



## Oral Arguments in PHH v. CFPB\*

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On Wednesday, May 24, 2017, the U.S. Court of Appeals for the D.C. Circuit (Court) sat *en banc* to rehear oral arguments in *PHH Corporation (PHH) v. Consumer Financial Protection Bureau (CFPB or Bureau)*. **Mr. Ted Olson** presented on behalf of PHH, with Department of Justice Attorney **Mr. Hashim Mooppan** representing the United States as an amicus curie in the case; **Mr. Lawrence DeMille-Wagman** argued on behalf of CFPB. All of the Court's active judges participated in the rehearing – with the notable exception of Judge Merrick Garland, who recused himself; his spot was filled by Senior Judge Randolph, who sat on the original panel. Notably, of the eleven judges who participated, six were appointed by a Democratic president.

The oral arguments and accompanying discussion focused on five major areas: (1) presidential powers under Article II of the U.S. Constitution; (2) the scope of the president's power to remove the CFPB Director; (3) the role of independent agencies as compared to multi-member agencies; (4) controlling authorities in this case; and (5) whether the CFPB Director may continue as an independent director serving five-year terms.

Below we provide a brief summary of the procedural posture of the case, review the main points of discussion in the hearing, and outline expected next steps in the case.<sup>1</sup> As discussed in more detail below, based on the questions from the judges, it seems that CFPB likely will prevail on the constitutionality of the structure of the agency (meaning the structure of a single director who can only be removed for cause will remain), but the CFPB likely will not prevail on the RESPA interpretation, statute of limitations, and fair notice issues. The focus of the hearing was the constitutionality of the CFPB, and the limited questions posed on the remaining issues (RESPA, statute of limitations, and fair notice) indicate that the Court is likely to reinstate the panel's decisions or adopt those decisions as their own. It's important to note, however, that the questions from the judges do not necessarily indicate their position.

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\*The information contained in this newsletter does not constitute legal advice. This newsletter is intended for educational and informational purposes only.

<sup>1</sup>See ***Bob Barnett's article*** in this issue of *Our Perspectives* detailing the possibilities for the track of this case.

## I. Background

The underlying dispute originated in 2015 after a CFPB administrative law judge recommended a \$6.5 million fine against PHH for allegedly receiving unlawful kickbacks from mortgage insurers in violation of Section 8 of the Real Estate Settlement Procedures Act (RESPA). PHH appealed that decision to CFPB Director Richard Cordray, who rejected its arguments and increased the fine to \$109 million.

On October 11, 2016, a three-judge panel of the Court vacated the \$109 million enforcement order by the CFPB, finding that: (1) CFPB's interpretation of RESPA unreasonable; (2) CFPB did not give fair notice to PHH of its interpretation of RESPA; (3) RESPA's three-year statute of limitations does apply to administrative actions; and (4) CFPB's structure is too unaccountable to be constitutional and poses an opportunity for the Director to abuse his power. To remedy this potential for abuse of power, the panel ordered that the CFPB would no longer be an "independent" agency, but "now will operate as an executive agency" and that the president "now has the power to supervise and direct the Director of the CFPB, and may remove the Director at-will at any time."

On February 17, 2017, the Court granted a motion by the CFPB to hold an *en banc* rehearing of the appeal. The order effectively vacates the panel's October 2016 judgment, arranges a briefing schedule, and set yesterday as the date for oral argument.

## II. Oral Argument Summary

### a. *Article II: Presidential Powers*

Arguing on behalf of PHH, Mr. Olsen suggested that the president's Article II appointment and removal powers are unconstitutionally-limited by the current CFPB structure. Expounding on this, Mr. Olsen stated the CFPB structure limits presidential power by: (1) vesting all of the Bureau's power in one Director; (2) limiting the president's power to replace the Director by requiring consent from the Senate; and (3) creating an agency that is wholly independent of the president and his administration. Mr. Olsen added that as the CFPB is currently structured, the Director may continue serving – even upon being dismissed – until a new director is confirmed by the Senate, which further limits the president's power.

### b. *Scope of the President's Removal Powers as Related to CFPB*

As the CFPB is currently structured, the president may only remove the CFPB Director for cause. Those concerned about the Bureau's structure highlighted the difficulties of dismissing the Director "for cause," pointing to various other agencies that allow the president to appoint and remove directors at-will as the appropriate method for removal. Some members of the Court referenced a letter to President Trump from members of Congress highlighting their concerns with the current CFPB structure – highlighting in particular that the director of an independent agency has never been removed for cause.

Some members of the Court discussed the important role of financial regulatory agencies in ensuring proper execution of the law and suggested that allowing the president to fire the director of a financial regulatory agency at-will could promote collusion in the most important agencies. Some members also pointed out that a court has never enjoined a president for dismissing a director at-will and that a director usually receives payment for the remainder of his tenure regardless.

Judge Thomas Griffith questioned how the president's power is limited in this case, noting instead that "[i]t would seem to increase presidential power if you only need to get rid of one person to reshape an agency." Mr. Olsen responded that the CFPB's independent director, its broad enforcement authority, and its dedicated funding – which sidesteps congressional appropriators – set a powerful precedent that could erode presidential authority if unchecked.

Mr. DeMille-Wagman acknowledged that a president has never successfully dismissed a director for cause, and discussed the process for appointing and removing Governors at the Federal Reserve System as similar to removing the CFPB Director. At the Federal Reserve, the Board of Governors serve as directors of the system, are appointed by the president, confirmed by the Senate, and slated to serve seven-year terms. After highlighting what he views as benefits in this type of structure, Mr. DeMille-Wagman added that because the CFPB Director serves a five-year term, a president has an 80 percent chance of appointing a new director while potentially not having an opportunity to appoint a new member to the Board of Governors of the Federal Reserve.

### ***c. Independent Agencies vs. Multi-Member Agencies***

One judge asked Mr. Olsen and Mr. Mooppan to discuss differences in how multi-member agencies are structured compared to independent agencies. According to the lawyers, in a multi-member system an agency has multiple directors – usually three-to-five – who can be replaced by the president periodically based on the statutes establishing the agency. They pointed out, however, that most independent agencies have only one director. When it was suggested that a single-director is likely to be more accountable than a committee of three or five directors, Mr. Olsen acknowledged that this may be true, but argued that the president should nevertheless have the authority to appoint a new director within the first year of taking office.

Mr. Olsen also highlighted the quick turnover rate of directors in multi-member agencies as rationale for justifying the president's ability to exercise this power. He then implored the Court to recognize the necessity of giving the president the same power over independent agencies like CFPB. Mr. Mooppan agreed with the assertion that a single-director limits the president's power, but argued that this does not matter. In response, a judge referenced a previous opinion that contradicted Mr. Mooppan's statement.

### ***d. Controlling Authority***

Central to the outcome of this *en banc* rehearing is the authority the Court applies. The members of the Court discussed three notable cases: (1) *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); (2) *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting); and (3) *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 499 (2010).

In *Humphrey's Executor*, President Roosevelt asked Mr. Humphrey to resign as commissioner of the Federal Trade Commission (FTC) based on his policy positions. Mr. Humphrey refused to resign and President Roosevelt fired him – though the FTC Act only allowed a president to remove a commissioner for cause. The Supreme Court held that the FTC Act was constitutional and did not interfere with the executive power of the president.

In *Morrison v. Olsen*, the Supreme Court held that the Attorney General's appointment of an independent counsel to investigate and prosecute government officials for violations of federal criminal laws did not violate the constitutional principle of separation of powers. Notably, the Supreme Court held that selection of independent counsel did not violate the president's appointment power. During oral arguments in *PHH v. CFPB*, Mr. Olsen highlighted Justice Scalia's dissent in *Morrison v. Olsen*, in which Justice Scalia cautioned the Supreme Court that establishing such precedent is dangerous for the future of the separation of powers doctrine.

In *Free Enterprise*, a non-profit organization challenged the creation of a Public Company Oversight Board (PCAOB) under the Sarbanes-Oxley Act and argued that its structure deprived the president of his appointment power. Note that *Free Enterprise* differs from *Morrison and Humphrey's* because the PCAOB is under direct supervision of the Securities and Exchange Commission (SEC), whose commissioners are appointed and can be removed by the president. Ultimately, the Supreme Court in *Free Enterprise* held that a "for cause" limitation on the removal of PCAOB board members is unconstitutional, as it violates the Constitution's separation of powers. The Supreme Court added that such a policy deprives the president from holding PCAOB board members accountable and contradicts the president's Article II powers. Thus, the PCAOB was allowed to continue operating, but the president was granted the authority to remove board members at-will.

In discussing the precedent set by these cases, Mr. Mooppan suggested that the Supreme Court's rationale in *Humphrey's* is based on the function of the FTC and should not be applied in every case concerning similar subject matter. He discussed the FTC's role as an administrative body as opposed to an executive one. Mr. Mooppan then highlighted the "principal executive officers removal exception" in Article II and argued that the Court is bound by *Morrison*. As such, he argued that the major question to decide is whether the CFPB Director is considered an inferior or principal officer, noting that *Morrison* only applies to inferior officers. Mr. Mooppan also suggested that the cause dismissal exception in *Humphrey's* does not apply in this case.

Mr. Olsen argued that the Court should follow the decision established in *Free Enterprise*, highlighting the following commonalities: (1) the CFPB does not allow the president to appoint a new director once taking office; (2) the CFPB performs executive functions by enforcing 19 consumer protection rules; and (3) the president does not have the power to fire the CFPB director at-will. He then suggested that the president's inability to exercise these powers limits his constitutional authority to oversee his Administration.

#### **e. CFPB Director's Current Role**

The rehearing also included discussion of alternatives to the current CFPB structure. Mr. DeMille-Wagman suggested that many directors voluntarily leave positions before their term expires and suggested that the current structure is sufficient so long as the president can remove for cause

–reiterating the similarities between the structure of the CFPB and FTC. When discussing the current power of the CFPB Director, a member of the Court said, “never before has one person had so much power and been shielded from the Constitution.”

PHH argued that, under the current structure, CFPB Director Cordray could remain in his position after his term expires, until a successor was confirmed by the Senate. In response, Mr. DeMille-Wagman stated that it is the CFPB’s view that the “for cause” removal limitation no longer applies once the Director’s term expires, and the president could then remove the Director “at will.”

### III. Conclusion and Next Steps

The Court’s decision following the *en banc* rehearing will offer insight into whether the CFPB can continue operating with its current structure and whether Director Cordray will continue in his position until his term expires in July 2018. The Court did not schedule an additional court date or indicate next steps. It is anticipated that the Court will issue its ruling in the fall or near the end of the year.

After the ruling, both sides would have the option to file a petition for a writ of certiorari with the Supreme Court of the United States. However, for CFPB to do so, it would need the consent of the Solicitor General, which it may not receive, depending on which rulings the CFPB would want to appeal. If PHH is victorious on some of the issues (e.g., RESPA interpretation, statute of limitations, and fair notice) but not others (e.g. constitutionality of CFPB structure), it may choose to not appeal the decision. A petition for certiorari must be filed within 90 days of the lower court’s ruling.

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