JONES DAY

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ANOTHER COURT OF APPEALS INVALIDATES RECESS NLRB APPOINTMENT

On Wednesday, May 16, the U.S. Court of Appeals for the Third Circuit issued a 2–1 decision striking down President Obama's March 2010 "recess appointment" of Craig Becker to the National Labor Relations Board ("NLRB"). The case is *NLRB v. New Vista Nursing and Rehabilitation* (Case Nos. 11-3440, 12-1027, 12-1936). The court majority held that the President's appointment of Becker was invalid because it did not occur during "the Recess of the Senate" and was thus a constitutionally defective intra-session appointment. In reaching this conclusion, the Third Circuit reinforced the January 2013 decision of the D.C. Circuit in *Noel Canning v. NLRB*, 705 F.3d 490, 497 (D.C. Cir. 2013), where Jones Day was counsel of record, which relied on similar reasoning to strike down the "recess appointments" of three other NLRB members.

The Third Circuit's decision in *New Vista Nursing* is the latest chapter in the ongoing controversy over the validity of several "recess appointments" made by President Obama to the NLRB. At the center of this controversy is the interpretation of the Recess Appointments Clause of the U.S. Constitution and the question of how to define "the Recess of the Senate," during which the President is empowered to make certain appointments without first obtaining the consent of the Senate. Defending the appointments in court, the Obama administration has taken the aggressive position that the Senate is "in recess" whenever it is not in a "regular session" and therefore is not functionally capable of performing its standard role of advice-and-consent. The administration has also contended that the President should receive considerable deference in determining when the Senate is in recess, and that a robust recess-appointment power is necessary to provide for a continuing efficient operation of the government. The importance of the issue is illustrated by the situation of the NLRB, which, according to the Supreme Court's decision in *New Process Steel*, 130 S. Ct. 2635 (2010), cannot perform its official functions without a minimum of three members who have been confirmed by the Senate or who have been given proper recess appointments. Currently, the Board has only three

members, which include two purported Board members who received "recess" appointments from President Obama on January 4, 2012.

In *New Vista Nursing*, the Third Circuit joined the D.C. Circuit in rejecting the administration's broad reading of the recess-appointment power, which the court determined "would eviscerate the divided-powers framework." Under the administration's reading, the court explained, "If the Senate refused to confirm a president's nominees, then the president could circumvent the Senate's constitutional role simply by waiting until senators go home for the evening." That cannot be the rule, the court held, because the Constitution makes clear that Senate consent should be the norm, with the recess-appointment power playing a mere "auxiliary role," in the words of Alexander Hamilton. Under the administration's view, by contrast, "The exception of the Recess Appointments Clause would swallow the rule of the Appointments Clause."

In concluding that "the Recess of the Senate" is limited to the period of time between Senate sessions—inter-session recesses—the Third Circuit placed considerable weight on the durational provision of the Recess Appointments Clause, which provides that recess appointments "shall expire at the End of" the Senate's next session. The purpose of this provision, the court found, is to give the Senate a chance to confirm or reject a recess appointee once the Senate comes back into session. Thus, if the Constitution had intended to authorize recess appointments during breaks in the middle of a session, the appointments would only last to the end of *that* session, not until the end of the *next* session.

If the D.C. Circuit decision in *Noel Canning* and the Third Circuit decision in *New Vista Nursing* are upheld, the impact of these rulings will be to make all decisions issued by the Board subject to invalidation dating back to at least August 27, 2011, which is the last time the Board had a quorum of three members who were not installed via disputed "recess" appointments.

Final resolution of this controversy will likely come from the United States Supreme Court. The Obama administration has already filed a petition seeking Supreme Court review of the D.C. Circuit's holding in *Noel Canning*, where the same recess-appointments issue is squarely presented. If the Supreme Court grants review in *Noel Canning*, where Jones Day represents the Noel Canning company against the NLRB, the Court would likely hear the case sometime in the fall of 2013 and decide the case by the end of June 2014.

Additionally, the *New Vista Nursing* decision makes the Third Circuit another "friendly" jurisdiction where parties who are adversely affected by an order of the Board can file an appeal if they are subject to that court's jurisdiction. Indeed, any such appeals may be expected to be held in abeyance, as is presently the case in the D.C. Circuit, pending a potential resolution by the Supreme Court.

Finally, the *New Vista Nursing* decision reinforces arguments that parties to Board proceedings have been making since the *Noel Canning* decision, including arguments that the Board has not had the authority to (i) decide cases, (ii) delegate Section 10(j) injunctive relief authority to its Acting General Counsel, (iii) engage in rulemaking, (iv) issue subpoenas, (v) appoint regional directors, and (vi) have its orders enforced in circuit courts. Additional arguments based on the *Noel Canning* and *New Vista Nursing* decisions may also be available to parties at various stages in Board proceedings, depending on the facts of the case in question.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Noel J. Francisco
Washington
+1.202.879.5485
njfrancisco@jonesday.com

E. Michael Rossman
Columbus
+1.614.281.3866
emrossman@jonesday.com

Willis J. Goldsmith
New York
+1.212.326.3649
wgoldsmith@jonesday.com

Robert L. Ford
San Francisco
+1.415.875.5740
rlford@jonesday.com

Jessica Kastin
New York
+1.212.326.3923
jkastin@jonesday.com

James S. Urban
Pittsburgh
+1.412.394.7906
jsurban@jonesday.com

Patricia A. Dunn
Washington
+1.202.879.5425
pdunn@jonesday.com

F. Curt Kirschner, Jr.
San Francisco
+1.415.875.5769
ckirschner@jonesday.com

Doreen S. Davis
New York
+1.212.326.3833
ddavis@jonesday.com

George S. Howard, Jr.
San Diego
+1.858.314.1166
gshoward@jonesday.com

Brian W. Easley
Chicago
+1.312.269.4230
beasley@jonesday.com

G. Roger King
Columbus
+1.614.281.3874
rking@jonesday.com

Stanley Weiner
Cleveland
+1.216.586.7763
sweiner@jonesday.com

Lawrence C. DiNardo
Chicago
+1.312.269.4306
lcdinardo@jonesday.com