

NLRB Hears Oral Argument In *Noel Canning v. NLRB*

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On Dec. 5, 2012, oral argument in *Noel Canning v. NLRB* was held before a three judge panel of the United States Court of Appeals for the D.C. Circuit. Our prior posts on this topic can be [found here](#). Barnes & Thornburg attorney Teresa Jakubowski was present for the oral argument. As a result, the BT Labor Relations Blog is able to offer our readers a quick play-by-play.

A. Background

The primary issue before the Court is the validity of President Obama's most recent recess appointments to the National Labor Relations Board ("NLRB"). When the Senate is in recess, the Constitution allows a president to unilaterally install nominees to posts that ordinarily require Senate confirmation. When President Obama made the appointments at issue, the Senate considered itself to be in session. The White House claimed, however, the pro forma session did not count because the Senate was not really available to make confirmations. Why does this matter? If the recess appointments were invalid, the NLRB would lack the three-member quorum necessary to render binding decisions.

B. The Oral Argument

Noel Canning's counsel devoted his allotted time for initial argument solely to the recess appointments, and Chief Judge Sentelle expressed concern that discussion of the merits of the underlying NLRB order not be overlooked. The questions directed to Noel Canning's counsel focused on why the D.C. Circuit should involve itself given its prior efforts to stay away from separation of powers disputes and recess appointment issues, whether a pro forma session of the Senate is an *actual* session, what constitutes a "recess," and whether the court even has jurisdiction over this issue given it was not raised in the proceedings before the NLRB.

The Department of Justice argued on behalf of the NLRB. The questions directed at the Department of Justice focused on historical practice regarding recess appointments, the significance between intrasession and intersession recesses, the purpose of the constitutional provision for recess appointments, and the minimum length required for a break to be considered a recess. In support of its position, the Department of Justice emphasized "100 years" of precedent (Andrew Johnson made an intrasession recess appointment) and the need to maintain the balance of power between the Executive Branch and the Senate. Chief Judge Sentelle challenged the Department on its reading of the recess appointments clause, noting that it appeared to apply only to a specific recess (intersession), and not any general recess. He also suggested that grammatically, the recess appointment power extends only to vacancies arising during a recess, not those that merely exist during a recess. The Department urged the Court to consider the "functional practicality" of the clause, to which the Chief Judge responded: "when was the last time we decided a constitutional question based on functional practicality?"

During his rebuttal argument, Noel Canning's counsel simply referred back to the historical practice regarding recess appointments and the contention that

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pro forma sessions are no different than other sessions of the Senate.

C. Reading the Tea Leaves

Given the challenges directed towards both sides, the outcome is uncertain . One the one hand, the Court did challenge the Department of Justice's interpretation of the recess appointment clause and repeatedly emphasized the clause's original purpose. One the other hand, the Court expressed some reluctance to address the recess appointment issue, noting that the Executive Branch had not been consistent in its interpretation of that power, that the Senate had not clearly determined the meaning of recess under its procedures, and that the Senate has its own tools for responding. Regardless of the outcome, though, the Court's decision will most assuredly have far reaching implications.