

Implications for the CFPB After the D.C. Circuit's Recess Appointments Decision

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Introduction

A panel of three judges in the D.C. Circuit stunned Washington on Friday by striking down President Obama's recess appointments to the NLRB in *Noel Canning v. NLRB* on a basis much more sweeping than had been anticipated. The two holdings in the decision cast doubt over the longstanding practice of intrasession recess appointment, which has been used especially frequently in the last two decades. For financial institutions, the decision is of direct interest because it calls into question President Obama's recess appointment that same day of Richard Cordray as Director of the CFPB and, as a result, all of the actions taken by the CFPB since his appointment. Richard Cordray's appointment is already being contested in the D.C. district court as part of a broader lawsuit challenging the constitutionality of other aspects of the CFPB, as well as of the Financial Stability Oversight Council and Title II of the Dodd-Frank Act. In this client alert, we discuss the *Noel Canning v. NLRB* decision and the impact it could have on Director Cordray's status and the validity of the CFPB's past and future actions.

Noel Canning v. NLRB

The Decision

The court's decision to invalidate President Obama's recess appointments to the NLRB rests on two alternative holdings. The first holding, which is joined by all three judges, is a tightly reasoned textual and originalist holding that interprets the Recess Clause to apply only during an *intersession* break and not during an *intrasession* break. The second holding, joined by only two of the judges, concludes that the President may make recess appoints to fill only vacancies that *arise* during the recess, as opposed to vacancies that *happen to exist* during the recess.¹ Because either holding rendered President Obama's recess appointments invalid, the court concluded the NLRB lacked the required quorum to issue the disputed decision.

Next Step: The Supreme Court?

The government is expected to petition the Supreme Court to review the D.C. Circuit's decision. Because the decision creates a sharp and ripe circuit split and because of the immediate impact on hundreds of NLRB decisions as well as on relations between the Presidency and the Senate, the Supreme Court is likely to grant certiorari, and could even potentially hear the case before the end of the current term if the government seeks an expedited schedule. The Supreme Court may affirm the D.C. Circuit's broad holdings, but it also has the option of upholding the decision on the narrower basis urged by the Congressional *amici*—who controls when a recess exists as a factual matter. The Roberts Court may be inclined to go with the narrower approach. Of course, the Supreme Court might also reverse by relying on the reasoning from the other circuit courts, but the novel twist in President Obama's appointments, as

¹ Compare AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 576 n.16 (2012) (noting that the "overwhelming mass of actual practice," as well as presidents, senators, and the judiciary, support the view that the recess-appointment power applies broadly to vacancies that happen to exist during the recess).

compared to the President Bush appointment upheld by the other circuit, is that the Senate did not believe it was in recess.

The D.C. Circuit's decision could also be stayed until the Supreme Court hears the case. In order to obtain a stay, the government would have to demonstrate that it is reasonably probable that the Supreme Court will grant certiorari, that it is reasonably possible that the Court could vote to reverse the decision, and that it would suffer irreparable harm if the decision is not stayed. Although stays are generally granted only under exceptional circumstances, some of the factors that traditionally support a stay are present here, including a substantial legal question dividing the circuits. The government may also petition for rehearing en banc, but that petition is not likely to be granted due to the general consensus among the panel.

Implications for the CFPB

There are no immediate repercussions for the CFPB, even though the CFPB is currently involved in similar litigation in the District of Columbia challenging the recess appointment of Director Cordray, and the *Noel Canning* decision, if not reversed, would be binding precedent on that court. But even if we assume that the recess appointment of Director Cordray is invalid under *Noel Canning*,² the additional issues facing the CFPB are exponentially more complex than those present in the NLRB case.

Structure of the CFPB

Many features of the CFPB's structure distinguish it from the NLRB. Unlike the NLRB, the CFPB lacks a multimember board; authority is vested in a single Director. Whether an order or rule was approved by a quorum is not at issue for the CFPB. Instead, the issue turns on the CFPB's authority to act without a validly appointed Director. Moreover, certain structural features of the CFPB make it more insulated from congressional and executive control, potentially exacerbating the separation of powers concerns over a recess appointment. For instance, the Congress has less power over the CFPB because the Director of the CFPB may request a reasonably necessary amount of funding from the Federal Reserve, and Title X prohibits the House and Senate Appropriations Committees from reviewing the CFPB's budget. The CFPB's Director has a five-year term and is removable by the President only for cause.

In fact, in addition to challenging Richard Cordray's appointment, the plaintiffs in the CFPB litigation allege that because of these structural features, the CFPB violates the Constitution's separation of powers doctrine. In particular, they claim that Title X impermissibly delegates unlimited authority to the CFPB, overly insulates the Director, and unconstitutionally removes the Congress's "power of the purse" over the CFPB.

Additional Wrinkles Specific to the CFPB

Does the CFPB need a Director to act?

The Supreme Court has recently held that the NLRB needs a quorum to issue an order. If the recess appointment of Director Cordray is invalidated, then the rules and orders issued by the CFPB could likewise be vacated if the court concludes the CFPB needs a Director to issue those rules and orders.

² Because no other appointee has yet held the new Director position under the Dodd-Frank Act, some have also asked whether this newly created position is even the type of "vacancy" that could be constitutionally filled with a recess appointment, as the Recess Clause has generally been used to fill interim vacancies in existing positions due to death or resignation. See, e.g., John Dugan et al., Covington & Burling LLP, *Legal Issues Raised by Recess Appointment of Director of Consumer Financial Protection Bureau* (Jan. 5, 2012), available [here](#).

Title X of the Dodd-Frank Act transferred to the CFPB certain powers previously held by other regulators, and also granted the CFPB new powers. The inspectors general for the U.S. Treasury and the Federal Reserve, along with other commentators, have taken the position that the CFPB requires an appointed Director only for its new regulatory powers conferred under the Dodd-Frank Act, such as its powers to regulate nonbank entities or declare certain financial products deceptive. But some commentators have argued that the CFPB requires a validly appointed Director in order to engage in any rulemaking.

Can the rules and orders issued by Director Cordray and the CFPB be upheld even if his appointment is invalidated?

Could the Secretary of the Treasury ratify actions taken by the CFPB? If the recess appointment is invalidated, then it is possible that the Secretary of the Treasury would still have authority over at least some parts of the CFPB. The Secretary of the Treasury's authority, however, may extend only to the CFPB's transferred powers and not to the CFPB's newly established authorities under Title X. The question then is whether the Secretary of the Treasury could use that authority to ratify otherwise invalid actions taken by the Director and the CFPB pursuant to the transferred powers.

De facto officer doctrine? Even if the court determines that Director Cordray was unconstitutionally appointed, the government could raise the argument that the CFPB's past actions under his directorship were protected under the de facto officer doctrine. This doctrine holds that the acts of an officer acting under color of official title may be valid even if that officer's legal claim to the title is later proven invalid.³ A small number of federal decisions have cited this doctrine in upholding the de facto validity of actions taken by officers appointed in violation of the Appointments Clause.⁴ Even apart from this doctrine, the Supreme Court has, on a few occasions, accorded de facto validity to the acts of federal officers that were not appointed in compliance with the Appointments Clause. The exact scope of this doctrine, however, remains vague and unsettled in the case law. Moreover, this doctrine would not prevent litigants in CFPB enforcement actions from using the Director's unconstitutional appointment as a defense.

Can the Deputy Director validate the CFPB's actions? Another question is whether the Deputy Director could constitutionally act as the Director to ratify past CFPB actions even without Senate confirmation. Commentators have doubted, however, the validity of rules passed only by the Deputy Director, and some have pointed out that the Director's appointment of the Deputy Director itself may be invalid. In addition, the current Deputy Director has announced that he is leaving at the end of January, which raises the question whether Director Cordray can validly appoint another Deputy Director.

Moving Forward

Litigation Against the CFPB

The challenge to the CFPB in the District of Columbia is not very far along, and it is possible that the case will be dismissed for lack of standing. A decision on the merits regarding Director Cordray's appointment is a long ways away. Nevertheless, the *Noel Canning* decision could spawn new lawsuits brought by plaintiffs with unquestioned standing—for example, plaintiffs who refuse to comply with CFPB rules.

A Political Deal?

The issue could also be resolved through a grand political compromise to restructure the CFPB. In return for confirming Richard Cordray and allowing him to ratify his previous actions as CFPB Director (if

³ See *Ryder v. United States*, 515 U.S. 177, 180-81 (1995).

⁴ See, e.g., *Franklin Savings Association v. Director of the Office of Thrift Supervision*, 740 F. Supp. 1535, 1541-42 (D. Kan. 1990).

necessary), Republicans could ask President Obama and the Democrats to restructure the CFPB so that the Bureau and its Director are less insulated from congressional oversight and subject to greater accountability. Or will the Senate Republicans filibuster?

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