

June 26, 2014

## U.S. Supreme Court Invalidates Obama's NLRB Recess Appointments

On Thursday, June 26, the U.S. Supreme Court ruled that President Obama's 2012 recess appointments to the National Labor Relations Board ("NLRB") were unconstitutional. In *National Labor Relations Board v. Noel Canning*, 573 U.S. \_\_\_\_ (2014), the Court found that the President had no authority to invoke the Constitution's recess appointments clause to appoint three members to the NLRB. Ordinarily, Presidential appointees must be approved by the Senate. The recess appointments clause allows the President, without Senate approval, to "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." U.S. Const., Art. II, § 2, c. 2.

President Obama nominated Sharon Block, Richard Griffin and Terence Flynn to the NLRB in 2011. The nominations had been pending for some time before President Obama invoked the recess appointments clause to appoint them to the NLRB on January 4, 2012, three days after the Senate's last session. At the time of their appointments, the Senate was in a series of pro forma sessions with "no business transacted" every Tuesday through Friday from December 17, 2011, through January 20, 2012 (although the Senate enacted legislation during the pro forma sessions).

The Court interpreted the recess appointments clause "as granting the President the power to make appointments during a recess but not offering the President the authority to routinely avoid the need for Senate confirmation." The Court held that the recess appointments clause applies to both inter-session recess ("i.e., a break between formal sessions of Congress"), as well as to intrasession recess in the middle of a congressional session. The Court also held that the "scope of the words 'vacancies that may happen'" in the recess appointments clause applies to vacancies that arise during the recess and those that occurred before the recess that continue to exist during the recess. Justice Breyer, writing for the majority, found that "three days is too short a time to bring a recess within the scope of the Clause."

In *New Process Steel v. National Labor Relations Board*, 560 U.S. 674 (2010), the Supreme Court held that the NLRB did not have the power to act without a quorum of three members. Given this, the hundreds of decisions the NLRB issued during the recess appointments of Block, Griffin and Flynn are likely invalid.

The Court's decision sheds little light on how the NLRB should proceed with the cases issued and rules promulgated during the recess appointments. NLRB Chairman Mark Gaston Pearce issued a statement that the NLRB is "analyzing the impact that the Court's decision has on Board cases in which the January 2012 recess appointees participated."

The NLRB may take the same approach that it did following the 2010 *New Process Steel* decision. Following that decision, the federal courts and individual parties returned about one-fifth of the cases issued when the NLRB lacked a proper quorum (from January 2008 to March 2010) to the NLRB for new decisions. The NLRB closed the remainder of the cases "with no review required."

The NLRB currently has five members appointed with Senate confirmation. The decision is unlikely to change the NLRB's agenda.