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### A Message from Jeffrey Chalmers:

"Could the CFPB be restructured...or dissolved? We'll see soon."

## Financial Services Committee Hears Arguments to "Restructure CFPB"

The House Financial Services Committee (FSC) held a hearing on Tuesday into the constitutionality of the structure of the Consumer Financial Protection Bureau (CFPB). The hearing arose in part from a pending case, *PHH Corp. v. CFPB*, in which that constitutionality is one of the principal issues. The DC District court recently ruled in **favor of PHH** but CFPB has been granted a rehearing. The Justice Department has opposed that action and has sided with PHH against the Bureau.

The committee's first witness was Theodore B. Olson Partner, Gibson, Dunn & Crutcher LLP and Former Solicitor General of the United States. Olson is also lead counsel for PHH in the pending suit. He said the creation, by the Dodd-Frank Act in 2010, of the CFPB "is the product of cherry-picking some of the most democratically unaccountable and power-centralizing features of the federal government's administrative agencies, and aggregating them into one massive and all-powerful body." That the Bureau is headed by a single, autonomous Director appointed by the President and confirmed by the Senate to a five-year term that may extend indefinitely until a successor is confirmed allows the Senate to prevent a president from appointing a new director and prohibits the President from removing the director except for cause. Olson maintains that Dodd-Frank violated this principle of the Separation of Powers when it created the CFPB.

The CFPB, he said, is an executive agency possessing far-reaching legislative, executive, and judicial powers that impact vast sectors of our economy. The Director has broad discretion to enforce 19 federal consumer protection laws, promulgate regulations, litigate in the name of the federal government, and punish private citizens-all without any accountability to the President, in whom the Constitution vests the executive power to "take Care that the Laws be faithfully executed." The Director's immense powers are perpetually funded outside the auspices of congressional oversight and appropriation. The Director also has **expansive** authority to hire, fire, and compensate CFPB employees, including discretion to waive the normal competitive-service requirements.

## National Average Mortgage Rates



	Rate	Change	Points
<b>Mortgage News Daily</b>			
30 Yr. Fixed	7.09%	+0.07	0.00
15 Yr. Fixed	6.56%	+0.03	0.00
30 Yr. FHA	6.62%	+0.07	0.00
30 Yr. Jumbo	7.35%	+0.04	0.00
5/1 ARM	7.30%	+0.06	0.00

### Freddie Mac

30 Yr. Fixed	7.02%	-0.42	0.00
15 Yr. Fixed	6.28%	-0.48	0.00

### Mortgage Bankers Assoc.

30 Yr. Fixed	7.08%	-0.10	0.63
15 Yr. Fixed	6.61%	+0.01	0.65
30 Yr. FHA	6.89%	-0.03	0.94
30 Yr. Jumbo	7.22%	-0.09	0.58
5/1 ARM	6.56%	-0.04	0.66

Rates as of: 5/17

## Recent Housing Data

		Value	Change
Mortgage Apps	May 15	198.1	+0.51%
Building Permits	Mar	1.46M	-3.95%
Housing Starts	Mar	1.32M	-13.15%
New Home Sales	Mar	693K	+4.68%
Pending Home Sales	Feb	75.6	+1.75%
Existing Home Sales	Feb	3.97M	-0.75%

The application of a for-cause **removal** provision to a single director, Olson said, differentiates the CFPB from almost every other independent agency. "And if the Director and the President, acting through an executive agency, disagree on the interpretation of federal consumer finance law, the Director's view controls. Thus, the CFPB's organic statute even purports to give the Director greater power than the President in the execution of federal consumer finance law."

He said the CFPB possesses other characteristics that further remove it from **presidential oversight**. For example, Dodd-Frank prohibits the President from exercising any authority to control the CFPB's communication with Congress, with respect to legislation or testimony. Not only is the Director unaccountable to the President, he is also unaccountable to Congress.

The ability to determine how money is spent is also an important check on federal agencies. However, Congress effectively **abdicated** this responsibility by allowing the CFPB to fund itself entirely outside the appropriations process. The Director is authorized to claim as much as 12% of the Federal Reserve System's assessed fees, a percentage which amounted to \$632 million in fiscal year 2016.

The agency's **structure** also insulates the President from political accountability. In the constitutional system envisioned by the Framers, the President is "directly dependent on the people, and since there is only one President, he is responsible."

The **second witness**, Saikrishna Bangalore Prakash, Professor of Law and Miller Center Senior Fellow at the University of Virginia, also took exception to any prohibition on a president removing executive officers from their position, basing his opinion also on Article II of the Constitution which "Establishes this general Proposition, That "The EXECUTIVE POWER shall be vested in a President of the United States of America . . . ", arguing that that power includes removal from office.

He says only in unusual instances is Congress authorized to **abridge** or **restrain** presidential powers. Though the Constitution grants the President the power to remove, it nowhere grants Congress power to retract or limit that authority. Another way of putting the point, Prakash says, is that the Constitution does not generally treat presidential powers as if they were modifiable by congressional decree. Rather the Constitution's grants to the Presidents are not defeasible by statute."

A **third witness** invited by the committee's Republican majority was Adam J. White of the Hoover Institution. White relied primarily on case law in his testimony which centered around the single-head structure of CFPB rather than a multi-member commission which is common to many independent agencies. In its recent and contested opinion in PHH Corp. v. CFPB: the DC court found, "The Director of the CFPB is the single most powerful official in the entire U.S. Government, other than the President. Indeed, within his jurisdiction, the Director of the CFPB can be considered even more powerful than the President. It is the Director's view of consumer protection law that prevails over all others. In essence, the Director is the President of Consumer Finance."

Under *Morrison v. Olson*, the courts found an officer can enjoy **statutory "independence"** from the President if and only if the officer enjoys only "limited jurisdiction and tenure and lack policymaking or significant administrative authority." However, the Dodd-Frank Act gave the CFPB Director statutory independence from the President, yet also vested the Director with an immense delegation of power to regulate and prosecute whatever he deems to be an "unfair, deceptive, or abusive act or practice."

White said, "This grant of independent power goes far beyond the lines that the Court drew around the independent counsel statute in *Morrison*, and thus should be struck down by the courts-or, better still, reformed by Congress."

In the PHH case the count also vindicated a fundamental principal of "independent" agencies, namely that such independence should be reserved only for "quasi-judicial and quasi legislative" bodies that exercise power through multi-member deliberation rather than through unilateral action.

By focusing on the structure and nature of independent commissions, the Court in *Humphrey's Executor* "**drew a sharp line** between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers, and those who are members of a body 'to exercise its judgment without the leave or hindrance of any other official or any department of the government.'" When a multi-member commission exercises its judgment, White said, it is exercising collective judgment, in a process that differs starkly from single-leader agencies. With multi-member commissions, decision and activity are replaced by deliberation; secrecy is replaced by transparency; dispatch is replaced by friction. Like congressmen or appellate judges, the members of a commission debate one another, challenging each other's positions and ultimately producing a collective judgment and perhaps dissenting opinions.

Brianne J. Gorod Chief Counsel, Constitutional Accountability Center and counsel in *PHH Corp. v. CFPB* to members of Congress involved in the passage of Dodd-Frank was the only witness invited by minority committee members. She called the CFPB's leadership structure consistent with the text and history of the Constitution and Supreme Court precedent.

In drafting the Constitution, the Framers gave Congress **considerable flexibility** in determining how to shape the federal government. The Supreme Court held over 80 years ago that Congress may choose to shield the heads of independent regulatory agencies from presidential removal at will and has repeatedly reaffirmed that principle, including six years ago in an opinion by Chief Justice John Roberts. She said, "In the process, the Court has explained that the question in assessing the constitutionality of a removal restriction is whether that restriction 'impedes the President's ability to perform his constitutional duty'." Here she says, it plainly does not because if the President determines, for instance, that the Director is "abusing [his] office," committing a "breach of faith," or "neglecting his duties or discharging them improperly," the President may hold the Director accountable by removing him.

Nor, she maintains, is there any constitutional prohibition on the CFPB being funded outside the congressional appropriations process. This is in factor common practices for federal financial regulatory agencies, and all but two are funded in that way. Further, the argument of CFPB opponents that its independent funding is prohibited by the Constitution's Appropriations Clause is irrelevant because the Bureau's funding does not involve paying money out of the Treasury. No other part of the Constitution prohibits Congress "from enacting funding structures for agencies that differ from the procedures prescribed by the ordinary appropriations process."

Finally, Gorod says, CFPB opponents argue that the CFPB's power is both **unprecedented** and **unlimited**. "This, too, is clearly wrong. In fact, the CFPB's powers resemble those of comparable financial regulatory agencies and are subject to the same restrictions, along with additional limits unique to the Bureau."

Olson puts forth some prescriptions for Congress to "remedy the constitutional problems of the CFPB." It must fundamentally change the structure of the agency to respect the separation of powers principles of the constitution. The Director must be made removable at will by the President and other provisions limiting the President's oversight authority must be eliminated.

While the Supreme Court has approved multi-member "independent agencies" while allowing restrictions on the President's removal power, "The Framers did not envision government by a multiplicity of "experts" removable only for cause."

Congress should also reassert its own oversight he says, giving it back the power of the purse. This oversight is an important democratic check, particularly if Congress eliminates the existing for-cause removal provision. Removing the disabilities placed on the President without shoring up Congress's authority could significantly change the balance of power between executive and legislative branches.

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**Jeffrey Chalmers**

