WILMERHALE

Supreme Court Agrees To Address Scope of Recess Appointments Power

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This morning the Supreme Court granted review of the D.C. Circuit's decision holding that President Obama's recess appointment of three members of the National Labor Relations Board (NLRB) violated the Constitution's Recess Appointments Clause. The Supreme Court's resolution of the case will likely have significant ramifications for the Consumer Financial Protection Bureau (CFPB), the Director of which, Richard Cordray, was given a recess appointment on the same day as the NLRB members and whose appointment would also be invalid under the D.C. Circuit's reasoning. Depending on whether the Supreme Court adopts some or all of the D.C. Circuit's reasoning, its decision could also dramatically restrict the circumstances under which Presidents could make recess appointments.1

The Recess Appointments Clause provides that "[t]he 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." U.S. Const., art. II, § 2, cl. 3. In an opinion by Chief Judge Sentelle, joined by Judges Henderson and Griffith, the D.C. Circuit in January held that the Clause empowers the President to make recess appointments only during intersession recesses of the Senate—that is, formal breaks between congressional sessions—and not during intrasession adjournments, breaks that occur during the course of a congressional session. *See Noel Canning v. NLRB*, No. 12-1115 (D.C. Cir. Jan 25, 2013) (slip opinion), at 16-30.2 Chief Judge Sentelle and Judge Henderson also held that the President may make recess appointments only to fill vacancies that actually arise during an intersession recess of the Senate, rejecting a practice the Executive Branch has followed since the nineteenth century. *See id*. at 30-39.3 Because President Obama's appointments of the NLRB members occurred during an intrasession break and because the vacancies for those appointments had not arisen during an intersession recess, the court held that the President's appointments were unconstitutional. *See id*. at 40-44. Judge Griffith filed an opinion concurring in part, saying he would have decided the case solely on the intersession/intrasession ground. *See id*. at 47.

The D.C. Circuit made only passing reference to a third argument raised by Noel Canning—that the Senate's pro forma sessions held every three days prevented the Senate's 20-day break in January

2013 from constituting a "recess" for purposes of the Recess Appointment Clause. According to the order it issued today, however, the Supreme Court will consider that argument as well.

Although CFPB Director Cordray's recess appointment was not directly challenged in this case, any of the three grounds for affirming the D.C. Circuit's decision urged by Noel Canning would likely apply equally to Mr. Cordray's appointment. Moreover, a challenge to the constitutionality of Mr. Cordray's appointment is already pending in the federal district court in Washington, DC, and that court would be bound by the Supreme Court's decision. *See State National Bank of Big Spring et al. v. Geithner et al.*, No. 12-cv-1032 (D.D.C.). The resolution of the *Noel Canning* case will thus likely have significant implications for the legality of actions taken by the Bureau during Mr. Cordray's tenure.

Even if Mr. Cordray's appointment were to be invalidated in a challenge to a particular action by the Bureau, additional analysis, and potentially additional legal challenges, would be required to determine which actions during Mr. Cordray's tenure could stand and which not. First, there may be questions about which CFPB actions require the presence of an appointed director and which do not. Second, there may be issues raised over the validity of the CFPB's (and the NLRB's) actions under the "de facto officer doctrine."

Briefs will be filed in the Supreme Court in the summer and fall, and oral argument is likely to be held in December 2013 or January 2014. A decision is likely before the end of June 2014.

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[1] For an effort to identify the many recess appointments over the past 30 years that would have been invalid under the D.C. Circuit's reasoning, see H. Hogue et al., The Noel Canning Decision and Recess Appointments Made from 1981-2013, Congress Research Service Memorandum (Feb. 4, 2013), available at http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/112/pdf/Recess 2013.pdf.

[2] In a decision handed down last month, a divided panel of the Third Circuit also endorsed this view in invalidating the appointment of an NLRB member who had been appointed during an intrasession break during the spring of 2010. *See NLRB v. New Vista Nursing and Rehabilitation*, Nos. 11-3440, 12-1027, 12-1936 (3rd Cir. May 16, 2013). The Eleventh Circuit has taken the contrary position. *See Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004).

[3] The D.C. Circuit's view on this point conflicts with rulings by the Second, Ninth, and Eleventh Circuits. *See United States v. Allocco*, 305 F. 704, 710-13 (2d Cir. 1962); *United States v. Woodley*, 751 F.2d 1008, 1010-13 (9th Cir. 1985) (en banc); *Evans*, 387 F.3d at 1222.