

Rehabilitating Agency Actions after the *New Process Steel* and *Noel Canning* Decisions

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New Process Steel v. NLRB

- January 2008 through April 5, 2010—NLRB operated with two members
- June 17, 2010—U.S. Supreme Court ruled
 - that the statute required the Board’s powers to be vested at all times in a group of at least three members
 - a delegee group must maintain a membership of three to exercise delegated authority of the Board

New Process Steel v. NLRB: Impact and NLRB Response

- Decision invalidated approximately 600 rulings during the 27-month period
- 90 cases pending in the federal courts of appeals
- Six cases pending at the Supreme Court
- July 1, 2010—NLRB announced “The Board is seeking to have each of these cases remanded to the Board for further consideration.”

— BNA Labor Relations Week, July 8, 2010

New Process Steel v. NLRB: Impact and NLRB Response

- July 8, 2010, NLRB press release
 - Announced that it ratified the December 2007 temporary delegation to the NLRB General Counsel of all authority on court litigation matters
 - Ratified all personnel, administrative, and procurement actions taken by the two Members during the 27-month period, including appointments of Regional Directors, Administrative Law Judges, and Senior Executives between January 1, 2008, and April 5, 2010

New Process Steel v. NLRB: Impact and NLRB Response

- August 6, 2010—NLRB released decisions in four cases reconsidered by a three-member panel, made up of the two members who issued the original decisions, plus a new member, Mark Gaston Pearce
 - Statement that the new panel considered the ALJ’s decision, the evidentiary record, the parties’ exceptions and briefs, and adopted the ALJ’s findings and conclusions “for the reasons stated” in the prior decision of the two members
 - BNA Labor Relations Week, August 12, 2010

New Process Steel v. NLRB: Impact and NLRB Response

- NLRB stated that about 500 other cases “were closed through compliance with the original Board decision, settlement, withdrawal, or other means”
- Remainder “in some stage of litigation or compliance stemming from the original decision”
- Only about 100 ultimately contested
 - BNA Labor Relations Week, August 12, 2010
 - BNA USLW, March 3, 2013

Noel Canning v. NLRB

- January 4, 2012—President Obama appointed Richard Griffin, Sharon Block, and Terrence Flynn, Jr., asserting the recess appointment power
- January 25, 2013—U.S. Court of Appeals for the District of Columbia Circuit ruled
 - The President can make recess appointments only during intersession recesses, not during intrasession recesses
 - Such appointments can be made only to fill vacancies that have occurred--“happened”--during the recess in which the appointment is made

New Process Steel and Noel Canning

- All NLRB actions between January 9, 2012, through the present invalidated because during no portion of that period did the NLRB have three Senate-confirmed members
- Because the NLRB consists of only Marc Gaston Pearce, now the Chairman, and two recess appointees, the NLRB lacks authority to decide cases under *Noel Canning* and *New Process Steel* in the DC Circuit

Time Period	Published Decisions	Unpublished Decisions	Total
January 9 – July 24, 2012	87	234	321
July 24 – December 16, 2012	124	208	332
December 17, 2012 – March 3, 2013	27	85	112
TOTAL:	238	527	765

Chart derived from Kenneth T. Lopatka, *Understanding Noel Canning—How It Arose, What It resolved, and Where It Leads*, Bloomberg BNA Workplace Law Report, 3/15/2013.

Impact of *New Process Steel* and *Noel Canning*

- D.C. Circuit is holding 33 cases in abeyance plus 29 cases in which the April 2010 recess appointment of former member Craig Becker is an issue
- Recess appointments of Block, Flynn, and Griffin raised in NLRB enforcement proceedings in every federal circuit except the Tenth
- Becker's appointment is an issue in cases in the third, Fourth, Fifth, Ninth, and Tenth circuits

Impact of *New Process Steel* and *Noel Canning*

- *Noel Canning* raised in nine representation cases and 58 unfair labor practice cases
- Agency expects challenges to the actions of 10 NLRB regional directors appointed since 2010 with approval of board members whose recess appointments are disputed
- Ruling in *Noel Canning* at odds with rulings in three other circuits

NLRB Response to Noel Canning

- "The Board respectfully disagrees with today's decision and believes that the President's position in the matter will ultimately be upheld. It should be noted that this order applies to only one specific case, Noel Canning, and that similar questions have been raised in more than a dozen cases pending in other courts of appeals.
- In the meantime, the Board has important work to do. The parties who come to us seek and expect careful consideration and resolution of their cases, and for that reason, we will continue to perform our statutory duties and issue decisions."
 - NLRB Press Release, January 25, 2013

NLRB Response to Noel Canning

- March 12, 2013 NLRB Press Release—intends to seek Supreme Court Review
- Petition for cert. filed April 25, 2013
- Response due May 28, 2013
- February 4, 2013, Supreme Court denied emergency relief from NLRB injunction ordering a company to reinstate striking nurses in HealthBridge Management case

Impact of *Noel Canning* on CFPB

- Consumer Financial Protection Bureau (CFPB) Director Richard Cordray appointed on January 4, 2012, the same time as NLRB recess appointees whose appointments were invalidated in *Noel Canning*
- January 10, 2013—Cordray signed a final rule implementing Sections 1411 and 1412 of the Dodd-Frank Act – with an effective date of January 10, 2014—Qualified Mortgage Rule

Impact of *Noel Canning* on CFPB

- Cordray signed final rule on remittance transfers to foreign countries under the Electronic Funds Transfer Act January 23, 2012
- Cordray signed modifications on August 7, 2012
- Cordray signed technical corrections June 26, 2012
- Cordray extended effective date on January 22, 2013
- Comment period open on proposal for further amendments

Impact of *Noel Canning* on CFPB

- Without a validly appointed Director, the CFPB cannot issue regulations, take enforcement actions, or take other actions
- Casts doubt on the legal status of existing regulations, Truth in Lending Act provides for private rights of action—so not just CFPB enforcement, but third party reliance

Possible Remedies When Agency Actions Performed by Official Not Validly Appointed

- *Buckley v. Valeo* (1976) –S.Ct. held four members of the FEC invalidly appointed, but stated past acts of FEC would be accorded “*de facto* validity”
 - Court permitted FEC to continue “legislative” functions like data collection and factual investigation
 - Invalidity of appointments did not affect the validity of FEC administrative actions and determinations
 - Court stayed for 30 days the judgment to give Congress opportunity to revise the statute, or to make other arrangements to allow continued enforcement of valid portions of campaign finance statutes administered by FEC

Possible Remedies When Agency Actions Performed by Official Not Validly Appointed

- “When the powers of the FEC have been significantly affected by the Court, Congress has stepped in and quickly amended the Act to protect its interests and maintain the goals of the legislation.”
 - (Joshua Kershner, *Political Party Restrictions and the Appointments Clause: The Federal Election Commission's Appointments Process Is Constitutional*, 32 CARDOZO L. REV. 615, 653 n. 250 (2010))
- This response not likely here because of the inter-branch conflict—not a problem Congress can remedy, or would be so inclined to remedy

Possible Remedies When Agency Actions Performed by Official Not Validly Appointed

- *Northern Pipeline* (1982)—when Supreme Court ruled that process for adjudicating bankruptcy disputes violated Article III by conferring judicial power on Article I courts, it applied the ruling prospectively and did not upset prior bankruptcy court rulings
- *Ryder v. U.S.* (1995)—appeared to narrow *Buckley* determination to acts of an entire legislative (or executive?) body— noted *de facto* officer doctrine protects public from chaos, ensures orderly functioning of government
- *Franklin v. OTS* (D .Kansas 1990)—no retroactive invalidation of actions of Director of OTS not validly appointed because of chaos that could result in the savings and loan industry
- *Free Enterprise Fund v. Public Co. Accounting Oversight Board* (2010)—invalidated two-tier, for-cause removal provision, in Sarbanes-Oxley Act, but left rest of apparatus in place, a victory with no meaningful remedy

Raymond Natter, *Implications of Canning Case on CFPB Rules* (Barnett, Sivon & Natter, P.C.) (February 2013) Kent Barnett, *The Consumer Financial Protection Bureau's Appointment with Trouble*, 60 AM. U. L. REV. 1459 (2011)

Possible Remedies When Agency Actions Performed by Official Not Validly Appointed

- QM Rule—Sections 1411 and 1412 of Dodd-Frank Act automatically went into effect on January 21, 2013, unless final regs promulgated before that date—faced with statute going into effect without regulatory guidance, court could decide that CFPB regs remain in effect pending valid appointment of a Director
- Disruption in mortgage markets a factor
- QM rule is not effective until January 2014, so do not disturb status of rule at this time
 - Natter

Possible Remedies When Agency Actions Performed by Official Not Validly Appointed

Secretary of Treasury—asserts authority under section 1066 to administer consumer provisions transferred to CFPB prior to appointment of the Director

--administrative transfer of functions, or administration of substantive provisions of statute as well?

--Treasury could argue that because FRB proposed both QM and remittance rule, the proposed rule of CFPB is saved by section 1063 of Dodd-Frank

--Treasury—new proposed rule, or issue a final rule based on proposed rule—still subject to challenge

-Natter

Concluding Thoughts

- President could nominate and Senate could confirm new NLRB Members providing a quorum and the newly constituted NLRB could ratify all prior actions of Commission
- Supreme Court could overrule D.C. Circuit decision in *Noel Canning* and validate recess appointments of NLRB Members (and by implication, Director Cordray of CFPB)

Concluding Thoughts

- Supreme Court could endorse decision of D.C. Circuit in *Noel Canning* and then fashion a variety of remedies:
 - Give NLRB actions *de facto* validity (*Buckley*, *Northern Pipeline*)
 - Stay prospective application of judgment (*Buckley*) to prevent disruption, chaos, extensive litigation and to give political branches time to resolve situation
 - Invalidate all NLRB actions—forcing similar response as in *New Process Steel*—assuming NLRB can achieve a quorum

Concluding Thoughts

- NLRB is powerless to remedy its situation without a quorum, validation of the appointments by the Supreme Court, or *de facto* validation of past actions
 - Not just Board adjudications, but appointments of regional directors—implications for pay as well as actions

Concluding Thoughts

- CFPB seems to have more options—which are not without risk
- Best solution here, also, is to have a Senate-Confirmed Director who can ratify prior actions, or reconsider as NLRB did after *New Process Steel*

Concluding Thoughts

- Administrative Law as proxy for political battles over the value of regulatory programs
 - NLRB
 - CFPB



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