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# District of Columbia Circuit Holds NLRB Recess Appointments Invalid, Undermining Numerous NLRB and Consumer Financial Protection Bureau Decisions

Ordinarily, senior officials of the federal government take office only after being nominated by the President and confirmed by the Senate. The Constitution does, however, grant the President limited power to make "recess appointments" when the Senate is in recess. On January 4, 2012, President Obama—declaring that Congress was in the midst of a recess—appointed three individuals (Sharon Block, Terence Flynn, and Richard Griffin) to serve as members of the National Labor Relations Board ("NLRB" or "the Board") and Richard Cordray to serve as director of the Consumer Financial Protection Bureau ("CFPB" or "the Bureau").

A little more than one year later, on January 25, 2013, the United States Court of Appeals for the District of Columbia Circuit held that the President exceeded his constitutional authority in appointing the NLRB members. That decision casts substantial doubt on the validity of hundreds of NLRB decisions and on virtually all of the actions taken by the CFPB since Mr. Cordray's appointment. The ultimate decision regarding this issue almost certainly will be made by the Supreme Court, but it is important to understand the implications of the court of appeals' decision in the event—which appears more likely than not—that the Supreme Court reaches the same conclusion.

## *Noel Canning v. NLRB*: The D.C. Circuit Recognizes Significant Limitations on The Recess Appointment Power

The Constitution 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." Each Congress sits for two "sessions," which begin on January 3 (for example, the two sessions of the Congress that just ended began on January 3, 2011, and January 3, 2012). For more than 100 years, Presidents from both parties have asserted the power to make appointments during Congress's *inter*session recesses (the recesses between the two sessions) as well as during *intra*session recesses (those occurring during a congressional session). In the latter situation, however, the Executive Branch has recognized repeatedly that the recess must last for more than three days (in part because the Constitution prevents the Senate from adjourning for more than three days without the consent of the House of Representatives).

During the George W. Bush Administration, the Senate—at the time controlled by the Democratic Party—adopted the practice of convening every three days for "pro forma" sessions in order to prevent the exercise of the

recess appointment power. That practice continued into the Obama Administration. Although the Senate did not plan to conduct business during these sessions, it did on occasion take legislative action by unanimous consent.

In justifying President Obama's recess appointments, the Justice Department took the view that the President could find that the Senate was in fact in recess, notwithstanding these pro forma sessions, and that the President therefore was able to exercise his recess appointment authority consistent with past practice. If the pro forma sessions were disregarded, the Justice Department argued, Congress was in fact in an intrasession recess of greater than three days.

The *Canning* case involved a determination by the NLRB that the Noel Canning company had violated the National Labor Relations Act by failing to execute a collective bargaining agreement. The company—with support from and participation by the U.S. Chamber of Commerce—sought judicial review of the adverse NLRB decision and argued that the Board's ruling was invalid because the Board lacked a quorum. (A prior Supreme Court decision had established that three Board members are required to empower the Board to act. If the three recess appointments were invalid, the Board would have had only two properly-appointed members, and therefore would be unable to act.)

Most observers believed that the focus of the legal dispute would be whether the recess period was sufficiently lengthy to permit exercise of the recess appointment power and, in particular, whether the Obama Administration was correct in its view that the President may decide for himself whether the Senate is in "recess" for longer than three days—even if the Senate takes the position that it reconvened every three days, albeit for a pro forma session.

The court of appeals agreed that the recess appointments violated the Constitution, but decided the case on much broader grounds. The court unanimously concluded that the Recess Appointment Clause authorizes the President to act only during intersession recesses—the break between the end of one session of Congress and the beginning of another. Two of the three judges went even further, holding that the President's authority is subject to a second limitation—that he may only fill a position that became vacant during the recess in which he makes the appointment. (The third judge did not disagree, but declined to reach the issue because it was not necessary to resolve the case.)

As a practical matter these two limitations severely diminish the President's ability to make recess appointments. Intersession recesses tend to be short, sometimes only a matter of minutes (and a Congress not controlled by the President's party will have a strong incentive to keep them short in order to preclude recess appointments). In addition, the remote likelihood that the President would wish to, and would be ready to, use the recess appointment power to fill a vacancy arising during that short period makes the use of this authority quite unlikely.

## Impact on NLRB: All Board Actions Since January 4, 2012, Subject to Challenge

The NLRB chairman issued a statement disagreeing with the *Canning* ruling and pointing out that the court of appeals' decision "applies to only one specific case." That is of course true as a technical matter. But if the Supreme Court upholds the court of appeals' conclusion that the recess appointments are invalid (either on the same grounds or narrower ones), the effect on the NLRB's authority will be sweeping:

- Board rulings in enforcement actions issued in the future, and those issued since

January 4, 2012, but not yet judicially enforced, are likely to be set aside. That was the result in the *Canning* case, and the targets of enforcement proceedings are likely to raise the issue in every case. Some commentators have suggested that courts could invoke the "de facto officer" doctrine to find Board decisions valid even though the Board members were not lawfully appointed. But the Supreme Court rejected that argument in its 1995 decision in *Ryder v. United States*, and other courts have rejected the argument as well.

- With respect to Board adjudications since the recess appointments that have been enforced, there may be a stronger argument that the "de facto officer" doctrine applies to preclude a challenge. But even then, the significance of the constitutional defect may be sufficient to lead a court to invalidate the Board's action. It would be sensible to file any such challenge expeditiously to blunt the claim that the company failed to assert its rights in a timely manner following the D.C. Circuit's ruling.
- With respect to post-recess appointment regulations and other Board actions no longer subject to judicial review that have a continuing effect on a large class of businesses, there is an even stronger argument that a challenge will be permitted and the regulation or Board action invalidated—especially if the Board or another party attempts to apply the regulation in the course of an enforcement or other proceeding. In that context, unlike the situation with a Board order targeting a specific company, the entity being subjected to the regulation will not have failed to raise the issue in a prior proceeding in which it was the specific target. The entity challenging the regulation or Board action should raise the question of validity at the earliest possible stage, to avoid any argument that it has failed to raise the issue in a timely manner.

## Impact on CFPB: Significant Questions About The Agency's Authority to Act and The Validity of Its Past Actions

The *Canning* court's analysis means that President Obama's appointment of Richard Cordray as director of the CFPB is also invalid. The White House has put a brave face on the issue, with the President's Press Secretary stating that the decision "had to do with one case, one company, one court" and "has no bearing on Richard Cordray."

As with the NLRB's similar effort at "damage control," that statement is technically true. But any party challenging a CFPB action may file a lawsuit in the U.S. District Court for the District of Columbia or, in some circumstances, the Court of Appeals for the District of Columbia. The *Canning* decision will be binding precedent in all such lawsuits unless that ruling is overturned. For that reason, the outcome of these lawsuits is clear—the CFPB appointment will be held invalid because it was made in the same circumstances as the NLRB appointments. (There is a case pending in the District Court for the District of Columbia challenging the CFPB's constitutionality on a number of grounds, including the invalidity of the recess appointment. But the government has raised a significant challenge to the standing of the plaintiffs to assert those claims.)

What is the practical effect of that result?

Answering that question requires a bit of background regarding the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") that created the CFPB. The statute grants this new agency its authority in two stages—in July 2011, when the Bureau came into being, a limited amount of authority was conferred upon the Bureau to be exercised by the Treasury Secretary "until the Director of the Bureau is confirmed by the Senate." The Inspectors General of the Federal Reserve and Department of the Treasury have

explained that this provision limited the Treasury Secretary to—

- Prescribing rules, issuing orders, and producing guidance relating to federal consumer financial laws that pre-dated the Dodd-Frank Act and were previously administered by the federal banking regulators;
- Conducting examinations (for federal consumer financial law purposes) of banks, savings associations, and credit unions with total assets in excess of $10 billion, and any affiliates thereof;
- Conducting consumer protection functions relating to federal laws regulating mortgages and home sales previously within the authority of the Secretary of the Department of Housing and Urban Development;
- Prescribing rules, issuing guidelines, and conducting studies under specified consumer laws previously administered solely by the Federal Trade Commission;
- Taking over enforcement of orders and other rulings relating to consumer protection functions transferred to the Bureau with respect to a bank, savings association, or credit union with total assets in excess of $10 billion, and any affiliates thereof; and
- Replacing the federal banking agencies in any ongoing consumer protection lawsuit or proceeding.

***All other functions***, and in particular the new regulatory, examination, and enforcement authority created by the Dodd-Frank Act, could be exercised only by a lawfully-appointed director. This category of authority includes the Bureau's power to supervise and examine nondepository institutions under Section 1024 of the Dodd-Frank Act— mortgage lenders, brokers and servicers, providers of private education and payday loans, and larger participants in a market for other consumer financial products or services identified pursuant to a CFPB rule (to date, the Bureau has issued final rules identifying larger participants subject to examination in the debt collection and consumer reporting markets).

The CFPB's exercise of both categories of authority is highly questionable, but the legal grounds are somewhat different.

For actions taken by the Bureau since January 4, 2012, under the authority that the statute conferred initially on the Treasury Secretary, invalidation would be warranted because those actions were taken, and the relevant decisions made, by Richard Cordray and not by the Treasury Secretary as the statute requires.

For actions taken by the Bureau since January 4, 2012, under its other authority, the grounds for invalidation are twofold. First, Mr. Cordray is not (and as a legal matter never was) the director and therefore is not authorized to make those decisions. Second, because there has never been a lawfully-appointed director, no one in the Bureau is authorized to exercise that authority (the statute permits the director to appoint a deputy who may serve as acting director, but because Mr. Cordray was not the director his appointment of a deputy is invalid).

As with the NLRB, the path to invalidation is most obvious for CFPB actions that have not become final because they remain subject to judicial review.

- Any future action taken by Mr. Cordray or in his name (whether promulgating a regulation, issuing an enforcement order, or performing an examination) is subject to challenge and invalidation; and
- Any action taken by Mr. Cordray or in his name that remains subject to judicial review is open to invalidation.

For past actions no longer subject to judicial review, the Bureau—like the NLRB—probably will seek to invoke the "de facto officer" doctrine.

But the Bureau is likely to have a harder time prevailing because lawful appointment of the director is one of the only checks on the Bureau's authority—the Bureau's power is exercised by a single individual, not a multi-member commission; the director serves for a fixed term and can be dismissed by the President only for cause; the director is free to spend more than $550 million annually without approval by the President or Congress; and the director is free to appoint subordinates and issue rules without any Presidential oversight. Given the absence of any congressional or presidential control over the Bureau, as compared to other independent agencies, courts are likely to conclude that the unconstitutional appointment requires invalidation of the Bureau's actions.

Finally, considerable attention has been focused on the consequences of the recess appointment ruling for the large set of mortgage-related rules issued by the Bureau earlier this month (e.g., ability-to-repay/qualified mortgage standards, mortgage servicer requirements, loan originator compensation requirements, high-cost mortgage loans and escrow requirements). Those rules are based on authority granted by pre-existing statutes, such as the Truth-in-Lending Act and the Real Estate Settlement Procedures Act (in some circumstances enhanced by title XIV of the Dodd-Frank Act). But because Mr. Cordray is the person who issued them on behalf of the Bureau, they are subject to invalidation.

Another area of interest is the effect of invalidation of the rules on the effective date of the Dodd-Frank Act's title XIV mortgage-related provisions. That is because the statute provides that "[a] section of this title for which regulations have not been issued [by January 22, 2013] shall take effect on such date"; if rules have been issued, the effective date can be postponed to no more than 12 months after the issuance of the rules. Most of the mortgage-related rules issued by the Bureau earlier this month have an effective date in January 2014.

Even if the mortgage-related rules are set aside on the ground that Mr. Cordray's appointment was unlawful, the Bureau did in fact issue regulations. The statute does not require that the regulations be "lawful" or that they subsequently be upheld in order to trigger the statutory provision permitting postponement of the effective date. Indeed, Congress plainly would not have intended that result: regulations often are set aside on a variety of grounds, such as because they are arbitrary and capricious, because they violate the governing statutory standard, or because of some procedural default by the agency. If one or more of the mortgage-related rules were set aside on such grounds in mid-2013, Congress would not have intended the rules' invalidity to trigger the statutory provision barring postponement of the effective date, thereby changing the effective date of the statutory provisions retroactive to January 2013. The issuance of the rules, whatever their validity, is sufficient to postpone the statute's effective date.

## When Will These Questions Be Resolved?

In the short term, there will be considerable uncertainty regarding the legal effectiveness of the actions of both agencies. A considerable amount of litigation is likely, as parties seek to preserve the applicability of a future definitive ruling by the Supreme Court on the recess appointment power. (It appears highly unlikely that the Senate will confirm any of these individuals.)

Hopefully, the federal government will recognize that delay will only multiply the confusion, and will seek immediate review by the Supreme Court of the *Canning* decision as well as an expedited hearing so that the case can be resolved before the Court recesses at the end of June. Otherwise at least a year of uncertainty is inevitable. (The recess appointment challenge is presented in a number of other challenges to

NLRB decisions pending in the federal courts of appeals.)

With respect to the CFPB, it is possible that the Administration and Congress will conclude that the best course is to put the agency on a firm footing by reaching a compromise that applies to the Bureau the same checks and balances that govern other administrative agencies—including a multi-member commission and congressional oversight of appropriations—and, at the same time, confirms a set of reasonable appointees to the commissioner positions. That could even occur before a Supreme Court ruling, although that ruling may be essential to provide the necessary incentive for a compromise.

*For more information about this topic, please contact any of the following lawyers.*

**Andrew J. Pincus**
+1 202 263 3220
apincus@mayerbrown.com

**Marcia E. Goodman**
+1 312 701 7953
mgoodman@mayerbrown.com

**Jeffrey P. Taft**
+1 202 263 3293
jtaft@mayerbrown.com

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