January 25, 2013

Obama Recess Appointments Ruled Unconstitutional

Last January, President Obama appointed three members to the National Labor Relations Board, claiming the Senate was in recess. Today, the U.S. Court of Appeals for the District of Columbia ruled unanimously that those appointments were unconstitutional.

In today's decision, *Noel Canning v. National Labor Relations Board*, the appeals court panel held that the Constitution limits the President's recess appointment authority to intersession recesses and only for vacancies arising during the recess of the Senate. Each of the three appointments was made while the Senate was holding pro forma sessions, and each was to fill a vacancy that did not occur during a recess. While the Senate did not formally appear in the case, 42 Republican Senators filed an amicus brief and were represented at oral argument by Miguel Estrada.

> **"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*

Challenges to the NLRB Decision

Shortly after their appointments, the President's appointees to the NLRB – Sharon Block, Terence F. Flynn, and Richard Griffin – began issuing orders and opinions in labor disputes, including one against bottling company Noel Canning. Almost immediately, challenges to the Board's authority to operate as a valid quorum arose, including that of Noel Canning. In today'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

Today's decision reaffirms the Senate's essential role in the advice and consent responsibility our founders gave it in the Constitution to ensure that it remains a check on the Executive. As the

court wrote today, “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

Today’s decision holds that the President’s authority to make recess appointments is limited to recesses occurring during intersession recesses of the Senate, and not intrasession recesses. In reaching its conclusion, 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.” This interpretation departs from other circuit court opinions, and almost certainly means that the Supreme Court will be addressing the question.

Ramifications of *Noel Canning*

Today’s ruling means that all decisions the Board issued by a quorum of these members are subject to challenge and invalidation. It also calls into question the validity of the appointment of Richard Cordray to the Consumer Financial Protection Bureau, as it was made at the same time, and in the same unconstitutional manner, as the invalidated NLRB Board members.