

Daily Journal

www.dailyjournal.com

FRIDAY, OCTOBER 14, 2016

PERSPECTIVE

Checks & balances vs. the CFPB

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Earlier this week, the U.S. Court of Appeals for the D.C. Circuit struck down as unconstitutional a key provision of the highly partisan and controversial 2010 Dodd-Frank Act — legislation that was intended to overhaul the United States financial regulatory system. At issue was a provision designed to insulate the newly minted Consumer Financial Protection Bureau (CFPB) from political changes. To that end, the act handed the bureau's reins to a single director who could not be removed by the president without a showing of misfeasance. The D.C. Circuit, in *PHH Corp. v. Consumer Financial Protection Board*, struck that provision as a violation of the separation of powers.

The Court of Appeals' opinion is very significant in this day and age where the sheer number and reach of government bureaus, agencies, boards, commissions, corporations, etc. tends to inure us to the real impact those agencies have on our lives. The CFPB — with a staff exceeding 1,000 and funding of over \$600 million — is one of the nation's most powerful agencies. The bureau's primary purpose is to administer 18 federal consumer protection statutes with broad powers not previously available to similar agencies. Thus, in its first few years, the bureau radically restructured the mortgage market, placing new restrictions on credit cards, ATM services, auto lending and leasing, electronic funds transfers and student loans. The bureau is looking to adopt new rules for credit reporting, overdraft coverage, arbitration, debt collection and general-purpose reloadable

cards. The Dodd-Frank Act also gave the bureau broad authority to enforce its rules under vague standards of protecting consumers against "risk" and policing against "unfair," "deceptive" and "abusive" practices — terms that Congress left undefined. Thus, the bureau controls many aspects of the U.S. financial system, including the mortgage market, credit bureaus, education loans, overdraft policies, payday lenders and credit cards.

In ruling that the bureau's structure was unconstitutional, the court noted that the "massive power" wielded by agencies like the CFPB "pose[s] a significant threat to individual liberty" — even more so where there is no oversight or accountability. The risk of arbitrary governance is just too high. Indeed, the facts underlying *PHH Corp.* exemplify that risk. The CFPB sought \$109 million in fines for conduct that its predecessor agency, Housing and Urban Development, had expressly approved as legal for many years. Despite HUD's approval, the CFPB simply reversed position and then sought a nine-figure penalty based on its retroactive interpretation of certain financial regulations, arguing that its enforcement actions were not subject to any statute of limitations. The D.C. Circuit rejected this attempt to retroactively enforce changes in legal standards on the basic due process principle that the government may not impose penalties for conduct that the public was not reasonably apprised was illegal.

But reversing the fine was not enough. In order "to preserve individual liberty and ensure accountability," the court explained that any exercise of authority must be subject to the checks and balances of separate but co-equal branches

of government. The U.S. Constitution grants the legislative branch the power to pass laws, the executive branch the power to administer and enforce those laws, and the judicial branch the authority to adjudicate conflicts arising in connection with those laws. By establishing the CFPB as an independent agency headed by a single person who may only be removed "for cause," the Dodd-Frank Act delegated elements of each of those branches to the bureau's director, without any oversight.

The CFPB will continue to administer and enforce laws affecting the financial system, but will do so as an executive agency.

What's more, the act provided the director with more authority than any other officer in any of the three branches of the U.S. Government, other than the president, but even the president is ultimately accountable to the public every four years. The D.C. Circuit explained that such a "combination of power that is massive in scope, concentrated in a single person, and unaccountable to the President" simply cannot exist in our constitutional system.

The Court of Appeals' remedy for this violation was rather conservative. It did not eliminate the bureau. Instead, it simply struck the phrase "for cause" from the act, making the director accountable to the president and removable without cause. The CFPB will continue to administer and enforce laws affecting the financial system, but will do so as an executive agency, such as the Department of Justice and the Department of the Treas-

ury, under the supervision and direction of the president. That remedy, however, undermines the intention of insulating the CFPB from changes in the political environment and will likely renew calls for replacing the single director with a bipartisan, multi-member board. Of course, that solution begs the question whether multi-member boards can or should carry out executive functions without direct presidential supervision.

All of that is not to say that the court's remedy is not important. The role of administrative agencies is often a hot-button political issue. The president, insofar as he or she reflects the values of the voting public, should be able to change the course of an executive agency within the confines of the law. To allow one Congress to create unaccountable agencies designed to promote fixed ideologies without control or coordination by either president or Congress is contrary to the most basic underpinnings of our republic.

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