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Practical Implications of *Noel Canning* on the National Labor Relations Board: In Brief

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Summary

On January 4, 2012, President Obama exercised his recess appointment power and appointed three individuals—Terrence F. Flynn, Sharon Block, and Richard F. Griffin, Jr.—to be members of the National Labor Relations Board (NLRB or Board). Whether the President had authority to make these appointments pursuant to the Recess Appointments Clause was at issue in the 2014 Supreme Court case *National Labor Relations Board v. Noel Canning*. The case marked the first time that the Court would examine the scope of the Recess Appointments Clause.

This report provides an overview of the Recess Appointments Clause, as well as the unique factual circumstances of the NLRB recess appointments. In *Noel Canning*, a unanimous Supreme Court concluded that the three recess appointments were constitutionally invalid. The Court was sharply divided, however, when it came to the reasoning for why the appointments were infirm. Despite adopting a broad reading of the Recess Appointments Clause, the majority of the Court ruled the appointments invalid because it determined that the Senate was only in an intra-session recess of three days, a period of time deemed insufficient to trigger the President's recess appointment power.

The report also discusses some of the practical implications at issue for the NLRB in the aftermath of the Court's decision, and examines how the Board will address the roughly 700 decisions that were issued between January 4, 2012, and August 5, 2013, when the NLRB consisted of three Senate-confirmed members. Although the NLRB has not formally outlined its plans for these decisions, its approach is likely to follow the actions taken by the agency in 2010, when approximately 550 Board decisions were similarly called into question as a result of the Supreme Court's decision in *New Process Steel, L.P. v. National Labor Relations Board*. In July 2014, the NLRB's General Counsel indicated that the agency had already set aside its orders in 43 cases that were pending in federal appellate courts when *Noel Canning* was decided. In addition, to setting aside these orders, the Board has also filed motions with the various federal courts of appeals to return other pending cases to the Board for further action.

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Introduction

On January 4, 2012, President Obama exercised his recess appointment power and appointed three individuals—Terrence F. Flynn, Sharon Block, and Richard F. Griffin, Jr.—to be members of the National Labor Relations Board (NLRB or Board).[1] Whether the President had authority to make these appointments pursuant to the Recess Appointments Clause was at issue in the 2014 Supreme Court case *National Labor Relations Board v. Noel Canning*.[2] This case marked the first time that the Court would examine the scope of the Recess Appointments Clause.

This report provides an overview of the Recess Appointments Clause, as well as the unique factual circumstances of the NLRB recess appointments. The report also reviews the Supreme Court's decision in *Noel Canning*, and discusses some of the practical implications at issue for the NLRB in the aftermath of the Court's decision.

Overview of Recess Appointments Clause

The U.S. Constitution allocates specific roles to both the President and the Senate in the appointment of government officials. The Constitution establishes two methods by which the President may make appointments. The Appointments Clause, which establishes the principal method of appointment, requires that the President: "*shall nominate, and by and with the Advice and Consent of the Senate*, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."[3] Thus, while the Appointments Clause authorizes the President to nominate principal officers of the United States,[4] a nominee cannot assume the powers of the office for which she has been nominated until confirmed by the Senate.[5]

The Constitution also provides an alternative method of appointment that may be exercised only "during the Recess of the Senate." The Recess Appointments Clause establishes that:

> The President shall have 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.[6]

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[1] Press Release, White House, *President Obama Announces Recess Appointments to Key Administration Posts* (Jan. 4, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts. The President also recess appointed Richard Cordray as Director of the Consumer Financial Protection Bureau, who was later confirmed by the Senate to the position on July 16, 2013. For additional discussion of Cordray's appointment, *see* CRS Legal Sidebar WSLG998, *CFPB Likely Unaffected by the Supreme Court's Recess Appointment Decision*, by (name redacted).

[2] 134 S. Ct. 2550 (2014).

[3] U.S. Const. art. II, §2, cl. 2 (emphasis added). The Appointments Clause also provides that the "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Court of Law, or in the Heads of Departments."

[4] The Supreme Court has distinguished "principal officers," who must be appointed by the President with the advice and consent of the Senate, from inferior officers, whose appointment Congress may vest solely in the President, the judiciary, or a head of a department. U.S. Const. art. II, §2, cl. 2.

[5] Once confirmed by the Senate, an officer is not formally appointed until her commission is signed by the President.

[6] U.S. Const. art. II, §2, cl. 3.

The Recess Appointments Clause permits the President to make temporary appointments unilaterally during periods in which the Senate is not in session. It has generally been opined that the Clause was crafted to enable the President to ensure the operation of the government during periods when the Senate was not in session and therefore unable to perform its advice and consent function.[7] Though designed to ensure administrative continuity, Presidents also have exercised their recess appointment power for tactical or political purposes throughout the history of the republic, giving rise to significant political and legal controversy.[8] Interpretations and the President's application of the recess appointment power have evolved over time, likely due to the inherent textual ambiguities of the Recess Appointments Clause.[9]

Most prominent among these lingering questions is the proper interpretation of the two phrases that form the very foundation of the Clause: "the Recess of the Senate" and "Vacancies that may happen." With respect to the former, what is meant by "the Recess"? Specifically, is the President's recess appointment authority triggered only during inter-session recesses (recesses *between* enumerated sessions of Congress) or may he also exercise his authority during intra-session recesses (recesses that occur *within* an enumerated session of Congress)?[10] Regarding the latter, must the vacancy *arise* during the recess in which the President exercises his appointment authority, or is it sufficient that the vacancy merely *exist* at the time the Senate is in recess and the appointment made?

Prior to the Supreme Court's decision in *Noel Canning*, only a handful of courts engaged in any significant interpretive analysis of the Recess Appointments Clause. Those three decisions—*United States v. Allocco*,[11] *United States v. Woodley*,[12]and *Evans v. Stephens*[13]—upheld recess appointments to the judiciary and arguably interpreted the Clause in a broad manner, such that a variety of circumstances could be viewed as triggering the use of the President's recess appointment power. The traditionally prevailing view of the Recess Appointments Clause has been that the President is authorized to make recess appointments during an inter- or intra-session recess of the Senate to any vacancy regardless of when the vacancy occurred.[14]

[7] For an in-depth discussion of the Recess Appointments Clause and the Supreme Court's *Noel Canning* decision, *see* CRS Report RL33009, *Recess Appointments: A Legal Overview*, by (name redacted) [hereinafter CRS Recess Appointment Report].

[8] *See id*. at 2.

[9] Aspects of the recess appointments power were considered as early as 1792, and there were at least 19 formal Attorneys General opinions in the 19th century on recess appointments. The Senate, throughout the 18th and 19th centuries, also occasionally opined on the meaning of the Recess Appointments Clause, usually in response to presidential action that it deemed inappropriate. For further discussion, *see* CRS Recess Appointment Report at 4-10.

[10] It should be noted that prior to the Civil War intra-session recesses were relatively uncommon as Congress generally met for relatively short sessions followed by long intersession recesses of six to nine months. *See id*. at 2 n.7; *see also* CRS Report R42977, *Sessions, Adjournments, and Recesses of Congress*, by (name redacted) and (name redacted).

[11] 305 F.2d 704 (2nd Cir. 1962).

[12] 751 F.2d 1008 (9th Cir. 1985).

[13] 387 F.3d 1220 (11th Cir. 2004).

[14] *See, e.g.*, Intra-session Recess Appointments, 13 Op. Off. Legal Counsel 271 (1989) Recess Appointments Issues, 6 Op. Off. Legal Counsel 585 (1982).

January 4, 2012, Recess Appointments

Despite an arguably settled interpretation of the President's recess appointment power, at least from the executive branch's perspective and congressional acquiescence on the matter, the unique facts underlying President Obama's recess appointments of Flynn, Block, and Griffin, Jr. brought the inherent tensions of the appointments process into stark focus.

The NLRB consists of a board of five officials appointed by the President with the advice and consent of the Senate.[15] At least three Board members are needed to sustain a quorum. In 2011, the NLRB had only three Board members, with one of the three scheduled to vacate his seat by the end of the first session of the 112th Congress. In an effort to prevent membership from dropping below the number required to sustain a quorum, President Obama nominated Terrence F. Flynn to be a member on January 5, 2011.[16] The President also formally nominated Sharon Block and Richard F. Griffin, Jr., to be members of the NLRB on December 15, 2011.[17] By December 17, 2011, the Senate had not acted on any of these nominations. On this date, the Senate adopted a unanimous consent agreement in which the body adjourned, but scheduled a series of *pro forma* sessions every three to four days to occur from December 20, 2011, until January 23, 2012.

The unanimous consent agreement established that "no business" would be conducted during the *pro forma* sessions and that the second session of the 112th Congress would begin at 12:00 pm on January 3, 2012, as required by the Constitution.[18] As none of the three nominees were confirmed, the President, citing Senate inaction and asserting that the Senate was in recess despite the *pro forma* sessions, exercised his recess appointment power to appoint Mr. Flynn, Ms. Block, and Mr. Griffins, Jr., on January 4, 2012, the date between the January 3 and January 6 *pro forma* sessions.

The Supreme Court's *Noel Canning* Decision

Acting with its newly appointed members, the NLRB issued an administrative decision against the Noel Canning Corporation (a Pepsi distributor and bottler) in February 2012, ruling that the company had violated the National Labor Relations Act (NLRA) by failing to reduce to writing a collective bargaining agreement with a local Teamsters Union.[19] Noel Canning challenged the NLRB's decision in the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit), claiming that three members of the Board were invalidly appointed and that, as a result, the Board lacked a quorum to issue the decision.[20] The D.C. Circuit ruled that the appointments were constitutionally

[15] 29 U.S.C. §153.

[16] 157 Cong. Rec. S68 (daily ed. Jan. 5, 2011).

[17] 157 Cong. Rec. S8691 (daily ed. Dec. 15, 2011).

[18] 157 Cong. Rec. S8783-S8784 (daily ed. Dec. 17, 2011). The unanimous consent agreement stated that the Senate would "adjourn and convene for pro forma sessions only, with no business conducted" on December 20, 23, 27, and 30, 2010; that the second session of the 112th Congress would convene on January 3 at noon "for a pro forma session only, with no business conducted;" and that the Senate would then convene for pro forma sessions "with no business conducted" on January 6, 10, 13, 17, and 20, 2012.

[19] 358 N.L.R.B. No. 4 (2012).

[20] Noel Canning v. Nat'l Lab. Rel. Board., 705 F.3d 490 (D.C. Cir. 2013).

invalid because the President may only make recess appointments during an inter-session recess when the Senate adjourns *sine die* and only to those vacancies that arise during that inter-session recess.[21] The D.C. Circuit's interpretation of the Clause was contrary to the holdings of the other three federal circuit courts that had earlier examined and supported a broad interpretation of the phrases "the Recess of the Senate" and "Vacancies that may happen." The Supreme Court granted the government's petition for *writ of certiorari*, and heard oral argument on January 13, 2014.[22]

A unanimous Supreme Court affirmed the judgment of the D.C. Circuit, concluding that the three recess appointments to the NLRB were constitutionally invalid.[23] However, the Court was sharply divided when it came to the reasoning for why the appointments were infirm. Despite adopting a broad reading of the Recess Appointments Clause, such that the President can make appointments during an inter- or intra-session recess of longer than 10 days to any vacancy,[24] the majority of the Court ruled the appointments invalid because it determined that the Senate was only in an intra-session recess of three days, a period of time deemed insufficient to trigger the President's recess appointment power.[25] A minority of Justices, in contrast, ruled the appointments invalid based on a narrow interpretation of the Clause as articulated by the D.C. Circuit. Under their view, the President lacked authority to make these recess appointments because no inter-session recess occurred as the Senate did not adjourn *sine die*, and moreover, the vacancies to which the members were appointed were pre-existing vacancies.[26]

Practical Implications for the NLRB After *Noel Canning*

Between January 4, 2012, the date of appointment for the three NLRB members at issue in *Noel Canning*, and August 5, 2013, when the Board consisted of three Senate-confirmed members, it is believed that the NLRB issued approximately 700 decisions and approved the appointments of several regional directors.[27] The Court's June 2014 decision has called into question the validity of the Board's actions during this 19-month period. Since the Court's decision, the Board has attempted to clarify how it will address its relevant actions. On July 9, 2014, for example, the

[21] *Id*. at 506, 514. Applying its interpretation of the Clause to the recess appointments at issue, the D.C. Circuit found that the Senate did not enter "the Recess" between the first and second sessions of the 112th Congress even though it adjourned on December 30, 2011. Because the Senate declined to adjourn *sine die*, the first session of the 112th Congress expired simultaneously with the beginning of the second session when the hour of 12 o'clock arrived based on the constitutional limitation. Thus, there was no inter-session recess during which the President could have made the appointments, nor did the vacancies arise during that recess such that the President could fill them pursuant to the Clause. *Id*. at 513-514.

[22] Nat'l Lab. Rel. Board. v. Noel Canning, 133 S. Ct. 2681 (2013) (order granting petition for *writ of certiorari*).

[23] Nat'l Lab. Rel. Board. v. Noel Canning, 134 S. Ct. 2550 (2014).

[24] *Id*. at 2567, 2573 (Breyer, J., majority). The Court said that a recess of three days or less was "too short to trigger the President's recess-appointment power," and that, in light of historical practice, a "recess of more than 3 days but less than 10 days is *presumptively* too short to fall within the Clause." (emphasis added) *Id*. at 2567.

[25] *Id*. at 2573-78 (concluding that the Senate is in session when it is holding *pro forma* sessions and that based on this interpretation the Senate had only a three-day recess at the time of the January 4, 2012 recess appointments and therefore the President lacked the constitutional authority to make these appointments).

[26] *Id*. at 2592-2618 (Scalia, J., concurring).

[27] *See* G. Roger King and Bryan J. Leitch, *The Impact of the Supreme Court's Noel Canning Decision – Years of Litigation Challenges on the Horizon for the NLRB*, 123 Daily Lab. Rep. (BNA) I-1 (July 26, 2014).

NLRB's General Counsel indicated that the agency had already set aside its orders in 43 cases that were pending in federal appellate courts when *Noel Canning* was decided.[28] In addition, on July 18, 2014, the NLRB unanimously ratified all of the administrative, personnel, and procurement matters taken by the Board between January 4, 2012 and August 5, 2013.[29]

Although the NLRB has not indicated formally how it will address the remaining decisions that were issued during the relevant period, its approach is likely to follow the actions taken by the agency in 2010, when approximately 550 Board decisions were similarly called into question following the Supreme Court's decision in *New Process Steel, L.P. v. National Labor Relations Board*.[30]

NLRB Action After *New Process Steel*

In *New Process Steel*, a case involving the validity of a collective bargaining agreement, the Court considered whether, following a delegation of the NLRB's powers to a three-member panel, two members could continue to exercise the delegated authority after the departure of the group's third member.[31] For 27 months, between January 1, 2008 and April 5, 2010, the Board operated with just two members after the third member's term expired.

Focusing on the plain meaning of Section 3(b) of the National Labor Relations Act,[32] the Court emphasized that "a straightforward understanding of the text . . . coupled with the Board's longstanding practice, points us toward an interpretation of the delegation clause that requires a delegee group to maintain a membership of three."[33] The Court's decision in *New Process Steel* effectively invalidated the decisions that were issued during the 27-month period.

Shortly after the Court ruled in *New Process Steel*, the NLRB outlined its plans for handling "returned cases."[34] The Board indicated that it would seek to have 96 cases that were pending on appeal before a federal court of appeals or the Supreme Court remanded for further consideration. The cases would be considered by a three-member panel that included the two Board members who were involved with the original decisions. The remaining two members of the five-person Board could participate in the reconsideration, but would not be required to be involved.

By March 2013, new decisions were issued by the Board on all of the returned cases.[35] It appears that the Board closed most of the remaining two-member cases that were not pending before a

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[28] Lawrence E. Dube, *NLRB General Counsel Provides Update on Responses to Noel Canning Decision*, 131 Daily Lab. Rep. (BNA) AA-1 (July 9, 2014).

[29] Nat'l Lab. Rel. Board, *NLRB Officials Ratify Agency Actions Taken During Period When Supreme Court Held Board Members Were Not Validly Appointed* (Aug. 4, 2014), *available at* http://www.nlrb.gov/news-outreach/news-story/nlrb-officials-ratify-agency-actions-taken-during-period-when-supreme-court.

[30] 560 U.S. 674 (2010).

[31] *Id*. at 687-88.

[32] 29 U.S.C. §153(b) ("The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise.").

[33] *New Process Steel*, 560 U.S. at 683.

[34] Nat'l Lab. Rel. Board, *NLRB Outlines Plans for Considering 2-Member Cases in Wake of Supreme Court Ruling* (July 1, 2010), *available at* mynlrb.nlrb.gov/link/document.aspx/09031d458037e114.

[35] *See* Nat'l Lab. Rel. Board, *Background Materials on Two-Member Board Decisions*, http://www.nlrb.gov/news-outreach/fact-sheets/background-materials-two-member-board-decisions (last visited Aug. 27, 2014).

federal court of appeals or the Supreme Court. In a fact sheet, the Board stated simply that "nearly all of the remaining two-member cases were closed under the Board's processes with no review required."[36] Given the composition of the three-member panel, some speculated that most employers chose not to challenge the two-member decisions because it seemed likely that the outcome would not be any more favorable.[37] For example, one commentator observed: "[I]t may not be worth the time and expense for the vast majority of employers to challenge the two-member board decisions."[38]

NLRB Action After *Noel Canning*

Although the NLRB has not outlined its plans for cases that were decided between January 4, 2012, and August 5, 2013, in the same way that it did following *New Process Steel*, it does appear that the Board is approaching the cases pending on appeal in a similar fashion.[39] In addition to setting aside Board orders in 43 cases, the NLRB has also filed motions with the various federal courts of appeals to return cases to the Board for further action.[40] While the NLRB's General Counsel has noted that the Board could potentially reconsider cases that did not reach the courts of appeals, he also observed that parties would probably not seek reconsideration by the Board if they received a satisfactory ruling or if a dispute has been resolved.[41] Following *New Process Steel*, for example, new decisions were issued in roughly only one-fifth of the cases decided by the two-member Board.[42]

In August 2014, the NLRB began its reconsideration of cases held in abeyance pending the Court's decision in *Noel Canning*. To date, the same three-member panel has been used to reconsider these cases.[43] In each case, the panel considered the administrative law judge's decision and the record in light of the exceptions and briefs de novo. Thus far, the panel has adopted the judge's recommended order in each case.

While the Board appears to be acting upon cases that were pending on appeal either through reconsideration or by setting aside its prior orders, it has taken a different approach with regard to its administrative, personnel, and procurement actions between January 4, 2012, and August 5, 2013. As noted, on July 18, 2014, the Board ratified its administrative, personnel, and procurement actions during that period. The Board explained that it ratified its past actions "to remove any question concerning the validity of actions undertaken during that period."[44]

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[36] *Id*.

[37] *See* M. Trevor Lyons, *Putting the Genie Back in the Bottle: What Happens in the Wake of the Decision in New Process Steel v. NLRB?*, 32 N.J. Lab. & Emp. L. Q., no. 2, 2010 at 14-16.

[38] *Id*. at 15-16.

[39] *See* Dube, *supra* note 28.

[40] *Id*.

[41] *Id*.

[42] *See* Nat'l Lab. Rel. Board, *supra* note 35.

[43] *See* Leader Communications, 361 NLRB No. 28 (2014); Lederach Electric, Inc., 361 NLRB No. 21 (2014); Mike-Sell's Potato Chip Co., 361 NLRB No. 23 (2014). In each case, the three-member panel included Chairman Mark Gaston Pearce, Kent Y. Hirozawa, and Harry I. Johnson, III.

[44] Nat'l Lab. Rel. Board, *supra* note 35.

The doctrine of ratification is derived from the principles of agency law and recognizes a principal's ability to approve the prior actions of its purported agent.[45] Although some may contend that ratification amounts to nothing more than a "rubberstamp" of past actions, at least some courts have sustained ratifications, particularly when it seems that redoing administrative proceedings will yield the same outcome.[46] For example, in *Federal Election Commission v. Legi-Tech, Inc*., a 1996 case involving ratification and the enforcement actions of a reconstituted Federal Election Commission, the D.C. Circuit explained that "forcing the Commission to start at the beginning of the administrative process, given human nature, promises no more detached and 'pure' consideration of the merits of the case than the Commission's ratification decision reflected."[47]

In 2010, following the Court's decision in *New Process Steel*, the NLRB ratified all personnel, administrative, and procurement actions taken by the two-member Board between January 1, 2008 and April 5, 2010.[48] The Board explained that the ratification "is intended to remove any question that may arise regarding this period during which the Board was reduced to two Members."[49] It appears that the NLRB's 2010 ratification has not been questioned. The absence of any legal challenges to the 2010 ratification might arguably suggest that the Board's recent ratification of administrative, personnel, and procurement actions between January 4, 2012, and August 5, 2013, might be similarly uncontroversial.

While *Noel Canning* has required the NLRB to revisit its decisions and actions between January 4, 2012, and August 5, 2013, the decision has also allowed the Board to seek reconsideration of at least one decision involving a recess appointee who was not involved with that case. In *National Labor Relations Board v. New Vista Nursing and Rehabilitation*, a case decided after the D.C. Circuit's consideration of *Noel Canning*, but before the Supreme Court's June 2014 decision, the U.S. Court of Appeals for the Third Circuit (Third Circuit) vacated a Board order on the grounds that one member of the three-member panel that issued the order was improperly appointed.[50] New Vista, the operator of a nursing and rehabilitative care center, had argued that because NLRB member Craig Becker was appointed during an intra-session recess, he was not validly appointed under the Recess Appointments Clause. If Becker was not validly appointed, the relevant panel would have included only two members in contravention of the NLRA and *New Process Steel*.

Like the D.C. Circuit in *Noel Canning*, the Third Circuit concluded that the Recess Appointments Clause contemplates appointments only during breaks between enumerated or annual sessions of the Senate.[51] Becker was appointed during an intra-session recess that began on March 26, 2010 and ended on April 12, 2010. During this time, the Senate was not holding *pro forma* sessions.[52]

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[45] *See* Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision, 139 F.3d 203, 212 (D.C. Cir. 1998) ("Ratification occurs when a principal sanctions the prior actions of its purported agent.").

[46] *See, e.g*., Federal Election Commission v. Legi-Tech, Inc., 75 F.3d 704 (D.C. Cir. 1996); Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision, 139 F.3d 203, 214 (D.C. Cir. 1998) ("We are also sure that redoing the administrative proceedings would bring about the same outcome . . .").

[47] *Legi-Tech*, 75 F.3d at 709.

[48] *See* Nat'l Lab. Rel. Board, *New Board Ratifies General Counsel's Litigation Authority in 2008-09, Also Ratifies Administrative and Personnel Actions From That Period* (July 8, 2010), *available at* http://www.nlrb.gov/news-outreach/news-releases.

[49] *Id*.

[50] 719 F.3d 203 (3d Cir. 2013).

[51] *Id*. at 238-39.

[52] *Id*. at 213.

Finding Becker's appointment to be invalid, the Third Circuit concluded that the three-member panel "acted without power and lacked jurisdiction when it issued the order."[53]

In light of the Supreme Court's *Noel Canning* decision, however, the NLRB has sought a rehearing of *New Vista*.[54] On August 11, 2014, the Third Circuit granted the Board's petition for rehearing.[55]

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[53] *Id*. at 244.

[54] Scott Flaherty, *Noel Canning Has No Bearing On 3rd Circ. Ruling, NLRB Says*, http://www.law360.com/articles/559814/noel-canning-has-no-bearing-on-3rd-circ-ruling-nlrb-says (last visited Aug. 27, 2014).

[55] SUR Petition for Panel Rehearing, Nat'l Lab. Rel. Board v. New Vista Nursing and Rehabilitation, Nos. 11-3440/12-1027/12-1936 (3d Cir. Aug. 11, 2014).