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Practical Implications of *Noel Canning* on the NLRB and CFPB

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Summary

In *Noel Canning v. National Labor Relations Board*, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) ruled that President Obama's appointments of three Members to the National Labor Relations Board (NLRB) were constitutionally invalid. In reaching its decision, the D.C. Circuit concluded that under the Recess Appointments Clause, the President may only make recess appointments during a formal intersession recess (a recess between the end of one session of Congress and the start of another), *and* only to fill those vacancies that arose during the intersession recess in which the appointment was made.

The legal reasoning of the case, if adopted by other courts or affirmed by the Supreme Court, could significantly alter the relationship between the President and the Congress in the appointments context. It also would cast serious doubt upon an array of previous actions by the NLRB and its ability to function in the future. Furthermore, because Richard Cordray was appointed as Director of the Bureau of Consumer Financial Protection (CFPB) at the same time and in the same manner as the NLRB appointees, *Noel Canning* raises questions about the validity of Cordray's appointment; the validity of various actions already undertaken by the CFPB; and the authority of the CFPB to function going forward.

However, the opinion's immediate impact on the functioning of the Board may be limited because the D.C. Circuit's order in *Noel Canning* vacated only the Board's administrative ruling that the company had engaged in an unfair labor practice. The decision did not invalidate any other Board actions, nor did the court issue an injunction preventing Board Members from taking any specific actions in the future. Moreover, the decision only carries precedential value within the D.C. Circuit and in no way binds other federal courts outside of the circuit.

This report assesses the potential legal impact *Noel Canning* may have on the past and future operations of the NLRB and the CFPB.

A companion report, CRS Report R43030, *The Recess Appointment Power After Noel Canning v. NLRB: Constitutional Implications*, by Todd Garvey and David H. Carpenter focuses on the ramifications that the *Noel Canning* decision might have on the President's authority to make recess appointment by providing a legal analysis of *Noel Canning* and the applicable case law that existed prior that decision. While sharing the general overview of the facts and legal reasoning necessary for understanding how *Noel Canning* might affect the NLRB and CFPB, this report does not duplicate the companion report's detailed constitutional analysis of the Recess Appointments Clause.

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Introduction

On January 4, 2012, in the midst of a series of "pro forma" sessions, President Obama asserted his authority under the Recess Appointments Clause of the U.S. Constitution[1] and announced the appointments of Richard Cordray as Director of the Consumer Financial Protection Bureau (CFPB or Bureau) and Terrence F. Flynn, Sharon Block, and Richard F. Griffin, Jr. as Members of the National Labor Relations Board (NLRB or Board).[2] As a result of the controversial circumstances in which these appointments arose, numerous lawsuits have been initiated challenging the President's constitutional authority to make the appointments.[3]

On January 25, 2013, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) became the first court to evaluate the merits of these challenges. In *Noel Canning v. National Labor Relations Board*, the circuit court issued a broad decision invalidating the appointment of the three NLRB Board Members.[4] Although the decision directly applies only to the NLRB's authority to undertake the single action at issue in the case,[5] the legal reasoning, if adopted by other courts or affirmed by the Supreme Court, could significantly alter the relationship between the President and the Congress in the appointments context. It also would cast serious doubt not only upon an array of previous actions by the Board and its ability to function in the future, but also upon the validity of the President's appointment of Director Cordray; the validity of various actions already undertaken by the CFPB; and the authority of the CFPB to function going forward.[6]

[1] U.S. Const. art. II, §2, cl. 3.

[2] *President Obama Announces Recess Appointments to Key Administration Posts*, White House, Press Release, Jan. 4, 2012, available at http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts.

[3] See Lyle Denniston, *Spreading challenge to appointment power (UPDATED)*, SCOTUSblog, Jan. 28, 2013, available at http://www.scotusblog.com/2013/01/spreading-challenge-to-appointment-power/; Complaint, State Nat'l Bank of Big Spring v. Geithner, Case No. 1:12-cv-01032 (D.C. Sept. 20, 2012), available at http://newsandinsight.thomsonreuters.com/uploadedFiles/Reuters_Content/2012/09_-_September/statenationvcfpb—amendedcomplaint.pdf; Opposition to Receiver's Second Request for Payment, Consumer Fin. Prot. Bureau v. Gordon, Case No. CV12-6147-RSWL(MRWx), (C.D.Cal. July 18, 2012), available at http://www.cfpbmonitor.com/files/2013/02/CGCFPB-Opp-Rec-Req-2.pdf.

[4] No. 12-115 (D.C. Cir., Jan. 25, 2013) (hereinafter *Noel Canning*) available at http://www.cadc.uscourts.gov/internet/opinions.nsf/D13E4C2A7B33B57A85257AFE00556B29/$file/12-1115-1417096.pdf.

[5] The decision only carries precedential value within the D.C. Circuit and in no way binds other federal courts outside of the circuit. In making future recess appointments, the Obama Administration—which has stated that it disagrees with the Noel Canning decision—may not feel bound by the restrictions established by the circuit court until the Supreme Court takes a position on the issue. However, a plaintiff challenging a future recess appointment to a position located within the District of Columbia would likely have the choice of filing that lawsuit in the D.C. Circuit where *Noel Canning* would be accorded significant precedential weight.

[6] Taken to its logical limits, the reasoning of the opinion could create uncertainty as to the validity of hundreds of other recess appointments made across the government in recent years. Consideration of these appointments is beyond the scope of this report.

The Appointments and Recess Appointments Clauses

The U.S. Constitution allocates specific roles to both the President and the Senate in the appointment of government officials. The Constitution establishes two methods by which the President may make appointments. The Appointments Clause, which establishes the principal method of appointment, requires that the President

> *shall nominate, and by and with the Advice and Consent of the Senate, shall appoint* Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other *Officers of the United States* whose Appointments are not herein otherwise provided for, and which shall be established by Law; but *the Congress may by Law vest the Appointment of such inferior Officers*, as they think proper, *in the President alone, in the Court of Law, or in the Heads of Departments*.[7]

Thus, while the Appointments Clause authorizes the President to nominate principal officers of the United States,[8] a nominee cannot assume the powers of the office for which she has been nominated until confirmed by the Senate.[9]

In addition to this general provision, the Constitution also provides an alternative method of appointment that may be exercised only "during the Recess of the Senate." The Recess Appointments Clause (Clause) establishes that

> The 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.[10]

The Recess Appointments Clause permits the President to make temporary appointments, without Senate approval, during periods in which the Senate is not in session.[11]

This constitutionally established appointment process, whether executed pursuant to the Appointments Clause or the Recess Appointments Clause, has often served as a source of political conflict between the President and Congress.[12] This tension between the branches is perhaps most acute when the Senate perceives the President as circumventing the Senate's constitutional "Advice and Consent" role by unilaterally appointing officials pursuant to the Recess Appointment Clause; or, conversely, when the President perceives the Senate as obstructing his duty to execute the laws by refusing to confirm nominees the President feels are qualified.

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[7] U.S. Const. art. II, §2, cl. 2 (emphasis added).

[8] The Supreme Court has distinguished "principal officers," who must be appointed by the President with the advice and consent of the Senate, from inferior officers, whose appointment Congress may vest solely in the President, the judiciary, or a head of a department. U.S. Const. art. II, §2, cl. 2. The differences between principal and inferior officers is discussed in the "The Establishment of the Bureau and Director" section below.

[9] Once confirmed by the Senate, an officer is not formally appointed until his commission is signed by the President.

[10] U.S. Const. art. II, §2, cl. 3.

[11] CRS Report RL33009, *Recess Appointments: A Legal Overview*, by Vivian S. Chu.

[12] *Id*. at 2 (citing numerous examples of contentious recess appointments).

Absent a few generally established principles,[13] the Recess Appointments Clause is typically characterized as containing a number of inherent ambiguities. Most prominent among these lingering questions is the proper interpretation of the two phrases that form the very foundation of the Clause: "Vacancies that may happen during" and "the Recess of the Senate." With respect to the former phrase, must the vacancy *arise* during the recess in which the President exercises his appointment authority, or is it sufficient that the vacancy merely *exist* at the time the Senate is in recess and the appointment made? Regarding the latter, what is meant by "the Recess"? Specifically, is the President's recess appointment authority triggered only during intersession recesses (recesses *between* sessions of Congress) or may he also exercise his authority during intrasession recesses (recesses that occur *within* a session of Congress)?[14] Or to the contrary, is it the *duration*, rather than the form, of a recess that triggers the President's authority?

The executive branch and Congress have given some of these questions consideration in Attorneys General opinions [15] and committee reports, respectively.[16] The courts, however, have rarely engaged in any significant interpretive analysis of the Recess Appointments Clause. The Supreme Court, for example, has never considered when the President's appointment authority is triggered under the Clause, and prior to the D.C. Circuit's decision in *Noel Canning*, only three federal courts of appeals had engaged in such analyses. Those three decisions—*United States v. Allocco*,[17] *United States v. Woodley*,[18]and *Evans v. Stephens*[19]—arguably interpreted the Clause in a manner that imposed limited restrictions on the President's exercise of the recess appointment authority.[20] As is explained in CRS Report R43030, *The Recess Appointment Power After Noel Canning v. NLRB: Constitutional Implications*, by Todd Garvey and David H. Carpenter, the D.C. Circuit's decision in *Noel Canning* contrasts significantly with *Allocco*, *Woodley*, and *Evans* regarding the ultimate scope of the President's authority under the Recess Appointments Clause.

The January 4 Appointments

The unique facts underlying President Obama's recess appointments of Cordray, Flynn, Block, and Griffin, Jr. have brought the inherent tensions of the appointments process into stark focus. President Obama formally nominated Cordray to be the first Director of the CFPB on July 18, 2011.[21] On October 6, 2011, the Senate Committee on Banking, Housing, and Urban Affairs

[13] CRS Report R43030, *The Recess Appointment Power After Noel Canning v. NLRB: Constitutional Implications*, by Todd Garvey and David H. Carpenter, pp. 3-4.

[14] It should be noted that prior to the Civil War intrasession recesses were relatively uncommon as Congress generally met for relatively short sessions followed by long intersession recesses of six to nine months.

[15] For example, aspects of the recess appointments power were considered as early as 1792, and there were at least 19 formal Attorneys General opinions in the 19th century on recess appointments, the earliest written in 1823. See CRS Report RL33009, *Recess Appointments: A Legal Overview*, by Vivian S. Chu.

[16] See, e.g. S.Rpt. No. 58-4389 at 2 (1905) ("[Recess] means, in our judgment, in this connection the period of time when the Senate is *not sitting in regular or extraordinary session as a branch of the Congress* ... ; when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not [*sic*] receive communications from the President or participate as a body in making appointments.") (emphasis in original).

[17] 305 F.2d 704 (2nd Cir. 1962).

[18] 751 F.2d 1008 (9th Cir. 1985).

[19] 387 F.3d 1220 (11th Cir. 2004).

[20] All three cases arose in the context of judicial appointments, and all three courts also held that the Recess Appointments Clause authorized the President to fill judicial vacancies.

[21] 157 CONG. REC. S4646 (daily ed. July 18, 2011). Title X of the Dodd-Frank Wall Street Reform and Consumer (continued...)

approved Cordray's nomination for a full vote of the Senate.[22] However, on December 8, 2011, the Senate fell seven votes shy of the 60-vote threshold necessary to reach cloture and move to a vote on the nomination.[23]

The NLRB, an agency with certain powers to investigate and adjudicate unfair labor practices, consists of a board of up to five officials appointed by the President with the advice and consent of the Senate.[24] In 2011, the Board had only three Members—the minimum number of Members required for a quorum[25]—with one of the three scheduled to vacate his seat by the end of the first session of the 112th Congress. In an effort to prevent membership from dropping below the minimum quorum required for the Board to fully conduct business, President Obama nominated Flynn for a seat on the Board on January 5, 2011.[26] The President formally nominated Block and Griffin, Jr. for positions on the Board on December 15, 2011.[27] Two days later, the Senate adopted a unanimous consent agreement in which the body adjourned, but scheduled a series of "pro forma" sessions every three to four days to occur from December 20, 2011, until January 23, 2012. The unanimous consent agreement established that "no business" would be conducted during the pro forma sessions and that the second session of the 112th Congress would begin at 12:00 p.m. on January 3, 2012, as required by the Constitution.[28]

None of the four nominees were confirmed before the end of the first session of the 112th Congress. On January 4, the President, understanding the Senate to be in a recess, asserted his authority under the Recess Appointments Clause and announced his appointment of Cordray, Block, Flynn, and Griffin, Jr.[29]

(...continued)

Protection Act (Dodd-Frank Act) established the CFPB and provided the independent agency with rulemaking, enforcement, and supervisory powers over many consumer financial products and services, as well as the entities that provide them.

[22] *Johnson Statement on Committee Approval of Richard Cordray's Nomination to Lead the CFPB*, S. Comm. on Banking, Hous., and Urban Affairs, Press Release, Oct. 6, 2011, available at http://shelby.senate.gov/public/index.cfm/newsreleases?ContentRecord_id=893bc8b0-2e73-4555-8441-d51e0ccd1d17.

[23] 157 CONG. REC. S8429 (daily ed. Dec. 8, 2011).

[24] 29 U.S.C. §153.

[25] In 2010, the Supreme Court ruled that the NLRA prevents the NLRB from exercising rulemaking powers without having three or more acting Members. New Process Steel v. Nat'l Labor Relations Bd., 130 S. Ct. 2635 (2010).

[26] 157 CONG. REC. S68 (daily ed. Jan. 5, 2011).

[27] 157 CONG. REC. S8691 (daily ed. Dec. 15, 2011). President Obama had nominated Craig Becker on January 26, 2011 to retain the seat on the Board that he had previously held by recess appointment. That nomination was withdrawn on December 15, 2011. *Id*.

[28] 157 CONG. REC. S883-S8784 (daily ed. Dec. 17, 2011). The unanimous consent agreement stated that the Senate would "adjourn and convene for pro forma sessions only, with no business conducted" on December 20, 23, 27, and 30; that the second session of the 112th Congress would convene on January 3 at noon "for a pro forma session only, with no business conducted;" and that the Senate would then convene for pro forma sessions "with no business conducted" on January 6, 10, 13, 17, and 20, 2012.

[29] *President Obama Announces Recess Appointments to Key Administration Posts*, White House, Press Release, Jan. 4, 2012, available at http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts. The appointments occurred in the time between pro forma sessions on January 3 and January 6, 2012.

D.C. Circuit: *Noel Canning v. NLRB*

Acting with its newly appointed Members, the NLRB issued an administrative decision against Noel Canning (a Pepsi distributor and bottler) in February 2012, ruling that the company had violated the National Labor Relations Act (NLRA) by failing to reduce to writing a collective bargaining agreement with a local Teamsters Union. Noel Canning challenged the NLRB's decision in the D.C. Circuit, claiming that three Members of the Board were invalidly appointed and that, as a result, the Board lacked a quorum to issue the decision.[30]

A unanimous three-judge panel held that the President's three recess appointments to the Board were constitutionally invalid. The opinion rested on two alternative justifications.

First, the court held that "the Recess," for purposes of the Clause, refers only to an intersession recess entered into at the end of a session of Congress.[31] To reach this holding, the D.C. Circuit placed significant importance on the Framers' choice of the phrase "the Recess," as opposed to "a recess," the plural "recesses" or the even broader "adjournment."[32] Looking to the "natural meaning of text as it would have been understood at the time of the ratification of the Constitution," the court concluded that the use of "the Recess," "points to the inescapable conclusion" that the Framers must have intended the Clause to mean something other than a "generic break in proceedings."[33]

Although the D.C. Circuit's holding that recess appointments may only be made during intersession recesses was sufficient to invalidate the President's appointments, a two-judge majority[34] also held that the President's recess appointments were invalid because the vacancies that were filled did not "happen during the Recess of the Senate."[35] The Court determined that the Clause authorizes the President to fill only those vacancies that "come into being" or "arise" during an intersession recess, rather than those that "happen to exist" during an intersession recess.[36] Moreover, the court held that the recess appointment must occur "during the same intersession recess when the vacancy for that office arose."[37] The court arrived at this construction because a plain reading of "that may Happen" could not properly be read to encompass all vacancies in existence, otherwise, the court argued, "the operative phrase ... would be wholly unnecessary."[38]

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[30] Noel Canning v. Nat'l Labor Relations Bd., No. 12-1115 (D.C. Cir. Jan. 25, 2013).

[31] *Id*. at 16-30.

[32] *Noel Canning,* No. 12-115, at 16-18.

[33] *Id*. at 17.

[34] Noting that the "intersession recess" holding was sufficient to invalidate the appointments, Judge Griffith did not join the court's holding that a vacancy also must arise during "the Recess." *Id*. at 47 (Griffith, J. concurring).

[35] *Id*. at 30-44. The court began its analysis "by looking at the natural meaning of the text as it would have been understood at the time of the ratification of the Constitution." *Id*. at 30-31.

[36] *Id*. at 30-31. ("Upon a simple reading of the language itself, we conclude that the word 'happen' could not logically have encompassed any vacancies that happened to exist during 'the Recess.'").

[37] *Id*. at 43-44.

[38] *Id*. at 31. The court acknowledged that this interpretation directly conflicted with the decisions in *Allocco*, *Woodley*, and *Evans*, but criticized those decisions for relying on modern dictionaries to define "happen," rather than contemporary 18th century dictionaries that would define the term as understood during the time of ratification. *Id*. at 35-36.

Potential Implications of *Noel Canning* on the NLRB

The D.C. Circuit's actual order in *Noel Canning* vacated only the Board's administrative ruling that the bottling company had engaged in an unfair labor practice.[39] The decision did not invalidate any other Board actions, nor did the court issue an injunction preventing Members Block and Griffin, Jr. from taking any specific actions in the future.[40] Moreover, the decision only carries precedential value within the D.C. Circuit and in no way binds other federal courts outside of the circuit. Consequently, the opinion's immediate impact on the functioning of the Board may be limited as it only directly implicates the Board's action against Noel Canning within the D.C. Circuit. However, the court's determination that the Board Members were invalidly appointed may be widely applicable to legal challenges of other actions undertaken by the Board in which Flynn, Block, and Griffin, Jr. participated. For example, the more than 200 disputes on which the Board reportedly has ruled since the January 4, 2012 appointments likely would be called into question if the reasoning of *Noel Canning* is applied in future cases.[41]

The limitations on the reach of the appellate court's decision are reflected in the NLRB response to *Noel Canning*. Shortly after the decision, NLRB Chairman Mark Gaston Pearce announced that the NLRB "respectfully disagrees" with the D.C. Circuit's decision and noted that "similar questions have been raised in more than a dozen cases pending in other courts of appeals."[42] Given the decision's application to only "one specific case" and the Board's confidence that the "President's position in the matter will ultimately be upheld," Chairman Pearce asserted that the Board would "continue to perform our statutory duties and issue decisions."[43] As a result, it does not appear that the Board will interpret *Noel Canning* as mandating a stop to administrative proceedings. Indeed, in response to parties who have invoked *Noel Canning* in NLRB proceedings, the Board reportedly has concluded that these arguments "lack merit."[44]

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[39] Although the order does not appear to question either the authority of NLRB regional offices or NLRB Administrative Law Judges (ALJs) to continue to function pursuant to NLRA delegations, any ALJ or Regional Director appointed by the Board after the January 4 appointments may be subject to challenge under the theory that the Board lacked authority to make the appointment.

[40] Flynn resigned as Member of the Board on July 24, 2012. *National Labor Relations Board Member Terrence Flynn Resigns*, Press Release, Nat'l Labor Relations Bd., May 27, 2012.

[41] Any extension of the holding in *Noel Canning* would need to be achieved through future litigation.

[42] *Statement by Chairman Pearce on Recess Appointment Ruling*, NLRB News Release Jan. 25, 2013. The NLRB has stated that it intends to file a petition for certiorari with the Supreme Court by Apr. 25, 2013. *NLRB To Seek Supreme Court Review in Noel Canning v. NLRB*, NLRB News Release March 12, 2013.

[43] *Id*.

[44] Counsel for the Acting General Counsel's Reply Brief to Respondent's Answering Brief, 24 Hour Fitness USA, Inc. v. Nat'l Labor Relations Bd., Case No. 20-CA-35419, Mar. 7, 2013 ("It is not appropriate for the Board to suspend its activities in response to a claim that Presidential appointments to the Board are not valid. Although, Respondent correctly points out that the D.C. Circuit has recently held that the President's appointments to the Board were not valid, the Board has publicly stated that it disagrees with that decision. In addition, it should be noted that in *Noel Canning* the D.C. Circuit Court itself noted that its conclusions concerning the Presidential Appointments had been rejected by the other circuit courts to address the issues. Moreover, even in the absence of a circuit conflict, it has been the Board's longstanding practice not to acquiesce in adverse decisions by individual courts of appeals in subsequent proceedings involving different parties.") (internal citations omitted).

Future Authority of the Board

Although the Chairman is correct that the D.C. Circuit decision applied only to the validity of the order issued against Noel Canning, the holding that Flynn, Block, and Griffin, Jr. were invalidly appointed is likely to be accorded significant precedential weight within the D.C. Circuit. Thus, within the D.C. Circuit's jurisdiction, the NLRB currently has only one validly appointed Member, and therefore lacks the statutorily defined minimum quorum necessary to fully function as determined by the Supreme Court in *New Process Steel, L.P. v. NLRB*.[45] As a result, until two additional Members are validly appointed, the D.C. Circuit likely will view the Board itself as without authority to take any action requiring a quorum of three Board Members.[46]

The D.C. Circuit's view of the Board's authority is unusually significant because section 10(f) of the NLRA allows final Board orders to be appealed by an aggrieved party to the U.S. Court of Appeals where the party resides or transacts business, where the unfair labor practice in question was alleged to have occurred, *or to the D.C. Circuit*.[47] Therefore, any party affected by a Board action—anywhere in the country—has the discretion to file a challenge to that action in the D.C. Circuit.[48] Once the challenge is before the D.C. Circuit, it is likely the court will follow the precedent established in *Noel Canning* and vacate the challenged Board action for lack of a quorum. Given these circumstances, the current Board may have difficulty enforcing its future actions.[49]

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[45] 130 S.Ct. 2635, 2640 (2010) (interpreting 29 U.S.C. §153(b) to require "three participating members 'at all times' for the Board to act.").

[46] *Id*. at 9-10, n. 4 ("The Board may not, of course, itself take any action absent sufficient membership to muster a quorum (three), and in that sense a quorum requirement establishes a minimum membership level."). The Supreme Court left open the possibility that non-Board members, such as regional directors and the Board's general counsel, may exercise certain powers provided by the NLRA in absence of a quorum on the Board. *Id*. ("Our conclusion that the delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel. The latter implicates a separate question that our decision does not address.").

[47] 29 U.S.C. §160(f) (emphasis added).

[48] In making future recess appointments, the Obama Administration—which has stated that it disagrees with the Noel Canning decision—may not feel bound by the restrictions established by the circuit court until the Supreme Court takes a position on the issue. However, a plaintiff challenging a future recess appointment to a position located within the District of Columbia would likely have the choice of filing that lawsuit in the D.C. Circuit where *Noel Canning* would be accorded significant precedential weight.

[49] The NLRB orders generally are not self-executing, but the Board is authorized to seek an enforcement order from a U.S. Circuit Court of Appeals. 29 U.S.C. §160(e). Unless overturned by the Supreme Court, the *Noel Canning* holding also likely will apply to cases challenging Board actions that are currently pending before the D.C. Circuit. However, at this time, the court has held most of these cases in abeyance "pending further order of the court." See, e.g., Order No. 12-5250, Chamber of Commerce of the United States v. Nat'l Labor Relations Bd., 1:11-cv-02262-JEB, (D.C. Cir., Feb. 19, 2013), available at http://www.chamberlitigation.com/sites/default/files/cases/files/2011/D.C.%20Circuit%20Order%20removing%20from%20calendar%20and%20holding%20in%20abeyance.pdf. Claims that are currently pending in other circuit courts may have more difficulty taking advantage of the *Noel Canning* holding. See CRS Legal Sidebar Post WSLG411, Noel Canning and the National Labor Relations Board, by Jon O. Shimabukuro. Other circuit courts would not be bound by the D.C. Circuit's *Noel Canning* decision, but they may be influenced by it.

Past Actions of the Board

In addition to potentially restricting the Board's authority to act in the future, the reasoning underlying *Noel Canning* casts doubt on the legality of every substantive action taken by the Board during the tenures of Block, Flynn, and Griffin, Jr. Moreover, because the NLRA does not establish an explicit time limit on when Board orders may be appealed to a federal court of appeals,[50] legal uncertainty could surround any order issued in which a recess appointee appointed in conflict with the reasoning of *Noel Canning* participated in the decision and was necessary for meeting the Board's quorum requirement.[51] For example, there appear to have been periods in which the Board was composed of no more than two Senate-confirmed appointees dating back to at least the late 1980s.[52]

If parties were to challenge past actions of the Board, two legal doctrines might minimize the effect of a broader application of the *Noel Canning* holding: the de facto officer doctrine, which permits a court to validate an action of an official serving with apparent authority, to acknowledge that certain recess appointments were improper without invalidating all Board actions in which the appointees participated; and ratification by a properly constituted Board (i.e. a Board with at least three properly appointed Members). These two legal doctrines are discussed in greater detail below.

De Facto Officer Doctrine

The de facto officer doctrine "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient."[53] Thus, a reviewing court could invalidate the appointment of an officer, while limiting the remedies available to plaintiffs by applying the de facto officer doctrine to validate these past actions. The doctrine is intended to guard against "the chaos that would result from multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question, and seeks to protect the public by insuring the orderly functioning of the government despite technical defects in title to office."[54]

The courts have not established a clear test for when the de facto officer doctrine should be applied. However, the application of the doctrine appears to be shaped by two factors: the

[50] Buchannan v. Nat'l Labor Relations Bd., 597 F.2d 388, 392 (4th Cir. 1979) ("This is a clear signal that Congress intended a 'no time limit' under the National Labor Relations Act for petitions to courts of appeals."); Griffith Co. v. Nat'l Labor Relations Bd., 545 F.2d 1194 (9th Cir. 1976); Kovach v. Nat'l Labor Relations Bd., 229 F.2d 138 (7th Cir. 1956).

[51] See, e.g., Citation of Supplemental Authorities Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, D.R. Horton, Inc. v. Nat'l Labor Relations Bd. Case No. 12-60031 (5th Cir., Jan. 29, 2013), available at http://amlawdaily.typepad.com/hortoncanningletter.pdf (arguing that the appointment of Member David Becker was invalid under the reasoning of *Noel Canning*, and, without Becker, the NRLB did not have sufficient quorum at the time that it issued an order against petitioner; therefore, the order also is invalid).

[52] See *Members of the NLRB since 1935*, available at http://www.nlrb.gov/members-nlrb-1935. Questions regarding the impact of *Noel Canning* on the validity of other recess appointees are beyond the scope of this report.

[53] Ryder v. United States, 515 U.S. 177, 180 (1995) (quoting Norton v. Shelby County, 118 U.S. 425, 440 (1886)).

[54] *Ryder*, 515 U.S. at 180-81 (quoting 63A, Am Jur. 2d., Public Officers and Employees §578, pp. 1080-81 (1984)).

magnitude of constitutional or policy principles at stake and the timeliness of the challenge to the officer's appointment.[55]

In *Buckley v. Valeo*,[56] the Supreme Court held that the appointment of four Members of the Federal Election Commission (FEC) by Congress, rather than the President, violated the Appointments Clause.[57] The Court invalidated the appointments as unconstitutional, while also determining that

> the Commission's inability to exercise certain powers because of the method by which its members have been selected should not affect the validity of the Commission's administrative actions and determinations to this date. The past acts of the Commission are therefore accorded *de facto validity*.[58]

However, the Court in *United States v. Ryder* called into question the precedential value of *Buckley*'s "de facto validity" determination.[59] *Ryder* involved a challenge to a criminal conviction by the Coast Guard Court of Military Review because two of the three judges that decided the case were unconstitutionally appointed.[60] On appeal, the Court of Military Appeals held that the appointments were unconstitutional, but, citing *Buckley*, upheld the petitioner's conviction by applying the de facto officer doctrine. The Supreme Court reversed the Court of Military Appeals ruling. The *Ryder* Court reasoned that *Buckley* did not "explicitly rel[y] on the de facto officer doctrine ... ",[61] and instead "quite summarily held" that the FEC's prior actions were valid, de facto, while siding with the plaintiff on the constitutional questions raised and awarding his requested injunction and declaratory relief.[62] While the *Buckley* civil case may have been "thought to have implicitly applied a form of the de facto officer doctrine, we are not inclined to extend [the case] beyond [its] facts."[63] The Court also distinguished the facts in *Ryder* from those of three prior criminal cases in which de facto officer doctrine was applied by focusing on the timing of the appeal and the type of appointment defect in question:

> Unlike the defendants in *Ball*, *McDowell*, and *Ward*, petitioner [Ryder] raised his objection to the judges' titles before those very judges and prior to their action on his case. And his claim is based on the Appointments Clause ... rather than a misapplication of a statute providing for the assignment of already appointed judges to serve in other districts.[64]

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[55] See *Ryder*, 515 U.S. at 180-83; Ronald M. Levin, *"Vacation" At Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L. J. 293, 326-29 (2003).

[56] 424 U.S. 1 (1976).

[57] *Buckley*, 424 U.S. at 140-42. See *Ryder*, 515 U.S. at 183 ("Neither *Buckley* nor *Connor* explicitly relied on the de facto officer doctrine, though the result reached in each case validated the past acts of public officials.").

[58] *Buckley*, 424 U.S. at 142 (emphasis added). The *Buckley* Court issued a temporary stay in order to provide "Congress an opportunity to reconstitute the Commission ..., allowing the present Commission in the interim to function de facto in accordance with the substantive provisions of the Act." *Id*.

[59] *Ryder*, 515 U.S. at 184 ("To the extent that these civil cases [*Buckley* and *Connor*] may be thought to have implicitly applied a form of the de facto officer doctrine, we are not inclined to extend them beyond their facts.").

[60] The two judges, who were determined to be inferior officers, were appointed by the General Counsel of the Department of Transportation, rather than by the President, a department head, or a court, as is required by the Appointments Clause. *Ryder*, 515 U.S. at 179-80.

[61] *Ryder*, 515 U.S. at 183.

[62] *Id*. (internal quotations omitted).

[63] *Id*. at 184.

[64] *Id*. at 181-82 (internal citations omitted) (citing McDowell v. United States, 159 U.S. 596, 598-601 (1895) (applying (continued...)

The Court concluded that a "timely challenge to the constitutional validity" of an appointment warrants a "decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred."[65]

In the 2003 decision, *Nguyen v. United States*,[66] the Court ruled that the de facto officer doctrine should not be applied to uphold criminal convictions issued by a panel that included one improperly appointed judge, even though the challenge to the appointment was first made in a petition for *certiorari* to the Supreme Court, rather than before the panel that levied the conviction or on direct appeal.[67] To reach its conclusion, the Court analyzed precedents involving challenges to the appointments of judges. The Court explained that the de facto officer doctrine "[t]ypically" is applied in cases where a judicial appointment is challenged based on a "merely technical" statutory defect.[68] The Court has been more reticent to apply the doctrine in cases that hinge on more than mere technicalities, such as cases involving a statutory challenge "that 'embodies a strong policy concerning the proper administration of judicial business' even though the defect was not raised in a timely manner."[69] The Court illustrated the point through a quote from an 1893 decision:

> If the state made [the judge] incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it by appeal, error or *certiorari*.[70]

Application of the De Facto Officer Doctrine to the NLRB

While it is difficult to predict how and when courts will apply the de facto officer doctrine, the cases indicate that the doctrine has been most commonly applied to validate the actions of

(...continued)

the de facto officer doctrine because McDowell failed to challenge the validity of a judge's appointment until after indictment and trial and because his challenge "presents a mere matter of statutory construction ... It involves no trespass upon the executive power of appointment."); Ball v. United States, 140 U.S. 118, 128-29 (1891) (applying the de facto officer doctrine to deny requested relief of a criminal defendant who did not challenge the validity of his sentencing judge's appointment until after his sentencing)).

[65] *Ryder*, 515 U.S. at 182-83. See also Nguyen v. United States, 539 U.S. 69, 78 (2003) ("By contrast, we have agreed to correct, at least on direct review, violations of a statutory provisions that 'embodies a strong policy concerning the proper administration of judicial business' even though the defect was not raised in a timely manner."); Office of Thrift Supervision v. Paul, 985 F. Supp. 1465, 1475 (S.D. Fla. 1997) ("*Ryder* does provide an exception to the *de facto* officer doctrine, specifically when 'one makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case.'"); In re Fichner, 144 N.J. 459, 471 (N.J. 1996) ("In *Ryder*, ... the Supreme Court permitted a constitutional challenge to the composition of the Board of Military Review but only because the issue had been raised in a direct challenge while the case was pending before that Board.... ").

[66] 539 U.S. 69 (2003).

[67] *Id*. at 73 and 80.

[68] *Id*. at 77 (2003) (quoting Glidden Co. v. Zdanok, 370 U.S. 530, 535 (1962) (plurality)) ("In *McDowell v. United States*, for example, the Court declined to notice alleged irregularities in a Circuit Judge's designation for temporary service in another district ... [because] the judge whose assignment had been questioned was otherwise qualified to serve, because he was a judge of the United States District Court, having all powers attached to such office, and because the Circuit Judge was otherwise empowered to designate him.") (internal citations and quotations omitted). See also *Ryder*, 515 U.S. at 181-82.

[69] *Nguyen*, 539 U.S. at 78 (quoting *Glidden*, 370 U.S. at 536). See also *Ryder*, 515 U.S. at 182-83.

[70] *Nguyen*, 539 U.S. at 78 (quoting American Constr. Co. v. Jacksonville, T. & K. W. R. Co., 148 U.S. 372, 387 (1893)).

officials whose appointments were infirm as a result of a *technical statutory* defect.[71] The doctrine is less likely to be applied where the defect in the officer's appointment involves (1) constitutional principles or fundamental policy issues,[72] especially when these objections are raised (2) timely and (3) directly.

A reviewing court likely would consider challenges to the January 4 appointments as raising significant constitutional issues, rather than technical statutory flaws. Consequently, the doctrine is unlikely to be applied to timely, direct challenges of the actions of these Board Members. There is, however, considerable uncertainty as to what challenges a court would consider to be both timely and direct. At the very least, it seems that the more time that has elapsed since the Board issued the order being challenged, the more likely it is that a reviewing court will consider validating the Board's past actions. For example, a court might apply the doctrine in cases contesting the actions of a Board from the 1980s that consisted of Members deemed to be appointed in conflict with the reasoning of *Noel Canning*.[73] Additionally, a court might be compelled to apply the doctrine where the party had previously appealed a Board order to a circuit court without raising an objection to the validity of the appointments, only to later collaterally attack a court's enforcement of that order on appointment grounds.

Ratification

Ratification, a legal doctrine derived from agency law, "occurs when a principal sanctions the prior actions of its agent."[74] A review of three court decisions illustrates how the doctrine may be applied by duly authorized governmental officers to affirm a past action performed by an officer subsequently determined to lack the authority to act, potentially without the need to redo the administrative procedures required by statute.

In *Federal Election Commission v. NRA Political Victory Fund*,[75] the FEC filed a petition for *writ of certiorari* to the Supreme Court without the approval of the Solicitor General, as was required by law. After the expiration of the statute of limitations to file the petition, the Solicitor provided approval for the FEC's petition.[76] The Supreme Court was left to "determine whether this 'after-the-fact' authorization relates back to the date of the FEC's unauthorized filing so as to make it timely."[77] According to the Court, "[t]he question is at least presumptively governed by ... the doctrine of ratification."[78] In order for the ratification to be valid, however, the ratifying party must have the legal authority to perform the act "*at the time the ratification was made*."[79] Because

[71] For an example of a "technical statutory defect" recognized by a court, see *supra* n. 68.

[72] *Id*. at 80.

[73] As previously mentioned, the NLRA does not provide a statute of limitations for appeals of Board orders. See *supra* n. 50.

[74] Doolin Sec. Sav. Bank v. Office of Thrift Supervision, 139 F.3d 203 (D.C. Cir. 1998) (citing Restatement (Second) of Agency §82 (1958)).

[75] 513 U.S. 88 (1994).

[76] *Id*. at 98.

[77] *Id*.

[78] *Id*.

[79] *Id*. (emphasis original) (quoting Cook v. Tullis, 18 Wall. 332, 338 (1874)).

the Solicitor lacked the authority to file the writ on the day that he gave his approval, the Court held that he could not retroactively ratify the FEC's filing.[80]

In *Federal Election Commission v. Legi-Tech, Inc.*,[81] the D.C. Circuit was asked to affirm the lower court's dismissal of an enforcement action initiated by the FEC against Legi-Tech. While the Legi-Tech case was pending before the lower court, the D.C. Circuit ruled in a separate case that the FEC was "unconstitutionally constituted" because two of its non-voting, *ex officio* Members were appointed in contravention of the Appointments Clause.[82] In response, the FEC voted to reconstitute itself without the two invalid *ex officio* Members. The FEC began the administrative process of initiating the enforcement action against Legi-Tech while it was unconstitutionally composed.[83] After reconstituting itself without the invalid Members, the FEC continued its investigation against Legi-Tech and formally filed the action. Rather than starting the administrative process from scratch, the newly structured Commission ratified the past actions involving Legi-Tech.[84] The D.C. Circuit "assume[d] that no matter what course was followed—other than a dismissal with prejudice (which not even Legi-Tech dares request)—some effects of the unconstitutional structure of the FEC are to be presumed to have impacted on the action."[85] However, the court did not believe that the outcome would have changed significantly had the FEC started the entire process over.[86] Reversing the dismissal, the court concluded that "the better course is to take the FEC's post-reconstitution ratification of its prior decisions at face value and treat it as an adequate remedy for the [past] constitutional violation."[87]

Doolin Security Savings Bank v. Office of Thrift Supervision (OTS)[88] involved a fact pattern similar to that in *Legi-Tech*. OTS had determined to place a depository institution into receivership while Jonathan Fiechter was acting as the Director of OTS. Feichter had been appointed pursuant to questionable legal authority.[89] The enforcement action against the bank was completed under the leadership of the validly appointed Nicolas P. Retsinas.[90] Applying the reasoning of *NRA Political Victory Fund* and *Legi-Tech*, the court felt that "Retsinas made a detached and considered judgment in deciding the merits against the Bank." It also concluded that requiring the OTS to restart the administrative process would not have changed the outcome.[91] The court held that the enforcement action against the bank was valid because Retsinas "effectively ratified"[92] the enforcement proceedings initiated by Feichter "at a time when he could have initiated the charges himself."[93]

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[80] *Id*. at 98-99.

[81] 75 F.3d 704 (D.C. Cir. 1996).

[82] *Id*. at 706 (citing Federal Election Comm'n v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993)).

[83] *Id*. at 706.

[84] *Id*. at 707.

[85] *Id*. at 708.

[86] *Id*. at 708-09.

[87] *Id*. at 709.

[88] 139 F.3d 203 (D.C. Cir. 1998).

[89] *Id*. at 204. The court did not need to reach a conclusion regarding the validity of Feichter's appointment because it held that the his successor was validly appointed and ratified Feichter's actions. *Id*. at 214 ("Because we hold that Retsinas effectively ratified the Notice of Charges signed by Fiechter at a time when he could have initiated the charges himself, we do not decide whether Fiechter lawfully occupied the position of Director.").

[90] *Id*.

[91] *Id*. at 213-14.

[92] The court found the ratification was effective in spite of the fact that Retsinas never explicitly "invoke[d] the term." (continued...)

NLRB's Authority to Ratify Past Actions

In sum, agency actions taken by unconstitutionally appointed officers may be subsequently validated through the doctrine of ratification but only by a party that has the legal authority to perform the act at the time of the ratification. Thus, Board actions performed with the involvement of Block, Flynn, and Griffin, Jr. may be ratified by a Board consisting of at least three validly appointed Members. The *Legi-Tech* and *Doolin* decisions also indicate that the ratifying party, in this case a Board consisting of at least three validly appointed Members, may not be required to repeat all of the administrative steps performed by the unauthorized Members in order to validly ratify an action. Instead, the newly constituted Board could make it clear that they carefully and independently evaluated the prior proceedings and decided that the same outcomes were warranted.

Potential Implications of *Noel Canning* on the CFPB

As previously mentioned, while the *Noel Canning* decision does not directly impact the CFPB, the legal reasoning of the case could be applied to the CFPB.[94] Challenges to the validity of Cordray's appointment currently are pending before multiple courts, including the U.S. District Court for the District of Columbia, where *Noel Canning* will hold significant precedential weight.[95] As a result, *Noel Canning* casts doubt not only over the validity of the President's appointment of Director Cordray, but also over various actions already undertaken by the CFPB and the authority of the CFPB to function going forward.

The implications of a court ruling that Cordray's appointment was invalid would be complicated by the fact that no one prior to Cordray has served as CFPB Director and a provision of law appears to provide the Secretary of the Treasury the authority to exercise *some, but not all*, of the Director's powers until a Director is validly appointed. Specifically, section 1066(a) seems to authorize the Secretary to exercise those powers that were transferred to the Bureau from a number of other federal financial regulators, but not the Bureau's newly established authorities that were not held by other federal regulators prior to the enactment of the Consumer Financial Protection Act of 2010 (CFP Act).[96]

(...continued)

Id. at 213-14. The court explained: "Retsinas issued the order after reviewing the evidence, explaining his reasons, and concluding that the Bank had violated the law. This had the legal consequence of ratifying Fiechter's [actions] ... even though Retsinas did not say as much." *Id*. at 214, n. 11 (internal citations omitted).

[93] *Id*. at 212-14. As a result, the court did not have to "decide whether Feichter lawfully occupied the position of Director." *Id*. at 214.

[94] In fact, the *Noel Canning* court noted that "early interpreters [] understood that the Clause only applied to vacancies where the office had previously been occupied, as opposed to vacancies that existed because the office had been newly created." *Noel Canning*, at 34-35.

[95] See, e.g., Complaint, State Nat'l Bank of Big Spring v. Geithner, Case No. 1:12-cv-01032 (D.C. Sept. 20, 2012), available at http://newsandinsight.thomsonreuters.com/uploadedFiles/Reuters_Content/2012/09_-_September/statenationvcfpb—amendedcomplaint.pdf; Opposition to Receiver's Second Request for Payment, Consumer Fin. Prot. Bureau v. Gordon, Case No. CV12-6147-RSWL(MRWx), (C.D.Cal. July 18, 2012), available at http://www.cfpbmonitor.com/files/2013/02/CGCFPB-Opp-Rec-Req-2.pdf.

[96] For a more in-depth legal analysis of the CFP Act, see CRS Report R42572, *The Consumer Financial Protection Bureau (CFPB): A Legal Analysis*, by David H. Carpenter.

The Establishment of the Bureau and Director

The CFP Act[97] establishes the Bureau as an independent executive agency within the Federal Reserve System (FRS).[98] All of the Bureau's powers are concentrated within a single Director, who is to be appointed by the President, subject to the advice and consent of the Senate, to serve for a five-year term. The Director may only be removed by the President for "inefficiency, neglect of duty or malfeasance in office."[99] The Director may appoint a Deputy Director, who is authorized "to serve as acting Director in the absence or unavailability of the Director."[100] Additionally, the Director has authority to appoint and hire the employees necessary to carry out the duties of the Bureau[101] and "to delegate to any duly authorized employee, representative, or agent any power vested in the Bureau by law."[102]

The CFP Act empowers the Bureau through

1. the *transfer* of *existing* consumer protection powers from other federal regulators[103] ("transferred powers" or "transferred authorities"); and
2. *newly established* enhanced consumer protection authorities that were not explicitly provided by law to federal regulators prior to the Dodd-Frank Act's enactment ("newly established powers" or "newly established authorities").

The Bureau's transferred authorities include the power to issue rules to implement 19 federal consumer protection laws (the enumerated consumer laws) that, with one exception,[104] were enacted prior to the Dodd-Frank Act. They also include consumer compliance supervisory, enforcement, and rulemaking powers over banks, thrifts, and credit unions holding more than $10 billion in deposits (larger depositories).[105]

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[97] The CFP Act is enacted as Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), P.L. 111-203.

[98] Dodd-Frank Act §1011; 12 U.S.C. §5491. Although the Bureau is housed within the FRS, it has considerable independence from the Board of Governors of the Federal Reserve System (FRB).

[99] Dodd-Frank Act §1011, 12 U.S.C. §5491.

[100] Dodd-Frank Act §1011, 12 U.S.C. §5491.

[101] Dodd-Frank Act §1013, 12 U.S.C. §5493.

[102] Dodd-Frank Act §1012, 12 U.S.C. §5492.

[103] The seven "transferor agencies" are the five federal banking regulators—the Office of the Comptroller of the Currency (OCC); the FRB; the Federal Deposit Insurance Corporation (FDIC); the National Credit Union Administration (NCUA); and OTS—as well as the Federal Trade Commission (FTC), and the Department of Housing and Urban Development (HUD).

[104] The Bureau acquired rulemaking authority pursuant to most provisions of the Mortgage Reform and Anti-Predatory Lending Act, which was enacted as Title XIV of the Dodd-Frank Act. Dodd-Frank Act §1400. The majority of these provisions are enacted as amendments to TILA or RESPA.

[105] Dodd-Frank Act §§1061-1067, 12 U.S.C. §§5581-5587. More specifically, the transferred authorities include

- "all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law," including the rulemaking authority under the 18 enumerated consumer laws, held by the HUD, FRB, OCC, OTS, FDIC, and NCUA;
- certain consumer compliance examination and other supervisory authorities over larger depositories;
- primary enforcement authority of consumer financial laws and regulations over larger depositories;
- subject to certain limitations, the FTC's authority "to prescribe rules, issue guidelines, or conduct a study or issue a report mandated under [the enumerated consumer laws] ... ";

(continued...)

The Bureau's newly established authorities largely consist of: enhanced, up-front supervisory and enforcement powers over covered non-depository financial institutions, such as payday and mortgage lenders;[106] new rulemaking powers, distinct from the rulemaking authorities provided under the enumerated consumer laws;[107] and certain limited consumer compliance enforcement and supervisory powers over "smaller depository institutions" (i.e., banks, thrifts, and credit unions with $10 billion or less in assets).[108]

Based on extent of the powers provided to the position, the CFPB Director arguably is an "Officer of the United States" who is exercising "significant"[109] governmental authorities.[110] If it were determined that, as a matter of law, Richard Cordray's appointment was invalid, then there would be no remaining "Officer[s] of the United States" appointed in accordance with the Constitution and CFP Act section 1011 to exercise the Director's powers. Additionally, if the Director position had never been validly filled, certain statutory avenues for temporarily filling the position would not apply to the CFPB. For instance, while the Bureau's Deputy Director is provided the authority to serve as acting director in the Director's absence, only the Director may appoint a Deputy Director.[111] If Cordray did not have the authority to exercise any Bureau powers, his appointment of a Deputy Director likely would be invalid.[112]

Consequently, in the absence of a congressional authorization to the contrary, it appears that no one may exercise the "significant authorities"[113] provided to the Bureau pursuant to the CFP Act until a Director is validly appointed in accordance with the Constitution. However, in order to

(...continued)

- the authority to coordinate a process by which certain employees of all of the transferor agencies other than the FTC are identified to be transferred to the CFPB, as necessary to perform the transferred authorities.

Dodd-Frank Act §1061, 12 U.S.C. §5581.

[106] Dodd-Frank Act §1024, 12 U.S.C. §5514.

[107] See, e.g., Dodd-Frank Act §§1022, 1031-1036, 12 U.S.C. §§5512, 5531-36.

[108] Dodd-Frank Act §1026(a), 12 U.S.C. §5516. The banking regulators retained both safety and soundness and primary consumer compliance authorities over smaller depositories.

[109] Quoting *Buckley*, 424 U.S. at 126, n. 162 ("'Officers of the United States' does not include all employees of the United States.... Employees are lesser functionaries subordinate to the officers of the United States.") ("Officers of the United States" refers to "any appointee exercising significant authority pursuant to the laws of the United States."). An individual "exercising significant authority" of the United States generally is either a principal or inferior officer, who must be appointed in accordance with Appointments Clause or Recess Appointments Clause. *Id*. See also Edmond v. United States, 520 U.S. 651, 662 (1997) ("The exercise of 'significant authority pursuant to the laws of the United States' marks, not the line between principal and inferior officer for Appointments Clause purposes, but rather, as we said in *Buckley*, the line between officer and non-officer."). See also United States v. Germaine, 99 U.S. 508, 511-12 (1878) (an officer "embraces the ideas of tenure, duration, emolument, and duties, and that the latter [are] continuing and permanent, not occasional or temporary.")

[110] U.S. Const. art. II, §2, cl. 2. The fact that the Director may only be removed for cause and only by the President, the fact that the Director is not subject to direct oversight or supervision of any other executive officer, the broad scope of the Director's powers, and the permanent tenure of the office of the Director all strongly indicate that the Director is, in fact, a *principal* officer of the United States. Regardless of the type of officer, Congress, through the CFP Act, requires that the Director be appointed by the President and confirmed by the Senate. Dodd-Frank Act §1011, 12 U.S.C. §5491.

[111] Dodd-Frank Act §1011, 12 U.S.C. §5491.

[112] Additionally, the Vacancies Reform Act (VRA), a statutory alternative to filling some advice and consent positions, would not be applicable to the CFPB Director position. Under the VRA, a "vacancy" arises when the relevant officer "dies, resigns, or is otherwise unable to perform the functions and duties of the office." 5 U.S.C. §3345(a). If Cordray's appointment was invalid, the Director position would be vacant because it had never been filled, rather than for one of the VRA's triggering events—death, resignation, or inability to perform.

[113] Quoting *Buckley*, 424 U.S. at 126, n. 162.

prevent all of the CFPB's powers from remaining dormant until the indefinite time when a Director could be validly appointed, Congress appears to have empowered the Secretary of the Treasury to exercise the Bureau's transferred powers in accordance with section 1066(a).[114]

CFP Act Section 1066(a)

Presumably out of a recognition that it might take some time before a Director could be validly appointed, section 1066(a) of the CFP Act provides interim authority to the Secretary of the Treasury to exercise certain functions of the Bureau. Section 1066 is located within subtitle F of the CFP Act. The provisions of subtitle F transfer the relevant consumer financial protection functions and personnel from the five banking regulators, the Federal Trade Commission (FTC), and Department of Housing and Urban Development (HUD) to the CFPB. Section 1066(a) states,

> In General.—The Secretary [of the Treasury] is authorized to perform the functions of the Bureau *under this subtitle* until the Director of the Bureau is confirmed by the Senate in accordance with section 1011.[115]

Section 1066(a) is the only unexpired statutory provision in the CFP Act that provides substantial Bureau authorities to an officer or office other than the CFPB Director, the CFPB Deputy Director, or the Bureau itself.[116]

As is detailed below, the plain meaning of section 1066(a), its location within the structure of the CFP Act, the act's repeated distinction between transferred and newly established authorities, the legislative history of the provision, and the practical concerns that the provision seems to address point to the conclusion that the Secretary is authorized to exercise only the Bureau's *transferred powers*, which are effectuated pursuant to subtitle F, and only until a Bureau Director "is confirmed by the Senate.... "[117]

Plain Meaning, Location, and Structure

When required to interpret the meaning of a statute, courts typically will begin with an examination of the statutory text. Under the "plain meaning rule," judicial interpretation will

[114] *Buckley*, 424 U.S. at 162. Before statutory authority may be exercised, it must be both effective and a government actor (i.e., principal officer, inferior officer, or non-officer employee) must be authorized to wield it. The Supreme Court's interpretation of the NLRA in *New Process Steel* provides a clear example of this in practice. Although the NLRB's powers under the NLRA clearly had gone into effect, the Board lacked the authority to exercise those powers for want of a quorum. *New Process Steel*, 130 S.Ct. at 2644-45.

[115] Dodd-Frank Act §1066(a), 12 U.S.C. §5586(a) (emphasis added).

[116] Three other CFP Act provisions provided the Secretary authority related to the Bureau; however, those authorities terminated on July 21, 2011, the designated transfer date. Dodd-Frank Act §1062, 12 U.S.C. §5582 (authority to establish the designated transfer date, in consultation with other regulators); Dodd-Frank Act §1017(a)(3), 12 U.S.C. §5497(a)(3) (authority to request funds from the FRB until the designated transfer date); Dodd-Frank Act §1066(b), 12 U.S.C. §5586(b) (authority for the Treasury Department to "provide administrative services necessary to support the Bureau.... "). Additionally, until July 21, 2014, the President has the authority to settle disputes among the Bureau and the transferor agencies regarding the transfer of functions and personnel in accordance with subtitle F. Dodd-Frank Act §1064(a)(8), 12 U.S.C. 5584(a)(8).

[117] As is explained in detail in CRS Report R42323, *President Obama's January 4, 2012, Recess Appointments: Legal Issues*, by David H. Carpenter et al., at 30-36, it is unlikely that a reviewing court would interpret section 1066(a) as restricting a validly appointed recess appointee, as compared to a Senate-confirmed appointee, from exercising the full authorities of the Director position.

begin and end with the text if its meaning is unambiguous.[118] Section 1066(a) expressly authorizes the Secretary's authority "to perform the functions of the Bureau *under this subtitle*." Section 1066 is located in subtitle F of the CFP Act. Additionally, no other provision of the CFP Act expressly authorizes the Secretary to perform substantive Bureau authorities.[119] As a result, CFP Act section 1066(a) seems to limit the Secretary's authorities to those provided to the Bureau under subtitle F.

In spite of this apparent plain meaning, at least one commentator has argued that the Secretary has the authority to exercise *all* of the Director's powers. [120] One problem with this argument is that an attempt to construe section 1066(a) as applying to all of the authorities provided under full CFP Act would render the phrase "under this subtitle" meaningless, which courts are hesitant to do.[121]

Additionally, had Congress intended to provide the Secretary *all* of the Bureau's authorities, it could have more clearly articulated that intent. One way this could have been accomplished is by substituting the word "title" for "subtitle," in order to reference the entire CFP Act (i.e., Title X of the Dodd-Frank Act), rather than just subtitle F (i.e., "Subtitle F—Transfer of Functions and Personnel; Transitional Provisions").[122] "Title" and "subtitle" are common terms used in legislative drafting, and the use of one over the other can dramatically alter statutory meaning. A reviewing court likely would presume that Congress intentionally chose the word "subtitle" rather than "title" unless there is "persuasive evidence" to the contrary.[123]

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[118] CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by Larry M. Eig.

[119] See *supra* n. 116.

[120] See, e.g., *Hurdle for Challengers to CFPB Recess Appointment: Consumer Bureau Had Full Power With or Without a Director*, Nat'l Consumer Law Ctr., Feb. 2012, available at http://www.nclc.org/images/pdf/regulatory_reform/issue-brief-cfpb-interim-powers.pdf (arguing that section 1066(a) provides the Secretary the authority to exercise *all* Bureau powers until a Director is validly appointed). But see *Review of CFPB Implementation Planning Activities*, Offices of Inspector General, Bd. of Governors of the Fed. Reserve Sys. and Bureau of Consumer Fin. Prot. and Dept. of the Treasury, at 2-4, July 15, 2011, available at http://www.federalreserve.gov/oig/files/ OIG_2011_Review_of_CFPB_Implementation_Planning_Activities.pdf.

[121] See, e.g., *New Process Steel,* 130 S.Ct. at 2640 ("See Duncan v. Walker, 533 U. S. 167, 174 (2001) (declining to adopt a 'construction of the statute, [that] would render [a term] insignificant'); Market Co. v. Hoffman, 101 U. S. 112, 115-116 (1879) ('[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be ... insignificant' (internal quotation marks omitted).''). See also CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by Larry M. Eig.

[122] See, e.g., *New Process Steel*, 130 S.Ct. at 2641 ("Second, and relatedly, if Congress had intended to authorize two members alone to act for the Board on an ongoing basis, it could have said so in straightforward language."). See also CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by Larry M. Eig, at 16.

[123] See, e.g., Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928) (holding that federal statute does not make government liable for interest in a collision with a U.S. naval ship) ("It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.... "). See CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by Larry M. Eig, at 14-15. Within the CFP Act there are numerous examples of the term "title" being used in what appear to be appropriate times, along with apparently apt uses of the term "subtitle." One notable example is in the way that the CFP Act delineates: (1) the CFPB's authority to prescribe rules declaring acts or practices pertaining to covered consumer financial products or services to be unlawful because they are unfair, deceptive, or abusive (Dodd-Frank Act §§1031, 1036, 12 U.S.C. §§5531, 5536); and (2) the FTC's mandate to prohibit unfair and deceptive "acts or practices in or affecting commerce." (15 U.S.C. §45). Because these powers are so similar, the CFP Act carefully defines the limits of the FTC's and CFPB's jurisdictions and how they are to interact in instances where their authorities overlap. To accomplish this, there are numerous references to "title" and "subtitle" that strongly indicate that each word was chosen with care. See Dodd-Frank Act §1061(b)(5), 12 U.S.C. §5581(b)(5).

Furthermore, the CFP Act repeatedly distinguishes between authorities "transferred under subtitles F and H," "the enumerated consumer laws," and the other "provisions of this title," which arguably express a congressional understanding that each of these groups of powers is unique, and at times, must be treated differently from one another.[124] [Subtitle H, entitled "Conforming Amendments," effectuates the transfer of authorities provided in subtitle F by amending the enumerated consumer laws and other statutes.[125]] Notably, section 1027 of the CFP Act generally prohibits the Bureau from exercising its newly established supervisory, enforcement, and rulemaking authorities with respect to certain entities (e.g., real estate brokers), but those exemptions do not apply to the extent that the entities are "*otherwise subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H*."[126]

Legislative History

A review of the legislative history of section 1066(a) suggests that several approaches were considered in five versions of three different bills.

First, section 166(a) of H.R. 3126 (111th Congress), which was marked-up by the House Committee on Financial Services (Financial Services Committee), used basically the same language as that of Dodd-Frank Act section 1066(a) that was signed into law, except that it accounted for the fact that, rather than being headed by a single director, the consumer agency under that particular proposal would have been run by a five-member board, each member of which was to "appointed by the President, by and with the advice and consent of the Senate."[127] H.R. 3126 (111th Congress) section 166(a) stated, in relevant part,

> In General—The Secretary is authorized to perform the functions of the Agency under this subtitle until 3 of the appointed Board members are confirmed by the Senate in accordance with section 112.

Ultimately, the bill that was ordered to be reported by the Financial Services Committee changed the leadership structure of the consumer agency to a single-directorship, but otherwise kept the relevant language providing the Secretary certain interim authorities intact.[128]

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[124] See, e.g., Dodd-Frank Act §1002(14), 12 U.S.C. §5481(14) ("The term 'Federal Consumer Financial Law' means the provisions of this title, the enumerated consumer laws, the laws for which authorities are transferred under subtitles F and H, and any rule or order prescribed by the Bureau under this title, an enumerated consumer law, or pursuant to the authorities transferred under subtitles F and H. The term does not include the Federal Trade Commission Act."). See also CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by Larry M. Eig, at 14-15.

[125] For example, subtitle F provides that the FRB's rulemaking authorities under the TILA shall be transferred to the Bureau. Section 1100A of subtitle H amends TILA to effectuate the transfer of authorities by, for example, replacing all relevant references to the FRB with references to the "Bureau."

[126] Dodd-Frank Act §§1027(b), (c), (d), (e), (f), (g), (h), and (*l*), 12 U.S.C. §§5517(b), (c), (d), (e), (f), (g), (h), and (*l*) (emphasis added). In addition to the plain meaning of the statutory text, the location of the Secretary's authorizing provision seems to indicate a legislative intent to constrict his power to exercise the Bureau's transferred authorities. It seems that subtitle A, which establishes the Bureau and the office of the Director and provides the Director with executive and administrative authorities, would be a more logical location for an authorization to the Secretary to perform all of the Director's powers until a valid appointment.

[127] H.R. 3126, 111th Cong. §§112 and 166. See also Mike Ferullo, *Frank Offers Revised Legislation to Create Consumer Agency; Hearing Set for Sept. 30*, Bureau of Nat'l Affairs, Inc., Oct. 1, 2009.

[128] See *Mark-Up of Discussion Draft of the consumer Financial Protection Agency Act of 2009 (to be reported as H.R.* (continued...)

The House Committee on Energy and Commerce (Energy and Commerce Committee) also marked-up a discussion draft that ultimately was ordered to be reported as H.R. 3126 (111th Congress). The version that was ordered to be reported by the Energy and Commerce Committee would have structured the consumer agency as a five-member commission, but it did not amend the interim authority language of section 166(a).[129]

When this bill moved to the House Committee on Rules, it was merged into a comprehensive financial reform bill as H.R. 4173 (111th Congress). That bill's language initially passed the full House as section 4102 of H.R. 4173 (111th Congress). Section 4102 of that bill established the position of Director to head the proposed consumer agency. Section 4102 also provided that the individual *nominated* by the President to be the Director would serve as Acting Director of the agency.[130] The provision stated,

> The individual nominated pursuant to paragraph (1) [to be Director] shall serve as Acting Director with *full authorities granted to the Director under this title* until the Director is confirmed by the Senate.[131]

The bill that was discharged by unanimous consent from the Senate Committee on Banking, Housing, and Urban Affairs (Banking Committee) and passed the full Senate as H.R. 4173 (111th Congress) section 1066(a), in lieu of S. 3217 (111th Congress) section 1066(a), was identical to the language of the Dodd-Frank Act section 1066(a) that was signed into law.

In sum, section 4102 of the House-passed H.R. 4173 (111th Congress) would have provided an acting director the "*full* authorities" of the Director provided pursuant to the entire CFP Act ("under this *title*") until a Director could be validly appointed. Rather than follow this path, the Banking Committee began and ended with the language that ultimately was enacted into law as section 1066(a). While this legislative history does not conclusively prove congressional intent on the issue of interim authorities to exercise Bureau powers, it certainly does not provide a strong indication that Congress intended to provide the Secretary interim authorities beyond those described in section 1066(a)'s language.[132]

Practicalities of Section 1066

Finally, Congress had a practical justification for distinguishing between the transferred and newly established powers in context of the interim period before a Director was validly

(...continued)

3126) Before the H. Comm. on Fin. Serv., 111th Cong. (2009), materials available at http://archives.financialservices.house.gov/Hearings/hearingDetails.aspx?NewsID=801.

[129] H.REPT. 111-367. See also *Markup of H.R. 3126, the Consumer Financial Protection Agency Act of 2009 Before the H. Comm,. on Energy and Commerce*, 111th Cong. (2009), materials available at http://energycommerce.house.gov/news/PRArticle.aspx?NewsID=7531.

[130] This provision would have raised constitutional concerns had it been enacted.

[131] H.R. 4173, 111th Cong. § 4102 (as passed by House, Dec. 11, 2009) (emphasis added). After an initial period in which the proposed consumer agency would have been run either by a single acting director or a single appointed director, the leadership structure of the agency would convert to a five-member commission. *Id.*

[132] The Dodd-Frank Act's conference report does not synthesize the legislative language. H.R. REP. 111-517. The report ordered by the Banking Committee stated: "Section 1066 provides the Secretary of the Treasury authority to perform the functions of the Bureau under the CFP Act until the Director of the Bureau is confirmed by the Senate." S.Rept. 111-176, at 178.

appointed—the regulatory scheme for the transferred powers had been in place for decades prior to the Dodd-Frank Act. The banking regulators have long held consumer compliance supervisory, enforcement, and rulemaking powers over large banks, thrifts, and credit unions. Many of the enumerated consumer laws also have been in place for significant periods of time.[133] Pursuant to the CFP Act, the transferred powers conveyed from the jurisdiction of the seven transferor agencies to the Bureau on a date certain—the designated transfer date.[134] Appointing officers subject to the advice and consent of the Senate is inherently uncertain. At the time of enactment, there was no way to guarantee that a Director could be in place by the designated transfer date. Had Congress not provided the Secretary (or some other valid officer) the authority to exercise those transferred powers, there would have been the possibility that no regulator had the authority to issue regulations under the enumerated consumer laws or to supervise the largest depository institutions in the country for compliance with consumer protection laws. For these reasons, Congress had compelling policy reasons to want to avoid such a regulatory gap. The policy justifications for ensuring that there were interim authorities to exercise the newly established powers are not as compelling because, before the Dodd-Frank Act, no such regulatory scheme existed.

In light of the plain language of section 1066, the structure of the CFP Act, the common uses of the terms within section 1066 in other places within the act, and the legislative history, coupled with the dearth of evidence to support an alternative interpretation, a reviewing court likely would determine that the Secretary of the Treasury is authorized to exercise the Bureau's transferred authorities until a CFPB Director is validly appointed, and that he has no authority to exercise the newly established powers.

Potential Impact on Past CFPB Actions

In light of the Secretary's authority to exercise the Bureau's transferred powers until a Director is validly appointed, a judicial determination that Richard Cordray's appointment was invalid could have a significant impact on past CFPB actions and the ability of the Bureau to act going forward.

For example, a court could conclude that every rulemaking and enforcement action conducted under the direction of Cordray was done without proper legal authority. However, unlike the statutory framework governing the NLRB which delegates authority to the Board alone, section 1066(a) appears to authorize the Secretary to exercise the CFPB's transferred powers until a Director is validly appointed. As is explained more specifically below, many of the substantive actions taken while Cordray was at the helm were exercises of transferred authorities that the Secretary could have authorized had he been serving as interim director pursuant to section 1066(a).[135] Consequently, the Secretary may be permitted to validate some of Bureau's past actions through the doctrine of ratification, which is discussed above.[136]

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[133] TILA, for instance, was originally enacted in 1968, while RESPA originally was signed into law in 1974.

[134] The Secretary, in consultation with other regulators, was required to establish the designated transfer date between 180 days and 18 months after the date of enactment, July 21, 2010. Dodd-Frank Act §1062, 12 U.S.C. §5582.

[135] Legal challenges might be initiated by a covered financial institution seeking to prevent the Bureau from exercising an authority specifically against it, or by the Bureau seeking a court order compelling an institution to comply with a law or regulation. As previously discussed, it would appear the de facto officer doctrine is not likely to be applied to timely, direct challenges of actions performed under the direction of Cordray because they would raise significant constitutional issues.

[136] The authorities also may be exercised by a duly authorized delegatee of the Secretary's. The Secretary has broad (continued...)

Rulemakings

The Bureau issued more than two dozen final rulemakings under Cordray's tenure as Director. Many of these rules were substantive issuances that potentially may have far-reaching impacts on consumer markets. Many also provide greater clarity and guidance to the industry on how to comply with statutory provisions that are, or soon will be, in effect. Questions about the enforceability and legal validity of these rules could cause widespread confusion among industry participants and could lead to market instability. To allay these concerns, the Secretary may have an incentive to ratify the rulemakings issued under Cordray pursuant to transferred powers.[137]

The majority of final regulations issued by the Bureau under Cordray's direction have been to implement one of the enumerated consumer laws.[138] The authority to issue rules under the enumerated consumer laws was transferred to the Bureau pursuant to subtitle F. Therefore, this authority would appear to fall within the Secretary's 1066(a) powers. For example, in February 2012, the CFPB issued final rules governing the provision of remittance transfers. These rules were amendments to Regulation E, which implements the EFTA, an enumerated consumer law.[139] Additionally, in January 2013, the Bureau issued a series of mortgage servicing and mortgage origination final regulations largely to implement provisions of Dodd-Frank Act, Title XIV. Each of these mortgage-related rulemakings amended either Regulation Z or Regulation X, which implement the enumerated consumer laws the Truth in Lending Act[140] and the Real Estate Settlement Procedures Act,[141] respectively.[142]

(...continued)

discretionary authority to "delegate duties and powers of the Secretary to another officer or employee of the Department of the Treasury." 31 U.S.C. §321(b). Under this provision, the Secretary presumably could hire Richard Cordray as an officer of the Treasury Department and delegate to Cordray his CFPB powers.

[137] The Secretary would not be bound by the actions taken under Cordray's leadership. Consequently, the Secretary could ratify each of these rules exactly how they previously were issued under Cordray, issue similar rules with changes, or altogether rescind certain rules.

[138] The Bureau provides links to all final and proposed rules at http://www.consumerfinance.gov/regulations/. Notable rulemakings issued under Cordray's leadership include Loan Originator Compensation Requirements under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 11,279 (Feb. 15, 2013) (to be codified at 12 C.F.R. Part 1026); Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696 (Feb. 14, 2013) (to be codified at 12 C.F.R. Part 1024); Mortgage Servicing Rules under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 10,092 (Feb. 14, 2013) (to be codified at 12 C.F.R. Part 1026); and Ability-to-Repay and Qualified Mortgage Standards under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 6,408 (Jan. 30, 2013) (to be codified at 12 C.F.R. Part 1026).

[139] Electronic Fund Transfers, 77 Fed. Reg. 6194 (Feb. 7, 2012) (to be codified at 12 C.F.R. Part 1005). The Bureau has made several amendments to the February final rule. See *Remittance Transfer Rule (Amendment to Regulation E)*, available at http://www.consumerfinance.gov/regulations/final-remittance-rule-amendment-regulation-e/.

[140] 15 U.S.C. §§1601, *et seq*.

[141] 12 U.S.C. §§2601, *et seq*.

[142] These Dodd-Frank Act provisions were drafted as amendments to the three enumerated consumer laws (TILA, RESPA, and EFTA). Dodd-Frank Act section 1400 expressly provides that the relevant mortgage-related provisions of Title XIV "shall be enumerated consumer laws, as defined in section 1002 [of the CFP Act], and shall come under the purview of the Bureau of Consumer Financial Protection for purposes of title X, including the transfer of functions and personnel under subtitle F of title X and the savings provisions of such subtitle." Dodd-Frank Act §1400, 12 U.S.C. §1601(note). Additionally, the authority to implement these amendments was provided to the relevant transferor agencies until the designated transfer date.

The Bureau also issued two rules to define certain credit reporting agencies[143] and certain debt collectors[144] as nondepository financial institutions that would be subject to the CFPB's supervision pursuant to CFP Act section 1024.[145] Section 1024 is a newly established power that likely is outside the scope of the Secretary's authority under section 1066(a). Therefore, the Secretary would not have the authority to ratify these rulemakings, and they probably could not be legally enforced by the Bureau until a Director is validly appointed. These appear to be the only substantive rulemakings issued pursuant to newly established authorities that seem to be outside of the scope of the Secretary's 1066(a) powers.[146]

Enforcement Actions

From the time of Cordray's appointment until the D.C. Circuit's *Noel Canning* decision, the CFPB had only entered into five formal enforcement actions.[147] Each of these actions was against a larger depository[148] and took the form of a consent order, to which the depositories voluntarily agreed. Pursuant to section 1066(a), the Secretary has the authority to supervise and engage in enforcement actions with each of the parties to these consent orders. However, each of the orders relied, at least in part, on the CFPB's newly established authority to prohibit unfair, deceptive, or abusive practices (UDAP).[149] Without the newly established UDAP arrow in its enforcement quiver, the CFPB, under the Secretary's direction, may not have the negotiating leverage to reach the same terms, if there is an attempt to ratify the orders with the consent of the parties.

Unlike the broadly applicable rulemakings, the terms of the five enforcement actions only apply to the small number of financial institutions that are parties to the agreements. For this reason, the Bureau may not have a strong incentive to proactively ratify the consent orders (or enter into new ones). Instead, the Bureau might choose to wait for the named parties to seek judicial relief from the terms of the orders. Since all of the named parties are larger depositories that will remain subject to the Bureau's regulatory jurisdiction under the direction of the Secretary, they may have practical reasons for not wanting to litigate the matter. Additionally, each of these parties failed to

[143] Defining Larger Participants of the Consumer Reporting Market, 77 Fed. Reg. 42,874 (July 20, 2012) (to be codified at 12 C.F.R. Part 1090).

[144] Defining Larger Participants of the Consumer Debt Collection Market, 77 Fed. Reg. 65,775 (Oct. 31, 2012) (to be codified at 12 C.F.R. Part 1090).

[145] Dodd-Frank Act §1024(a)(1)(B), 12 U.S.C. §5514(a)(1)(B).

[146] The CFPB also has issued final interpretative rules and rules involving internal Bureau procedures and policies. It seems unlikely that these rules could cause a personalized injury sufficient for a plaintiff to have legal standing to challenge their validity.

[147] *Stipulation and Consent Order*, In the Matter of: Capital One Bank, (USA) N.A., Consumer Fin. Prot. Bureau, July 18, 2012; *Joint Consent Order, Joint Order for Restitution, and Joint Order to Pay Civil Money Penalty*, In the Matter of: American Express Centurion Bank, Fed. Deposit Ins. Co. and Consumer Fin. Prot. Bureau, Oct. 1, 2012; *Consent Order, Order for Restitution, and Order to Pay Civil Money Penalty*, In the Matter of: American Express Bank, FSB, Consumer Fin. Prot. Bureau, Oct. 1, 2012; *Consent Order, Order for Restitution, and Order to Pay Civil Money Penalty*, In the Matter of: American Express Travel Related Services Company, Inc., Consumer Fin. Prot. Bureau, Oct. 1, 2012; and *Joint Consent Order, Order for Restitution, and Order to Pay Civil Money Penalty*, In the Matter of Discover Bank, Fed. Deposit Ins. Co. and Consumer Fin. Prot. Bureau, Sept. 24, 2012. These orders and other administrative adjudication materials pertaining to the Bureau are available at http://www.consumerfinance.gov/administrativeadjudication/.

[148] The orders were against either a larger depository directly or a third-party service provider of a larger depository, which is subject to the Bureau's regulatory authority to the same extent as a larger depository. Dodd-Frank Act §1025(d), 12 U.S.C. §5515(d).

[149] Dodd-Frank Act §§1031, 1036, 12 U.S.C. §§5531, 5536.

challenge the constitutionality of Cordray's appointment, and thus the authority to enter the enforcement actions, when the orders were being negotiated. Under these circumstances, a reviewing court might be more likely to apply the de facto officer doctrine to uphold the validity of these consent orders due to the belatedness of any future challenge.

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