

Paul Saunders Web Forum Entry

Title: "Is Noel Canning Justiciable?"

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Submission Date: September 9, 2013

Reflecting yet further on Noel Canning (and having just taught *Free Enterprise Fund v. PCAOB* in Administrative Law), I find myself more puzzled than ever about the justiciability of certain separation of powers cases.

For example, why does anyone have standing to bring a case like *Noel Canning*? That is, there is clearly no constitutional right to have one's administrative adjudication conducted by advice-and-consent appointees. Even pursuant to the D.C. Circuit's crabbed reading of Article II, had the NLRB vacancies first occurred and then been filled during an intersession recess of the Senate, the newly constituted NLRB could have indisputably gone ahead to decide unfair labor practice cases. So, what difference does it make in terms of Noel Canning's injury that its adjudication involved recess appointees named during an intrasession recess? Why is their beef not just the kind of generalized grievance on which the Court would turn its collective back? (In this respect, their case is different from *Evans v. Stephens*, which dealt with the constitutionality of sentencing by a recess-appointed judge. In that case, there was a colorable argument that a judge lacking Article III tenure protection would not be rendering sentences with the same assurances of judicial independence that a conventionally appointed judge would enjoy. In *Noel Canning*, I don't see how the quality of adjudication by a recess appointee could possibly vary with the circumstances of his or her appointment.)

(I mention *Free Enterprise Fund v. PCAOB* because I'm also at a loss to identify the particularized injury in that case.)

I have written elsewhere why I also think *Noel Canning* would be ripe for invocation of the political question doctrine. Here was my argument:

The most closely analogous case is probably *Goldwater v. Carter*, a 1979 case in which the Supreme Court declined to determine whether President Carter acted within his constitutional authority in terminating the U.S. mutual defense treaty with Taiwan or whether the treaty termination power is a power that presidents share with either the Senate alone or with both Houses of Congress. Writing for a Court plurality, then-Associate Justice Rehnquist characterized the controversy as "a nonjusticiable political dispute that should be left for resolution by the Executive and Legislative Branches of the Government." Justice Powell would have dodged the issue by finding the case not yet ripe for judicial resolution, yet his opinion was motivated by much the same considerations as Rehnquist's: "Differences between the President and the Congress," Powell observed, "are commonplace under our system." He continued: "The differences should, and almost invariably do, turn on political rather than legal considerations. The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse."

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The Court in *Goldwater v. Carter* was undoubtedly influenced by the dispute’s implications for foreign affairs and the judiciary’s traditional reluctance to narrow the President’s options in that arena. But the treaty termination dispute and the recess appointments dispute resemble each other in two respects that are more significant. First, unlike separation of powers cases that the Court has resolved – cases like *Youngstown Steel*, *Chadha* or *Boumediene*, – Noel Canning presents no issue with any direct connection to individual rights or liberties. That is, there is no reason to think that the fact of recess appointment during a Senate session, as opposed to between Senate sessions, gives a private party before the NLRB a hearing that is any less fair, robust, or respectful of the law. Life, liberty and property are simply not at issue.

Moreover, in both cases, the Court is confronted with “a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum.” Where Congress assigns to the elected branches a shared power, as with treaties or appointments, the Court behaves wisely in allowing each branch’s political and institutional incentives and disincentives to operate, as they were intended, to curb overreach by the other branch.