United States Court of Appeals for the District of Columbia Pushes Back at the NLRB and President Obama

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Once again the National Labor Relations Board has been found to have issued a decision without the statutorily mandated three member quorum. On January 25, 2013, the United States Court of Appeals for the District of Columbia found that the National Labor Relations Board's decision in the case of *Noel Canning v. National Labor Relations Board* was statutorily and constitutionally infirm because, at the time the NLRB issued its decision on February 8, 2012, it lacked a quorum of three members and, as such, it was not permitted to act. This decision will likely have wide ranging implications on the aggressive and union/employee friendly decisions handed down in the last 12 months by the NLRB.

To understand the ramifications of the D.C. Circuit's decision, some background is needed. During the latter part of 2011, the Board, which at the time consisted of five members, began to dwindle, and when member Craig Becker's seat became vacant on January 3, 2012, the NLRB no longer enjoyed the statutorily mandated quorum. The NLRB and the Administration knew that, once it lost its quorum, any attempts to issue decisions or engage in rulemaking would violate the United States Supreme Court's 2010 decision in *New Process Steel.*

Foreseeing such a problem, the President made several efforts to appoint members to the NLRB during 2011, but, given the controversial candidates submitted, the appointments did not receive Senate approval. Growing frustrated, the President took the position in January 2012 that Congress, specifically the Senate, was in recess, and, therefore, he could appoint three members to the NLRB as recess appointments without Senate approval. The President took this action despite the fact that the Senate, during its break from December 20, 2011 through January 23, 2012, adopted a unanimous consent agreement whereby the Senate would meet in pro forma sessions every three days from December 20, 2011 through January 23, 2012.

In reviewing these facts, the D.C. Circuit, in a detailed and reasoned constitutional analysis, determined that, at the time of the alleged recess appointments, the Senate was not in recess, and, therefore, the NLRB lacked a quorum of three members when it issued its decision in the *Noel Canning* case. According to the D.C. Circuit, to adopt "the proffered intrasession interpretation of 'the Recess' would wholly defeat the purpose of the Framers in the careful separation of power structure reflected in the Appointments Clause" of the Constitution. In addition, the D.C. Circuit took on directly the argument raised by the Office of Legal Counsel to the President, that the President has discretion to determine himself when the Senate is in recess. According to the D.C. Circuit, such an interpretation "will not do. Allowing the President to define the scope of his own appointments power would desecrate the Constitution's separations of powers."

This decision was not issued in a vacuum. Because the President's actions have been found to be constitutionally infirm, every decision of the NLRB undertaken since January 2012, when there were only two confirmed members of the NLRB, will likely be set aside as the cases are appealed to the various federal circuit courts of appeals. Some of the important decisions handed down during that period that may now be invalid include *D.R. Horton, Inc.* (holding that arbitration agreements where employees waive the right to pursue class or collective actions violate the National Labor Relations Act), *American Red Cross Blood Services Region* (holding that an employer violated the National Labor Relations Act by including an at-will employment policy in its employee handbook), *Fresenius* (ruling that an employer's duty to investigate harassment under Title VII violated the National Labor Relations Act) and *Banner Health Care* (ruling it a violation of the National Labor Relations Act to request that employees keep on-going investigations confidential).

Presumably *Noel Canning* will be appealed by the National Labor Relations Board and the Administration to the United States Supreme Court. In addition, the National Labor Relations Board and the Administration both issued statements on Friday, November 25, 2013, that they respectfully disagreed with the decision, that they were certain the decision would be reversed and that the National Labor Relations Board would continue on a "business as usual" basis.

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