


Labor and Employment Corner

By Douglas M. Topolski and Danuta Bembenista Panich

Supreme Court Holds NLRB Member Recess Appointments Unconstitutional

On June 26, 2014, in *National Labor Relations Board* *v. Noel Canning*, Case, No. 12-1281, the Supreme Court of the United States concluded that the recess appointments of former National Labor Relations Board (NLRB) members Sharon Block, Terence F. Flynn, and Richard F. Griffin, Jr. made on Jan. 4, 2012, were unconstitutional. As a result, every decision issued by the board between Jan. 4, 2012, and July 30, 2013, is void.

In this first-ever interpretation of the Recess Appointments Clause, the Court unanimously affirmed the decision of the D.C. Circuit Court of Appeals invalidating the recess appointments in question. Two opinions, totaling 108 pages, were written explaining the Court's rationale. The concurring opinion would have adopted the logic of the D.C. Circuit. The majority opinion, written by Justice Stephen Breyer, and joined by Justices Anthony Kennedy, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, relied on much narrower grounds for rejecting the President's action as unconstitutional.

The D.C. Circuit had concluded that recess appointments of government officials requiring the advice and consent of the U.S. Senate, including members of the NLRB, are permissible under the U.S. Constitution only if they are made "inter-session" (e.g., after the Senate adjourned following the 2012 elections and before the new Senate took up business in January 2013). Here, if there was a recess, it was only an "intra-session" recess. The D.C. Circuit further held that recess appointments are constitutional only if they are made while the Senate is not in session and are made to fill a vacancy that occurred during the inter-session recess. Since neither criterion was met, the attempt to appoint three members of the board without the advice and consent of the Senate was unconstitutional.

Three questions were presented to the Supreme Court:

1. Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate
2. Whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, rather than being limited to vacancies that first arose during that recess
3. Whether the President's three appointments were invalid because they were made when the Senate was in *pro forma* session, not recess.

The majority answered each of those questions with a "yes."

The majority reasoned that the purpose of the U.S. Constitution's Recess Appointments Clause is to ensure that the president is able to continue the business of the government when the Senate is not available to review and approve key appointments. As a result, the nature of the recess (intra-session or inter-session) is irrelevant. Likewise, when the vacancy filled by the recess appointment arose is irrelevant. The majority noted that a vacancy occurring late in a session could be just as vulnerable to non-action by the Senate as a vacancy occurring while the Senate was in recess. In either case, the President could be hampered in carrying on the business of the government for want of assistance from subordinate officers.

What was important was whether the recess was of sufficient duration that, under the circumstances, the Senate's inability to act would impede the President in the performance of his duties.

The majority stressed, however, that the Recess Appointments Clause is not a tool for the avoidance of the Senate confirmation process. The Senate confirmation process was "the norm." The majority emphasized that it sought "to interpret the Clause as granting the President the power to make appointments during a recess but not offering the President the authority routinely to avoid the need for Senate confirmation."

The majority further noted that it gave substantial deference to longstanding government practices. It acknowledged that the issue before it called for a delicate balancing of powers between two branches of government. It reasoned that its decision should take into account how those branches had themselves interpreted the clause.

Danuta Panich is a shareholder in the firm Ogletree, Deakins, Nash, Smoak & Stewart P.C., practicing labor and employment law. She is a past chair of the Federal Bar Association's Labor and Employment Section, a fellow in the College of Labor and Employment Lawyers, and recognized as a Best Lawyer in Labor Law—Management. Panich maintains offices in Chicago and Indianapolis. Douglas Topolski is a shareholder in the firm Ogletree, Deakins, Nash, Smoak & Stewart P.C. in its Washington, D.C. office. His practice focuses on traditional labor law and government relations. He has earned the designation of Leading Lawyer from Chambers*, and has been recognized as a Best Lawyer.*

Based on an exhaustive review of historical practices with regard to recess appointments (the majority attached appendices describing every recess taken by the Senate throughout its history and analyzing the circumstances of each recess appointment), the majority held that a three-day recess was simply too short to trigger the clause. The majority further held that recesses of 3 to 10 days were presumptively too short to trigger the clause.

The majority rejected the executive's argument that the recess was really of longer duration than three days because the Senate was only in *pro forma* sessions at the time. The majority refused to give absolute deference to the Senate's own determinations of when it was in session, noting that if the Senate were without the ability to act under its own rules, a contrary pronouncement that it was in session would not be decisive. However, the majority acknowledged that the Senate's own determination was entitled to great weight, and in this instance, the Senate's determination was consistent with a continuing capacity to act. Under the Senate rules, it could continue to conduct business even while in *pro forma* sessions. The majority rejected the executive's argument that it should examine what business was actually conducted rather than focusing on "capacity to act."

Thus, the Court affirmed the D.C. Circuit's holding that the recess appointments were unconstitutional.

In *New Process Steel, L.P. v. National Labor Relations Board*, ___ U.S. ___, 130 S.Ct. 2635 (2010), the Supreme Court had held that the board must have a quorum of three members to take lawful action. Thus, board action on more than 600 matters (all relatively simple and noncontroversial; cases where the two voting members—pro-employer Republican Peter C. Schaumber and pro-union Democrat Wilma B. Liebman—could *agree* on an outcome) were invalidated.

In *Noel Canning*, the invalidation of the President's three recess appointments meant the board lacked a quorum of members to act. Thus, pursuant to *New Process Steel*, any decisions issued during the period of Jan. 4, 2012, to July 30, 2013, when new board members were confirmed by the Senate, are void *ab initio* (from the beginning). Additionally, certain administrative decisions requiring board approval, such as the appointment of regional directors, are also called into question.

The Court referenced the recess appointment of former board member Craig Becker and noted that there are cases challenging that appointment pending in several circuit courts of appeals. For example, in *NLRB v. New Vista Nursing and Rehabilitation*, the Third Circuit Court of Appeals had invalidated Becker's appointment on grounds similar to those relied upon by the D.C. Circuit in *Noel Canning,* i.e., that the word "recess" meant only intersession breaks. Although the Court declined to opine on the proper disposition of those cases, the majority's rejection of narrow interpretations of the Recess Appointments Clause suggests Becker's appointment will ultimately be found valid. ⊙