AFR Americans for Financial Reform

The Independence of the Consumer Financial Protection Bureau

What the Second Circuit Said

On January 31, a federal appellate court upheld the constitutionality of the Consumer Financial Protection Bureau (CFPB) as an independent regulatory agency with a director who can be dismissed only for "inefficiency, neglect of duty, or malfeasance in office." That structure -- spelled out in the Dodd-Frank financial reform law of 2010 -- had been challenged by a New Jersey mortgage lender in a lawsuit contesting a CFPB enforcement action over kickbacks and inflated fees. The D.C. Court of Appeals rejected PHH's argument.

"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 ruled. "We have no warrant here to invalidate such a time-tested course. No relevant consideration gives us reason to doubt the constitutionality of the independent CFPB's single-member structure."

Here are some key points made in the majority opinion by Judge Cornelia Pillard:

Congress had sound reasons for deciding on a single director rather than a commission, and for shielding the CFPB director against dismissal without cause.

"Congress designed an agency with a single Director, rather than a multi-member body, to imbue the agency with the requisite initiative and decisiveness to do the job of monitoring and restraining abusive or excessively risky practices in the fast-changing world of consumer finance… A single Director would also help the new agency become operational promptly, as it might have taken many years to confirm a full quorum of a multi-member body."

"By providing the Director with a fixed term and for-cause protection, Congress sought to promote stability and confidence in the country's financial system."

There are many legal precedents for this kind of protection.

The [Supreme] Court has held, time and again, that while the Constitution broadly vests executive power in the President, U.S. Const. art. II, § 1, cl. 1, that does not require that the President have at-will authority to fire every officer."

The “removal restriction” established for the CFPB “is wholly ordinary.” The language of the statute is identical to that of a law “approved by the Supreme Court back in 1935 in *Humphrey’s Executor* and reaffirmed ever since.”

There is nothing in the Constitution or case law to suggest that an independent agency needs a “multi-headed structure” for the sake of accountability.

That argument “finds no footing in precedent, historical practice, constitutional principle, or the logic of presidential removal power.”

The CFPB is not uniquely powerful or free of restraint.

“Today’s independent agencies are diverse in structure and function…. [T]he CFPB’s power and influence are not out of the ordinary for a financial regulator or, indeed, any type of independent administrative agency.”

A single director is in some respects easier to hold accountable.

“Decisional responsibility is clear now that there is one, publicly identifiable face of the CFPB who stands to account—to the President, the Congress, and the people— for all its consumer protection actions. The fact that the Director stands alone atop the agency means he cannot avoid scrutiny through finger-pointing, buck-passing, or sheer anonymity. “

Effective mechanisms exist for holding the CFPB accountable. Its actions are subject to veto by the Financial Stability Oversight Council and to review by the courts.

The Second Circuit has itself affirmed a lower court’s decision to overturn a $109 million penalty imposed on PHH, agreeing that the CFPB misinterpreted the law. “The now-reinstated panel holding that invalidated the disgorgement penalties levied against PHH… illustrates how courts appropriately guard the liberty of regulated parties when agencies overstep.”

The budgetary autonomy given to the CFPB is also not unique.

“Congress has provided similar independence to other financial regulators, like the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the National Credit Union Administration, and the Federal Housing Finance Agency, which all have complete, uncapped budgetary autonomy.”

There is a long tradition of taking extra measures to ensure the independence of financial oversight agencies.

“[T]he CFPB Director’s autonomy is consistent with a longstanding tradition of independence for financial regulators, and squarely supported by established precedent. The CFPB’s budgetary

independence, too, is traditional among financial regulators, including in combination with typical removal constraints. PHH's constitutional challenge flies in the face of the Supreme Court's removal-power cases, and calls into question the structure of a host of independent agencies that make up the fabric of the administrative state."

"That independence shields the nation's economy from manipulation or self-dealing by political incumbents and enables [independent] 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 in the short term."

The CFPB's structure poses no threat to normal presidential authority over "core executive" functions. But if the courts accepted PHH's arguments against the CFPB, the whole idea of independent regulatory agencies would be threatened.

"The threat PHH's challenge poses to the established validity of other independent agencies, meanwhile, is very real. PHH seeks no mere course correction; its theory, uncabined by any principled distinction between this case and Supreme Court precedent sustaining independent agencies, leads much further afield. Ultimately, PHH makes no secret of its wholesale attack on independent agencies—whether collectively or individually led—that, if accepted, would broadly transform modern government."

"The President's plenary authority over his cabinet and most executive agencies is obvious and remains untouched by our decision. It is PHH's unmoored theory of liberty that threatens to lead down a dangerously slippery slope."