

## Restricting the Scope of the President's Recess Appointment Power Brief

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Statement of Argument:

When the founding fathers first established the United States Government, they created a system stated in the Constitution called the “separation of powers”. Each branch of government, the executive branch, the legislative branch, and the judicial branch, has their own designated duties; when one branch appears to overstep these boundaries, it can result in a highly dysfunctional system. This idea of “separation of powers” has been long disputed throughout American history especially in regards to the Constitution and the

Recess Appointment Clause which allows the President to appoint Senators while Congress is in Recess. However, the Constitution also grants the Senate power in the “advice and consent” of presidential appointments. This conflict within the Constitution has created great controversy and debate over time as the President has extended his individual power. In modern day, President Obama has indefinitely overextended his use of this power as seen in *National Labor Relations Board v Noel Canning*. In the case, the President had appointed officials to the NLRB breaking the power originally granted in the Constitution between the executive and legislative branches. In addition, he has made appointments while Congress is in session and he has filled positions that would have been vacant prior to recess. All of which is in violation of the Constitution. When the case reached court, The DC Circuit Court of Appeals declared the President’s actions unconstitutional and that the NLRB lacked the proper quorum to conduct business. As seen in this case, the President has abused his executive power, therefore, the scope of his Recess Appointment power must be restricted to the original means described in the Constitution.

#### Argument:

According to Edmund Randolph, “the President lacks ultimate authority in recess appointments”. Even George Clinton, in the letter of Cato IV, claimed that this power could result in an abuse of power. He stated that the president would “generally be directed by minions and favorites” if the Senate is not there to check his or her power. In more recent times, governor Morris has also advocated for limiting the President’s appointment power. In a short speech, he argues, “Mr President; if the rod of Aaron do not swallow the rods of the Magicians, the rods of the Magicians will swallow the rod of Aaron,” meaning that there is a risk of the president becoming tyrannical and corrupt if this power is not limited. Although the power of the president to appoint temporary officials while the Senate is in recess has been used since the first presidential administrations, it has recently come under high debate under the Obama administration. President Obama had made a total of three appointments to the National Labor Relations Board in 2012 during very short Senate recesses. This became controversial in the case of *NLRB v. Noel Canning*. The court decided that “the President’s recess appointment power may only be exercised during recesses that occur between enumerated sessions of Congress (that is, inter-session recesses), and not during any intra-session break.” Even Alexander Hamilton, a federalist, proclaimed that the president’s power of appointment could only be used during Senate recess when they have “become vacant by accidental circumstances.” The limitation of the president’s power to appoint has been limited by the narrow interpretation of George Washington,

who set precedents for the future presidents. Traveling further throughout history, many important officials have also denounced the broad usage of the this power. In more recent times, presidents have become increasingly powerful and domineering. The broad use of presidential appointments are a reason for this. Therefore, to sustain the balance and “separation of powers” between the branches of government, the executive branch has to revert back to a narrow interpretation and utilization of the president’s power to make appointments during the recesses of Senate.

Article 2, Section 2, clauses 2-3 of the Constitution also demonstrate the invalidity of the President’s abuse of recess appointments. Article 2, Clause 3 stands as the Recess Appointments Clause. It states, “The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate...” However, clause 3 is further enforced by the Senate’s power in clause 2 of the article; it states, “[The President] shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint...Officers of the United States, whose Appointments are not herein otherwise provided for.” Therefore, even though the President has his own right to grant recess appointment, all appointments are not permanent without “the advice and consent” of the Senate. This reinforces the fact that the President must rely on the Senate to check his decisions before he makes it official. But if he chooses to make this decision without conferring with the Senate, not only does it suggest that there is no longer a balance within the government, but it also clearly violates the words of the Constitution. This concept is validated again in the Court’s decision in *NLRB v Noel Canning* that the scope of the President’s recess power stands only in “all vacancies that may happen during the recess of the Senate and not those that are vacant prior to recess.” This says that the President cannot fill vacancies when the Senate is not in a recess. Additionally, the President used his power to fill vacancies that would have been vacant prior to recess. With all of the constitutional violations in mind, the DC Circuit Court of Appeals declared the NLRB has not sustained the quorum to do business.

Through the formative years of the United states, the founders argued over the validity of the President’s power to make recess appointments. While federalists argued for a broad interpretation of Article 2 section 2 clause3 of the constitution, Anti-Federalists feared that a broad interpretation of the recess appointments clause could be used by the president to overstep his scope of executive power. This abuse of power would tear down the division of power as instated in the constitution. Chief counsel for the Constitutional Accountability Center, Elizabeth Wydra, resurrected this concern when she argued that if Obama’s recess appointments in the national labor relations board were upheld in the case of *NLRB v. Noel Canning*, the balance between the executive and legislative branch would be disturbed, thus destroying the separation of power. Separation of power was put into effect to prevent one branch becoming too powerful and to eliminate the threat of a tyrannical

government, if the president is allowed power beyond the scope of that appointed, the threat of tyranny would reappear. Many states have tried to limit the Presidents scope of power and restore balance. North Carolina did this by duplicating article 2 section 2 clause 2 in their state constitution: “XX. That in every case where an officer, the right of whose appointment is by this constitution vested in the general assembly, shall during their recess, die, or his office by other means become vacant, the governor shall have power, with the advice of the council of state, to fill up such vacancy, by granting a temporary commission, which shall expire at the end of the next session of the general assembly...” . This limits the power of state officials and the president by forcing them to convene with the council in order to fill vacancies in office.

### Conclusion:

From the origin of the presidency, George Washington wrote to William Drayton, “Sir. The Office of Judge of the district Court in and for South Carolina District having become vacant; I have appointed you to fill the same..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 the recess of the Senate—and appointments so made shall expire at the end of the ensuing Session unless confirmed by the Senate”. George Washington set the precedent of Recess Appointment power. However, overtime the president’s individual power has grown to succeed the power granted in the Constitution. Conflicting clauses in Article 2 of the Constitution has led the scope of Recess Appointment power to be controversial throughout American history. While the President is granted authority to make recess appointments, the Senate has the power of “advice and consent” over all appointments. With expanding executive power, the President has exceeded the power granted to him from the Constitution and leached into the legislative branch. In his reach for ultimate authority in appointments, the President has also extended the original means of the Recess Appointment Clause. This extension of power is clearly evident in the case *National Labor Relations Board v Noel Canning*, where President Obama made appointments to positions that would have been vacant prior to recess while the Congress was in session. The DC Circuit Court of Appeals declared the President’s actions invalid under this evidence and stated that due to these invalid appointments, the NLRB has no quorum to make business. Even with the growth of the president’s individual power, the restrictions on recess appointments have been rooted on all levels of government. State executives have also been restricted in recess appointments by their own state constitutions. Therefore, the president has no validity to break the original precedents of recess appointment power on a federal level.

NLRB v Noel Canning will continue to be reviewed by the Supreme Court, where they will make the ultimate decision on how broad recess appointment power for the president is. However, the Senate has taken actions to restrict the President in his recess appointments. In 2007, with the regain of Democratic power in the Senate, they created “pro forma” sessions, in which business occurs in “a call to order” often by a single senator. These sessions are shorter than a regular recess session, therefore, it limits the President’s use of recess appointments. Using this method, it helps limit the abuse of the Presidential recess appointment power. There are numerous views regarding recess appointments, and many people see the growing executive power on these appointments as the government’s elasticity to adapt to change overtime. However, if the President continues to overextend his power, it will continue to destroy the foundations of the government. While it takes power away from the other branches, it’ll eventually corrupt the federal government. Therefore, restricting the bounds of recess appointments and the executive branch will protect the system of government that was created with the ultimate intention of representing the voice of the people.

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