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D.C. Circuit Upholds Structure of the CFPB

January 31, 2018 | *Jeffrey M. Bayne*

On January 31, 2018, the D.C. Circuit, sitting *en banc*, upheld the law preventing the President from firing the Director of the Consumer Financial Protection Bureau (CFPB) without cause. This decision, which can be read at the link below, reversed a November 2016 holding by a three-judge panel that the independent directorship of the CFPB violated separation of powers. The lawsuit originated when CFPB brought an enforcement action against PHH Corporation, a mortgage and reinsurance company. PHH, in turn, sought to vacate the $109 million penalty against it by arguing that CFPB's very structure violates the Constitution.

Spiegel attorneys Katharine Mapes, Jessica Bell, and Jeffrey Bayne represented *amici curiae* Separation of Powers Scholars, asking that the *en banc* D.C. Circuit reverse the panel's decision and uphold the constitutionality of the CFPB's structure. The brief's signatories were a group of distinguished professors of administrative and constitutional law who are experts in separation of powers issues: Harold Bruff, Gillian Metzger, Peter Shane, Peter Strauss, and Paul Verkuil. This brief looked to the historical analysis of restrictions on Presidential removal power and urged the court not to second-guess the congressionally-designed structure.

The *en banc* D.C. Circuit agreed. The majority opinion noted that the Supreme Court previously held that it is constitutionally permissible for Congress to create independent agencies led by multiple commissioners removable only for cause, and the Court explained that there is nothing in the Constitution that prevents Congress from creating an independent agency led by a single leader removable only for cause. In fact, there is a long history of Congress affording some degree of independence to financial regulators. And because an independent CFPB does not impede the President's control over core executive functions, the Court held that Congress did not violate the separation of powers when it chose to have a single Director, removable only for cause, lead the agency.

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