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CFPB Structure Is Unconstitutional, but Power Not Directly Affected

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In the closely watched case *PHH Corporation v. Consumer Financial Protection Bureau*, a panel of the US Court of Appeals for the District of Columbia Circuit has held that the Consumer Financial Protection Bureau's (CFPB's) structure is unconstitutional but that the constitutional flaw is remedied simply by striking the CFPB provision that authorizes the statute restricting the US president's power to remove its director except "for cause." In this manner, the court has allowed the CFPB to continue operating as it has done with minimal real changes: if the decision ultimately becomes final, the CFPB's director will become subject to removal from office by and the direction of the president, as is the case with any other Executive Branch agency, such as the US Department of Justice or Department of the Treasury.

Having determined that the CFPB may continue operating, the court also addressed the appeal's merits and remanded the case to the CFPB director for further action consistent with the opinion. The CFPB may seek review of the decision by the full DC Circuit or from the US Supreme Court.

The court's conclusion rests on its finding that Congress had unconstitutionally delegated Executive Branch power when it both created an independent agency and authorized the agency to be headed by a unitary director. The court noted that other independent agencies that do not directly report to the president, such as the US Securities and Exchange Commission, the Federal Trade Commission, and the Federal Communications Commission, are headed by commissions composed of multiple individuals who bring to bear expertise and divergent points of view. In the court's view, this structure of multiple-member checks and balances cures the independence issue.

Finding that the unitary director of the CFPB "enjoys more unilateral authority than any other officer in any of the three branches of the U.S. Government, other than the President," the court found that the "single-Director structure of the CFPB represents a gross departure from settled historical practice." Thus, the court held that the "CFPB lacks that critical check and structural constitutional protection, yet wields vast power over the U.S. economy" and found that "the CFPB is unconstitutionally structured." Describing the president as a check on agencies, the court determined that the president "now will be a check on and accountable for the actions of the CFPB as well."

Because the court determined that the CFPB will continue operating, the court also dealt with the specific claims that PHH Corporation asserted on appeal relating to captive reinsurance premiums under the Real Estate Settlement Procedures Act (RESPA). Of broad interest to businesses within the CFPB's regulatory and enforcement jurisdiction was the director's assertion that he could increase penalties that the agency's own administrative law judge recommended because the CFPB's authorizing statute did not contain a statute of limitations for any consumer protection statute, or RESPA violation claims when brought as an administrative action.

The court soundly rejected the director's assertion, finding a clear three-year statute of limitations for administrative actions under RESPA and remanding to the director for further actions consistent with its determination. This determination, however, was strongly presaged at oral argument when Judge Kavanaugh referred to other decisions that found the assertion that there is no statute of limitations to be an "abomination." The relatively narrow decision, which depends on the specific text of RESPA's limitations provision, does not, as some had hoped, resolve broader questions about the limitations period applicable to the CFPB's administrative enforcement powers.

Key Considerations

This is an important decision issued by the DC Circuit, which historically has taken the lead in ruling on matters of federal government structure and operations. That said, it is equally important not to overstate the decision's significance, because the net impact of this case is that the CFPB's day-to-day operations will remain unaffected at this time. Under the current administration, that undoubtedly will mean no change at all. However, a new president may now choose to terminate the incumbent director and appoint a new one.

The president also will direct the CFPB's operations in the same manner that he or she directs the policy of all Executive Branch agencies. At the same time, the exact relationship between the White House and the CFPB will need to be refined, as it has been throughout US history, to preserve the independence of officials such as the attorney general over individual prosecutorial decisions while still reporting to the president for policy, appropriations, and operational matters.

Although this case's focus is on broad constitutional principles, businesses that litigate before the CFPB also should pay close attention to the strict procedural deadlines that the case has established. There are hard and short deadlines that require immediate decisions, and procedural default is an easy trap—one that PHH Corporation avoided and that allowed it to properly position its case before the DC Circuit when others have failed.

Further, although the case may ultimately not have much (if any) effect on overall CFPB operations, there will likely be a substantial reduction in the penalties imposed on PHH Corporation, if only as the result of the statute of limitations issue.

The effect that this decision will have on past agency actions is also unclear. In a tantalizing footnote, the court disclaimed any need to analyze this question, but noted that other agencies whose constitutionality and structure have been held unconstitutional—such as the Public Company Accounting Oversight Board—"have subsequently worked through the resulting issues regarding the legality of past rules and of past or current enforcement actions." At the same time, it is entirely possible that some respondent or defendant or person adversely affected by a CFPB rule would challenge the authority of the agency's action (the likelihood that such a challenge would succeed, however, is a question that we leave for another time).

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