

## Paul Saunders Web Forum Entry

**Title: “Part III of The Teamsters’ Merits Brief And Footnote 60 Of The Solicitor General’s Brief Point The Way To A Restrained Resolution”**

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

**Submission Date: September 26, 2013**

The Court has received the opening merits briefs in *NLRB v. Noel Canning*, one from the Solicitor General on behalf of the petitioner National Labor Relations Board and another from the supporting respondent International Brotherhood of Teamsters Local 760. The underlying collective bargaining dispute and related unfair labor practice concern a collective bargaining agreement that the Teamsters had negotiated. The Teamsters were the charging party before the NLRB.

In Part I of its brief, the Teamsters support the Solicitor General’s position that the Recess Appointments Clause grants the President the power to fill vacancies during intrasession recesses of the Senate. Part II supports the argument that the President has the power to fill vacancies regardless of when they first arose. Parts I and II of the Teamsters’ brief are in harmony with the SG’s approach to those issues.

Part III (pages 22-29) of the Teamsters’ brief discusses what it terms the “essential inquiry” (quoting a 1905 Senate report which has been central in much of the literature on recess appointments). The Teamsters reach the same bottom line as the Solicitor General, namely, that the Senate was in recess on January 4, 2012 when the NLRB recess appointments in this case were made.

In contrast to the Solicitor General, the Teamsters reach that bottom line by considering the entire five-week period from December 17, 2011 to January 23, 2012. That period, during which Senators explicitly had no duty to attend, constituted a single recess that bridged completion of the work of the first session of the 112<sup>th</sup> Congress, which finally occurred on December 23, 2011 and the assembling of Congress (the House on January 17 and Senate on January 23, 2012) for the work of the second session. (The term “single recess” is my term, not the Teamsters’, but is supported by the Teamsters’ analysis.)

As described in the Teamsters’ brief (at page 22), the appointments were made “in the midst of a five week period” during which Senators owed no duty of attendance. Their brief (at page 25) correctly characterizes the unanimous consent agreement entered on December 17, 2011 as freeing Senators from their “duty of attendance,” the “predictable consequence” of which was that the Chamber was empty. Under Senate Rule VI, “No Senator shall absent himself from the service of the Senate without leave.” That rule may be enforced when a quorum call is had and a quorum fails to respond. The “no business” agreement entered on December 17 assured Senators there would be no quorum calls for the entire period from December 17 to January 23. The conduct of business on December 23, passage of payroll tax legislation by unanimous consent, did not alter the fact Senators were relieved of their duty to attend throughout that entire period.

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The Teamsters further note (at page 26) that communications from the President during “this period” – referring to the entire period from December 17 to January 23 – “were not placed before the Senate until the recess concluded on January 23.” Again referring to the entire period from December 17 to January 23, the Teamsters state (at page 27) that “[by binding itself to ‘convene for pro forma sessions only, with no business conducted,’]” the Senate assured that “its long break would constitute a ‘recess of the Senate.’” In sum, as described by the Teamsters (at page 27), “The Senate itself all but declared that there was a ‘Recess of the Senate’ for the period in question.”

While taking note of events in December, the Solicitor General emphasizes instead the period from January 3 to 23, 2012. In the view of the Solicitor General, the Twentieth Amendment requires dividing the full recess into two contiguous, back-to-back intrasession recesses interrupted only by the few seconds it took on January 3 to gavel open and close the “pro forma” session on that day. In accordance with arcane Executive Branch views on the length of recess appointments, the effect of this division of the Senate’s “long break” from mid-December to mid-January into two intrasession recesses (and perhaps its transparent objective as well) was to double the potential length of the January 4, 2012 appointments from one to two years.

The Solicitor General gets to that result by stating that the second session of the 112<sup>th</sup> Congress began on January 3 “by operation of law,” namely, the Twentieth Amendment. In describing the Twentieth Amendment, the Solicitor General states that the Amendment contains two obligations. One is that the annual session of Congress “begin” on January 3, unless the Congress sets a different date by law. The other is that Congress “assemble” annually. As for the second obligation, in footnote 60 (at page 61) the Solicitor General writes: “But a pro-forma session with a single member could hardly suffice to satisfy Congress’s other obligation under Section 2 of the Twentieth Amendment: to ‘assemble at least once in every year.’”

This is a breakthrough. Congress did not assemble until the House did so on January 17 and the Senate on January 23, 2012. The January 4 recess appointments were made during the recess that preceded the assembling of the Congress within the meaning of the Twentieth Amendment. Standing alone, the Solicitor General’s recognition that the annual assembly requirement is not satisfied by a single member pro-forma session (as occurred on January 3, 2012) should be enough to treat the recess preceding the actual assembly, and appointments made during it, as constitutionally comparable to intersession recesses and appointments. Coupled with the Teamsters well-supported description of a single “five-week” “long break” that spanned mid-December to mid-January, there is no need for the Court to resolve longstanding, often political issues about recess appointments at other times and in other circumstances.

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Of course, the most direct route to a restrained resolution of this matter would be the Solicitor General’s request, or the Court’s insistence, that this case be remanded to the now fully confirmed NLRB.