



## Did the D.C. Circuit Gut the CFPB?

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Did the Director of the Consumer Financial Protection Board (CFPB) receive an appointment that violated the U.S. Constitution? A recent D.C. Circuit Court of Appeals [decision](#) strongly suggests that the answer is yes. The answer is important because the new powers that the Dodd-Frank Act gave to the CFPB hinged on it having a director.

This is what happened: On January 25, 2013 the D.C. Circuit Court of Appeals ruled on several appointments to an unrelated agency—the National Labor Relations Board—that President Obama had made. President Obama, like a number of his predecessors, had used an exception to the rule that the Senate has to approve presidential appointments. If the Senate is in recess the President can appoint someone temporarily. It turns out that President Obama appointed Richard Cordray to be the CFPB Director in the same period and in the more or less the same way he appointed the NLRB commissioners who are at issue in this case.

The case the D.C. Circuit heard arose from an appeal by a company was subject to an NLRB decision. The company claimed it wasn't the NLRB decision wasn't valid because the Board the appointment of several of the commissioners was unconstitutional and without them the Board didn't have the quorum needed for a decision.

The D.C. Circuit agreed. It found that the Senate wasn't in fact on recess, at least as defined by the Constitution, and that therefore the President didn't have the right to make those appointments. The court also said that the President can only make appointments that happened during the recess. The NLRB vacancies had existed for some time before the claimed recess.

The D.C. Circuit based their decision on a reading of the U.S. Constitution. The appointments clause says:

“The 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. During recesses of the Senate, the President may appoint officers, but their commissions expire at the conclusion of the Senate's next session.”

The court focused on two issues.

First, they said the Framers of the Constitution really meant *the* Recess and not just any time the Senate goes on break. They pointed out that it wouldn't make any sense if the President could bypass Senate confirmation just because the Senators went on a lunch break. They concluded that **the** recess meant **the** recess between Sessions of Congress. Second, the majority (two of three judges) said that the framers really meant *happen during* and not vacancies that existed before the recess.

Basically, the D.C. Circuit seems to have concluded that the Framers of the Constitution were worried about how the President could run the country between the time Congress got on their horses and headed for their long journeys back home and when they came back. But they also concluded the Constitution didn't give the President *carte blanche* to appoint people whenever the Senate was on a break.

The NLRB can appeal this to the full D.C. Circuit and hope they get a different answer. Or they could appeal it directly to the Supreme Court. Given that this is a very important constitutional question, plus the fact that the 11<sup>th</sup> Circuit reached a different conclusion, it would seem pretty likely the Supreme Court would take this one. Importantly, the D.C. Circuit went beyond the unusual circumstances in the way President Obama made these particular recess appointments and apparently concluded that many of the recess appointments of other presidents, Democrats and Republicans alike, would not mass constitutional muster either. The stakes are quite high for the NLRB since all of its decisions in the last year could be invalid as a result.

And that brings us back to Cordray. The facts concerning the manner of his appointment are exactly the same as for the NLRB commissioners. It therefore seems inconceivable that the result would be any different. If the D.C. Circuit's decision in the NLRB decision case is upheld, Cordray's appointment will have been unconstitutional as well, and if it is reversed Cordray's appointment will have been constitutional.

Fortunately for the CFPB, the consequences of the NLRB decision becoming the law of the land are much less dire than for the NLRB. As it turns out, there are a lot of things that the CFPB can do even if it doesn't have a Director. Most importantly it can enforce all of the consumer protection laws that existed before

Dodd-Frank with respect to banks, thrifts, and credit unions with assets of \$10 billion or more.

What it can't do without a Director are the new things that it was tasked to do. Most importantly without a Director it doesn't have the power to deal with non-bank financial institutions. That covers a lot of ground including non-bank payments companies, money transmittal, payday lenders, student lenders, and non-bank mortgage service providers. It also is limited to going after unfair and deceptive practices—the old standard—and not “abusive practices,” although what abusive means and how it differs from deceptive is still unclear.

Some commentators have suggested that the NLRB decision would upend the recent orders against American Express, Capitol One, and Discover. While there may be some intricacies that are beyond my amateur legal talents, this is hard to see since all orders involved large banks owned by these entities, and therefore were covered until the old laws, and relied on the laws against deceptive, and not abusive, practices. More problematic are rules the CFPB has adopted for non-financial institutions and its ongoing investigations of these institutions.

Nevertheless, the CFPB faces a more uncertain future now than it did before the D.C. Circuit Court. It has a Director whose appointment may be unconstitutional and it may simply lack the power to do much of what its staff is currently doing. President Obama has nominated Cordray for a full term. The Senate Republicans have more leverage to block him now than before since the ability of the President to do another recess appointment is in question. On the other hand the large banks may lobby to get a Director in place so that their non-bank competitors are regulated too.

There's a compromise here that would deal with two fundamental governance problems with the CFPB. The CFPB is largely immune to Congressional oversight because its budget is set by a fixed formula (10% of the Federal Reserve Board's operating budget), with which Congress cannot tinker. And it has an all-powerful director with few checks and balances and little to guard against wild strings in enforcement priorities from administration to administration. While one can argue these points, my guess is that in the long run the CFPB would be healthier and make more consistently reliable decisions if it was run more like the Federal Trade Commission.

A good horse trade would involve amending the CFPB to give it the powers retroactively that it had under Cordray and to appoint Cordray as the Director on one side of the trade; and amending the CFPB to have it run by a 5-person commission (with the Director as the Chair), like the FTC with the majority held by the party in the White House, and have its budget set by Congress like other agencies. Just so the CFPB doesn't miss a beat, the horse trade could include leaving Cordray as the all-powerful Director until a Commission is put in place.

The alternative to the compromise is potentially just a lot of uncertainty for the CFPB and everyone it was supposed to regulate.