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D.C. Circuit Appeals Court Rules NLRB Recess Appointments Invalid

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The Decision

In *Noel Canning, a Division of Noel Corporation v. National Labor Relations Board*, No. 12-1115 (U.S. Court of Appeals for the District of Columbia, January 25, 2013), a three judge panel unanimously concluded that President Obama's asserted recess appointments in January of 2012 of three individuals to the National Labor Relations Board ("NLRB") were invalid.

United States Supreme Court precedent dictates that the NLRB cannot function without a quorum, i.e. at least three out of the five positions of the NLRB must be validly filled. The court concluded that because the three recess appointments were invalid, the quorum necessary for valid action did not exist. Accordingly, the court concluded that a decision against Noel Canning made by a three member panel of the NLRB was invalid and unenforceable.

The Analysis

It is beyond the scope and purpose of this Alert to examine in detail the court's interpretation of the Constitution's relevant provisions. However, a brief recitation of the facts and of the court's decision is necessary to discuss the implications of this decision if it is ultimately upheld by the United States Supreme Court.

The U.S. Constitution and various implementing laws provide that various offices of the United States are to be filled by individuals appointed by the President and approved by the Senate. However, the U.S. Constitution, Art. II, Section 2, clause 2, also provides in part: "…the President shall have the 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)

From December 20, 2011 through January 23, 2012, the U.S. Senate was not actively conducting business, but was meeting every third day in a proforma session at which few Senators appeared and no business was conducted. The Senate did meet on January 3, 2012, to convene to begin the second session of the 112th Congress in order to satisfy the constitutional mandate to meet at least once a year beginning "at noon on the 3rd day of January…" On January 4, 2012, President Obama appointed three members to the NLRB without the approval of the Senate. Noel Canning contended, and the court agreed, that the appointments were invalid because they did not "happen during the Recess of the Senate."

The court relied extensively on the wording of the Constitution; dictionary definitions of the words "the" and "happen" from the time of the drafting and adoption of the Constitution; contemporary commentary on the meaning of these words; and early precedent, or lack thereof, of the use of recess appointments. The court discounted more recent use of the recess appointments power as relatively less persuasive in determining the Framers' intent.

Following the extensive analysis, the three member panel concluded that the recess appointment clause can be exercised only during the periods between the end of one session of Congress and the beginning of the next session ("intersession" periods). The recess appointment clause cannot be invoked simply when the Senate is in adjournment for any period of time during a session ("intrasession"). The court noted that the Eleventh Circuit court of appeals had reached a different conclusion in a case decided two decades ago, but considered that decision to have given too much weight to existing practice and not enough weight to the actual text of the constitutional provision.

Two of the three judges found an additional flaw in the appointments, concluding that the only vacancies for which recess appointments can be made are vacancies that arise or "happen" during the recess, and not vacancies that, although they are in existence during the recess, first occurred before the recess. Since none of the three vacancies had arisen during the recess, no recess appointment was possible. These judges also concluded that the recess clause applied only to vacancies where the office had been previously occupied, and did not apply to newly created positions which had never been occupied. The third judge stated that he did not disagree with this analysis, but declined to join that portion of the decision because the decision on the first point was adequate to decide the case.

What Now?

The court's decision will not be the final word. The NLRB and the Administration can ask the court's entire panel of judges to rehear the case, or can seek Supreme Court review immediately. The validity of the appointments has also been challenged in other courts in proceedings involving the NLRB, and the Administration could wait to seek Supreme Court review until other courts weigh in. Given the constitutional issues involved, the U.S. Supreme Court is almost certain to have the final word.

Immediate Practical Implications for Employers

The effect of the court's decision on the authority and future operations of the Presidency are beyond the scope of this Alert. The impact of the decision on employers subject to the authority of the NLRB will be significant but uncertain as follows:

The Administration may ask the court to stay the decision pending Supreme Court review.

Until the validity of the appointments is resolved, the NLRB apparently does not have the authority to issue decisions. Processing of election petitions and unfair labor practice proceedings will continue at the administrative level, but final decisions at the NLRB level may not occur. However, the NLRB has announced that it will continue to function regardless of the decision.

The NLRB has issued a number of decisions within the last year, the large majority of which are pro union employer adverse. These decisions are now of questionable validity but will continue as precedent and policy until the appointment issue is resolved.

President Obama may attempt to obtain Senate confirmation of the recess appointees. In light of the extensive opposition to the NLRB's recent actions by employers and Republican members of Congress, confirmation of these appointees would appear to be exceedingly difficult, even under the Senate's revised filibuster rules.

The two remaining recess appointees could resign and President Obama may submit new appointees who would have a greater chance of confirmation.

President Obama could submit two new appointees to fill the two now vacant positions. However, even if confirmed to assure a quorum based upon the one existing confirmed appointee and two new

confirmed appointees, any decision in which the two recess appointees were involved would still be subject to question.

Once the NLRB has a legitimate quorum, the members could revisit decisions made during the questionable period, and reissue those decisions with or without change.

Employers who are or who became involved in NLRB proceedings must raise the quorum issue in order to preserve it as a defense. Losing parties before the NLRB may file an appeal in either the court of appeals with jurisdiction over the location at which the dispute arose, or in the United States Court of Appeals for the District of Columbia. Employers filing such appeals would be wise to do so in the District of Columbia court.

Employers must decide whether to conform actions to the NLRB's recent decisions and policies in all cases until the matter is finally resolved in the courts, or whether to assess which Board decisions and policies can be considered invalidated and thus of no effect as a result of the court's ruling.

Conclusion

During the period of uncertainty, employers must act with caution and consultation with counsel. There exist too many unknowns to chart a course of action without sound advice.

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