

CFPB Reform: The Latest Developments

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The House Financial Services Committee's Subcommittee on Oversight and Investigations on Tuesday [held a hearing](#) to explore the constitutional design of the CFPB. At the hearing, three of the four witnesses, including Ted Olson who is representing PHH,^[1] offered recommendations to "repair the CFPB's structural defects" by, among other things, making the director of the CFPB removable at will by the President and by subjecting the CFPB to the Congressional appropriations process. Only one witness, Brianne Gorod, was invited by the Republican majority to defend the CFPB's current structure and funding process.

Rep. Ann Wagner, presiding over her first hearing as Subcommittee Chair, opened her questioning by asking whether President Trump can remove CFPB Director Cordray immediately, even without a final decision in *PHH*. Rep. Wagner quoted former Congressman Barney Frank's remarks [at a 2012](#) hearing during which Rep. Frank said, "No one doubts that if a change in Administration comes, and the new President disagrees with the existing Director, he or she can be removed. And proving that you were not inefficient, the burden of proof being on you, would be overwhelming."

Each of three CFPB critics called as witnesses engaged with Rep. Wagner's line of questioning and agreed that President Trump is not obligated to wait for a final decision in *PHH* before choosing to remove Director Cordray. Nonetheless, as the American Banker has noted, the "[smart money](#)" likely remains on President Trump waiting to make any decision on Director Cordray's future until after the en banc D.C. Circuit decides *PHH v. CFPB*.

Arguments in *PHH* are scheduled for May 24th. [Late last week](#), the United States Department of Justice, in a reversal of its previous position, came out against the CFPB's current structure. The DOJ now takes the position that the CFPB's current structure is unconstitutional.

The spectacle of one government agency opposing another in court is rare and noteworthy, but is not so surprising in this case. [As we noted in October](#), "the [*PHH*] decision increases Presidential power and a new Administration may not object to that result." Indeed, the DOJ's brief notes that previous administrations, both Republican and Democratic, have raised objections to restrictions on the President's removal authority.

Though the DOJ has now come down on the side of PHH, the positions of the DOJ and PHH do not overlap entirely. The DOJ maintains that the D.C. Circuit may hand PHH a victory on statutory grounds and thus avoid deciding the separation-of-powers question, though it notes that the court could, in its discretion, choose to reach the constitutional issue. PHH, in contrast, takes what we believe to be the more compelling view, arguing that the court must either address the separation-of-powers issue or vacate the CFPB's decision without remanding. To do otherwise, PHH argues, would be to remand the case to an unconstitutional agency.

The DOJ and PHH also differ on the proper remedy if the CFPB's structure is found to be unconstitutional. The DOJ, agreeing with the panel below, believes that the restrictions on the President's removal authority can be severed from the rest of the statute, making the CFPB director subject to Presidential removal but otherwise leaving the CFPB intact. In contrast, PHH argues that severability is unworkable in this case and that the CFPB must be struck down "as a whole." PHH's position on this aspect of the case, which did not persuade a panel of three Republican appointees, seems unlikely to gain more traction before the en banc D.C. Circuit.

A brief from the CFPB in response to these and other arguments is due by March 31. Stay tuned to FinRegReform for updates.

[1] Olson stressed that he was appearing only in his personal capacity and that he was expressing only his personal views.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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