SPECIAL UPDATE

June 26, 2014

UNITED STATES SUPREME COURT FINDS THAT THE PRESIDENT LACKED THE POWER TO MAKE RECESS APPOINTMENTS TO THE NATIONAL LABOR RELATIONS BOARD.

Today, the United States Supreme Court ruled that President Obama lacked the power to make recess appointments when he filled three vacant positions of Board Members of the National Labor Relations Board ("NLRB"). This opinion will likely force the NLRB to revisit over 100 rulings that involved the three invalidly appointed board members.

Facts:

President Obama had appointed three members to the NLRB during the 2012 Senate recess in order to establish a quorum, which the Board of the NLRB must have by law in order to issue rulings. This recess-appointed Board served and made many labor-friendly decisions until a new Board was confirmed by the Senate in July 2013.

Ordinarily the President must obtain the "advice and consent of the senate before appointing an officer of the United States." But the Recess Appointments Clause creates an exception. It gives the President alone the power "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." (Article II, Section 2 of the U.S. Constitution)

Analysis:

In arriving at its decision, the U.S. Supreme Court considered three questions about the application of the Recess Appointments Clause in this case.

1. <u>What is the scope of the words "recess of the Senate"?</u>

Does that phrase refer only to an inter-session recess (i.e., a break between formal sessions of Congress), or does it also include an intra-session recess, such as a summer recess in the midst of a session?

The Court concluded that the Clause applies to both kinds of recess.

2. <u>What is the scope of the words "vacancies that may happen"?</u>

Does that phrase refer only to vacancies that first come into existence during a recess, or does it also include vacancies that arise prior to a recess but continue to exist during the recess?

The Court concluded that the Clause applies to both kinds of vacancy.

3. How do you calculate the length of a "recess"?

The President made the appointments at issue on January 4, 2012. At that time the Senate was in recess pursuant to a December 17, 2011, resolution providing for a series of brief recesses punctuated by "pro forma session[s]," with "no business . . . transacted," every Tuesday and Friday through January 20, 2012.

Does the Court include or ignore the pro forma sessions when calculating the length of a recess? Should the Court treat the series of brief recesses as a single, month-long recess?

The Court concluded that the pro forma sessions could not be ignored. When the appointments at issue took place, the Senate was in the midst of a 3-day recess. The Court found that three days is too short a period of time to be deemed a recess within the scope of the Clause.

Holding:

Thus, the Court concluded that the President lacked the power to make the recess appointments at issue.

Commentary:

Though the NLRB currently has a full complement of five Senate-confirmed members, today's decision means that numerous rulings issued when the disputed recess appointees were on the board are invalid. The recess-appointed Board had made many labor-friendly decisions until the new Board was confirmed by the Senate in July 2013, and they will likely all be revisited. Those decisions are invalid because the Supreme Court previously ruled in a case called *New Process Steel* (citation and link below), that the NLRB needs a three-member quorum to have the authority to operate.

Hundreds of legal challenges based on the NLRB's alleged lack of power to do business have been filed since January 2013, when the DC Circuit Court of Appeals first held that President Obama did not have the authority to appoint new members to the NLRB during the January 2012 Senate recess. These 100 plus challenges had all been placed on hold pending today's ruling, and can now be revisited and ruled upon in accordance with the Supreme Court's affirmation of the Court of Appeals' ruling.

National Labor Relations Board v. Noel Canning, et al. (2014) 573 U.S. ___.
http://www.supremecourt.gov/opinions/13pdf/12-1281_bodg.pdf

High Court Kills Obama's Recess Appointments, Law360, New York (June 26, 2014), Erica Teichert
http://www.law360.com/employment/articles/538457?nl_pk=a10b3ef9-255f-46d9-a6ce-679f71a8b826&utm_source=newsletter&utm_medium=email&utm_campaign=employment

New Process Steel v. NLRB, (2010) 560 U.S. ___.
http://www.supremecourt.gov/opinions/09pdf/08-1457.pdf