Written by **Thomas R. Eddlem** on June 27, 2014

High Court: Obama Violated Constitution on "Recess" Appointments

The U.S. Supreme Court dished out a unanimous condemnation of President Obama's dictatorial usurpation of the power of appointment in the June 26 decision of *NLRB v. Noel Canning*.

Under the terms of the Constitution, the president may make appointments with the consent of the Senate, and he may make emergency appointments while the Senate is not in session. Article II, Section 2 of the U.S. Constitution provides that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

But in 2012, President Obama brazenly and unconstitutionally claimed the ability to appoint members of the National Labor Relations Board (NLRB) without the consent of the Senate while the Senate was still in session. This unanimous decision by the Supreme Court slaps down the president's pretended power to make those appointments and negates the decisions made by the NLRB while his rogue appointees were putatively on the board.

The controversy stemmed from President Obama's appointment on January 4, 2012 of three members to the NLRB during what he called a "recess of the Senate." Because the minority Republicans (they controlled 47 of the 100 seats at the time) objected to two of the nominees who had strong labor union ties, they had filibustered the nominations and used Senate procedures to keep the legislative body in "pro-forma" session to prevent an otherwise legitimate recess appointment by the president. During the winter of 2012, the Senate met every three days, only to adjourn a few minutes later after little if any business was conducted.

The actions of the Republicans infuriated Capitol Hill Democratic leaders, and Senate Majority Leader Harry Reid (D-Nev.) threatened to use the "nuclear option" to break the deadlock by changing the Senate rule to allow a majority to stop a filibuster (instead of the traditional 60 votes). It's unclear if Reid and the majority Democrats had enough votes to actually confirm the two commissioners, Sharon

Block and Richard Griffin. But nearly a year after Obama had nominated the two, the Senate had yet to vote on the appointments. Obama then chose to flout the Constitution and appoint the two without the consent of the Senate, despite the protestations of Republican members of both houses of Congress, who wrote:

> We urge you to avoid attempting to give your latest NLRB nominees — Ms. Block and Mr. Griffin — recess appointments at any point, especially during the mandatory adjournment between sessions of the 112th Congress, which will undoubtedly be very brief. While some have publicly suggested doing so would be an appropriate course of action with regard to other nominations, it would, at the very least, set a dangerous precedent that would most certainly be exploited in future cases to further marginalize the Senate's role in confirming nominees and could needlessly provoke a constitutional conflict between the Senate and the White House.

The nominal issue decided by the court was a complaint by a Pepsi Cola bottler who was told by the rump NLRB board to settle a labor dispute. The bottler, Noel Canning, claimed the NLRB did not have authority to act because the five-member board did not have the majority of members needed for a quorum to act legally. The court agreed, and negated the decision.

The court unanimously ruled: "Because the Senate was in session during its pro forma sessions, the President made the recess appointments at issue during a 3-day recess. Three days is too short a time to bring a recess within the scope of the Clause, so the President lacked the authority to make those appointments." The court added: "The Clause does not say how long a recess must be in order to fall within the Clause, but even the Solicitor General concedes that a 3-day recess would be too short."

The court noted, "The Founders intended the norm to be the method of appointment in Article II, §2, cl. 2, which requires Senate approval of Presidential nominations, at least for principal officers." Indeed, George Washington's first attorney general, Edmund Randolph, wrote in 1792, "The Spirit of the Constitution favors the participation of the Senate in all appointments."

Associate Justice Antonin Scalia wrote a concurring opinion that tried to narrow the presidential recess appointment power further by noting that the "recess" was only the annual break between congressional sessions, and not the shorter breaks — such as a three-week "summer recess" — that Congress takes during its legislative session. Associate Justices Thomas, Alito, and Chief Justice Roberts joined in Scalia's opinion.