

Banking and Finance Law Daily Wrap Up, TOP STORY—Does CFPB encroach on presidential power? DC Circuit hears arguments, (May 24, 2017)

Banking and Finance Law Daily Wrap Up

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By [Richard A. Roth, J.D.](#).

Hearing arguments by PHH Corporation that the Consumer Financial Protection Bureau's structure as an independent agency with a single director violates the Constitution's separation of powers requirements, judges of the U.S. Court of Appeals for the District of Columbia Circuit seemed to want to shift the focus. During [oral arguments](#) on PHH Corporation v. CFPB, several judges made clear a preference to look not at what authority the CFPB director had but rather at whether the bureau's structure diminished the President's power. Whether the court could side with the company while adhering to Supreme Court precedent was an issue as well.

In October 2016, the majority of a three-judge panel decided that the bureau's structure was unconstitutional and that the appropriate remedy was to strike the provision that the director could be discharged only for cause. This would effectively convert the CFPB from an independent agency into an executive branch agency, which could operate with a single director rather than under a commission ([Banking and Finance Law Daily](#), Oct. 11, 2016). However, this decision was vacated when the full court decided to rehear the case.

Binding precedents. During the arguments, there was agreement that the court is bound by three prior Supreme Court decisions:

- Humphrey's Executor v. U.S., 295 U.S. 602 (1935), which upheld the statutory provision allowing the President to discharge Federal Trade Commissioners only for cause;
- Morrison v. Olson, 487 U.S. 654 (1988), which held that the independent counsel statute did not violate separation of powers principles, even though the officer could not be directly fired by the President; and
- Free Enterprise Fund v. PCAOB, 561 U.S. 477 (2010), which said that the two layers of "for cause" protection granted to Public Company Accounting Oversight Board members violated separation of powers principles.

There was less agreement over whether those precedents applied.

PHH Corp. arguments. On behalf of PHH Corp., Theodore B. Olson claimed the CFPB's power infringed on the President's power to ensure that the laws are faithfully executed. However, several of the judges challenged that assertion, questioning how the CFPB's authority infringed on presidential power more than that of other agencies. It is the President's power that is at issue, they pointed out.

As to the CFPB, most banking regulatory agencies are not subject to the appropriations process, and the requirement that the CFPB director appear before Congress periodically would encourage agency accountability. The director's five-year term means that most Presidents will have the opportunity to appoint a replacement, and the power to discharge the director for cause always is available. One judge pointed out that a President has to appoint FTC members who are not from his party, a restriction that does not apply to CFPB director appointments.

Comparing the CFPB to the FTC, one member of the en banc court noted that most presidents would have the ability to choose the single CFPB director, while few would be able to appoint a majority of the FTC. No President is likely to be able to appoint a majority of the powerful Federal Reserve Board.

Another judge pointed out that the independent counsel statute considered in Morrison clearly infringed on the President's power, yet it was upheld.

According to Olson, this case is meaningfully different from Humphrey's Executor because of the CFPB's extensive powers and the effect of the five-year term of office. While that case and Morrison permit some encroachment on the separation of powers principles, they also drew a line that should not be crossed. The sum of the CFPB's authority takes it across that line, according to Olson.

CFPB arguments. The three controlling Supreme Court decisions make clear that the President's power to "take care" that the laws are executed faithfully cannot be seen as subject to no limitation, said Lawrence DeMille-Wagman, arguing for the bureau. Rather, they say that there must be sufficient accountability to the President. Morrison shows that the discharge-for-cause power is enough to provide that accountability.

DeMille-Wagman responded directly to some points Olson raised. First, to ease any concerns over a possible unlimited holdover tenure if no successor could be confirmed, he said the CFPB agrees that after the director's five-year term ends the official would be subject to discharge at the President's discretion.

He also attempted to address arguments that the accumulation of the bureau's powers rendered it unconstitutional. Taken individually, none of the CFPB's various powers infringe on the President's power to see that the laws are enforced, he asserted, so there could be no impermissible infringement if they were combined—an argument he described as zero plus zero equals zero.

The CFPB attempted to emphasize the similarities between itself and the FTC, which was upheld in Humphrey's Executor. If the Supreme Court said the FTC did not violate separation of powers principles, the CFPB should be in the same situation.

DeMille-Wagman had to fend off efforts by a number of judges to induce him to address hypothetical questions, such as a single director with a 20-year term or whether the CFPB truly is the most powerful federal agency in history. However, one judge made a potentially telling point. If the CFPB is constitutional, could Congress create five or six independent agencies that each would handle one executive branch function, resulting in a "nominal presidency"?

PHH rebuttal. Responding to the bureau's arguments, Olson offered a rather emotional warning about the threat of placing so much power in the hands of an agency headed by a single director who was protected from discharge. He argued that if the CFPB structure is deemed to be permissible, executive agencies could "swallow up" the President's powers. "There is no stopping point," he asserted.

Olson also made clear in the end that the real concern is the totality of the power the CFPB holds. This, not the single-director structure, is the issue for PHH Corp. Presumably this argument was presented to steer the court toward invalidating the bureau completely instead of only requiring a structural change.

Chaos theory? The Justice Department, which agrees with the earlier panel's decision and remedy, based its presentation on a single argument—the difference between a single director and a multi-member commission is what matters. Humphrey's Executor does not provide the rule for the CFPB because the FTC is a five-member, deliberative commission, according to Hashim M. Mooppan, who argued for the Department. Humphrey's Executor allowed an encroachment on the President's powers due to the quasi-legislative, quasi-judicial, deliberative aspects of the FTC. These aspects are not characteristic of the CFPB, Mooppan argued. If the discharge-for-cause protection could be applied in the absence of those considerations, there would be no difference in principle between the CFPB director and a cabinet officer. Congress could provide by law that even the Treasury Secretary could be discharged only for cause.

Mooppan conceded that other agency directors, such as the Social Security Administrator, might be in a situation similar to that of the CFPB director. However, he resisted the idea that this might affect the current case.

Whether each agency's structure violated separation of powers principles should be considered on its own merits.

He also made clear that the Justice Department's concern is not related to the degree to which the CFPB structure encroaches on presidential powers. Even if the CFPB is no more problematic than the FTC, the for-cause restriction must be removed because the factors on which Humphrey's Executor relied are not present.

The case is No. 15-1177.

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Companies: PHH Corporation

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