OBAMA RECESS APPOINTMENTS SLAPPED DOWN BY DC CIRCUIT, CFPB AT RISK

What can only be described as a blockbuster opinion was just handed down by the DC Circuit in the case of Canning v NLRB, the validity of President Obama's recess appointments has been slapped down. Here is the full opinion. The three judge panel was Chief Judge David Sentelle, Karen Henderson and Thomas Griffith, all Republican appointees (one from each Bush and one Reagan).

The immediate effect of the court's decision is, of course, on the National Labor Relations Board (NLRB). Noel Canning was aggrieved by a decision of the NLRB and petitioned for review, the NLRB cross-petitioned to have its decision upheld. Fairly standard stuff – except the quorum on the NLRB Board was met only because of the fact Barack Obama controversially recess appointed three members in January 2012, as well as concurrently recess appointing Richard Cordray to be the Director of the Consumer Finance Protection Bureau. So, three out of the five members of the NLRB Board were, according to Canning's argument, not validly sitting and therefore their decision was invalid as to him

Canning had merits arguments on the specific facts of his individual case, but the court found those non-compelling and proceeded on the Constitutional arguments surrounding the validity of the recess appointments. And the Court agreed with Canning that Obama's recess

appointments were invalid. The discussion by the court can be gleaned from these passages:

> All this points to the inescapable conclusion that the Framers intended something specific by the term “the Recess,” and that it was something different than a generic break in proceedings.
> ….
> It is universally accepted that “Session” here refers to the usually two or sometimes three sessions per Congress. Therefore, “the Recess” should be taken to mean only times when the Senate is not in one of those sessions. Cf. Virginia v. Tennessee, 148 U.S. 503, 519 (1893) (interpreting terms “by reference to associated words”). Confirming this reciprocal meaning, the First Congress passed a compensation bill that provided the Senate’s engrossing clerk “two dollars per day during the session, with the like compensation to such clerk while he shall be necessarily employed in the recess.” Act of Sept. 22, 1789, ch. 17, § 4, 1 Stat. 70, 71.
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> Not only logic and language, but also constitutional history supports the interpretation advanced by Noel Canning, not that of the Board. When the Federalist Papers spoke of recess appointments, they referred to those commissions as expiring “at the end of the ensuing session.” The Federalist No. 67, at 408 (Clinton Rossiter ed., 2003). For there to be an “ensuing session,” it seems likely to the point of near certainty that recess appointments were being made at a time when the Senate was not in session – that is, when it was in “the Recess.” Thus, background documents to the Constitution, in addition to the language itself, suggest that “the Recess” refers to the period between

> sessions that would end with the ensuing session of the Senate.
> ….
> The Constitution's overall appointments structure provides additional confirmation of the intersession interpretation. The Framers emphasized that the recess appointment power served only as a stopgap for times when the Senate was unable to provide advice and consent. Hamilton wrote in Federalist No. 67 that advice and consent "declares the general mode of appointing officers of the United States," while the Recess Appointments Clause serves as "nothing more than a supplement to the other for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate." The Federalist No. 67, supra, at 408. The "general mode" of participation of the Senate through advice and consent served an important function: "It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." The Federalist No. 76, supra, at 456.

Then the blow was delivered:

> In short, the Constitution's appointments structure — the general method of advice and consent modified only by a limited recess appointments power when the Senate simply cannot provide advice and consent — makes clear that the Framers used "the Recess" to refer only to the recess between sessions.

and:

> In short, we hold that "the Recess" is limited to intersession recesses. The Board conceded at oral argument that the appointments at issue were not made during the intersession recess: the President made his three appointments to the Board on January 4, 2012, after Congress began a new session on January 3 and while that new session continued. 158 Cong. Rec. S1 (daily ed. Jan. 3, 2012). Considering the text, history, and structure of the Constitution, these appointments were invalid from their inception. Because the Board lacked a quorum of three members when it issued its decision in this case on February 8, 2012, its decision must be vacated.

But the court did not stop there, although it well could have. Instead, Sentelle's opinion proceeds to also gut the foundation of Obama's recess appointments by determining the meaning of the word "happen" in the Recess Appointment Clause contained in Article II, Section 2, Clause 3 of the Constitution. That consideration is described by this discussion:

> Although our holding on the first constitutional argument of the petitioner is sufficient to compel a decision vacating the Board's order, as we suggested above, we also agree that the petitioner is correct in its understanding of the meaning of the word "happen" in the Recess Appointments Clause. The Clause permits only the filling up of "Vacancies that may happen during the Recess of the Senate." U.S. Const. art. II, § 2, cl. 3. Our decision on this issue depends on the meaning of the constitutional language "that may happen during the Recess." The company contends that "happen" means "arise" or "begin" or "come into being." The Board, on the other hand, contends that the President may fill up any vacancies that

> "happen to exist" during "the Recess." It is our firm conviction that the appointments did not occur during "the Recess." We proceed now to determine whether the appointments are also invalid as the vacancies did not "happen" during "the Recess."

As you might guess from the direction so far, the court determined that "Our understanding of the plain meaning of the Recess Appointments Clause as requiring that a qualifying vacancy must have come to pass or arisen "during the Recess"". Sentelle then, in pages 23-27 of the opinion, went through and crucified the four variations of their theme the Administration argued, including a battering ot the OLC opinion on recess appointments dated January 6, 2012 and hand crafted and signed by Virginia Seitz. Tough day for both Seitz and Obama.

The court also went on to say that maintaining the consistent with the Article I Legislative Branch prerogative of the "Power of the Purse":

> The Framers placed the power of the purse in the Congress in large part because the British experience taught that the appropriations power was a tool with which the legislature could resist "the overgrown prerogatives of the other branches of government." The Federalist No. 58, supra, at 357. The 1863 Act constitutes precisely that: resistance to executive aggrandizement.

While this was interpretive of the ability to pay recess appointments and what that portended to the Framer's intent, it is also a pretty clear shot at maintaining the inherent separation of power in the assignment of the Purse Power to Congress and not the executive, something lost recently on the Platinum Coin crowd.

So, the net result is that Canning's NLRB

decision against him is void. Further, it would appear that any other decision of the NLRB taken by the Board depending on the three Obama recess appointments is also void. That is a major problem because it leaves the NLRB with only one single validly appointed member at this point, and will affect literally hundreds of opinions rendered.

The effect of today's decision, however, most certainly is not limited to the NLRB. In fact, the effect on the NLRB may, in the long run, be the least damaging result. That is because, of course, on the same day Barack Obama made the three NLRB recess appointments, he also recess appointed Richard Cordray to lead the CFPB.

The reason I took up so many column inches laying out the nature and strength of the court's opinion is because it is the deepest judicial review of this issue ever, by far, is devastating in nature and, honestly, is pretty strong and compelling. And it without any question will be the same decision as will be applied to Richard Cordray's status the second a case and controversy hits it challenging Cordray's status. And one will.

The challenge to Cordray, however, is not nearly so clean an issue as the sudden facial validity of a finite number of NLRB opinions. The CFPB was a brand new agency, and one of the reasons getting a permanent director was so critical was that many of the powers and, particularly rule making powers, did not vest to the entity without one. But other powers had already transferred without Cordray being installed.

There is a CRS memorandum detailing much of the problem in scattered vesting of CFPB power:

> Not all of the CFPB's powers become effective at the same time. Some of the Bureau's authorities took effect when the Dodd-Frank Act was signed into law on July 21, 2010. However, most of the Bureau's authorities will go into effect on the "designated transfer date"—a date

> six to 18 months after enactment, as determined by the Secretary of the Treasury (Secretary). Currently, the designated transfer date is July 21, 2011.
>
> In addition to the effective dates set out in the CFP Act, the authority to exercise the Bureau's powers may be affected by the appointment of a CFPB Director. The Bureau is designed to be headed by a single Director, who is to be nominated by the President and subject to the advice and consent of the Senate. If a Director is appointed before the designated transfer date, he will be able to exercise all of the powers provided to the Bureau pursuant to the CFP Act. However, a Bureau Director has not yet been appointed. Until a CFPB Director is appointed, the CFP Act provides the Secretary the authority to exercise some, but not all of the Bureau's authorities. Although not beyond debate, the CFP Act appears to provide the Secretary the authority to exercise the Bureau's transferred powers, but not the authority to exercise the Bureau's newly established powers.

As I noted back at the time the recess appointments were made in January of 2012, the inconsistent, and sometimes incongruent, vesting of power in CFPB was a particular issue in relation to the debatable nature of Cordray's recess appointment.

In fairness, I thought the recess appointments would minimally stand up under the logic expressed by the 11th Circuit in *Evans v. Stephens*. Well, Sentelle and the DC Circuit took that argument apart with every bit the vigor it did Seitz's OLC Opinion argument. As I said then:

> Normally a confirmed appointee and a

> recess appointee have the same legal authority and powers but, to my knowledge, there is no other situation in which substantive power for an agency flows only through its specific "confirmed" director.

Well, today's decision in *Canning* is going to put all those questions into play when a CFPB case hits the DC Circuit. Oh, and one is on the way – *State National Bank Of Big Spring et al v. Geithner et al*, 12-cv-01032 (complaint here). This is a big truckload of trouble heading dead on for the Obama Administration.

Here is the next glaring trouble spot from today's *Canning* decision. Just yesterday, Obama formally nominated Richard Cordray for regular confirmation as head of the CFPB. It was a nice little ceremony carried on television and everything. And then Harry Reid, Carl Levin, Pat Leahy and the old school Senate Democrats went out and killed every possible ability for Obama to actually get Cordray through the Senate Republican filibuster gauntlet when they refused to meaningfully reform the filibuster (see: here and here).

Actions have consequences, and so do crustacean like inaction and fear as exhibited by the Old School Dems and the White House. You think the Senate No Men led by Mitch McConnell were obstructive of the CFPB and NLRB before? Just wait until now when they smell the agencies' blood in the water.

Surely the Obama Administration will correct all this with a request for en banc consideration by the DC Circuit or an appeal to the Supreme Court, right? Well, no and yes. The DC Circuit effectively does not do en banc considerations in the first place, and even if they wanted to (they won't) they may not even have enough active judges to pull it off (note that DC Circuit is down yet another active judge since that article was written).

So, there will be no en banc to pin hopes for. There will almost certainly, however, be an appeal to the Supreme Court. And there being at least an argument that there is now a circuit split between the DC Circuit's *Canning* decision and the 11th Circuit's *Evans* decision, there may even be a good chance that SCOTUS grants cert.

That is where the good news may end though. I expect the appeal to be on several issues and, as John Ellwood at Volokh Conspiracy notes, the Canning decision is MUCH broader than expected and, really, will preclude almost all recess appointment power as has been used in the last century.

It is possible that SCOTUS could craft a middle ground not so restrictive of the Presidential recess appointment power, but it is fairly easy to see them still disallowing Obama's January 2012 recess appointments of the NLRB members and Cordray. In fact, I would be shocked if they did otherwise at this point.

As Lyle Denniston at SCOTUSBlog notes:

> The main Circuit Court opinion was written by Chief Judge David B. Sentelle, and it was a strong affirmation of the "original meaning" mode of interpreting the Constitution – that is, analyzing a constitutional issue in terms of what the words of the document meant at the time they were first written. The Sentelle opinion was filled with recollections of early government history, and of what the earliest generations believed they had put into the presidential appointments clause of the document.

It was certainly that, and such framing is designed to play straight into the heart of the conservative bloc love of "original intent" in Constitutionalism. They may walk back *Canning* a little, but on the critical Obama appointments, it is hard to see them not affirming.

This is a very ugly and humbling day for the Obama Administration.