



## Third Circuit Holds Another Recess Appointment Unconstitutional: Implications for the CFPB

Just two months after the District of Columbia Circuit Court of Appeals ruled in [Canning v. National Labor Relations Board](#) that President Barack Obama's January 2012 appointment of three new members of the National Labor Relations Board was "constitutionally invalid," a split panel of the Third Circuit Court of Appeals has followed suit, invalidating another NLRB action because one of a three-member NLRB delegate group that issued a labor relations order was appointed by the president during an intrasession break, a 17-day adjournment during the U.S. Senate's second session in 2010.

The Third Circuit's majority analysis in [NLRB v. New Vista Nursing & Rehabilitation](#) is consistent with the Canning court's holding that the U.S. Constitution's Recess Appointments Clause was meant to allow presidential appointments only during intersession breaks (breaks between sessions of Congress) rather than during other, shorter breaks that occur while Congress is in session. One of the three Third Circuit judges who heard the case disagreed, asserting, among other arguments, that the Constitution authorizes the president to make recess appointments whenever the Senate is "unavailable to provide advice and consent" on proposed appointees.

Both the *Canning* and *New Vista* rulings call into question the validity of the president's recess appointment of Richard Cordray as director of the Consumer Financial Protection Bureau. As we discussed in our previous [client alert on Canning](#), the Cordray appointment is critical to the consumer protection agency's authority since, under the Dodd-Frank Wall Street Reform and Consumer Financial

Protection Act of 2010, the CFPB cannot exercise many of its most important supervisory, regulatory and enforcement powers unless the Bureau has a validly appointed director. If a court were to determine that Mr. Cordray's appointment - which the president made on the same day as the appointments of the three NLRB members who were the subject of the *Canning* case - is constitutionally invalid, many of the Bureau's actions during its first year of existence could be subject to challenge, including rulemaking, supervision and enforcement activities.

While the Third Circuit's opinion does not go as far as the D.C. Circuit ruling, limiting the basis of its holding to the fact that the NLRB appointment occurred during a Senate break in late March and early April 2010 while the Senate was in session, the decision increases the likelihood that the U.S. Supreme Court will grant the Obama administration's request to review the *Canning* result. If granted, this review likely would not occur until at least this fall, and the questions surrounding the validity of the CFPB's director and some of the agency's actions to date likely will not be resolved in the near future.

The issue of the director's appointment will come up again next week when the Senate considers the president's renomination of Mr. Cordray to continue in his role after the recess appointment expires at the end of the current session of Congress.

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For more information about the content of this alert, please contact [Michael Mallow](#) or [Michael Thurman](#).

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