

U.S. Supreme Court Will Rule on Obama's Recess Appointments

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The fate of hundreds of mostly pro-union federal agency rulings now rests with the U.S. Supreme Court.

The Court this week [agreed to take up *Noel v. Canning*](#), the case involving President Obama's controversial recess appointments to the National Labor Relations Board ("NLRB"). As we have reported, the D.C. Circuit in January ruled that the President violated the Constitution by appointing a board majority pursuant to his recess appointments power, even though the Senate was technically in session.

The Court will consider the Obama Administration's appeal of the ruling during its 2013-2014 term, which begins in October. At stake is the status of hundreds of NLRB decisions that directly affect employers on issues ranging from social media policy, employer confidentiality and employee discipline rules.

According to the *Wall Street Journal*, the NLRB has issued 274 rulings since the *Canning* decision and up to 1,200 rulings since the President's January 2012 appointments.

Employer groups argue that all of those rulings should be invalidated because the NLRB was improperly constituted when it voted. The Obama Administration maintains that the appointments were legal or, alternatively, that the *Canning* ruling applies only to that particular case.

More broadly, the Court's ruling will likely define the scope of presidents' recess appointments powers for future administrations. Presidents must normally obtain Senate consent to fill agency board positions. The Constitution's Appointments Clause permits presidents to unilaterally fill agency vacancies when the Senate is in recess, an anachronism to the days when Congress recessed for months at a time.

Many presidents, including Bill Clinton and George W. Bush, have used the Recess Appointments power to appoint individuals whom they knew the Senate would not approve. Conversely, both parties have adopted the practice of holding "pro forma" sessions of Congress — during which no official business is conducted other than the banging of a gavel by one lawmaker to open and close the session — for the express purpose of preventing the President from making recess appointments. That is exactly what happened here.

The Supreme Court has an opportunity here to curtail the gamesmanship that currently surrounds federal agency appointments. If *Canning* is upheld, future presidents will have an incentive to nominate moderate agency officials that the opposing party can live to facilitate confirmation. If the Obama Administration wins, the advise and consent role of the Senate with respect to agency appointments will be rendered virtually meaningless.

Both parties will have to live with the result.

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