
The Supreme Court Strikes Down President Obama's Appointment of National Labor Relations Board Members Made During a Three Day Recess of the Senate

By Thomas P. Brady / Jun 26, 2014

In a decision that will impact cases decided by the National Labor Relations Board (Board) between January 9, 2012 and July 30, 2013, the U.S. Supreme Court ruled that President Obama lacked the authority to make the three January 9, 2012 recess appointments to the Board. *National Labor Relations Board v Noel Canning*, S. Ct. Docket No. 12-1281 (June 26, 2014).

On January 9, 2012, President Obama made three appointments to the Board claiming the Senate was in recess thus allowing him to make the appointments under the U.S. Constitution's recess appointment clause. However, between December 4, 2011 and January 23, 2012, the Senate held *pro forma sessions* every three days. Over the next year and a half, this Board decided more than 800 cases.

In the *Noel Canning* case, the Board held that Noel Canning committed an unfair labor practice when it refused to execute a collective bargaining agreement with a labor union. Noel Canning appealed to the U.S. Court of Appeals for the District of Columbia Circuit claiming that the Board did not have a proper quorum because the President did not have the authority to make the three recess appointments. The District of Columbia Circuit agreed with Noel Canning and refused to enforce the Board order. The Board appealed the decision to the United States Supreme Court.

The Supreme Court recognized that the President had the authority to make appointments without Senate approval while the Senate was in recess. The Court refused to establish a rule to determine when the Senate was in recess, leaving that decision to the Senate. However, the Court held that a three to ten day recess was presumptively too short for the President to exercise the recess appointment power. Because the Senate was holding *pro forma sessions* every three days, the Court found that the President lacked the authority to appoint the three members to the Board.

The impact of this decision is substantial because it requires the Board to reconsider many of the 800 cases decided between January 9, 2012 and July 30, 2013. Some examples of decisions the Board will have to reconsider are: (1) the expanded scope of disclosure of witness statements to the union; (2) the narrow scope of when employers can discharge employees for offensive postings on social media sites; (3) the requirement that employers reimburse employees who pay higher taxes as a result of a back pay award; (4) allowing unions to charge lobbying expenses to Beck objectors who do not pay dues but who pay an agency fee; (5) requiring employers to continue dues check-off following the expiration of a collective bargaining agreement; (6) disregarding employers' arbitration provisions; (7) prohibiting employers from requiring employees not to discuss internal human resource investigations into employee misconduct; and (8) adding extraordinary and onerous language to Board orders against employers.

However, in July, 2013, the Senate changed its rules for approving presidential appointment and appointed three new members to the Board. The current Board has three union and two management representatives. It is unlikely the current Board will rule differently than the former Board. However, the current Board will have to re-decide any of the 800 cases decided by the previous Board.

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