

U.S. Court of Appeals Rules Current Structure of CFPB Unconstitutional

The Consumer Financial Protection Bureau's (CFPB) reign as an unchecked power just suffered a significant check. On Oct. 11, 2016, the U.S. Court of Appeals for the District of Columbia found that the CFPB's structure was unconstitutional because too much power is vested with its sole director. While the CFPB can continue to operate, it must do so under the president's supervision.

The CFPB, created by a Democrat-controlled Congress, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111- 203, 124 Stat. 1376 (2010) (Dodd-Frank Act), is headed by a director, who is appointed for a five-year term by the president with the advice and consent of the Senate. Id. § 5491(b),(c). Title X of that Act establishes the bureau as an "independent bureau" within the Federal Reserve System. 12 U.S.C. § 5491(a). The director can only be removed by the president for cause. The president has the authority to remove the director for "inefficiency, neglect of duty, or malfeasance in office." Id. § 5491(c)(3). The director is responsible for conducting the bureau's affairs and managing its employees. Id. §§ 5492, 5493(a)(1).

The CFPB and its director have long been targets of the financial services industry and some Republicans who argue that the bureau operates with unchecked power, exceeds its jurisdiction, and creates policy through enforcement actions rather than through a constitutional legislative process.

The CFPB website boasts extraordinary numbers in the bureau's brief history: \$11.4 billion in fines and disgorgement, 25 million consumers receiving relief, and handling of more than 900,000 consumer complaints. The CFPB makes headlines for levying fines in the tens of millions of dollars and stipulated judgments in enforcement actions in the hundreds of millions of dollars. However, other headlines describe incredible overreach by the bureau. This Court of Appeals order may signal a turn in the tide.

Writing for the Court of Appeals, Circuit Court Judge Brett Kavanaugh's opinion summarizes the action brought by PHH Corporation against the CFPB for review of an order by the CFPB. PHH, a mortgage lender, was the subject of a CFPB enforcement action that resulted in a \$109 million order against it (the underlying administrative law judge awarded a \$6.4 million penalty). Writing for the Court, Judge Kavanaugh's introduction sets forth the issue:

This is a case about executive power and individual liberty. The U.S. Government's executive power to enforce federal law against private citizens – for example, to bring criminal prosecutions and civil enforcement actions – is essential to societal order and progress, but simultaneously a grave threat to individual liberty.

...

The CFPB's concentration of enormous executive power in a single, unaccountable, unchecked Director not only departs from settled historical practice, but also poses a far greater risk of arbitrary decision making and abuse of power, and a far greater threat to individual liberty, than

does a multi-member independent agency. The overarching constitutional concern with independent agencies is that the agencies are unchecked by the President, the official who is accountable to the people and who is responsible under Article II for the exercise of executive power. Recognizing the broad and unaccountable power wielded by independent agencies, Congresses and Presidents of both political parties have therefore long endeavored to keep independent agencies in check through other statutory means. In particular, to check independent agencies, Congress has traditionally required multi-member bodies at the helm of every independent agency. In lieu of Presidential control, the multi-member structure of independent agencies acts as a critical substitute check on the excesses of any individual independent agency head – a check that helps to prevent arbitrary decision making and thereby to protect individual liberty.

This new agency, the CFPB, lacks that critical check and structural constitutional protection, yet wields vast power over the U.S. economy. So “this wolf comes as a wolf.” *Morrison v. Olson*, 87 U.S. at 699 (Scalia, J., dissenting).

In light of the consistent historical practice under which independent agencies have been headed by multiple commissioners or board members, and in light of the threat to individual liberty posed by a single-Director independent agency, we conclude that Humphrey’s Executor cannot be stretched to cover this novel agency structure. We therefore hold that the CFPB is unconstitutionally structured.

The Court of Appeals declined the requested relief of shutting down the CFPB. Instead, it sent the enforcement decision back to the CFPB and held that the U.S. president should be empowered to remove the bureau’s director at will and to supervise and direct the bureau’s director.

Additionally, one of the other issues raised by PHH was whether the statute of limitations applies to the matter, with the CFPB claiming that it was not bound by the potentially applicable three-year statute of limitations related to alleged kickback violations. Significantly, the Court of Appeals disagreed with the CFPB and found that the three-year limit applies to enforcement of the alleged kickback violations.

Given the multitude of issues presented by the Court of Appeals’ Order, including the constitutional issue, it may be likely that this will not be the final pronouncement in this case. Either party could appeal the case to the full Court of Appeals or to the Supreme Court, or Congress may view it as an invitation to “fix” the problems highlighted by the court.

This document is intended to provide you with general information regarding the federal appeals court’s decision on the Consumer Financial Protection Bureau structure. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact one of the attorneys listed above or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

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