

The CFPB and the Supreme Court - Justices Agree to Hear Case on Recess Appointments

June 25, 2013 - The US Supreme Court has agreed to take up the case of President Obama's recess appointments to the National Labor Relations Board in its next term which begins in October. The decision that the court reaches will not only affect rulings from the NLRB but also from the Consumer Financial Protection Bureau because the President appointed Richard Cordray as the agencies director at the same time that he made the NLRB appointments. And the fact that the court has agreed to hear the case probably means that Cordray's recent reappointment to permanently head the CFPB is in jeopardy in the Senate.

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The case stems from the President's insistence of making recess appointments to both agencies while the Senate was still holding pro forma sessions. Those sessions had the senate gavelled to order every three days even though most members were actually nowhere near Washington, DC. The President is arguing that because of this, the chamber wasn't actually available to fulfill its constitutional duty of "advice and consent."

After the appointments, the NLRB made some decisions that were unfavorable to a company named Noel Canning. The company sued, stating that the rulings were unenforceable because without the Obama appointments, the NLRB wouldn't have had enough members for a quorum.

Since that case was filed, there have been two separate federal appeals court rulings - one in Noel Canning and another in a separate case - in which the President has lost. Enter the Supreme Court.

If the court agrees with the two lower court decisions, then every single determination by the NLRB made since the recess appointments will be unenforceable. The same will be true for the CPFB since the agency has absolutely no power to act without a director.

The fact that the court has agree to hear the case also means that the President's renomination of Cordray is likely stagnate in the senate. When Cordray was initially appointed, the senate couldn't break a filibuster of his nomination. That's why the President opted to try a recess appointment in the first place. Now that the court has agreed to hear the case, it is highly unlikely that anyone who was opposed to him in the first place will switch their vote.

byJim Malmberg

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