What is the scope of the President's recess appointment power?

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Statement of Argument:

The United States Court of Appeals for the District of Columbia Circuit has acted unconstitutionally in limiting the powers granted to the executive branch under Art II, § 2, Clause 3, which grants the President the power to make appointments while the Senate is in recess. We agree with some aspects of the Court of Appeals' decision, but find other facets of the decision to be in violation of the Constitution. Specifically, we hold that:

(1) The President's recess appointment power does not need to be limited to vacancies that first arose during recess due to precedent and controversy regarding interpretation of the language of the Constitution on this point.

(2) Given that the Senate is not actually in session during pro forma sessions, as they are simply attempts to shorten Senate recess and limit recess appointments, the President's recess appointment power may be exercised during pro forma sessions.

(3) The President's recess appointment power should be limited to recesses that occur between enumerated sessions of the Senate.

Argument:

The United States Court of Appeals for the District of Columbia Circuit's decision in National Labor Relations Board v. Noel Canning Corporation should be partially upheld. It is stated in the Constitution that the President has the power to make recess appointments. It does not state, however, the nature of the timing of these appointments. This point has led to much political debate and controversy over the interpretation of Article 2, section 2, clause 3 of the Constitution which directly addresses presidential recess appointments. The Court of Appeals decided that the President can only make recess appointments in recesses between Congress sessions, not during intra-session recesses; additionally, the President cannot make recess appointments during pro forma sessions. The Court of Appeals also decided that the President can only use recess appointments to fill vacancies that arose while the Senate was in recess.

Since the founding of our nation, power has been divided among the executive and legislative branches in that executive officers have been granted the power to make appointments, and the legislature has had the prerogative to approve or deny the appointments. The state constitutions of Maryland, Pennsylvania, and South Carolina have employed this division of power in filling governmental vacancies. This system of "advice and consent" was discussed in the Constitutional Convention and incorporated into the Constitution. However, executive officers have also been allowed to make decisions while the legislature was in recess, when their "advice and consent" is not available. Art II, § 2, Clause 3 states that "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." According to Alexander Hamilton, this clause "is evidently intended to authorise 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." Hamilton brings forth a broad interpretation of the recess appointment clause, stating that the President may make temporary appointments during a recess of the Senate, and not that the appointments must be only to vacancies that occurred while the Senate was in recess. There is much debate regarding the interpretation of this clause; however, under the broad interpretation, while the President's recess power should be limited to some degree, it should not be limited to merely appointing positions for vacancies that occurred during the recess.

The respondent argues that recess appointments are a way to enforce the executive branch's political leanings. The U.S. Court of Appeals, in an attempt to limit this executive power, decided that the President's power of recess appointment may not be exercised during pro

forma sessions. However, pro forma sessions are in themselves a political tool used by Congress in a split government to limit the influence of the executive branch's political party. The rules of the Senate, not the Constitution, allow the Senate to remain in session with only one or just a few members of Congress present, only to close it down minutes later. This is for the sole purpose of shortening the duration of Senate recesses and preventing the President from exercising his recess appointment power. Thus, we hold that because the Senate is not truly in session during pro forma sessions, the President's recess appointment power may be exercised during pro forma sessions.

We hold that while the President should be allowed to make recess appointments during pro forma sessions and that these appointments should not be limited to vacancies that occurred during the recess, the President's recess appointment power should not be exercised during intra-session recesses. Archibald Maclaine stated, "Congress are not to be sitting at all times; they will only sit from time to time, as the public business may render it necessary. Therefore the executive ought to make temporary appointments..." These appointments may be made during recesses in between sessions of Congress, but we hold that this executive power should be limited and not be executed during recesses within a single session of Congress.

Conclusion:

We agree that recess appointments should only be made in recesses between sessions rather than during short, intra-session recesses. However, we hold that since pro forma sessions have come to be used as a political tactic to limit the length of Senate recesses so that Presidents may not exercise their recess appointment powers, the President should be allowed to make recess appointments during recesses in between sessions, regardless of the presence of pro forma sessions. Additionally, we hold that recess appointments should not be limited to filling the vacancies that occurred while the Senate was in recess. Art II, § 2, Clause 3 is open to a less strict interpretation which suggests that recess appointments can be made for any vacancies, not only those that occurred during the recess in question. By defining the word "Recess" in a strict and narrow frame, the U.S. Court of Appeals for the District of Columbia Circuit goes against the U.S. Constitution. The Constitution enumerates the President's recess appointment power, and limiting this power in such a way as was done by the U.S. Court of Appeals dilutes a constitutionally ordained executive power and goes against the very foundation upon which our nation was built.