

Solomon's Service Violated Federal Law: Supreme Court Rules on Acting NLRB General Counsel Dispute

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By [Hera S. Arsen, Ph.D.](#)



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On March 21, 2017, the Supreme Court of the United States ruled that the Federal Vacancies Reform Act of 1998 (FVRA) prevents a person nominated to fill a vacant office requiring presidential appointment and Senate confirmation from performing the duties of that office in an acting capacity. Chief Justice Roberts stated that “[a]pplying the FVRA to this case is straightforward” and found that former National Labor Relations Board (NLRB) acting general counsel Lafe Solomon’s continued service as general counsel violated the FVRA. Specifically, in a 6-2 decision, the Court concluded that the FVRA prohibited Solomon from serving as acting general counsel once the president nominated him to fill the position permanently. [*National Labor Relations Board v. SW General, Inc., dba Southwest Ambulance*](#), No. 15-1251, Supreme Court of the United States (March 21, 2017).

Background

The president is tasked with appointing a general counsel to the NLRB—an appointment that requires Senate confirmation. In 2010, the NLRB's general counsel resigned, and President Obama, citing the FVRA as the basis for the appointment, directed Lafe Solomon to serve temporarily as the NLRB's acting general counsel. The FVRA authorizes the president to direct certain officials to temporarily carry out the duties of a vacant office that requires presidential appointment and Senate confirmation (a PAS office) in an acting capacity, but without Senate confirmation.

On January 5, 2011, President Obama nominated Solomon to serve as the NLRB's general counsel on a permanent basis. The Senate did not act upon the nomination. President Obama resubmitted Solomon's name for consideration in the spring of 2013, but later withdrew his nomination. The [Senate confirmed Richard Griffin](#), the president's new candidate for NLRB general counsel, on October 29, 2013. From the time of his appointment until President Obama's appointment of a new general counsel, Solomon served as the NLRB's acting general counsel.

In 2013, the NLRB agreed with an administrative law judge's conclusion that SW General, Inc. had committed unfair labor practices. The company argued that the unfair labor practices complaint was invalid because, under the FVRA, Solomon could not legally perform the duties of general counsel after having been nominated to fill that position. The NLRB argued that subsection (b)(1) of the FVRA applies only to first assistants who automatically assume acting duties under subsection (a)(1) of the statute. According to the NLRB, subsections (a)(2) or (a)(3) of the FVRA do not prohibit acting officers, such as Solomon, from serving. The U.S. Court of Appeals for the District of Columbia Circuit vacated the Board's order. On June 20, 2016, the Supreme Court agreed to resolve the dispute and ultimately affirmed the D.C. Circuit's ruling.

The Supreme Court's Decision

The Supreme Court ruled against the NLRB, finding that the prohibition in subsection (b)(1) of the FVRA applies to *anyone* performing acting service under the FVRA. "The text of subsection (b)(1) is clear," Roberts wrote. "Subject to one narrow exception, it prohibits anyone who has been nominated to fill a vacant PAS office from performing the duties of that office in an acting capacity, regardless of whether the acting officer was appointed under subsection (a)(1), (a)(2), or (a)(3). It is not limited to first assistants who automatically assume acting duties under (a)(1)."

Chief Justice Roberts concluded the majority opinion by stating:

Applying the FVRA to this case is straightforward. Solomon was appointed as acting general counsel under subsection (a)(3). Once the President submitted his nomination to fill that position in a permanent capacity, subsection (b)(1) prohibited him from continuing his acting service.

The duties of general counsel, the Court found, needn't have gone unperformed:

[T]he President could have appointed another person to serve as the acting officer in Solomon's place. And he had a wide array of individuals to choose from: any one of the approximately 250 senior NLRB employees or the hundreds of individuals in PAS positions throughout the Government. The President, however, did not do so, and Solomon's continued service violated the FVRA.

Thus, the Supreme Court affirmed the judgment of the D.C. Circuit.

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