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CFPB’s Structure Is Constitutional. So What?

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The US Court of Appeals for the District of Columbia Circuit, sitting *en banc*, held on Wednesday that the unitary and insulated directorship of the Consumer Financial Protection Bureau (CFPB) is constitutional. The 6-3 decision in *PHH vs. CFPB*, while legally significant, may be less momentous than originally might have been the case, inasmuch as the importance of the issue may have been overtaken by current events, which have intervened to create an interesting mix of legal and political drama.

The court held that while the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) created a uniquely powerful individual as the CFPB’s director serves a five-year term subject to removal only for cause, that structure is constitutional. The court also held that the agency is not appropriated by Congress and its rules are not subject to cost-benefit analyses by the White House Office of Management and Budget (OMB).

All of this mattered a great deal while Richard Cordray, the agency’s first and only permanent director, held office. An appointee of then-President Obama, his views and priorities were diametrically opposed to those of the current administration and, unlike other non-career (political) appointees, it seemed that he could not be removed from office. However, with this case pending, he resigned at the end of November to run for office as governor of Ohio.

In the interim, the president has filled the vacancy by appointing OMB Director Mick Mulvaney as acting CFPB director. Mr. Mulvaney will serve until a successor is nominated by the president and confirmed by the Senate. In turn, Mr. Mulvaney has taken a number of actions at the agency consistent with this administration’s stated intent to lessen the regulatory burden on industry. Among other things, he has withdrawn or extended deadlines for key new rules, and has radically shrunk the agency’s enforcement mission and changed its priorities. He has also set the stage to significantly reduce the CFPB’s budget, possibly shrinking the agency’s overall impact by dint of fewer available resources.

Under the Federal Vacancies Reform Act, the president has 210 days from Mr. Cordray's departure to nominate a successor. But, confirmation itself may take a long time and might not occur at all in a divided Congress. On the other hand, in an odd turn of events, because the ultimate confirmed director's term will be five years, the longer the Senate waits to confirm a new director (assuming one is confirmed), the later the term of a new director will end, possibly tying the hands of a new president wanting to appoint a new director until as late as 2023 or beyond.

For this reason, the same forces that strongly urged the court to find the CFPB's structure unconstitutional are not likely to press hard for legislative amendments to the CFPB's structure at this time. The unitary director and lack of Congressional budget authority permit the deregulation agenda to proceed without being held up in Congress.

While this latest decision may be seen by some as a victory for the authors of Dodd-Frank, the political reality is that the shoe is now on the other foot and the decision is of little moment—at least for now.

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