Client Alert

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Supreme Court Rejects Obama's Recess NLRB Appointments

By Timothy Ryan and Aurora Kaiser

On June 26, 2014, the U.S. Supreme Court unanimously limited the President's power to make recess appointments under the Recess Appointments Clause of the Constitution, Art. II, Sect. 2, Cl. 3. While the decision involved 2012 Presidential appointments made to the National Labor Relations Board (NLRB or "Board"), the ramifications of the decision extend far beyond labor law appointments.

The NLRB is a five-member board which hears complaints about union and non-union employers regarding unfair labor practice charges. A 2010 Supreme Court decision held that, to constitute a quorum and issue valid decisions, the Board must have at least three members.[1]

In February 2012, the Board issued a decision finding that Noel Canning had committed an unfair labor practice. When the Board issued this decision, it had five members—but President Obama had appointed three of them under the power of the Recess Appointments Clause, during a three-day recess of the Senate on January 4, 2012. Noel Canning appealed the Board's decision and argued, first before the District of Columbia Circuit and then before the Supreme Court, that the Board's decision against Noel Canning was void because three of the five Board members had been invalidly appointed by President Obama, leaving the Board without the requisite three members necessary to act.

The Recess Appointments Clause authorizes the President "to fill up all Vacancies that may happen during the Recess of the Senate," without first obtaining the "Advice and Consent" of the Senate. The company argued first that the Recess Appointments Clause only applies to *inter* session recesses of Congress, that is, recesses between sessions of Congress, and not merely "brief breaks" the Senate may take during a session. Second, Noel Canning argued that the President's power is limited to fill vacancies that first come into existence during a recess period, i.e., that "may happen" during a recess. Neither condition existed at the time the appointments were made. The District of Columbia Circuit agreed and overturned the Board's decision.

The Supreme Court was unanimous in affirming, but the majority affirmed on narrower grounds. The Court concluded that when, on January 4, 2012, the President appointed Terence Flynn, Richard Griffin, and Sharon Block to the Board, the appointments were invalid because they took place when the Senate was only in the midst of a three-day recess "and three days is too short a time to bring a recess within the scope of the Clause." Thus, the decision of the Board was invalid. The Court suggested that a 10-day recess would generally be sufficient as, historically, recess-appointments have been made during Senate recesses of 10 days or more.

[1] Under prior Supreme Court precedent, decisions issued when the NLRB does not have a quorum are void *ab initio*. *New Process Steel v. NLRB*, 130 S.Ct. 2635, 2640-41 (2010).

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The NLRB has not announced how it will deal with the cases in which one of the three January 4 appointees participated. NLRB records show that there were 436 contested cases decided by the Board in which the Board did not have a quorum in light of the Court's decision. Some of those cases involved significant and controversial changes from prior Board precedent, such as an employer's right to issue reasonable work rules concerning employee behavior; requiring employees to keep matters confidential during investigations by an employer; and requiring employers to disclose to a union the witness statements from the employer's internal investigation.

Also, administrative decisions made by the Board between January 4, 2012, and August 5, 2013, are also likely to be challenged, including the appointment of administrative law judges and Regional Directors, and perhaps the decisions they made.

The significance of the Court's decision will likely be somewhat limited by the recent amendment to the Senate filibuster rules, which no longer require a 60-person vote to approve a presidential appointment. Because of the change in those rules, it is more likely now that the President will get the "Advice and Consent" necessary to make appointments. But, of course, mid-term elections in the fall could change that calculation and, regardless, sometimes the confirmation process can drag on, leading the President to consider a recess appointment.

The Court's decision in *Noel Canning* will have repercussions for both unionized employers and those that are union-free. We will continue to update you as developments arise and provide a more detailed discussion of affected NLRB decisions and how the Board will deal with them in our August 2014 Employment Law Commentary.

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