



## No Recess: Supreme Court Decision Invalidates Three 2012 NLRB Appointments and Narrows President's Recess Appointment Powers

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On June 26, 2014, the United States Supreme Court ruled that President Obama's purported "recess" appointments of three National Labor Relations Board members was an invalid exercise of executive power. The decision has potentially sweeping ramifications for the future of the Board (as well as, more broadly, all executive appointments).

President Obama appointed the three members in question—Sharon Block, Richard Griffin, and Terence Flynn—during a 3-day adjournment between January 3 and January 6, 2012. These appointments were critical to the continued operation of the Board, as the Supreme Court had previously ruled that the Board required a "quorum" of at least three members to exercise its statutory powers. Following their appointment, Flynn remained on the Board until July 2012, and Block and Griffin served until 2013.

Generally, the President must consult the Senate before exercising his power to appoint federal officers. However, under the Recess Appointments Clause, the President has the power to "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." The Supreme Court's decision in *Noel Canning* turns on the meaning of this language. In its opinion, the Court acknowledged U.S. presidents' long history—dating back to the founding fathers—of making appointments while the Senate is not in session. While acknowledging this important tradition, the Court nevertheless took the position that a 3-day break is too short to constitute a "recess." The majority held that the President has the power to fill any existing vacancy during any recess, whether during or between sessions, as long as the recess is of "sufficient length." Reasoning that a 3-day break is too short to require House approval under the Adjournments Clause of the Constitution, the Court concluded that it was also too short to constitute a recess under the Recess Appointments Clause (but suggested that breaks of 10-days or more would likely be a valid "recess").

Though a seemingly narrow holding, the political ramifications are potentially quite broad. Because the senate can hold cursory “pro forma” sessions (in which a single senator arrives in the chamber, bangs a gavel, then leaves) virtually at-will, under *Noel Canning*, an opposition Senate theoretically could block the appointment of any executive appointee by preventing recesses indefinitely. The holding is particularly significant in the NLRB context, because of the prior holding that it must have a three member quorum to operate.

What are the ramifications for employers? In the short term, the holding calls into question the actions undertaken by the improperly appointed members, including the over 1000 cases decided while Block, Griffin and Flynn were on the Board. This impact may prove less dramatic than it would seem, however. A similarly large number of decisions were invalidated after the Court’s “quorum” holding, but in practice the vast majority of those disputed decisions were later re-issued with little comment.

In the medium to long term, however, the prospect of a partial shutdown of the NLRB is quite real. If a Democratic President were faced with a Republican Senate, or *vice versa*, the Senate could easily stymie the President’s efforts to appoint a member or members to maintain a quorum. If that were to happen, the investigatory arm of the NLRB, its General Counsel, regional directors, and investigators, could continue to investigate and litigate charges. Similarly, the Board’s administrative law judges (or “ALJs”) could continue to rule on such charges. However, the ALJs’ decisions would be placed in legal limbo, and remain potentially unenforceable, until there was a quorum on the Board.

For now, these consequences remain hypothetical. In the meantime, however, employers with cases decided by a Board including Block, Griffin or Flynn are advised to consider their options.

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