



January 30, 2013

Dear Senator,

The re-nomination of Richard Cordray to head the Consumer Financial Protection Bureau was a center of controversy long before its formal announcement this past Thursday. As the attached list of critiques of the Bureau indicates, this agency's structure and power, coupled with Director Cordray's pronouncements on using that power, have caused many people to take an extremely negative view of this agency. They regard it as a striking example of government power that is both massive and unaccountable. Many of these concerns were detailed in a May, 2011 letter to the President, signed by 44 Senators.

http://shelby.senate.gov/public/index.cfm/newsreleases?ContentRecord_id=893bc8b0-2e73-4555-8441-d51e0ccd1d17

In our view, the Bureau's power is unconstitutional, and for this reason our two organizations are participating in a court challenge against the agency.

But now a new issue has been raised by last Friday's Court of Appeals ruling in *Noel Canning v. National Labor Relations Board* (D.C. Cir., No. 12-1115), and the Administration's and the Bureau's response to it. In invalidating three NLRB recess appointments, the court noted the central role that the Appointments Clause plays in the Constitution's separation-of-powers structure, and the importance of insulating its terms from Presidential re-definition:

An interpretation of "the Recess" that permits the President to decide when the Senate is in recess would demolish the checks and balances inherent in the advice-and-consent requirement, giving the President free rein to appoint his desired nominees at any time he pleases, whether that time be a weekend, lunch, or even when the Senate is in session and he is merely displeased with its inaction. This cannot be the law. (Slip opinion at 26.)

Both the Administration and the Bureau, however, have dismissed this ruling as having only minimal consequence. White House press secretary Jay Carney reportedly said it was only "one court, one case, one company." <http://www.politico.com/story/2013/01/wh-blasts-recess->

[appointments-ruling-86737.html?hp=t2_3](http://www.omantribune.com/index.php?page=news&table=&id=136669&heading=Americas) And Bureau spokeswoman Moira Vahey was quoted as declaring that “the ruling had no direct effect on the bureau.”

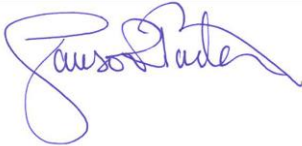
<http://www.omantribune.com/index.php?page=news&table=&id=136669&heading=Americas>

Perhaps the Administration will succeed in overturning or limiting the Circuit’s ruling, but until and unless that happens, its and the Bureau’s belligerent attitude are unfounded and inappropriate. And given the massive power wielded by the Bureau, its head-in-the-sand attitude towards the court’s decision is the height of administrative arrogance. Could it be that the Bureau’s insulation from congressional and presidential accountability, as described in the attachment to this letter, has led it believe that it is similarly unaccountable to the third branch of government as well?

For these reasons, we suggest that the Senate should withhold its confirmation of Mr. Cordray until the legal implications of the *Noel Canning v. NLRB* ruling become clear. This may well entail a temporary inconvenience in the Bureau’s work, but as the court noted in its decision, “[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.” Slip opinion at 39 (quoting a 1983 Supreme Court opinion).

For these reasons, we ask that at this time you delay action on Mr. Cordray’s re-nomination.

Sincerely,



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THE CONSUMER FINANCIAL PROTECTION BUREAU AND ITS DIRECTOR

Some Points To Consider

1. **The CFPB Claims the Power to Nullify Statutes:** In September of 2012, Director Cordray announced that the Bureau can invalidate or modify the provisions of other federal statutes. At a hearing, Cordray argued that the CFPB's power to impose certain disclosure requirements on lenders under Section 1032(a) of Dodd Frank enabled it to modify the disclosure requirements of other federal laws. And he contended that this was just one of many examples of provisions in Dodd Frank that give the CFPB the ability to waive or modify statutes.

http://www.weeklystandard.com/articles/biggest-kiss_655091.html?page=3

http://articles.washingtonpost.com/2012-11-16/opinions/35505301_1_cfpb-richard-cordray-community-bank

<http://www.c-spanvideo.org/clip/3938106>

2. **The CFPB Contends that It Can Engage in After-the-Fact Lawmaking:** The CFPB has the power to interpret such broad and ambiguous consumer lending terms as “unfair” and “deceptive”. The agency could issue regulations defining those terms in advance, so as to put lenders and consumers on notice. But instead the agency has decided to do this on a case-by-case basis, based on the “fact[s] and circumstance[s]” of each situation. The injustice of this approach is illustrated by Director Cordray's admission before a House Subcommittee that the term “abusive” is “a little bit of a puzzle.” This should be all the more reason for the Bureau to clarify it in advance, but the agency evidently prefers a keep-them-guessing enforcement approach.

http://cbnet.org/Advocacy/CFPB%20Resource%20Center/2012/02022012_CFPB_Report.aspx

<http://oversight.house.gov/wp-content/uploads/2012/06/01-24-12-Subcommittee-on-TARP-Financial-Services-and-Bailouts-of-Public-and-Private-Programs-Hearing-Transcript.pdf>

<http://www.heritage.org/research/reports/2013/01/the-cfpb-in-action-consumer-bureau-harms-those-it-claims-to-protect>

3. **Despite its Unprecedentedly Broad Powers, the CFPB Is Not Restrained by Traditional Congressional Oversight:** Congress has zero appropriations power over the CFPB. Every year, the agency can draw more than \$550 million from the U.S Federal Reserve, but Congress has absolutely no say over how it spends these funds. In fact, Congress may not even be aware of how this money is spent, since its lack of authority over the CFPB enables the Bureau to ignore congressional requests for information. Specifically, the CFPB has ignored requests for information on its hiring process, its financial operating plans, its performance plan, and even its office building budget. As the court noted in last Friday's *Noel Canning v. NLRB* ruling, the “Framers placed the power of the purse in the Congress in large part because the British experience taught that the appropriations power was a tool with which the legislature could resist

‘the overgrown prerogatives of the other branches of government.’” Sl. op. at 36. When it comes to the CFPB, that power is sorely lacking.

4. **The CFPB Is Similarly Unrestrained by Presidential Oversight:** During his or her five-year term, the CFPB’s Director cannot be fired by the President due to policy disagreements. He or she can only be removed for cause, which requires a very rare set of circumstances. And this limitation on removal restricts not only the President who appointed the Director, but also any new President who takes office before the Director’s term is up.

5. **The CFPB Is Ignoring the D.C. Circuit’s Recess Appointment Ruling:** On Friday, the CFPB spokeswoman Moira Vahey reportedly said that “the ruling had no direct effect on the bureau.”

<http://www.omantribune.com/index.php?page=news&table=&id=136669&heading=Americas>

This is despite the fact that the CFPB Director Cordray was given his recess appointment on the same day and in the same way as the three NLRB members whose appointments were invalidated by the court.