HUDSON COOK

Kraninger as CFPB Sheriff and the Potential Impact of the 2020 Presidential Election

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Almost one year ago, Kathy Kraninger was sworn in as the Consumer Financial Protection Bureau's second permanent Director. The Bureau's first Director, Rich Cordray, was known first and foremost for his aggressive law enforcement. After Cordray, the Bureau was run by Acting Director Mulvaney, and CFPB enforcement swung the other way: pending investigations ground to a halt, few new investigations were opened, and small-dollar settlements were reached with what some called the "Mulvaney discount." When Kraninger took over, the question was whether she would continue in the mold of Mick Mulvaney, her former boss at OMB, or whether she would forge her own path. Based on her first year, it looks like she is trying to steer a middle ground on enforcement as well as other areas. Her balanced approach is commendable, but will it be enough to survive if CFPB founder, Elizabeth Warren, wins the 2020 presidential election?

Kraninger's Law Enforcement Record

After initially engaging in a three-month "listening tour," Kraninger announced her approach to the Bureau's mission in a speech last April at the Bipartisan Policy Center. She said the Bureau's focus should be on the prevention of consumer harm and listed, in order of priority, how she expected to use the Bureau's tools: consumer education; rulemaking and guidance; supervision; and enforcement. Although listed last, Kraninger said there is a place for "purposeful enforcement" to reinforce clear rules of the road and prevent harm by making sure that bad actors know they will be held to account.

Kraninger's "purposeful enforcement" began by removing roadblocks to enforcement that existed under Acting Director Mulvaney. In early 2019, the CFPB Enforcement Office once again began to open investigations and issue Civil Investigative Demands ("CIDs"). In April, in a nod to industry, the Bureau announced a policy change regarding its CIDs, saying that CIDs will provide more transparency about the conduct and laws being investigated. With this policy change, Kraninger navigated the Bureau away from previous criticism about vague and overbroad CIDs issued under Cordray. And having done that, she opened the way again for new CIDs. In May, Kraninger denied several petitions to quash CIDs that had been languishing at the Bureau, allowing those investigations to move forward. More recently, on September 17, the Director denied a petition to quash a CID filed by one of the nation's largest banks regarding an investigation into its sales practices.

In addition to removing impediments to investigations, there has been a marked uptick in public enforcement actions under Kraninger. Consumer advocates criticized Acting Director Mulvaney for bringing only 11 enforcement actions during his one-year tenure. In contrast, in just three quarters of a year, Kraninger has announced almost twice that number. These enforcement cases cover a variety of markets, including small dollar lending, debt collection, credit reporting, student loan servicing, mortgage servicing, debt relief, remittance transfers, and bank deposits. Many of these cases were announced along with consent decrees, but Kraninger has shown a willingness to litigate in a handful of cases. And while the number of cases brought and the monetary relief obtained in many of these cases do not match the aggressive law enforcement under former Director Cordray, it easily exceeds the work done under Mulvaney. In sum, Kraninger has continued to navigate a middle ground as the Bureau's Sheriff.

Kraninger's Fine Line on CFPB Constitutionality Challenge

Kraninger deserves credit for how carefully she has steered the Bureau, avoiding the political ping-pong that plagued the Bureau in previous years. But more recently, Kraninger took a step that could end up shortening her term if Elizabeth Warren or another Democrat wins the 2020 presidential election. On September 17, Kraninger sent a letter to Congressional leaders explaining that she now believes the CFPB's single-director leadership structure is unconstitutional because the President can only remove the Director "for cause." The Bureau also joined with the Department of Justice in seeking Supreme Court review of a case, *Seila Law v. CFPB*, in which a California firm is challenging the "for cause" provision as unconstitutional. The Bureau now believes the President should be allowed to remove the Director without cause, or "at will."

Once again, Kraninger is attempting to find a middle ground. Kraninger told CFPB staff that this new position is actually *helpful to the Bureau's mission*, because a Supreme Court decision will provide closure on a constitutional question that has plagued the Bureau. She also told staff that a Supreme Court decision holding the for-cause removal provision unconstitutional should not affect the Bureau's ability to carry out its mission. In other words, the gamble is that the Supreme Court will hold that it can fix any constitutional defect by simply striking the "for cause" requirement and leaving everything else (such as its CID authority) intact. On September 18, the Bureau filed a letter in another case, *CFPB v. All American Check Cashing,* further explaining its position, arguing that the constitutional defect does not require the entire Consumer Financial Protection Act be struck down or the case dismissed because the for-cause provision is severable from the rest of the Act.

Kraninger appears to be walking an extremely fine line. The decision to not support the constitutionality of the Bureau's leadership structure could give a future president, say Elizabeth Warren, "cause" for Kraninger's removal. One could argue that the CFPB Director should support the Bureau completely, as Congress created it, and that not doing so is "neglect of duty." Alternatively, if the Supreme Court agrees that the Bureau's structure is unconstitutional and strikes the for-cause provision, the next president could remove Kraninger without cause. In other words, Kraninger's position puts her at risk of being removed by the next president regardless of how the Supreme Court rules on the constitutionality challenge.

The Impact of the 2020 Presidential Election

If the Supreme Court finds the for-cause provision unconstitutional, it seems clear that a new Democratic president would remove Kraninger and replace her with a new Director who will be more aggressive in pursuing the Bureau's mission. If the Supreme Court upholds the Bureau's leadership structure, however, will the new president seek to remove Kraninger for cause? While there is an argument for doing so based on Kraninger's latest position, this could be an uphill battle given Kraninger's steady leadership. Elizabeth Warren has been a staunch supporter of the Bureau's independence and, if elected President, could decide to leave Kraninger in place until her term expires, then appoint her own Director to a new five-year term. And in the meantime, Elizabeth Warren or another Democratic president could make significant leadership changes at the Federal Trade Commission, federal prudential regulators, and other agencies. Regardless of whether Kraninger stays or goes, the pendulum will swing again as it always does.

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