

Md. appointments appeal could hinge on interpretation of governor's powers

By: [Bryan P. Sears](#) Daily Record Government Reporter May 7, 2018



Retired Judge Alan M. Wilner is sitting in on the Court of Appeals because of a recusal in the case.
(File photo)

ANNAPOLIS — The state's appeal of a case in which the General Assembly withheld the salaries of two Cabinet members hinges largely on whether Maryland's top court believes the governor validly used recess appointments after withdrawing their nominations from Senate consideration

Assistant Maryland Attorney General Julia Doyle Bernhardt, representing Treasurer Nancy K. Kopp and the state, told the Court of Appeals on Monday that a circuit judge's ruling in favor of Gov. Larry Hogan would open the door to an endless circumvention of the Senate's advice and consent authority regarding appointments.

"This budget language does not interfere with the power of the (governor) to appoint," said Bernhardt, Attorney General Brian E. Frosh's chief of litigation. "The executive does not have the sole power to appoint. This is a shared power between the executive and the Senate. And so all of this discussion about separation of powers and how this interferes with the governor's power to have whomever he would like ..."

Bernhardt was cut off by Judge Alan M. Wilner, who repeatedly asked her if her case hinged on Hogan's authority to recess appoint two Cabinet secretaries — acting Health Secretary Dennis R. Schrader and former acting Planning Secretary Wendi Peters — before the full Senate could vote on them in 2017.

"If he had the power to do it, assuming he had the power to do it, what was there to correct?" asked Wilner, a retired jurist who sat on the seven-member court in place of Judge Shirley M Watts, who did not publicly disclose the reason for her recusal.

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The question led to the most energetic exchange between the court and attorneys arguing the case during the nearly one-hour hearing.

"If the appointments were valid then there (is) nothing to correct," Bernhardt responded.

"So the legislative prerogative was not transgressed?" Wilner said.

Bernhardt said the argument that attorneys general have long advised that such appointments were legal was overstated because previous cases "were quite different" than those of Peters and Schrader. Allowing Hogan's actions would, she said, create a system of "perpetual recess appointments" that could be used to sidestep legislative approval — something that has never happened in Maryland.

"That was not my hypothesis," said Wilner.

Bernhardt said the Senate acted to protect its own constitutional powers to review appointments made by the governor.

"I don't think you could just say there wouldn't be anything to correct," she said. "What would be corrected is that the Senate would not have had the opportunity to advise and consent. You would have high-level government officials who had never been confirmed by the Senate and that is not what the framers intended."

At issue is the constitutionality of budget language meant to prevent Hogan from paying Schrader and Peters after the governor withdrew their nominations in 2017 before the full Senate could vote on either. The legislature responded in the waning days of that year's 90-day session by using the budget to restrict payment of any appointment subject to Senate confirmation that had been withdrawn before a vote could be taken.

Only Peters and Schrader were subject to the language.

Timothy F. Maloney, a partner at Greenbelt-based Joseph, Greenwald & Laake P.A. who represents Schrader and Peters, argued to the court that Hogan "was clearly within his rights" to recess appoint the pair of secretaries he previously withdrew.

"If the General Assembly can do this, if they basically can chop off their heads, if you will, budgetarily by simply placing language on Cabinet members it doesn't want to appoint, here it would be recess appointments and next week it could be something else," said Maloney. "It really deprives the executive of the inherent executive authority to make recess appointments."

Anne Arundel County Circuit Judge Ronald Silkworth wrote in a December ruling, now under appeal, that the budget language used by the General Assembly to deny payment to Peters and Schrader violated the separation of powers as the governor cannot veto the budget bill.

Silkworth also ruled that Kopp had no legal authority to deny payment to either appointee.



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Silkworth ordered Schrader and Peters to be paid their back salaries and benefits. Peters and Schrader have since been moved to other positions within the state but have not been paid for their time served as acting secretaries.

The Court of Appeals is expected to render its decision by Aug. 31 in *Nancy K. Kopp, et al. v. Dennis R. Schrader, et al.*, No. 72 September Term 2017