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Recent Developments Under the National Labor Relations Act

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I. Introduction

Conceived in the throes of a difficult struggle between labor and industry, the National Labor Relations Board (*NLRB* or *Board*) has faced adversity in implementing its charge to protect the rights of both employees and employers, encourage collective bargaining, and curtail harmful private sector labor and management practices.[1] In the midst of the Great Depression, Congress enacted the National Labor Relations Act (*NLRA* or *Act*), 29 U.S.C. § 151 et seq., which President Roosevelt signed into law on July 5, 1935.[2] Since its inception, the Board has been no stranger to constitutional challenges or litigation. The validity and constitutionality of the NLRA itself was challenged when the Act and Board were still in their infancy. However, despite invalidating much of the previous New Deal legislation, and faced with President Roosevelt's so-called court packing plan, the Supreme Court upheld the NLRA as a valid exercise of Congress's power to regulate interstate commerce.[3]

In recent years, the Board's effectiveness has been questioned due to the decline of private sector union membership among American workers despite the increase in the nation's overall employment rate.[4] From 2012 to 2013, union membership remained steady at 11.3 percent of the workforce or approximately 14.5 million workers.[5] Union membership varies dramatically among the states. California and New York have the largest number of union members. Even though Texas has a workforce of 2.7 million employees, the state has approximately one-fourth of the number of represented employees as New York.[6] Notwithstanding this trend, the Board's recent decisions and policies have had a major impact on both union and non-union workplaces as the agency continue to address social media policies and other emerging issues.

II. Constitutionality of President Obama's Recess Appointments

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[1] National Labor Relations Act, *available at* http://www.nlrb.gov/resources/national-labor-relations-act (last visited April 1, 2014).

[2] History and Photos, The 1935 Passage of the Wagner Act, http://www.nlrb.gov/75th/1935passage.html (last visited April 1, 2014).

[3] *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). The Court reasoned that the Act "purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power."

[4] For a discussion of the decline in union membership *see* Steven Greenhouse, Share of the Workforce in Union Falls to a 97-Year Low, New York Times, Jan. 23, 2013, *available at* http://www.nytimes.com/2013/01/24/business/union-membership-drops-despite-job-growth.html?_r=0.

[5] Union Members Survey, Dep't of Labor, Jan. 24, 2014, *available at* http://www.bls.gov/news.release/union2.nr0.htm.

[6] See *supra* note 5. 2.4 million union members reside in California and two million reside in New York. Union density varies by region. The West Coast and Mid-Atlantic areas have higher union membership rates compared to the Southern United States. For example, in Mississippi and South Carolina only 3.7 percent of persons in the workforce are union members. *Id.* Compare that to Hawaii where 22.1 percent of the workforce is unionized. *Id.*

Noel Canning v. NLRB[7] has called into question the legitimacy of Board decisions in numerous cases. On January 25, 2013, the D.C. Circuit Court of Appeals vacated an order of the NLRB on the ground that the Board lacked the quorum necessary for it to take lawful action.[8] Since then several other circuits have adopted the reasoning of the D.C. Circuit in *Noel Canning*.[9] The Supreme Court granted certiorari in June 2013 and heard oral arguments on January 13, 2014.[10]

The implications of the Supreme Court's ruling in *Noel Canning* will extend beyond federal labor jurisprudence as it concerns important constitutional questions, including the fundamental issue of separation of powers. The case primarily centers on the President's ability to make federal appointments during Congressional recesses to positions normally requiring the advice and consent of the Senate. If the Supreme Court upholds the ruling of the D.C. Circuit, potentially hundreds of decisions issued by the NLRB could be invalidated going as far back as the Reagan Administration when the first recess appointments to the Board occurred.[11]

A. *New Process Steel* and The Necessity of a Quorum

A complete discussion of the impact of the *Noel Canning* decision must first begin with the history and events setting the stage for President Obama's appointments to the NLRB. This story began in 2007 when the Democrat-controlled Senate began performing *pro forma* sessions rather than adjourning for a formal recess as a strategy to prevent Republican President George W. Bush from making recess appointments.[12] During this time, President Bush declined to challenge the Senate's strategy and made no recess appointments. The President's recess appointment powers comes from Article II, Section 2, Clause 3 of the Constitution that reads in relevant part: "The

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[7] The NLRB decision giving rise to the litigation was *Noel Canning, A Division of Noel Corporation and Teamsters Local 760,* 358 NLRB No. 4 (2012).

[8] *Noel Canning v. NLRB*, 705 F.3d 490 (2013).

[9] For example, the Third Circuit adopted the D.C. Circuit's definition of *recess* and found President Obama's recess appointments to the Board unconstitutional in *NLRB v. New Vista Nursing and Rehabilitation,* 719 F.3d 203 (3rd Cir. 2013). The Fourth Circuit followed these decisions in *NLRB v. Enterprise Leasing Co. Southwest, LLC*, 722 F.3d 609 (4th Cir. 2013).

[10] The Supreme Court granted certiorari and directed the parties to brief the question whether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro forma sessions. *NLRB v. Noel Canning*, 133 S. Ct. 2861 (2013).

[11] Because it deals with interpretation of a constitutional clause that applies to numerous agencies other than the NLRB, the Supreme Court's decision could potentially expose the decisions of other agencies to constitutional attacks as well. See *The Noel Canning Decision and Recess Appointments*, memorandum, Congressional Research Service, Feb. 4, 2013, available at http://www.fas.org/sgp/crs/misc/m020413.pdf.

[12] *See* 153 Cong. Rec. S14609 (daily ed. Nov. 16, 2007) (remarks of Mr. Reid) (stating "the Senate will be coming in for pro forma sessions during the Thanksgiving holiday to prevent recess appointments.").

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