



## U.S. Urges Supreme Court Denial of Cordray Case

Chris Bruce

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The Justice Department said the U.S. Supreme Court should turn away a case testing Consumer Financial Protection Bureau Director Richard Cordray's ability to act in the wake of an invalid recess appointment by President Obama (*Gordon v. Cons. Fin. Protection Bureau*, U.S., 16-cv-00673, response filed 4/24/17).

The case tests the validity of a CFPB enforcement lawsuit brought in July 2012 – after Cordray's January 2012 recess appointment by President Obama, but before the Senate's July 2013 confirmation of Cordray to head the agency. Attorney Chance E. Gordon was the defendant in that lawsuit, which alleged deceptive mortgage relief services. After a district court ruled for the CFPB in the case, Gordon appealed, saying the CFPB's lawsuit was invalid because Cordray had not been properly installed.

Two judges on a panel of the U.S. Court of Appeals for the Ninth Circuit disagreed, saying that although Cordray's appointment was flawed, the agency later ratified his actions. One judge dissented, saying "no one had the executive power necessary to prosecute this civil enforcement action in the district court."

In November, Gordon petitioned the U.S. Supreme Court to review the case, but the Justice Department April 24 urged the court to deny the petition, saying the Ninth Circuit's ruling was correct. The case doesn't involve a conflict among the federal appeals courts, the CFPB properly ratified Cordray's pre-confirmation actions, and the appointment question doesn't affect the jurisdiction of the district court to hear the case, the Justice Department said.

"Further review is unwarranted," the government said.

The Justice Department has taken a position adverse to the CFPB in a separate enforcement case involving PHH Corp. There, the Justice Department has argued that the CFPB's leadership structure is unconstitutional because of statutory limits on the president's ability to remove the CFPB director.

However, Gordon can't use that argument in this case, the Justice Department said in its April 24 response to Gordon's petition. "Petitioner has never argued that the Director's action is invalid for that reason, and he has thus forfeited any such challenge," it said.

Several groups are supporting Gordon's petition. In separate briefs, the Center for Constitutional Jurisprudence, the U.S. Chamber of Commerce, and the Cato Institute urged the court to tackle questions posed by the case.

The government is represented by Acting Solicitor General Jeffrey B. Wall. CFPB General Counsel Mary McLeod, Deputy General Counsel John R. Coleman, and Senior Counsel Kristin Bateman joined Wall on the response. Gordon is represented by Richard A. Samp of the Washington Legal Foundation in Washington.

WLF General Counsel Mark Chenoweth April 25 criticized the government's position. "The government concedes that CFPB violated Article II of the U.S. Constitution in this case, but incredibly it appears to think there should be no consequences for that violation," he said.