

## Due Process? Really?

December 1, 2016 | [Michael A. Benoit](#)

On October 11, the U.S. Court of Appeals for the District of Columbia Circuit held that the CFPB's structure is unconstitutional. In *PHH Corporation v. Consumer Financial Protection Bureau*, the appellate court found that the Director of the CFPB "enjoys more unilateral authority than any other officer in any of the three branches of the U.S. Government, other than the President," in violation of the Due Process Clause of the U.S. Constitution. While it permits the CFPB to continue to operate, it "will do so as an executive agency akin to other executive agencies headed by a single person, such as the Department of Justice and the Department of the Treasury" and its Director will serve at the pleasure of the President.

In January 2014, the CFPB charged that PHH's captive reinsurance arrangement, whereby it referred customers to mortgage insurers that in turn purchased reinsurance from a PHH affiliate, was an illegal kickback under the Real Estate Settlement Procedures Act (RESPA). An administrative law judge (ALJ) agreed, despite the fact that the CFPB was adopting a novel new interpretation of RESPA, contrary to the interpretation that Department of Housing and Urban Development ("HUD," the prior RESPA regulator). To the surprise of many, CFPB Director Richard Cordray decided that the ALJ's decision to base his \$6.5 million disgorgement recommendation on the Dodd-Frank Act's three-year statute of limitations was misplaced, and made the case that the statute of limitations applied only to court proceedings, and not administrative proceedings. Accordingly, he increased the penalty to \$109 million, effectively penalizing PHH for conduct that (1) occurred before the CFPB was even formed, and (2) conformed to and complied HUD interpretations of RESPA in effect at the time.

Not surprisingly, PHH took exception to the Director's action and appealed the decision to the DC Circuit. While the Director had held that captive reinsurance arrangements like PHH's were illegal under RESPA. Consistent with HUD's established interpretation, it held that RESPA allows the captive reinsurance arrangements at issue, provided that the amount paid by the mortgage insurer for the reinsurance does not exceed the reasonable market value of the reinsurance. It also found that the CFPB inappropriately applied -- retroactively -- a new interpretation of RESPA. Lastly, it disagreed with the CFPB's contention that, under the Dodd-Frank Act, there is no statute of limitations for CFPB administrative actions to enforce any consumer protection law.

While PHH's arguments won the day even before getting to the due process arguments about the Bureau's structure, the court felt it had to address the structure question

before it could remand the case to the Bureau for further consideration consistent with its ruling. In other words, it could not remand the case to an agency alleged to be unconstitutional without first addressing the allegation. The court spent a significant portion of its well-reasoned and carefully crafted opinion on the Bureau's structural problems, reviewing the history and application of the Due Process Clause, in particular with respect to administrative agencies. It noted that "independent" agencies typically ensure due process through governance by politically balanced multi-member commissions (like the FTC or FCC), whose members serve as a check and balance on each other. In the CFPB's case, its novel single director structure, combined with the inability of the President to fire the Director at will, vested a dangerous amount of power in a single person allowing that person to operate unchecked and without constraint or accountability, contrary to constitutional principles.

The remedy the court imposed was to strike the provision in the Dodd-Frank Act that only permitted the President to dismiss the Director for cause, making the Director an "at will" employee of the President and the CFPB an executive agency (as opposed to an independent agency). If upheld, this has significant ramifications for the Bureau including, among other things, that it would have to start complying a number of Executive Orders regulating executive agency behavior it has, to date, routinely ignored.

The CFPB is certain to appeal the decision. The only question (which may be settled by the time this article gets to print) is whether it will request a rehearing *en banc* at the DC Circuit (i.e., before all the judges, not just a three judge panel) or appeal directly to the Supreme Court. For what it's worth, I have a few observations.

You may recall a couple of years ago that Harry Reid (D-NV), the then-Senate Majority Leader, deployed the "nuclear option" for approving federal judges. Democrats felt the Republican minority was creating a crisis of vacancies on federal appeals courts by leveraging Senate rules requiring 60 votes to cut off debate to block President Obama's nominees. Without 60 Democrats, Sen. Reid was having difficulty getting judges confirmed, so he got the Senate to change the rules. Now, just 51 votes are needed to end debate on most judicial appointments. As a result, a number of judges were confirmed including several to fill vacancies on the DC Circuit. A cynic would say it was important to Democrats to fill the DC Circuit with Obama nominees in the hopes they would uphold executive actions taken by the President and the Executive Branch. Undoubtedly, it was just as important to the Republicans to fill the courts with judges nominated by a Republican president, and we are seeing the political price for Sen. Reid's decision in the form of the current Republican majority's refusal to consider President Obama's nominee to the Supreme Court, Merrick Garland (ironically, the Chief Judge of the DC Circuit). And just today, several Republican senators have suggested they would seriously consider opposing all of Hillary Clinton's Supreme Court nominees should she win the election. Ah, politics.

Given the number of judges on the DC Circuit who are President Obama's appointees, I would bet the CFPB opts to request a rehearing *en banc*. Clearly, the hope would be that these judges would more favorably view the CFPB's current structure, and be more likely to overturn the three judge panel's decision. An appeal to the Supreme Court comes with significant uncertainty with its current 4-4 split between liberals and conservatives. A tie

vote on appeal would result in the DC Circuit's ruling being upheld.

I tend to be optimistic about America and the Constitution, and I'm particularly fond of our commitment to due process. To Congress (and everyone else), it shouldn't matter whether judges are appointed by Republicans or Democrats, because they should leave any partisan leanings at the door to the courthouse. But judicial appointments are political by design, and it's human nature to want to make appointments that reflect the political persuasions of those making - and confirming - the appointments. That said, I suspect most federal judges are big fans of due process, since they are by their very nature "due process incarnate" -- it's their job!

What struck me most about the DC Circuit's opinion (other than I thought it was spot on) was how well-crafted it was. The panel clearly knew their decision would be appealed regardless of their holding, and the opinion seems written with that in mind. Not only did they carefully reason lay out the due process analysis, they cited Justices Breyer and Kagan -- two of the more liberal Supreme Court justices -- to support their reasoning. One might think that approach, in and of itself, cynical, but I'd be surprised if our judicial branch as a whole wasn't troubled by the novelty and potential for abuse the CFPB's structure invites. I guess we might soon see.

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