

PUBLICATION

Supreme Court Finds NLRB Recess Appointments Invalid

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In a highly anticipated decision, *NLRB v. Noel Canning*, the U.S. Supreme Court unanimously held yesterday that three of President Obama's recess appointments to the National Labor Relations Board (NLRB) were invalid because they did not occur during a constitutional recess. As a result, all of the NLRB cases decided by those recess appointments are void and must be re-decided by a properly constituted NLRB.

This case arose from President Obama's claim that the Senate was in recess when he made three appointments to the NLRB on January 4, 2012. However, the Senate had not declared itself in recess, and it was conducting pro forma sessions every three days so that it would not go into recess. Thus, the Supreme Court was asked to determine whether the Senate was actually in "recess" when the President made the appointments to the NLRB.

Yesterday, the Supreme Court unanimously concluded that the Senate was not in recess because the Senate, not the President, has the power to determine when it is in recess. Since the Senate was in session and able to conduct business, it was not in recess, and the recess appointments were invalid. There was no recess, and therefore, there could not be recess appointments.

According to the Congressional Research Service, the invalid recess appointees, NLRB Members Sharon Block, Richard Griffin and Terrence Flynn, decided more than 200 cases. As a result of the Supreme Court's decision, all of the NLRB decisions in which the recess appointments participated are void. Many of these cases are on appeal, and will be remanded to the NLRB for re-decision.

It is important to note that the Supreme Court's holding was narrow. Unlike the D.C. Circuit Court of Appeals' holding in *Noel Canning*, the Supreme Court's holding is limited to the appointments of NLRB Members Griffin, Flynn and Block. The decision does not have the far ranging implications for other recess appointments that were envisioned by the D.C. Circuit's opinion in *Noel Canning*.

Justices Thomas and Alito, along with Chief Justice Roberts, joined in a concurring opinion by Justice Scalia which would have affirmed the D.C. Circuit on broader grounds and further limited the President's recess appointment power. But rather than adopting the D.C. Circuit's rationale which would have substantially limited the President's recess appointment power, the Supreme Court's majority limited its holding to the uncontroversial proposition that the Senate decided when it is in recess and when it is not in recess.

Another possible result is that a properly constituted NLRB has the authority to appoint Regional Directors for the approximately 32 NLRB regional offices throughout the country. Regional Directors initiate complaints for violations of the National Labor Relations Act. The open question, based upon the Supreme Court's decision, is whether Regional Directors appointed by an invalid NLRB are themselves invalid appointments, and thus, complaints they issued may also be invalid. Although that will impact fewer NLRB decisions, it is obvious that further litigation in those circumstances will be necessary.

Yesterday's decision also calls into question the precedential value of all of the NLRB's decisions in 2012 and early 2013. The decision is also likely to create a backlog of cases at the NLRB.

