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The Consumer Financial Protection Bureau and Its Non-Director: What Now?

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It may be back to the beginning for the new Consumer Financial Protection Bureau (CFPB). The agency, under the direction of Richard Cordray, had just built up a full head of steam, releasing some 16 regulations in the past year. But a court decision on January 25 may not only stop this train, but send it back to the station. Such a reversal would be good news for consumers, and possibly lead to welcome reform of this ill-considered agency.

"Recess" Appointments. The controversy stems from several appointments made in January 2012 by President Obama, intended to fill three vacant seats on the National Labor Relations Board (NLRB) and appoint Cordray to be the first CFPB director. To sidestep opposition in the Senate, the President declared these to be "recess" appointments, invoking his prerogative to fill vacancies without Senate confirmation when that body is not in session. The action was roundly criticized on the grounds that although the Senate was not actively conducting legislative business, it was formally still in session.

Addressing the NLRB picks, the D.C. Circuit ruled in its January 25 decision that the appointments were invalid. The decision was quite broad, ruling not just that the Senate must be in formal recess, but that it must be a recess between annual sessions. Moreover, the vacancy must arise during such a recess.[1]

Although the court case did not include the CFPB appointment, there is little legal difference between the appointments. At least one challenge to Cordray is already pending, and unless Cordray is confirmed by the Senate or the D.C. Circuit decision is reversed, it appears that he will have to leave the director's chair.[2]

This will impact the agency in several ways. First, the new rules adopted by the CFPB under Cordray will likely be invalidated.[3] There are at least nine of these, ranging from newly announced mortgage servicing rules to loan originator compensation requirements to controls on remittances abroad. Pending proposals by the agency for other rules would also be stopped. Also in jeopardy are other actions by the CFPB, such as settlements of enforcement actions.

But the bad news for the bureau does not end there. Until a new director is confirmed by the Senate, the agency cannot use any of its new authority—meaning authority created by the 2009 Dodd–Frank Act as opposed to authority previously held by other agencies and transferred to the CFPB. This will prevent the agency from re-adopting most of the invalidated rules until Cordray or another director is confirmed by the Senate.

It also will prevent the CFPB from exercising other newly created powers, such as the power to define "abusive" acts or regulate non-bank institutions until a director is confirmed.[4]

Slight Hopes for the Agency. There are some scenarios in which the CFPB's regulations would remain in place. There is a possibility that the D.C. Circuit sitting en banc or Supreme Court will review the appeals court panel decision. This would take a year or more even if it went straight to the Supreme Court, but the Court could issue a stay of the NLRB decision. Nevertheless, there are several grounds for either the full D.C. Circuit Court or the Supreme

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Court to sustain the original decision, including a narrower ground that the Senate was not in fact in recess when the appointments were made. The Administration must prevail on all issues, based on constitutional theory and in fact, for the appointment to be upheld.

One other alternative is for the CFPB to try to invoke the "de facto officer" doctrine. This doctrine holds that a decision by an officer of the government may still be valid even if that officer's authority to act is later found to be invalid. That doctrine, however, is generally not available in cases with constitutional appointment defects, and when a timely objection to the constitutional appointment of the official is at issue.[5] It also was implicitly rejected by the court in the NLRB case.

Reform Needed. The odds are that this imbroglio will stall the CFPB's regulatory agenda for some time. That, however, is no bad thing for consumers. The rules adopted by the CFPB, by limiting lender activity, decrease options for consumers and increase costs for mortgages and other loans. Reining them in could actually be a boon for consumer welfare.[6]

Structurally, the CFPB is riddled with problems as well. It is perhaps the least accountable entity in the federal government. Formally part of the Federal Reserve, it is outside the Executive Branch, leaving it beyond presidential supervision. It is funded through revenues from the Federal Reserve, meaning it is outside the power of congressional appropriators. At the same time, however, the Federal Reserve itself is barred from interfering with the activities of the CFPB. This structure defies all concepts of accountability and oversight, as well as the constitutional principles of separation of powers.

Back to the Senate. These problems were the primary reason that the Senate failed to confirm Mr. Cordray in the first place. The President's illegal recess appointment was an attempt to bypass these concerns. Last week's court decision blocked that effort.

The question of Cordray's nomination—and the future of the CFPB—should now go back to the Senate, where it should have been all along.[7] The Senate should then take the opportunity to conduct a full review of the consumer bureau's regulatory powers and its accountability. It should confirm Cordray—or any new director—only when the flaws of this new agency are fixed.

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1. For a discussion of this decision, see Todd Gaziano, "Hoist on His Own Petard," *National Review Online*,The Corner, January 25, 2013, http://www.nationalreview.com/blogs/print/338896 (accessed January 30, 2013).
2. The pending case is being challenged on the grounds that the plaintiffs—a Texas bank and two nonprofit groups—lack the legal standing to sue, since they have not suffered the requisite harm. However, it is widely expected that if that case should fail based on lack of standing, other plaintiffs will be in a position to challenge the appointment.
3. Actions taken before Cordray's purported appointment are not at issue. Mandates or restrictions in the underlying statutes would of course remain on the books.
4. The limits on the CFPB's powers were outlined in a joint letter from the Inspectors General of the Department of the Treasury and the Federal Reserve Board to Representatives Spencer Bachus (R–AL) and Judy Biggert (R–IL), January 10, 2011, http://www.federalreserve.gov/oig/files/Treasury_OIG_Posted_PDF_-_Response_CFPB.pdf (accessed January 30, 2013).
5. *Ryder v. United States*, 515 U.S. 177 (1995).
6. Diane Katz, "The CFPB in Action: Consumer Bureau Harms Those It Claims to Protect," Heritage Foundation *Backgrounder* No. 2760, January 22, 2013, http://www.heritage.org/research/reports/2013/01/the-cfpb-in-action-consumer-bureau-harms-those-it-claims-to-protect.
7. Cordray's nomination was sent to the new Senate for confirmation just one day before the D.C. Circuit ruling.