

Paul Saunders Web Forum Entry

Title: NLRB v. Noel Canning, Several Post-Argument Observations
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1. Is the Recess Appointments Clause a “Horse and Buggy” Relic?

There was some discussion at the January 13 argument whether the Recess Appointments Clause is a relic of a bygone horse and buggy era. Certainly, the ability of Members to come to the District of Columbia by airplane rather than by horse or boat has made it easier to reassemble. Other changes, such as that over time fewer Members farmed and air conditioning made it somewhat tolerable to work in D.C. in July, also had an impact on the congressional calendar. Perhaps most important, the challenge of governing a continental nation with international responsibilities has stretched the congressional calendar so that it occupies much of the year.

Still, there is a natural cycle, during most years, in which the Senate tries to wrap up as much pending work as possible before completing the work of a session. That, of course, is especially so leading to the break between Congresses. Those intersession recesses are not horse and buggy relics but, like the conclusion of Terms of Court, a real occasion to try to complete work in anticipation of a new beginning, whether that be days, weeks, or months ahead. As such, those intersession breaks are also part of a natural Executive cycle for temporarily filling vacancies that for whatever reason had not been filled through advice and consent. That is especially important when a function pursuant to law— here the continuity of a legislatively established forum to adjudicate labor-management disputes in the interest of economic peace – would be suspended in the absence of temporary appointments. That’s far more than nostalgia for a horse and buggy era. It warrants that the Court be mindful of the need to preserve the opportunity for intersession appointments, an opportunity that will be severely diminished if pro forma sessions (no matter what their need or appropriateness might be during a session) preclude the use of the Recess Clause between the time Congress completes the work of one session and actually assembles for the work of the next session.

Furthermore, as Norman Ornstein of the American Enterprise Institute has pointed out in a 9/11 reflection in this forum, the need to ensure continuity of Government may require attention to existing tools as well as the fashioning of new ones. From the existing tool kit, the Recess Clause might be called on to fill vacancies in the Executive and Judicial Branches when, if the awful ever occurred, a functioning Senate is suddenly unavailable to give its advice and consent, without having had time to join the House in voting to take a long recess. That possibility underscores the importance of the Court weighing the value, after more than 200 hundred years of High Court silence on the Recess Clause, of saying little if anything about the boundaries of the clause.

2. *Counsel for Senate Republicans Described a Way the President Could Have Made these Appointments.*

In response to a question from Justice Ginsberg, Miguel Estrada said:

“On the facts of this case, there is a substantial question, which no one really has litigated, as to whether there was, in fact, an inter-session recess, whether the first session of the 112th Congress ended on the morning of January 3rd and therefore, we have the same Teddy Roosevelt situation, or whether by adjourning on December 30th and contemplating no further meetings until January 3rd, whether that in effect – in effect was a sine die adjournment that ended the first session of the Congress.

“If the president had the same view about the nature of the pro forma sessions, he could have taken the view about the sessions between December 17th and January 3rd and could have had a better legal argument in attempting to claim that between December 30th and January 3rd, there was at least an arguable inter-session recess. And he did not do that.

“Why didn’t he? Because by waiting until the convening of the first session – of the second session of the 112th Congress, by making an appointment on January 4th instead of the morning of January 3rd, he gives an extra year to his appointee to serve. That shows that this is, indeed, the bottom of the slippery slope on the Recess Appointments Clause.”

Transcript at 73-74.

I’d amend the second paragraph in one way. An appointment made between December 30, 2011 and noon on January 3, 2012 would have been more than “arguably” an intersession recess appointment. When the pro forma session on December 30 adjourned, there was no subsequent moment, within the first session of the 112th Congress, in which the Senate could have returned absent the President convening the Senate for a special session. The answer to the “substantial question” posed by Mr. Estrada – whether the adjournment on December 30 “in effect was a sine die adjournment that ended the first session of the Congress,” is yes.

Mr. Estrada’s assessment as to why the President did not make the NLRB appointments during that December 30 to January 3 safe harbor is that by making them on January 4, rather than, let’s say on January 2, the President sought to double the potential length of the appointments from one to two years. That would be the result of the arcane way the Executive Branch has counted the length of recess appointments. Under the Executive Branch’s counting method, recess appointments last through the remainder of a session and then through all of the next session. That’s a stratagem that Mr. Estrada characterized, with some justice, as “the bottom of the slippery slope.”

3. *If Valid One-Year Intersession Appointments Could Have Been Made on January 2, 2012, Why Couldn't They Also Have Been Made on January 4, 2012 or on Any Other Day Before the Senate Assembled for the Work of the Second Session on January 23?*

In January 2012, Congress did not assemble to begin the work of the Second Session until the House assembled on January 17 and the Senate on January 23, 2012. Thus, the January 4 recess appointments were made during the recess that preceded the assembling of Congress within the meaning of the Twentieth Amendment. As the appointments preceded the assembling of the Congress, they should be treated as valid intersession appointments that would last for up to a year, not two years, but comfortably covering and validating the February 8, 2012 NLRB orders in the Noel Canning case. That's all that should be necessary to decide in this case.

In an earlier post, I noted that in their main brief (at page 27) the Teamsters, the union whose controversy with Noel Canning launched this case, correctly described the recess as the "long break" between December 17, 2011 and January 23, 2012. 158 Cong. Rec. S13 (daily ed. Jan. 23, 2012) (quoting welcome remarks of Majority Leader Reid). The Teamsters reiterated that in their reply brief, at page 9. That was the reality: a long break during which, after the enactment of payroll tax legislation on December 23, 2011, no business was intended to be conducted and none was conducted until the assembly of the House on January 17 and the Senate on January 23, 2012.

Each side seeks to overcome the reality of the "long break."

First, each slices the month long break into two parts, separated by the 41 seconds shortly after noon on January 3, 2012 it took a Senator to call the Senate to order and adjourn it or the few seconds more it took a Representative to do that in the House. The Twentieth Amendment provides that "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." Before leaving in December 2011, the Congress did not by law appoint a different day and thus should have assembled on January 3. But no one is suggesting that the fleeting presence of a Senator in one chamber and a Representative in the other constituted the assembling of the Congress within the meaning of the Twentieth Amendment.

Nevertheless, for the Solicitor General's side of the case, the few seconds of non-assembly of January 3 are enough for the President to say, in effect, to the Senate on January 4, "as you won't be assembling for 20 more days – and 20 is a long enough intra-session break for me to make recess appointments, time's up, you have had enough time in the first 24 hours of the new session to give your advice and consent so I'll now make recess appointments that may last two years and be the longest in the Nation's history."

The other side of the case also sees advantage in slicing the long break into two, but only as a prelude to slicing the two parts (and particularly the January part) into min-three day "pro forma" parts, none of which is long enough for a recess appointment.

I agree that during the annual meeting the Senate determines when it is in session and neither the Executive nor the Judicial Branch may second-guess the Senate on that. Of course, if the Recess Clause generally permits only intersession appointments (with latitude for continuity of Government or other extraordinary circumstances), there would be no need for the Senate to defend against appointments during Memorial Day and July Fourth weeks at home by requiring a DC area member to come in every three days for a few seconds. But there is one time of year when the Constitution overrides the rule making authority of each House, and that is when any change in the requirement of an actual assembly of the Congress must be done by law and not by the resolution of either or both Houses. And even then, the only power of Congress is to change the date. The Congress has no power to change the requirement that the Congress assemble.

Thus the long break that lasted until the House assembled on January 17 and the Senate on January 23, 2012 is just that, a long break that is not subject to the slicing that either side of the case proposes. If reality has a role in this constitutional adjudication, the appointments made on January 4, 2012 are within the recess that bridged completion of the work of the first session of the 112th Congress and the assembly of the Congress to commence the work of the second session. However, those valid recess appointments are ordinary one-year appointments and not the record setting two-year appointments that the Executive Branch had sought.

4. Events Since the Granting of Certiorari Provide Added Reason for Not Drawing Judicial Lines that the Political Branches Have Long Lived Without

Consider how the landscape has changed since the Supreme Court granted certiorari on June 24, 2013. On July 30, the Senate confirmed five appointments, a full slate, to the National Labor Relations Board. Given the staggered terms of NLRB members, the next vacancy on the Board (apart from any that may happen through death or resignation) will not occur until December 2014. On October 29, the Senate confirmed the President's nominee to serve as General Counsel to the Board. That nominee had been one of the recess appointees whose temporary appointment had given rise to the Noel Canning case. On November 21, the Senate established a precedent on bringing debate on nominations to a close by upholding a ruling of the Chair that the threshold for cloture on nominations, not including those to the Supreme Court, is now a majority of Senators rather than 60. Since the upholding of that ruling, the Senate has been closing debate and confirming nominations on the basis of majority votes.

If Noel Canning is successful in the Supreme Court, there is a substantial chance – to the extent the labor-management dispute remains an active one – that the underlying matter will resume before the fully confirmed Board. If that is likely, for Noel Canning or other companies who have objected to rulings when the Board had recess appointees, no constitutional ruling by the Supreme Court is needed to simply return this matter to the fully confirmed Board.

Looking at this matter from the Government side, the Solicitor General is representing the Board. Since confirmation of its members on July 30 that has been the

fully confirmed Board. For the now fully confirmed Board, revisiting a number of cases might involve additional work, but that would be a small price in return for the benefit of the Court not refereeing an Executive Branch – Legislative Branch issue that is no longer necessary to decide. Of course, the Solicitor General is seeing this mainly from the point of view of the President rather than the Board, but it is the Board that is the party before the Court and the Solicitor General who is representing it.

The change in Senate precedent on closing debate injects several considerations. One is that the change in precedent will have an impact, which may take a while to discern, on the occasions in which the Senate enters a recess with unresolved vacancies for which a President might determine there is a need to temporarily fill through recess appointments. More broadly, the dispute within the Senate -- about nominations, the appropriate rules for cloture on them, and larger issues about change or stability in Senate rules -- has been a bruising one. There is much to work out within the Senate and between the Senate and the President. Perhaps there is never a good time, but this may be a particularly inopportune time for a judicial ruling declaring a winner and a loser. So, to end on a hope: it would be truly wonderful if somewhere in the deliberation process the Court decided that this is no occasion to further fuel that fire.