The Future of Recess Appointments in Light of Noel Canning v. NLRB

Peter M. Shane

Public Law and Legal Theory Working Paper Series
No. 219

May 14, 2013

Bloomberg BNA

Daily Report for Executives™

Government Operations

The Supreme Court likely will soon weigh the constitutional validity of recent presidents' use of the recess appointment power. Ohio State Law School professor Peter M. Shane outlines the history of the power and how it has grown in importance in a time of chronic congressional gridlock and obstruction.

He says the justices are not likely to adopt the D.C. Circuit panel's reasoning in *Noel Canning v. NLRB*, which severely cut back the president's power. But they could drastically modify or virtually eliminate it in different ways.

The Future of Recess Appointments in Light of *Noel Canning v. NLRB*

BY PETER M. SHANE

A Jan. 23, 2013, panel decision of the U.S. Court of Appeals for the District of Columbia Circuit casts doubt on more than the future of two current federal agencies. It calls into question the legality of innumerable actions by hundreds of federal officials counting back to the days of the Reagan Administration.[1]

In *Noel Canning v. NLRB*,[2] the court invalidated Obama's January 2012 invocation of his recess appointments power to name three members to the National Labor Relations Board (NLRB). The panel unanimously concluded that the recess appointments power was available to presidents only between sessions of Congress. Yet well over 300 federal officials since 1981 have received such appointments during congressional sessions.

Two of the three judges went further. They interpreted the recess appointments power as applying only to offices that first become vacant between sessions of Congress. That holding would likely invalidate most of the more than 300 additional recess appointments that presidents since Reagan have made between congressional sessions.

The Pro Forma Session Gambit

The *Noel Canning* decision arose in the context of an ongoing struggle between presidents and Congress over the use of the recess appointments power. The Constitution conveys that power in a paragraph that authorizes the President ''to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.''[3]

When the Democrats regained control of the Senate in 2007, they began a practice of conducting so-called ''pro forma sessions'' during those recesses that occur within sessions of Congress. These pro forma sessions typically last only a couple of minutes, if that, during which the only business conducted—often by a single senator—is simply a call to order and adjournment until the next pro forma session. Senate Majority Leader Harry Reid (D-Nev.)—now a supporter of the contested Obama appointments—originally took the position that such pro forma sessions converted otherwise lengthy recesses into shorter adjournments, each of which would be too brief to trigger the president's recess ap-

[1] Henry Hogue, et al., The *Noel Canning* Decision and Recess Appointments Made from 1981-2013, at 4 (CRS Feb. 4, 2013) (tabulating presidential recess appointments since 1981).

[2] 705 F.3d 490 (D.C. Cir. 2013).

[3] U.S. Const., Art. II, § 2, ¶ 3.

Peter M. Shane *is the Jacob E. Davis and Jacob E. Davis II Chair in Law at Ohio State University's Moritz College of Law. The opinions expressed are those of the author.*

 ISSN 0148-8155

pointments power.[4] Although apparently advised by the Justice Department that his recess appointments power remained intact,[5] President George W. Bush declined to challenge the Reid strategy.

Between Dec. 17, 2011 and Jan. 23, 2012, the Senate again met only during ten pro forma sessions—but this time, not at the Democrats' behest. Article I, Section 5 of the Constitution provides that ''[n]either House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days . . . .'' The evident purpose of this clause is to enable each House to keep the other in town in order to assure that business between them may be conducted. House Republicans, however—who were by no means staying in town to conduct business of their own—used this clause to deny the Senate permission to adjourn for more than three days between the end of the first and the start of the second session of the 112th Congress. The intent, once again, was to block presidential recess appointments.

Crises at the NLRB and CFPB

Against this procedural background, Obama faced a late 2011 administrative crisis involving two federal agencies. Obama had nominated labor attorney Craig Becker to the NLRB on July 9, 2009. When Senate Republicans filibustered Becker's confirmation vote, Obama gave him a recess appointment to the Board over eight months later, on March 28, 2010. He resubmitted the nomination on Jan. 26, 2011, but the Republicans persisted in their filibuster. Republicans also prevented a vote on a second January, 2011 nominee, Terrence F. Flynn.

As a result of these filibusters, the NLRB was facing a calamity brought on by the Supreme Court's 2010 decision in a case called *New Process Steel v. NLRB*.[6] The Court there interpreted the National Labor Relations Act to require three lawfully participating members to be in place in order for the NLRB to act. The expiration of the 2010 Becker recess appointment threatened to reduce the Board's membership to two. Thus, on Dec. 14, 2011, Obama withdrew the Becker nomination and forwarded to the Senate nominations for Sharon Block and Richard F. Griffin Jr. When the Senate predictably did not act on these nominations by the end of the first session of the 112th Congress, Obama set the stage for *Noel Canning v. NLRB* by giving recess appointments to Block and Griffin—and to Terrence F. Flynn—on Jan. 4, 2012.

Although the *Noel Canning* decision technically dealt only with these three NLRB appointments, Obama also made a fourth recess appointment on Jan. 4, 2012. He appointed Richard Cordray to head the Consumer Financial Protection Bureau (CFPB) created by the Dodd-Frank Act. The Senate had sat on the Cordray nomination since July 18, 2011, because of Republican hopes to force an amendment to the Act that would convert the CFPB into a multi-member commission. Because the Dodd-Frank Act conditions certain of the agency's powers on the appointment of the agency head,[7] a vacancy in the director's position would disable the CFPB from carrying out a number of its significant supervisory, enforcement, and rulemaking powers.

The Court's Reasoning in Noel Canning

Noel Canning, a Pepsi-Cola bottling firm in Yakima, Washington, sued in the D.C. Circuit to overturn an NLRB order finding that management had unlawfully refused to enter into a collective bargaining agreement with the Teamsters local representing its production employees. A panel comprising Judges David Sentelle, Karen Henderson, and Thomas Griffith— appointees of Presidents Reagan, Bush 41 and Bush 43, respectively—concluded that the NLRB's decision was legally supportable, but that it could not be enforced. The panel held that the Obama recess appointments were invalid and that, without them, the NLRB lacked the necessary quorum to conduct business.

Judge Sentelle's opinion for the court reached its conclusion based on what it took to be the original ''public meaning'' of the Recess Appointments Clause. The panel determined that the phrase ''the recess'' in that clause would have been understood in the late 18th century to refer only to the period of adjournment between two sessions of Congress. Because the second session of the 112th Congress convened on Jan. 3, 2012, the court reasoned that appointments made on Jan. 4 were impermissible ''intrasession'' appointments.

Judge Sentelle went on to argue further, with only Judge Henderson in concurrence, that the original meaning of ''happen'' in the Recess Appointments Clause was ''to occur.'' For that reason, he wrote, the Recess Appointments Clause, properly read, would allow presidents to fill only those vacancies that first arise during recesses between sessions of Congress. Under this reasoning, the president could not legally fill a vacancy created by an official's death even a day prior to the Senate's adjournment, no matter how long the Senate remained in recess.

The court insisted that its strict reading of the Recess Appointments Clause was necessary to preserve the Senate's critical confirmation role in the process of appointing officers of the United States, and to create a bright-line rule susceptible to objective judicial enforcement.

An Audacious Opinion

For lawyers, two things are immediately noteworthy about the *Noel Canning* opinion. The first is that the court struck down the Obama appointees on the broadest constitutional ground imaginable. The panel could have decided the case against the NLRB by concluding that, whether or not the Recess Appointments Clause

[4] Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions (O.L.C. Jan. 6, 2012) [hereafter, OLC Recess Appointments Opinion], *citing* 154 Cong. Rec. S7558 (daily ed. July 28, 2008) (statement of Sen. Reid), and 153 Cong. Rec. S14609 (daily ed. Nov. 16, 2007) (statement of Sen. Reid) (''[T]he Senate will be coming in for pro forma sessions . . . to prevent recess appointments.'').

[5] Id., at 4, *citing* Memorandum to File, from John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Lawfulness of Making Recess Appointment During Adjournment of the Senate Notwithstanding Periodic ''Pro Forma Sessions'' (Jan. 9, 2009).

[6] 130 S. Ct. 2635 (2010).

[7] 12 U.S.C. § 5586(a).

  DER ISSN 0148-8155

permits intrasession appointments, adjournments of three days are too short to count as a ''recess,'' and that the 2012 pro forma sessions effectively divided what would have been a 20-day recess into a series of mere three-day breaks. That analysis is debatable, but it would have had the obvious virtue of avoiding the unnecessary decision of larger constitutional issues. The Supreme Court has repeatedly described judicial modesty as the appropriate stance to take in conducting judicial review.

Second, the D.C. panel reached its conclusions despite significant contrary custom and authority. Presidents since the 1820s have consistently taken the position that vacancies ''happen'' during a recess of the Senate if they ''happen to exist'' during that recess. Congress itself effectively ratified that position in enacting the so-called Pay Act,[8] which allows recess appointees to receive their salaries even if they were appointed to vacancies that occurred when the Senate was in session. The narrow reading of ''happen'' on which *Noel Canning* relies has been rejected by earlier opinions of the Second,[9] Ninth,[10] and Eleventh[11] Circuits.

The permissibility of intrasession appointments is arguably a closer question. But presidents have consistently asserted authority to make intrasession appointments since 1921. As noted earlier, intrasession recess appointments have been as common since the first Reagan administration as intersession appointments. The Eleventh Circuit upheld their legality in *Evans v. Stephens.*[12]

In making his January, 2012 appointments, Obama acted under Justice Department advice memorialized in a Jan. 6, 2012, Office of Legal Counsel memorandum that relied, in turn, on earlier institutional precedents. In an official 1921 opinion for President Harding, Attorney General Harry M. Daugherty adopted a functional view of ''recess,'' derived from a 1905 Senate committee report; the 2012 OLC memo follows the same approach. The Senate committee asserted: ''The word 'recess' is one of ordinary, not technical signification, and it is evidently used in the constitutional provision in its common and popular sense.''[13] The report went on describe the Senate as being in recess when ''its members have no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the president or participate as a body in making appointments.''[14]

OLC observed in its 2012 opinion that the Senate's 2011 and 2012 pro forma sessions were conducted pursuant to a unanimous consent resolution that had provided there would be ''no business conducted'' during those sessions.[15] As viewed, therefore, by Obama, the pro forma sessions left unchanged the reality that the Senate was unavailable from Jan. 3 to Jan. 23, 2012 to act on nominations. The pro forma sessions left the ''recess'' intact.

Weighing the Arguments

The strongest arguments against the Obama appointments support not the broad D.C. Circuit ruling, but the narrower analysis it eschewed. Opponents could argue that, notwithstanding the resolution promising ''no business conducted,'' the pro forma sessions did, in fact, keep the Senate available to consider nominations had the Senate chosen to do so. As pointed out by former OLC head Charles J. Cooper in testimony to the House Education and the Workforce Committee,[16] the Senate did, at one of its pro forma 2011 sessions, pass by unanimous consent a two-month extension of a payroll tax cut, as requested by Obama.[17] Should this argument prevail, the President's Jan. 4 appointments would have been constitutional only if the three day Jan. 3-6 break counted as a ''recess'' adequate to trigger his recess appointments powers. No court has held a three-day break to be sufficient for this purpose, and executive branch pronouncements on the issue have not been consistent.[18]

The strongest argument in support of the president's position rests on the proposition that the Constitution intends that the President to take the leading role in staffing the executive branch. Urging New Yorkers to ratify the Constitution, Alexander Hamilton explained the design of the appointments process in these terms: ''[O]ne man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment.''[19] The Senate was given a role in the appointments process not to impede the President's policy agenda, but as a check on potential corruption: ''[The Senate] would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.''[20] Protecting the Senate's confirmation role at the expense of the President's appointments responsibility turns the constitutional design on its head.

If the President's position is rejected, then presidents—who are constitutionally charged to ''take Care that the Laws be faithfully executed''[21]—could be stymied permanently in the execution of their administrative responsibilities by a Senate minority determined to block appointments. Executive administration could even be blocked by a House of Representatives intent, as was the 2011 House, on disabling a Senate majority from adjourning. Because there is no plausible argument to be made that the House is intended to have a role in the appointments process, this perverse result is a powerful argument that ''recesses'' do not change their constitutional character because of pro forma sessions or, alternatively, that three-day breaks count as constitutional ''recesses.'' Three-day breaks are the lon-

[8] 5 USC § 5503.
[9] United States v. Allocco, 305 F.2d 704 (2nd Cir. 1962).
[10] United States v. Woodley, 751 F.2d 1008 (9th Cir. 1985).
[11] Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004).
[12] Id.
[13] S. Rept. No. 4839, 58th Cong., 3rd Sess. 3823-3824 (1905), quoted in Precedents of the House of Representatives, § 6687, at 852-853.
[14] Id.
[15] 157 Cong. Rec. S8783 (Dec. 17, 2011).
[16] Statement of Charles J. Cooper Before the House Committee on Education and the Workforce Concerning ''The NLRB Recess Appointments: Implications for America's Workers and Employers,'' 2 (Feb. 7, 2012), available at http://edworkforce.house.gov/uploadedfiles/02.07.12_cooper.pdf.
[17] 157 Cong. Rec. S8789 (Dec. 23, 2011).
[18] OLC Recess Appointments Opinion, *supra* note 4, at 9 n. 17.
[19] The Federalist, No. 76 (Hamilton).
[20] Id.
[21] U.S. Const., Art. II, § 3.

gest periods of adjournment that the Senate may take without regard to the wishes of the House.

The textual arguments that the D.C. Circuit mustered for the narrowest possible reading of the President's appointments power are weak. There is significant evidence that the Founding Generation understood a legislative ''recess'' to be a break that could occur either within or between legislative sessions. There is likewise evidence that 18th century readers would have understood the word ''happen'' to mean ''happen to exist.'' A straightforward textual reading of the President's power ''to fill up all vacancies that may happen during the recess of the Senate'' would validate his authority ''to fill up, during a period of adjournment either within or between sessions of the Senate, all vacancies that may happen to exist during that period of adjournment.'' This is plainly the most practical reading of the Recess Appointments Clause, and the D.C. Circuit opinion rejecting it has the feel of semantic cherry-picking.

Impact on the Agencies

Standing on its own, *Noel Canning* is of limited practical significance. It affects only one NLRB order and is binding precedent only in the D.C. Circuit. The NLRB has continued to hear and decide cases notwithstanding its D.C. Circuit loss.

As well summarized, however, in an April, 2013 Congressional Research Service report,[22] the potential impacts of the decision go much further. In the year between the disputed recess appointments and the D.C. Circuit's opinion, the NLRB ruled on over 200 cases, any of which could be challenged in litigation on recess appointments grounds. Over 60 published decisions have been rendered by the Board since *Noel Canning*, along with a yet larger number of unpublished orders. Any party aggrieved by an NLRB decision has the discretion to appeal that decision to the U.S. Court of Appeals for the District of Columbia Circuit, which now obviously poses a problem for the enforcement of future NLRB orders.

Aggrieved parties might also use *Noel Canning* to challenge actions undertaken by the Consumer Finance Protection Bureau. The Dodd-Frank Act transferred to the CFPB a variety of supervision, enforcement and rulemaking powers previously delegated to other agencies, which the Act also permitted the Secretary of the Treasury to implement prior to the ''confirmation'' of a CFPB Director. A significant number of additional authorities, however, were vested exclusively in the Director, once duly in office.

Based on *Noel Canning*, all the rulemaking and enforcement actions undertaken by Director Richard Cordray are susceptible to a recess appointments challenge. Should the director's appointment be invalidated, however, his exercise of any powers merely transferred to the CFPB from other agencies could be subsequently ratified by action of the Secretary of the Treasury, to whom those powers would revert.

The reasoning of *Noel Canning* calls into question not only the rules and order of the NLRB and CFPB, but all official actions of recess appointees who received either intrasession appointments or who were appointed to fill vacancies that first occurred when the Senate was in session. Yet even courts inclined to adopt the reasoning of *Noel Canning* might leave pre-*Noel Canning* actions intact under the so-called ''de facto officer'' doctrine. That doctrine ''confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient.''[23] It guards against ''the chaos that would result from multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question, and seeks to protect the public by insuring the orderly functioning of the government despite technical defects in title to office.''[24]

A potential glitch in applying this doctrine, however, is that the unconstitutional appointment of an officer of the United States might not be deemed the kind of ''technical defect'' to which the doctrine refers. As the Congressional Research Service observed, ''it is difficult to predict how and when courts will apply the de facto officer doctrine.''[25]

Anticipating the Supreme Court

The government has asked the Supreme Court to hear *Noel Canning*, and it would be surprising for the Court not to do so. The importance of the issues, the conflict in the circuits, and the expansiveness of the D.C. Circuit rationale all augur for Supreme Court review.

Predicting the outcome, however, is all but impossible. The Court is unlikely to adopt the D.C. Circuit's reasoning because it goes so far beyond what is necessary to decide the case. That leaves, however, at least three options for the Court: It could uphold the Obama appointments because a three-day break is a recess or because the pro forma sessions left the relevant 20-day recess intact. It could uphold the Obama appointments because intrasession recess appointments to fill vacancies that arose at any time are constitutionally permissible, and the length of adjournment necessary to constitute a ''recess'' is best regarded as a political question to be fought out between the executive and legislative branches. Or, the Court could overturn the appointments following the more modest rationale that three days are too short to count as a ''recess,'' and the Jan. 3-23 ''recess'' was no more than a series of three-day breaks.

The justices' individual agendas cut in many different ways on the recess appointments issue.

For Justices Scalia and Thomas, the D.C. Circuit's textualist methodology will be attractive, but its execution by the lower court was clumsy. These Justices will also be aware that the D.C. Circuit's reasoning could seriously weaken the presidency as an institution, and each is a reliable defender of executive power in almost all constitutional contexts. The same is likely true of

[22] David H. Carpenter and Todd Garvey, Practical Implications of *Noel Canning* on the NLRB and CFPB (CRS Apr. 1, 2013).

[23] Ryder v. United States, 515 U.S. 177, 180 (1995).
[24] Id. at 180-81.
[25] Carpenter and Garvey, *supra* note 22, at 10.

  DER ISSN 0148-8155

Chief Justice Roberts and Justices Alito and Kennedy. They will not be oblivious to the institutional implications of deciding the case against the NLRB.

On the other hand, the current Justice best known for a pragmatic style of constitutional interpretation—Justice Breyer—is also an institutional veteran of the Senate, having served as both a Special Counsel and later as Chief Counsel to the Senate Judiciary Committee. He will not be dismissive of the Senate's role in the confirmation process.

In short, the recess appointments issue—occurring at the confluence of concerns over executive power, constitutional interpretation, and party politics—resists easy categorization. The *Noel Canning* reasoning is unlikely to survive. Beyond that, we can only guess.

The Future of Recess Appointments – and of Congress

What many observers have characterized as a breakdown in the process of nomination and confirmation highlights a critical feature of constitutional government: The effective operation of the separation of powers system depends as much on informal norms or customs as it does on the constitutional text. Until recent years, presidents and Senates have generally behaved as though recess appointments should be rare, and nominees—especially to noncontroversial positions—should receive relatively prompt Senate up-or-down votes. Constitutional text, however, guarantees neither proposition, and recent behavior threatens to eviscerate these understandings.

A September, 2012 Congressional Research Service report documented the breakdown in norms by examining delays in Senate floor votes on noncontroversial presidential nominees to lower court judgeships.[26] The report focused on nominees whom the Senate Judiciary Committee approved either by voice vote or unanimous roll call, and whose nominations were eventually approved by the full Senate with five or fewer dissenters. The report found: ''For uncontroversial circuit court nominees, the mean and median number of days from nomination to confirmation ranged from a low of 64.5 and 44.0 days, respectively, during the Reagan presidency to a high of 227.3 and 218.0 days, respectively, during the Obama presidency. . .For uncontroversial district court nominees, the mean and median number of days from nomination to confirmation ranged from a low of 69.9 and 41.0 days, respectively, during the Reagan presidency to a high of 204.8 and 208.0 days, respectively, during the Obama presidency.''[27] In other words, as compared to the Reagan years, the Senate is taking somewhere between three and five times longer, on average, to confirm judicial nominees about whom there is virtually no disagreement.

If the Obama appointments are upheld and if the pattern of Senate obstruction persists, one can reasonably predict far more recess appointments in the future. Of course, presidents will always have significant disincentives to use recess appointments. Such appointments can antagonize senators whose support is necessary for other business. They reduce stability in administration. When used for judges, recess appointments create the dangerous situation that cases supposed to be decided by appointees with life tenure are instead decided by judges who are effectively on probation and too easily worried about alienating the Senate that has to vote on them.

But recess appointments are a president's primary tool for pushing back against Senate intransigence. If Senate filibusters persist, and should minority Senators block nominations in hopes of stalling agencies out of business, presidents will have no real alternative to ratcheting up the recess appointment device.

If *Noel Canning* is upheld, then the future depends on the grounds for decision. Should the Supreme Court agree with the D.C. Circuit that recess appointments are permissible only during intersession recesses and only for positions that first become vacant during those recesses, recess appointments will likely disappear—or presidents may engage in their own ''creative'' tactics, insisting on resignations during intersession recesses so that the resulting vacancies can be immediately filled.

The Senate could take the position that it need not comply with the House's Article I objections to adjournment unless the House itself remains in session.

On the other hand, if the Obama appointments are nullified only because three-day adjournments are not ''recesses,'' and pro forma sessions effectively break recesses into three-day breaks, then much will depend on the response of future Senates. Recess appointments will continue when the party that occupies the White House controls both the Senate and House. The Senate will not worry about recess appointments by a president of the majority party, and the House will not disable the Senate from recessing for lengthy periods.

If, however, either the House or the Senate is controlled by a party different from the president's, then the pro forma session appointments block is likely to be institutionalized. If the opposing party controls the Senate, the Senate will adopt pro forma sessions on its own initiative. If the opposing party controls only the House, the House will use its Article I power to prevent the Senate from adjourning for more than three days.

This last scenario—the scenario that actually played out in 2011 and 2012—raises yet another dramatic possibility for the breakdown of constitutional norms. The Senate could take the position that it need not comply with the House's Article I objections to adjournment unless the House itself remains in session—which the House may well resist doing. In other words, a Senate controlled by the president's party could ignore the House's lack of consent to adjourn if it regards the objection as illegitimate. The Senate could simply adjourn *sine die* at will. The House would have no legal remedy against the Senate, and the decline in institutional comity that seems to have overtaken the federal government since 1981 will accelerate.

[26] Barry J. McMillion, Length of Time from Nomination to Confirmation for ''Uncontroversial'' U.S. Circuit and District Court Nominees: Detailed Analysis, at 2 (CRS Sept. 18, 2012).
[27] Id.