

Noel Canning v. NLRB

President Obama's unprecedented and unlawful "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. On January 13, 2014, the U.S. Supreme Court heard oral arguments in the case of *Noel Canning v. NLRB*, the main issue of which is whether the President's appointments were unconstitutional.

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 actions during the time 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 D.C. Circuit ruled on the latter grounds. While other presidents have made appointments during break periods that occur during a session of Congress (intrasession recesses), few courts have ruled on the constitutionality of such appointments. 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 Problem

If the Supreme Court deems the appointments unconstitutional, it will then have to consider several issues: Are all decisions and rulemakings issued by the unconstitutional Board invalid? Must companies and unions comply with orders issued by the invalid Board? Do decisions of the tainted Board establish precedent for possible future litigation?

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 Circuit Court's ruling in *Noel Canning*:

- 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 (Craig Becker's invalid appointment expired in January 2012.)
- 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.”

Anticipating the Supreme Court's Decision

Press reports on the oral arguments before the Supreme Court in *Noel Canning* suggest liberal and conservative justices alike seem inclined to rule the President cannot circumvent Senate confirmation by declaring the Senate is in recess. The Washington Post noted even Obama appointee Elena Kagan observed only the Senate can determine whether or not they are in recess. If the high court does in fact invalidate the appointments, the hundreds of decisions and other actions of the Board may also be invalid. An analysis by the National Right to Work Foundation (NRWF) shows the Obama appointees in question participated in over 1,700 decisions going back to April of 2010. The Court will also have to consider potential effects on many other purported recess appointments by Obama and other recent presidents. See the NRWF analysis here: <http://www.nrtw.org/en/nlr-watch/what-noel-canning-decision-means>.