

## Dispute over Recess Appointments Affecting CFPB Appealed to Supreme Court

April 26, 2013 - We've written about the case known as NLRB v. Noel Canning on several occasions now. A January decision by the DC Court of Appeals ruled that President Obama's recess appointment of three members to the National Labor Relations Board violated the Constitution. The decision is extremely important in world of credit and bank regulation because on the same day the President made the appointments to the NLRB, he also appointed Richard Cordray as Director of the Consumer Financial Protection Bureau (CFPB). If the court's ruling is allowed to stand, then Cordray's appointment is also unconstitutional; something that would leave every single decision made by the CFPB open to court challenge. Today, the Obama administration appealed the decision to the Supreme Court.

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NLRB v. Noel Canning is a labor relations dispute. It came about as a result of an NLRB order to Noel Canning (a Pepsi bottling company) to enter into a collective bargaining agreement with its workers. The company took the NLRB to court. Their lawsuit challenged the constitutionality of Obama's recess appointments to the NLRB. Those appointments had been filibustered by Republicans in the Senate. Based on a prior Supreme Court ruling, if the appointments were unconstitutional then the NLRB wouldn't have had enough members to issue any legally binding rulings.

The DC Court of Appeals determined that since the Senate had not adjourned - it was holding pro forma sessions every three days - the appointments were unconstitutional. It further determined that the President's power over recess appointments was strictly limited to filling only positions that had become vacant during a congressional recess. Positions that had been open but unfilled while Congress was in session could not be filled.

This particular appeal is going to be extremely interesting to watch and regardless of how the case plays out, the final decision is almost assuredly going to be regarded as "landmark." Because of differing opinions by other federal appeals courts around the country, there is very little doubt that the Supreme Court will agree to hear the case.

There are two real issues at stake in the case. First is the President's power to fill positions using recess appointments even if the position didn't become vacant during a recess. The January decision said that he can't do that. That decision may be the easiest for the Supreme Court to overturn. Presidents have used this type of recess appointment for more than two centuries to fill open positions. Allowing this portion of the January decision to stand could open a Pandora's Box for the government as it would result in legal challenges that could go on for years.

The second issue is more subtle. It will require the court to determine the exact meaning of the term "recess" as specified in the Constitution. The Obama administration is claiming that even though the Senate was holding sessions, most

senators were out of town and that no real business was being conducted. Therefore, they were legally in recess.

That's a much more difficult argument to make for two big reasons:

- If the court was to agree with the President's position, it would mean that the Senate's power of "advice and consent" for appointments would be nearly meaningless. As soon as Congress went home for the night, any President could simply make new appointments even if he knew that Congress wouldn't approve of those appointments.
- If the Senate is in recess, then it shouldn't be able to conduct any business. But at just about the same time that Obama made his appointments to the NLRB and the CFPB, Senator Harry Reid took to the Senate Floor and passed an extension of payroll tax cuts during a session. I think this is the most compelling argument that the Obama administration will have to overcome and I don't really see how they can.

The DC Appeals Court decision is already impacting the CFPB. Richard Cordray was scheduled to the CFPB's semi-annual report to the House of Representatives in the near future. On Monday the chairman of the House Financial Services Committee, Jeb Hensarling (R-TX) sent Cordray a letter barring him from testifying as a result of the Noel Canning decision. The letter stated that to testify, Cordray would need to be legally acting as Director of the CFPB and that "you do not meet the statutory requirements of a validly serving director of the CFPB, and cannot be recognized as such."

If the Supreme Court upholds the portion of the lower court opinion that the NLRB results were unconstitutional, then every decision made by both the NLRB and the CFPB since the appointments were made could be challenged in court.

byJim Malmberg

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