Supreme Court Strikes Down NLRB Recess Appointments

Insights
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Dealing the agency its second major setback on the legitimacy of its quorum, the Supreme Court has invalidated a trio of recess appointments made to the NLRB back in January of 2012. Moments ago, the Court handed down its landmark decision in *NLRB v. Noel Canning*, upholding a challenge to the agency's authority to issue hundreds of decisions over the 18 months that followed the invalid appointments.

In a case of first impression, the Court lent strict interpretation to Article II, Section 2 of the U.S. Constitution, which empowers the President to "fill up all Vacancies that may happen during the Recess of the Senate." This decision has broad ramifications for the employers involved in the invalidated cases (all of which must now be re-decided), and on the Board's ability to maintain focus on a pro-labor agenda over the course of this year. It also promises to reshape the delicate balance between executive and legislative powers for decades to come.

Background
Back in June of 2010, the Supreme Court first rebuked the NLRB for want of a legal quorum with its decision in *New Process Steel*, invalidating the Board's authority to act with only two members and temporarily overturning hundreds of cases in the process. That upheaval proved to be short-lived, however, as a trio of new Board members took their turns on "rump panels" with their incumbent counterparts to effectively rubber stamp those decisions.

By the end of 2011, however, the NLRB was once again confronting a possible return to the days of two-member status. Member Schaumber had long since departed, and Chairman Leibman's term expired in August, bringing the Board to only three members for the duration of that year. Member Becker's recess appointment was slated to end on January 3rd of 2012, leaving only Democratic Chairman Mark Pearce and Republican member Brian Hayes.

With the NLRB again at risk of losing a proper quorum (and therefore its legal authority to act by virtue of *New Process Steel*), the Administration moved swiftly to fill the vacancies with a trio of new recess appointees on January 4, 2012. Acting without the Senate's "advice and consent," President Obama appointed pending Democratic nominees Sharon Block and Richard Griffin, along with Republican nominee Terence Flynn, to fill the vacancies and preserve the agency's ability to continue rendering decisions thereafter. The recess appointees participated in hundreds of cases through July of 2013, when they were replaced by set of four new confirmed nominees who joined incumbent

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Chairman Pearce.

But as fate would have it, their appointments were made at a time when the Senate was technically not in recess, but instead remained in a *pro forma* session that had commenced on December 17 and continued over the holidays. The Administration maintained that for all intents and purposes, the Senate was not in session at all because it was not actually meeting and conducting business. In the face of concerns that the Administration was without authority to confer these appointments while the Senate remained in session, the agency declared that it too remained open for business and proceeded to issue a series of new decisions, one of which was adverse to a family-owned bottling company called Noel Canning.

How The Case Arose

Over the course of 2011, Noel Canning was in the process of contesting unfair labor practice charges alleging that it had refused to execute a collective bargaining agreement to which it had orally agreed. On the heels of an adverse determination by the Administrative Law Judge presiding over the case, the company filed an appeal in an effort to secure relief from the NLRB. In February, 2012, the agency upheld the ALJ's findings.

Following standard procedure, a trio of Board members participated in that decision, two of whom had just been appointed over recess. Shortly thereafter, Noel Canning petitioned for review with the U.S. Court of Appeals for the D.C. Circuit on the basis that those appointments failed to pass constitutional muster, and that it was not up to the Executive branch to decide when the Senate was in recess.

In January of 2013, the D.C. Circuit Court held that the Board's decision would have been enforceable, but for the fact that the underlying recess appointments were unconstitutional. Because the Board's decision was not approved by a quorum of three properly appointed members, it was struck down as invalid. Writing for the panel, Judge Sentelle applied a strict reading of Article II, Section 2 to conclude that the "recess" requirement refers only to a recess *between* formal Senate sessions, and that the Constitution did not confer an executive right to make "intrasession" appointments. Because the appointments were made *after* the start of the 112th Congress, the court ruled (in a finding largely adopted by the Circuit Court of Appeals for the 3rd Circuit) that they were made intrasession and therefore invalid.

Two of the judges went on to note that the underlying vacancies did not *come into being* during an intersession recess of the Senate, and found the ensuing appointments to be invalid for that reason as well. The NLRB petitioned directly for Supreme Court review of the Circuit Court's rationale on both grounds. Noel Canning did not take issue with the petition, but did ask the Court to consider a third issue revolving around the President's authority to exercise recess appointment powers while Senate is convening every three days in *pro forma* session, as was the case in early 2012. The high court agreed to take the case, and to consider all three issues.

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The Court's Ruling And Its Impact On The NLRB

In a unanimous decision with an extensive concurring opinion from Justices Scalia, Roberts, Thomas and Alito, the Court ruled that the Administration exceeded its authority by invoking Article II to fill a trio of vacant NLRB positions in early 2012. Reviewing a litany of recess appointments stemming back decades, the majority concluded the Congress ultimately decides when it stands in recess, and that a recess of less than ten days is presumptively too short to confer appointment power upon the President. Consequently, there was no recess at the time the President acted, and his appointments were therefore rendered invalid.

While the ruling leaves the President's substantial recess appointment powers intact, it emphasizes that even the Executive in Chief must respect Congress's *pro forma* recess authority, and that if either house of Congress is in control of the opposing party, then those powers can be effectively blocked. Because the President failed to respect that authority in this particular case, the Court concluded that it had no choice but to uphold the D.C. Circuit's decision, invalidating the three recess appointments in the process.

Reading from his concurrence, Justice Scalia criticized the majority for relying upon the vague nature of historical precedent, suggesting instead that a strict reading of the Constitution would have confined recess appointments to those made between formal sessions. Scalia went on to accuse the majority of "judicial adventurism" by constructing presumptive standards as to the proper length of a pro forma recess, and suggesting that the anachronistic nature of recess appointments should preclude the judiciary from making them broadly available.

What This Means For Employers

At a minimum, this decision represents good news for approximately 600 employers who sustained adverse determinations from the highest level of the NLRB between January of 2012 and July of the following year. Every one of these cases (many of which were controversial themselves) was decided by a Board that lacked authority to act, and is therefore null and void *ab initio* (i.e., from the beginning). While many will presumably meet the same fate a second time around, that prospect is by no means a certainty, given the potential impact of two new Republican members, and four new members overall.

Unlike the Board's last encounter with a Supreme Court reproach to its quorum, this time the agency would be left with but a single member (Chairman Pearce) who participated in the decisions at issue. That would force the Board to establish new three-member panels in every case, consisting of a majority of members who have yet to consider the underlying facts. More importantly, there's nothing to preclude the establishment of some panels consisting of two Republican members, in which case the fortunes of the parties could be inexorably altered. Consequently, the rubber stamp may not be utilized to the same degree this time around.

By the same token, the breadth of this decision now calls into question a host of additional cases decided between August 27, 2011 and January 3, 2012, to the extent that they too were quorum-

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decided between August 27, 2011 and January 3, 2012, to the extent that they too were quorum deficient due to the participation of an improper recess appointee. Among them are dozens of three-member cases involving former member Becker, who himself was serving recess appointment. Becker participated in several Board developments of note, including the so-called "quickie election" rule that has since been republished, and the controversial *D.R. Horton* decision that now forms the basis of current Board doctrine invalidating mandatory arbitration provisions containing class waivers.

While the vast majority of American businesses would not be directly impacted under either scenario, these developments could influence the course of labor relations on a much broader scale in the months to come. Thus far, the Board has made no secret of its intent to implement an activist pro-labor agenda, and Chairman Pearce has gone on record with his support of a quickie-election rule that could conceivably be reinstated with little fanfare.

If the Board were forced to confront the daunting task of reevaluating a myriad of improperly decided cases issued over the past two years, however, it could get bogged down in exercises of retrospection that may forestall that agenda for quite some time. Consequently, the implications of *Noel Canning* could ultimately prove to be far-reaching, and we encourage employers to closely monitor developments at the NLRB as it adapts and responds to the high Court's decision.

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