
DC Circuit Invalidates Obama Recess Appointments

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This morning, a panel of the US Court of Appeals for the District of Columbia Circuit held that President Obama's recess appointment of three members of the National Labor Relations Board (NLRB) violated the Constitution's Recess Appointments Clause.¹ The DC Circuit's decision, which the Government will likely appeal, has significant ramifications for Director Richard Cordray of the Consumer Financial Protection Bureau (CFPB or the Bureau), who was appointed the same day as the NLRB members and whose appointment would also be invalid under the DC Circuit's reasoning. Hence, it will likely have important implications for many recent and pending CFPB rulemaking and supervisory actions. If the decision were to be the last word on the issue, it would dramatically restrict the circumstances under which Presidents could make recess appointments. Thus, it seems highly likely the Government will seek review, either by the full court of appeals or by the Supreme Court.

The Recess Appointments Clause provides that "[t]he President shall have Power 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."² In an opinion by Chief Judge Sentelle, joined by Judges Henderson and Griffith, the court of appeals held that the Clause empowers the President to make recess appointments only during *intersession* recesses of the Senate—that is, recesses between formal sessions of the Senate—and not during *intrasession* recesses, which are breaks that occur during the course of a congressional session.³ Chief Judge Sentelle and Judge Henderson also held that the President may make recess appointments only to fill vacancies that actually arise during an intersession recess of the Senate, rejecting a practice the Executive Branch has followed since the nineteenth century.⁴ Because President Obama's appointments of the NLRB officers occurred during (at most) an *intrasession* recess and because the vacancies for those appointments had not arisen during an intersession recess, the court held that the President's appointments were unconstitutional.⁵ Judge Griffith filed an opinion concurring in part, saying he would have decided the case solely on the intersession/intrasession ground.⁶

Although Mr. Cordray's recess appointment was not directly challenged in this case, the DC Circuit's reasoning would appear to apply equally to his appointment. Moreover, a challenge to the constitutionality of Mr. Cordray's appointment is already pending in the federal district court in DC,

and that court would be bound by the DC Circuit's decision.⁷ Today's decision thus has significant ramifications for the legality of the actions of Mr. Cordray and the Bureau.

Even if Mr. Cordray's appointment were to be invalidated in a challenge to a particular action by the Bureau, additional analysis, and likely additional legal challenges, would be required to determine which actions during Mr. Cordray's tenure could stand and which do not. First, there may be questions about which CFPB actions require the presence of an appointed director and which do not. For example, among the issues to be addressed may be whether the Bureau may continue to exercise its powers over non-bank institutions, such as check-cashing companies and payday lenders, and its powers to enforce the provisions prohibiting unfair, deceptive, or abusive acts or practices.⁸ Second, there may be issues raised over the validity of the CFPB's (and the NLRB's) actions under the "de facto officer doctrine."

The Government has 45 days to seek rehearing en banc by the full DC Circuit. If it decides to go directly to the Supreme Court, it will have 90 days to file its petition for writ of certiorari.

¹See *Noel Canning v. NLRB*, No. 12-1115 (D.C. Cir. Jan. 25, 2013) (slip opinion), [http://www.cadc.uscourts.gov/internet/opinions.nsf/D13E4C2A7B33B57A85257AFE00556B29/\\$file/12-1115-1417096.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/D13E4C2A7B33B57A85257AFE00556B29/$file/12-1115-1417096.pdf).

² U.S. Const., art. II, § 2, cl. 3.

³See *Noel Canning*, slip op. at 16-30.

⁴See *id.* at 30-39.

⁵See *id.* at 40-44.

⁶See *id.* at 47.

⁷See *State National Bank of Big Spring et al. v. Geithner et al.*, No. 12-cv-1032 (D.D.C.).

⁸See, e.g., 12 U.S.C. §§ 5514(b), 5531-5532, & 5536.

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