Gorsuch, CFPB And Future of The Administrative State
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U.S. Supreme Court nominee Judge Neil Gorsuch would have an outsized influence on federal consumer protection enforcement if he is confirmed. In particular, if PHH v. Consumer Financial Protection Bureau is appealed to the Supreme Court, a Justice Gorsuch is likely to vote to strongly curtail the independence of the Consumer Financial Protection Bureau and limit its enforcement powers. More generally, he will be a skeptic of agency action, one who will support greater judicial review of agency actions.

PHH v. CFPB

The Consumer Financial Protection Bureau faces an existential threat from PHH v. CFPB. PHH, a mortgage company, was the subject of a Real Estate Settlement Procedures Act enforcement action by the CFPB. After the CFPB ordered PHH to pay $109 million, PHH petitioned the United States Court of Appeals of Appeals for the District of Columbia Circuit for review. In a wide-ranging opinion, Judge Brett Kavanaugh, joined by Judge A. Raymond Randolph, held that the structure of the CFPB was unconstitutional (Judge Karen Henderson, the third member of the panel, did not join in this part of the opinion). Judge Kavanaugh’s opinion also rejected the CFPB’s interpretation of RESPA as well as its retroactive application. The CFPB has sought en banc review from the D.C. Circuit. If the en banc petition is granted and the panel’s decision is reversed, there is no doubt that PHH will appeal the decision to the Supreme Court.

The rationale for Judge Kavanaugh’s opinion is based on what he describes as a threat to individual liberty that the CFPB’s structure poses. Unlike nearly all other independent agencies whose leaders can only be removed for cause, the CFPB has a single director at its helm instead of a multimember commission. Judge Kavanaugh writes that, “[b]ecause of their massive power
and the absence of Presidential supervision and direction, independent agencies pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances.” Kavanaugh finds that multiple commissioners act as a check on each other’s power, while a lone agency director will have as much unchecked authority in his or her domain as the president has throughout the executive branch. The agency director’s unchecked power, according to Kavanaugh, has a “greater risk of arbitrary decisionmaking and abuse of power” than the checked power of commissioners.

In Humphrey’s Executor v. United States, the Supreme Court held that Congress could create independent agencies, where agency heads are only removable by the president for cause. Kavanaugh asks whether the rationale of Humphrey’s Executor, developed with a multimember commission in mind, extends to the CFPB’s single-director structure as well. Judge Kavanaugh’s analysis of the separation of powers issue focuses heavily on “history and tradition.” Finding only three more examples of independent agencies headed by single directors, none of which have “deep historical roots,” Kavanaugh concludes that the single-director structure is a violation of the separation of powers contemplated in the Constitution. The court’s remedy for this “gross departure from settled historical practice” is to sever the “for-cause” provision from the statute, thereby giving the president the power to remove the CFPB director at will. This converts the CFPB from an independent agency to a more typical executive agency that is directly accountable to the president. The result that Kavanaugh reaches is not based on the text of the Constitution nor on a close reading of precedent. Rather it reflects a broader jurisprudential understanding of how
separation of powers principles should shape the modern administrative state. While I will not provide a thorough critique of this view, I do note that this near-requirement for “deep historical roots” sets a high bar for Congress to jump over as it seeks to regulate the administrative state. I will also note that Kavanaugh provides no support for the claim that a single director would act more arbitrarily and would be more likely to abuse power than a commission. While this may be true, it is the type of assertion that would seem to call for substantial support, particularly in a judicial opinion that is more than a hundred pages long.

As far as the statutory claim is concerned, Kavanaugh appeared a bit skeptical of the CFPB’s claim that its interpretation of the statute was entitled to Chevron deference (meaning that courts should defer to reasonable agency interpretations of federal laws that the agency administers). But because he found that the CFPB’s interpretation of RESPA was inconsistent with the statute’s plain language, his Chevron analysis could stop there. He also found that the CFPB director’s retroactive interpretation of the statute violated the Fifth Amendment because it “contravenes the bedrock due process principle that the people should have fair notice of what conduct is prohibited.”

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Gorsuch and the CFPB

Judge Gorsuch has not had much to say about the regulation of consumer finance directly, but has had lots to say about separation of powers and the appropriate scope of agency action. His record indicates that he will be skeptical of an expansive CFPB.

Gorsuch echoes Kavanaugh in his Gutierrez-Brizuela v. Lynch concurrence (a case reviewing a Board of Immigration Appeals order). He writes that the separation of powers must be strictly maintained in order to “guard against governmental encroachment on the people’s liberties . . .”9 Gorsuch appears to believe that Chevron’s purpose and effect are “at odds with the separation of legislative and executive functions . . ..”10 At the end of his Gutierrez-Brizuela concurrence, he imagines a world without Chevron and predicts that the federal government could be run just as efficiently as it does with Chevron. This skepticism for Chevron deference will find allies among the conservative justices sitting on the Supreme Court.

Again, like Kavanaugh, Gorsuch is very skeptical of the retroactive application of an agency’s interpretation of a statute. In De Niz Robles v. Lynch (another review of a BIA order), he identifies some of the “ill effects” of retroactivity: “upsetting settled expectations with a new rule of general applicability, penalizing persons for past conduct, doing so with a full view of the winners and losers . . .”11 These opinions all point to agreement with Kavanaugh’s reasoning in PHH.
Adventures in Wonderland

More telling about Gorsuch’s approach to administrative law issues is the picture of the federal government that he sketches in his opinions. His opinion in *Caring Hearts Personal Home Services v. Burwell* (reviewing a Centers for Medicare & Medicaid Services reimbursement denial), describes a federal bureaucracy that has too much in common with the Court of Hearts in *Alice’s Adventures in Wonderland*, ruled over by its bewildering king and bothersome queen.¹² *Caring Hearts* opens,

Executive agencies today are permitted not only to enforce legislation but to revise and reshape it through the exercise of so-called “delegated” legislative authority. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984). The number of formal rules these agencies have issued thanks to their delegated legislative authority has grown so exuberantly it’s hard to keep up. The Code of Federal Regulations now clocks in at over 175,000 pages. And no one seems sure how many more hundreds of thousands (or maybe millions) of pages of less formal or “sub-regulatory” policy manuals, directives, and the like might be found floating around these days. For some, all this delegated legislative activity by the executive branch raises interesting questions about the separation of powers.¹³

Gorsuch notes that this state of affairs “raises troubling questions about due process and fair notice — questions like whether and how people can be fairly expected to keep pace with and conform their conduct to all this churning and changing ‘law.’”¹⁴ He adds:

This case has taken us to a strange world where the government itself — the very “expert” agency responsible for promulgating the “law” no less — seems unable to keep pace with its own frenetic lawmaking. A world Madison worried about long ago, a world in which the laws are “so voluminous they cannot be read” and constitutional norms of due process, fair notice, and even the separation of powers seem very much at stake.¹⁵

The “strange world” of *Caring Hearts* evokes the topsy-turvy trial at the end of *Alice’s Adventures in Wonderland*. The trial is adjudicated by the king who wears his crown over his judge’s wig. The heartless king makes up rules on the spot, much to Alice’s dismay. It is one thing though for Alice to be benighted by the procedures in the Court of Hearts. It is quite
another for a federal judge to be left bemused by the operations of the modern federal
bureaucracy, notwithstanding its voluminous laws, rules and policies. One would hope that a
Supreme Court justice could figure out a way to make sense of it all.

Gorsuch describes a federal bureaucracy that is out of control, just way too big. It is comforting
that Gorsuch identifies and seeks to remedy some of the contradictions that many citizens find
themselves caught up in when interacting with the federal government. But it is disturbing that
Gorsuch offers no path of escape from the regulatory Wonderland he describes so dramatically.
The federal government, with its budget measured in the trillions of dollars, is and will remain
massive. Congress will continue to pass more and more laws. Administrative agencies will
continue to promulgate regulations mandated by those laws.

If Gorsuch’s diagnosis is that the federal government is too big to operate rationally, his
prescriptions offer no more than temporary relief for the few who make it to federal court. And
there is, of course, no going back to a simpler time. The world is a lot more complicated than it
was in the 1930s when Humphrey’s Executor was decided, let alone than in the 1780s when
James Madison was drafting the Constitution. Today’s citizens live and do business across the
globe, with its gross world product of $75 trillion. Navigating the federal bureaucracy is just one
small part of the work of today’s Americans. And yet somehow they figure out how to navigate
the world well enough, notwithstanding its immensity and complexity. Do we really have to
throw up our hands when it comes to the voluminous edicts of the federal government?
The Future of the Administrative State

In the cases discussed above, Kavanaugh and Gorsuch both rely on “history and tradition” to put the judicial stamp of approval on the early administrative state. This is something of a paradox because that same line of reasoning would have led the 1930s Supreme Court to reject the holding in Humphrey’s Executor because it reflected newfangled ideas about how government should operate in the modern era. This heavy reliance on past practices does not provide much guidance on how the modern administrative state should be allowed to operate.

If Gorsuch is confirmed, there is no doubt that his will be a skeptical voice regarding the reach of the modern administrative state. This is not to say that he will be the swing vote on this issue. But his views will have a far-reaching impact on how the federal bureaucracy operates in general. And if he hears an appeal from PHH v. CFPB, he will likely be sympathetic to PHH’s positions, both in terms of the unconstitutionality of the CFPB’s structure and in terms of the reach of its enforcement powers. There is no reason to expect that a Supreme Court with a Justice Gorsuch on it will cry out, “Off with their heads!” to the CFPB and other agencies, like the Queen of Hearts is wont to do. But there is good reason to expect that it will dramatically limit how agencies go about their business.

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1. 839 F.3d 1 (D.C. Cir. 2016).
2. Id. at 6.
3. Id. at 8.
5. 839 F.3d at 7.
6. Id. at 18.
7. Id. at 8.
8. Id. at 46.
9. 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, concurring).
10. Id. at 1154.
11 803 F.3d 1165, 1176 (10th Cir. 2015).
12 824 F.3d 968 (10th Cir. 2016).
13 Id. at 969.
14 Id.
15 Id. at 976.