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July 11, 2014

THE SUPREME COURT LIMITS THE PRESIDENT'S RECESS APPOINTMENT POWER

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In January 2012, President Obama made recess appointments of the first Director of the Consumer Financial Protection Bureau and two members of the National Labor Relations Board during a three day period when the Senate was in pro forma session. The Senate later confirmed Director Cordray to his position, resolving questions about the legality of his actions going forward. But in late June, in *National Labor Relations Board v. Noel Canning*, the Supreme Court unanimously declared the recess appointments to the NLRB to be unconstitutional. This potentially raises questions about the legality of actions taken by the CFPB while the Director was serving under his recess appointment.

President Obama made these recess appointments despite substantial doubts among Executive Branch lawyers, dating back to the Carter Administration, about whether the Recess Appointment Clause of the Constitution would apply during such a three-day Senate recess. The Supreme Court has definitively answered that question. Its decision that reduces the powers of all future Presidents to make recess appointments to fill vacancies that have occurred in senior leadership positions in the Executive Branch.

In reality, the Office of the President dodged a bullet. It avoided much more severe limitations on the President's powers that were brought into play by these risky appointments. The Justices divided sharply about the scope of the Recess Appointment Clause. Four conservative Justices who concurred in the ultimate decision would have limited this power so drastically that it would have lost any significance as a tool for effectively managing the Executive Branch.

The five Justices, including Justice Kennedy, who signed Justice Breyer's majority opinion, rejected more sweeping limitations on recess appointments and largely adopted the Executive Branch's position on the scope of the Recess Appointment power that had been developed gradually by Attorneys General starting in Andrew Jackson's Administration. The majority held that the President can make recess appointments during any recess of the Senate, whether between its Sessions or in the course of a Session, as long as the Senate is not prepared to do business for a significant period of time. The actual holding in *Noel Canning* is extremely narrow – that a three day recess is not sufficiently long for the President to make recess appointments. At the same time, the majority held that the Senate has the power under its own Rules to prevent the President from making recess appointments by keeping itself in "session," defined as meaning that the Senate has the capacity to act on public business.

Noel Canning thereby recognizes and preserves the powers of both Branches of government concerning appointment of senior Executive Branch officials. It forces all future Presidents to negotiate with future Senates concerning his ability to make recess appointments during a Congressional adjournment. The Senate will be able to prevent or permit such appointments depending upon whether it chooses to stay in pro forma session. In the view of the five majority Justices, this outcome preserves the balance of powers between the Legislative and Executive Branches.

By contrast, Justice Scalia's minority opinion would have sharply curtailed the President's power to make recess appointments by restricting this authority only to vacancies that occur and are filled in the short period between when one session of Congress ends in December and the next session begins in early January.

In sum, *Noel Canning* is a loss for the Presidency. President Obama will pass along diminished powers to all his successors. But given the extraordinary risks the Administration ran and the 5 to 4 division with the Supreme Court, the outcome could have been much worse from the Executive Branch's perspective. The Presidency dodged a bullet.