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No. 12-1115 Argued January 14, 2014

The respondent, National Labor Relations Board, is being challenged for the administrative decision made against Noel Canning in February 2012. The NLRB ruled that Noel Canning, a Pepsi bottling and distributing company, failed to fulfill a collective bargaining agreement with a local Teamsters Union. Noel Canning contested the NLRB's administrative decision in the D.C. circuit, with the claim that three Members of the Board were unlawfully appointed by President Barack Obama on January 4, 2012, thus the Board lacked a quorum of three to issue the decision.

Held: The President acted within his Constitutional powers granted in Article 2 Section 2, when he appointed Terrance F. Flynn, Sharon Block, and Richard F. Griffin Jr. to the National Labor Relations Board. The Supreme Court has never had the opportunity to interpret the clause for which the President's power to appoint was being called into question. However, the lower courts of the United States have heard cases regarding the President's power to appoint, see United States v. Allocco, United States v. Woodley, Evans v. Stephens. The query over when the President may make his appointment is being challenged, essentially questioning whether the President lawfully executed the recess-appointments clause. In effect, can the President's recess-appointment power be exercised during a recess within a session of the Senate? Does the vacancy of the position have to exist during a recess, or does it have to occur dur-

ing the recess? Can the recess-appointments powers exist when the Senate is assembling every three days in pro-forma sessions? These questions represent the basis of the case, which effectively focuses on how you view the language "happens to exist;" thus determining whether on January 4, 2012, the President possessed the power to make recess appointments. The court finds that the President does possess the power to make appointments during either an inter- or intrasession recess of the Senate; as well as to fill vacancies that happen to exist during a recess; and make appointments during the Senate's pro-forma sessions.

D.C. Cir. 12-1115 reversed.

JUSTICE ZWALLY delivered the opinion of the Court.

On January 4, 2012, President Barack Obama announced the appointment of three people to the National Labor Relations Board ("NLRB" or "the Board"). The President made these appoints during a three day break between the Senate's sessions. The Senate was meeting in "pro-forma" sessions in which no formal business is typically done; however, they are used to fulfill Constitutional requirements that prohibit one house from adjourning for longer than three days without the consent of the other. Despite the Senate's pro-forma engagements the appointments were made to the NLRB. In February 2012, the NLRB heard a review of Noel Canning's practices which were presented to the Board by a local Teamster's Union. The union claimed Noel Canning violated section 8(a)(1) and (5) of the National Labor Relations Act ("NLRA"), 29 U.S.C.§ 158(a)(1), (5), by refusing to properly executing a collective bargaining agreement with Teamster's. The NLRB's decision forced Noel Canning, to comply with the sections of the NLRA.

Noel Canning has prompted a challenge of the President's appointments based upon the fact that they were made during a time in which it felt the Senate was in session and therefore properly able to give "advice and consent" (Art. 2 Sec. 2.) on appointments. The challenge was heard by the United States Court of Appeals for the D.C. circuit in January 2013. The lower court ruled unanimously that the President's three recess appointments were unconstitutional. The lower court's ruling was characterized into two parts; it held that "the Recess," for the purpose of the clause, only dealt with an intersession recess entered into at the end of a session of Congress in which a sine die[1] adjournment has been made; the second part by way

1 Literally translates from Latin as "without day;" thus the Legislative branch adjourns with no

of a two-thirds majority held that the President may make recess appointments only to fill vacancies that arise during the intersession recess in which the appointment is made. The Presidents recess appointments neither were made, nor did the vacancies arise, during "The Recess"[2]

The Circuit Court focused on three themes of which two are pertinent to this opinion concentrating on interpreting the text of the Constitution in order to discover the meaning of the Recess Appointments Clause at the time of it was established. It established, "When interpreting a constitutional provision, we must look to the natural meaning of the text as it would have been understood at the time of the ratification of the Constitution."[3] Next the lower court makes a key assertion stating, "In fact, the historical role of the Recess Appointments Clause is neither clear nor consistent."[4] This allows the lower court to make a decision based upon their opinions and create the reasoning in their own way.

It is the position of this court that we distance ourselves from the decision made by the D.C. Circuit Court and look at the decisions of other U.S. Court of Appeals. In United States v. Allocco[5], the Second Circuit of the United States heard a case regarding President Eisenhower's appointment of John Cashin as a federal judge. The position became vacant on July 31, 1955, in which time Senate was still in session until August 2, when it adjourned sine die. President Eisenhower made his appointment on August 17, during an intersession recess. The lower court ruled unanimously that the Recess Appointments Clause permits the filling of vacancies that "happen to exist" at the time of a recess and rejected the argument that the President cannot fill those vacancies that arise while the Senate is in session.[6] The Court held a restrictive interpretation of language would allow vacancies to persist, "on the day the senate adjourns [would allow positions] remain vacant until the Senate reconvenes and has the opportunity to fill them."[7]

This approach is valuable because it recognizes that practical issues arise in attempting to secure appointments and provoking a delay into this

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setting a date in which it will return

2 Noel Canning v. National Labor Relations Bd., No. 12-1115 (D.C. Cir. January 25, 2013). Opinion.

3 Id. Page 17

4 Id. Page 19-20

5 305 F.2d 704 (2nd Cir. 1962). (U.S. v. Allocco)

6 Id. 710-13

7 Id. 710

process would be a "manifestly undesirable situation."[8] This line of jurisprudence extended twenty years when the Ninth Circuit for the United States Court of Appeals concurred with the outcome in U.S. v. Allocco in its decision in U.S. v. Woodley. The Woodley court held that a vacancy must not arise during a Senate recess for it to be under the spectrum of the Clause. And furthermore, in embracing, the "happen to exist" interpretation of the Clause, the court felt that adopting an interpretation that did not allow the President to fill vacancies when they existed would lead to "absurd results."[9]

The facts regarding Evans v. Stephens are slightly different from those of Allocco and Woodley. In Stephens, President Bush used his Recess Appointment power to make an intrasession appointment to the federal bench. The difference between the cases is the effect of an intersession and intrasession, which effectively refers to when the President made the appointment. In Allocco and Woodley it was made in-between sessions of Congress and in Stephens it was made during a session of Congress. The Stephens court was the first to authorize the President to make appointments during an intrasession recess, citing that the text of the Clause, "does not differentiate expressly between inter- and intrasession recesses..."[10] The findings of the three federal courts of appeals which upheld the notion that the President may fill vacancies that "happen to exist" leads to a conclusion that a narrow interpretation of the Recess Appointments Clause would have severe consequences. In addition, detrimentally ruining a check the framers gave the President to make Recess Appointments when the Senate is not in session. The Supreme Court accepts these findings and rejects the narrow read given by the D.C. Circuit Court.

The argument set forth by the respondent, NLRB, in favor of a broad interpretation of the Recess Appointments Clause is favored by this Court. The argument begins with the respondent contesting for a line of reasoning that interprets the Recess Appointments Clause that respects the structural role the framers set forth while also recognizing the separation of powers. Citing Justice Kennedy's concurring opinion in Public Citizen v. United States Dept. of Justice, "The Framers of our Government knew that the most precious of liberties could remain secure only if they created a structure of Government based on a permanent separation of powers... It remains one of the most vital functions of this court to police with care the separation of the governing powers. That is so even when...no immedi-

8 Id. 711-12

9 751 F.2d 1008 (9th Cir. 1985) (U.S. v. Woodley)

10 387 F.3d 1220 (11th Cir. 2004) (Evans v. Stephens)

ate threat to liberty is apparent."[11] He notes the importance of protecting each branch's Constitutional powe',s especially when the Senate infringes on the Presidents power to appoint. The respondent argues that in these circumstances the Court must choose, "...between [which of] two plausible readings of the Recess Appointments Clause should be governed by which interpretation of the clause best promotes, and does least violence to, the allocation of power between the President and the Senate that the Founders originally envisioned, and which reading best promotes the workable government they sought to achieve."[12] The supporters of the petitioner also claim another unconstitutional attempt by the Senate, "the Senate's adoption of illusory pro forma sessions to eliminate formal recesses, in order to deprive the President his recess appointment power entirely."[13]

The amici in support of the NLRB also claim, "The common sense reading of the text of the Recess Appointments Clause adopted by President Monroe in 1823, and by President Harding a century later, has enabled the clause to operate for almost two centuries as a crucial structural check against Senate failure or refusal to perform its advice and consent responsibilities during a regular session."[14] The Senate's actions in these matters are a serious risk to the integrity the Constitution provides each branch of government.

Noel Canning petitioned the Court stating that the Constitution's appointments mechanism is in place so that the President can, "take Care that the laws be faithfully executed."[15] This adds additional evidence to challenge the Senate blocking the President's ability to carry out an action given to his office. The founders sensibly crafted the appointments power as a mechanism to fill the offices authorized by law. In Alexander Hamilton's Federalist No. 76 he explains, "[O]ne man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal..."[16] Hamilton also alludes that the check on the President's appointment merely served as an opposition to favoritism and the framers thought it "not very probable that a [President's] nomination

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11 491 at 498 (US. 1989) (Pope Citizen v. United States Dept. of Justice)

12 No 12-1281The Brennan Center for Justice, Amicus Curiae Brief in support of the Respondent, produced September 20, 2013

13 Id. Page 11

14 Id. Page 18

15 U.S. Constitution Article II, § 3.

16 The Federalist No. 76 at 510-511 (Alexander Hamilton)

would often be overruled."[17]

The interpretation the D.C. Circuit takes in the Senate's use of pro forma sessions in order to get around the adjournment clause is seriously flawed. The Executive office and legislative branch have operated for more than 90 years under the same understanding of which, "short intra-session breaks of three or fewer days do not trigger the Recess Appointments Clause, but longer breaks can do so."[18] In this case, President Obama recognized that pro forma sessions had been ongoing for over twenty days and felt this constituted a Recess for purposes of his Recess Appointments powers. The Senate Judiciary Committee in 1905 found that, "a 'recess' exists during 'the time period when' the Senate's 'members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it cannot receive communications from the President or participate as a body in making appointments.'"[19]

This concludes that effectively the Senate was not in Recess but fully able to conduct business. Eliminating this structural check provided by a viable Recess Appointment clause would, moreover, be particularly destructive at this time, given the current political field and climate. Given the extreme partisan efforts to hijack the Senate under the modern filibuster rule it would be a travesty to the President's ability to carry out the law.[20] The D.C. Circuit by limiting the power to fill vacancies to those during a recess empowers the Senate to refuse to act on nominations during its regular sessions, knowing that vacancies could not be filled temporarily by the President during a Senate recess. The Senate's use of pro forma decisions to prevent the exercise of the recess appointment clause should be seen as toxic to the way in which the federal Government is supposed to exist.

It is the opinion of this Court that the ruling of the D.C. Circuit be reversed, for the reasons that President Obama acted in accordance with the Recess Appointments Clause under Article II Section II of the U.S. Constitution. This court concurs with the courts of Allocco, Woodley and Stephens in which the President has the authority to make appointments that "happen to exist" at the time of a recess. The Senate's use of pro forma sessions is a direct way of abusing its power over the President. Additionally,

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17 Id. At 512-513

18 No 12-1281 Brief for the Petitioner, NLRB at 45

19 Id. At 45

20 No 12-1281The Brennan Center for Justice, Amicus Curiae Brief in support of the Respondent, produced September 20, 2013 (page 20)

this court finds that the President may make an appointment during either a recess of inter- or intrasessions. In no context of the Recess Appointments Clause does there make any mention to the differentiation of inter- or intrasessions of Congress. Despite the character in which President Obama acted in making these appointments, it is my opinion that he acted within accordance to the portions of the U.S. Constitution that are being called into question.

For the foregoing reasons the judgment of the Court of Appeals is

Reversed.