

The CFPB'S unconstitutional power grab

Recently, the U.S. Court of Appeals for the D.C. Circuit — often referred to as the country's second highest court — concluded that the Consumer Financial Protection Bureau (CFPB) was unconstitutional. In *PHH Corporation v. CFPB*, the D.C. Circuit explained that the unbridled authority possessed by the CFPB's Director coupled with the "enormous power" the CFPB Director has "over American business, American consumers, and the overall U.S. economy" violated the Constitution.

The D.C. Circuit first emphasized the critical importance to our constitutional system of separation of powers — that is, the placement of executive power in a different but co-ordinate branch of government from legislative power and judicial power. The Court noted the separation and diffusion of these powers was intended to and actually does help safeguard and preserve individual liberty against arbitrary government interference. The Court next emphasized the additional safeguard the Constitution provided against the unfettered exercise of executive power: "the Framers ... lodged full responsibility for executive power in the President of the United States, who is elected by and accountable to the people." This liberty-supporting feature of a unitary executive — that all executive power be exercised by an accountable President or



From the Desk of ...

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by subordinate officers under his control — is why the U.S. Supreme Court long recognized the constitutional right of the President to supervise, control and terminate at-will heads of executive agencies.

The CFPB has a single director who is only terminable for cause and therefore independent of the President. The D.C. Circuit acknowledged that, in very limited circumstances, the U.S. Supreme Court has interpreted the Constitution to allow so-called independent agencies, agencies whose leaders are not terminable at-will by the President. However, analyzing the history of such agencies, the D.C. Circuit concluded that this limited exception only applies to agencies headed by a commission or committee of multiple members. The D.C. Circuit explained that multiple leaders "act as checks on each other" and

thus this structure "reduces the risk of arbitrary decision making and abuse of power." This check essentially substitutes for the normal Presidential check on agency power. But the CFPB is different. It would have been the first "independent agency exercising substantial executive authority . . . headed by a single person." The D.C. Circuit understood this puts far too much power and discretion over an incredibly broad section of the economy in the hands of one unelected and unaccountable director.

The D.C. Circuit did not strike down the CFPB as a whole. Instead, the Circuit Court simply invalidated the portions of the statute that limited the termination of the CFPB Director to "for cause" justifications. Moving forward, the President may terminate the Director at will. Otherwise, the CFPB may keep operating as usual as to future events. But the D.C. Circuit left perhaps the most interesting question unanswered: whether the regulations, enforcement actions and other pronouncements made by the CFPB when it was structured unconstitutionally are valid or unenforceable. For an answer to that question, we will all have to await the next case.

Leslie Rutledge is the 56th Attorney General of Arkansas. Elected on Nov. 4, 2014, she is the first woman and first Republican in Arkansas history to be elected to the office. ❖