

POLITICS

Justices Voice Doubts on Obama Recess Appointments

By ADAM LIPTAK JAN. 13, 2014

WASHINGTON — In an extended argument that contained large doses of history and practical politics, the Supreme Court on Monday seemed skeptical of the Obama administration's contention that it had acted properly in bypassing the Senate to appoint several officials during a break in the Senate's work.

Several justices seemed attracted to the relatively narrow argument that President Obama had acted during a break in the Senate's work that was too brief to allow a recess appointment. Others spoke in favor of a much broader argument that would limit such appointments to recesses between sessions of Congress.

Much of the argument concerned how to reconcile the text of the Constitution with more than a century of tradition. On the one hand, as a federal appeals court in Washington ruled, the words of the Constitution can be read to allow a quite limited appointment power.

The constitutional provision at issue says that "the president shall have power to fill up all vacancies that may happen during the recess of the Senate." The appeals court, leaning heavily on the phrase "the recess," ruled that appointments may be made only during the recesses that occur between the formal, numbered sessions of Congress. The court added that the vacancies must have arisen during that recess.

Solicitor General Donald B. Verrilli Jr., representing the Obama administration, said presidents of both parties have made many appointments during breaks in sessions of Congress. Justice Antonin Scalia responded that the text of the Constitution was more important than contrary practice.

The case, National Labor Relations Board v. Noel Canning, No. 12-1281,

arose from a labor dispute. The labor board ruled against a bottling company, saying it had engaged in an unfair labor practice by refusing to enter into a collective bargaining agreement.

The company appealed, arguing that the labor board had been powerless to rule because a majority of its members had been appointed during a 20-day stretch when the Senate was convening every three days in pro forma sessions without conducting any business. Since the members of the board were not properly appointed, the company argued, its ruling was void.

The United States Court of Appeals for the District of Columbia Circuit accepted the argument in a sweeping decision. Since then, the Senate has overhauled its filibuster rules, which had frustrated the Obama administration and prompted its recess appointments. The Senate also confirmed a different slate of nominees to the labor board.

But the question of whether the board's ruling against the company should stand remains alive.

Noel J. Francisco, a lawyer for the company, said the recess appointments clause was the product of an era in which lawmakers traveled on horseback and it was impossible to reconvene them on short notice. He said the Senate cannot be simultaneously in the midst of a session and in recess.