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Supreme Court Finally Decides Noel Canning and Says President Obama's Recess Appointments to the National Labor Relations Board (NLRB) are a No Go

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Today, the **Supreme Court** issued its long-anticipated decision in *NLRB v. Noel Canning*, unanimously affirming an appellate court decision striking down three of President Obama's **recess appointments** to the **National Labor Relations Board** on the grounds that they were **unconstitutional.** I briefly discuss the case and its impact on employers below.

The National Labor Board Decision ordered Noel Canning, a Washington soft drink distributor to execute a collective bargaining agreement with a labor union. Noel Canning challenged the order claiming that the three controversial NLRB appointments of Sharon Block, Richard Griffin, and Terence Flynn that President Obama made during a three-day legislative recess in January 2012 were invalid and therefore the Board did not have the necessary quorum to issue a binding decision. Specifically, it argued that Constitution's Recess Appointments Clause did not grant the President*carte blanche* to bypass the Senate in making appointments during such brief recesses.

In its unanimous decision, the Supreme Court agreed with the D.C. Circuit Court of Appeals that the President's recess appointments were unconstitutional. The Court held that recesses must be of a sufficient length to bring the recess appointment power to bear, and although the Appointments Clause does not identify a specific length of time, a three-day recess is not long enough to trigger the President's power to fill vacancies without the Senate's input and consent. Instead, any appointment made during a recess of 10 days or longer will likely do the trick.

Does this decision upset the apple-cart for employers? Not really. The NLRB issued roughly 100 decisions during the period at issue, which it now must revisit upon a party's request. Given the Board's current makeup, which is now comprised of validly-appointed members, there is only a slim chance that it will alter those decisions materially. So, at least for now, employers would be wise to treat these invalidated decisions good law. At the same time, if the Board is preoccupied with revisiting old matters, it may well lead to longer adjudication periods for pending matters. This delay may come as a welcome breather for some employers.

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