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Trump's Recess Appointment Power Limited by Labor Case

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If Republicans want to block President Donald Trump from using the upcoming summer break to replace embattled Attorney General Jeff Sessions without Senate approval, the Supreme Court has already provided a blueprint.

Trump has voiced his displeasure with Sessions over the attorney general's decision to recuse himself from the ongoing Russia investigations. Some Republicans rallying to their former colleague's defense say they will not vote on a replacement for Sessions. That has prompted observers to wonder whether the president would try to skirt Senate approval by naming Sessions' successor while lawmakers are on a three-week recess.

"If you're thinking of making a recess appointment to push out the attorney general, forget about it," Sen. Ben Sasse (R-Neb.) said last week in Senate floor remarks aimed at Trump. "The presidency isn't a bull and this country isn't a china shop."

The problem for Trump: the Supreme Court's 2014 decision in *Noel Canning* when it struck down former President Barack Obama's 2012 appointment of three National Labor Relations Board members. That decision gave lawmakers a clear route for stopping recess appointments. The justices unanimously said the three-day Senate break during which Obama made the appointments was not long enough for the president to invoke his authority to appoint certain government officials without Senate confirmation.

Any recess that's less than 10 days isn't likely to be long enough to justify the president's use of the power to appoint cabinet members and other key officials without Senate consent, the court said. It also said the Senate can break up longer recess periods by holding pro forma, or "shadow," sessions that technically keep the chamber open for business, even when most members are back in their home states.

"If the Senate were inclined, it could block a Trump recess appointment of a Sessions replacement if it held a short pro forma session every three days," Tuan Samahon, a Villanova

University law professor, told Bloomberg BNA. “A senator would gavel in a session and then one minute later gavel out the session as concluded. No business, or at least very little business, would need to be conducted.”

The high court’s 2014 decision had an immediate impact on federal labor law, throwing into question the results of hundreds of cases decided by recess-appointed NLRB members Sharon Block (D), Richard Griffin (D), and Terence Flynn (R). It’s long term impact, however, may be that the decision significantly limits the White House’s ability to make major personnel moves without input from Congress.

White House Press Secretary Sarah Huckabee Sanders has repeatedly denied reports that Trump is considering moving Sessions to Homeland Security chief and replacing him via the recess appointment process. Senate Majority Leader Mitch McConnell (R-Ky.), who controls the chamber’s schedule, hasn’t publicly waded into the issue.

Trump Lawyer Fought Recess Appointments

The Noel Canning case started as a dispute about alleged unfair labor practices at a bottling plant in Yakima, Wash. It eventually shifted into a high-stakes battle over the federal separation of powers.

The list of lawyers and conservative advocacy groups who joined in the effort to block the Obama appointments reads like a who’s who of the limited government bar. Jay Sekulow—Trump’s personal attorney—filed a brief on behalf of then House Speaker John Boehner (R-Ohio), while former Tenth Circuit judge Michael McConnell urged the court to scrap the appointments on behalf of a group of constitutional law scholars. Citizens United, Judicial Watch, The Cato Institute, and the National Right to Work Legal Defense Foundation filed similar briefs.

The President is required by the Constitution to seek the advice and consent of the Senate in nominating judges, Cabinet members and other key officials. The commander in chief has some limited power, however, to fill those roles without the Senate’s input when the chamber is in recess.

Obama appointed the three NLRB members during Congress’s annual winter holiday, which typically stretches from mid-December into the new year. The Obama White House said the moves were necessary to counteract partisan gridlock in Congress. Democrats held a slim 51-seat majority at the time, but Senate rules required 60 votes to approve a nominee.

The government argued that the board was rendered powerless because three of its five seats remained open, thanks to Senate Republicans’ refusal to take up the nominations. Solicitor General Donald Verrilli said the recess appointments were a necessary part of Obama’s constitutional duty to execute federal labor law.

Then Senate Majority Leader Harry Reid (D-Nev.) in 2013 successfully changed Senate rules—with a majority of senators agreeing—to allow nominees other than those for the Supreme Court to be approved by a simple majority vote. McConnell (R-Ky.), who became leader when

Republicans took control of the Senate in 2015, tweaked the rules earlier this year to allow a simple majority for high court nominations.

Checks and Balances

This time around, the Noel Canning decision could be an important tool for a GOP-controlled Senate looking to curb the power of a president from the same party.

“The Constitution doesn’t allow recess appointments during non-recesses, and the president doesn’t get to determine when the Senate is in recess,” Ilya Shapiro, a Cato Institute lawyer who filed a brief on behalf of the conservative-leaning think tank in the Supreme Court case, told Bloomberg BNA. “A president can’t get around that, other than with an acting appointment that’s necessarily temporary. Why? Because we want accountability. Ultimately the voters will judge whether the Senate gives its consent too handily or denies it for no good reason.”

Trump still hasn’t said publicly whether he actually wants to replace Sessions, who the president in recent days on Twitter has called “beleagured” and chided for allowing Acting FBI Director Andrew McCabe to remain on the job. Still, Senate Minority Leader Chuck Schumer (D-N.Y.) is urging his colleagues not to take any chances.

“The Senate should remove even the possibility of it coming about,” Schumer said July 31 in floor remarks, referring to a possible recess appointment to replace Sessions. “So, in the tradition of the Senate, I expect we will hold pro forma sessions throughout the upcoming recess to prevent a recess appointment from being made.”