May 21, 2013

NLRB "Recess" Appointments Rebuked Again

The U.S. Court of Appeals for the Third Circuit ruled last week that another unilateral appointment by President Obama was unconstitutional. The decision -- *NLRB v. New Vista* -- agrees with the reasoning of U.S. Court of Appeals for the D.C. Circuit. That court ruled in January, in the *Noel Canning* case, that the President's authority to make recess appointments is limited to inter-session recesses of the Senate, and not intra-session recesses.

> "If the Senate refused to confirm a president's nominees, then the president could circumvent the Senate's constitutional role simply by waiting until senators go home for the evening. The exception of the Recess Appointments Clause would swallow the rule of the Appointments Clause."
>
> – NLRB v. New Vista

The *New Vista* ruling reaffirms the Senate's essential role in the advice and consent responsibility our founders gave it in the Constitution, to ensure that it remains a check on the Executive. Judge D. Brooks Smith, writing for a divided panel, noted that failing to recognize the respective powers of the President and Senate "would eviscerate the divided-powers framework the two Appointments Clauses establish." He furthered observed that, "The president has a prerogative to *nominate* whomever he likes, and the Senate has the prerogative to reject or confirm whomever the president nominates."

Another invalid NLRB recess appointment

In March 2010, President Obama appointed Craig Becker to the National Labor Relations Board during a two week adjournment of the Senate. Becker joined other NLRB Board Members and began issuing orders and opinions in labor disputes, including one against a nursing and rehabilitative care center, New Vista Nursing and Rehabilitation. The court held that because "Member Becker was invalidly recess appointed to the Board during ... [an] intra-session break" the Board's decision against New Vista was vacated because it lacked the requisite quorum, and thus, authority to decide the labor dispute in the first place.

Mr. Becker's invalidated appointment follows the previous invalidation of other appointees to the NLRB – Sharon Block and Terence Flynn – who were recess appointed in January 2012 during *pro forma* sessions of the Senate.

The implications of *New Vista*

Last week's ruling means that even more decisions issued by the NLRB are subject to challenge and invalidation. As the *Wall Street Journal* noted, "Mr. Becker's term began earlier than the other recess appointees, thus invalidating hundreds of other decisions that the labor board made without a legal quorum."

> "The number of NLRB decisions jeopardized by the three illegal recess appointments now stand at some 1,200."
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> – Wall Street Journal Editorial, May 16, 2013

Following the *Noel Canning* decision, NLRB Chairman Mark Pearce disagreed with the opinion and stated that the Board would continue with business as usual, because the order applied to "only one specific case." But with another federal court weighing in, and hundreds of decisions now implicated by these invalidated appointments, the unlawfully appointed NLRB members should step down.

Impact on the Administration's appeal to the Supreme Court

Last week's decision is the second time an appellate court has disagreed with a prior ruling by the Eleventh Circuit, which held that recess appointments were permitted during both intersession and intra-session recesses of the Senate. This split among three circuit courts makes it more likely that the Supreme Court will hear the Administration's challenge to *Noel Canning*.

Senate Republicans, represented by former Assistant to the Solicitor General Miguel Estrada, will submit an amicus brief to the Court urging it to hear *Noel Canning*. As was done at the appellate level, Senate Republicans will ensure that the Senate's institutional interests are protected. Last week's decision only serves to further buttress the case Senate Republicans have made and will continue to make.

By reaffirming the reasoning of the D.C. Circuit, the *New Vista* decision undercuts the Obama Administration's position in its petition to the Supreme Court that the *Noel Canning* decision is "inconsistent with the proper reading of the Recess Appointments Clause."