



U.S. Department of Justice
Civil Division

Tel: 202-514-4052

[ORAL ARGUMENT HELD ON DECEMBER 5, 2012]

VIA CM/ECF

January 16, 2013

Mark Langer, Clerk
U.S. Court of Appeals,
for the District of Columbia Circuit
333 Constitution Ave., NW
Washington, DC 20001

RE: *Noel Canning v. NLRB* (Nos. 12-1115 & 12-1153)

Dear Mr. Langer:

Under Fed. R. App. P. 28(j), we provide this supplemental authority.

The Court questioned whether Presidents may make appointments during intrasession recesses. Among other support for this long-recognized authority, we cited the 1798 appointment of a U.S. Senator from New Jersey, during the state legislature's intrasession recess, under the (since superseded) recess appointment provision of the U.S. Constitution, Art. I, § 3. He was seated without Senate objection. NLRB Br. 68-69.

We have identified another, similar example—the appointment of a U.S. Senator from Rhode Island. Under that State's Constitution, legislators held "one session" annually, which could be adjourned to a future sitting of that session in a different city. R.I. Const. of 1842, art. VIII, §1; amend. III (1854). On May 29, 1884, that legislature adjourned to a sitting on January 6, 1885.¹ Rhode Island's

¹ Copies of journal entries, obtained from the Rhode Island State Archives, are enclosed.

Senator was appointed during that intrasession recess, and seated without Senate objection. 16 Cong. Rec. 1, 10 (1884).²

The Court inquired whether Congress acquiesced in intrasession recess appointments. The Pay Act reflects acquiescence, as discussed in the referenced Comptroller General Opinion. 28 Comp. Gen. 30, 34-37 (1948).

Because petitioner did not challenge the validity of intrasession recess appointments in general, the government's briefing was abbreviated, but a detailed treatment appears in the United States' Opposition Brief, at 16-26, in *Evans v. Stephens*, No. 04-828 (S. Ct.). Neither petitioner nor the government urged that the appointments here were made during an intersession recess. And the government's position continues to be that the appointments were made during the second of two adjacent intrasession recesses. NLRB Br. 31 n.11. If the Court were to conclude, however, that the January break was part of an intersession recess beginning in December, the appointments would still be valid. *See id.*

Sincerely,

/s/ Beth S. Brinkmann
Beth S. Brinkmann

Enclosures

cc: all counsel (via CM/ECF)

² Journal entries confirm the recess's intrasession nature. The May 1884 adjournment was to reconvene at a date certain, but the later adjournment at the end of the annual session was "to meet according to law" for the House, and "sine die" for the Senate.

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2013, I e-filed the foregoing with the CM/ECF system. Service will be made automatically on counsel for all parties through the CM/ECF system.

/s/ Beth S. Brinkmann
Beth S. Brinkmann

House Journal

Thursday May 29thDavis & Pitman
Co. B. 2^d Batt.

Geo. P. Lawton

Davis & Pitman

Company B, 2^d Battalion R. I. Militia

George P. Lawton

Also

An Act in amendment of Chapter 349 of
Ch. 349 P. Laws the Public Laws.

Also

Peabody Rifle Co. An Act to incorporate the Peabody Rifle Company.

Also

Actua Stopped Co. An Act to incorporate the Actua Stopped Company.

Also

Freeman Co. An Act in amendment of an Act to incorporate
the Freeman Company.

Also

Act: Mantou No. 6979 Acts to incorporate:

A. O. of F.

Court Mantou Number 6979 Ancient Order of
Foresters.

Lily Pond Ice Co.

The Lily Pond Ice Company.

Also

Indigent Insane In House amendments to Resolution making provision
for the Indigent Insane.

Also

Jones Estate Co. An Act in addition to an Act to incorporate
the Jones Estate Company

Also

Acts to incorporate:

Kalkyard Electric

The Kalkyard Electric Company.

Mfg. Co.

The Mutual District-Telegraph and Messenger
Company of Newport.

Mut. Dist-Telegraph &

Messenger Co.

Elmwood Paper Box Co.

The Elmwood Paper Box Company.

Field Medicine Co.

The Field Medicine Company.

Also

An Act in Amendment of an Act to incorporate
the Harris Revolving Ring Spinning Machine Company.Harris Revolving Ring Spinning
Machine Co.

Also

An Act to reenact and revise an Act to
incorporate the Mantou Horse Railroad Company.

Mantou H.R.R. Co.

Also

Senate business finished announcing that the Senate has finished the busi-

399

May Session 1884.

ness of the session and is ready to adjourn. Wednesday May 29.

A message is sent to the Senate announcing House Business that the House has finished the business of the finished session and is ready to adjourn.

The House then adjourns to meet in the State Adjournment House in Providence on the first Tuesday in January A.D. 1885 at eleven o'clock a.m.

Clarke H. Johnson.
Clerk

End of May Session
1884.

May Session 1854.

which were severally read and passed in
Concurrence. May 29

The Senate resolution of adjournment,
until January next and taken from the table
and indefinitely postponed. Adjournment,

Senator Hall presented a remonstrance of
Charles T. Hazard & others against passage Newport Harbor
R.R. Co.
of act to incorporate the Newport Harbor
R.R. Co. Ref. to com. on corporations.

(From the House of Representatives.) H.R.
Resolution continuing unfinished business. Unfinished business
Read & concurred.

Also, its concurrence in Senate amend- Pay of Officers &c.
ment to Resolution to pay officers & attendants.

The Senate adjourned to meet in Providence
on the first Tuesday in January next at 11 A.M.

J. M. Addemaury Secy.

House Journal

Friday April 24. A Resolution to pay the bill of the Court of Probate Cumberland ct. of the town of Cumberland of Probate.

Also

A Resolution to pay the bill of E.L. Freeman & Co. E.L. Freeman & Co. \$435.

Ch. 410 P. Laws. Mr. Blodgett from the Committee on the Judiciary reports an act in amendment of chapter 410 of the Public Laws recommending that the same be indefinitely postponed. Postponed to the May Session of the General Assembly 1885.

Senat. Message A message is received from the Senate announcing that the Senate has concurred in:

Samuel A. Tolland A Resolution to pay the bill of Daniel A. Tolland \$50.

Also

State Bd. of Agriculture An act to create a State Board of Agriculture.

Also

State Census. An act making an appropriation for the taking of the State Census for 1885 and other purposes.

Also

Bristol Probate ct. A Resolution to pay the bill of the Probate Court of Bristol.

Also

4th R. I. Vols. A Resolution in relation to the Clothing Account of the 4th Rhode Island Volunteers.

Also

Ch. 146 P. St. Communicating An Act in addition to chapter 146 of the Public Statutes in which the Senate has concurred but with amendments. Read and postponed to the May Session 1885.

Also

Levee Lands. A Resolution in relation to the Supplemental Message of the Governor relative to the levee lands in which the Senate has concurred with amendments. Read and concurred in.

Also

State Home & The Report of the Commission to locate the State School for Children Home and School for Dependent Children. Read a file.

607

January Session 1885

Also

Friday April 24.

A Resolution continuing Unfinished Business to the next General Assembly. Read and concurred in. Unfin. Business

Also

That the Senate has finished the business of the Senate Ready Session and is ready to adjourn. to adjourn.

Mr Adams from the Committee on Education reports Woodland Loan Act in Amendment of an act to incorporate the Woodland Landreth Company of Kentucky, recommending concurrence. Read and concurred in.

(Mr Andrews in the Chair)

Mr Adams offers a Resolution of Thanks to Hon. Hon. F. G. Johnson Francisco G. Johnson Speaker of the House. Read and passed unanimously.

An act for clearing the channel of the Seckonk Seckonk River River at India Point &c. is Read and concurred in:

A message is sent to the Senate announcing House Ready that the House has finished the business of the to adjourn session and is ready to adjourn.

The House then adjourns to meet according to law.

Clarke H. Johnson
Clerk

End of January Session.

475

January Session 1885.

Senator Page presented a Resolution of thanks to His Excellency the Governor, suspending the consideration of the foregoing, Senator Sprague offered a Resolution expressing regret at the retirement of Senator Seabury;

April 24
Thanks to the
Governor.

Senator Seabury.

and the Resolutions were unanimously adopted by a rising vote; to which the Governor made a touching and appropriate response.

Senator Gregory presented a Resolution concerning unfinished business, Read & passed.

Unfinished business

(From the House of Representatives.)

H.R.

Resolution appointing committee relative to school for dependent children. Read and indefinitely postponed.

Home & School

Also, Resolution to pay bill of Bristol Court of Probate & Read & concurred.

Bristol Probate Ct.

Also, Resolution in regard to 4 R.I. Volunteers. Read and concurred.

4 R.I.V.

Also, announcing its concurrence in Senate amendments to an act providing for the establishment of a true meridian line to a fixed standard measure;

Meridian line

Also, in an act in amendment of Chapter 88 of the Public Statutes "of Shows & Exhibitions"

Chap. 88

Also, in an act in addition to Sec. 7, Chapter 420 of the Public Laws;

Chap. 420

Also, in an act authorizing the City Council of the City of Providence to make ordinances regulating drainage, &c

Providence

Drainage &c

Senate Journal

April 24

Chap. 146

Oysters.

Senator Dubois from the committee on Fisheries reported House bill entitled "An act in addition to Chapter 146 of the Public Statutes 'of oyster fisheries.'" Read & concurred with amendments.

H.R.

Unfinished business

(From the House of Representatives.)
A message announcing its concurrence in Resolution continuing unfinished business;

Public Laws.

Also, in Resolution to print public laws of the present session

Woodland Cemetery

Also, in An act in amendment of the Charter of the Woodland Cemetery,

Home & School
afcs

Also, in Resolution to pay bill of Henry A. Stearns et al.

Cove Lands.

Also, in Senate amendments to Resolution relative to supplemental message of the Governor relative to the Cove Lands;

Appropriations

Also, in the act making additional appropriations for the support of the State government, &c.

Seekonk bridge

(Chap. 349.)

(Senator Young in the Chair.)
Senator Dubois presented an act in amendment of Chapter 349 of the Public Laws. (Seekonk bridge.) Read and passed.

A message was received from the House announcing its concurrence in the foregoing act.

The Senate adjourned siue die.

J. M. Addeman, Secretary.