



The Supreme Court Declares a Recess for Recess Appointments

Introduction

On June 26, 2014, the Supreme Court issued its decision in the closely-watched *NLRB v. Noel Canning* case, challenging President Obama's recess appointments to the National Labor Relations Board. In a unanimous opinion, the Supreme Court held that the President's appointments to the NLRB were unconstitutional under the Recess Appointments Clause, invalidating hundreds of NLRB decisions.

Background—The NLRB's Quorum Troubles

The National Labor Relations Act (the Act), passed in 1935 and amended in 1947, created the NLRB, a federal agency that administers the Act and functions as the appellate body in labor disputes regarding union representation and unfair labor practices. The Board is comprised of a chairman and four members. Traditionally, the chairman is a member of the president's political party and the remaining members consist of two Democrats and two Republicans.

At the end of 2007, the Board had only four members and the terms of members Peter Kirsanow and Dennis Walsh were set to expire, which would leave the Board with only two members — Democrat Wilma Liebman and Republican Peter Schaumber. Under Section 3(b) of the Act, the Board would have lacked a quorum and been unable to function. In what many viewed as a problematic attempt to resolve this dilemma, on December 28, 2007, the four members delegated the Board's authority to members Kirsanow, Liebman and Schaumber and declared that members Liebman and Schaumber would thereafter constitute a quorum of the newly-created three-member body. The Board then proceeded to decide approximately 600 cases with only two members.

The Board's authority to issue decisions with only two members was challenged in the courts of appeals in over 75 cases and eventually brought to the Supreme Court. On June 17, 2010, in *New Process Steel, L.P. v. NLRB*, the Supreme Court held that the Board did not have authority to issue decisions with only

two members. The *New Process Steel* decision thus invalidated the 600 or so NLRB decisions, a substantial number of which had to be re-decided by a new, properly-constituted NLRB.

Less than two years later, the same Congressional gridlock that caused the Board's membership to fall to only two in 2007, threatened to once again result in the Board losing its quorum. This time, there was no creative legal maneuvering available to the Board that would allow it to function with only two members thanks to the *New Process Steel* decision. So, on January 4, 2012, President Obama made three "recess" appointments to the NLRB, appointing members Sharon Block, Richard Griffin and Terence Flynn.

But the Board's problems were far from over. At the time the recess appointments were made, the Senate was operating under a Senate resolution whereby it recessed briefly for several days broken up by *pro forma* sessions during which no business was transacted. *Pro forma* sessions of the Senate have been used by both political parties as a means to prevent the President from making recess appointments during a longer break between sessions.

The Administration took the position that the Senate was effectively in recess until January 20, 2012 (when the *pro forma* sessions were set to end) and therefore the President was empowered to make the appointments under the Recess Appointments Clause of the Constitution.

The Supreme Court Finds That the January 2012 Recess Appointments Were Invalid

Not surprisingly, many stakeholders objected to the President's January 2012 recess appointments, arguing that they were unconstitutional. On January 25, 2013, the United States Court of Appeals for the District of Columbia Circuit held that the recess appointments were invalid. Undeterred, the NLRB continued to issue decisions by members whose appointments had been declared unconstitutional by the D.C. Circuit.

Once again, the Supreme Court was asked to resolve a question affecting the validity of hundreds of NLRB decisions. And once again, the Supreme Court concluded that hundreds of NLRB decisions were decided by an invalid Board. The Supreme Court's lengthy decision—over 100 pages including a concurring opinion by Justice Scalia—answers several significant questions concerning the scope of the Recess Appointments Clause. The decision construes the President's recess appointment power broadly, but concludes that the recess appointments at issue were invalid because the Senate was not in recess long enough. As Justice Breyer wrote for the Court: "Three days is too short a time to bring a recess within the scope of the Clause."

The Court declined to limit the Recess Appointments Clause to a far greater extent, holding that despite the seeming plain language of the Clause, the vacancy did not need to "happen" during a recess to invoke the recess appointment power and that in referring to "The" Recess the framers did not intend to limit the power only to the recess occurring at the end of a Congresses' term. According to the Court, the power may be exercised during any recess of sufficient duration to satisfy constitutional requirements. In a concurring opinion, Justice Scalia (joined by three others) would have held that separation of powers doctrine called for a less flexible construction of plainly stated constitutional limitations on Executive Branch powers.

The practical effect of the Supreme Court's decision in *Noel Canning* is that all of the Board decisions issued between January 2012 and August 2013 (when the NLRB finally began operating with five Senate-confirmed members again) are void.

Practical Impact of *Noel Canning*

Noel Canning is the first Supreme Court decision squarely addressing the scope of the President's power under the Recess Appointments Clause, and its effects will be felt by the current and future administrations. In addition to the significant constitutional issues resolved by *Noel Canning*, the decision also has practical significance for employers in two principal areas.

First, any employer who was subject to an unfavorable decision from the NLRB between January 2012 and August 2013 can challenge that decision as invalid. Parties who already appealed an adverse Board decision to the courts of appeals will likely see the NLRB's decision vacated and remanded by the court. Parties who have not yet appealed a decision from the now-invalid Board should consult with counsel about their options in light of *Noel Canning*.

Second, a number of the NLRB decisions invalidated by *Noel Canning* represent significant changes in Board law. These decisions, which could now be decided by the full five-Member NLRB, include:

- > *WKYC-TV*, 359 NLRB No. 30 (2012) — Overturning 50 years of Board precedent (Bethlehem Steel) and holding that employers must continue to deduct union dues from employees' paychecks even after a collective bargaining agreement expires.
- > *Banner Health*, 358 NLRB No. 93 (2012) — Striking down an employer's "blanket" confidentiality rule for workplace investigations, placing significant restrictions on employers' ability to maintain confidentiality during internal investigations

Conclusion

After *New Process Steel* was decided, the NLRB issued new decisions in many challenged cases that had previously been decided by the two-member Board. It is safe to assume that the NLRB will announce a similar plan to deal with the significant number of invalidated decisions in light of the *Noel Canning* decision.

The NLRB may take the opportunity to expand on the rules announced in some of its controversial decisions, many of which have faced significant criticism from employers. While many of the Board's decisions affected by *Noel Canning* could be rubber-stamped (as many decisions were following *New Process Steel*), it is far from certain that the NLRB will reach the same result in all of the cases.

Noel Canning brings to a close another chapter in the Board's troubled recent history. We will continue to monitor and keep you updated as the impact of the Supreme Court's decision is felt at the Board and in the courts of appeals.

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