

Solicitor General, PHH File Briefs in PHH v. CFPB

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On Thursday, December 22, PHH and the Solicitor General of the United States filed briefs in response to the [CFPB's petition](#) for en banc review in [PHH v. CFPB](#). As we [have previously discussed](#), in PHH a three judge D.C. Circuit panel held that the CFPB's current single-director structure violated the separation of powers, and that, to remedy this constitutional violation, the Director of the CFPB must be removable by the President at will.

In its en banc petition, the CFPB argued that the PHH panel failed to follow Supreme Court precedent and urged the full D.C. Circuit to hear what might be "the most important separation of powers case in a generation." The Solicitor General's [brief](#), which was filed at the request of the D.C. Circuit and provides the views of the United States Department of Justice, echoes the CFPB's call for the D.C. Circuit to hear the case en banc, though on slightly different grounds.

The Solicitor General argues that PHH merits en banc review because the case presents a "significant constitutional question that the Supreme Court has not yet squarely confronted." Furthermore, according to the Solicitor General, the panel's approach to resolving the question deviated from Supreme Court precedent. In the DOJ's view, the panel failed to focus only on whether restrictions on the President's removal power would impede the President's ability to perform his constitutional duty and instead improperly analyzed whether a CFPB headed by a single-director removable only for cause threatens individual liberty more than a multi-member agency.

Even so, the Solicitor General's brief closes by noting that the D.C. Circuit may not need to reach the separation of powers issue, and argues that the court could instead give PHH the relief it seeks on statutory grounds, thus avoiding a decision on the constitutional issue.

In contrast, PHH's brief [argues](#) that the panel's decision was a "meticulous" and "well-reasoned" judgment which adopted a "minimalist remedy" by allowing the President to remove the Director of the CFPB at will but otherwise leaving the CFPB intact. PHH states that the panel correctly applied settled constitutional law, and even quotes Senator Elizabeth Warren's description of the panel's remedy as a "small, technical tweak to Dodd-Frank" to argue that PHH v. CFPB is not worthy of en banc review.

PHH also contends, in a separate [motion](#), that by allowing both the CFPB and the Solicitor General to file briefs, the United States Government has been granted two rounds of briefing amounting to "30 total pages of internally inconsistent arguments." PHH thus asks for the chance to specifically respond to the Solicitor General's arguments with a further 15 page brief. On December 28, the CFPB filed a motion opposing PHH's request. As of this writing, a decision by the D.C. Circuit on whether to allow PHH to file an additional brief is pending. In light of the pending motions, it now seems unlikely that the D.C. Circuit will decide whether to hear the case en banc before President-Elect Trump takes office but it may well make the decision before there is new leadership in place at the DOJ and the SG. Even if a rare en banc petition is granted, the new principals of the Trump Administration may well take a different view of the panel's decision.

Law clerk Ryan Johansen contributed to this post.

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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