

CFPB on Collision Course with Trump's Justice Department

By John Heltman
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WASHINGTON — The political independence of the Consumer Financial Protection Bureau may end not with a bang — after a protracted battle in Congress — but with a whimper, the victim of a bureaucratic rule that prevents the agency from appealing a pending court case to the Supreme Court.

The D.C. Circuit ruled in October that the CFPB's single-director structure was incompatible with its status as an independent federal agency, finding that its leader would have to serve at the pleasure of the president to avoid violating the Constitution's separation of powers.

Although the CFPB is appealing that decision, its ultimate ability to overturn it may hinge on whether the Justice Department allows it to move the case forward. With President-elect Donald Trump due to take the reins of Justice in January, there are growing doubts that the CFPB can prevail.

"This is unprecedented, and there are a lot of people who are confused and I think a lot of speculation about what's going to happen," said Thaya Brook Knight, associate director of financial regulation studies at the Cato Institute.

At issue is Title X of the Dodd-Frank Act, which establishes the CFPB. It gives the agency explicit authority to pursue its own litigation up to and including the Circuit Court level. But when it comes to the Supreme Court, the law says the CFPB must first file a written request to the U.S. Attorney General within a specified timeframe and that the "Attorney General concurs with such request or fails to take action within 60 days of the request."

But Sen. Jeff Sessions, R-Ala., Trump's pick for attorney general, could conceivably withhold such concurrence. That would mean the Trump administration effectively blocks the CFPB's decision to appeal to the Supreme Court.

This leaves CFPB with relatively few scenarios to prevail in the PHH v CFPB case. The agency has requested an en banc rehearing of the matter before all sitting justices on the D.C Circuit, and if either that request for rehearing is denied or is granted and the panel upholds the earlier ruling, the Justice Department could prevent the CFPB from appealing the case further. While the Trump administration is not yet in office, one former Treasury official said a Trump-controlled department would stop the CFPB. "I assume that one of the first orders of business of a Trump Justice Department will be to end that appeal and effectively confess judgment, say 'Yes, it was unconstitutional,' and then fire [CFPB Director Richard] Cordray," the former Treasury official said. "I've never seen a case where the eagle was on both sides of the case. That would actually sort of be proof that the ruling was right, wouldn't it?"

But if the CFPB prevails en banc, it's a different story. In that case, presumably PHH would appeal to the Supreme Court, but the bureau would have the upper hand of defending a lower court's ruling rather than asking the court to overturn a lower court ruling. If the court does not grant certiorari, then the en banc ruling would stand.

And if the high court did grant cert and heard the case, Ohio State University law professor Peter Shane said, the court would likely assign an amicus defendant to stand in the government's place if it decides it does not want to defend its side of the case. Precisely such a scenario unfolded in 2013 with respect to the Defense of Marriage Act; the Obama administration opted not to defend certain aspects of the law before the Supreme Court, so the court invited Republican members of the House of Representatives to stand in as parties of standing in the government's place.

"The same thing really happened in the DOMA cases, where the Supreme Court allowed members of the House of Representatives who wanted to defend DOMA to do so," Shane said. "Perhaps congressional Democrats or other intervenors would ask for leave to defend the CFPB."

But Shane said that if the Justice Department were to decide not to allow CFPB to defend itself, that would represent something of a departure from tradition. Administrations tend to stick up for each other, even across partisan lines, he said.

"In normal times, one administration would be expected to defend in court the regulatory actions of a prior administration despite policy differences," Shane said. "What makes this case different is that the D.C. Circuit voided the CFPB action partly on constitutional grounds that the court did not even have to reach, but which gives the decision much broader implications. That complication makes it hard to predict how the next solicitor general would decide to proceed."

There are a number of ways that the PHH case could play out. Richard Horn, a former CFPB senior counsel, said the CFPB and PHH could still settle the case at any time, even in such a way that would vacate the lower court's ruling in exchange for, say, a generous reduction in the \$109 million penalty that spurred PHH's suit in the first place.

"The bureau might go to PHH and say, 'We're not going to pursue this case past the statute of limitations, that the panel decision ... so could we settle for a much lower number?' " Horn said. "And PHH could potentially agree to that settlement, and there would be no further opinions in this case."

Another variable in the equation is when Cordray will depart the agency. There is little doubt that he would not be reappointed by Trump, but his term does not expire until 2018. Trump could simply let the clock run out on his term or attempt to remove him sooner.

Aditya Bamzai, an associate professor of law at the University of Virginia, noted in a blog post in the Yale Journal on Regulation recently that the executive branch has its independent prerogative to determine whether a law is unconstitutional and doesn't have to wait for the courts to decide for the president.

President Thomas Jefferson did precisely that when he deemed the Alien and Sedition Acts unconstitutional in the early 19th century, and President Woodrow Wilson did the same in firing a postmaster in the early 20th century, he said. So Trump could conceivably decide that the CFPB's structure violates the Constitution and opt to fire Cordray soon after taking office. If he does, Cordray would have to vacate the office and either do nothing or sue to challenge the removal.

That raises another question, which is that if both the executive and judicial branches have independent rights to interpret the Constitution, what happens if those branches reach conflicting conclusions? Bamzai said that in such an event, the Supreme Court has the power to decide if a president's actions have violated the Constitution.

"In those situations where there's a conflict between the court and the president, the court does ultimately win out," Bamzai said. "They're able to say that the president's action was unlawful."

Bamzai said that a more likely scenario would be for Trump to fire Cordray, and Cordray to sue for wrongful termination — which would generate a separate suit. In such a case, it's possible that Cordray might not be able to seek reinstatement, but just seek back pay since his term isn't due to expire until 2018.

"There would be the possibility of a remedy, if the court finds the removal unlawful — it just would happen at a subsequent point in a personal lawsuit," Bamzai said. "This whole question of whether reinstatement is permissible has never been addressed in a Supreme Court case."