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Obama Out Foxes Himself on Nominations

By Mark Calabria
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Last week President Obama made the “recess” [appointment](#) of Richard Cordray to head the Consumer Financial Protection Bureau, created under the Dodd-Frank Act. I’ve already discussed some of the [various](#) problems with this so-called recess appointment.

Another, perhaps ultimately more critical, problem is that at the time of this action, January 4th, there was **not** a pending nomination of Richard Cordray before the Senate. By the [unanimous agreement](#) of the Senate, his nomination was returned to the President on January 3rd, 2012, for all purposes extinguishes said nomination. Per Paragraph 6 of Senate Rule XXXI, the President would have to re-submit Cordray’s nomination in order for it to be considered by the Senate.

But then I guess if one doesn’t really believe the Senate was in session on January 3rd, despite marking the beginning of a new session, then I guess one might also not believe the Senate could have conducted any business that day, such as returning nominations to the President.

Ironically enough, had the President made the appointment two days earlier, he would be on much stronger, if not still shaky ground. The President’s own attempt at being clever, by trying to gain another year of service for his nominations, may be what ultimately dooms said nominations.

If indeed there was no pending Cordray nomination on January 4th, then following the [decision](#) of the District Court for DC in *Olympic Federal Savings and Loan Association v. Director, Office of Supervision*, it would seem pretty clear that Cordray’s appointment was unconstitutional. But with no lawyer, so we will see.

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