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Flatbush Gardens: The Latest Challenge to the Obama Recess Appointments*

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March, 2012

The latest, and perhaps the most serious, challenge to the validity of the President's recess appointments soon will be decided by the U.S. District Court for the Eastern District of New York. The case involves a labor dispute between Flatbush Gardens, an apartment complex in Brooklyn, N.Y., and SEIU, a union representing the maintenance and other workers at the complex. This case should not be confused with a different case pending in the D.C. district court involving the National Association of Manufacturers. In the latter case, the court ruled on procedural grounds that it would not consider the recess appointment issue. No such obstacle exists with regard to the Flatbush Gardens litigation.

The Flatbush Gardens case arose on January 26, 2012, when the National Labor Relations Board (NLRB) filed for an injunction against the management of the apartment complex, Renaissance Equity Holdings. The injunction would require the management company to cease from what the NLRB found to be an unlawful employee lockout, and to rehire the employees who were terminated.

Flatbush Gardens sought to have the case dismissed. On February 27, 2012, the management company filed a brief in support of its motion to dismiss, and oral arguments were made before the judge on March 1. The case against the injunction is based on the theory that the NLRB cannot bring such an action unless the NLRB has a quorum, and that the recess appointments of three NLRB members made by President Obama on January 4, 2012 were constitutionally invalid.

The argument against the constitutionality of the appointments is straightforward. On January 3, 2012, the Senate met in pro forma session, and this

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was recognized as a valid session of the Senate by the President for purposes of initiating the second session of the 112th Congress. Thus, the appointments made on January 4 do not expire until the end of the next session, near the end of 2013.

If the Senate was not in session on January 3, the recess appointments would have ended after only one year, at the end of 2012. This result would occur because recess appointments end at the end of the following session of the Senate, and thus, if the January 3 pro forma meeting was not valid, the recess appointments would have been made during the first session of the 112th Congress, which terminates at the end of this year. The Executive Branch asserts that the recess appointments do not terminate until the end of 2013.

While the President recognizes the pro forma session on January 3 as a legitimate session of the Senate, he determined not to recognize the pro forma sessions of the Senate held on January 6, 10, 13, 17, and 20. If those sessions were recognized, it would have been much more difficult, if not impossible, to make any recess appointments.

The brief argues that the Constitution does not allow the President to pick and choose which pro forma sessions "count" as Senate sessions, and which do not. The brief also argues that pro forma sessions should be considered Senate sessions, because under the Constitution, the Senate has the power to determine when it is, or is not in recess, and the President has no authority to override the Senate's decision to consider pro forma meetings to be valid meetings for constitutional purposes.

In support of this position, the brief cited a letter written by then-Solicitor General Kagan (now Supreme Court Justice Kagan) who wrote to the Supreme Court in 2010 in another matter. In that 2010 letter, Solicitor General Kagan affirmed the Senate's ability to use pro forma sessions to block recess appointments: "the Senate may act to foreclose [the recess appointment] option by declining to recess for more than two or three days at a time over a lengthy period. For example, the Senate did not recess intrasession for more than three days at a time for over a year beginning in late 2007." It may be hard for a court to reconcile the advice given by the Solicitor General in 2010 with the position now taken by the Department of Justice that the President can unilaterally determine that the Senate is in recess.

Among the other arguments made, the brief also noted that even when the Senate is in pro forma sessions, it can conduct Senate business, explaining that the Congress passed two bills in 2011 while technically the Senate was only in pro forma meetings. The brief also noted that the assertion that the President can determine if the Senate is in recess was never before made, and therefore is unprecedented.

While this brief is just one side of the argument, it is useful to look at because it brings into focus some of the main issues that arise by the President's recess appointments, which include the appointment of the Director of the CFPB as well as the members of the NLRB. The NLRB and the Justice Department will no doubt have strong arguments as well on the other side of the issue. Further, the court may strive to resolve this issue without reaching the constitutional question. However, unless the court succeeds in side stepping the legality of the appointments, this case will be an important first indication of the constitutionality of the recess appointments made on January 4, 2012. Of course, final resolution of this issue will likely require a decision by the U.S. Supreme Court.

A copy of the brief may be found here.

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