

June 26, 2014

**Supreme Court Rules President Obama's
NLRB Recess Appointments Unconstitutional**

The Supreme Court unanimously ruled (9-0) today in *NLRB v. Noel Canning* that President Barack Obama's three recess appointments to the National Labor Relations Board ("NLRB") in January 2012 were unconstitutional, a decision that will nullify hundreds of NLRB cases decided between January 2012 and August 2013 and limit President Obama's (as well as future presidents') power to unilaterally appoint officials while the Senate is in so-called "pro-forma" sessions.

In December 2010, Noel Canning, a soda bottler and distributor in Yakima, Washington, and Teamsters Local Union No. 760 had a dispute over whether a new collective bargaining agreement had been reached by the parties. The Union claimed that it had; the Company disagreed. In 2012, the case went before the NLRB, which found for the Union.

The Company appealed that decision to the U.S. Circuit Court of Appeals for the District of Columbia on the basis that NLRB members involved in the ruling were unconstitutional recess appointments. In January 2013, the D.C. Circuit agreed with the Company, holding that the NLRB's decision was invalid because of the recess appointments. The Obama administration then sought review of that decision by the Supreme Court.

Under the U.S. Constitution, the President generally must obtain "the Advice and Consent of the Senate" before appointing an officer of the United States. The "Recess Appointments Clause," however, creates an exception. It gives the President alone the 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." U. S. Const., Art. II, §2, cl. 3.

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The Supreme Court concluded today that no such “Recess of the Senate” occurs where, as here, the Senate is holding “pro-forma” sessions (*i.e.*, sessions where no Senate business is being conducted but the Senate is not formally adjourned).

Despite the Court’s decision being unanimous in its outcome, it was divided in its legal reasoning. Justice Scalia wrote a concurring opinion, joined in by Chief Justice Roberts, Justice Thomas and Justice Alito, in which he argued that the Court majority did not go far enough. Justice Scalia would have ruled, as the D.C. Circuit had, that the term “Recess” in the Constitution means only a formal inter-session recess and applies only to a vacancy that occurs during the recess period itself. Instead, the Court majority held that both inter- and intra-session recess appointments are valid under the Constitution and a vacancy does not have to occur during the recess itself.

The Court’s more limited ruling, however, is of no immediate help to President Obama, who, during a three-day “pro-forma” Senate session in January 2012, appointed three members to the five-member NLRB (Terence Flynn, Richard Griffin and Sharon Block). The Obama administration claimed it was simply following a long-standing interpretation of the recess appointments power in the U.S. Constitution, dating back to President George Washington. The Company argued, however, that the President ignored the original intent of the Constitution’s drafters, who included the recess appointments clause to ensure the government could continue to function when the Senate was in recess for extended periods of time—a time when senators had to travel to and from Washington on horseback.

“Three days is too short a time to bring a recess within the scope of the [Recess Appointments] Clause,” Justice Stephen Breyer wrote for the Court, noting that recesses shorter than 10 days were also “presumptively” too short. “Thus we conclude that the President lacked the power to make the recess appointments here at issue.”

Today’s decision constitutes another check on the authority of the NLRB by the Supreme Court, which held in *New Process Steel* in 2010 that hundreds of NLRB decisions were invalid because the NLRB had acted without a proper quorum of

at least three members. It remains to be seen whether this latest curb on recess appointments will have a moderating or polarizing effect on the composition of the NLRB, and by extension on that agency's decisions and policies.

Although the NLRB is now properly constituted with all five members, it will need to reassess hundreds of cases affected by today's decision, which may create a significant backlog at the agency. Mark Gaston Pearce, the current NLRB chairman, released a statement today in reaction to the Court's ruling in which he affirmed that the NLRB is "committed to resolving any cases affected by today's decision as expeditiously as possible."

If you have any questions regarding any of these issues, please contact John Keil (212) 758-7862, Phil Repash at (212) 758-1078, or another attorney at the Firm.

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