Legal Effect of Finding that the CFPB Director Was Not Validly Appointed*

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On January 4, 2012, the President announced the recess appointment of Richard Cordray as the Director of the Consumer Financial Protection Bureau. This appointment immediately became controversial because technically the Senate was not in recess on January 4, but was meeting in so-called "pro forma" sessions. This raises the question of what the legal impact would be if a court were to determine that the appointment was unconstitutional, and that Mr. Cordray was holding office illegally. Would all of Mr. Cordray's actions as Director become void? Would the deliberations and actions taken by the FDIC, which now includes Mr. Cordray as a board member, also be subject to challenge? Past precedent indicates that the answer to both questions is "no."

The common law has long recognized that problems could ensue if a government official is determined to have been improperly appointed, and therefore developed the legal principle known as the "*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. As explained by the Supreme Court in the 1995 case of *Ryder v. U.S.*, the *de facto* officer doctrine springs from the fear of 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 ensuring the orderly functioning of the government despite technical defects in title to office.

In 1982, the Supreme Court held that Congressional legislation creating a system of bankruptcy judges who would serve for a term of 14 years was unconstitutional. (Northern Pipeline v. Marathon Oil) The Court did not

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invoke the *de facto* officer doctrine. However, it nevertheless concluded that its decision would only be applied prospectively and would not upset prior determinations made by these judges. In reaching this conclusion, the Court noted that the constitutionality of the bankruptcy judges appointment was "an issue of first impression whose resolution was not clearly foreshadowed by earlier cases" and that "retrospective application could produce substantial inequitable results" by producing substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts.

Some early cases have held that pursuant to the *de facto* officer doctrine, a party could not attack the validity of the appointment of an agency official in litigation over the action taken by the judge or agency. For example, under this view, a person aggrieved by an agency rule or administrative order could not raise Appointment Clause issues as part of his or her challenge to the government action. Instead, the only remedy would be to bring a suit directly challenging the appointment. Such a suit is difficult to maintain in light of jurisdictional requirements relating to standing. Under the standing rules, a plaintiff must show harm or injury in order to bring suit, and it would be hard to make that showing if the challenge is limited to the appointment and not to the official's actions.

More recent cases have permitted litigants to raise Appointments Clause questions as part of lawsuits relating to governmental actions. In the *Ryder* case, the Supreme Court upheld an Appointments Clause challenge to the composition of a military court, made in the course of the litigation. The Court determined that two of the three judges on the panel were illegally appointed. The Court stated that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred. Any other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments."

In the case of *Andrade v. Lauer*, the Court of Appeals for the D.C. Circuit held that a challenge to an administrative action based on the Appointments Clause could proceed, if two conditions are met: First, the plaintiff must bring his action at or around the time that the challenged government action is taken. Second, the plaintiff must show that the agency or department involved has had reasonable notice under all the circumstances of the

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claimed defect in the official's title to office. This does not require that the plaintiff perform any particular rituals before bringing suit, nor does it mandate that the agency's knowledge of the alleged defect must come from the plaintiff. It does, however, require that the agency or department involved actually knows of the claimed defect.

Just last year, the D.C. District Court in the case of *Johnson v. McCool* refused to hear a challenge to a criminal conviction based on the alleged improper appointment of a government official, because the challenge came 16 years after the conviction. The court explained that a plaintiff challenging government action on the grounds that the officials taking that action improperly held office must bring his action at or around the time that the challenged government action is taking place, and that 16 years was too long to wait.

In sum, it appears that if a court determines that the Director is not legally in office, the prior actions of the Director may be protected under the *de facto* officer doctrine, or under the court's inherent discretion to fashion a remedy that would not produce substantial inequitable results, injustice and hardship upon those who relied on the action. However, the *de facto* officer doctrine would not prevent a party from challenging the constitutionality of the appointment provided the suit is brought at or around the time of the regulatory action that causes harm or injury to the plaintiff, and the court accepts that the Director of the CFPB is aware of the alleged infirmity in his appointment.

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