Supreme Court Uses Labor Case To Again Stifle Presidential Power

Insights
3.21.17

In a decision released today, a 6 to 2 majority of the Supreme Court restricted the president's power to fill high-level administrative positions without the Senate's advice and consent, handing a victory to an employer in a labor dispute. The decision has wide-ranging implications for this and future presidents' ability to choose nominees for important positions in administrative agencies such as the National Labor Relations Board (NLRB), and continues a recent trend of limiting presidential power recently seen in the Court's June 2016 immigration decision.

While the decision will have an immediate impact on the litigants in this case and the president's prerogative to appoint administrative officials, the long-term effects of the Court's decision on employers are probably limited (*National Labor Relations Board v. SW General*).

Gridlock From Clinton To Trump
This case is a byproduct of another contentious era of federal government gridlock. By the late 1990s, the federal government bureaucracy was treading water. Approximately 20% of government officers in positions technically requiring presidential nomination and Senate confirmation (so-called PAS positions) were serving in "acting" capacities, meaning they had not been nominated and confirmed for the position. Though federal law limits the time that officers are allowed to serve in an acting capacity, many acting officers served well beyond their supposed legal time limits.

The Federal Vacancies Reform Act: Who Is In Charge?
In that hyper-partisan and politically-acrimonious time, Congress reached bipartisan agreement on legislation attempting to end presidential runarounds of the constitutional provision requiring the advice and consent of the Senate for PAS positions. The resulting legislation is the Federal Vacancies Reform Act of 1998 (FVRA).

The FVRA provides several ways for the president to fill PAS position vacancies. The default is that the "first assistant" to the PAS position automatically takes over in an acting capacity. But the president may also appoint either a senior employee from the same administrative agency or an officer who has already been nominated and confirmed for a position in another administrative agency to serve in an acting capacity.

To address the problem of individuals serving in acting capacities improperly or longer than permitted, the FVRA voids certain actions taken by acting officers deemed to be serving in violation

permitted, the FVRA voids certain actions taken by acting officers deemed to be serving in violation of the statute. An open question existed, however, as to which acting officers were legitimately serving in their capacities.

How Did We Get Here?

After the then-General Counsel resigned in 2010, President Obama directed Lafe Solomon, a senior employee of the NLRB, to take over as acting General Counsel. Six months later, President Obama nominated Solomon to fill the position on a permanent basis, but the Senate did not act on Solomon's nomination. After another unsuccessful attempt, President Obama ultimately withdrew Solomon's name and nominated another individual whom the Senate confirmed in November 2013.

In the process, Solomon served as acting General Counsel from June 2010 through November 2013. During that window of time, a union filed an unfair labor practice (ULP) charge against an Arizona ambulance service provider, SW General, Inc. (Southwest). After a hearing, an administrative law judge found that Southwest committed a ULP. Southwest objected to the judge's findings. The employer noted that the NLRB's General Counsel has final and unreviewable authority with respect the issuance of ULP complaints, as well as the investigation and prosecution of such matters, and that Solomon's role in the matter was improper.

Because Solomon continued to serve in an acting capacity after President Obama nominated him for NLRB General Counsel on a permanent basis, Southwest urged the Board to rule the charge against it had no force or effect. In sum, the employer's main argument was Solomon served in violation of the FVRA, because the statute prohibits some acting officers from continuing to serve in an acting role when nominated by the president to fill the position permanently. The Board disagreed, adopting most of the administrative law judge's findings and ignoring Southwest's argument relating to Solomon's role.

On appeal, the Court of Appeals for the District of Columbia sided with Southwest and held that the FVRA prohibits any person serving in an acting capacity in a PAS position from continuing in such a position after permanent presidential appointment. Since Solomon served in violation of the statute after President Obama's nomination, the Court of Appeals held that actions he took (e.g., issuing charges) after his nomination were invalid.

The NLRB appealed, and the Supreme Court was asked to address whether the text of the FVRA – characterized by one Justice as "peculiar" during oral argument – prohibits all acting officers from continuing as temporary designees after permanent presidential appointment, or whether the statute only prohibits first assistants who become acting officers from continuing in the position when appointed to fill the position permanently.

SCOTUS Rejects NLRB Challenge, Limits Presidential Authority

The divided Supreme Court agreed with Southwest and the D.C. Circuit: acting officials can't continue to serve post-nomination. The Court held that the text of the FVRA clearly prohibits individuals nominated to fill a vacant PAS position from performing that position's duties in an acting capacity. In so holding, the majority refused to credit the argument that the legislative history and

capacity. In so holding, the majority refused to credit the argument that the legislative history and past practice supported applying the ban only to first assistants, noting dryly that the "glitch in this argument is of course the text of" the statute.

What This Means Going Forward

The only sure thing is that Southwest, the employer in this case, is off the hook for the unfair labor practice charge. The broader practical impact of this decision, however, is likely limited. None of the stakeholders in this case argued that the consequences of this decision would have wide-ranging impacts on any pending cases. The reason is simple: most litigants have not challenged acting officials' authority to make decisions under the FVRA. The only pending cases impacted are cases in which a party has timely challenged an improperly serving acting official's action.

Moving forward, presidents will know that once they appoint certain acting officials to fill the same post permanently, the acting official will need to step down from the post until confirmed by the Senate.

On a broader scale, however, this decision will make it more difficult for presidents to place their preferred individuals in powerful administrative positions, particularly when the Senate fails or refuses to act on presidential appointments. Accordingly, the Court's opinion is a modest victory for employers who are protected from overreaching presidential appointments, such as the long-term, temporary NLRB General Counsel designee in this case who served without the advice and consent of the Senate.

For more information about how this decision might impact your business, visit our website at www.fisherphillips.com or contact your regular Fisher Phillips attorney.

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