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Supreme Court Ruling Regarding NLRB Recess Appointments

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Today, the U. S. Supreme Court released its opinion in the *National Labor Relations Board v. Noel Canning*, No. 12-1281 (June 26, 2014), matter. The case involved that the constitutionality of the president's recess appointments. Specifically, whether the president properly exercised his authoirty to make appointments to the National Labor Relations Board "during the Recess of the Senate, which shall expire at the end of their next session."

The Supreme Court unanimously ruled that President Obama improperly appointed two members to the National Labor Relations Board during an ultra-brief Senate recess. All nine justices agreed that President Obama's two National Labor Relations Board appointments were improper. The court's four most consistently conservative justices, though, also signed on to an unusually long concurring opinion that argued for stricter limits on the White House.

In its ruling, the Supreme Court recognized that the President has the authority to make recess appointments to pre-existing vacancies when the Senate is in recess. However, in the case at hand, the Supreme Court found that, at the time of President Obama's appointments, the Senate was "in-session." "Three days is too short a time to bring a recess within the scope of the (Recess Appointments) Clause," Justice Stephen Breyer wrote. "Thus we conclude that the President lacked the power to make the recess appointments here at issue." Citing "historical practice," Breyer said that "a recess of more than three days but less than 10 days is presumptively too short" to allow the president to make a recess appointment.

It should be noted, however, the Supreme Court's ruling did confirm the President's authority to appoint officials during recesses. Indeed, the Justices stressed that presidents retain authority to appoint officials during longer recesses, and they rejected arguments that would have further limited the vacancies that might be filled. "We add the word 'presumptively' to leave open the possibility that some very unusual circumstance—a national catastrophe, for instance, that renders the Senate unavailable but calls for an urgent response—could demand the exercise of the recess-appointment power during a shorter break," Breyer noted.

Employer's Take Away

Today's ruling will undoubtedly have an effect on recent NLRB rulings entered after the recess-appointments. Specifically, the employers' ability to make employment decisions based on social media activity of their employees since the NLRB decisions had predominantly limited such adverse actions under Section 7 of the National Relations Board Act. Nevertheless, many states (such as New York and California) have already limited employers actions based on employees private social media activity. Only time will tell how the matter will unfold; both on the NLRB and the State levels.

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