

# PUBLICATION

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## D.C. Appeals Court Gives Chilly Reception for NLRB Recess Appointments

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A three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit struck down President Obama's National Labor Relations Board (NLRB) "recess appointments" of members Sharon Block and Richard Griffin, both Democrats, as well as former member Terence Flynn, a Republican who resigned in 2012. These three so-called "recess appointees" were named on January 4, 2012, when the Senate was holding short "pro forma" sessions at least once every three days between December 20, 2011, and January 23, 2012, to avoid being in recess. The Obama Administration contended the Senate was effectively in recess beginning December 20, 2011, that the pro forma sessions were only intended to prevent such action and that it had the power to make recess appointments during this period.

The court, by contrast, held in *Noel Canning v. NLRB* that the Senate was indeed in session on January 4, 2012, and therefore that the President did not possess the constitutional authority to make these appointments. This decision, if upheld on appeal, will leave the NLRB with only one "valid" member – Chairman Mark Gaston Pearce, a Democrat. It would also mean that all of the NLRB's decisions dating back to January 4, 2012, may be void for lack of a quorum.

The U.S. Constitution's "Recess Appointments Clause" gives the president the power "to fill up all Vacancies that may happen during the Recess." The employer in *Noel Canning* argued that the president has recess appointment power only when the Senate is in recess and only for vacancies that "happen" during the recess. The court found in the company's favor on both points. On the threshold issue of whether the Senate was in recess on January 4, the court concluded that "recess" means a recess that occurred between Senate sessions, or an "intersession" recess. The court then concluded that the Senate had officially convened a second session of the 112th Congress on January 3, 2012. Thus, the Court reasoned, no "recess" existed on January 4, the date of the appointments. The Court also agreed that a recess appointment could be made only for a vacancy that happened during the recess. Not only was there no recess on January 4, according to the court, the vacancies that were filled on that date had not happened during any recess that included January 4, 2012. Accordingly, the Court granted Noel Canning's petition for review and vacated the Board's order in the case.

If the court's decision stands, and if it is ultimately applied broadly to all decisions issued by the NLRB after January 4, 2012, those decisions will be void for lack of the three-member quorum required under *New Process Steel v. NLRB*, a 2010 Supreme Court decision. Many of these Board decisions were perceived as having a negative impact on employers. Some overruled decades of precedent. As such, the effect of *Noel Canning* could be momentous. Employers with active cases before the Board in any part of the U.S. may seek to get their cases before the D.C. Circuit in order to avoid the enforcement of Board orders. It is also possible that some employers will proactively seek to enjoin further Board action on the grounds that it does not have a quorum. The decision may also affect pending compliance proceedings resulting from Board orders that have been issued since January 4, 2012.

By contrast, the decision is unlikely to affect actions by Lafe Solomon, Acting General Counsel for the Board, or investigations by regional offices of the Board, except when Board enforcement is needed, such as in the case of enforcement of a Board subpoena. If you have questions about how this decision may affect your business, please contact any of our more than 70 Labor & Employment attorneys located in [Birmingham](#),

Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee; and Houston, Texas.