

# PUBLICATION

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## New York Federal Judge Rules CFPB's Structure Unconstitutional

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Senior United States District Judge for the Southern District of New York, Loretta A. Preska, issued an opinion on June 21, 2018, that has set the consumer finance world atwitter, sparking discussions of a potential review by the United States Supreme Court. In her opinion, Judge Preska, a 1992 George H.W. Bush appointee, ruled that the structure of the Consumer Finance Protection Bureau ("CFPB" or the "Bureau") violates the U.S. Constitution's separation of powers and, as such, terminated the Bureau's status as a party to a lawsuit. She went on to say that she would strike an entire section of the 2010 Dodd-Frank Act relating to the establishment of the CFPB, rather than overhauling it, as other judges have suggested.

The lawsuit, filed by the Bureau and the People of the State of New York, alleged that a New Jersey company had defrauded former NFL players suffering from brain injuries and 9/11 emergency medical workers anticipating money from large settlements to the tune of millions, thereby violating provisions of the Consumer Financial Protection Act (CFPA). One can't ask for more sympathetic plaintiffs, right? The defendants moved to dismiss the action on several bases, including the assertion that the CFPB is not structured in compliance with the U.S. Constitution and thus lacks authority to bring claims under the CFPA.

Though Preska denied the crux of defendants' motion, allowing the claims of the State of New York to stand, she wrote that "because the CFPB's structure is unconstitutional, it lacks the authority to bring claims under the CFPA and is hereby *terminated as a party to this action*" (emphasis added). BOOM! She reasoned that the fact that the Bureau was set up as a completely independent agency, with a single director who cannot be fired by the president (except for cause), places it squarely outside the confines of constitutional fitness. In the decision, Judge Preska acknowledged the en banc holding of the Court of Appeals for the District of Columbia Circuit in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018), which reversed a lower court ruling and held that the CFPA statute was indeed constitutionally sound. However, in a statement demonstrating a bit of judicial sass, Preska wrote, "Of course, that decision is not binding on this Court."

Instead, Judge Preska largely adopted the findings of Judge Kavanaugh's dissent in *PHH*, asserting that, "based on considerations of history, liberty, and presidential authority, Judge Kavanaugh concluded that the CFPB 'is unconstitutionally structured because it is an independent agency that exercises substantial executive power and is headed by a single director.'" She parted ways with Judge Kavanaugh, however, when it came to the overall constitutional health of the CFPA. Kavanaugh asserted that the remedy to the problem was to completely overhaul the CFPA. Preska, conversely, claimed that she "would strike Title X in its entirety," a step that would require the shuttering of the Bureau altogether. She went on to say that the constitutional issues relative to the CFPB's structure are not cured by President Trump's appointment of Mick Mulvaney as Interim Director because, as defendants so accurately pointed out, "the relevant portions of the Dodd-Frank Act that render the CFPB's structure unconstitutional remain intact." Even the President's appointment on June 18, 2018 of Kathleen Kraninger as Director (an action that was not acknowledged in the opinion) doesn't remedy the problem, as Ms. Kraninger's position is still subject to the unconstitutional "for cause" provision of Dodd-Frank.

Because the Court let the claims of the State stand, there is no "final" ruling from which the CFPB can currently appeal. In order to obtain a review of Judge Preska's decision, the Bureau would thus have to obtain leave to appeal ... from the very judge who terminated its status as a party to the action. Because of the difference of opinion between Circuits on this issue, however, this is most certainly not the last we'll hear on the constitutionality of the CFPB's structure. There are rumors in the consumer financial services community that this issue will end up before the U.S. Supreme Court for a final determination of the CFPB's constitutionality and perhaps even that of Dodd-Frank Section X, as a whole.

Stay tuned. This is going to get interesting.