

NLRB NEWS—Controversy erupts over NLRB recess appointments

The decision by President Barack Obama to use his recess appointment powers to name three new NLRB members has engendered a firestorm of controversy. Critics of the President's action have honed in on the manner in which the appointments were made, while supporters of the move have praised the President for ensuring the Board will be able to perform its duties.

The President appointed three members, Terrence F. Flynn, Sharon Block, and Richard Griffith to the Board yesterday, using his recess appointment powers. Flynn, a Republican member of the Board, was nominated in January 2011, but the Senate failed to take action on the nomination during that year. In December 2011, the President nominated Block and Griffith, both Democrats, but the Senate adjourned without taking action.

Critics of the Board's recent decisions and rulemakings urged Republicans in the Senate not to allow confirmation votes on the nominees in hope that the Board would fall to two members, which would, under the Supreme Court's ruling in *New Process Steel v NLRB*, have denied the Board a quorum, thereby shutting down Board operations. Following the nominations of Block and Griffith, the Senate Republicans signaled their reluctance to confirm the new nominees in a [letter](#) to the President that urged him not to make recess appointments for the new nominees. The letter noted that Board appointments have "traditionally been made through prior agreement of both parties."

The President [decided](#) that such an agreement was not forthcoming, saying that, "We can't wait to act to strengthen the economy and restore security for our middle class." He then made the recess appointments.

"Recess" appointments. President Obama's predecessors, during the past 30 years, have made [ample use](#) of the recess power to appoint Members to the Board. President Ronald Reagan made four such appointments; Presidents George H.W. Bush and President Bill Clinton made three; and President George W. Bush made six. The President's critics, however, contend that none of those appointments was made during a recess of less than nine days, a contention borne out by the Congressional Research Service report into the recess appointments made by President George W. Bush.

President Obama's critics, including Senator Mike Enzi (R-Wyo.), the ranking member on the Senate HELP committee, pointed out that the Senate has not, technically, been in recess. Senate Republicans anticipated the likelihood of recess appointments and, therefore, have been requiring the Senate to meet briefly, then adjourn — the so-called "gavel-in, gavel-out" procedure. This procedure was used by Senate Democrats to deny President George Bush the opportunity to make recess appointments during late 2007 and, in fact, President Bush did not make any appointments during that time. President Obama, however, insists that he has the authority to make recess appointments when the Senate is "effectively" in recess. That contention has some support in the Recess Appointments Clause, which does not specify the length of time that the Senate must be in recess before the President may make a recess appointment.

According to Pat Hoban, an attorney with Zashin & Rich Co., L.P.A., a Cleveland, Ohio, firm that represents management, “Mr. Obama has effectively re-established a Board quorum by making recess appointments during a period when the U.S. Senate did not consider itself in ‘recess.’ While the issues are by no means crystal clear, the legitimacy of these appointments is certainly subject to legitimate legal challenge on constitutional grounds. As a result, future Board decisions that adversely affect any party—labor or management—will be subject to challenge on grounds that the Board’s quorum is illegitimate and that it has no authority to issue decisions. To advise their clients effectively, labor lawyers will have to get up to speed on some unfamiliar constitutional issues very quickly.”

Senator Enzi [raised](#) another point of contention with the appointments, namely, that as of January 4, neither of the Democrat nominees had filed the required committee application. Enzi also pointed out that the lack of a Congressional vetting process denied Congress the opportunity to ensure that neither nominee “is facing any pending civil or criminal investigations” or faces conflicts of interest.

“Once again this Administration has shown its contempt for America’s small businesses,” said Senator Enzi. “The president has ignored the Senate’s confirmation and vetting process, ensuring that our struggling economy will soon be faced with two additional bureaucrats who will shackle America’s employers with new onerous regulations. Just look at the most recent actions by the NLRB.”

The President’s supporters, however, insisted that the criticism is nothing more than gripes over process. The Communications Workers of America [applauded](#) the move, saying that the President had “shown leadership that is necessary to break the gridlock imposed by a do nothing Republican Congress and obstructionist Republican Senators.” The union, in its statement, pointed out that Senate rules require “a supermajority of 60 votes just to get to the floor for debate and discussion” and that, as a result, few of the President’s nominees have received a confirmation vote.

Representative George Miller, the ranking member on the House Committee on Education and the Workforce, [contended](#) that the President had to act, because “taxpayers deserve a fully functioning government.” He argued that the appointments “will guarantee that both employers and employees will have a place to go to have their rights under the law protected and enforced.”

Source: CCH Employment Law Daily, January 5, 2012