

## E-ALERT | Financial Institutions

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### *NOEL CANNING V. NLRB* AND THE IMPLICATIONS FOR THE CFPB

Earlier today, the U.S. Court of Appeals for the D.C. Circuit released its highly-anticipated decision in *Noel Canning v. NLRB*, which challenged the President's recess appointments of three members to the National Labor Relations Board (NLRB). A unanimous panel concluded that the appointments were unconstitutional. Although this case deals strictly with the NLRB, the decision has major implications for (i) the recess appointment of Richard Cordray as Director of the Consumer Financial Protection Bureau (CFPB) on January 4, 2012, and (ii) the validity of certain CFPB actions taken after that date.

#### BACKGROUND

In passing the Dodd-Frank Act, Democrats and Republicans in Congress struck a compromise: the Act granted the Secretary of the Treasury limited interim authority "to perform the functions of the Bureau under [subtitle F of Title X] until the Director of the Bureau is confirmed by the Senate in accordance with section 1011." 12 U.S.C. § 5586(a). Only then would the CFPB wield its more potent statutory authority to regulate nonbanks or bring enforcement actions. Although President Obama nominated Richard Cordray to be Director of the CFPB in July of 2011, the nomination languished in the Senate.

Mindful that the President might try to fill vacancies by exercising his power under the Recess Appointments Clause of the Constitution, the Senate had, for a time, met in "pro forma" sessions every few days during long breaks. By meeting twice a week for a few minutes, the Senate believed that it was not truly in "recess." Continuing this practice, the Senate adjourned on December 17, 2011, but held pro forma sessions every Tuesday and Friday for the remainder of the year. The Senate then met again in pro forma session on January 3, 2012, to simultaneously end the first session of the 112th Congress and open its second session of the same Congress.

On January 4, 2012, President Obama announced that he would appoint Richard Cordray as the Director of the CFPB and three other individuals as members of the NLRB, claiming that the Senate was not truly meeting and thus was in "recess" for purposes of the Recess Appointments Clause. Thereafter, Cordray and the CFPB began to exercise the agency's full powers under the Dodd-Frank Act. Likewise, the five-member NLRB satisfied its quorum requirement and began issuing orders.

#### THE *NOEL CANNING* DECISION

Noel Canning filed suit in the D.C. Circuit to overturn an adverse ruling by the five-member NLRB on a collective bargaining agreement. In addition to challenging the NLRB's reasoning on statutory grounds, Noel Canning argued that the three recess-appointed NLRB members were unlawfully appointed under the Constitution, and thus the NLRB lacked a quorum when it issued its decision.

In today's opinion, the D.C. Circuit agreed and vacated the NLRB's order. Writing for the entire panel on the key point, Chief Judge Sentelle reasoned that the reference to "the Recess" in the Recess

Appointments Clause referred only to recesses that occurred *between* sessions of Congress. Such so-called “intersession recesses” were distinct from “intrasession recesses” that occurred any time the Senate took a break—even an extended one—*during* a session. Because the NLRB recess appointments occurred the day after the Senate began a new session of the 112th Congress, the Court reasoned that the appointments were invalid, intrasession appointments made during an ongoing session of Congress.

Although the Court’s holding with respect to intrasession appointments was “sufficient to compel a decision vacating the Board’s order,” the Court also concluded that the appointments were improper because the vacancies had not happened during a recess.<sup>1</sup> According to the Court, the President may invoke the Recess Appointment Clause only to fill a vacancy arising during an intersession recess, not to fill vacancies that already existed when the recess begins. Indeed, the Court suggested that the recess appointment power could “only appl[y] to vacancies where the office had previously been occupied, as opposed to vacancies that existed because the office had been newly created.”

### IMPLICATIONS FOR THE CFPB

The Court’s decision in *Noel Canning* is important because Cordray’s appointment as the Director of the CFPB followed precisely the same path as the NLRB members at issue in this case. Based on the Court’s interpretation of the Recess Appointments Clause, it seems clear that Cordray’s appointment was also invalid.

The Court’s decision could also have the effect of invalidating certain CFPB actions taken after Cordray’s appointment. Just as the NLRB could not issue orders without a quorum of validly-appointed members, the CFPB could not take certain regulatory actions in the absence of a duly-appointed Director. If Cordray were not duly appointed—a result likely compelled for courts within the D.C. Circuit by today’s decision—recent regulations that could not have been issued or enforcement actions that could not have been taken under the Secretary of the Treasury’s interim authority may also be invalid.

As such, the D.C. Circuit’s decision today raises serious questions for financial institutions’ interactions with CFPB going forward. Some of these questions may be resolved soon because they are already pending in cases before courts, including *State National Bank of Big Spring v. Geithner*’s challenge to the Dodd-Frank Act’s constitutionality in the U.S. District Court for the District of Columbia. In any event, more lawsuits against the CFPB may well be filed after today’s decision.

Although the Court’s decision raises serious questions about the validity of CFPB actions, this panel of the D.C. Circuit, or even the full D.C. Circuit sitting en banc, likely will not have the last word in this case. The government may—and likely will—seek review by the U.S. Supreme Court. Given the importance of the issue and the fact that the D.C. Circuit’s decision is at odds with the Eleventh Circuit’s in *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), the Supreme Court may very well decide to hear it.

Finally, today’s decision could have an effect on the current debate over the re-nomination of Cordray and the structure of the CFPB.

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<sup>1</sup> This portion of Chief Judge Sentelle’s opinion was joined only by Judge Henderson. Judge Griffith wrote a concurring opinion stating that he would not reach this issue since it was unnecessary to do so in this case.

Covington's Financial Institutions and Appellate practice groups would be happy to discuss these issues further as they relate to your institution. For more information, please contact any of the following:

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