



January 29, 2013

Court Rebukes Obama “Recess” Appointments

Last January, President Obama flagrantly bypassed the Senate and appointed three members to the National Labor Relations Board, claiming the Senate was in recess even though it was meeting regularly in pro forma session. Last week, the U.S. Court of Appeals for the District of Columbia ruled unanimously that those unilateral appointments were unconstitutional.

The Dallas Morning News

Appeals court slaps down former
constitutional law prof

THE WALL STREET JOURNAL.

Obama's Abuse of Power

POLITICO

President Obama's Recess
Appointment Bet Sours



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Court Finally Reins In Obama's
Imperial Presidency

THE KANSAS CITY STAR.

Court: Obama Recess
Appointments are Unconstitutional

The Washington Post

Court says Obama exceeded
authority in making appointments

Los Angeles Times

Court rules Obama's recess picks
are illegal

In [*Noel Canning v. National Labor Relations Board*](#), the appellate court rejected the President's unprecedented assertion of power. It ruled he could not circumvent the Senate's constitutional role in the appointment process by defining for the Senate when it was in a "recess" for purposes of using his power under the Recess Appointment Clause.

"An interpretation of 'the Recess' that permits the President to decide when the Senate is in recess would demolish the checks and balances inherent in the advice-and-consent requirement, giving the President free rein to appoint his desired nominees at any time he pleases, whether that time be a weekend, lunch, or even when the Senate is in session and he is merely displeased with its inaction. This cannot be the law." -- [*Noel Canning v. NLRB*](#)

The Court held that the Constitution limits the President's recess appointment authority to intersession recesses and only for vacancies arising during such recesses. The three appointments were made while the Senate was holding a series of [pro forma](#) sessions, and each was to fill a vacancy that did not occur during the intersession recess. Senate Republicans, represented by former Assistant to the Solicitor General Miguel Estrada, submitted an amicus brief to the Court defending the institution against the President's power grab, and they participated in oral argument.

Challenges to the NLRB Decision

The President's appointees to the NLRB – Sharon Block, Terence F. Flynn, and Richard Griffin – began issuing orders and opinions in labor disputes shortly after their appointments. Almost immediately, challenges to the Board's authority to operate as a valid quorum arose. One of the disputes involved the bottling company Noel Canning. In Friday's ruling, the court held that because "the appointments were constitutionally invalid and the Board therefore lacked a quorum," the Board's decision against Noel Canning was vacated.

The Senate's Advice and Consent Role Is Re-enthroned

The appellate court's decision reaffirms the Senate's essential role in the advice and consent responsibility our founders gave it to ensure that it remains a check on the Executive. As the court wrote, "Allowing the President to define the scope of his own appointments power would eviscerate the Constitution's separation of powers." The court added, "it would have made little sense to extend [the recess appointment authority] to any intrasession break" because the ability to make recess appointments would swallow the advice and consent role of the Senate.

Recess Appointment Authority Means InterSession Not IntraSession

The decision also limits the President's authority to make recess appointments to recesses occurring during intersession recesses of the Senate, and not intrasession recesses. The court noted that a recess appointment power unconstrained by the textual and historical precision of the term "the Recess" of the Senate as used in the Constitution, would allow any President to "simply wait until the Senate took an intrasession break to make appointments." Consequently, "'advice and consent' would hardly restrain his appointment choices at all."

Questions Arising in the Wake of *Noel Canning*

- What's next for the NLRB?

Last week's ruling means that all decisions the Board issued by a quorum made up of these members, over [200](#) in the past year, are subject to challenge and invalidation, because the board lacked the [requisite](#) quorum without these now-invalidated members.

- Are the recess appointees to the NLRB still on the Board?

Board members Griffin and Block [continue](#) to serve on the Board, and the current Chairman, Mark Pearce, has [said](#) that they will continue to issue decisions. Terence Flynn left the Board at the end of last July. The Obama Administration [considers](#) the decision to have "no impact" on the NLRB.

- What does the decision mean for Richard Cordray's appointment to the CFPB?

Friday's decision also calls into question the validity of the appointment of Richard Cordray last year as Director of the Consumer Financial Protection Bureau, as it was made at the same time, and in the same unconstitutional manner, as the invalidated NLRB members. The Cordray appointment is currently being challenged in the U.S. District Court for the District of Columbia in the case [SNB v. Geithner](#). Former White House Counsel C. Boyden Gray is attorney for the plaintiffs.

- Can the President continue to make recess appointments?

The Obama Administration has stated that it strongly [disagrees](#) with the decision and considers it limited to the controversy in *Noel Canning*. In light of such defiance and the uncertainty of how an appeal might turn out, the Administration may decide to make additional "recess" appointments.

- Will the Supreme Court consider an appeal of the D.C. Circuit's decision?

The D.C. Circuit Court's interpretation of recess appointment authority conflicts with the decisions of [other circuit courts](#) and almost certainly means that the Supreme Court will be resolving the conflict among the circuits. The Obama Administration has to decide whether to appeal directly to the Supreme Court, which would require an appeal within 90 days of last week's decision, or whether to allow the D.C. Circuit to consider the matter *en banc*, which would require a petition to be filed within 45 days of last week's decision.