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Labor Law Caught in Constitutional Crisis

NLRB's expansion of employee rights hinges on 'Noel Canning' decision.

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A constitutional showdown between President Barack Obama and Republican members of Congress over the president's recess appointments to the National Labor Relations Board (NLRB)—appointments without the consent of the Senate—is likely en route to the U.S. Supreme Court.

In *Noel Canning v. NLRB*,[1] decided on Jan. 25, 2013, the D.C. Circuit held that the president's recess appointments were unconstitutional, contradicting a 2004 holding by the Eleventh Circuit.[2] Because the legitimacy of the NLRB's decisions since January 2012 hangs in the balance, a period during which the Board aggressively expanded the rights of employees and unions, the stakes for federal labor law on both sides of the issue could not be higher. This article examines the *Noel Canning* decision and its impact on the NLRB's recent expansion of employee rights.

Political Gridlock and NLRB Appointments. During the Bush and Obama presidencies, the NLRB appointments process became so politicized that the NLRB had to struggle just to keep its doors open for business. In December 2011, the NLRB had only three members, the minimum quorum (out of five members) necessary to adjudicate cases,[3] with one member's recess appointment set to expire at end of the year. Although Obama nominated individuals to fill the vacant positions, the Senate failed to confirm these nominees before the end of its 2011 term.[4] Further, the Republican-controlled House forced the Democrat-controlled Senate to hold pro-forma sessions, typically empty formalities during which no business is conducted, from Dec. 20, 2011, until Jan. 23, 2012, avoiding a recess of more than three days for the express purpose of blocking recess appointments.[5] Relying on an opinion from the Office of Legal Counsel,[6] Obama determined that the Senate's pro-forma sessions were not sufficient to prevent an ongoing "recess" under the constitution, and on Jan. 4, 2012, between pro forma Senate sessions scheduled for Jan. 3 and Jan. 6, made three recess appointments to the NLRB.[7] The appointments gave the NLRB a full membership of three Democrats and two Republicans.

'Noel Canning' Narrows the Recess Appointment Power. The constitutional provision commonly known as "The Recess Appointments Clause" authorizes the president to "fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[8] However, on Jan. 25, 2013, in *Noel Canning v. NLRB*, the D.C. Circuit held that Obama's three recess appointments, ostensibly made under the authority of this clause, were unconstitutional. In that case, the NLRB had found Noel Canning guilty of an unfair labor practice. On appeal to the D.C. Circuit, Noel Canning challenged the NLRB's authority to make such a ruling, arguing that the recess appointments were unconstitutional, and therefore, the NLRB did not have a quorum when it decided Noel Canning's case. According to Noel Canning, under the Recess Appointments Clause, Obama's recess appointments, which took place during a three day interval between pro forma sessions of the Senate, were not made "during the Recess of the Senate."

The D.C. Circuit agreed with Noel Canning's arguments. The court held that Obama's NLRB recess appointments violated the Recess Appointments Clause, and therefore the NLRB order finding that Noel Canning engaged in an unfair labor practice was void.[9]

Noel Canning went much further, however. The court imposed strict limits on the president's recess appointment power. Specifically, the D.C. Circuit held that the Recess Appointments Clause authorizes the president to make appointments only during the *intersession* recess between legislative sessions of the Senate.[10] An intersession recess occurs when the Senate adjourns "sine die"—that is, without date—marking the end of a legislative session.[11]

Under *Noel Canning*, the president lacks authority to make recess appointments during *intrasession* recesses—that is, recesses of the Senate that occur during a legislative session—no matter how long.[12] This holding could empower Congress to prevent recess appointments by simply refusing to hold an intersession recess.[13] Since the Senate did not adjourn sine die before the start of the 2012 session, there was arguably no intersession recess between the Senate's 2011 and 2012 sessions during which Obama could have exercised his recess appointment power.

The D.C. Circuit's ruling has serious implications and runs contrary to the manner in which presidents have used the recess appointment power during the latter part of the 20th century. The lack of opportunity for a president to make appointments outside the normal nomination process could potentially lead to an inability of various agencies to function once they lose a quorum of Senate-approved members. Indeed,

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if *Noel Canning*'s prohibition on intrasession recess appointments had been the law from Reagan's presidency to the present, roughly 329 intrasession recess appointments would have been unconstitutional.[14]

Competing Interpretations of "the Recess." *Noel Canning* creates a circuit split with the Eleventh Circuit's en banc decision in *Evans v. Stephens*, which upheld President George W. Bush's appointment of William H. Pryor to the Eleventh Circuit during an eleven day intrasession recess in 2004. A brief review of the disagreement between *Noel Canning* and *Evans* makes clear there are reasonable arguments on all sides.

The D.C. Circuit emphasized that the Recess Appointments Clause authorizes appointments during "*the* Recess," not "*a* Recess," to support its conclusion that the clause refers to the annual intersession recess.[15] Meanwhile, the Eleventh Circuit found that "the Recess" could "just as properly refer generically to any one—intrasession or intersession—of the Senate's acts of recessing, that is, taking a break."[16] Indeed, common usage of the terms "the" and "a" themselves suggest the viability of these differing interpretations.

The D.C. Circuit and Eleventh Circuit also divided on the relevance of the historical record of presidential recess appointments. The D.C. Circuit found that the "dearth of intrasession appointments in the years and decades following the ratification of the Constitution"[17] trumps contemporary presidential practice, while the Eleventh Circuit viewed the practices of modern presidents as evidence that intrasession appointments are constitutional.[18]

Moreover, even if the D.C. Circuit is correct that the "early understanding of the constitution" is dispositive, it does not follow from the absence of intrasession recess appointments at the time of the nation's founding that such appointments are unconstitutional today. During the 18th and 19th centuries, intersession recesses regularly lasted *over six months*[19] and, as the D.C. Circuit noted, "senators did not have the luxury of catching the next flight to Washington."[20] Thus, the presidents with an "early understanding of the constitution" were assured the opportunity to make recess appointments during a lengthy intersession recess. Not so today. Thus, applying the "original understanding" of the Recess Appointments Clause to Obama's 2012 NLRB appointments may not be as straightforward as *Noel Canning* suggests.[21]

Impact of 'Noel Canning'. The day *Noel Canning* was decided, NLRB Chairman Mark Pearce issued a public statement that the "Board respectfully disagrees" with the decision, and would "continue to perform [its] statutory duties and issue decisions."[22] Although Pearce noted that *Noel Canning* "only applies to one specific case," its ramifications are much more far reaching because the NLRB must petition a federal court of appeals to enforce its orders.[23] Critically, "a person aggrieved by a final order" from the NLRB can appeal to the circuit where the party resides, where the unfair labor practice allegedly occurred, or *the D.C. Circuit*.[24] Thus, going forward, losing parties will appeal NLRB orders to the D.C. Circuit, where the orders are void under *Noel Canning*. Indeed, the D.C. Circuit has already begun issuing orders holding NLRB cases in abeyance.[25] Based on the NLRB's lack of enforcement power, at least one employer, Prime Healthcare, made a public statement that it would not adhere to NLRB rulings issued after Jan. 4, 2012.[26]

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Perhaps more significantly, *Noel Canning* jeopardizes a series of pro-labor NLRB rulings issued throughout 2012. Consider the following prominent examples. In *WKYC-TV*,[27] the NLRB overruled the 50-year precedent of *Bethlehem Steel*,[28] which allowed employers to stop adhering to "dues checkoff" provisions—contractual provisions requiring employers to deduct union dues from the wages of employees—upon the expiration of a collective bargaining agreement. *WKYC-TV* requires employers to honor "dues checkoff" provisions *after* the expiration of a contract. Historically, employers have used the ability to stop deductions as a way to starve the unions of funding and force them to the bargaining table. Thus, the *WKYC-TV* holding significantly alters the collective bargaining playing field by preventing employers from blocking union funding while negotiating a new contract. If the *WKYC-TV* is no longer valid, employers will have regained what many consider an essential bargaining chip against unions.

In another landmark decision, *D.R. Horton*,[29] the NLRB held that the National Labor Relations Act (NLRA) bars employers from conditioning employment on an employee's waiver of the right to pursue employment-related disputes through class actions if such waiver prevents an employee from bringing class actions in both arbitral and judicial forums. Even though the Supreme Court recently held that class-action waivers in consumer arbitration clauses are enforceable,[30] the NLRB found that the Supreme Court's reasoning was inapplicable to the employment context because employees have the right to take concerted activity for their mutual aid and protection, which includes litigation, and class-wide arbitration is less cumbersome in employment cases.[31] The prohibition against such waivers is significant since many employee disputes involve allegations of general improper employment practices resulting in harm to each employee to a degree that would make the case economically unattractive for attorneys unless it could be brought as a class action. If *Noel Canning* invalidates *D.R. Horton*, employers would be free, under the NLRA, to require class action waivers, thereby effectively preventing many cases from being brought at all.

An Expansive Right to Concerted Activity. Another 2012 decision, *Hispanics United*,[32] has received a great deal of attention because it holds that employees' right to engage in "concerted activities for the purpose of…mutual aid and protection" [33]—which includes complaining about the conditions of their employment—extends to public comments on social media.[34] The case also merits attention, however, for a more fundamental reason: It establishes an extremely broad right to "concerted activity."

Hispanics United grew out of a dispute among employees of an organization that assists victims of domestic violence. One day, Lydia Cruz-Moore, an employee who was often critical of her coworkers' performance, told another coworker, Marianna Cole-Rivera, that she planned to complain to the Executive Director about her other colleagues' poor performance. Subsequently, Cole-Rivera posted the following message on Facebook: "[A] coworker feels that we don't help our clients enough…. My fellow coworkers how do u feel?" Several other employees then posted messages objecting to Cruz-Moore's criticism of their performance. After the executive director found out about the Facebook postings, he terminated Cole-Rivera and other employees for "bullying and harassing" Cruz-Moore through their Facebook postings.[35]

The NLRB determined that the Facebook comments of Cole-Rivera and her coworkers were protected under the NLRA, and their termination was illegal. Even though the Facebook posts did not suggest that Cole-Rivera and her colleagues intended to prepare a group response—or even

any response—to Cruz-Moore's charges, the NLRB held that their discussions "were indispensable initial steps along the way to possible group action."[36] On this view, Cole-Rivera was implicitly "preparing her coworkers for a group defense."[37] In dissent, member Brian Hayes argued that "not all shop talk among employees" is concerted activity because there must be "a nexus to group action."[38] Hayes complained that "the mere fact that the subject of discussion involved an aspect of employment…is not enough" to make the discussion protected conduct under the NLRA.[39]

By stretching the meaning of "concerted activity" to include "*initial steps*" to "*possible group action*," the NLRB has created an opening for employees to assert that any employment-related discussion constitutes "concerted activity" supporting an NLRA retaliation claim. As the following hypothetical will illustrate, this development has the potential to vastly expand the scope of traditional labor litigation.

If the Supreme Court decides that 'Noel Canning' is correct, or even agrees that Obama's recess appointments were unconstitutional on a narrower basis, 'WKYC-TV', 'D.R. Horton', and 'Hispanics United', along with all the NLRB's 2012 decisions, will be rendered invalid.

Consider an employee of a nonpublic New York corporation who is fired for disclosing an ongoing fraud to coworkers and management. The employee's disclosure would not be protected under New York's whistleblower protection statute, which requires disclosure of a "substantial and specific danger to the public health or safety."[40] The employee would not have a wrongful termination claim under New York's strict at-will employment doctrine.[41] Finally, the employee's disclosure would probably not be protected under the Dodd Frank or Sarbanes Oxley whistleblower protection provisions, which, for the most part, apply only to publicly traded companies.[42]

Based on *Hispanics United*, however, the employee might have a retaliation claim under the NLRA based on an argument that disclosure of fraud to a coworker, or even to a higher level employee, was protected concerted activity. Specifically, the disclosure was an "initial step" toward "possible group action" to rectify the fraud and protect the employee and his or her colleagues from potential liability, and thereby "improve the terms and conditions of employment or otherwise improve their lot as employees."[43] Although the NLRA does not provide for a private right of action, the employee could file an NLRB charge, forcing the employer to defend a costly NLRB investigation and potentially an administrative proceeding, or use the threat of an NLRB charge as leverage in severance negotiations.

The Impact of a Supreme Court Decision. If the Supreme Court decides that *Noel Canning* is correct, or even agrees that Obama's recess appointments were unconstitutional on a narrower basis,[44] *WKYC-TV*, *D.R. Horton*, and *Hispanics United*, along with all the NLRB's 2012 decisions, will be rendered invalid. The NLRB has been in a similar bind before. In *New Process Steel v. NLRB*,[45] decided in 2010, the Supreme Court held that nearly 600 NLRB decisions were invalid because they were issued during a period of 27 months when the NLRB had only two members.[46] This decision required the NLRB to re-decide prior decisions or treat them as non-precedential.[47] The Supreme Court could put the NLRB back in the same bind if it affirms *Noel Canning*.

But there would be an important difference this time. The two-member NLRB decisions invalidated by *New Process Steel* were decided by an ideologically balanced panel of two members, one Democrat and one Republican, who avoided controversial decisions.[48] By the time *New Process Steel* was decided, the NLRB had four members, and was able to "rubber stamp" the two-member decisions.[49] The current NLRB decisions, on the other hand, reflect a much more ideologically liberal approach which will be harder for a future NLRB panel to "rubber stamp." Indeed, the future direction of federal labor law will turn on whether *Noel Canning* is upheld.

1. *Noel Canning v. NLRB*, No. 12-1115, Slip Op. (D.C. Cir. Jan. 25, 2013).
2. *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004).
3. See *New Process Steel v. NLRB*, 130 S.Ct. 2635, 2642 (2010).
4. See CRS Report R42323, President Obama's Jan. 4, 2012, Recess Appointments: Legal Issues, at 2 (Jan. 23, 2012).
5. See CRS Report RS21308, Recess Appointments: Frequently Asked Questions, at 9-10 (Jan. 9, 2012).
6. Mem. Op. for Counsel to the President, Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, at 2 (Jan. 6, 2012).
7. See CRS Report R42323, supra note 4, at 2-3.
8. U.S. Const., Art. II, §2, cl. 3.
9. *Noel Canning*, No. 12-1115, Slip Op., at 30, 44.
10. Although not necessary to the court's holding, two members of the panel also held that the president's recess appointment power is limited to positions that become vacant during the intersession recess when the appointment is made. Id. at 30-44.
11. See CRS Report RS21308 supra note 5, at 2. The D.C. Circuit described an intersession recess as "the period between sessions of the Senate when the Senate is by definition not in session and therefore unavailable to receive and act upon nominations from the President." *Noel Canning*, No. 12-1115, Slip Op., at 16.
12. *Noel Canning*, No. 12-1115, Slip Op., at 30.
13. Scholars have indicated that Congress could choose to hold no intersession recess in an effort to block recess appointments. See Edward A. Hartnett, "Recess Appointments of Article III Judges: Three Constitutional Questions," 26 Cardozo L. Rev. 377, 426 (2005) ("If recess appointments can be made only during intersession recesses, and not during intrasession recesses, Congress might attempt to eliminate the intersession recess—and the recess appointment power—by declining to adjourn a session until immediately before the start of a new session"); Michael B. Rappaport, "The Original Meaning of the Recess Appointments Clause," 52 UCLA L. Rev. 1487, 1565-66 (2005) ("[O]ne can imagine an arrangement where Congress attempts to use its power to schedule recesses to deprive the President of recess appointments"). The same scholars note, however, that the president could still engage in procedural maneuvering to get around Congress' refusal to hold an intersession recess. See Hartnett, at 427; Rappaport, at 1566.
14. See CRS Report 7-5700, The Noel Canning Decision and Recess Appointments Made from 1981-2013, at 4 (Feb. 4, 2013).
15. *Noel Canning*, No. 12-1115, Slip Op., at 16-17.
16. *Evans*, 387 F.3d 1220, 1224 (11th Cir. 2004).
17. *Noel Canning*, No. 12-1115, Slip Op., at 29; see also id. at 20-21.
18. See *Evans*, 387 F.3d at 1226 ("Twelve Presidents have made more than 285 intrasession appointments of persons to offices that ordinarily require consent of the Senate").
19. Rappaport, supra note 13, at 1498.
20. *Noel Canning*, No. 12-1115, Slip Op., at 23.
21. See Ilan Wurman, "Noel Canning: Proving Too Much with the Absence of History," JURIST-Dateline (Feb. 12, 2013), http://jurist.org/dateline/2013/02/ilan-wurming-recess-appointments.php.
22. Statement by Chairman Pearce on recess appointment ruling (Jan. 25, 2013), http://www.nlrb.gov/news-outreach/news-releases/statement-chairman-pearce-recess-appointment-ruling.
23. See 29 U.S.C. §160(e). The NLRB can seek immediate injunctive relief from a circuit court pending the resolution of an appeal. Id.
24. Id. §160(f).
25. Mark Theodore, Court Rules Recess Appointments to NLRB Unconstitutional (Jan. 25, 2013), http://www.laborrelationsupdate.com.
26. Terry Baynes, "Exclusive: Hospital Chain defies NLRB rulings after court decision," Reuters (Jan. 31, 2013).
27. *WKYC-TV*, 359 NLRB 30 (2012).
28. *Bethlehem Steel*, 136 NLRB 1500 (1962).
29. *D.R. Horton*, 357 NLRB 184. Although *D.R. Horton* was decided before the Obama's 2012 recess appointments, it was decided by two NLRB members, one of whom was an intrasession recess appointment.
30. See *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011).
31. *D.R. Horton*, 357 NLRB 184, at 12.
32. *Hispanics United of Buffalo*, 359 NLRB 37 (2012).
33. 29 U.S.C. §157.
34. Steven Greenhouse, "Even if It Enrages Your Boss, Social Net Speech Is Protected," The New York Times (Jan. 21, 2013).
35. *Hispanics United*, 359 NLRB 37, at 1-2.
36. Id. at 3 (quotations omitted).
37. Id.
38. Id. at 4.
39. Id.
40. N.Y. Labor Law §740.
41. See, e.g., *Sullivan v. Harnisch*, No. 82 Slip Op. (N.Y. May 8, 2012).
42. See, e.g., 18 U.S.C. §1513A(a) (protecting employees of companies who register securities under §12 of the Exchange Act or file reports under §15(d) of the Exchange Act).
43. *Eastex v. NLRB*, 437 U.S. 446 (1987).
44. For example, without deciding whether intrasession recess appointments are constitutionally permissible, the court could hold that days between pro-forma sessions do not constitute a "Recess" under the Recess Appointments Clause.
45. See *New Process Steel*, 130 S.Ct. 2635, 2642 (2010).
46. Id. at 2638.
47. See, e.g., *Karl Knauz Motors*, 358 NLRB 164 n. 4 (2012) (noting that "we do not rely on…a case issued by a two-member Board"); Ruben J. Garcia, "Foreword: The Workplace Law Agenda of the Obama Administration," 16 Emp. Rts. & Emp. Pol'y J. 1, at 3 (2012).
48. See Steven Greenhouse, "Labor Panel Is Stalled by Dispute on Nominee," The New York Times (Jan. 15, 2010).
49. See, e.g., *ADF*, 355 NLRB 62 (Aug. 5, 2010) (adopting order rendered invalid by New Process Steel); Matthew D. Moderson, "The National Labor Relations Board After 'New Process Steel': The Case for Amending Quorum Requirements Under the National Labor Relations Act," 80 UMKC L. Rev. 463, 479 (2011).