Written by **Warren Mass** on June 24, 2013

Supreme Court to Rule on Obama Recess Appointments

The U.S. Supreme Court agreed on June 24 to hear a case involving the validity of three recess appointments President Obama made to the National Labor Relations Board in January 2012. The U.S. Court of Appeals for the District of Columbia Circuit ruled in January that the appointments to the NLRB's board, which normally has five members, were invalid. The court's decision will be made during the High Court's next term, which will start in October.

The legal controversy originated when Obama ostensibly employed the recess power granted in Article II, Section 2, Clause 3 of the Constitution to fill three seats on the National Labor Relations Board (NLRB). The Constitution's language on recess appointments reads: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

The core of the dispute, however, lies in the fact that the Senate was in a "pro forma" session at the time of the appointments during the 2011-12 winter holiday break. Republican senatorial leaders had arranged for a single Republican lawmaker to arrive at the upper chamber every three days and gavel the Senate to order, then after a short while, gavel it to a close.

A Yakima, Washington, Pepsi bottler named Noel Canning brought a legal challenge against an NRLB ruling concerning the bottler's dealings with the Teamsters Union on the grounds that Obama lacked the authority to make recess appointments to the NRLB, rendering the appointments invalid and, therefore, the board lacked a quorum to render a decision.

In this case, *National Labor Relations Board v. Noel Canning*, the D.C. appeals court decided in Canning's favor on January 25. In so doing, the court also invalidated Obama' recess appointments.

"Allowing the president to define the scope of his own appointments power would eviscerate the Constitution's separation of powers," D.C. Circuit Judge David B. Sentelle wrote in the *NLRB v Noel Canning* decision. "An interpretation of 'the recess' that permits the president to decide when the Senate is in recess would demolish the checks and balances inherent in the advice-and-consent requirement, giving the president free rein to appoint his desired nominees at any time he pleases, whether that time be a weekend, lunch, or even when the Senate is in session and he is merely displeased with its inaction. This cannot be the law."

The D.C. judicial panel also voted 2 to 1 that the phrase "vacancies that may happen" means only those openings that arise during the recess, not those that already exist when the recess occurs.

Following the decision, Senate Minority Leader Mitch McConnell said in a written statement: "The D.C. Circuit Court today reaffirmed that the Constitution is not an inconvenience but the law of the land, agreeing with the owners of a family-owned business who brought the case to the court."

The U.S. Solicitor General, Donald B. Verrilli, Jr., filed a petition to the Supreme Court challenging the Circuit Court's decision, arguing that such a reading of the recess appointments clause would

"drastically curtail the scope of the president's authority."

In his petition asking the High Court to review the case, Verrilli said that presidents have made more than 500 appointments during inter-session recesses, including "three cabinet secretaries, five court of appeals judges, 10 district court judges, a Director of Central Intelligence, a Chairman of the Federal Reserve, numerous members of multi-member boards, and holders of a variety of other critical government posts."

A report on this case from *USA Today* correctly observed that the underlying power struggle between the executive and legislative branches of the federal government overshadows the immediate issue at hand in *National Labor Relations Board v. Noel Canning*, which was a classic management vs. labor dispute. In recent years, senators have used a variety of methods to stall or derail presidential appointments and presidents have, in turn, used the recess appointment to perform an end-run around the Senate.

In anticipating how the Supreme Court might rule on this case, the *USA Today* writer suggested that the deciding factor might be how the justices interpret two words found in the Constitution's recess appointments clause ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."): "the" and "happen."

The report noted that the D.C. Circuit Court of Appeals determined that the words "the recess" means the singular break between annual sessions of Congress and that "may happen" means only positions that fall vacant during the same recess.

Court watchers will eagerly await the Supreme Court's decision regarding *National Labor Relations Board v. Noel Canning* this fall, as it will be a significant constitutional test of executive branch power.

Related article: Obama Violated Constitution With Recess Appointments, Appeals Court Rules