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D.C. Circuit Upholds CFPB Director’s Independence Under Dodd-Frank

By Clay J. Pierce and Marsha J. Indych

The Consumer Financial Protection Bureau (CFPB) is constitutional, and the president cannot replace the CFPB director at will. So said a federal appeals court on Wednesday, January 31, overturning a prior ruling that held the CFPB’s structure violated Article II of the Constitution. *PHH Corp. v. Consumer Financial Protection Bureau*, No. 15-1177 (D.C. Cir. Jan. 31, 2018).

Wednesday’s decision was issued by the full panel of judges of the D.C. Circuit in a seven-to-three (*en banc*) decision. The prior ruling – a split decision issued by two members of a three-judge panel in October 2016 – was based on the fact that the sole director could only be terminated by the president for cause. This, they said, made the CFPB unconstitutional.

In making Wednesday’s ruling, the *en banc* panel rejected the argument that Congress overstepped its bounds when it enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) and limited the president’s power to remove the single director of the CFPB to circumstances limited to “inefficiency, neglect of duty, or malfeasance in office.” Instead, the court ruled that Dodd-Frank “is consistent with the President’s constitutional authority.” Specifically, the court found that “Congress’s decision to provide the CFPB Director a degree of insulation reflects its permissible judgment that civil regulation of consumer financial protection should be kept one step removed from political winds and presidential will.” The court added that “the CFPB is one of a number of federal financial regulators—including the Federal Trade Commission, the Federal Reserve, the Federal Deposit Insurance Corporation, and others—that have long been permissibly afforded a degree of independence.” The court noted that negating Dodd-

Frank’s for-cause removal provision would “call into question the legitimacy of every independent agency.”

In a dissenting opinion, Judge Kavanaugh—the author of the October 2016 ruling overturned by Wednesday’s decision—argued that the CFPB’s single-director structure made its director wholly unaccountable. Judge Kavanaugh criticized the “enormous” unilateral power of a single director to issue, enforce, determine compliance with, and penalize violations of rules, finding that it was clearly less preferable than the check on authority provided by a multi-member commission.” He noted that, until Dodd-Frank, “[n]o independent agency exercising substantial executive authority has ever been headed by a single person.” Judge Kavanaugh said that the inability to remove the CFPB’s single director except “for cause” effectively diminishes the executive authority granted the president under Article II of the Constitution. He offered the illustration of the current president, who, “upon taking office in January 2017 . . . could not appoint a new Director of the CFPB, at least absent good cause for terminating the existing Director.”

Though they lost their constitutional challenge to the CFPB, the parties who brought the lawsuit were successful in getting a \$109 million disgorgement order vacated. They are reportedly reviewing their options, including filing a petition for certiorari with the United States Supreme Court.

Wednesday’s ruling has been cheered by consumer groups and criticized by the business community. We expect there to be further disputes as the administration and the courts wrestle over the CFPB’s mandate and scope of authority.

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