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Administrative Dissonance: NLRB Decision Making In The Aftermath Of *Noel Canning*

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The National Labor Relations Board (NLRB or Board), the federal agency responsible for enforcing labor laws applicable to most private sector employees in the United States, is once again embroiled in a political and legal controversy that arguably undermines the effectiveness of the agency in its core mission of enforcing federal labor law. The NLRB currently is continuing to decide cases despite the fact that the United States Court of Appeals for the DC Circuit recently held that the recess appointments of two of the current three NLRB members were "invalid from their inception." Surprisingly, the agency continues to function as if there were no constitutional question at all regarding their legal authority to act. Indeed, on the very day that the DC Circuit issued its landmark decision in *Noel Canning v. NLRB*,[1] the NLRB's Chairman, Mark Pearce, announced that:

> 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.

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Since that announcement, the NLRB has continued to decide cases and issue orders affecting private sector employers and labor unions throughout the United States, creating an ever increasing body of case law which may be completely unenforceable and creating tremendous uncertainty for employers, unions and employees who rely on the NLRB to enforce their statutory rights.

The constitutional issue raised by the NLRB's recess appointments goes to the very core of our republican form of government – the separation of powers between the three distinct branches of government. In *Noel Canning*, the DC Circuit ruled that the NLRB recess appointments made by President Obama on January 4, 2012, were an "unconstitutional act" because the President exceeded the scope of his authority under the Recess Appointments Clause. The crux of the issue was whether the United States Senate was in recess at the time that these appointments were made by the President. The January 4 recess appointments came just one day after the Senate convened into session on January 3, 2012. In accordance with a unanimous consent agreement adopted on December 17, the Senate convened into sessions every third day from December 20, 2011 until January 20, 2012. The President's recess appointments were predicated on the assertion that these sessions (often called *pro forma* sessions) were constitutional "shams" because each had a short duration.

The Administration's use of the recess appointment power while the Senate was meeting every third day was unprecedented. The so-called *pro forma* sessions have been used for decades for a variety of legislative purposes. The use of them to prevent recess appointments dates back to the 1980s, when Majority Leader Byrd threatened to use them to prevent President Reagan from making recess appointments. They were similarly used by Majority Leader Reid during the George W. Bush Administration. The Senate, moreover, has passed two major pieces of legislation during these sessions – including one just two weeks before the President's appointments to the Board – both of which President Obama promptly signed into law. It should therefore come as no surprise that, until now, no president had ever questioned the validity of these sessions. Thus, even the Department of Justice's Office of Legal Counsel (OLC), in an opinion attempting to justify President Obama's appointments, acknowledged that "[t]he question is a novel one, and the substantial arguments on each side create some litigation risk for such appointments" and, therefore, that it "[could] [n]ot predict with certainty how courts will react to challenges of appointments made during intrasession recesses, particularly short ones."[2] The Obama Administration nevertheless asserted in this case that the Senate was effectively "closed for business" during the so-called *pro forma* sessions.

The DC Circuit disagreed and invalidated the appointments. The Court's holding was supported by two grounds, both of which have broad implications. *First*, the Court held that recess appointments may be made only during the recess between each session of Congress – which happens, at most, only once per year – rather than breaks occurring during each session of Congress. The Recess Appointments Clause gives the President "Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commis-

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sions which shall expire at the End of their next Session." Based upon this language, the DC Circuit concluded that the clause's use of the words "the Recess" "makes clear that the Framers used 'the Recess' to refer only to the recess between sessions." In other words, appointments may be made only during "inter-session" recesses.

Second, the Court held that recess appointments may be used to fill only those positions that become vacant *during the recess*, prohibiting the President from using the recess appointment power to fill preexisting or long-standing vacancies since potential appointees could have been submitted to the Senate for consideration. Again, the DC Circuit focused on the Recess Appointment Clause's explicit language allowing appointments to fill "Vacancies that may happen during the Recess of the Senate." The panel concluded that a "vacancy happens, or comes to pass, only when it first arises, demonstrating that the Recess Appointments Clause requires that the relevant vacancy arise during the recess."

Based upon its textual analysis of the Recess Appointments Clause, the DC Circuit ultimately held that the recess appointments of current Board Members Sharon Block and Richard Griffin were invalid.[3] Given this predicate finding, the DC Circuit went on to hold that the NLRB has been acting without a lawful quorum since January 4, 2012. This holding was mandated in light of the U.S. Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), in which the high court ruled that the Board must maintain a quorum of three validly appointed members in order to conduct official business. Because the two current recess appointees were not lawfully appointed, the Court held that the Board's order in the *Noel Canning* case was void.

Although the immediate legal effect of the *Noel Canning* decision is the rescission of the NLRB's remedial order in that case, the implications of the decision are far reaching. Indeed, approximately three dozen other cases involving NLRB orders are currently pending before the DC Circuit. All of these cases – which include several significant Board decisions changing federal labor policies–are presumably subject to reversal based upon the Board's lack of a quorum when the decisions were issued. Moreover, the National Labor Relations Act (NLRA or Act) gives any party aggrieved by a final Board order the right to file a petition for review in either the U.S. court of appeals in the circuit where the unfair labor practice occurred or in the U.S. Court of Appeals for the DC Circuit. As a result, any party that loses before the Board can file a petition for review in the DC Circuit and ask the court to invalidate the order based on *Noel Canning*. Currently, the DC Circuit is staying cases involving the Board where the underlying order may be affected by the *Noel Canning* decision.

While the Board has indicated that it intends to keep issuing decisions, at least one lawsuit has been filed in an attempt to prevent further action by the current Board. The National Right to Work Legal Defense Foundation, Inc., has filed a petition for writ of mandamus or writ of prohibition that would enjoin the Board from deciding a currently pending case. In *In re Jeanette Geary*,[4] the mandamus petition asked the Court to "exercise its supervisory powers … to halt all further efforts to adjudicate and decide Geary's case until a constitutionally valid Board is seated." In short, even if the Board has the power to keep issuing decisions – which is questionable – the right of appeal to the DC Circuit renders those decisions essentially unenforceable until the dispute over the recess appointments is settled.

It is unclear whether the Obama Administration will appeal the *Noel Canning* decision, including asking the DC Circuit to hear the case *en banc* or seeking *certiorari* from the Supreme Court. In a press conference on January 25, White House Press Secretary Jay Carney indicated that they are prepared to be aggressive. According to DC Circuit rules, the Board may file a petition for panel rehearing or rehearing *en banc* within 45 days of the decision. The Board will have 90 days to seek certiorari from the Supreme Court, but that deadline may be extended by 60 days with the Court's permission.

Noel Canning certainly has an impact on decisions issued by Members Block and Griffin. Its aftermath, however, may extend far beyond the current Board, and far beyond the Board's case decisions. As Chairman Pearce noted, the recess appointment issue has been raised in numerous other cases pending in the circuit courts. In at least two of those cases, parties have argued that *Noel Canning* also invalidates the appointment of former Member Craig Becker. In *D.R. Horton, Inc. v. NLRB*,[5] the U.S. Court of Appeals for the Fifth Circuit has been asked to apply *Noel Canning* to a three-Member decision that included Member Becker. Soon after *Noel Canning* was decided, D.R. Horton, Inc. filed a supplemental letter with the Court stating that "[j]ust like the situation in *Noel Canning*, the vacancy Mr. Becker filled did not arise during the Senate's recess, nor did the President appoint him during that recess." The Fifth Circuit allowed parties until February 22, 2013 to file briefs addressing the recess appointment issue. The logic of *Noel Canning* indicates that because Member Becker was an intra-session recess appointee appointed to fill a vacancy that did not "happen" during the Senate's recess, he was not validly sitting on the Board. If that is correct, the Board would not have had a valid quorum since former Chairman Wilma Liebman's term expired on August 27, 2011, potentially invalidating nearly 1,000 published and unpublished decisions.

The recess appointment issue has also arisen in challenges to the Board's rulemaking on representation case procedures. On May 14, 2012, a federal district court judge in *Chamber of Commerce v. NLRB*,[6] invalidated the rule on procedural grounds, finding that the Final Rule was published without a quorum voting on the rule. Specifically, the district judge found that Member Hayes did not vote and, because only two Members – Chairman Pearce and Member Becker – did vote, the Board failed to satisfy its quorum requirement. The NLRB appealed to the DC Circuit where the Chamber of Commerce and co-plaintiff Coalition for a Democratic Workplace filed supplemental statements arguing that Member Becker's appointment was invalid in light of *Noel Canning*. As a result, even if Member Hayes participated in the approval of the Final Rule, the Rule would still be invalid because the Board only had two valid members and thus lacked a quorum. On February 19, 2013, the DC Circuit issued a one-sentence order stating that "[u]pon consideration of" *Noel Canning*, the Court was cancelling oral argument and indefinitely holding the case in abeyance.

Given these recent developments, the legal and political row regarding the status of the current NLRB and its ever-expanding body of decisions appears to be far from over. What is clear is that *Noel Canning* could invalidate a significant amount of Board activity in recent years. What is less clear, however, is how parties affected by the Board – employers, employees, and unions alike – are expected to proceed while the Board continues to act despite that the DC Circuit has held that it has no quorum to act. On February 13, the White House resubmitted to the Senate the nominations of recess appointees Block and Griffin to the Board. However, until they are confirmed by the Senate, the Board continues to have only one confirmed and undisputedly valid Member: Chairman Mark Pearce, whose term expires on August 27, 2013.

The Administration's unfortunate – and at least for now unlawful – decision to fill the Board with recess appointees called into question the validity of countless Board actions. The Board's insistence on ignoring a federal court decision finding that actions by the current Board are unlawful exacerbates the uncertainty. Until a resolution is reached, employers, employees, and unions – who rely on the Board to protect their statutory rights – remain caught in the middle.

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1 Case No. 12-1115 (DC Cir. Jan. 25, 2013).

2 The OLC's legal opinion memo may be found at http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf.

3 President Obama also recess appointed Terence F. Flynn, who resigned from the Board effective July 24, 2012.

4 Case No. 13-1029 (DC Cir.)

5 Case No. 12-60031 (5th Cir.).

6 Case No. 12-5250 (DC Cir.).