

# President's Recess Appointments to NLRB Unconstitutional

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The United States Court of Appeals for the District of Columbia issued the long anticipated ruling in the *Noel Canning v. National Labor Relations Board* case. In this case, Noel Canning ("Canning") asked the Court to review a decision by the National Labor Relations Board ("NLRB"), finding that Canning violated the National Labor Relations Act by refusing to sign a collective bargaining agreement reached with a Teamsters local union. While a review of an NLRB decision is considered by some routine, this case was not. In addition to Canning's arguments that the findings in the case were not supported by the evidence presented at hearing or the law (both arguments rejected by the D.C. Circuit), Canning also questioned the authority of the NLRB to issue its order on two constitutional grounds – (1) that the NLRB lacked authority to act because it did not have a quorum since three members of the five-member board were illegally appointed by the President without Senate confirmation as recess appointments and (2) the vacancies filled by the purported recess appointments did not actually happen during a recess of the Senate, as required under the Recess Appointments Clause of the U.S. Constitution.

### Appointments Were Invalid Because They Were Not Made During "the Recess"

Under the Recess Appointments Clause, the President has the power "to fill up all Vacancies that may happen during the Recess of the Senate, . . . ." In this case, the D.C. Circuit Court concluded that President Obama's January 2012 alleged recess appointments to the NLRB of Board Members Sharon Block, Terence Flynn and Richard Griffin were not made during "the Recess" of the Senate. Instead, the January 4 appointments were made when the Senate was operating pursuant to a unanimous consent agreement that provided the Senate would meet in a pro forma session every three business days from December 20, 2011 through January 23, 2012. Because the Senate acted to convene the 112th Congress on January 3 -- fulfilling a constitutional mandate that the Senate convene on that day -- under the Appointments Clause of the U.S. Constitution, nominations of Officers of the United States made by the President require the advice and consent of the Senate.

Here, the recess appointments were made by the President on the claim that, although the Senate must give its advice and consent to any appointment, the Senate was not in session (and in a de facto recess) because the Senate's pro forma sessions occurred during the holiday season when the Senators were not actually present in the Senate Chamber. Therefore, the President claimed that the appointments were

valid under the Recess Appointments Clause. Rejecting this argument, the D.C. Circuit reasoned that the term "the Recess" of the Recess Appointment Clause is by definition the period of time the Senate is not in session and therefore unavailable to receive and act upon nominations from the President. The Recess Appointments Clause has strict limits and appointments under this clause can be made only when the Senate is between sessions, not during a routine adjournment, a long weekend or a lunch break during regular workings sessions of the Senate and certainly not when the President unilaterally decides that the Senate is unavailable. Thus, the term "the Recess" is limited to intersession recesses. The D.C. Circuit Court pointed out that the Senate's role through advice and consent serves an important function as a check upon the President's power.

#### Appointments Also Invalid Because They Did Not Arise During the Recess

The D.C. Circuit went on to conclude that the appointments were also invalid because they did not actually "happen" during a recess. The three seats the President attempted to fill had become vacant on August 27, 2010, August 27, 2011 and January 3, 2012. The NLRB argued that these vacancies could be filled under the Recess Appointments Clause because the vacancies existed during the alleged recess. The Court, however, agreed with the employer and ruled that the vacancies must arise during the Recess, not just extend into the recess period. To rule otherwise would mean that a President could fill any vacancies during the Recess regardless of when the vacancy arose, meaning that a President would never have to submit nominees to the Senate for confirmation. The Court found that these three Board member vacancies did not arise during "the Recess" for purposes of the Recess Appointments Clause. Because the vacancies did not happen during an intersession recess and these appointments were made after Congress began a new session on January 3, the recess appointments were invalid. Without the three recess appointments, the NLRB lacked its required quorum of three members when it issued its decision in the Canning matter on February 8; therefore, the decision and order must be vacated.

#### Consequences of Invalidating the NLRB Appointments

The result of this decision is yet to be determined, but it certainly is a decisive blow to the President who, by appointing members to the NLRB in such a controversial fashion, opened the door to a historic ruling that his appointments were unconstitutional. Because the decision finds the appointments invalid from their inception, the more than 200 decisions issued since January 4, 2012 listed on the NLRB website may also be invalid. 2012 marked a year in which the NLRB made several highly publicized and controversial decisions concerning social media, at-will disclaimers and the reversal of some long-standing labor law. The President is surely going to be disappointed and whether the NLRB's direction is going to change the direction it appeared to go will depend largely on the make-up of the Board in the years to come.

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