

PHH v. CFPB En Banc Oral Argument Recap: The Skinny on the Scuffle

4 min read

May 25, 2017

By: Vaishali S. Rao

For more than an hour and half on Wednesday, May 24, lawyers for PHH Mortgage and the Consumer Financial Protection Bureau discussed, debated, and decried the CFPB's authority before the full D.C. Circuit Court of Appeals. There was minimal discussion of the underlying RESPA claims that formed the basis of the CFPB's \$109 million dollar judgment obtained against PHH. The major debate focused on whether the CFPB's single director leadership and the President's limited, for cause removal of that single director violated the Constitution's separation of powers clause. The parties debated, among other issues, (1) the diminishment, if any, of the President's ability to faithfully execute the laws; (2) the effect and nature of the for-cause removal provisions; (3) the single director structure v. multi-member commission structure; (3) the effect and nature of the Bureau's other structural features, such as budget & appropriations; and, (4) departure, if any, from historical traditions and ideals.

PHH argued that concentration of power atop the CFPB in one person, and limited removal power of that one person vested in the President rendered the agency unconstitutional. The CFPB argued that the director cannot be distinguished in the power he wields from the Treasury secretary or other members of the President's cabinet, and that the for cause removal limitation works in similar fashion to the Federal Trade Commission. The United States, in an unusual but expected turn siding with PHH, [stuck to its script](#) in arguing that a multi-member commission is the way to resolve the Bureau's unconstitutional structure. Even when baited to suggest other approaches to provide balance to the Bureau's structure, the government's attorney wouldn't bite and pivoted back to the multi-member commission.

While we await the decision, here are some notable quotes from the panel at oral argument:

- “The question isn’t how serious [a potential \$10 million penalty is], it’s how seriously it limits the president’s power.”
- “I thought the problem here is that Congress took away from the President the authority to enforce all these different statutes and invested it in one.”
- “Does the dead hand of the past president in controlling the agency matter?”

- “If you have a fairly robust authority to remove the one person there—not every president is going to get to do it, I grant you that, but some presidents are—and you compare it to a situation in which there are multiple members, and there is a greater likelihood that each president can remove one, but perhaps depending on the terms, a lesser likelihood that each president can remove a majority, then aren’t we at kind of a wash?”
- “Which is the greater intrusion of Presidential power? The replacement of someone of your choice for the Bureau or forcing the President to appoint someone from the other party to the [Federal Trade] Commission?”
- “President Trump appoints someone in July, 2018. That person serves until July 2023. The new President might be a different party, might have run on a platform of consumer protection, might be the person who created the consumer protection agency (audible laughter), and will not have the authority to do anything about that for 3 years, contra how he or she would be able to handle all of these other agencies. And that’s a reality. Now, let’s say he goes 2 terms. Then it goes to 2028. So the President who comes in in 2024, and might have run on a platform of consumer protection, can’t do it for 4 years, until right before the 2028 election. And so, I look at that reality, and I say, that sounds crazy as a matter of constitutional text, history, structure, and common sense, frankly. And so why would we buy into a concept that’s going to lead to this oddity that we’ve never had before?”
- [In discussing appropriations, communications budget & appropriations]: “When you combine all [the structural features regarding appropriations, communications, budget & appropriations], isn’t it a different institution with a greater threat to the president’s executive control?”
- “If you look at each of those other restrictions, none of them restricts the President whatsoever... Each of those things analyzed separately is a zero with respect to the for cause removal argument... So when you add them all together you are adding zero + zero + zero + zero, and at the end of the day, when you add all those zero’s together, you’re still there with zero.”
- “There has never been an agency like this. The zero + zero + zero + zero, all of those things that Congress carefully put in the statute to ensure the independence of this agency are not zero’s. They are significant in each and every respect and the sum total of that bequest of authority to this agency creates the most powerful agency.”

[Read the basics that set the stage for the en banc hearing.](#)

Vaishali is a regulatory & compliance attorney in Hinshaw & Culbertson’s Consumer Financial Services practice. She previously served as a Supervising Attorney in IL Attorney General Lisa Madigan’s Consumer Fraud Bureau where she worked on health and financial fraud matters, including on matters concerning the CFPB.

Topics

D.C. Circuit Court Of Appeals, CFPB, Trump Administration, RESPA

