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CLIENT ALERT: The U.S. Court of Appeals for the District of Columbia Finds the Recess Appointments of Three Members to the NLRB to be Invalid

Introduction

In a decision that will undoubtedly have a significant impact on private sector employers, the U.S. Court of Appeals for the District of Columbia held that President Obama's recess appointments of three members to the National Labor Relations Board in January 2012 were invalid, resulting in the Board lacking a valid quorum to support an unfair labor practice order in *Noel Canning Div. of Noel Corp. v. NLRB*, D.C. Cir., No. 12-1115 (Jan. 25, 2013). Similar cases are pending in other circuits, making it likely that at some point the U.S. Supreme Court will weigh in on the issues presented. At stake are numerous decisions by the Board in the past year (many of which have been widely criticized due the number of reversals to longstanding Board precedent) and the possibility that they will be invalidated.

Background

The case arose in what the court described as a "routine review" of a Board decision relating to an unfair labor practice charge. The Board held that the employer, Noel Canning, violated Section 8(a)(5) of the Act by refusing to reduce to writing a collective bargaining agreement it had negotiated with the union. In response, the employer petitioned the D.C. Circuit for review of not only the unfair labor practice findings but also raising the issue of whether the Board had the authority to hear the case due to the fact there was only one Senate-confirmed member on the Board's panel, along with the two recess appointees.

The employer's argument centered on whether Board members Sharon Block (D), Terence Flynn (R), and Richard Griffin (D) were validly appointed by the President under the Recess Appointments Clause of the Constitution, Article II, Section 2, Clause 3. That Clause provides:

> The 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.

In the case at hand, the Senate was operating from December 20, 2011, through January 23, 2012 pursuant to a unanimous consent agreement under which it met in brief pro forma sessions every three business days. On January 3, 2012, the Senate convened to commence the formal second session of the 112th Congress. On January 4, 2012, frustrated over the difficulties in securing normal Senate confirmation of NLRB appointments, President Obama exercised what he believed to be his right to make recess appointments and added three members to the Board.

Controversy over the term "the Recess"

Ultimately, the case centered on the meaning of the term "the Recess" as used in the Clause. The employer argued that the term "the Recess" refers to "the intersession recess of the Senate, that is to say, the period ***between*** the sessions of the Senate when the Senate is by definition not in session and therefore unavailable to receive and act upon nominations from the President." In contrast, the NLRB argued that the alternative appointment procedure created by the Clause "is available during ***intrasession*** **'**recesses,'or breaks in the Senate's business when it is otherwise in continuing session." The Board argued that the Senate was in a continuous recess after mid-December 2011 despite some pro-forma sessions, and that under the Constitution, the President had the right to make what it considered "recess appointments." The Attorney General's office argued that "recess" should be given its normal and customary meaning and that the Senate was functionally in recess in January 2012 when the President made his formal appointments.

The court reviewed the three interpretations of "the Recess" contained in the Recess Appointments Clause that were advanced by the NLRB. The first was that the Clause simply referred to "some substantial passage of time, such as a ten- or twenty-day break." The court rejected this alternative, explaining that, "[g]iven that the appointments structure forms a major part of the separation of powers in the Constitution, the Framers would not likely have introduced such a flimsy standard…An undefined but substantial number of days-break is not a plausible interpretation of 'the Recess.'"

The next alternative was that "the Recess" refers to "any adjournment of more than three days pursuant to the Adjournment Clause." This was similarly rejected by the court stating, "[t]he Framers did not use the word 'adjournment' in the Recess Appointments Clause. Instead they used 'the Recess.'" Based on the clear separation of the two Clauses and the lack of any historical evidence that they are linked in any way, the court held that this interpretation lacked any constitutional basis.

Lastly, the court considered the argument by the Office of Legal Counsel which put forth the argument that "the President has discretion to determine that the Senate is in recess." The court strongly disagreed with this interpretation, holding that,

> Allowing the President to define the scope of his own appointments power would eviscerate the Constitution's separation of powers. The checks and balances that the Constitution places on each branch of government serve as "self-executing safeguard[s] against the encroachment or aggrandizement of one branch at the expense of the other." An interpretation of "the Recess" that permits the President to decide when the Senate is in recess would demolish the checks and balances inherent in the advice-and-consent requirement, giving the President free rein to appoint his desired nominees at any time he pleases, whether that time be a weekend, lunch, or even when the Senate is in session and he is merely displeased with its inaction. This cannot be the law.

After hearing all potential alternative interpretations of "the Recess," the court ultimately held that the Framers' intent was to use "the Recess" to refer to ***the recess between formal sessions***,

and *not* short recesses or adjournments while the Senate is technically still in session. The court said that "[t]he intersession interpretation of 'the Recess' is the only one faithful to the Constitution's text, structure, and history."

Reactions

Considering the major impact this decision may have, not only moving forward, but on a year's worth of Board decisions, reactions from both sides were rapid. White House Press Secretary Jay Carney described the ruling as "novel and unprecedented," and that the administration "respectfully but strongly" disagrees with the holding. Board Chairmen Mark Pearce (D) released a statement that the Board "believes that the President's position in the matter will ultimately be upheld." AFL-CIO President Richard Trumka issued a statement stating that the court's decision was "nothing less than shocking."

Conversely, Republicans whole-heartedly agreed with the decision and are seeking resignations from the recess appointees. John Kline (R-Minn), Chairman of the U.S. House Education and the Workforce Committee, stated that "[t]he Obama labor board must cease all activity until qualified nominees have been constitutionally appointed to the board." This was followed by harsh comments from Lamar Alexander (R-Tenn) who stated, "[t]hese individuals should resign from the board immediately, because no decision in which they participate can be valid … This judgment is proof that the administration defied the Constitution's separation of powers and its concept of checks and balances, which are the guard against an imperial presidency[.]"

The Supreme Court has already been asked to take the case on an emergency basis given its broad implications.

Conclusion

While Board Chairman Mark Pearce quickly pointed out that "[i]t should be noted that this order applies to only one specific case," the potential significance of this ruling is quite large. There have been numerous decisions by the Board since January 2012, which have widely affected employer policies, including "at-will" provisions in handbooks, social media policies, union right to witness statements and dues check off requirements at the expiration of a collective bargaining agreement. Most of these decisions have been found to restrict employers in various capacities, but if *Noel Canning* is upheld on appeal, those decisions will likely be invalidated. As a result, all employers should closely monitor how this case proceeds through the appeals process. Employers should understand that Board functions at the regional offices will continue to operate as it normally does, but Board review of decisions at the regional level may be significantly impaired.

Employers should contact Morgan, Brown & Joy with questions about how these changes affect their business moving forward.

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