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Respondent Brief

Table of Cited Authorities:

- Letter from Alexander Hamilton to James McHenry
- Letter from George Washington to William Drayton
- Maryland Constitution of 1776
- National Labor Relations Board v. Noel Canning (oyez.org)
- NLRB v. Noel Canning  
[http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-1281\\_3d9g.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-1281_3d9g.pdf)
- Pennsylvania Constitution of 1776
- Poe, Lauren. "Executive Power: Hamilton and Jefferson on the Role of the Federal Executive." Accessed February 21, 2014.  
[http://thomasjeffersonpersonalitycharacterandpubliclife.org/Lauren\\_Poe\\_Executive\\_Power\\_Past\\_and\\_Present\\_2.pdf](http://thomasjeffersonpersonalitycharacterandpubliclife.org/Lauren_Poe_Executive_Power_Past_and_Present_2.pdf)
- The Harlan Institute
- South Carolina Constitution
- The Federalist No. 67
- The Federalist No. 77
- The United States Constitution

Statement of Argument:

The president should be very limited in his recess appointment powers. His recess appointment power should be limited to recesses that occur between enumerated sessions of the Senate, limited to vacancies that first arose during that recess, and it may not be exercised when the Senate is convening every three days in pro forma sessions. The executive and legislative branches jointly have the power in the appointment process, because the president nominates to fill the vacant spot, while the Senate approves or disapproves his choice. Vacancies that first arise prior to the recess should be able to be filled by the president, but if they are open during the recess and have been empty for a while he should have to wait for the recess to be over in order to have Congress be able to approve the person he would eventually pick for that spot. Also if the president makes sure that his appointment choice is confirmed by the Senate beforehand, then there would be less of a problem in the process of the recess appointments since the Senate already know who the President wants to appoint. These sessions help Congress be able to get what they want out of the recess appointment situation. The president should not be able to fill vacancies during a pro forma session, because it is only a three day recess, while he is

only allowed to appoint people and fill vacancies during a recess that occurs between enumerated sessions of the Senate of four days or more.

Argument:

The interpretation and the definition of the recess appointment is the major fixture in this case. There have been many different ideas on how the President's recess appointment powers should be upheld, narrowly or broadly. These ideas will vary depending on the political parties involved. The Recess Appointments Clause argues that the President can only fill vacancies that occur during the recesses between Congressional sessions by saying "The 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." The power of appointing during a recess that is within a session and filling a vacancy that did not occur within a recess is a stretch of the President's powers. The 10th amendment states that the powers delegated to the federal government should be limited. This applies to all three branches of government, including the executive branch, including the President. The framers of the Constitution limited the powers of the President so the national government would not be overbearing. Allowing the President this power would be unconstitutional and over extending the powers he already has. Abusing his recess appointment powers is an example of the reason why checks and balances was created, to have each branch have equal separate powers.

In Maryland's 1776 Constitution, the appointment power was held by only the state legislature and the governor could only fill a few vacancies. In Pennsylvania's 1776 Constitution, their executives barely held any power, and the power they did have was limited by trade embargoes. South Carolina's 1778 Constitution only let their governor appoint officials with the "advice and consent" of his council. Alexander Hamilton finally solved this appointment problem at the 1787 Constitutional Convention by making the appointment power joint between the executive and legislative branches. It states in Article 2, Section 2, Clause 3 of the United States Constitution that the president can "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." The president is able to appoint people during Senate recesses, but the Senate has to confirm if the people appointed will be there permanently or not later on. The United States Constitution states in article 2, section 2, clause 2 that "[The President] shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for..." upholding the tradition of the President looking to Congress to aid in such decisions. If the Senate is not in session, the President does not have the opportunity to go to them for approval over appointments. With that being said, the recess appointment power is very unpredictable. It could happen or occur at the tip of a hat when Congress decides to end their session. So logically, the Senate has always had control over the recess appointment power and when it could be put into action because of pro forma sessions. The Senate picks and chooses when they have a recess or when to have a pro

forma session which could affect the President's ability to appoint new members. The president can only do this between enumerated sessions and he cannot do this during a pro forma session which is a three day break. In article 2, section 2, clause 2 of the United States Constitution it states, "[B]y and with the Advice and Consent of the Senate..." This proves that the Senate must approve his appointment after their recess is over, which balances the power of the executive branch with the legislative branch.

If the Senate is convening in a pro forma session, then the president should not be allowed to make an appointment because it is only a three day recess. He can't fill vacancies during a pro forma session because the D.C. Court of Appeals decided, according to the constitution the phrase "the recess" means that the president can only make appointments during the adjournment of two sessions of Congress. Alexander Hamilton agreed with the Constitution that the House of Representatives is supposed to have no role in the appointment process. In Federalist No. 77, Hamilton states, "A body so fluctuating, and at the same time so numerous, can never be deemed proper for the exercise of that power... All the advantages of the stability, both of the executive and of the senate, would be defeated by this union..." Although in Article 1, Section 5, Clause 4 of the United States Constitutions states, "Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days..." This shows that if the House wanted to involve itself into the appointment process, then it could use the power of consent over the Senate to adjourn for recess, which forces the Senate to go into pro forma sessions, which is when the president is not allowed to make appointments because it is a three day break, not like an actual recess which is four or more days.

The president should according to George Washington himself, appoint people based on the fact that he is sure that the Senate would approve of his decision when they get back. Having the Senate's approval before hand would make the appointing people into vacancies process much easier. It says in the Letter from George Washington to William Dayton, "This is rendered necessary by the Constitution of the United States, which authorizes the President of the United States to fill up such vacancies [sic] as may happen during recess of the Senate---and appointments so made shall expire at the end of the ensuing Session unless confirmed by the Senate; however there cannot be the smallest doubt but the Senate will readily ratify and confirm this appointment, when your commission in the usual form shall be forwarded to you." George Washington knew that having the Senate's full support would make this appointment process more constitutional in the literal sense of what the framers wrote in the Constitution. Knowing that the Senate would approve of the appointed official of the president, then it would be following the Constitution since the Senate is supposed to be involved in the process, considering they will have to approve or disapprove of the appointed official after they return.

Thomas Jefferson had his own take on executive powers. He saw the executive branch to be like a monarchy. In 1797 he wrote a letter to Arthur Campbell stating "Hitherto, their [the

Federalists] influence & their system has been irresistible, and they have raised up an Executive power which is too strong for the legislature.” He thought that the executive branch had too much power, more than any other branch, and it wasn’t equally justified for them to have that much power. Jefferson was an advocate of interpreting the Constitution narrowly rather than broadly.

The president should be limited to recesses that occur between enumerated sessions of the Senate because the duration of a recess is four days or more, and that is when he is allowed to make appointments. In the Letter from Alexander Hamilton to James McHenry (May 3, 1799), Hamilton states, “It is clear, that independent of the authority of a special law, the President cannot fill a vacancy which happens during a session of the Senate.” Hamilton is talking about how when Congress is in session the president cannot fill vacancies, because constitutionally he is only allowed to fill vacancies during a recess in between the sessions of Congress. In Federalist No. 67, Alexander Hamilton states, “The ordinary power of appointment is confided to the President and Senate jointly, and can therefore only be exercised during the session of the Senate...” With this statement it is believed that the president should not be able to appoint anyone to office during a Senate recess at all, but prolonging a recess just to fill a vacancy would be unnecessary, so it would just be easier to fill it during the recess. Hamilton also states in the Federalist No. 67 that, “[T]he succeeding clause is evidently intended to authorize [sic] the President singly to make temporary appointments ‘during the recess of the Senate, by granting commissions which should expire at the end of their next session.’” This is what allows the president to fill the vacancies during that recess when necessary and limits his power to do so. His power to do so is limited since he is only allowed to fill vacancies that arise during recesses in between sessions of Congress.

Conclusion:

In the case of the National Labor Relations Board v. Noel Canning, Noel Canning appealed the United States Court of Appeals for the District of Columbia and to argue the President’s recess appointment powers. The appeals process found that the Presidents appointments were invalid. The reasons the appointments were invalid were for two basic reasons. First, the timing of the appointments was questionable. The courts concluded (unanimously) that the appointments did not occur in the proper time frame. They did not occur between sessions, but rather during the congressional sessions. The courts decided that was not the intent of the original writers of the Constitution. And secondly, the court concluded that the appointments were made for vacancies that occurred during the congressional session, rather than in between sessions which was explained. The courts interpreted this from the original 18<sup>th</sup> century reading or interpretation of the Constitution. Presidents have been using recess appointments for many years, just rarely for major positions like this one. Implying what the Constitution says can exceed what is necessarily meant by the framers of the written document.

After researching this case, it is shown President Barack Obama's decision to appoint three new members to Congress while it wasn't in session was invalid as determined by the D.C. Court of Appeals. There is a need to insure a continuous operation of government, but we feel this particular abuse or overuse of the recess appointment is not necessary. The rules for the recess appointments are clearly spelled out and should be adhered to by all Presidents.