Federal Court Ruling on Obama Recess Appointments Bad News for CFPB

January 25, 2013 - Last year, even though the Senate was holding pro-forma sessions, President Obama decided that he would make several recess appointments to fill certain open positions at various agencies. The people that he had appointed had run into stiff opposition from Republican senators and had very little chance of ever being confirmed by the Senate. Because of this, it didn't take long for the lawsuits to start flying. Now there is a decision in the first of those lawsuits and even though it doesn't impact the CFPB directly, if the decision stands it will likely mean that every single rule that the agency has attempted to put in place over the past year will be overturned.

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This morning, the Federal Court of Appeals for the Washington, DC Circuit issued a ruling that President Obama's recess appointment of three people to the National Labor Relations Board (NLRB) was unconstitutional. The ruling is important because Richard Cordray was given a recess appointment to head up the Consumer Financial Protection Bureau (CFPB) on the same day that the President made the recess appointment to the NLRB. This means that if the NLRB appointments were unconstitutional, so was the CFPB appointment.

The Obama administration has already indicated that it intends to appeal any court ruling invalidating recess appointments to the Supreme Court, but that could be an uphill battle. The Constitution specifically gives each house of Congress the right to write its own rules. This means that if Congress says it is in session, the courts may be extremely reluctant to say that it wasn't in session.

If Richard Cordray's reign at the CFPB is ultimately determined to be unconstitutional, every single action taken by the agency since he started there will be thrown into question. When Congress created the CFPB, it required that the agency have a director in order for it to have any power. At the very least, every single ruling made by the agency to date is likely to be challenged in court.

It was just yesterday that President Obama asked to Senate to take up Cordray's nomination again and make him the permanent head of the agency. The new court ruling isn't likely to improve his odds of confirmation. In fact, it will probably hurt him as new lines are drawn in the Senate.

If the Supreme Court refused to take the case, then the ruling by the DC Circuit would stand and Cordray would be out of a job. Two other NLRB cases challenging the President's recess appointments are moving through the Third and Fourth Circuit courts and should be decided soon. If all of those cases are decided the same way, then the Supreme Court could very easily decide not to take the case. If, on the other hand, any of the other cases is decided differently than the

ruling issued this morning, then the Supreme Court may very well take up the case.

The ruling this morning was in the case Noel Canning v. NLRB.

byJim Malmberg
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