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Court's Ruling That NLRB Appointments Were Invalid Introduces Uncertainty Going Forward

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The United States Court of Appeals for the District of Columbia Circuit has issued a decision invalidating the President's January 4, 2012 recess appointments to the National Labor Relations Board ("NLRB" or "Board"). The decision means that since then, at least in the District of Columbia Circuit, the Board has not had a quorum of at least three validly appointed members necessary to issue decisions. The case is *Noel Canning, a Division of the Noel Corporation v. National Labor Relations Board*, No.12-115 (D.C. Cir., January 25, 2013).

Following the ruling, NLRB Chairman Mark Pearce released a statement in which he said that the "Board respectfully disagrees with today's decision and believes that the President's position in this matter will ultimately be upheld." The District of Columbia Circuit also issued stay orders in other cases pending before it which raise the same recess appointment issue.

It is virtually certain that the *Noel Canning* decision will not be the last word on this issue. There are a number of other cases challenging the recess appointments pending in other federal circuit courts of appeals around the country, and the Board will most probably seek immediate review by the United States Supreme Court. However, because all appealable NLRB decisions may be taken by the adversely affected party to the District of Columbia Circuit, that court's ruling takes on added significance.

Background

Three persons received recess appointments to the NLRB from the President on January 4, 2012. The Senate had convened a new session on January 3, 2012, but was not actively conducting business. In fact, while the Senate was convening in *pro forma* sessions for a few moments each day, it was acting under a resolution which prohibited substantive business from being conducted.

Among other things, the petitioning employer and amici supporting it asserted that since the Senate had convened a new session, the recess appointments were invalid under the United States Constitution's Recess Appointments Clause, Article II, Section 2, Clause 3 which provides in part:

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session. [Emphasis added.]

The questions addressed by the court were:

(1) did the President make the putative recess appointments during "the Recess"; and

(2) were the appointments to vacancies that "happen[ed] during the Recess".

The court answered "no" to both questions.

When is a Senate recess "the Recess"?

As noted, at the time of the appointments, the Senate was on a three-day break during the session of the Senate which began at noon on January 3, 2012. The NLRB maintained that this period was what is referred to as an "intrasession" recess, because it occurs *during* a session of the Senate. An intercession recess, by contrast, occurs only between Senate sessions, i.e., between the recess that begins with the *sine die* adjournment of one session of the Senate (generally – but not always – late in the calendar year), and ends with the beginning of the next session of the Senate at noon on January 3 of each year (pursuant to the Twentieth Amendment to the Constitution.)

The court of appeals reviewed the history of the Recess Appointments Clause, including an extensive review of the contemporaneous history and debate regarding the language and its early historical application. For anyone interested in Constitutional history, this opinion makes for interesting reading. The court concluded that "the Recess" referred to in the Recess Appointments Clause, meant only intersession recesses – those that occur between yearly sessions of the Senate – and not to the intrasession recesses such as the ones taken over holiday periods and the like during Senate sessions. The court stated:

[W]e hold that "the Recess" is limited to intersession recesses. The Board conceded at oral argument that the appointments at issue were not made during the intersession recess: the President made his three appointments to the Board on January 4, 2012, after Congress began a new session on January 3 and while that new session continued. Considering the text, history and structure of the Constitution, these appointments were invalid from their inception. Because the Board lacked a quorum of three members when it issued its decision in this case on February 8 2012, its decision must be vacated.

Slip op. at 30.

When a vacancy "happen[s] during the Recess"

The court went on to address the second question: whether the vacancies being filled by the appointments "happen[ed] during the Recess." The issue was whether the vacancies for which the Board members were recess appointed must have occurred, i.e., arisen, during an intersession recess; or whether the President may fill vacancies that "happen to exist" during the recess, even if they had occurred or arisen sometime before. The court undertook a close examination of the Recess Appointments Clause, concluding:

The power of a written constitution lies in its words. It is those words that were adopted by the people. When those words speak clearly, it is not up to us to depart from their meaning in favor of our own concept of efficiency, convenience, or facilitation of the functions of government. In light of the extensive evidence that the original public meaning of 'happen' was 'arise,' we hold that the President may only make recess appointments to fill vacancies that arise during the recess.

Slip op. at 39.

There was no dispute that the vacancies at issue did not arise during an intersession recess, and the court held them to be invalid on that ground as well. One of the judges on the panel issued a separate opinion concurring in the court's judgment, but stating that he would not reach the issue of when the vacancies must "happen" because the ruling on "the Recess" was sufficient to dispose of the matter.

Impact of the decision

Subject to the outcome of any review by the Supreme Court, and the decisions of other circuits that may reach the issue in the meantime, the decision in *Noel Canning* could have a broad impact, not only legal but political, as the battle over the scope of the President's power to make recess appointments continues.

Focusing only on the NLRB, and its impact on Board decisions during the past year and before, the numerous questions raised by *Noel Canning* will depend on when a case was decided and where in the process a case is pending, or whether it is now closed. Included in this morass are many important decisions of the Board issued over the last year involving social media, confidentiality of employer investigations into workplace incidents, access to employer property and the workplace by off-duty employees and third parties, expansion of Board remedies to take into account the tax and social security effect of back pay awards, and the ability of employers to end union dues check-off upon expiration of a collective bargaining agreement.

Certainly any decision issued by the Board since January 4, 2012, and that was appealed to the DC Circuit, will now be subject to the law of the circuit as expressed in *Noel Canning*. Already, though, the DC Circuit has begun issuing orders holding in abeyance other cases pending there which raise the recess appointment issue.

Cases that were appealed to other circuits will likely be processed through decision in those circuits – at least the lead cases. Chairman Pearce's statement indicated that there were more than a dozen cases pending in the various circuits.

Cases that were not yet appealed but in which the parties plan an appeal will likely go to the DC Circuit in order to take advantage of the *Noel Canning* decision, although for now it appears that any new appeals are likely to be held in abeyance by the court.

Cases that are in compliance following an unappealed Board decision present a less clear picture. Depending on the circumstances, it is possible that a party might cease the compliance process and either seek to appeal, or await action by the Board to enforce compliance, and attempt to rely on the *Noel Canning* decision as a bar to such enforcement. Whether either course would be successful is not clear, particularly the latter, given the Board's ability to seek enforcement in courts outside the District of Columbia Circuit in cases arising, or with respect to parties residing, outside the District of Columbia.

Cases that have closed on compliance – i.e., cases where all compliance has been completed and that are closed at the Board, would probably face a difficult time being resurrected. Aside from that, parties may be reluctant to reopen such a case that has otherwise become final.

Left on the table are cases not yet decided by the Board involving graduate student organizing, third-party access to employer property, and other cases presenting issues of importance to the parties and beyond. For now Chairman Pearce has announced that the Board will continue issuing decisions, but it remains to be seen whether and for how long that will be a viable course of action. A bottleneck may occur if the Board is unable to effectively process appeals from any of the Regional Office or Administrative Law Judge decisions. And in any event, Board decisions issued by the current panel will remain suspect until the issue is finally resolved in the courts, probably by the Supreme Court.

In the meantime, newly filed unfair labor practices will still be investigated and election petitions will still be processed by the Board's Regional Offices acting under the supervision of the Acting General Counsel. *Noel Canning* does not appear to affect any of these functions, or the holding of hearings before Board Administrative Law Judges. It is unclear whether the decisions will affect the 2011 delegation of authority to the Acting General Counsel to seek 10(j) injunctions at any time the Board does not have a quorum. That may depend, as noted below, on how far back the DC Circuit decision (if it is upheld) can be applied.

Employers with union contracts who have the ability to arbitrate many if not most workplace disputes, may be able to avoid or reduce the effect of this quagmire going forward. Although the Acting General Counsel has recently acted to narrow the scope of his deference to collectively bargained arbitration procedures, this may change if that is the only way to effectively resolve workplace disputes that might otherwise get bogged down in the Board's process. Certainly unionized employers will want to take a hard look at what opportunities there are in the arbitration area.

Another question is how far back the holding in *Noel Canning* could be applied. It is likely that a great many (if not nearly all) recess appointments in the past few decades have been made during periods, and made for vacancies that arose, outside "the Recess". For example, could the holding be applied to actions taken by a three member Board quorum that included former Member Craig Becker? He had received a recess appointment from the President in March, 2010. His appointment was not made either during "the Recess" or for a vacancy that "happen[ed] during the Recess" of the Senate. Mr. Becker participated on three member panels that involved a number of important issues which are in litigation in the federal courts, including the Board's regulation requiring a speed-up in representation elections, as well as the Board's landmark decision outlawing class action waivers included in arbitration systems established by employers to resolve various employment disputes. If his recess appointment was not valid, the Board's actions in those and other matters where he made up part of the three-member quorum might be called into question.

One other upcoming event could further cloud the waters. Chairman Pearce's term – for which he was confirmed by the Senate – ends by law on August 27, 2013. At that time the Board could be down to only the two members who were recess-appointed on January 4, 2012, and unable to decide any cases for lack of a three-member quorum, even if the recess appointments of those remaining two members were eventually deemed to be valid. This may set up another battle over whether and how a successor to Chairman Pearce will be appointed or re-appointed, again affecting the power of the Board to make decisions because it would only have a two-member quorum. It will be recalled that the Supreme Court has ruled that the Board cannot decide cases with only two members. *New Process Steel L.P. v. NLRB,* 130 S. Ct. 2635 (2010).

The decision in *Noel Canning* has opened a can of worms, much like the two-member quorum dispute did in the period 2008-2010. When that dispute was finally resolved by the Supreme Court, over 600 Board decisions were left in doubt and it took the Board well over a year (or longer) before all of them were finally cleared up. It appears that the recess appointment issues could cause a similar result.

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