

The PHH Decision And Its Consequences For The CFPB

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The tortuous path of the Consumer Financial Protection Bureau's enforcement action against PHH Corporation took yet another twist this week, as the D.C. Circuit, sitting en banc, decided that the bureau's structure — featuring a single director whom the president may remove only for cause — was constitutional.

As the headlines indicate, the bureau prevailed on an important constitutional issue. However, the full content and context of the court's opinion offers as much to bureau critics as it does to its supporters. The court's defense of the CFPB director's power and tenure has very different consequences today, as President Donald Trump prepares to nominate a new director to a five-year term, than they would have had if former Director Richard Cordray had not resigned. Moreover, the court reinstated a portion of the panel's opinion that excoriated the Cordray administration's enforcement tactics and legal interpretations. The net result is that the court has provided Acting Director Mick Mulvaney and his successor with judicial support for their authority, their approach to enforcement, and at least five years to transform the CFPB.

The Director's Authority

While the en banc court was predictably splintered, the various opinions converge on a simple point: The bureau director has significant discretionary authority to chart the bureau's course. This point was made most vividly in Judge Brett Kavanaugh's dissent. He expresses concern that the director's "massive power" is a threat to individual liberty, as a director without the checks and balances of shared power or presidential supervision may make decisions that are "extreme, idiosyncratic and off the rails." Judge Kavanaugh fears that the Dodd-Frank Act makes the CFPB director "the single most powerful official in the entire U.S. government ... in terms of unilateral power."

While the majority opinion does not share these concerns, it does not disagree that the CFPB director has enormous discretion. The real difference is that the majority embraces the merits of such independence. Citing legislative history, the court explains that the independence of regulators from the president "enables such agencies to pursue the general public interest in the nation's longer term economic stability and success, even where doing so might require action that is politically unpopular."



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This independence is particularly appropriate in light of the “distinctive danger of political interference with financial affairs.” In the eyes of the majority, Congress permissibly decided that “civil regulation of consumer financial protection should be kept one step removed from political winds and presidential will.”

The Next Director

Given the splintered court’s general agreement that the bureau’s director has free range to shape the bureau, it is no small matter to note that the position is currently open and comes with a five-year term. While Cordray was still in office, the Trump administration filed an amicus brief in PHH arguing that the president should be able to terminate the bureau director at will. Now that Cordray has resigned, the administration may be relieved to have lost that argument. Trump may now nominate a director who will be eligible to serve a full five-year term, even if the president is not re-elected. Put another way, a Republican administration that complained about eight months of a Democratic CFPB director may now inflict two or three years of a Republican CFPB director upon a Democratic administration.

The Bureau’s Mission

Amid the 250 pages of constitutional analysis, the court reinstated the prior decision of a court of appeals panel “insofar as it related to the interpretation of RESPA [the Real Estate Settlements Procedures Act] and its application to PHH.” That decision will likely save PHH the \$109 million Cordray ordered them to disgorge, and save billions more for the financial institutions that engaged in similar captive mortgage reinsurance arrangements. However, the decision may also prove enormously influential to the future course of the bureau.

The now-reinstated panel opinion on RESPA was not a dry academic exercise but a *cri de coeur* against both the bureau’s interpretation of the statute and its approach to enforcement. Indeed, the panel’s concerns with the way the bureau enforced RESPA against PHH seems to have colored — if not determined — the panel’s criticism of the bureau’s single-director structure. Accordingly, it is surprising that the en banc court reinstated an opinion that belies the majority’s relatively benign view of the risks of giving one director too much authority.

On RESPA, the reinstated panel opinion insisted that “the basic statutory question in this case is not a close call,” and that the bureau’s reading of the statute “makes little sense.” Moreover, the court found that the bureau’s decision to apply that reading to PHH retroactively was “facially nonsensical,” and “gamesmanship” that amounted to “a serious due process violation.” Similarly, the court found that the bureau’s position on statute of limitations was “flatly wrong” as a reading of the relevant statute, and imputes an “absurd” intention to Congress.

The problems with the bureau’s treatment of PHH were surely on CFPB Acting Director Mick Mulvaney’s mind when he penned a recent Wall Street Journal op-ed recasting the bureau’s mission. Mulvaney explains that he wants the agency to make a sharp turn away from “pushing the envelope” on enforcement matters. Instead, “bringing the full weight of the federal government down on the necks of the people we serve should be something that we do only reluctantly, and only when all other attempts at resolution have failed.” These alternatives to enforcement include “making sure that the people we regulate ... know what the rules are before being charged with breaking them.” In short, Mulvaney promised “less regulation by enforcement” and more “humility and prudence.”

Mulvaney’s comments have increased significance after the PHH opinion. Their substance is echoed by

the court's reinstated opinion on the RESPA and enforcement issues raised by the PHH matter. And their authority is amplified by the fact that the D.C. Circuit has made clear that the bureau director has enormous discretion to choose a direction for the agency, and five years to execute on that direction. Thus, while there is no doubt that the PHH decision was a significant victory for an independent CFPB, it seems likely that the fruits of that victory will, for the foreseeable future, be used to create a less aggressive bureau.

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