

# One Minute Memo®



## Win Some, Lose Some: Trump Gets a Loss and a Win in the Fight to Control the CFPB

By Renée B. Appel, Tonya M. Esposito and Esther Slater McDonald

**Seyfarth Synopsis:** One court upholds protection of Dodd-Frank limiting the President's removal authority, while another court stifles a challenge against Mulvaney serving as acting Director of CFPB.

Last week, the Trump Administration experienced mixed results in the ongoing litigation over the Consumer Financial Protection Bureau ("CFPB"). As we've mentioned in our [prior publications](#), there are several actions pending that involve the President's authority to control the CFPB. The first action discussed below, which had been languishing in the court for some time, raised the issue of whether the CFPB's structure as an independent agency is constitutional. The Trump Administration lost on this issue for the moment. In the second action, the Trump Administration dodged, at least temporarily, a challenge to President Trump's appointment of current CFPB Director Mick Mulvaney because the court determined that the plaintiff, a non-profit credit union, had no standing to bring its case.

On January 31, 2018, the United States Court of Appeals for the District of Columbia, sitting *en banc*, [ruled](#) that the CFPB's structure is constitutional by upholding Dodd-Frank's restriction that the Director of the CFPB can be removed by the President only for cause. The court reasoned that under Dodd-Frank, independence of the agency is persevered and that with Article II, the "President [still] retains 'ample authority to assure' that the official 'is competently performing his or her statutory responsibilities.'" This ruling is a blow to the Trump Administration's recent efforts to challenge the CFPB's structure on grounds that the director was unaccountable to the executive branch, and that he or she should be subject to removal for any reason and not only for inefficiency, neglect or wrongdoing.

In 2015, PHH Corporation challenged the CFPB's authority after the Bureau levied a \$109 million fine against the company for allegedly taking kickbacks for sending customers to mortgage insurers. In October 2016, a three-judge panel of the D.C. Circuit held that the Constitution requires the President to have authority to fire the director for any reason, prompting a rehearing before the full court. Given the Trump Administration's public criticism of the CFPB, the *en banc* ruling likely won't end the long-running dispute over the bureau. Instead, the case will likely head to the U.S. Supreme Court for the final ruling on this issue. Until then, this decision highlights that the CFPB was established as an *independent* agency, insulated from the control of the executive branch, and in this particular instance, that agency leadership is protected from at-will removal by the President.

Meanwhile, the Trump Administration had its second win over challenges to the President's authority to appoint the CFPB's acting director. On February 2, U.S. District Judge Paul Gardephe of the U.S. District Court for the Southern District of New York [dismissed](#) the Lower East Side People's Federal Credit Union lawsuit because the credit union lacked standing to sue.

While acknowledging that the credit union was not a “mere outsider” to the changing agency leadership, the court found that the credit union had not shown that Mulvaney’s appointment would adversely affect the credit union. According to the court, the credit union’s “speculation” that Mulvaney may withdraw existing CFPB rules or not enact long-expected CFPB rules “is not sufficient to establish an imminent injury” necessary for standing.

This ruling follows on another district court’s ruling last month that the President has authority to appoint the CFPB’s acting director. The district court rejected Deputy Director Leandra English’s claim to be the rightful acting director based on former Director Richard Cordray’s attempt to name her as his successor. English has already appealed this ruling and is on the track for an expedited review with initial briefing to be completed by March 6, and the credit union may appeal its dismissal as well.

As the fight for control of the CFPB continues, we will keep you apprised of the battles won and lost.

If you have any questions, please contact [Renée Appel](mailto:rappel@seyfarth.com) at [rappel@seyfarth.com](mailto:rappel@seyfarth.com), [Tonya Esposito](mailto:tesposito@seyfarth.com) at [tesposito@seyfarth.com](mailto:tesposito@seyfarth.com) or [Esther Slater McDonald](mailto:emcdonald@seyfarth.com) at [emcdonald@seyfarth.com](mailto:emcdonald@seyfarth.com).

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**Seyfarth Shaw LLP One Minute Memo®** | February 6, 2018

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