



Labor & Employment ADVISORY ■

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D.C. Circuit Finds Obama Recess Appointments to NLRB Unconstitutional

On Friday, January 25, 2013, a unanimous panel of the D.C. Circuit Court of Appeals held in *Noel Canning v. NLRB* that three recess appointments made by President Obama to the National Labor Relations Board (NLRB or “the Board”) were unconstitutional. If the decision stands, it would mean that hundreds of decisions made by the NLRB would be invalidated.

Typically, the NLRB has five members, although only three members are required for a quorum. As of December 2011, the Board 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 Board without a quorum and thus without authority to act. Senate Republicans were blocking President Obama’s attempts to appoint new members to the Board, but the Senate was scheduled to take a holiday break. Fearing that the President would attempt to bypass the Senate confirmation process by making recess appointments, Senate Republicans held “pro forma” sessions every few days, technically keeping the Senate in session. Nevertheless, on January 4, 2012, President Obama invoked his constitutionally granted power to make recess appointments and named three additional members to the Board. In doing so, the President argued that the pro forma sessions, some of which lasted less than a minute, were a sham, and the Senate was in recess.

In *Noel Canning*, a three-judge panel of the D.C. Circuit unanimously held that the three recess appointments to the NLRB were unconstitutional because the Senate was in session and not in recess as defined by the Recess Appointments Clause of the Constitution. Although the *Noel Canning* decision only directly vacates the NLRB’s holding in the specific case that was challenged, the implications of the case could be far-reaching. Assuming the court’s decision stands and is not overturned on rehearing, *en banc* review or an appeal to the Supreme Court, all decisions issued by the Board and all NLRB rulemaking that occurred from January 3, 2012, to present would be vacated and rendered unenforceable, as the Board did not have enough validly appointed members to constitute a quorum during that period. The Board’s decisions that would be invalidated include a decision holding that a waiver of class action lawsuits in arbitration agreements violated the NLRA, and a decision holding that employer social media policies cannot broadly prohibit employees from making damaging or disparaging statements about the company. To become enforceable, the invalidated decisions would have to be sent for reconsideration to a properly constituted Board, which given the current political climate in Washington, might not come to exist for a period of months or even years.

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The court's decision also left several unanswered questions regarding the impact of the *Noel Canning* decision, such as the status of administrative law judge decisions that were overturned by the Board, and the weight that should be given to positions taken by the NLRB Acting General Counsel's Office during the period in which the Board has lacked a quorum. For now, however, the impact of the decision will be limited, as the government may seek rehearing on the matter by the three-judge panel or by the full D.C. Circuit. Moreover, there are more than a dozen similar cases currently pending before other U.S. Courts of Appeals, and the *Noel Canning* decision is already in conflict with a 2004 decision from the Eleventh Circuit upholding an intra-session appointment by President Bush. Thus, given the developing split of authority and the important constitutional issues in play, it appears likely that the Supreme Court will eventually take up the matter.

In the meantime, NLRB Chairman Mark Gaston Pearce has issued a press release indicating that the Board disagrees with the D.C. Circuit's opinion and believes that President Obama's position will ultimately prevail. As a result, Pearce said that the Board will continue to perform its statutory duties and issue opinions.

The *Noel Canning v. NLRB* decision is available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/D13E4C2A7B33B57A85257AFE00556B29/\\$file/12-1115-1417096.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/D13E4C2A7B33B57A85257AFE00556B29/$file/12-1115-1417096.pdf).

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

ATLANTA

Shama Barday
404.881.7437
shama.barday@alston.com

Molly M. Jones
404.881.4993
molly.jones@alston.com

Brooks Suttle
404.881.7551
brooks.suttle@alston.com

Deborah Yoon Jones
213.576.1084
debbie.jones@alston.com

Ashley D. Brightwell
404.881.7767
ashley.brightwell@alston.com

J. Thomas Kilpatrick
404.881.7819
tom.kilpatrick@alston.com

Kristen Willoughby
404.881.4284
kristen.willoughby@alston.com

Sayaka Karitani
213.576.1026
sayaka.karitani@alston.com

Lisa H. Cassilly
404.881.7945
lisa.cassilly@alston.com

Christopher C. Marquardt
404.881.7827
chris.marquardt@alston.com

CHARLOTTE
Susan B. Molony
704.444.1121
susan.molony@alston.com

Claire Lucy Readhead
213.576.1181
claire.readhead@alston.com

Brett E. Coburn
404.881.4990
brett.coburn@alston.com

Wes R. McCart
404.881.7653
wes.mccart@alston.com

DALLAS
Jon G. Shepherd
214.922.3418
jon.shepherd@alston.com

Nicole C. Rivas
213.576.1021
nicole.rivas@alston.com

Patrick L. Coyle
404.881.4367
patrick.coyle@alston.com

Charles H. Morgan
404.881.7187
charlie.morgan@alston.com

NEW YORK
Erin L. Connolly
212.210.9461
erin.connolly@alston.com

Casondra K. Ruga
213.576.1133
casondra.ruga@alston.com

Clare H. Draper IV
404.881.7191
clare.draper@alston.com

Edmund M. Morrell
404.881.7953
edmund.morrell@alston.com

LOS ANGELES
Lindsay G. Carlson
213.576.1038
lindsay.carlson@alston.com

WASHINGTON, D.C.
Emily Seymour Costin
202.239.3695
emily.costin@alston.com

R. Steve Ensor
404.881.7448
steve.ensor@alston.com

Glenn G. Patton
404.881.7785
glenn.patton@alston.com

Martha S. Doty
213.576.1145
martha.doty@alston.com

Charles A. Gartland II
202.239.3978
chuck.gartland@alston.com

Kimberly L. Fogarty
404.881.4502
kim.fogarty@alston.com

Robert P. Riordan
404.881.7682
bob.riordan@alston.com

James R. Evans, Jr.
213.576.1146
james.evans@alston.com

Jonathan G. Rose
202.239.3693
jonathan.rose@alston.com

Alexandra V. Garrison
404.881.7190
alex.garrison@alston.com

Eileen M. Scofield
404.881.7375
eileen.scofield@alston.com

Jesse M. Jauregui
213.576.1157
jesse.jauregui@alston.com

Leslie Wood Bradenham
202.239.3636
leslie.bradenham@alston.com

Marilee Fiebig Holmes
404.881.4374
marilee.holmes@alston.com

Alicia P. Starkman
404.881.4994
alicia.starkman@alston.com

ALSTON & BIRD LLP

WWW.ALSTON.COM

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ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777

BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719

CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111

DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899

LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213-576-1100

NEW YORK: 90 Park Avenue ■ 12th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444

RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260

SILICON VALLEY: 275 Middlefield Road ■ Suite 150 ■ Menlo Park, California, USA, 94025-4004 ■ 650-838-2000 ■ Fax: 650.838.2001

WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.756.3300 ■ Fax: 202.756.3333

VENTURA COUNTY: 2801 Townsgate Road ■ Suite 215 ■ Westlake Village, California, USA, 91361 ■ 805.497.9474 ■ Fax: 805.497.8804