

QUESTIONS FOR DISCUSSION

On June 25, the Supreme Court granted certiorari in *National Labor Relations Board v. Noel Canning*, bringing before it later this year [significant questions](#) about presidential and Senate authority relating to the Constitution's Recess Appointments Clause. At the time the Court granted certiorari, the NLRB—the Nation's principal forum for adjudicating labor-management disputes—was descending rapidly into paralysis. Rooted in years of gridlock over confirming Board members, that paralysis had been intensified by the U.S. Court of Appeals for the District of Columbia Circuit's [decision](#), in the *Noel Canning* case, invalidating the January 2012 recess appointments that provided three of the Board's five members at the time the Board entered its final order.

Then, just one month after the Court granted certiorari in *Noel Canning*, the landscape changed dramatically. On July 30, the Senate confirmed a full slate of Labor Board members. Part of the political resolution that enabled this was an accommodation within the Senate which had two elements: an agreement to proceed with a number of stalled non-judicial nominations together with a decision to pull back from an effort to change Senate rules through a process that might have unpredictable consequences for Senate accommodation in the future. The President helped to facilitate the political resolution by withdrawing the nominations of the two recess appointees and replacing them with nominees who had not been involved in the recess appointment controversy.

Our legal system now has the opportunity to join our political system in elevating accommodation over conflict. Here are four questions, among others that may come to mind, which we hope will be addressed, debated, and explored in this web discussion, and which, again in the spirit of our general approach, may elucidate areas of overlooked consensus.

1. Should the Solicitor General ask the Supreme Court to return the *Noel Canning* case to the NLRB for disposition of the underlying labor-management dispute by the now-fully confirmed Board?

Professor Peter Shane, of Ohio State University's Moritz College of Law, has recently answered this question in the affirmative in a Bloomberg BNA Daily Report for Executives piece entitled [In NLRB Recess Appointment Case, Roberts Court Can Now Show it Knows How to Exercise Judicial Restraint](#). In it, he explains why the Solicitor General should seek the return of *Noel Canning* to the NLRB, and argues that by obliging such a request, the Supreme Court can "leave the recess appointments controversy where it belongs – [with] the elected branches of government."

2. On reflection, was Noel Canning ever a good case for adjudicating the intrasession versus intersession issues that have been presented to the Court?

Together with this invitation, we are posting today a piece by Michael Davidson, who questioned intrasession appointments as Senate Legal Counsel, but who believes Noel Canning to be an undesirable vehicle for the Court to enter a broad ruling on intrasession versus intersession appointments. Davidson questions whether the litigants in Noel Canning have pushed their legal claims to extremes that fail to account for an available, moderate ground for resolution. Pointing both to constitutional text and the timeline of this dispute, he argues that the recess in which the appointments were made should be treated as the equivalent of an intersession recess. Such an understanding would reveal valid appointments lasting for one year rather than the two years the Executive Branch has claimed, but long enough to include the time during which the NLRB orders under review in Noel Canning were made.

3. Would deciding the case, on the grounds presented by the parties, lead the federal courts over time into a bramble bush of congressional practice on structuring recesses and adjournments? Would it likewise demand consideration of the various predicaments that might arise when the continuity of government is threatened?

From time to time, beginning in World II and as recently as this past week, Congress has utilized “conditional adjournments” that authorize the congressional leadership, when the public interest warrants it, to notify the House or Senate to “reassemble.” Originally, this form of adjournment was prompted by wartime uncertainties, but it has been used in other circumstances since its inception. Though most often labeled as “intrasession” recesses, such adjournments may prove difficult to distinguish, in any principled way, from express “intersession” recesses, especially when the former can last for months and arise in circumstances in which the Congress, the President, and the public understand that the Congress has completed its work for the year.

Continuity-of-government concerns also require looking ahead to contingencies. If Congress ever enters a period in which it is unable either to meet or to adjourn formally, there may be a need for extensive use by a President of recess authority to ensure the continuity of government functions. Even if the norm is that recess authority should be used only during intersession recesses, there may be benefit in avoiding a rigid Court-decreed boundary between “the recess” in which appointments are permissible, and those in which they are not.

4. Going forward, are there suggestions for longer-term accommodations on appointment issues, including recess appointments?

The Executive Branch may be concerned that without reversal by the

Supreme Court it will be difficult to revive use of intrasession appointments. Even a vacated judgment in *Noel Canning* may not outweigh the sum of three appellate losses, making intrasession appointments too risky. If that's so, then the most important objective now may be to assure there is an intersession opportunity to use the recess power as an annual safety valve in the appointment process, leaving to statutory holdover and vacancy provisions the avoiding or filling of vacancies at other times.

It may also be necessary to consider more broadly how both the Executive Branch and the Senate (and the House when legislation is needed) can improve both the nomination and confirmation process, and statutory mechanisms, such as holdover provisions and the Federal Vacancies Act, to ensure that public offices established by Congress are filled and their public functions performed while giving appropriate latitude to the advice and consent responsibilities of the Senate. For an historical overview of efforts at political accommodation on recess appointments, see this [CRS report](#), authored by Lou Fisher.

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In addition to the resources cited and linked above, *ScotusBlog* has hosted a helpful [online symposium](#) on the topic, and both the [Volokh Conspiracy](#) and Stanford's [Law Library Blog](#) have assembled comprehensive reading lists. In keeping with the general ethos of The Constitution Project, we seek diverse viewpoints, but reserve the right to limit postings to nonpartisan contributions that seek to advance the discussion in a substantive and positive manner.