It'd be better for ministers like Barnaby Joyce to have any potentially contentious decisions made by an acting minister until their citizenship issues are resolved.AAP/Mick Tsikas

What would happen if the High Court found that ministers Barnaby Joyce, Fiona Nash and Matthew Canavan had not been validly elected at the last federal election in July 2016?

In the case of the senators (Nash and Canavan), the High Court, sitting as the Court of Disputed Returns, would most likely order a special recount of the votes, as it did in relation to senators Bob Day and Rod Culleton, with the seat then most likely going to the next person on the Coalition ticket.

This may disrupt the balance between the National Party and the Liberal Party in the Senate, as those most likely to replace the two National Party senators would be from the Liberal Party.

Joyce's seat, being in the lower house, would most likely go to a byelection, as previously occurred in the cases of Jackie Kelly and Phil Cleary. Like Kelly and Cleary, Joyce could stand for his seat at the byelection, as he has now renounced his New Zealand citizenship.

A bigger question arises, however, as to the validity of decisions that they made as ministers since the last election. If they were not validly elected in July 2016, then Section 64 of the Constitution becomes relevant. It says:

… no minister of state shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.

That three months ran out a long time ago. So, for a considerable time they would have been exercising powers conferred upon ministers by statute, without actually being ministers. Were those decisions valid? Could they be challenged?

This brings into play the “de-facto officer” doctrine. This is a common law doctrine that protects people who rely on acts done in the apparent execution of their office by an officer who appears to be “clothed with official authority”, even though they may not validly hold that office.

It is not aimed at protecting those who invalidly exercise power, but rather those who rely in good faith on the apparent authority of those who publicly exercise power. The doctrine is also relied on to give certainty concerning the validity of acts of persons whose appointment or election may later be challenged.

The public policy behind the doctrine is to avoid the chaos that would ensue if decisions of public officials were automatically rendered invalid because of a later discovered defect in their election or appointment. For example, the decisions of a Western Australian magistrate were upheld, even though they were taken after she had reached the compulsory age for retirement.

The application of the doctrine, however, is uncertain. It does not necessarily apply to all decisions of an invalidly appointed officer, and therefore is likely to lead to litigation if decisions are contentious.

Its application has also been doubted in relation to matters that concern a breach of the Constitution. For example, High Court Justice Michael Kirby observed in a 2006 case about the constitutional validity of acting judges that:

It is difficult to reconcile the [de facto officer] doctrine with the fundamental role of the federal Constitution as the ultimate source of other laws. Constitutional rulings can occasionally be unsettling, at least for a period. However, this is inherent in the arrangements of a nation that lives by the rule of law and accords a special status to the federal Constitution as its fundamental law.

Moreover, the doctrine ceases to protect the actions of the purported official at the point when they lose the cloak of authority, such as when the validity of their appointment is contested, or their lack of qualification to hold office is “notorious”.

It is quite possible that point arises when, in the case of a Commonwealth minister, they admit to being a dual national and refer to the High Court the question of their qualification to sit in the parliament, especially if the invalidity to hold parliamentary office exceeds three months.

For this reason, it would be prudent for those ministers who are currently under a cloud concerning their lawful occupation of office to cease to make decisions which are contentious or might give rise to legal challenges with significant consequences.

Instead, such actions, if they need to be taken before the question of the status of these ministers is resolved by the High Court, could be taken by acting ministers to ensure their validity and avoid the financial and social costs of further litigation and uncertainty.

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