

D.C. Circuit Decides PHH v. CFPB--Is the Supreme Court Next?

February 2, 2018 | Client Update | 3-minute read

The question we are being asked most often is whether *PHH v. CFPB* is headed to the Supreme Court. The D.C. Circuit's *en banc* [decision](#) that the current structure of the CFPB—an agency headed by a single director, removable by the President only for “inefficiency, neglect of duty or malfeasance in office”—is constitutional has produced a majority opinion, three concurrences and three dissents. It is another remarkable development in the young history of the CFPB. The 250 page decision leaves much to ponder. The authors of this post—both former Supreme Court clerks long ago—offer the following thoughts.

Is the Supreme Court Next? In our view, it very much depends upon what the Solicitor General decides to do. When the CFPB first asked the D.C. Circuit to rehear *PHH*, the Obama Solicitor General filed a response in support of the CFPB. After President Trump was inaugurated, the Trump Solicitor General took the unusual step of reversing that previous view and instead filed a brief in support of PHH that argued that the CFPB is unconstitutionally structured. The Supreme Court grants cert only around 1% of the time. If we assume, however, that the Solicitor General takes a position in support of a PHH cert petition, cert is much more likely to be granted. An [academic analysis](#) of Solicitor General cert recommendations reveals that cert is granted in such cases between 67.6% and 76.5% of the time. These numbers are in line with our memories as former Supreme Court clerks where the views of the Solicitor General, often dubbed the Tenth Justice, carry great weight at the cert granting phase.

A threshold question, however, may be whether PHH has an incentive to file for cert. PHH is in many ways the victor here, given that the *en banc* court reinstated the panel's ruling in favor of PHH on the statutory RESPA question and remanded to the CFPB for further proceedings. PHH's [press release](#) issued after the ruling said that it would present facts and evidence on remand, “if necessary,” but made no mention of a potential cert petition. More [elaborate maneuvers](#) to get *PHH*'s constitutional issue in front of the Supreme Court are also possible.

***Morrison v. Olson* Revisited?** The majority opinion goes to great lengths to ground the CFPB's constitutionality in the well-known Supreme Court precedents *Humphrey's Executor v. United States* and *Morrison v. Olson*. The dissents make the point that the CFPB does not fit within those precedents. As we pointed out in [our memo](#) on the *PHH* panel opinion, however, it is not entirely clear that the Supreme Court, even before it was joined by Justice Gorsuch, is particularly enamored of *Morrison*. We will not attempt to add anything to that discussion here, noting only that the debate is a real and longstanding one.

Renewed Interest In Congress? As originally proposed, the CFPB was to be a multi-member, bipartisan commission. The House Republicans' proposed Dodd-Frank revamp, known as the CHOICE Act, would reform the CFPB along these lines. Proposed changes to the CFPB's structure have been lower on the Republican Congressional agenda in recent months, and senior Democrats [came out against](#) the idea early last year. The *en banc* ruling will return debate about the CFPB's structure to the headlines and a renewed Congressional push to restructure the CFPB may be on the horizon. Given the waves Acting CFPB Director Mulvaney is making at the CFPB, some Congressional Democrats may even be moved to reconsider the idea of concentrating the CFPB's power in the hands of one agency head.

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.

Margaret E. Tahyar

+1 212 450 4379

margaret.tahyar@davispolk.com

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's privacy notice for further details.