Supreme Court Strikes Down NLRB Recess Appointments

In a highly-awaited, end-of-Term decision, the U.S. Supreme Court yesterday decided *Noel Canning v. NLRB*—a separation-of-powers showdown between the President and Congress on the question of when the President can make "recess" appointments. By a unanimous vote, the Court held that the President acted outside of his constitutional power in appointing three members to the National Labor Relations Board (NLRB or Board) in January 2012. Yesterday's decision has major implications for hundreds of recent labor decisions, as well as the President's ability to fill future government vacancies.

The case arose from a labor dispute involving Noel Canning, a Pepsi bottling company. When the NLRB ruled against it, the company asked the D.C. Circuit to overturn the ruling on the basis that the NLRB lacked a lawful quorum when it acted. Under *New Process Steel*, a Supreme Court decision from 2010, the NLRB, a five-member board, needs at least three members for a quorum. The Board panel that decided the case included only two Senate-confirmed members; the others had been given recess appointments by the President on January 4, 2012.

At the time of those appointments, however, the Senate was meeting in *pro forma* sessions every three days, while it was otherwise out of session from mid-December through mid-January. The case thus presented the question whether the President had the power to make recess appointments during those breaks.

Although the normal method of appointment requires the Senate's "advice and consent," the Recess Appointments Clause gives the President alone the power "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, cl. 3. The D.C. Circuit held that the President lacked authority to make the appointments at issue under this Clause for two reasons: First, it reasoned that the Clause extends only to *inter*-session recesses—those between the formal sessions of the Senate—not *intra*-session recesses—those within a session. Because the recess on January 4, 2012, was within a session, the appointments were invalid.

Second, the D.C. Circuit held the appointments invalid because the vacancies that the President sought to fill did not "happen" during "the Recess." Focusing on the original historical meaning of the word "happen," the court held that it meant "arise," and that the relevant vacancies did not "arise" in the recess. Taken together, these holdings were seen as greatly limiting the President's recess appointment power. The Solicitor General thus sought *certiorari*, and the Supreme Court took up both holdings—along with the question whether the President could exercise the recess appointment power when the Senate is meeting every three days in *pro forma* sessions.

Yesterday, the Supreme Court unanimously agreed that the appointments were invalid, but on a narrower basis than the D.C. Circuit's ruling—and in a ruling that produced a four-Justice concurrence. The Court's majority opinion—written by Justice Breyer and joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan—focused largely on the Clause's "purpose and historical practice," emphasizing that the Clause "sets forth a subsidiary, not a primary, method for appointing officers of the United States."

On the first question, the Court rejected the D.C. Circuit's narrower reading of the phrase "the Recess," holding that it includes any "recess of substantial length," whether inter-session or intra-session. According to the Court, the text is "ambiguous" and the "Clause's purpose demands the broader interpretation."

And on the second question, the Court again disagreed with the D.C. Circuit, holding that vacancies "happen" during the recess if they arise *or* exist during that recess.

The Court then turned to the question of how long a recess is long enough to activate the President's recess appointment power. The Court held that "a recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause." The Court added "the word 'presumptively' to leave open the possibility that some very unusual circumstance—a national catastrophe, for instance, that renders the Senate unavailable but calls for an urgent response—could demand the exercise of the recess-appointment power during a shorter break." Mere "political opposition," the Court explained, "would not qualify as an unusual circumstance."

On the third and final question, the Court concluded that the three-day recess before the Court was too short to support the President's exercise of his recess appointment power. Rejecting the government's argument, the Court explained that the Senate's *pro forma* sessions are valid sessions that interrupt a recess. "[T]he Senate is in session when it says it is," the Court emphasized, and it "retained the power to conduct business" during its *pro forma* sessions.

Justice Scalia—joined by Chief Justice Roberts and Justices Thomas and Alito—concurred only in the judgment. In his view, the D.C. Circuit's reasoning was correct, and the majority's opinion relied "on an adverse-possession theory of executive authority" that inappropriately gave "deference" to "ambiguous" and "late-arising historical practices." Relying on "the plain, original meaning of the constitutional text," Justice Scalia would have held that the appointments were invalid because "the Recess" is limited to inter-session recesses, and because the recess appointments power is limited to vacancies that actually arise during the recess.

Although the Supreme Court's decision grants broader recess powers to the President than did the D.C. Circuit's, this difference may be limited in practice. The Senate can choose to structure its affairs so that it meets every three days in *pro forma* sessions. And if the Senate chooses to do so, yesterday's decision should prevent the President from making recess appointments during those periods. Moreover, the House can prevent the Senate from adjourning for more than three days under the Adjournment Clause (U.S. Const. Art. I, § 5, cl. 4), though if there is disagreement on "the time of adjournment," the President has power to adjourn both the Senate and House "to such time as he shall think proper" (U.S. Const. Art. II, § 3). And, of course, where the President's own party controls the Senate, the issue of recess appointments is less likely to arise.

Noel Canning will likely have extensive effects on labor cases decided between January 2012 and August 2013, when the Board lacked a quorum. By some estimates, some 436 NLRB decisions could be invalid under *Noel Canning*. These include decisions involving employee use of social media (*Costco Wholesale Corp.* (2012)), employer confidentiality rules (*Costco* and *Banner Health System* (2012)), dues check-offs (*WKYC-TV, Gannett Co.* (2012)), and employee discipline/bargaining over grievance-arbitration process (*Alan Ritchey, Inc.* (2012)). By way of comparison, after the Supreme Court's 2010 decision in *New Process Steel*, the NLRB reconsidered several hundred decisions issued while it lacked a quorum, ratifying many of them.

Other NLRB actions, such as decisions by regional directors who were approved by recess-appointed members, could also be subject to challenge. Moreover, the Supreme Court noted that some litigants had challenged the recess appointment of an earlier board member, which could affect cases decided by the NLRB from April 2010 - June 2010 and August 2011 - January 2012. That appointment was made during a 14-day recess.

In addition, the Supreme Court's decision in *Noel Canning* could have implications for actions taken by other government officials who were recess-appointed on the same date. For example, the President appointed Richard Cordray as director of the Consumer Financial Protection Bureau on the same date he made the NLRB appointments invalidated in *Noel Canning*. Although Cordray was later confirmed by the Senate, CFPB actions between his appointment in January 2012 and his confirmation in July 2013 could become the target of challenges under yesterday's decision.

In sum, *Noel Canning* puts a hard limit on the President's power to make recess appointments, and will likely require the NLRB to reconsider hundreds of cases decided while the appointees at issue sat on the Board.

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