SULLIVAN & CROMWELL LLP

June 27, 2014

# Supreme Court Details Limits on President's Recess Appointments Power

## Court Unanimously Rules that Senate, Not President, Decides When Senate Is In Session; *Pro Forma* Sessions Preclude Recess Appointments

### SUMMARY

The U.S. Supreme Court has clarified the circumstances under which the Recess Appointments Clause of the Constitution empowers the President to appoint executive branch officials and judges without confirmation by the Senate. In *National Labor Relations Board* v. *Noel Canning*, No. 12-1281 (June 26, 2014), a unanimous Court yesterday affirmed the judgment of the U.S. Court of Appeals for the D.C. Circuit, holding that the Senate itself generally determines when it is in recess, and that short adjournments between *pro forma* Senate sessions convened every three days are not "recesses" triggering the President's recess appointments power. The practical effect of the decision was to invalidate appointments President Obama made in January 2012 to the National Labor Relations Board (NLRB). The Court did not, however, adopt the D.C. Circuit's narrower interpretation of the President's recess appointments power, which would have confined the use of that power to vacancies that actually arose during the same *inter*-session recess in which the appointment was made, contrary to how presidents of both parties have employed that power in modern times. The decision gives many parties subject to NLRB enforcement actions an opportunity to challenge decisions the NLRB took during the period when it lacked a quorum of properly appointed members and could give rise to other challenges to agency actions as well.

### BACKGROUND

In general, appointments to high-level executive branch positions – what the Constitution calls "Officers of the United States" – require the President to seek and obtain the Senate's advice and consent. The

Constitution's Recess Appointments Clause provides an exception, recognizing the need for presidents to have the assistance of subordinates during times when the Senate, especially during the founding era, was not in session and thus unavailable to give advice and consent. The recess appointments power affords the President the authority "to fill up all Vacancies that may happen during the Recess of the Senate."[1] Presidents of both parties have long used recess appointments to fill vacant executive branch positions and seats on the federal bench both in periods between formal one-year sessions of Congress – so-called "inter-session recesses" – and during breaks in the middle of a session – "intra-session recesses." Late in the previous administration, though, the Senate took steps designed to minimize the President's ability to make recess appointments, by convening regular "*pro forma* sessions," in which the Senate gavels in every three days even though almost all Senators have left Washington.

At the end of 2011, the NLRB had only two active members, short of a quorum necessary for it to conduct business. At the same time, the Senate set a schedule under which it would convene for *pro forma* sessions every Tuesday and Friday until it returned for ordinary business in late January 2012. On January 4, 2012, during the three-day intra-session break between two such *pro forma* meetings, President Obama asserted that he was invoking his recess appointments power to appoint three members to the NLRB. In February 2012, the NLRB – now including the three people whose appointments occasioned this dispute – issued a decision upholding an Administrative Law Judge's order that Noel Canning, a soft drink bottler and distributor, had violated the National Labor Relations Act.

Noel Canning appealed to the D.C. Circuit Court of Appeals, arguing that no quorum existed because three members of the NLRB had neither been confirmed by the Senate nor lawfully appointed under the Recess Appointments Clause. The D.C. Circuit ruled that the recess appointments power is confined to inter-session recesses; that the power extends only to vacancies that come to exist during a Senate recess; and that such vacancies must be filled during the same recess in which they arose.[2] Accordingly, the panel held the appointments to be invalid and vacated the NLRB's order against Noel Canning.

Shortly thereafter, in *NLRB* v. *New Vista Nursing & Rehab*., a panel of the Third Circuit followed the D.C. Circuit in invalidating an intra-session recess appointment to the NLRB.[3] The decisions in *Noel Canning* and *New Vista* created a circuit split with the Eleventh Circuit, which in 2004 upheld the validity of an intra-session recess appointment to the federal judiciary.[4] The Supreme Court granted certiorari in *Noel Canning*, asking the parties to address both the D.C. Circuit's ruling and whether a President can make recess appointments even when the Senate says it is in session and is conducting *pro forma* sessions.

---

1 U.S. CONST. art. II, § 2, cl. 3.

2 *Noel Canning* v. *N.L.R.B.*, 705 F.3d 490, 506, 512, 514 (D.C. Cir. 2013).

3 *N.L.R.B.* v. *New Vista Nursing & Rehab.*, 719 F.3d 203 (3d Cir. 2013).

4 *Evans* v. *Stephens*, 387 F.3d 1220 (11th Cir. 2004).

## THE SUPREME COURT'S DECISION

The Supreme Court unanimously ruled that the disputed appointments were invalid, affirming the D.C. Circuit. The justices split on the rationale for that decision. Justice Breyer wrote the opinion of the Court holding that a three-day break between *pro forma* sessions of the Senate is too short a window to trigger the President's recess appointments power and generally affirming that the Senate, not the President, has the prerogative to decide when it is and is not in session. The five-member majority rejected that part of the D.C. Circuit's decision that limited the recess appointments power only to vacancies that arise during the same inter-session recess in which the appointment is made. Specifically, the majority held that the recess appointments power is available during both the inter-session recess and "an intra-session recess of substantial length."[5] The majority held that a break of three days, however, is "constitutionally *de minimis*"[6] and any recess shorter than ten days "is presumptively too short to fall within the clause," absent "some very unusual circumstance," for which mere "political opposition in the Senate" does not qualify.[7] The majority also rejected the D.C. Circuit's reasoning that the only vacancies eligible for a recess appointment are those that come to exist during that particular recess, ruling that recess appointments may also be made for vacancies predating a legitimate Senate recess.[8] Crucially, the Court said that it is the Senate's prerogative to determine when it is and is not in session, "provided that, under its own rules, it retains the capacity to transact Senate business."[9] Because "the Senate said that it was in session" during its *pro forma* sessions and "retained the power to conduct business," the *pro forma* sessions conducted by the Senate "count as sessions, not as periods of recess."[10] Therefore any purported recess is bounded by such sessions, and the three-day window between *pro forma* sessions during which the President acted was thus *per se* not a recess for the purpose of the Recess Appointments Clause.

In an opinion concurring in the judgment, written by Justice Scalia, four justices said that they would have adopted the D.C. Circuit's rationale, describing the Constitution's reference to "the Recess" as limited to inter-session breaks. Such a ruling would have eliminated recess appointments during intra-session breaks or for vacancies that arose prior to the relevant recess. Because all justices agreed that the disputed appointments were invalid, the decision affirming the D.C. Circuit's judgment was unanimous.

---

5 *N.L.R.B.* v. *Noel Canning*, No. 12-1281, slip op. at 9 (June 26, 2014).

6 *Id.* at 20.

7 *Id.* at 21.

8 *Id.* at 33.

9 *Id.* at 34.

10 *Id.* at 36.

## IMPLICATIONS

The implications of yesterday's decision for the President and his successors are clear-cut; the implications for agency actions taken under the authority of persons now ruled not to have been properly appointed are less so.

To begin with the former, although the Court did not formally do away with intra-session recess appointments, in practice the Court sanctioned a mechanism that effectively allows the Senate to prevent the President from making recess appointments during intra-session recesses. Some of that power extends to the House of Representatives as well, as neither chamber of Congress may adjourn for a period longer than three days without the consent of the other.[11]

As to implications for agency actions taken under the apparent authority of the persons not properly appointed, we expect to see a variety of legal challenges, with some succeeding and others failing. The most obvious beneficiaries are litigants who were subject to adverse NLRB rulings while the Board lacked a valid quorum and who preserved their challenge to the Board's composition. Various estimates suggest that the NLRB issued hundreds of decisions in the relevant period between January 2012 and January 2013, and parties subject to those decisions may claim them to be void. (We also expect that the process of addressing yesterday's decision and its consequences will occasion delays in the NLRB's consideration of pending and new matters.)

Apart from these NLRB rulings in labor disputes, the prospects for overturning other actions by persons now deemed not to have been validly appointed are less clear. The Court's decision provides no guidance as to how courts should view actions taken on the authority of such persons. To defend the validity of actions notwithstanding the invalidity of the appointments, the federal government will likely invoke the "*de facto* officer" doctrine, under which certain acts performed by a person under color of official title and with apparent authority remain valid and binding even if that person's appointment to the office is later held to have been procedurally infirm. The success of these challenges and the government's defenses to them will turn on the specific nature of the actions challenged and the contours of challenges asserted.

Of note, the ruling could potentially occasion challenges to certain actions of the Consumer Financial Protection Bureau (CFPB) because Director Richard Cordray was initially "appointed" at the same time and in the same manner as the disputed NLRB appointees. As Director Cordray was subsequently confirmed by the Senate in July 2013, actions taken thereafter are not at issue. If there are challenges to CFPB actions undertaken prior to his confirmation, it is difficult to predict how courts would treat them, especially because following his confirmation Director Cordray took the additional step of "affirm[ing] and

[11] U.S. CONST. art. I, § 5, cl. 4.

ratify[ing] any and all actions" he had undertaken as a would-be recess appointee.[12] And again, the federal government has various defenses to these sorts of challenges, so it is difficult to predict whether any would succeed.

* * *

[12] Notice of Ratification, 78 Fed. Reg. 53734 (Aug. 30, 2013).

## ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 800 lawyers on four continents, with four offices in the United States, including its headquarters in New York, three offices in Europe, two in Australia and three in Asia.

## CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers listed below, or to any other Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future related publications from Stefanie S. Trilling (+1-212-558-4752; trillings@sullcrom.com) in our New York office.

## CONTACTS


| | | |
|---|---|---|
| **New York** | | |
| Mitchell S. Eitel | +1-212-558-4960 | eitelm@sullcrom.com |
| Tracy Richelle High | +1-212-558-4728 | hight@sullcrom.com |
| Theodore O. Rogers Jr. | +1-212-558-3467 | rogersto@sullcrom.com |
| Matthew A. Schwartz | +1-212-558-4197 | schwartzmatthew@sullcrom.com |
| **Washington, D.C.** | | |
| Brent J. McIntosh | +1-202-956-6930 | mcintoshb@sullcrom.com |
| Jennifer L. Sutton | +1-202-956-7060 | suttonj@sullcrom.com |
| Jeffrey B. Wall | +1-202-956-7660 | wallj@sullcrom.com |
| Samuel R. Woodall III | +1-202-956-7584 | woodalls@sullcrom.com |