

INSIGHTS

NLRB Plans to Ignore D.C. Circuit Ruling Invalidating Obama Recess Appointments; Validity of Appointment of Richard Cordray as CFPB Director Also Suspect

January 25, 2013

In what appears to be the continuation of a showdown among the three branches of federal government, the D. C. Circuit ruled today that President Obama's January 2012 "recess" appointments of three members to the National Labor Relations Board ("Board") were unconstitutional.

In [*Noel Canning v. NLRB*](#), No. 12-1115, the court found the appointments of Members Sharon Block and Richard Griffin and former Member Terence Flynn were invalid under the Recess Appointments Clause of the Constitution for two reasons: (1) the Senate was not actually in recess when President Obama made the appointments and (2) the appointments did not fill vacancies that arose during a Senate recess. The court concluded that the Board has lacked the three-member quorum necessary to issue decisions or rules since the expiration of the last constitutional appointment (Member Craig Becker) on January 3, 2012. The decision leaves intact only the appointment of Chairman Mark Pearce, whose term expires August 27, 2013.

The court's ruling calls into question all of the Board's decisions and rules issued, or to be issued, after January 3, 2012, particularly given the U. S. Supreme Court's 2010 *New Process Steel* decision invalidating nearly 600 decisions issued by the Board without the requisite three-member quorum. In spite of this precedent, the Board Chairman today issued a defiant [press release](#) disagreeing with the court's ruling, "not[ing] that this order applies to only one specific case" and stating that the Board "will continue to perform our statutory duties and issue decisions."

If the court's decision is upheld in an expected appeal to the U. S. Supreme Court, then it will deal a severe blow to the significant effects of the aggressive, pro-labor Obama Board. Similar appeals are pending in several other federal circuit courts of appeal, including the Third and Fourth circuits.

Because the January 2012 "recess" appointment of Richard Cordray as Director of the Consumer Financial Protection Bureau was made under identical circumstances, it too is vulnerable, as well as all CFPB regulations issued under his authority. A separate appeal of that appointment is pending.