Cordray's Recess Appointment: Future Legal Challenges

By V. Gerard Comizio and Amanda M. Jabour*

Introduction

On January 4, 2012, President Obama appointed Richard Cordray as director of the Consumer Financial Protection Bureau ("CFPB"), pursuant to the President's constitutional recess appointment powers. The Recess Appointments Clause, Article II, Section 2, of the U.S. Constitution provides in part 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."

Cordray's appointment has raised questions about the constitutionality of the President's actions for a number of reasons. Partially because the appointment of a CFPB director has been politically charged, challenges to Cordray's appointment are likely.[1] These potential legal challenges include, but are not limited to, challenges to both new regulations and enforcement actions against nonbank lenders.[2] As a result, the legal issues surrounding the appointment have significant implications for all institutions regulated by the CFPB.

The role of the CFPB

Now that the CFPB has a director, the bureau has broad authority to change the regulatory landscape for financial institutions. For example, pursuant to the Dodd-Frank Act ("Dodd-Frank"), once a CFPB director is in place, the bureau has authority to take on a more expansive regulatory role, primarily direct regulation of nonbank firms, as well as enforcing abusive acts and practices rules.[3]

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[1] A Department of Justice legal opinion regarding the recess appointment states, "The question is a novel one, and the substantial arguments on each side create some litigation risk for such appointments." *See* Memorandum Opinion for the Counsel to the President, from Virginia A. Seitz, Assistant Attorney General, "Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions," (Jan. 6, 2012) (hereafter "Department of Justice Opinion").

[2] At the same time, President Obama also used his recess appointment power to appoint three members of the National Labor Relations Board ("NLRB"). Cases have already been brought to challenge those appointments as unconstitutional, and presumably the outcome of these cases could indicate the potential for success for future challenges to Cordray's appointment. Republican senators have indicated that they will join an amicus curiae brief in one of the cases – depending on the content of the brief, this could signal their willingness (or unwillingness) to challenge Cordray's appointment. *See* Seung Min Kim, "Republicans join challenge of recess appointments," Politico.com (Feb. 13, 2012).

[3] 12 U.S.C. § 5586.

Cordray, who testified before a House Oversight Committee subcommittee on January 24, has signaled his intention to aggressively regulate nonbank financial institutions in a manner similar to how banks are regulated.[4] However, the questions that have been raised regarding the constitutionality of his appointment could potentially undermine any actions the CFPB takes under his directorship. As discussed in further detail below, if Cordray's appointment is deemed to be invalid, then many of the actions taken by the CFPB under his leadership could, in turn, be called into question and become the subject of separate legal challenges.

Questions regarding the constitutionality of Richard Cordray's recess appointment

The primary issue concerning Cordray's appointment is whether President Obama had the authority to make the recess appointment pursuant to the Recess Appointment Clause. The asserted purpose of the Recess Appointments Clause is to enable the President to keep the government fully staffed when the Senate is not "in session for the appointment of officers."[5] Although the general understanding of the scope of the recess appointment power has changed over time, Presidents since George Washington have made recess appointments.[6] In determining the President's authority, the foundational issue is whether the Senate was at recess, as required by the Constitution. When the Senate is not at recess, the President does not have the authority to make recess appointments. In the case of Mr. Cordray's appointment, whether a proper recess existed requires resolution of two questions: (i) did the House consent to the Senate recess as required by Article I, Section 5 of the Constitution, and (ii) if the Senate was at recess, did the pro forma sessions interrupt the recess? A third issue is whether, regardless of whether a proper recess existed, a recess appointment is a valid means of appointing a CFPB director, as required by Dodd-Frank.

A. Did the House consent to the Senate recess?

Before the Senate adjourned for the 2011 holiday break on December 17, 2011, it passed a resolution providing in part that the Senate "adjourn and convene for pro forma sessions only, with no business conducted… and that following each pro forma session the Senate adjourn until the following

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[4] *See* Daniel Wagner, "Consumer chief defends his post, outlines agenda," The Washington Post (Jan. 25, 2012); s*ee also* "Obama, Cordray Telegraph Early Action By CFPB Against Nonbank Financial Firms," BNA Banking Report (Jan. 4, 2012).
[5] *See* James Madison, The Federalist # 67, The Federalist Papers.
[6] President George Washington appointed John Rutledge as Chief Justice of the Supreme Court during a recess in 1795. *See* Louis Fisher, "Recess Appointments of Federal Judges," Congressional Research Service (Sept. 5, 2001).

pro forma session..." and outlining specific time periods during which the pro forma sessions would be conducted.[7]

However, Article I, Section 5 of the Constitution states that neither house of Congress may adjourn for more than three days without the consent of the other house.[8] It is undisputed that the House did not consent to the Senate recess at the end of the year, and without consent the Senate cannot constitutionally recess. Republicans and others opposing Cordray's appointment point to this as the crux of the issue: the Senate was not - and could not have been - in recess during the December 2011- January 2012 holiday season. The Administration, arguing that the provision cannot trump the Recess Appointments Clause,[9] maintains that the unanimous consent of the Senate is sufficient to send the Senate into a valid recess.[10] In the past, both houses of Congress have conducted pro forma sessions in order to comply with the consent requirement in Article I, § 5.[11]

B. Did the pro forma sessions interrupt the Senate recess?

The Administration and Republican Senators have generally assumed the Senate was at recess and instead have focused their dispute on a separate legal issue: whether the pro forma sessions conducted by individual senators were sufficient to interrupt the recess. The December 17th resolution made clear that the Senate was to remain in session, although no business was to be conducted.[12]

The obvious purpose of such pro forma sessions, which have been used by Republicans and Democrats alike,[13] is to prevent the President from making recess appointments. Under pro forma procedure, a member of the Senate "gavels in," brings the house to order, and gavels out without

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[7] Sen. Ron Wyden, "Orders for Tuesday, December 20, 2011 through Monday, January 23, 2012," remarks in the Senate, *Congressional Record*, vol. 157, part 195 (Dec. 17, 2011), pp. S8783-S8784.
[8] U.S. Const. art. I, § 5.
[9] *See* Charlie Savage, "Justice Department Defends Obama's Recess Appointments," The New York Times (Jan. 12, 2012).
[10] Press Gaggle by Secretary Jay Carney, discussion with press corps aboard Air Force One (Jan. 4, 2012).
[11] *See* Department of Justice Opinion, *supra* n. 1, at 3.
[12] Although no business was supposed to be conducted, on December 23, Senator Harry Reid did conduct some business regarding the payroll tax holiday extension. *See* John P. Elwood, "Recess Appointment of Richard Cordray Despite Pro Forma Sessions," The Volokh Conspiracy (Jan. 4, 2012).
[13] *See* Henry B. Hogue, "Recess Appointments: Frequently Asked Questions," Congressional Research Service at 1 (Jan. 9, 2012).

conducting any business.[14] The question is whether the sessions, which typically last less than one minute, interrupt the Senate's recess for the purpose of the Recess Appointments Clause.

The answer to the legal issue is unclear: unsurprisingly, Democrats generally argue "no," and Republicans generally argue "yes." Both sides point to persuasive authority in support of their positions.

The Obama Administration has referred to the pro forma sessions as a political "gimmick,"[15] and White House Counsel Kathryn Ruemmler has concluded that they do not interrupt the recess. The argument is that pro forma sessions are a mere formality and do not interrupt a recess of the Senate, in part because they do not allow the Senate to conduct any business. In a 1905 report, the Senate Judiciary Committee recognized that a "Recess of the Senate" occurs when it cannot "participate as a body in making appointments" and that a recess must be "actual, not something fictitious."[16] The pro forma sessions, by contrast, have no substance, and apparently their sole purpose is to prevent the President from using his appointment power. Concluding that such sessions interrupt the recess would thus undermine the separation of powers because the Senate could unilaterally frustrate the exercise of the President's power.[17]

The Department of Justice has reached the same conclusion, apparently advising the President of its views before Cordray's appointment.[18] According to a DOJ legal brief addressing the issue, "The Senate could remove the basis for the President's exercise of his recess appointment authority by remaining continuously in session and being available to receive and act on nominations, but it cannot do so by providing for pro forma sessions at which no business is to be conducted."[19]

Republicans and others opposing the President's recess appointment argue that pro forma sessions are sufficient to interrupt the Senate recess. Their argument turns on the timing of the appointment: in the past thirty years, no President has used a recess appointment during a recess of less than 10 days.[20] The Constitution does not specify the length of time the Senate must be in recess

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[14] *See* Elwood, "Recess Appointment," *supra* n. 12.
[15] Dan Pfeiffer, "America's Consumer Watchdog," The White House Blog (January 4, 2012).
[16] *See* Steven G. Bradbury and John P. Elwood, "Call the Senate's bluff on recess appointments," The Washington Post (Oct. 15, 2010).
[17] *See* Elwood, "Recess Appointment," *supra* n. 12.
[18] *See* Savage, "Justice Department Defends Obama's Recess Appointments," *supra* n. 9.
[19] *Id.* (citing to Department of Justice Opinion, *supra* n. 1).
[20] *See* "Recess Appointments, Technically without the recess," Law Blog, The Wall Street Journal (Jan. 4, 2012).

before the President may make a recess appointment. Presidents generally do not exercise recess appointment power where Congress is at recess for less than 10 days; however, a Department of Justice brief from 1993 implied that the President may make a recess appointment during a recess of longer than three days.[21] Yet, the pro forma sessions at issue occurred every three days. The Republican argument, therefore, is that President Obama acted outside his constitutional authority in appointing Cordray during that three day period.

There are several other arguments against the Administration's position. First, the Senate has validly employed pro forma sessions in other contexts, such as "to satisfy the Twentieth Amendment's direction that in the absence of legislation providing otherwise, Congress must convene on January 3."[22] Second, one could argue that the Executive Branch is bound by the Senate's own understanding of whether the pro forma sessions validly interrupt the recess.[23] The Department of Justice has countered these arguments by determining that while Congress can set rules governing its internal operations, it may not ignore its constitutional restraints.[24]

C. Is the appointment of the Director valid pursuant to the Dodd-Frank Act?

A separate legal issue is whether a recess appointment has the same force as a Senate confirmation as required by the Dodd-Frank Act. The statutory language of the Dodd-Frank Act requires that "the Director shall be appointed by the President, *by and with the advice and consent of the Senate*." (Emphasis added).[25] Because Cordray's appointment was not with the advice and consent of the Senate, it is unclear whether it fulfills the statutory requirement. Moreover, it would be difficult, given the factual positions it has already staked out, for the Administration to argue that the Senate provided the consent that the Dodd-Frank Act requires.

On the other hand, many other statutes requiring appointments have similar language.[26] The Constitution itself provides that the President "shall nominate, and by and with the Advice and

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[21] *See* Hogue, "Recess Appointments," *supra* n. 13, at 2 (citing Memorandum of Points and Authorities in Support of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, at 24-6, *Mackie v. Clinton,* 827 F. Supp. 56 (D.D.C. 1993), *vacated as moot*, 10 F.3d 13 (D.C. Cir. 1993)).
[22] *See* John Elwood, "OLC Opinion on Pro Forma Sessions and Appointments Published," The Volokh Conspiracy (Jan. 12, 2012).
[23] *Id.*
[24] *Id.*
[25] 12 U.S.C. § 5491(b)(2).
[26] *See, e.g.*, 28 U.S.C. § 133(a) (appointment of judges to federal district courts); 31 U.S.C. § 301 (appointment of Secretary of the Treasury); 22 U.S.C. § 2651a (organization of Department of State);

Consent of the Senate" appoint certain government officials,[27] but that has not precluded presidents from making recess appointments without Senate consent.[28] Such language has not served as a barrier to recess appointments in the past, and arguably does not raise a novel issue in the context of Cordray's appointment.

Neverless, the question of whether proper Senate consent was given to the Cordray appointment may prove to be a central issue in the event Cordray's appointment becomes the subject of legal challenges.

Potential political and legal consequences

Cordray's appointment has caused backlash on Capitol Hill and in the financial industry, and will likely lead to one or more potential consequences. On Capitol Hill, Republican senators could filibuster all presidential appointments until President Obama rescinds the recess appointments. Senators could also stall the President's legislative agenda or refuse to approve his budget requests. Such actions would add to the legislative gridlock that has become the status quo, and the implications for the CFPB are unclear because eventually Congress and the Administration would need to reach an agreement on CFPB leadership.

It is likely that there will be litigation challenging the CFPB's actions and enforcement, particularly in light of the current lawsuits challenging President Obama's appointments to the NLRB.[29] Anyone filing a lawsuit would need to have standing, but challenges could potentially be brought by members of Congress, entities regulated by CFPB, or industry trade groups. An interested trade group could bring suit in the near future, or litigation could come in the form of individual entities challenging specific actions.

The increasingly likely outcome seems to be that firms targeted by CFPB regulation (i.e., nonbank financial institutions such as mortgage servicers and payday lenders), who would likely have standing, will file lawsuits challenging the constitutionality of Cordray's appointment and potentially

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46 U.S.C. § 106 (appointment of head of the Federal Aviation Administration); 15 U.S.C. § 2053 (appointment of head of Consumer Products Safety Commission).

[27] U.S. Const. art. II, § 2.

[28] For example, President Bill Clinton made 139 recess appointments; President George W. Bush made 171. *See* Hogue, "Recess Appointments," *supra* n. 13, at 1. *See also* Fisher, *supra* n. 5.

[29] *See* discussion, *supra* n. 2. However, litigation challenging Cordray's appointment may be delayed pending the outcome of the NLRB cases.

rendering invalid any CFPB actions under his directorship.[30] Specifically, if the CFPB issues a regulation or enforcement order that depends on the authority of Cordray as director, a firm subject to such order or regulation could challenge the action in court.[31] However, banks are generally unlikely to challenge their regulators in court, so if litigation is pursued, such litigation will likely be brought by nonbank institutions. The U.S. Chamber of Commerce, which includes many nonbanks that will be subject to CFPB authority, or other similar organizations, might also bring legal challenges to proactively protect members.[32]

Although litigation seems to be a likely outcome of the appointment, there is hope that the Administration and Congress will reach a resolution acceptable to both sides. Despite the fact that recent years have shown the decline of political compromise between the two major parties, Cordray appears to be a candidate with bipartisan support[33] and both sides may be able to reach a mutually agreeable solution.

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[30] Cordray's appointment has not formally been challenged by members of the Senate or nonbank trade groups to date.

[31] In testifying before the House subcommittee on January 24, Cordray said that the CFPB "will not hesitate to use enforcement actions to right a wrong." *See* Wagner, "Consumer chief," *supra* n. 4. A nonbank subject to such enforcement action may seek to challenge the action on the basis that Cordray's appointment was unconstitutional, and thus, the CFPB had no authority to act.

[32] *See* Andrew Joseph, "Cordray Recess Appointment Opens CFPB to Lawsuits," Influence Alley, National Journal (Jan. 4, 2012); *see also* Press Release, U.S. Chamber of Commerce, U.S. Chamber Condemns Unprecedented Recess Appointment of CFPB Director (Jan. 4, 2012).

[33] *See* Reid Cramer, "Cordray Has Bipartisan Support," Debate Club, U.S. News and World Report (Jan. 6, 2012).