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WLF Asks *En Banc* Ninth Circuit Court of Appeals to Reconsider Judgment for CFPB in Unauthorized Suit

(*Consumer Financial Protection Bureau v. Gordon*)

“From July 18, 2012, when this civil enforcement action against Gordon commenced, until June 26, 2013, when the district court granted CFPB summary judgment, no one before the court was properly vested by the Executive Branch with the necessary power and authority to enforce the CFPA—an absolute prerequisite for executive standing. Yet the Ninth Circuit’s panel majority would have that fact be of no consequence.”

—Cory Andrews, WLF Senior Litigation Counsel

“Courts have now determined that President Obama acted unconstitutionally when he recess-appointed Richard Cordray to head the CFPB on a day when the Senate was still in session. Yet the panel decision in this case, which upheld Cordray’s right to retroactively validate all court actions he undertook while serving as a recess appointee, would render illusory crucial constitutional limits on a President’s appointment powers.”

—Richard Samp, WLF Chief Counsel

“If the Ninth Circuit panel’s expansive ratification theory is upheld, future Presidents would receive a ‘free pass’ to install executive officers without Senate confirmation, knowing that a perfunctory ‘ratification’ by some future, validly appointed official could cure any defects. But that’s not the way the Constitution says recess appointments are supposed to work.”

—Mark Chenoweth, WLF General Counsel

WASHINGTON, DC—Washington Legal Foundation yesterday evening, on behalf of its client, defendant Chance Gordon, petitioned the U.S. Court of Appeals for the Ninth Circuit to rehear *en banc* a panel decision that upheld a massive trial-court judgment in an enforcement action that the Consumer Financial Protection Bureau (CFPB) was not authorized to file—because CFPB lacked any validly appointed executive “officers” at the time it filed and litigated the lawsuit.

In a rehearing petition filed in *CFPB v. Gordon*, WLF argues that the underlying district court judgment must be dismissed because federal courts lack Article III subject-matter jurisdiction to hear suits where (as here) federal officials were not authorized to file suit (and thus lacked “standing”). WLF also argues that, even if the district court did not lack jurisdiction, CFPB Director Richard Cordray did not remedy the Appointments Clause defect in the case when he purported to ratify the results of the unauthorized litigation (and the resulting judgment) by issuing a perfunctory “ratification” notice *after* the district court’s entry of final judgment against Mr. Gordon.

The issue arises because the U.S. Senate did not confirm Richard Cordray's appointment as Director of CFPB until July 2013. Before that date, Cordray purported to head the CFPB by virtue of a recess appointment made by President Obama on January 4, 2012. The validity of all actions taken by Cordray during that 18-month period was thrown into serious question when the U.S. Supreme Court ruled in 2014 that the Senate was not in recess on January 4, 2012, thus rendering all recess appointment made by President Obama on that day invalid.

During the 18-month period, CFPB (at Cordray's behest) litigated an enforcement action against Mr. Gordon, based on claims that he engaged in deceptive practices under the Consumer Financial Protection Act (CFPA) in connection with his provision of mortgage-relief services. Following Cordray's Senate confirmation, he sought to retroactively ratify all actions he had taken while serving as a recess appointee. WLF's petition, filed at the Ninth Circuit's invitation, asks the court to convene an 11-judge *en banc* panel to determine whether the Constitution permits the Executive Branch to evade the consequences of its unauthorized activities by issuing perfunctory "ratification" orders.

Upon filing its petition, WLF issued the following statements.

Senior Litigation Counsel Cory Andrews:

"From July 18, 2012, when this civil enforcement action against Gordon commenced, until June 26, 2013, when the district court granted CFPB summary judgment, no one before the court was properly vested by the Executive Branch with the necessary power and authority to enforce the CFPA—an absolute prerequisite for executive standing. Yet the Ninth Circuit's panel majority would have that fact be of no consequence."

Chief Counsel Richard Samp:

"Courts have now determined that President Obama acted unconstitutionally when he recess-appointed Richard Cordray to head the CFPB on a day when the Senate was still in session. Yet the panel decision in this case, which upheld Cordray's right to retroactively validate all court actions he undertook while serving as a recess appointee, would render illusory crucial constitutional limits on a President's appointment powers. Unless the Ninth Circuit reconsiders its ruling, WLF anticipates bringing this issue before the U.S. Supreme Court, whose past rulings directly conflict with the panel decision."

WLF General Counsel Mark Chenoweth:

"If the Ninth Circuit panel's expansive ratification theory is upheld, future Presidents would receive a 'free pass' to install executive officers without Senate confirmation, knowing that a perfunctory 'ratification' by some future, validly appointed official could cure any defects. But that's not the way the Constitution says recess appointments are supposed to work."

WLF is a free-market, public-interest law firm and policy center that seeks to confine agencies in the Executive Branch to exercise only those powers Congress has delegated to them.

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