

Could the CFPB be Undone?

September 27, 2012 - When Congress created the Consumer Financial Protection Bureau, it left the new agency devoid of any regulatory power until a director could be appointed. Needless to say, the creation of the agency itself was controversial. And putting a director in place became a near impossibility when the President appointed Richard Cordray; an appointment that required approval of the Senate for whom there was no Republican support. That is, it was in impossibility right up until the time that the President used a recess appointment to put Cordray into place. Only one problem. The Senate was not in recess and the administration is now being sued by more than 40 senators as a result.

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The Constitution requires that the heads of federal agencies be appointed by the President and confirmed or rejected by the Senate. So when Richard Cordray was appointed to head up the CFPB, it was well known that he would have to approve before he could take office. But Cordray isn't at all liked by most Republicans and the President knew that at the time he appointed him. He also had to know that it would be nearly impossible for him to garner the needed support to ever be confirmed. And the only way to bypass that process was to use what is called a recess appointment. This allows the president to put an appointed person in place without Senate confirmation, for a period of one year.

But in order for a recess appointment to be effective, Congress actually needs to be in recess. And the Constitution forbids one house of congress - in this case, the Senate - going into recess without the other house of congress - in this case, the House of Representatives - agreeing to that recess. And the House of Representatives wouldn't agree to a recess specifically because it wanted to prevent the president from using a recess appointment.

This particular tactic has been used by both parties in the past to prevent recess appointments. And even the current President advocated its use before he came into office. Given all of this, it is not surprising that 41 senators have now joined a law suit challenging Cordray's appointment, along with several other presidential appointments that were made at the same time.

While all of this is interesting to those of us who are fascinated by the Constitution, it also brings into question every single thing that the CFPB has done to date. If the President's appointment of Cordray to the CFPB was illegal, then it stands to reason that every single decision that has been made by the agency is meaningless. If you will recall from the first paragraph, Congress specifically structured the creation of the CFPB so that it would have no power until it had an agency head.

And since the CFPB has already issued a wide range of regulations and levied a number of multimillion dollar fines against companies, it is also reasonable to assume that those companies may sue to recover their money if the appointment was illegal.

This is a case that will almost certainly wind up at the Supreme Court. As such, we can only hope that it gets there sooner than later. The longer that the case takes to wind through the courts, the larger the cloud of uncertainty is likely to be about the CFPB and its authority. And that cloud will only hurt businesses and consumers.

by Jim Malmberg

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