

Paul Saunders Web Forum Entry

Title: Why It is Neither Necessary Nor Desirable to Go to Either of the Extremes Now Presented in *NLRB v. Noel Canning*: The Significance of the Annual Meeting Clause

Author: Michael Davidson, Former Legal Counsel, United States Senate

Submission Date: August 15, 2013

Synopsis: The Supreme Court is being presented with an incomplete set of choices. The January 4, 2012 recess appointments to the National Labor Relations Board were made prior to the actual assembling of the House (on January 17, 2012) and Senate (on January 23, 2012) when a quorum of each was first present to begin the annual meeting of Congress within the meaning of the Twentieth Amendment. The January 4 recess appointments should be treated as valid appointments that if not identical to intersession appointments, which they may be, are at least constitutionally comparable to them. As such, they lasted for one year until the end of the second session of the 112th Congress on January 2, 2013, thus including the date, February 8, 2012, on which the NLRB issued the order under review. There is no need for the Court to decide either the question of intrasession versus intersession recess appointments or the impact of “pro forma” meetings on intrasession recesses.

On July 30, the Senate confirmed the full membership --a Chairman and four other members --of the National Labor Relations Board. The Senate's action was part of an accommodation within the Senate and between the President and the Senate that cleared the way for confirmation of a number of long-stalled nominations. Part of the accommodation was the President's withdrawal of the nominations of two Board members whose recess appointments in January 2012, together with the recess appointment of a third temporary member, had precipitated the controversy that led to the Supreme Court's grant of certiorari on June 25 in *National Labor Relations Board v. Noel Canning*. Those recess appointees are no longer on the Board.

A Call for Restraint that Should be Heeded

Professor Peter Shane of Ohio State University's Moritz College of Law, in the Bloomberg BNA Daily Report for Executives, has explained why confirmation of all members of the NLRB should prompt the Solicitor General to ask the Court, without deciding the recess appointment issue, to remand so that the underlying labor-management case may be re-heard by the confirmed Board. Pointing to possible consequences of a final constitutional judgment, Professor Shane makes the persuasive point that arguably the most important reason for judicial restraint is that “any final constitutional judgment on intrasession appointments could have a profound impact on the dynamics of the entire appointment process, especially during periods of divided government.” A ruling one way could effectively end recess appointments. A ruling the other way could prompt presidents to use intrasession recess appointments more aggressively.

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Either consequence would impair the Constitution's carefully balanced allocation of appointment responsibilities. The Constitution's primary method for filling major appointive offices is through presidential nomination and Senate confirmation. During the annual meeting of Congress, the focus of the President and Senate should be on coming to agreement on nominations. Relentless strife -with the Senate believing it needs to erect defenses such as "pro forma" sessions during spring or summer breaks to protect against intrasession appointments —is not conducive to the broader goal of making the shared appointment system work. But it is also important to retain the viability of an annual safety valve that enables the President through recess appointments, in addition to statutory provisions on vacancies that are available throughout the year, to ensure that public offices are filled and public functions continue.

The Missing Question in this Case

In addition to those described by Professor Shane, another reason for restraint is that this has never been a good case for a definitive ruling by the Supreme Court on the intrasession versus intersession choice the litigants have presented to it . The Executive Branch has asserted that recess appointments on January 4, 2012 would last not only through the second session of the 112th Congress but also (prior to the confirmations that just occurred) until the end of the first session of the present 113th Congress. These nearly two-year recess appointments would have been the longest ever. The parties and amici opposing the appointments stand at the other extreme. They argue that no recess appointments could have been made. The stark choice between zero and two years fails to account for the availability, under the facts and the law, of a path to conventional one-year recess appointments.

In considering whether there is an alternative, a place to begin is that the Recess Appointments Clause uses neither the term "intrasession" nor "intersession." These have long been useful terms in thinking about recesses, but the constitutional term is "the recess." Nor does Recess Clause refer to any particular parliamentary procedure in commencing or describing the length or conditions of a recess. Even while the terms intrasession and intersession are generally helpful in describing the major choice, there may be circumstances in which judgment is needed about how a particular recess should be treated. In the present case, that judgment should be informed by a companion provision of the Constitution on the annual meeting of Congress, originally in Article I, section 4 and then, from 1933, with a change of date (and another word change) in the Twentieth Amendment.

Section 2 of the Twentieth Amendment provides: "The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day." As will be discussed more fully below, the key term, with respect to the Recess Clause, is "assemble," for it is that act, the assembling of the Congress, which describes how the annual meeting shall "begin." (Columbia Law

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Professor Peter Strauss deserves credit for first drawing attention to the bearing of the 20th Amendment on the recess issue in *Noel Canning*. See his Reaction: The Pre-Session Recess, Harvard Law Review Online Forum (Vol. 126, Feb. 2013, No. 4).

The missing question in *Noel Canning* is this: The January 4, 2012 recess appointments were made during a break that began in fact with conclusion of the work of the first session of the 112th Congress on December 23, 2011 (or, in any event, by noon on January 3, 2012). That break which featured no business, no quorums, no duty at all to attend, extended in fact until a quorum assembled in the House on January 17 and in the Senate on January 23, 2012 to begin the work of the second session of the 112th Congress. In light of the requirement of the Twentieth Amendment that the Congress “assemble” to begin its annual meeting, should the “no business” period which preceded the actual assembly of Congress be understood to be within “the recess” during which a recess appointment may be made?

If the answer is “yes,” the January 4, 2012 recess appointments preceded the actual, not theoretical, beginning of the next meeting of Congress and lasted for a year (as intersession appointments generally do) until the end of the second session of the 112th Congress on January 2, 2013. That year included February 8, 2012 when the NLRB entered the order under review in *Noel Canning*. That’s all that ever needed to be decided with respect to the intrasession/intersession issue in *Noel Canning*. (The comments in this post do not address the second ground of the D.C. Circuit’s *Noel Canning* opinion, that recess appointments may only fill vacancies that first come into existence in a recess. That holding, which no other Circuit has joined, will also fall by the wayside if the case is remanded for rehearing by the confirmed Board.)

The Facts

By December 17, 2011, the soon-expiring first session of the 112th Congress had one piece of remaining business for which there was a strong economic and political imperative to complete: extension of the partial holiday for social security taxes and several items, including extension of long-term unemployment compensation benefits, which were being carried with the payroll tax legislation. On December 17, the Senate sent the House a two-month extension and left town. The objective was to force the House to accept that extension.

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As the House had not sent to the Senate a concurrent adjournment resolution, or a bill or joint resolution to be signed by the President to set a date other than January 3 for assembling the second session, the Senate took the only recess or adjournment action it could take as one House. That was to provide either by a Senate resolution or a unanimous consent agreement (it chose the latter) for a meeting every three days until the day the Senate planned to begin the work of the second session, January 23. To assure its members that they had no duty to attend until January 23, the UC also provided that these would be pro forma sessions at which “no business” would be conducted. Of course, that necessarily (although not explicitly) allowed for another UC to permit business to be conducted if the House returned a payroll tax bill that required further action by the Senate.

By December 23, House and Senate leaders reached agreement, among themselves and the President, on the one piece of business that the President, House and Senate wanted to conduct before the second session: enactment of a payroll tax extension with the other items carried with it. On the morning of December 23, even before the House had acted, the Senate accomplished its part through a unanimous consent agreement with one member in the chair and the Majority Leader on the floor. Between that action and assembling on January 23 the Senate intended to conduct no business and in fact conducted no business.

Going back to December 17, it was clear from that day until January 23 that the Senate intended to take no further nomination actions. The Senate took three nomination actions on December 17. It agreed to a list of the last confirmations of the first session. It acted under Senate Rule 31(6), which provides that when the Senate adjourns or takes a recess for more than 30 days all nominations not yet acted on shall be returned to the President. In accordance with customary action under that rule, by unanimous consent it provided that all nominations would remain in the Senate except for a list of specific ones that would be returned to the President. Finally, the Senate scheduled debate and vote on the next nomination it would consider, a U.S. district court nomination on January 23, 2012. These actions brought to an end the Senate’s work on nominations until it next assembled on January 23.

Finally, the December 17 unanimous consent agreement on pro forma sessions included this provision: “that the second session of the 112th Congress convene on Tuesday, January 3, 2012 at 12 p.m. for a pro forma session only with no business conducted,” and following that “the Senate adjourn and convene for pro forma sessions only, with no business conducted” on designated dates until January 23. The significance, if any, of this portion of the UC, should be considered in light of the requirement of the Twentieth Amendment that Congress “assemble” for its annual meeting and that any variation, of the date alone, be by law, and thus not by the unanimous consent agreement of one or both Houses.

The Constitution’s Annual Meeting Clause

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The Twentieth Amendment was quoted in full above. Here is the text of the original provision as found in Article I, section 4: “The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they by Law appoint a different Day.”

When the Clause was discussed on August 7, 1787, George Mason expressed the conviction “that an annual meeting ought to be required as essential to the preservation of the Constitution.” Reflecting on English history, Roger Sherman described frequent meetings of Parliament “as an essential safeguard of liberty.” The debate at the Convention addressed solely whether the Constitution should specify a date for the annual meeting or whether it should leave that to Congress. They settled on a date fixed in the Constitution but subject to a change “by law.” As Justice Joseph Story described the provision: “Thus, the legislative discretion was necessarily bounded; and annual sessions were placed equally beyond the power of faction, and of party, of power, and of corruption.” Commentaries on the Constitution of the United States, sec. 413 (Rotunda and Nowak ed.).

In the Convention’s debates, there is no direct description of what was intended by the word “assemble” in the Annual Meeting Clause beyond its ordinary meaning. There is, however, an instructive use of the word by Benjamin Franklin, on the Convention’s final day – September 17, which we now celebrate as Constitution Day. In his Notes of Debates in the Federal Convention of 1787, James Madison set forth Franklin’s speech (read by James Wilson) explaining his support of the Constitution. Describing the virtues and defects of the product of an “assembly,” Franklin acknowledged that “when you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men, all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views.” That’s what the Framers understood the words “assemble” and “assembly” to mean: representatives coming together, pooling their joint wisdom together with their prejudices and local views. It is surely inconceivable that they would have imagined one member of the Senate appearing alone in the chamber for a few seconds would ever be thought to be the assembling of the Senate.

Under its rule making authority, the Senate has broad authority not subject to Executive control or judicial review to make its rules. This includes the power to set forth procedures in the form of a unanimous agreement that carries over to a following session. But there are limits if the Constitution states a specific command or subjects a matter to control by law, thereby providing (when a law is required) for a role for both Houses and the President. See *United States v. Ballin*, 144 U.S. 1, 5 (1892) (The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional constraints....)

Accordingly, the annual assembly requirement may not be modified by the action of one House alone, or by the two Houses without the President (unless they override a presidential veto), and even then the law may only change the date for the beginning of the annual meeting, not the requirement that the Congress assemble. The Senate’s UC on December 17 declaring that the

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second session convene on January 3, at noon, is no substitute for the requirement **that Congress assemble. Although the December 17, 2011 UC said that the second session** convened on January 3, 2012 for a pro forma session, the action of either or both Houses could not modify the Constitution's requirement that the annual meeting begin with the assembling of the Congress.

It is true that Congress did not pass a law providing for a date to assemble in 2012 other than on January 3. Thus, Congress should have assembled on January 3. But the fact that Congress should have assembled on January 3, doesn't mean that it did not assemble on that date. No one is subject to any sanction because the Congress did not assemble until the House did so on January 17, and the Senate on January 23, but neither should the President lose the constitutional opportunity to make recess appointments in the period preceding the actual assembly of the Congress.

Conclusion

In short, no matter on what date the first session may be said to have ended -on December 23 when the last business was done or a moment before noon on January 3 --the constitutionally-required assembly of the second session did not occur until the House assembled on January 17 and the Senate on January 23. January 4, the date on which the NLRB recess appointments were made, thus fell during the interval between the first session and the beginning, in accordance with the Twentieth Amendment, of the second annual meeting of the 112th Congress. From the vantage point of recess appointments made on January 4, the end of the next session was the end of the second session of the 112th Congress, which occurred on January 2, 2013.

The one-year duration of the January 4, 2012 appointments maintains the balance struck by the appointments provisions of the Constitution. Following those appointments, the Senate and the President had a full session of the Senate to work through advice and consent appointments. That they failed to do so for these particular offices until July 30, 2013, is a matter for their responsibility, but that failure does not affect the legitimacy for one-year of the appointments made on January 4, 2012.

While this was not explored in the court of appeals, nor presented in the briefs on the petition for certiorari, the fact that the controversy may be resolved in a manner that avoids the extremes now being presented adds to the reasons why this case should not be the vehicle for a major constitutional judgment on recess appointments but instead should be brought to a quiet conclusion on remand to the now fully-confirmed NLRB.