The Future of The CFPB In The Trump Era

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The Consumer Financial Protection Bureau (CFPB) faces an uncertain future with constitutionality challenges in court, threats from Republicans in Congress vowing to dismantle the Dodd-Frank Act, and efforts by the White House to fire Richard Cordray, the CFPB’s Chief.¹ Jones Day partner C. Hunter Wiggins, a former principal deputy enforcement director at the CFPB, notes, “Any given week, a wide range of possible outcomes for the Bureau is on the table. And nobody really knows what that’s going to look like yet.”² In the wake of this uncertainty, on February 16, 2017, the U.S. Court of Appeals for the D.C. Circuit granted the CFPB’s request for en banc review of the decision in PHH Corporation v. CFPB and vacated the earlier ruling.³ In late May 2017, the entire bench reconsidered this landmark separation of powers case calling into question the constitutionality of the CFPB based on its single-Director structure.⁴ By vacating its earlier panel decision, the court removed the possibility of President Trump firing CFPB Director Cordray during the pendency of the case.

The D.C. Circuit’s decision to rehear this case provides hope for an otherwise dismal looking future for the CFPB. This case makes “a fascinating study on checks and balances” with the constitutional issue posing a threat to other agency structures, a recent switch of sides by the Justice Department under the Trump Administration, and the interplay of several branches of government. This is all against the backdrop of a judicial climate of concern regarding overreaching by President Trump after the executive order travel ban.⁵

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⁴ Id.
**Case History**

This case stems from conduct dating back to 1994, when PHH Corporation, a mortgage lender, established a wholly-owned subsidiary Atrium Insurance Corporation, which provided reinsurance to the insurance companies that insured mortgages originated by PHH. PHH would refer borrowers to the mortgage insurers using Atrium’s reinsurance services in an arrangement known as “captive reinsurance.” In 2014, the CFPB initiated an administrative enforcement action against PHH Corporation. The CFPB alleged that by only referring customers to mortgage insurers that had contracts with Atrium, PHH engaged in a kickback scheme which violated Sec. 8 of the Real Estate Settlement Procedures Act (RESPA).  

The enforcement action resulted in an order from the CFPB that required PHH to pay $109.2 million in disgorgement and enjoined PHH from entering into future captive reinsurance arrangements. On appeal from the ALJ decision, Richard Corday, as head of the CFPB, reversed the decision in part by imposing a fine far beyond the initial penalty of $6.4 million. The ALJ’s penalty limited PHH’s violations to illegal kickbacks that were connected with loans closed on or after July 21, 2008, while the CFPB based the calculation on all insurance premiums received, regardless of when the mortgage closed. Cordray reasoned that PHH committed a separate violation every time it accepted a reinsurance payment from a mortgage issuer.

PHH appealed the CFPB’s decision to the U.S. Court of Appeals for the D.C. Circuit, arguing that Cordray’s interpretation of RESPA was inconsistent with its plain language and longstanding precedent and therefore not entitled to *Chevron* deference. PHH also argued that the Director’s retroactive reinterpretation of the statute violated the Due Process Clause of the Fifth Amendment. Finally, it argued that the agency’s decision was invalid for the independent

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reason that the CFPB’s structure violates the executive power entrusted in the President under Article II of the Constitution.\textsuperscript{11}

On October 11, 2016, the federal appeals court declared the structure of the CFPB unconstitutional, identifying the “massive, unchecked power” exercised by its single director as lacking the necessary supervision and direction from the President.\textsuperscript{12} To remedy the constitutional defect, the court severed the removal-only-for-cause provision from the Dodd-Frank Act to allow the President to supervise, direct, and remove the Director of the CFPB at will, at any time. The decision allowed the CFPB to continue to operate and to perform its duties, “but as an executive agency akin to other executive agencies headed by a single person, such as the Department of Justice and the Department of the Treasury.”\textsuperscript{13} The court also vacated the $109.2 million penalty, sending it back to the agency for further proceedings.\textsuperscript{14}

The CFPB filed a petition with the D.C. Circuit in November 2016, asking it to grant a rehearing en banc of its decision.\textsuperscript{15} Under D.C. Circuit rules, a majority of the circuit judges may order that an appeal be reheard by the court en banc if it is necessary to secure or maintain uniformity of the court's decisions, or if the proceeding involves a question of exceptional importance.\textsuperscript{16}

In granting the rehearing, the panel asked the parties for guidance on the constitutional separation of powers issue, whether the constitutional question can be avoided given the panel's ruling on the statutory RESPA issues, and the precedential effect the ruling may have on other


\textsuperscript{12} PHH Corp., 839 F.3d 1, 12 (D.C. Cir. 2016).

\textsuperscript{13} Tillman & Barber, supra note 9.

\textsuperscript{14} Brian Wolfman, D.C. Circuit holds that the Consumer Financial Protection Bureau's governing structure is unconstitutional, PUB.CITIZEN: CONSUMER L. & POL’Y BLOG (Oct. 11, 2016), http://pubcit.typepad.com/clpblog/2016/10/dc-circuit-holds-that-cfpb-s-governing-structure-is-unconstitutional.html (explaining that the court unanimously agreed with PHH because tying arrangements are permitted if the services are priced at market value so CFPB must determine whether and by how much the price of the reinsurance exceeded market value).


agencies. The court set a quick briefing schedule, with the petitioner’s opening brief due on March 10, the CFPB’s due on March 31 and oral argument on May 24th.

**Separation of Powers Issue**

*PHH Corp. v. CFPB* is a landmark case for calling into question the Bureau’s constitutionality. The constitutional issue arises from the fact that the CFPB is an independent agency with rulemaking, adjudicatory, and enforcement powers, run by a director who may only be removed by the President for cause. Traditionally, multi-member commissions have headed independent agencies and contain sufficient constitutional checks and balances on the agencies’ power. The CFPB is arguably unique because it was specifically created in response to the regulatory failure leading up to the 2008 financial crisis as a way to enforce federal consumer financial laws and protect consumers in the financial marketplace. Thus, Congress structured the CFPB as an independent agency with a unique institutional framework, including conditions such as a budget independent from Congress, a shift of power from the FTC to regulate financial conduct, mandatory annual audits by the GAO, and an independent director removable only for cause.

The U.S. Court of Appeals for the D.C. Circuit reasoned that, by creating an agency with vast powers and shielding it from oversight, Congress violated the intent of Article II of the Constitution to defend against arbitrary decisions and abuses of power. In the court’s view, the structure provides more independence from the President than the constitution allows an agency exercising executive-type power. The court changed the CFPB to operate as a traditional executive agency “in light of Congress’s clear textual expression of its intent regarding

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19 *See* 12 U.S.C. § 5581(b)(5); *Id.* § 5491(c)(3) (“The CFPB’s Director may be removed only for inefficiency, neglect of duty, or malfeasance in office”).
20 Examples of such agencies include the Federal Communications Commission, the Securities and Exchange Commission, the Federal Trade Commission, and the National Labor Relations Board.
22 *See* 12 U.S.C. § 5581(b)(5).
23 Wolfman, supra note 12.
severability”, and because the Dodd-Frank Act and the CFPB may function without the CFPB’s for-cause removal provision.24

The CFPB, in its petition for en banc review, argued that the panel’s constitutionality ruling conflicts with U.S. Supreme Court precedent. In describing the D. C. Circuit’s constitutionality ruling as setting up what may be the most important separation-of-powers case in a generation, the CFPB argues that eliminating its structure “unduly limits Congress’s flexibility to respond to ‘the various crises of human affairs.’”25 The CFPB also identified the effect the decision could have on other agencies headed by a single director removable only for cause including the Social Security Administration, Federal Housing Finance Agency, and Office of Special Counsel.

The U.S. initially supported the CFPB’s position in its first response filed by the U.S. Solicitor General under the Obama administration. On December 22, 2016, the U.S. also argued that the approach to resolving the CFPB’s constitutionality departs from how the Supreme Court has resolved such separation-of-powers questions in the past. According to the brief, the panel’s opinion was wrongly premised on its view that an agency with a single head “poses a greater threat to individual liberty than an agency headed by a multi-member body that exercises the same powers.”26 The panel did not conclude that the single-Director structure of the CFPB impaired the exercise of Presidential power more than would a multimember directorate nor that the CFPB exercises greater power than multi-member independent agencies. The brief identified the proper inquiry is whether a removal restriction is an impermissible intrusion on the President’s ability to perform his Constitutional duty, and if it is not, the inquiry ends there. So, although a removal restriction’s effect on individual liberty may shed light on what constitutes an impermissible intrusion, the impact has not been an independent inquiry.27

24 PHH Corp., 839 F.3d at 28.
In an unusual move, on March 17, the Trump Administration Justice Department filed an amicus brief opposing the CFPB.28 The DOJ urged the entire D.C. Circuit to agree with the three-judge panel's decision to strike down the Dodd-Frank Act’s for-cause removal provision. The brief is limited to the issue of whether the limitations on the President’s removal authority apply beyond multi-member regulatory commissions to an agency headed by a single Director.29 According to the DOJ's new brief, "a removal restriction for the Director of the CFPB is an unwarranted limitation on the President's executive power."30 The DOJ, however, stopped short of asking the court to eliminate the agency as a result of the constitutional defect.31

What’s Next for the CFPB?

The D.C. Circuit’s ruling raises questions as to the validity of past and pending CFPB actions as well as the fate of the agency under the new administration. Based on the industry reaction and court guidance, on the one hand, the CFPB appears as though it will continue to remain a strong agency subject to protection regarding it’s past, current, and future actions. Because the enforcement action and panel decision were vacated, prior CFPB decisions will continue to have legal authority. Depending on how the court rules, past actions of the CFPB may be subject to challenge for the reason that at the time he ruled, the Director mistakenly believed he could only be removed for cause.32

As for current and future actions, the CFPB has not yet backed down in the aftermath of the initial PHH v. CFPB decision, nor President Trump’s win. In the past year, the CFPB has been increasingly aggressive and grown into a tough new regulator, bringing multimillion-dollar enforcement actions and implementing rules to restrict activities such as payday lending and arbitration agreements that prevent class actions.33 Additionally, the current CFPB director,
Richard Cordray, shows no plans to resign before his five-year term expires in July 2018. After the D.C. Circuit ruling, Cordray told agency staff in a weekly memo: “Keep yourselves on track just as before, and continue to focus, as always, on doing our work as best we can to deliver value in protecting and supporting consumers.” As long as the CFPB is still going, attorneys in the industry seem to remain focused. C. Hunter Wiggins noted that the review of the appeals court decision “gave people a bit of a pause with regard to the agency's structure, but I don’t think really impacted people's overall view of the agency.” Leaders in the finance industry commented that CFPB attorneys are often so invested “in the agency ‘mission’ that they are not bent on spinning through Washington’s revolving door.”

On the other hand, the shift to a Republican administration creates concern that the agency is bound to lose some of its power. Even before the administration change, President Trump campaigned on the promise to “dismantle” the Dodd-Frank Act. In January 2017, U.S. Rep. Randy Neugebauer, a Texas Republican and longtime critic of the CFPB, was reported as a possible replacement for Cordray. Chairman Jeb Hensarling of the House Financial Services Committee issued a statement backing the government’s new brief, “Republicans have said for years that the Bureau is unconstitutionally structured. Its lack of accountability and the unparalleled authority placed in the hands of the Bureau’s unaccountable sole director make the CFPB arguably the most powerful and least accountable bureaucracy in American history.”

Regardless of what occurs in this case, there will likely be a change in the nature of the industry and the CFPB, as we know it. A Trump-controlled CFPB would largely leave a regulatory "vacuum" in the consumer financial services space. State attorneys general, however, have publicly indicated that they plan to significantly increase their presence and police

34 Mishkin, supra note 6.
36 Barber, In Trump Era, supra note 2.
37 Id.
40 Taylor et al., supra note 5.
the financial services industry. It is likely that enforcement actions against financial service companies will continue, but instead at the state rather than the federal level.\textsuperscript{41}

**Conclusion**

Litigation in the full D.C. Circuit, potentially followed by the U.S. Supreme Court, could last through 2017 and into early 2018. It is also possible that the court may decline to rule on the constitutional issues at stake and decide the case on RESPA or administrative law grounds. Given the issues the D.C. Circuit requested to be briefed, the court may adhere to the doctrine of constitutional avoidance and promote the disposition of cases on issues other than constitutional questions.\textsuperscript{42} With oral arguments conducted on May 24, 2017, we will soon find out if the uncertainty surrounding the CFPB will persist.\textsuperscript{43}

\textsuperscript{41} Id.
\textsuperscript{42} Id.