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The Labouring Oar

Fate of NLRB Recess Appointments Now in Hands of Supreme Court

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On June 24, 2013, the U.S. Supreme Court agreed to hear a case that will determine whether President Obama's three 2012 recess appointments to the National Labor Relations Board (NLRB or board) were constitutional. The appointments at issue – members Sharon Block, Terence Flynn, and Richard Griffin – were made in January 2012 without Senate confirmation, pursuant to the Recess Appointments Clause. A finding that these appointments were unconstitutional could have far – reaching consequences, potentially invalidating hundreds of Board decisions.

D.C. Circuit Holds Recess Appointments Unconstitutional

The case at issue was brought by Noel Canning, a bottler and distributor of Pepsi – Cola products. Noel Canning was engaged in negotiations for a new collective bargaining agreement with Teamsters Local 760 (the union). At the end of the negotiations, the parties disagreed over the terms of the final agreement, and the union filed an unfair labor practice charge against Canning. Affirming an administrative law judge's findings, the board held that Canning violated Sections 8(a)(1) and (5) of the National Labor Relations Act by refusing to reduce to writing and execute a collective bargaining agreement. Canning appealed the board's decision to the D.C. Circuit Court of Appeals.

After first despending with the questions unrelated to the constitutional issues, the D.C. Circuit turned to the constitutional arguments asserted by Noel Canning, namely, that the Recess Appointments Clause is inapplicable to the above presidential appointments because: 1) the Senate

was not in "recess" at the time of the putative appointments; and 2) the vacancies did not "happen" during a Senate recess.¹

The Recess Appointments Clause provides that "[t]he 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." Canning argued that at the time of the appointments, the Senate was not in "the recess" between sessions and, therefore, the appointments were unconstitutional. The board, on the other hand, argued that the Recess Appointments Clause permits appointments during intrasession breaks. The court rejected the board's interpretation and held that "the recess" is limited to intersession recesses, which "refers to the time period between sessions that would end the ensuing session of the Senate." Because the board conceded that the appointments were not made during the intersession recess, the court held that the appointments were invalid from their inception.

Although it was not necessary for the court to address Canning's second argument, it chose to do so and found that the appointments were likewise invalid because the vacancies did not "happen" during the recess. As to this second argument, the Court found the phrase "that may happen" meant the president could only exercise his Recess Appointment Power during the same recess in which the vacancy arose. The Court stated in support of its decision: "There is no reason the framers would have permitted the president to wait until some future intersession recess to make a recess appointment, for the Senate would have

¹ *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013)

been sitting in session during the intervening period and available to consider nominations.”

The Court ultimately vacated the board’s order, holding the board did not have a quorum when it issued the order because the president’s appointments were invalid. The Court specifically found the Recess Appointments Clause was inapplicable to the president’s actions because the Senate was not in “recess” at the time of the appointments and the vacancies did not “happen” during the recess of the Senate.

Third Circuit Holds Prior Recess Appointment Unconstitutional

On May 16, 2013, the Third Circuit followed the D.C. Circuit’s reasoning the Noel Canning and found the recess appointment of former NLRB member Craig Becker invalid because the Senate was not in recess at the time President Obama appointed Becker in March 2010.² Like the D.C. Circuit, the Third Circuit, in *New Vista Nursing*, focused on the text of the Recess Appointments Clause and held that the meaning of “recess” is limited to the time between official sessions of the Senate. The Third Circuit, however, chose not to address the issue of when a vacancy “happens” in order for the position to be eligible for a recess appointment. Because Becker’s appointment was invalid and he was one the three – member quorum to decide *New Vista Nursing*, the Third Circuit invalidated the board’s decision, holding that the panel lacked three validly appointed members.

Issues Before the Supreme Court

The Obama administration’s petition to the Supreme Court presents two questions: (1) whether the Recess Appointment Power may be exercised during a recess that occurs within a session of the Senate, or rather, is limited to recesses that occur between enumerated sessions of the Senate; and (2) whether the power may be exercised to fill vacancies that exist during a recess, or instead, is limited to vacancies that arise during that recess. In addition, the Supreme Court directed the parties to

brief whether the Recess Appointment Power may be exercised when the Senate is convening every three days in pro forma sessions.

Potential Impact

The *Noel Canning* decision has implications far beyond that particular case. If the Supreme Court affirms the D.C. Circuit’s opinion, all board action since the recess appointments were made in January 2012, and until the board has a quorum, are potentially impacted. This includes numerous controversial and precedent – departing decisions issued over the last year relating to social media issues, the obligation to disclose witness statements to a union, the limitation of confidentiality requirements during investigations, continuation of dues deduction after contract expiration, and limitations on off – duty access policies to name a few. In addition, given the recent *New Vista Nursing* decision, legal challenges to board action could reach back as far as the recess appointment of Craig Becker in 2010. Not only would such a decision put prior decisions at risk for invalidation, but it would prevent the board from acting on current and future cases until the Senate confirms a quorum.

The *Noel Canning* decision also potentially impacts recess appointments to other agencies. In its petition for certiorari, the Obama administration noted that the ruling could invalidate other presidential recess appointments as far back as World War II.

Current Status of the Board

On July 20, the Senate voted to confirm a slate of nominees to the board. The newly confirmed board does not include recess appointees Block and Griffin. ■

² *NLRB v. New Vista Nursing & Rehab.*, 2013 U.S. App. LEXIS 9860 (3rd Cir. May 16, 2013)



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