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The Supreme Court Should Stay Out of the Noel Canning Recess Fight

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The recess appointments fight has now moved to the U.S. Supreme Court. *National Labor Relations Board v. Noel Canning* was the Supreme Court's first oral argument of 2014. Perhaps the Justices did not have quite long enough of a holiday recess to build up the energy reserves necessary to consider this important and convoluted case. Consider veteran Supreme Court reporter Lyle Denniston's pre-argument description for Scotusblog.com:

The case has unfolded before the Court in somewhat the same fashion that partisan gridlock has grown more rigid across the street in the House and Senate: The two sides are so far apart that common ground seems like a delusion. Beneath each side's core arguments is a decided mistrust of the other side's reading of history and constitutional principle, with escalating rhetoric of the dire consequences if the other side were to win.

The same Senate partisan bullies who used holds and filibuster blocks to keep critically important government agencies short-staffed, now drag the high court into their appointments brawl. Although not parties in the adjudication and not representing the Senate as an institution, amici Senate Minority Leader Mitch McConnell and his 44 GOP caucus members were granted "extraordinary" permission by the Court to participate in the oral arguments. The argument time was extended to a full 90 minutes to accommodate the partisans' participation. Perhaps with the accommodation, the Justices were sending a signal.

No Debate: A 9-0 Defeat for Obama?

Many conservative opponents of the Obama recess appointments already express confidence in total victory. If the tea leaves of oral argument are reliable, their confidence is well-founded. Last week, I was privileged to participate in a dress rehearsal of the High Court arguments. My role was to defend President Obama's appointments in a debate co-sponsored by the Cato Institute and Federalist Society. C-SPAN's coverage added the challenge and fun of arguing to a much broader audience. Georgetown Law Professor Nicholas Quinn Rosenkranz made an exceptionally strong case when explaining his view that the NLRB appointments were unconstitutional. He had co-authored one of the twenty-five Supreme Court amici briefs

supporting Noel Canning and I had written one of three amicus briefs supporting the President's appointments. My brief, however, in raising the political question doctrine, makes an argument substantially alternative to the Solicitor General's ill-received argument.

From the beginning of the debate, Nick Rosenkranz was confident in his well-developed argument, asserting: "I don't think this is a close case." So sure was he that the appointments were unconstitutional, that Professor Rosenkranz boldly predicted a 9-0 victory for Noel Canning.

I repeated my amicus brief's summary of the constitutional history that led the 1787 Philadelphia Framers to grant the President a predominant permanent appointment authority (via Article II, Section 2, Clause 2), and exclusive temporary appointment power (via Article II, Section 2, Clause 3). The Constitutional Convention's vote to allow the President exclusive recess appointment power was the "capstone" of their broader summer decision to grant the President such a predominant role in federal appointments. In Federalist writings, Alexander Hamilton describes the Senate's responsibility as only to "ratify or reject" the president's permanent appointment choices. Absolutely no House role in appointments was allowed, thus preventing "infinite delays and embarrassments."

I argued that the Constitution exclusively grants the Executive both the responsibility to determine Senate unavailability and the discretion to sign temporary commissions. Hamilton further explained in Federalist 67 that Clause 3 is "intended to authorize the President singly to make temporary appointments." The textual commitment of authority recognizes that only the Executive has the institutional competence to know when such temporary appointment action is required for his Article II, Section 3 mandate: "[H]e shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States."

I emphasized my consistent support for the recess appointment authority of the past four presidents without regard to their party. I shared that I have long criticized the Senate's sham pro forma sessions and was most concerned about preserving the constitutional authority for future presidents. At a Cato Institute event, purposeful mention of a possible future "President Rand Paul appointment authority" catches audience attention. And at a Federalist Society event, expressing sincere concern about judicial restraint is always taken seriously.

Judicial Restraint: Calling the Spirit of Alexander Bickel

Judicial restraint is at the heart of my *Noel Canning* amicus briefs filed both at the D.C. Circuit and the Supreme Court. For over a year, I unsuccessfully attempted to convince the Obama Justice Department to adopt an alternative nonjusticiability argument. The DOJ lawyers defending challenges against President Obama's appointments before the Third, Fourth, Seventh and D.C. Circuits refused to adopt the political question alternative argument. It was left to me to file amicus briefs before each circuit. I argued at the time here and most recently, last week in Jurist.org, that the recess appointment challenge presents the judiciary with a nonjusticiable political question and thus, with a historic opportunity to exercise genuine judicial restraint. The Supreme Court should stay out of the recess fight and not reach the merits of the challenge to the President's authority.

In *Marbury v. Madison* (1803), Chief Justice John Marshall offered an early political-question description: "Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." Marshall explained that the president has certain discretionary powers for which he is "accountable only to his country in his political character, and to his own conscience." My brief applies the modern political-question criteria of *Baker v. Carr* (1962), *Goldwater v. Carter* (1979) and *Walter Nixon v. United States* (1993).

If the Court is not persuaded to avoid the partisan appointment fight by its own "political question" precedent, my amicus brief, as a last stand, raises the less "domesticated" abstention perspective promoted by the late Alexander Bickel in *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962). Professor Bickel advised the judiciary to consider prudential abstention when faced with a particularly strange, intractable, and/or momentous issue which might tend to "unbalance judicial judgment." In referencing "the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from," Bickel appears to have been presciently warning the Roberts Court to stay out of the partisan mud-fight of appointment obstruction

It now appears unlikely that the Roberts Court will seize the unique opportunity *Noel Canning* affords to exercise judicial restraint. The Court is still at a relatively early stage of its deliberations, however. The alternative abstention theories put before the Court in my amicus brief, would still provide a "way out for the Court," as suggested by Lyle Denniston's Scotusblog.com pre-argument analysis. Denniston describes the Roberts Court as not "shy" about confronting "profound" constitutional issues. He reasons, however, that the Court "conceivably could wind up drawing the conclusion that this is one that it can leave to others to answer." In a democratic Republic, those "others" are our elected political leaders.

The judges should stay out of the fight. However, as the late Robert Bork warned, the "political seduction" of having the last word may prove irresistible.

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