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Appeals Court Gives Rogue Agency A Stay Of Execution; The Supreme Court Should Pull The Switch

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2010 was a bad year for the Constitution. Not only did Congress saddle us with the misnamed Affordable Care Act, which has caused a legal war over its highly questionable constitutionality, but it also passed the Dodd-Frank Act, which created the Consumer Financial Protection Bureau (CFPB). The CFPB was the brainchild of Senator Elizabeth Warren (D-Mass) and her idea was to make it an independent agency – amazingly, unconstitutionally independent agency.

Consider, for example, the way CFPB is funded. Unlike every other federal regulatory agency, which gets its budget through congressional appropriation, CFPB gets its money directly from the Federal Reserve. That's a glaring constitutional problem because no federal money is supposed to be spent except as appropriated by Congress – the power of the purse is given to Congress alone.

In Federalist #58, James Madison wrote that the power over spending is, “The most complete and effectual weapon with which any constitution can arm the immediate representatives of the people.” It's a crucial part of our system of checks and balances between the branches of government. It promotes accountability.

But Dodd-Frank renounces the power of the purse by stipulating that the CFPB's director can tap into the Federal Reserve system for an amount up to 12 percent of that system's annual revenues, an amount exceeding \$600 million per year. That demand cannot be refused, but neither the Federal Reserve nor any other part of the federal government exercises any control over CFPB's spending and actions.

For example, CFPB decided that it needed a magnificent office in Washington, for which the price tag has reached \$215 million. Quoted in this [The Hill story](#) about it, Representative Jeb Hensarling said, “When they passed the Dodd-Frank Act, Democrats in Congress and the White House made CFPB unaccountable to taxpayers and to Congress.” That's exactly why CFPB Director Richard Cordray (who left office last year) was able to squander money with impunity.

There is also the matter of accountability within the Executive branch. Unlike other agency leaders, who serve at the pleasure of the president, the director of the CFPB can only be removed by the president “for inefficiency, neglect of duty, or malfeasance in office.” That so narrows the grounds for removal from office that the director is further insulated from accountability.

Moreover, the director is empowered to unilaterally enforce federal consumer protection statutes, deciding what rules to issue and what penalties to impose. (As the Competitive Enterprise Institute has shown, the CFPB's rules do consumers much more harm than good – see, e.g., [this piece](#).)

The CFPB is virtually a branch of government unto itself. It's the very opposite of the kind of limited and accountable government the Founders envisioned.

A case challenging the constitutionality of the CFPB has reached the D.C. Circuit Court of Appeals, *PHH Corporation v. CFPB*. PHH, a mortgage company, was victimized by Director Cordray when he overruled an administrative law judge, reinterpreted longstanding precedent, and imposed a huge fine on the company retroactively.

The case was heard by a three-judge panel of the D.C. Circuit. In October of 2016, the court, in an opinion by Judge Kavanaugh, held that CFPB had violated the plaintiff's due process rights and, far more importantly, that the very structure of the CFPB was unconstitutional.

A good outcome, but remember that five years ago Senator Harry Reid moved mountains to stack the D.C. Circuit with judges who would be amenable to the expansive ideas about federal power that "progressives" rely on. (If you've forgotten, read [this piece](#) by Ross Kaminsky on *The Federalist*.) After the panel's decision, CFPB sought and got *en banc* review of the case – nine judges, not three.

In its amicus brief to the court en banc, Cato Institute nailed the problem with the CFPB exactly: "an agency that operates without the constitutional checks required by the separation of powers is apt to violate the due process rights of those it regulates. The constitutional issues in this case are systemic, baked into the very structure of the CFPB, and are likely to recur in other cases."

In other words, unless the CFPB is excised like a malignant tumor, it will keep on behaving in the high-handed, supra-legal manner it did regarding PHH.

And here's an even scarier thought. If CFPB is constitutional, we might find Congress and/or the executive branch creating more rogue agencies like it. If the judiciary doesn't stand up for the rule of law now, we face a very slippery slope.

In spite of Cato's earnest argumentation (and other *amici*), the result en banc was just what the progressives hoped for. The decision repudiated the CFPB on the due process arguments, but *upheld its constitutionality*.

In the court's opinion, there is no constitutional problem with the CFPB. The majority's handiwork reminds one of Chief Justice Roberts' handiwork to save Obamacare in *NFIB v. Sebelius*. As the *Wall Street Journal's* editorial put it, "The majority bobs and weaves like a gardener dodging thorny bushes to find the CFPB constitutional." Like the Obamacare case, the politically desired decision came first, followed by the rationalizations to justify it.

So the CFPB survives for now, but PHH can and should seek review by the Supreme Court. Given the extremely important separation of powers issues, there is every reason to believe that the Court would take the case.

In his tremendous 2014 book, *Is Administrative Law Unlawful?* Columbia University law professor Philip Hamburger argued that our garden variety of administrative law exemplified by the SEC, NLRB, FCC and other agencies is incompatible with the Constitution's vision of divided and accountable government.

If he is right, it follows *a fortiori* that the CFPB is unconstitutional. Let us hope the Supreme Court arrives at that conclusion.