

# The New Nullification: GOP v. Obama Nominees

- Jonathan Cohn
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Elizabeth Warren won't get a chance to run the new Consumer Financial Protection Bureau, but Richard Cordray may. And perhaps that's good news.

Warren, the Harvard Law Professor and champion of consumer interests, **may run for the U.S. Senate**, seeking the seat Ted Kennedy once occupied and that Republican Scott Brown now does. Although a first-time candidate, she could be formidable. As for Cordray, the former Ohio attorney general, he was the **first state official** to sue a mortgage servicer over foreclosure fraud. "Progressives think extremely highly of Cordray," says **Amy Hanauer**, executive director of Policy Matters Ohio. "He's smart, strategic and excellent on the issues. He stood up for consumers in Ohio and I think he would in this role, too."

But wait – will Cordray ever get to serve? Precisely because he'd make an effective regulator, financial industry lobbyists don't like him. And **Republicans months ago threatened to block any nominee to run**

the consumer board, regardless of his qualifications, until Obama agrees to reforms that would weaken the agency. That's a worrisome, even alarming development – and not simply because it could leave consumers more vulnerable to predatory financial practices.

Republican threats to block nominees to the consumer board are of a piece with their opposition to Don Berwick, Obama's first choice to run the Center for Medicare and Medicaid Services; to Peter Diamond, whom Obama tapped to sit on the Federal Reserve Board; and most recently to John Bryson, Obama's nominee to take over the Commerce Department. It's nothing short of a power grab by the Republican Party – an effort to achieve, through the confirmation process, what they could not achieve through legislation. And it seems unprecedented, at least in modern times.

True, the constitution gives the Senate the power to “advise and consent” on executive branch appointments. And from the early days of the republic through the end of the 19th Century, the Senate and president fought regularly over the precise boundaries of that power – most famously when the Reconstruction Congress passed a law forbidding then-President Andrew Johnson from removing a cabinet official without congressional permission. It was his decision to flout that law that drew impeachment and, very nearly, his removal from office.

But since that time the Senate has deferred more to the president on appointments, partly on the theory that a modern society needs a president who could staff the executive branch with like-minded officials. Although senators have frequently raised substantive and ideological objections to nominees, explicitly or implicitly, they did not engage in such wholesale, blanket opposition to appointments based (explicitly or even implicitly) on governing philosophy. As the Senate's own website confirms, the Senate voted down nominations “only in the most blatant instances of unsuitability.” The obvious exception has been judicial appointments. But even those have increased dramatically in the last few years and, besides, those are lifetime appointments to an entirely separate branch of government.

What makes this ideological policing even more pernicious is the fact that it's policing by a minority. The formal letter threatening to block consumer board appointments includes 44 Republican senators, less than a majority but enough to block nomination with filibuster. If the Senate still operated by majority rule, Berwick, Bryson, Diamond, and Warren would likely be busy running their agencies right now. Instead, they are serving as lame duck recess appointees -- or not serving at all.

The problems of the nomination process, of course, are legendary at this point. They are not entirely new and they reflect, in part, institutional changes like an increase in the number of positions requiring Senate confirmation. But, by most measures, the problem has gotten worse in the last few years, particularly with Obama in office. And this sort of brazen refusal to confirm appointees on ideological grounds really does seem like a turning point.

Just to be sure, I consulted **Thomas Mann**, the political scholar at **Brookings** known for his encyclopedic knowledge of congressional history. Here's what he said:

In the case of the Consumer Protection Board, Senate Republicans have said they would not confirm anyone who does not agree to restructure the leadership of the agency from a single person to a multi-member body. They insist that a legitimately passed law be changed before allowing it to function with a director – a modern-day form of nullification. Same with the director of the Center for Medicare and Medicaid Services. There is nothing normal or routine about this. The Senate policing of non-cabinet appointments is sometimes more aggressive but the current practice goes well beyond that, more like pre-Civil War days than 20th century practice.

Ah, yes, nullification. The ostensible philosophy behind that idea was the need to protect rights of a permanent minority, namely the slave-holding states of the South, lest they never have a say in policy. But Republicans aren't a permanent minority in need of special constitutional protections. They're a faction trying to bully the majority. And they're getting away with it.

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