, Rifkind, Wharton & Garrison LLP, is Senior Policy Advisor to the Brennan Center for Justice at New York University School of Law.

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