

Noel Canning v. NLRB

President Obama's unprecedented and unlawful 2012 "recess appointments" to the National Labor Relations Board¹ (NLRB or Board) have caused unnecessary upheaval and uncertainty in labor relations resulting in a significant increase in litigation. The U.S. Supreme Court, however, has recently issued a decision cutting into this uncertainty. On June 26, 2014, the Supreme Court unanimously held in the case of *Noel Canning v. NLRB* that President Obama's 2012 appointments were unconstitutional, because the Senate was holding pro-forma sessions and was, therefore, not in recess. Now over 700 reported and unreported NLRB decisions issued between January 2012 and August 2013 are potentially invalid.

Context

In January 2012, President Obama made recess appointments to fill three empty seats on the NLRB, even though the Senate was not in recess at that time.² When the Board issued an order against Noel Canning—a Yakima, Washington, beverage bottler—the company challenged the order on the grounds that the recess appointments were invalid and thus deprived the Board of the lawful quorum it needs to issue orders. On January 25, 2013, in *Noel Canning v. NLRB*, the U.S. Court of Appeals for the D.C. Circuit ruled President Obama's purported "recess" appointments to the Board were made while the Senate was in session and were, therefore, unconstitutional.³ Because the Supreme Court has ruled a quorum of no less than three is required for the NLRB to issue orders and decisions or promulgate rules, the *Noel Canning* decision has raised doubts as to the validity of many the Board's actions during the time the recess appointees served. On May 16, 2013, the U.S. Court of Appeals for the Third Circuit echoed *Noel Canning* in its decision in *New Vista Nursing and Rehabilitation v. NLRB*, and on July 17, 2013 the Fourth Circuit issued its decision in *NLRB v. Enterprise Leasing* also finding the appointments unconstitutional. In August 2013, five new Board members were sworn in after Senate confirmation.

¹ The NLRB is the federal government agency charged with enforcing and interpreting the National Labor Relations Act (NLRA). The NLRA, which was enacted in 1935, established the right of most private sector employees to join or refrain from joining a union and governs relations between most private businesses and unions.

² Details on the appointments are available at <http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts>. The president has limited authority under Article II, Section 2 of the Constitution to make appointments without Senate confirmation when the chamber is in recess.

³ President Obama's January 2012 recess appointments were unprecedented, as no prior administration attempted appointments at a time when the Senate declared itself to be in session. Noel Canning challenged the validity of the recess appointments on that basis and on the grounds the Constitution only permits recess appointments during the period between sessions of Congress (intersession recesses) and when the vacancy arises during that recess. The administration knew the recess appointments would create uncertainty and litigation, as the White House Office of Legal Counsel (OLC) noted in a memo on the appointments (available at <http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf>), "[t]he question is a novel one, and the substantial arguments on each side create some litigation risk for such appointments." OLC also noted, "there is little judicial precedent addressing the [p]resident's authority to make intrasession recess appointments." In short, the administration knew it was attempting something novel that would invite legal challenges, as there was no judicial precedent on the issue of recess appointments when the Senate was in session and limited precedent on the intrasession issue.

The Board Made the Situation Worse

Unfortunately, rather than taking measures to address the chaos created by the President's unconstitutional recess appointments, the Board made matters worse by continuing to issue decisions, despite the various Appeal Court rulings:

- Richard Griffin and Sharon Block—the two Board members whose appointments were invalidated by *Noel Canning*—continued to sit on the Board and participate in its activities until August 2013; and
- On the day the *Noel Canning* opinion was issued, NLRB Chairman Mark Pearce publicly stated that he, along with Block and Griffin, would “continue to perform [the Board's] statutory duties and issue decisions.”

The Supreme Court's Decision

The justices unanimously determined the recess appointments were unconstitutional, claiming the three day recess in which the appointments were made was too short of a period of time in which the President could operate under the clause of the Constitution. The ruling, therefore, invalidated the appointees' terms and left the Board without a quorum during their tenure. All decisions made during their terms were thereby invalidated. Many of these decisions were significant and involved controversial regulations and serious changes to long standing precedent. The Board has yet to determine how it will address those cases, but the impact of the *Noel Canning* decision will be felt by the Board for several years.

CDW Reaches Out to the Board

On October 9, 2014 CDW filed a letter with the NLRB urging the agency to request input, or amicus curiae briefs, from relevant stakeholders on ten major decisions that were issued by the Board during the tenure of the unconstitutional recess appointees. These decisions substantially altered labor law, ignored decades of precedent, and dealt with a wide range of issues greatly affecting the workplace, from the use and/or monitoring of social media to enforceability of arbitration requirements. These cases are vital to labor policy and the harmonization of the employer-employee relationship. Therefore CDW urged the Board to at least hear out the concerns of those individuals and entities affected by its agenda.