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Supreme Court Terminates Obama's Recess Appointments

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On June 26, 2014, the U.S. Supreme Court ruled that President Obama's three recess appointments made to the National Labor Relations Board in January 2012 were unconstitutional. The decision is very significant, and will have immediate results, as all decisions made by the Board during the term of the recess appointment board members are effectively invalidated by the decision. This is very good news for employers, as the decisions were generally burdensome to employers. The Court's decision will force the NLRB to revisit, or attempt to revisit, the many rulings involving these invalidly appointed board members.

The nation's highest court shot down the NLRB's challenge to a January 2013 decision from the D.C. Circuit, siding with soda bottler Noel Canning. That decision held that the so-called recess appointments to the labor board of three members did not pass constitutional muster because the Senate was not actually in recess when they were appointed.

On December 17, 2011, the Senate passed a resolution providing for a series of "pro forma" sessions with no business transacted. At the time three of the five NLRB members had pending appointments. Between January 3, 2012 and January 6, 2012 (during pro forma sessions) the President appointed the three under his Recess Appointment power in the Constitution. Canning, a Pepsi distributor, sought to set aside an NLRB order on the basis that the three members were not validly appointed.

In holding that the appointments were invalid, the Court found that the recess appointment provision can occur to "both intersession recess (breaks between formal sessions of the Senate) and intra-session recesses (breaks in the midst of a formal session)" provided the recess is of "substantial length." The Court went on to state that a recess of more than three days but less than 10 days is "presumptively too short" to allow the Recess Appointment clause to be used by the President.

"Three days is too short a time to bring a recess within the scope of the clause. Thus we conclude that the president lacked the power to make the recess appointments here at issue,"

said Justice Stephen Breyer's lead opinion, which was joined by Justices Anthony Kennedy, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan.

Also, interestingly, the Court said that the Senate is in session when it says it is, provided that, under the Senate rules, it "retains the capacity to transact Senate business. The Court noted that although the Senate's determination is entitled to "great weight" it is not "absolute". In other words the Supreme Court can have the last say.

Thursday's ruling also nixed the D.C. Circuit's finding that the president can only use recess appointments to fill vacancies that occur during the same recess, and not vacancies that open up before recess occurs.

Though the NLRB currently has a full complement of five Senate-confirmed members, the high court's decision means that numerous rulings issued when the disputed recess appointees were on the board were invalid. That's because the Supreme Court previously ruled in a case called *New Process Steel* that while the NLRB does not require a full complement of five members to act, it does needs at least a three-member quorum to have the authority to operate.

When the NLRB urged the high court in April to agree to hear its appeal, the agency warned that the decision could dramatically curtail the president's recess appointment power and have consequences stretching beyond the NLRB. The opinion appears to confirm the rationale for that warning.

Justice Antonin Scalia wrote a concurring opinion Thursday that was joined by Chief Justice John Roberts, as well as Justices Clarence Thomas and Samuel Alito.

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