

## DC Circuit Court of Appeals Throws Out Recess Appointments to the NLRB

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In a stunning rebuke to President Obama, the District of Columbia Circuit Court of Appeals declared the President's recess appointments to the National Labor Relations Board as unconstitutional. The ruling could have widespread implications on other recess appointments, including that of Richard Cordray to the Consumer Financial Protection Bureau, which is being challenged in a separate case. The case, issued today, is *Noel Canning v. NLRB*. The employer, Noel Canning, challenged an opinion by the NLRB and members who had been appointed by the President during what the President deemed a recess.

The issue in the case is whether the U.S. Senate was in recess on January 4, 2012, when President Obama made three recess appointments to the NLRB of Sharon Block, Terry Flynn and Richard Griffin. The Senate had been meeting in "pro forma" sessions every three business days, but was not conducting business. On that basis the President considered the Senate to be in recess and exercised his power to make recess appointments. In ruling as it did, the unanimous Court declared that the appointments of three members of the National Labor Relations Board were "invalid from their inception." Without the valid appointment of a third Board member, the NLRB had only two validly appointed members, lacked a quorum, and could not issue decisions. This ruling conflicts with a ruling by the Eleventh Circuit Court of Appeals, *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) concerning recess appointments for federal judges.

The Court confirmed that the President has the power to make appointments when the U.S. Senate is not in session and thus, unavailable to review and vote on presidential nominations. The Court ruled that the Senate's "pro forma" sessions did not qualify as a true break in proceedings and thus could not constitute a recess. Given no recess, the Court found that the appointments were invalid.

**Employer Guidance:** Given this ruling, any opinion (particularly in the D.C. Circuit) issued by the NLRB during the period on or after January 4, 2012, could well be in jeopardy. It is fully expected the NLRB will appeal the ruling. However, it is not clear what position the Board will take on proceeding with pending cases outside of the DC Circuit. The issue is further complicated because any NLRB decision may be appealed to the DC Circuit and we now know where that Circuit stands on this important issue. With this important constitutional question and a contrary ruling by the Eleventh Circuit, this matter could be fast-tracked to the Supreme Court. We'll be watching.