

Supreme Court To Decide If Presidential Appointees Can Fake It Until They Make It

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Barely two years after the U.S. Supreme Court decided a similar issue in *Noel Canning*, the court has again decided to weigh into the propriety of one of President Obama's appointees to the National Labor Relations Board (NLRB). *NLRB v. SW General*. The case involves President Obama's appointment of Lafe Solomon as "acting general counsel" of the board at the same time the president nominated him for the general counsel (GC) position, prior to his confirmation by the Senate. The NLRB GC has the final authority to issue complaints of unfair labor practices among other supervisory duties over the board, and many consider the NLRB GC to be the most powerful position on the board. The case arose when SW General Inc., an Arizona ambulance company, challenged an unfair labor practice complaint issued by the NLRB at a time when Mr. Solomon was service as acting GC. The company contended that the board's action was illegal because the case was initiated by an acting GC whose appointment was prohibited by the Federal Vacancies Reform Act of 1998 (FVRA). Last summer, the D.C. Circuit found for the employer. It vacated the NLRB order and held that Mr. Solomon was serving in violation of the FVRA, rendering his decision void. Unlike in *Noel Canning*, the D.C. Circuit held that the violation of the FVRA could be raised because the respondent had expressly preserved the issue below. The court of appeal expressed doubt that it would have reached the same conclusion if the issue had not been raised in exceptions before the board. It is not clear if the Supreme Court will address that issue. *This article was co-authored by [Minal Khan](#).*

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