

Supreme Court Affirms Noel Canning Decision, Invalidates President Obama's January 2012 Recess Appointments to the NLRB



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Yesterday, the U.S. Supreme Court affirmed the D.C. Circuit Court of Appeals' **Noel Canning decision**, which found that President Obama's **recess appointments** in January 2012 of Sharon Block, Richard Griffin and Terence Flynn to fill vacancies at the **National Labor Relations Board** were invalid under the Recess Appointments Clause of the U.S. Constitution. (Art.II, Sec.2, cl.3).

Ordinarily, appointments to high-level positions in government must be confirmed by the Senate. However, the Recess Appointments Clause allows the President to "fill up all Vacancies that may happen during the Recess of the Senate..." Such appointments expire at the end of the Senate's next session.

In January 2012, the National Labor Relations Board had only two confirmed members. Thus, it lacked a quorum of three lawfully appointed members, and under the Supreme Court's 2010 *New Process Steel* decision, it could not lawfully exercise its power to function. The President had nominated Block, Griffin and Flynn in 2011 to fill the remaining three vacancies on the Board, but the Senate had not taken action on the nominations. On January 4, 2012, President Obama invoked the Recess

Appointments Clause and appointed all three to the Board. However, during the period December 18, 2011 through January 23, 2012, although the Senate was not in regular session, it was holding *pro forma* sessions every Tuesday and Friday.

In February 2012, the Board found that Noel Canning had violated the National Labor Relations Act by refusing to execute a collective bargaining agreement with its union and ordered it to sign the agreement and make employees whole for any losses they may have suffered. Noel Canning appealed this decision to the D.C. Circuit Court of Appeals, claiming that Block, Griffin and Flynn had not been lawfully appointed since the Senate was not in recess on January 4, 2012, and thus the Board lacked the necessary quorum under *New Process Steel*.

The Court of Appeals agreed. It held that recesses under the Clause do not include those that occur within a formal session of Congress, and that the Clause is applicable only to recesses between formal sessions. Additionally, the appeals court held that the Clause only applied to vacancies that come into existence during the recess, whereas Block, Griffin and Flynn had been appointed to fill vacancies which had occurred before the beginning of the recess during which they were appointed.

The Supreme Court agreed with the result but rejected the rationale relied upon by the appellate court. Rather, it held that a recess of three days was too short a time to bring the recess within the scope of the Recess Appointments Clause. It also disagreed with the conclusions of the appellate court, holding that the President does have the authority to make appointments in both intra- and inter-session recesses, but that the time period in question in this case did not constitute either of those.

As a result of this decision, any cases decided by the Board while Block, Griffin and Flynn were acting as members are invalid, and will have to be revisited by the current Board. All five current Board members were confirmed by the Senate as of July 30, 2013, and actions taken by the Board after that date are not affected by this decision. Given the Democratic majority on the Board, we anticipate that many of the invalid prior decisions will be reaffirmed by the Board, but some decisions may be modified or revoked.

This decision does not address challenges to the recess appointment of former member Craig Becker who was appointed by President Obama in April 2010 during a recess in which *pro forma* sessions were not held. Member Becker's appointment was found to be invalid by the Third Circuit Court of Appeals in 2013. Nor does the decision resolve cases working through the court system which challenge the validity of actions taken by Regional Directors appointed during the tenure of members Block, Griffin and Flynn.

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