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One Minute Memo®

President Obama's Recess Appointments To NLRB Ruled Unconstitutional

Today, the Court of Appeals for the D.C. Circuit invalidated three of President Obama's recent appointments to the NLRB on constitutional grounds. In *Noel Canning v. NLRB*, a unanimous court held that the appointments of Sharon Block, Terence Flynn, and Richard Griffin to the Board on January 4, 2012 were not valid "recess" appointments under the Constitution. If the Court's reasoning is not disturbed by the United States Supreme Court, this means the Board has been acting without the legally required three-member quorum. As a consequence, the Board's orders issued since January 4, 2012 are void and cannot be enforced.

At issue in *Noel Canning* was the meaning of the so-called "Recess Appointments Clause," which provides "[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." The employer (backed by 42 Senators in a brief) argued that the appointments were invalid because the Senate was not in recess on January 4, 2012.

Specifically, the employer contended that, when the appointments were made, the Senate had not adjourned "sine die" (i.e., "without a day" specified for a future meeting), which was the historical practice since the First Congress for signaling the recess between sessions of Congress. As such, the First Session of the 112th Congress expired simultaneously with the beginning of the Second Session, and there could be no valid "recess" appointments. The NLRB countered that the term "recess" meant, in effect, whenever there was a short break in the Senate's business, as there was at the time of these appointments.

The D.C. Circuit agreed with the employer's argument on linguistic, logical, and historical grounds. The key part of this ruling is that the use of the definite article "the" in the phrase "the Recess of the Senate" strongly suggests that the Framers of the Constitution had envisioned a single recess between sessions, and not multiple "recesses" of imprecise duration, as the Board contended. The Court's opinion effectively invalidates the use of intra-session recess appointments, which have been used more frequently in recent years, including by President George W. Bush.

The Court also sided with the employer in concluding that the word "happen" in the Recess Appointments Clause ("Vacancies that may happen during the Recess of the Senate") means "arise" or "begin" or "come into being," and not, as the Board argued, "happen to exist." This provided a further basis for invalidating the appointment of Members Block, Flynn, and Griffin as no vacancy "happened" during "the Recess" of the Senate. The three Board seats had become vacant on August 27, 2010, August 27, 2011, and January 3, 2012, respectively. The Senate was in intra-session recess during the first two vacancies, and the last vacancy arose at the end of the Senate's session on January 3, 2012. Thus, no vacancies "happen[ed]" during an intersession recess, and the appointments were therefore invalid for this additional reason.

The D.C. Circuit's opinion is in conflict with a 2004 opinion of the Eleventh Circuit which upheld President Bush's intra-session recess appointment of a federal court of appeals judge. Given the circuit conflict, and the enormous impact of *Noel Canning*, it is highly likely that the Supreme Court will review this decision.

Shortly after the D.C. Circuit's opinion was released, NLRB Chairman Mark Gaston Pearce issued a statement in response: "The Board respectfully disagrees with today's decision and believes that the President's position in the matter will ultimately be upheld. It should be noted that this order applies to only one specific case, Noel Canning, and that similar questions have

been raised in more than a dozen cases pending in other courts of appeals. In the meantime, the Board has important work to do. The parties who come to us seek and expect careful consideration and resolution of their cases, and for that reason, we will continue to perform our statutory duties and issue decisions."

Ultimately, if the Supreme Court concludes that the recess appointments are invalid, and the Board's orders were void, there will be considerable pressure on the U.S. Senate to confirm NLRB appointments to permit the Board to do its business. If recent history is our guide, it can be expected that this pressure will be met with determined resistance. Depending upon the outcome of that fight, and the makeup of the Senate, the NLRB may be an agency without the power to issue final orders for a considerable period of time, perhaps years.

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