

Federal Appeals Court Strikes down President Obama's NLRB Appointments

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In a decision that could have an enormous impact on employers, a federal appeals court has ruled that President Barack Obama violated the Constitution when he appointed three members to the [National Labor Relations Board](#) (“NLRB”) without Senate approval.

The unanimous ruling from the three-member panel of the Court of Appeals for the District of Columbia Circuit could invalidate hundreds of NLRB regulations and decisions issued since January 4, 2012. President Obama is expected to appeal the ruling to the Supreme Court.

The issue stems from Obama's use of so-called “recess appointments” to place favored candidates in important federal agencies who might not otherwise garner Senate approval. Though agency nominees generally require Senate confirmation, the Constitution allows the president to unilaterally fill agency vacancies when the Senate is in recess.

The “[Appointments Clause](#)” is an anachronism to the days when recess appointments were necessary because it could take weeks for lawmakers to travel to and from their districts and legislative recesses regularly lasted six to nine months.

Many Presidents, including Bill Clinton and George W. Bush, have used elastic (and often dubious) definitions of when Congress is “in recess” to install controversial agency members. Presidents most often do this when Congress is in a *pro forma* session, in which either house is technically in session but no votes are held.

The D.C. Circuit's ruling addresses President Obama's recess appointments of Deputy Labor Secretary Sharon Block, union lawyer Richard Griffin and NLRB counsel Terence Lynn to fill NLRB vacancies. In the past year, the newly constituted NLRB has passed numerous regulations and issued decisions that make it easier for unions to organize.

The status of those actions is now in limbo because, without the three recess appointees, the NLRB lacked the required quorum for a valid vote. The D.C. Circuit panel, however, seemed unconcerned about this consequence

as it chastised President Obama for making appointments during what it called an “imaginary recess.”

If allowed to stand, the President’s actions:

“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 . . . This cannot be the law,” wrote Chief Judge David Sentelle.

A cautionary note: Despite the ruling employers should act as if the NLRB’s recent actions **remain in effect**. It will take months for the impact of this ruling to shake out and employers should **not** assume that any NLRB action is automatically null and void. We will closely follow any developments, including the likely appeal to the Supreme Court.

Stay tuned.

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