

## Trump's Justice Department Works Both Sides of the CFPB

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The Trump administration's U.S. Justice Department is both simultaneously challenging and backing the Consumer Financial Protection Bureau, creating a litigation whirlwind as Republicans and business advocates push reforms that would strip some power from the Obama-era federal agency.

The cases, which present different legal issues, could end up before the justices next term in an unusual juxtaposition for the Justice Department's Office of Solicitor General. Both cases are high on the watch lists of business advocates, financial companies and consumer groups.

In March in a federal appeals court, the Justice Department opposed the consumer bureau in a crucial constitutional challenge to its single-director structure. The Justice Department's new stance, against the CFPB, was a switch from the government's position during the Obama administration. The next month, the Justice Department defended the bureau in a different case that is pending in the U.S. Supreme Court.

In the U.S. Court of Appeals for the D.C. Circuit, the Justice Department on March 17 filed an amicus brief in *PHH v. CFPB*, taking the position that the restriction on the president's power to remove the bureau's director, Richard Cordray, is unconstitutional. The case will be argued May 24 before the full D.C. Circuit. Gibson, Dunn & Crutcher's Theodore Olson is expected to argue for the mortgage lender PHH Corp.

The Supreme Court case also focuses on Cordray, but in a different way. The department on April 24 urged the justices not to review a challenge to Cordray's ratification of enforcement actions taken between his January 2012 recess appointment and his July 2013 Senate confirmation.

The pro-business Washington Legal Foundation brought the petition in *Gordon v. CFPB* in November. The justices will take their first look at the case—Chance Gordon, a lawyer, is the challenger—during their May 25 conference.

The U.S. Chamber of Commerce, in an amicus brief by Latham & Watkins partner Gregory Garre, contends Cordray filed nearly a dozen complaints in federal court and began numerous administrative proceedings during that period, resulting in fines, restitution and other payments totaling about \$400 million.

Those "unconstitutionally initiated enforcement actions," Garre wrote, underscore "the breadth of the power that Mr. Cordray invoked."

Washington Legal Foundation's Richard Samp is counsel to Gordon, a lawyer in California whom the CFPB accused of violating consumer protection laws. "I think this is a very fundamental question of separation of powers, an issue that has not been addressed by the court but should be," Samp said.

The CFPB sued Gordon in 2012, alleging violations of the Consumer Financial Protection Act and Regulation O, the mortgage assistance relief services rule. The agency alleged Gordon obtained millions of dollars from financially distressed homeowners through a scheme in which he charged illegal upfront fees for home loan modification services.

A federal district court held Gordon liable for \$11.4 million in disgorgement and restitution. A divided panel of the Ninth Circuit in April 2016 upheld the ruling, rejecting Gordon's argument that the bureau lacked standing because of Cordray's invalid recess appointment. The panel also held that Cordray's subsequent valid appointment and ratification of the suit "cured" any appointments clause issues.

In dissent, Judge Sandra Ikuta argued the consumer bureau lacked standing to sue Gordon because standing was dependent on Cordray's being validly appointed. Cordray's later ratification of his actions "could not retroactively cure the district court's lack of jurisdiction," Ikuta wrote.

In his Supreme Court petition, Samp makes two arguments. First, Cordray's status throughout the proceedings against Gordon was that of a private citizen and since no properly constituted federal official authorized the lawsuit, there was no federal court jurisdiction over it. Samp also argued that because neither Cordray nor anyone else associated with the CFPB possessed the legal capacity to authorize the suit when it was filed and litigated, an 1873 Supreme Court decision bars Cordray from ratifying it later.

Samp said the Ninth Circuit decision conflicts with other appellate rulings that require more than a "rubber stamp" ratification. He asked the justices to decide whether ratification can include not just the initial act, but, as in Gordon's case, federal court rulings entered in response to the act.

Relying on "ordinary agency law" principles, acting Solicitor General Jeffrey Wall counters that Cordray's ratification was effective because the bureau had the authority—at the time the suit was filed—to bring a case against Gordon. Although Cordray was not a properly designated agent at that time, according to the Justice Department, he later ratified those actions as the bureau's director.

Wall also argued that Cordray did not ratify anything other than actions taken on CFPB's behalf—not court rulings. And, he adds, there is no circuit conflict on the issue.

Besides the Chamber of Commerce, a supporting brief for Gordon has been filed by Irell & Manella's David Schwarz on behalf of the Cato Institute, and a brief by Anthony Caso of Chapman University Fowler School of Law on behalf of the Center for Constitutional Jurisprudence.