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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Lawyers Weigh In On High Court's Recess Appointment Ruling

Law360, New York (June 26, 2014, 7:49 PM ET) -- The U.S. Supreme Court on Thursday struck down President Barack Obama's three recess appointments to the National Labor Relations Board, but took a broad view of the president's appointment power. Here, attorneys tell Law360 why the decision in National Labor Relations Board v. Noel Canning is significant.

Anne Knox Averitt, Bradley Arant Boult Cummings LLP
"Specific to Noel Canning, the opinion invalidates the NLRB's decision that the company failed to execute a collective-bargaining agreement. It will also likely require the NLRB to revisit hundreds of decisions issued since the subject Board members' appointment on Jan. 4, 2012. In broader terms, the ruling means that while the president can make a recess appointment without Senate confirmation, either the House or the Senate can block a recess appointment by ending a Senate recess and implementing a 'pro forma session.' This could pose a significant barrier to presidential appointments if Republicans gain control of the Senate in November."

Marshall Babson, Seyfarth Shaw LLP, Former NLRB member
"The immediate implications for the NLRB are that some 128 cases likely will have to be re-decided. This undoubtedly will have an impact on the NLRB's ability to deal with many pending cases and issues before the board. In addition to case processing, however, the Senate's ability to control the times when it is in session very well may become an issue after the November 2014 elections should the Republicans regain control of the Senate. In December 2014, the term of Democratic Board Member Nancy Schiffer ends and with it the Democrat's control of the NLRB. The ability of the president to make a recess appointment at that time may also become severely limited given today's decision by the Supreme Court."

Joel S. Barras, Reed Smith LLP
"Current NLRB members are all properly appointed. Any decision rendered with improper recess appointments so as to eliminate a proper quorum will now have to be redecided. I would expect identical results, as the current members share the same legal philosophy as the recess appointees."

Steven M. Bernstein, Fisher & Phillips LLP
"At a minimum, Noel Canning represents good news for hundreds of employers who sustained adverse determinations between January of 2012 and July of 2013. While some will likely meet the same fate a second time around, that prospect is by no means a certainty, given the potential impact of two new Republican members, and four new members overall. These developments could also impact the business community at large. Forced to confront the daunting task of re-deciding hundreds of decisions, the board could get bogged down in exercises of retrospection that may forestall their current agenda for some time to come."

Paul Bittner, Ice Miller LLP
"The Supreme Court did not directly address the validity of the board's decisions involving recess appointees between Jan. 31, 2012 and July 16, 2013. The board issued a total of 436 decisions in contested cases during this time period, many of which were disfavored by employers. The board's current membership makes it likely that if these cases were heard now, the decisions would be the same. Therefore, employers who are looking for guidance from these prior board decisions would be prudent to act as if they are still good law. The board's regional offices will likely review cases and look for new opportunities to bring these same issues before the board again."

Mario R. Bordogna, Steptoe & Johnson PLLC
"In the short-term, the significance of the court's decision is great, since the NLRB will now have to revisit and, ultimately, again issue rulings in the great many decisions the board issued without a proper quorum of correctly appointed board members, since decisions without a quorum no longer have persuasive or binding effect according to the court's 2010 New Process Steel [v. NLRB] opinion. In the long-term, however, the impact of the decision is not likely to alter the labor law landscape a great deal, since the board's composite membership remains pro-Democratic now, and the decisions the board re-issues are likely to remain similar as to when initially issued. Perhaps the most significant thing for employers to watch going forward is not how the many opinions the NLRB must re-issue the second time around, but whether the time the board takes to do so slows down the timing of other important actions they were expected to tackle later this year, such as delivering a ruling on employee use of employer e-mail systems for organizing activity in the Purple Communications Inc. case, or finalizing the rules on expedited representation elections and pre-election procedures."

Stuart R. Buttrick, Faegre Baker Daniels
"The decision is significant from a constitutional perspective because it is the first time the Supreme Court has ever addressed the meaning of the Recess Appointments Clause. From a labor law perspective, the decision invalidates hundreds of NLRB cases that were decided by the unconstitutionally appointed members of the NLRB. The current NLRB will now need to spend significant time reconsidering all of the improperly decided cases — like it did when the court decided New Process Steel v. NLRB in 2010. Moreover, Noel Canning also calls into question other acts taken by the NLRB, including its appointments of Regional Directors and other Board officials. Finally, I think it is likely that Noel Canning will significantly slow down any potential controversial rule-making by the Board — both because it may now be more wary of additional legal challenges to such rules and because of the time needed to revisit all of the improperly decided decisions that were invalided by Noel Canning."

Elizabeth Carlson, Hodgson Russ LLP
"For employers, what does the Noel Canning ruling mean? Several hundred decisions by the NLRB are now invalid. The current full board will have to revisit the recess appointment cases and either reissue decisions or reevaluate the recess board's decisions. It is yet to be seen if significant decisions, on topics from social media and the definition of protected concerted activity to dues check-offs and Beck objectors. Moreover, for employers with current pending matters at the board, there may be delay in the processing of those cases while the board determines how to proceed on the invalidated cases."

Mark Carter, Dinsmore & Shohl LLP
"As a result of the Supreme Court's decision, it is plain that all the NLRB actions as a board were ultra vires as the Supreme Court has previously held that in order for the NLRB to take action, it must have a quorum of duly appointed members. Because the three members appointed in 2012 were not appropriately appointed, a quorum of the NLRB did not exist when they took action and their decisions

were, as a matter of law, ultra vires, or, without legal authority. The critical question now is what, if any, precedential impact the NLRB and its General Counsel will afford to the board decisions rendered from 2012 until a properly confirmed NLRB was constituted, and how the cases decided by Chairman Pearce and Member Hayes, along with the invalid appointees, will be finally resolved."

John Cooney, Venable LLP
"The bottom line is that decision is a loss for President Obama, who will pass along diminished powers to all his successors. But given the extraordinary risk the Administration ran by making recess appointments during a three day recess of the Senate, the outcome could have been much, much worse. The holding today is extremely narrow — that a three day recess is not sufficiently long for the president to exercise that power. The Office of the Presidency dodged a bullet."

John Elwood, Vinson & Elkins LLP
"Under the Adjournment Clause, the Senate cannot adjourn for more than three days without the House's consent. Because either house of Congress can require the Senate to use pro forma sessions, after Noel Canning, the president will be unable practically to make recess appointments unless both houses permit it. Noel Canning may not have great practical effect because the Vacancies Reform Act gives the President significant authority to fill Executive offices with acting officials — though that law does not apply to NLRB appointments. The decision's greatest significance may be its willingness to consider Executive Branch practice to resolve separation-of-powers issues."

Miguel A. Estrada, Gibson Dunn, Represented Sen. Mitch McConnell and 44 others
"Today's ruling is a victory for the Senate. The Supreme Court reaffirmed the Senate's power to prescribe its own rules, including the right to determine for itself when it is in session, and rejected the president's completely unprecedented assertion of unilateral appointment power. I am grateful to Leader McConnell for giving me the opportunity to represent the Senate's larger institutional interests in the Supreme Court."

Peter J. Felsenfeld, Barger & Wolen LLP
"The cat and mouse game between the Executive Branch and Congress regarding recess appointments had become untenable. The Canning ruling appears to provide a reasonable framework for applying the Constitution's Appointments Clause in the modern era."

Charlie Feuss, Kilpatrick Townsend & Stockton LLP
"The decision is significant in that it brings clarity to the limits of the president's power to use recess appointments. It is really not significant from a labor relations standpoint because the membership of the NLRB has changed and is functioning with a pro-labor majority as it was at the time of the board's decision in the underlying case. The new majority will have some busy-work in revisiting hundreds of cases decided by the board members whose appointments were just ruled unconstitutional, but this will not change the board's current operations or agenda."

Noel J. Francisco, Jones Day, Argued the case on behalf of Noel Canning
"We are delighted that the Supreme Court unanimously agreed with our client's position that the president's appointments to the [NLRB] were unconstitutional. The court's ruling vindicates the constitutional rights of the Noel Canning Company and ensures that the Recess Appointment Power is exercised in accordance with constitutional limits."

Vito A. Gagliardi Jr., Porzio Bromberg & Newman PC
"While the Supreme Court decision in the Noel Canning is significant in its precedent-setting definition

of the scope of the president's recess powers, its impact on the parties whose cases were decided by the recess-appointees likely is limited. The NLRB now is staffed by members whose appointment is not in question, and I would expect the NLRB simply to vote to ratify the decisions made by the board previously with the recess-appointee majority. Some of the affected litigants may use this development as an opportunity to have their case reconsidered, but there is no evidence so far that such a move will be considered by the NLRB."

Mark Girouard, Nilan Johnson Lewis PA
"At the end of the day, it is doubtful that any of the decisions invalidated by the court's ruling will turn out differently when they are re-decided; but in the meantime, employers will likely see delays in the processing of pending cases while the board works its way through this new backlog. The need to re-decide all of these cases will also likely slow the board's aggressive, pro-labor rule-making agenda, including its efforts to create 'hurry-up' election rules and to require employers to allow organizers to use company e-mail to solicit employees."

Seth D. Harris, Dentons, former acting secretary for the DOL
"Today's decision in NLRB v. Noel Canning gave Americans a window into the epic struggle over constitutional interpretation that rages in the private chambers of the U.S. Supreme Court. Justice Stephen Breyer and a slim majority won the day for a narrower reading of the Constitution's Recess Appointments clause than President Obama might have liked but, over the heated objections of constitutional formalist Justice Antonin Scalia, the majority preserved future presidents' ability to appoint officials across the federal government when the Senate takes a break longer than 10 days. Nonetheless, the Noel Canning decision creates a mess at the [NLRB] that will take months or longer to clean up. Hundreds of cases decided by a board populated by recess appointees beginning in 2012 must be reconsidered by the current board of Senate-confirmed presidential appointees. An agency that's already managing its ordinary case docket along with aggressive congressional oversight, new efforts at regulatory lawmaking, and a host of legal and political issues just had a mountain of additional work dumped on it by the U.S. Supreme Court. There will be long days ahead for the NLRB's already hard-working staff."

Brian Hayes, Ogletree Deakins Nash Smoak & Stewart PC, Former NLRB member
"The now conclusively unconstitutional appointments to the NLRB will result in more confusion, delay and uncertainty for all parties before the NLRB. What is clear is that a host of decisions, many of them far-reaching and controversial, are invalid because they were decided by improperly seated NLRB Board Members. The NLRB will seek the return of those cases that are still being contested in the federal courts, and will have to reconsider and re-issue all that are returned. The board may also have to deal with a host of other claims related to the unconstitutional appointments."

Allyson Ho, Morgan Lewis & Bockius LLP
"The court's unanimous decision that the specific recess appointments to the NLRB were invalid endorses separation of powers and confirms an important structural constitutional protection. It also vindicates Noel Canning's litigation strategy of asking the court to decide that narrower question as well as the broader issues before the court."

Steven B. Katz, Reed Smith LLP
"Between this morning's decision in Noel Canning, and Monday's decision of the California Supreme Court in Iskanian v. CLS Transportation, D.R. Horton is dead. The NLRB panel that originally decided D.R. Horton had the same recess appointment problem that the court addressed in Noel Canning. Furthermore, in Iskanian, the state court most notoriously hostile to class relief waivers in arbitration

overwhelmingly concluded that the NLRB's rejection of FAA preemption in D.R. Horton was fundamentally flawed and erroneous. The few states that tried to follow California's lead in resisting arbitration to preserve employment class actions will doubtlessly fall into line very quickly."

John P. Keil, Collazo Florentino & Keil LLP
"The significance of Noel Canning is that it vacates hundreds of NLRB decisions. It will be more difficult for the agency to reopen and resolve these cases than in the aftermath of the Supreme Court's decision in New Process Steel, where one member of each party agreed on the outcomes. The decisions vacated here are more divisive. The longer-term significance will be to limit the president's power to make recess appointments. The court has effectively left it to Congress to define that power, by saying that, in most cases, the Senate can determine when it's in session. The issue remains whether this ultimately will have a moderating influence on presidential nominations to key government agencies."

Robert M. Lieber, Blank Rome LLP
"My reaction is that, implementing the decision, the board will reconsider the decisions where there wasn't a legitimate complement of board members, and largely rubber-stamp the prior decisions, except perhaps in only a very few cases where the new board, which is even more liberal than before, wants to reverse the prior decision. There simply are too many cases that will have to go onto the docket to warrant substantive deliberations."

Jeffery A. Meyer, Kaufman Dolowich & Voluck LLP
"Today's unanimous Supreme Court decision struck down three Obama appointments to the NLRB. The decision will invalidate hundreds, if not thousands, of decisions issued by the board during that time. While the decision addresses some very critical constitutional issues, the impact of the decision as it related to the labor and employment may likely be marginal at best. All of the cases decided by the improper board will likely be reviewed by the current five-member board stacked with otherwise valid Obama appointees. It is probable that a majority of these decisions will be upheld by the new board."

Jon Nadler, Eckert Seamans Cherin & Mellot LLC
"For employers, the short-term significance is that hundreds of NLRB decisions issued between January 2012 and August 2013 are nullified, including key decisions limiting employer rights in the areas of social media, confidentiality during internal investigations, off-duty employee access to an employer's property, continuation of dues-checkoff even after expiration of a collective bargaining agreement, and the obligation to bargain with a newly certified union before imposing serious discipline. However, that impact is likely to be short lived. As was the case after the 2010 decision in New Process Steel, the board is likely to reaffirm most, if not all, of these decisions in the next six to 12 months. The broader impact is a greater likelihood that the NLRB will experience more episodes of paralysis where it cannot act because of lack of a quorum. Under the court's ruling, it appears either the House or the Senate now can prevent a recess of sufficient length to permit the president to make a recess appointment to fill vacancies at the NLRB — and elsewhere — and so unless one party controls the White House, the Senate and the House, the potential for gridlock on this issue appears greater than ever."

Royal F. Oakes, Barger & Wolen LLP
"The recess appointment ruling boosts congressional power, recognizing the Senate has the right to define 'recess' as it wishes. As a practical matter though, the change in Senate rules, permitting a majority to approve appointments, means the president won't need to go for stealth appointees under cover of recess."

Bob Overman, Stinson Leonard Street LLP

"We all learned in civics class that our government has three branches of power. Today's unanimous Supreme Court decision reminded us of that Constitutional structure. By the administrative branch unilaterally defining whether Congress was in session or not, it usurped the power of the legislative branch. Using its self-definition of 'recess,' the administrative branch made the board member appointments. By overturning those appointments, the judicial branch corrected the overreach of the administrative branch and restored the balance of power. That's a strong Constitutional statement. We are now left with the real world consequences of the ruling: how will the present board address the decisions made by the improperly assembled NLRB?"

David Phippen, Constangy Brooks & Smith LLP
"The fallout could be huge. All board decisions from Jan. 4, 2012, to July 30, 2013, are void for lack of a three-member quorum. Many of these decisions negatively affected employers; several overruled precedent. The board will probably have to redecide the still-pending cases, as it did after New Process Steel. However, the results may not be dramatically different because the current board is likely to come to the same results as the 'invalid' board. Will past appointments of Regional Directors and ALJs be invalid, too? Does the current General Counsel now have a conflict? Finally, the decision is a victory for the rule of law and the Separation of Powers. The president cannot unilaterally define terms to override the power of the legislative branch."

Robert Rizzi, Steptoe & Johnson LLP
"For the Obama administration, it could have been worse. Many observers believed that the relatively aggressive position on recess appointments, and the shocking pushback by the D.C. Circuit, created a risk that the Canning case could have upended longstanding constitutional assumptions. The Supreme Court decision did not do so. However, the court has in effect given the GOP the right to prevent all recess appointments for the rest of the Obama administration, by staging pro forma sessions as currently choreographed. If the GOP wins the Senate in November, it could be difficult or impossible to staff certain executive branch positions with Senate confirmed appointees. This will in turn put much greater stress on the White House 'czar' system. That may be the next political battlefield."

Mary B. Rogers, Day Pitney LLP
"In light of the 2010 U.S. Supreme Court decision in New Process Steel, which held that the NLRB did not have the power to act without a quorum of three-members, the hundreds of decisions issued by the NLRB during the terms of the Jan. 4, 2012, three recess appointees likely are invalid. The NLRB may take the same approach that it did following the New Process Steel decision: review and issue new decisions in some cases and close the remainder of the cases 'with no review required.' Today's decision is unlikely to change the NLRB's agenda. It currently has five-members appointed with Senate confirmation. Three of the five members previously worked as counsel to unions, and it is expected that the NLRB will continue to issue decisions and rules in favor of organized labor."

Philip B. Rosen, Jackson Lewis PC
"Today's decision is a 'blockbuster' from a constitutional perspective. It clarifies the recess appointment quagmire and makes it harder for the president to make recess appointments in the future. It also will result in significant additional work for the NLRB immediately. The impact, however, is significantly lessened for the affected cases because the NLRB now has a properly constituted and confirmed full board. We anticipate that today's decision will result in the denial of enforcement of more than 1,000 board decisions awaiting decision by various U.S. courts of appeals. However, as happened in connection with the New Process Steel decision, we expect the current board to move swiftly to reconsider all of those decisions and essentially reconfirm them. The composition of the current board is not unlike the composition of the board that decided the cases that are now invalid. There are two

additional areas of impact to consider. First, we expect the decision will make it very difficult for the president to make recess appointments because the court has given the Senate wide latitude in deciding when it is and is not in recess. Second, the task of having to review the many invalid decisions could result in the delay of several NLRB initiatives. We do not believe that this will delay the NLRB's issuance of a final election procedures rule. However, the board will have to manage its resources by prioritizing whether it has the time to quickly move forward on other cases, such as the NLRB's review of employee use of employer email in Purple Communications Inc. and joint employer standard in Browning-Ferris Industries. The ruling also could delay — but not change — any decision in the controversial Northwestern University athlete-as-employee case."

Jonathan Segal, Duane Morris LLP
"SCOTUS unanimously struck down as unconstitutional President Obama's appointments to the NLRB. While the court did not analyze whether decisions issued under the unconstitutionally appointed board are not binding, the result should be that any decision issued during this time can be successfully challenged because the D.C. Circuit case that was affirmed by the Supreme Court held that the board's decision was invalid because the board was invalid. While a victory for the rule of law, it probably does not offer much relief for employers. Expect the NLRB to reach out for same types of cases and issue the same rulings."

Alex Stevens, Haynes and Boone LLP
"The immediate takeaway from Noel Canning is the Supreme Court's affirmation of the Senate's power — not the president's — to decide when it is in recess. This decision will protect the Senate as a key player in the appointment process, rather than an obstacle to be worked around. From a labor law perspective, we have not seen the last of the hundreds of decisions invalidated by Noel Canning. Today, all five NLRB members have been confirmed by the Senate, and have full authority to reconsider these cases and issue new decisions. When the board took similar steps following New Process Steel, most cases reached the same result. The same is likely to happen here. While there may be drastic changes to the labor law landscape in the coming months, they are more likely to come from pending cases currently before the board."

Peter Stergios, McCarter & English LLP
"Under Supreme Court precedent the NLRB as constituted lacked decision-making authority, and this decision presumably renders invalid the determinations of the recess appointees. But given the NLRB's current political bent, it's likely to review earlier decisions cursorily and rubber stamp them. It's hard to envision significant reexamination or any unraveling of any NLRB decisions simply because the appointments are now deemed invalid, as the affected cases' merits don't turn on the appointments' validity. To the extent this throws into question the validity of NLRB's decisions, that could also apply to any federal agency where decisions depended on appointees installed improperly under the Supreme Court's rationale."

Cate Stetson, Hogan Lovells
"The Supreme Court confirmed today that the president has the power to appoint during either an inter-session or intra-session recess of the Congress, and may fill vacancies that arise either before or during those recesses. What the president may not do, the court explained, is take advantage of a short recess punctuated with pro forma sessions to make appointments; anything less than 10 days is 'presumptively too short.' Thus it is the length of the recess, not its character as inter-session or intra-session, that matters."

Rick Warren, Ford & Harrison LLP
"Today's decision will have a significant impact on the board, at least in the short term. By way of reference, after the Supreme Court's decision in New Process Steel, only about 100 two-member decisions out of approximately 550 were returned to the board for new decisions to be issued. A similar percentage could occur here. It is likely that the current board would uphold the decisions in question. Nonetheless, this process will create uncertainty, increase the board's caseload, and slow down its momentum in issuing decisions and taking other actions that likely would be unfavorable to employers."

Scott J. Witlin, Barnes & Thornburg LLP
"Although unanimous in judgment holding that President Obama exceeded his authority, the court split 5-4 on more far reaching issues of whether the president can fill vacancies on a recess basis if those vacancies arise while the Senate is in session and whether the recess appointment power applies only to intersession recesses. The D.C. Circuit had more severely limited presidential power. Four Justices who are generally viewed as conservative, Roberts, Scalia, Thomas and Alito, would have held that presidential authority is more limited. Given the conservatives are frequently thought of as favoring a strong executive, this decision, along with others in recent years that reigned in attempts by the Obama administration to expand presidential power could well cause scholars to go back and reassess their views of what is left and what is right."

--Editing by Emily Kokoll.

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