



Labor & Employment ADVISORY ■

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Supreme Court Finds Obama Recess NLRB Appointments Unconstitutional

In a game-changing decision, the United States Supreme Court held on June 26 that President Obama exceeded his authority under the Constitution when he made high-level government appointments during a period in which he declared the Senate to be in recess and unable to act on the nominations. Significantly for employers, the Court held in *NLRB v. Noel Canning*, 573 U.S. ___ (2014) (“*Noel Canning*”) that three of Obama’s appointments to the National Labor Relations Board (NLRB or the “Board”) made during a so-called Senate recess period in January 2012 were unconstitutional.

Although the Court found that the Constitution authorizes the President to fill any existing vacancy during any recess period, it also ruled that the Senate is in session whenever it states that it is and as long as it retains the capacity to transact Senate business. The Court held that the Senate was “in session” in January 2012 when Obama made three appointments to the NLRB, and therefore that those appointments were unauthorized.

Noel Canning has far-reaching implications in the employment context, as it potentially vacates and renders unenforceable hundreds of NLRB decisions that were invalidly issued after the President made the unauthorized Board appointments in January 2012.

Background: the NLRB’s Quorum Requirement, Political Gridlock and the D.C. Circuit Court Opinion

The background events leading up to the Court’s June 26 decision help to elucidate the significance of *Noel Canning*. Typically, the NLRB has five members, although only three members are required for a quorum. As of December 2011, the NLRB had three members that had been confirmed by the Senate. One of the member’s terms was set to expire on January 3, 2012, leaving the NLRB without a quorum and thus without authority to act. Senate Republicans blocked President Obama’s attempts to appoint new members to the NLRB, but the Senate was scheduled to take a holiday break. Aware that the President might attempt to bypass the Senate confirmation process by making recess appointments, Senate Republicans held “pro forma” sessions every three days, technically keeping the Senate in session. But, President Obama nonetheless invoked his constitutional power to make recess appointments, and on January 4, 2012, named three additional members to the NLRB. The President technically appointed Terence Flynn, Richard Griffin, and Sharon Block to the NLRB *between* two of the Senate’s pro forma sessions. The President argued that his appointments were valid because the Senate was in recess and the Senate’s pro forma sessions were a political sham.

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In January 2013, a unanimous panel of the D.C. Circuit Court of Appeals held that President Obama's January 4, 2012, NLRB appointments were unconstitutional because the Senate was in session when those appointments were made. In *NLRB v. Noel Canning*, 705 F.3d 490 (D.C. Cir. 2013), the D.C. Circuit Court directly vacated the NLRB's holding in the specific case that was challenged because the court found that the NLRB did not have enough validly appointed members to constitute a quorum during that period. But, the court left undecided the status of *all* NLRB decisions issued after January 2012 but prior to August 2013 when the Board finally attained a Senate-approved quorum, and it opened up the potential for the government to appeal to the Supreme Court for further answers. The government so petitioned, and the Court decided to hear the case.

The Supreme Court's Opinion

On June 26, 2014, the Supreme Court issued a unanimous decision, holding that the Senate was "in session" during its January 2012 pro forma sessions, and thus that the President was not authorized under the Constitution's Recess Appointments Clause to make NLRB appointments during that time. The Recess Appointments Clause gives the President the power "to fill up all Vacancies that may happen during the Recess of the Senate." Art. II, § 2, cl. 3. Thus, if the Senate was in "recess" while it held its pro forma sessions, the President was constitutionally authorized to fill the NLRB vacancies. However, if the Senate was in "session" during this time, the President's power under the Recess Appointments Clause was never triggered and his appointments were invalid.

Looking to both history and the constitutional text, the Court found that "the Senate is in session when it says that it is" as long as, under its own rules, the Senate "retains the capacity to transact Senate business." According to the Court, the Senate met this standard during its January 2012 pro forma sessions because, during that time, the Senate indicated that it had convened for "sessions" every few days and because the Senate retained the power to conduct business during that time. Because the Senate was "in session" in January 2012, President Obama did not have the constitutional authority to make appointments to the NLRB at that time, and the three NLRB appointments he made were unconstitutional.

Implications and Potential Issues

Because the NLRB cannot conduct business without a three-member quorum, *Noel Canning* means that the NLRB will likely have to revisit decisions that were issued and rulemaking that occurred while President Obama's invalidly appointed members were acting on the Board. In August 2013, other NLRB nominees were properly confirmed by the Senate and sworn in as members. Thus, the current NLRB has five Senate-confirmed and thus validly appointed members. But, the status of the approximately 400 to 800 cases decided by the improperly constituted Board between January 2012 and August 2013 remains uncertain.

The status of the regional directors appointed by the Board during the period in which it was invalidly assembled is also uncertain. Because *Noel Canning* held that, during this time, the NLRB did not have the three-member quorum it needed to act, the Board lacked the authority to appoint the regional directors who investigate and issue unfair labor practice complaints and participate in the union election process. If the NLRB did not have the authority to appoint regional directors during this time, it is quite possible that the regional directors they invalidly appointed were likewise unauthorized to act. This could call into question several regional labor investigations, complaints, and decisions related to union elections that took place between January 2012 and August 2013. Moreover, even if the potentially unlawfully appointed regional directors were to be reconfirmed now that the Court has ruled in *Noel Canning*, such an action is not likely to resolve all of the issues. In cases that are still pending, parties are likely to challenge the decisions that have been made on the basis that the regional directors involved in those cases were invalidly appointed.

Current NLRB Chairman Mark Gaston Pearce has promised to resolve “any cases affected by [*Noel Canning*] as expeditiously as possible.” But it is not clear that the current Board will simply rubber-stamp the decisions it made when it was unauthorized to act, which the NLRB has done before. A similar situation arose after the Supreme Court held in *New Process Steel v. NLRB*, 560 U.S. 674 (2010) that the NLRB could not exercise its statutory authority without a quorum of three members. After the *New Process* decision, the NLRB summarily reaffirmed and closed about 500 cases that had been invalidated by the Court’s decision. However, the NLRB did individually review about 100 cases that had been adjudicated while it lacked a quorum. The consequences of individually reevaluating every NLRB decision and rule made between January 2012 and August 2013 are significant, as several noteworthy and controversial NLRB opinions were issued during that time.

But *Noel Canning* potentially creates an even messier problem: when the term of one of the Democrats on the NLRB expires on December 16, 2014, the Board will be split 2–2, Democrat and Republican. Under that setup, it will be much more difficult, if not impossible, for the Board to reaffirm some of its invalidly issued decisions—especially those that are considered partisan or controversial. Moreover, the potential NLRB gridlock created by a 2–2 Board split could be exacerbated by a mid-term election in which the Republicans take control of the Senate. In such a circumstance, the Senate could block the President’s NLRB appointments and effectively prevent a fifth NLRB member from being confirmed. Because the Senate can now use pro forma sessions to keep the President from making appointments, a long-term 2–2 Board split is a realistic possibility.

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