

Supreme Court Rejects President Obama's NLRB Recess Appointments

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President Barack Obama's National Labor Relations Board (NLRB) member appointments made under the Recess Appointment Clause on January 4, 2012 were unconstitutional, the U.S. Supreme Court ruled in *NLRB v. Noel Canning*, released Thursday.

The decision renders more than 700 decisions issued by the Board between January 2012 and August 2013 potentially invalid. A number of these decisions expressly overruled long-standing NLRB precedent.

Ordinarily, the President must request and obtain Senate consent before appointing an "officer of the United States," which includes the board members of the NLRB. However, the Recess Appointments Clause of the U.S. Constitution provides that the President may "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."

President Obama, like Presidents Bush and Clinton before him, faced continuing political difficulties in obtaining Senate approval of his appointments to the NLRB. In late 2011, the Senate was in recess, but conducted "pro-forma" sessions every Tuesday and Friday between December 17, 2011 and January 23, 2012, in an attempt to avoid a recess that would allow President Obama to make appointments under the Recess Appointments Clause. On January 4, 2012, in spite of the Senate's pro-forma sessions, President Obama made three recess appointments to the NLRB to fill the Board to its full complement of five members.

The NLRB appointments were challenged by Noel Canning, a company accused of violating the NLRA. As part of their defense to the unfair labor practice charges, Noel Canning asserted that the Board did not have jurisdiction since the majority of the Board members were appointed in violation of the Recess Appointments Clause. Since three of the five members were wrongly appointed, Noel Canning asserted that the Board did not have a majority of three members in order to issue decisions.

The Court faced three questions to determine the validity of the appointments: (1) does the phrase "recess of the Senate" apply to intra-session recesses; (2) does the phrase "vacancies that may happen" apply to vacancies occurring place before the recess, during the recess, or both; and (3) does the length of the recess allow for appointments during pro-forma sessions?

The Court held that the phrase "recess of the Senate" applied to both intra- and inter-session breaks, and that the president did have the ability to make recess appointments during intra-session recesses like the one in question. The Court also found that "vacancies that may happen" applied to both vacancies that arose before the Senate recess and those that occurred during the Senate recess.

The Court then moved to the critical issue of whether the Senate was actually in recess at the time of President Obama's appointments. The Court found that a recess of more than three but less than ten days was too short to count as a legitimate recess for purposes of the Recess Appointment Clause, and held that the appointments violated the United States Constitution.