

Paul Saunders Web Forum Entry

Title: Anniversary of 9/11 reflection on *Noel Canning*

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Twelve years ago today, I was at Dulles Airport, on the jetway to board my flight when we were called back—all air traffic in the country had been frozen in response to the second plane hitting the World Trade Center. That set of events led me to a dozen years of trying to get Congress, various presidents, Supreme Court justices and others to focus on, and act on, avenues to make sure that our constitutional institutions, especially the presidency, Congress and the Supreme Court, would continue to function without interruption in the event of a massive terrorist attack. Our constitutional arrangements and laws are simply not prepared to deal with something that could, in one fell swoop, leave the House, Senate or both without the quorum required in the Constitution to do any official business, or wipe out the president, vice president and everyone else in the line of succession established in the Presidential Succession Act of 1947, or leave the Supreme Court without its statutory quorum requirement of six justices.

Twelve years have not produced any meaningful solutions. But the problems go beyond the inertia and inaction of Congress and the president. Thinking about worst case scenarios also requires one to think about how we would or could fill essential executive or judicial posts if the ordinary confirmation process cannot work. What if there is no Senate to confirm presidential nominee, because, say, a massive anthrax attack leaves sixty senators in intensive care for months with inhalation anthrax? What if the House is incapacitated because of an attack, and cannot replace its members for months—leaving the Senate unable to act?

The sweeping decision of Judge Sentelle in *Noel Canning* ignored these possibilities, and create the possibility, if it is upheld by the Supreme Court, of leaving the country in an even more disruptive and disastrous situation if there is a debilitating terrorist attack. We may indeed be living in an era very different from the one the Framers foresaw, one where Congress operates year round and where members can get from one end of the country to the other in a handful of hours. But the modern era also creates possible circumstances and dilemmas where multiple recess appointments would be required to keep the basic functions of government going in something close to a legal and legitimate fashion. To bar them under nearly all circumstances would be itself deeply dangerous to the country and its constitutional fabric.