

One Minute Memo[®]



An SDNY Dilemma: CFPB Held Unconstitutional Over Director Removal Provision

By *Tonya Esposito, Esther Slater McDonald, and Jonathan Huie**

On June 21, 2018, in deciding a motion to dismiss a complaint brought the Consumer Financial Protection Bureau (“CFPB”) and the State of New York, Judge Loretta Preska of the U.S. District Court for the Southern District of New York held that the CFPB’s structure is unconstitutional.

Previously the D.C. Circuit, sitting *en banc* in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018), had held that Title X of the Dodd-Frank Act, which “established the CFPB as an ‘independent bureau’ within the Federal Reserve System,” was validly enacted. Judge Preska disagreed with the panel and adopted the minority view proposed by the dissent in that case. First, she accepted Judge Brett Kavanaugh’s conclusion that the CFPB was unconstitutionally structured because it is an “independent agency that exercises substantial executive power and is headed by a single Director.” Namely, Judge Kavanaugh took issue with the CFPB’s unchecked authority vested in a single director, where history, liberty, and presidential authority dictate otherwise.

Second, Judge Preska declined to adopt Judge Kavanaugh’s proposed remedy to strike the offending “for-cause removal provision” of the statute and to require the CFPB director be held accountable under the president. She instead subscribed to Judge Karen LeCraft Henderson’s suggested remedy to strike Title X entirely because the offending provision was at the “heart” of Title X and because a “severability clause ‘does not give the court power to amend’ a statute.”

Third, Judge Preska held that the CFPB’s unconstitutional structure could not be cured by agency action. The CFPB had argued that Director Mick Mulvaney’s ratification of the enforcement proceeding resolved the constitutional issues because the President may remove Mr. Mulvaney at will. But Judge Preska explained that whether Mr. Mulvaney ratified the CFPB’s actions has no bearing on whether the CFPB’s structure is constitutional. The Court acknowledged that while Mr. Mulvaney was subject to removal at will, his successor will still be subject to the same problematic “for-cause” removal provision.

Judge Preska found the CFPB lacked authority to sue the defendants because the agency’s “composition violates the Constitution’s separation of powers.” But, although she terminated the CFPB as a party, she held that the claims brought by the State of New York could proceed.

Seyfarth Shaw continues to monitor the developments involving the CFPB and will keep its readers apprised of updates. If you have any questions, please contact [Tonya Esposito](mailto:tesposito@seyfarth.com) at tesposito@seyfarth.com or [Esther Slater McDonald](mailto:Esther.Slater.McDonald@seyfarth.com) at emcdonald@seyfarth.com.

www.seyfarth.com

* Jonathan Huie is a Summer Fellow in Seyfarth Shaw’s Litigation Department.

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