

## **D.C. Circuit Rules Recess Appointments of NLRB Members Unconstitutional, Calling Into Question Hundreds of NLRB Decisions**

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On January 25, 2013, the U.S. Court of Appeals for the District of Columbia ruled in *Noel Canning v. National Labor Relations Board* that President Obama's use of recess appointments to fill three vacancies on the National Labor Relations Board (NLRB) was unconstitutional. As a result, the D.C. Circuit denied enforcement of an order issued by the NLRB on the grounds that the Board did not have the required quorum to act. The D.C. Circuit's decision not only calls in question the validity of hundreds of decisions issued by the NLRB since President Obama's January 2012 recess appointments, but also raises serious implications for the NLRB's ability to act going forward.

At the time of the Board's decision, only two of its members had been confirmed by the Senate. The other members were appointed by the President on January 4, 2012 pursuant to the Recess Appointments Clause of the Constitution and therefore were not confirmed by the Senate. Notably, in 2010, the U.S. Supreme Court ruled that the Board needs to have a quorum of at least three members in order for its actions to be binding.

The D. C. Circuit ruled that the term "the Recess" as used in the Recess Appointments Clause is limited to the Senate's intersession recesses. Because President Obama's recess appointments did not occur during an intersession recess and did not arise from a vacancy created during the recess, those appointments were not legally valid. Thus, the Court held that the Board did not have the required quorum of members when it issued its order, making the order void. Accordingly, the Court vacated the Board's order.

The D.C. Circuit ruling calls into question the validity of all of the decisions issued by the Board since January 2012, because those decisions are vulnerable to the same attack. However, the D.C. Circuit ruling may not be the final word on the issue, as there are cases presenting the same issue pending in other federal courts of appeal, and the D.C. Circuit decision is not binding on those other courts. Also, the decision conflicts with a 2005 federal appellate decision affirming the validity of recess appointments made by President George W. Bush during intrasession recesses. The matter may ultimately be decided by the U.S. Supreme Court.

On the day of the *Noel Canning* decision, NLRB Chairman Pearce issued a statement on behalf of the Board respectfully disagreeing with the D.C. Circuit's decision, expressing the Board's belief that the President's position will ultimately be upheld, and indicating that the Board would continue issuing decisions.

In the meantime, the Board's authority remains uncertain as no new members have been confirmed by the Senate.

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Note: On June 24, 2013, the U.S. Supreme Court agreed to review the D.C. Circuit's ruling in *Noel Canning*.

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