

## Constitutional Challenges to Dodd-Frank

By Sarah Maneval, J.D. Candidate 2019 | February 15, 2017

In 2016, the United States Courts of Appeals for the 10<sup>th</sup> Circuit and the D.C. Circuit declared provisions of the Dodd-Frank Act (Dodd-Frank) to be unconstitutional. Despite these holdings, financial regulation remains intact, at least for the moment.

In *Bandimere v. SEC*, the 10<sup>th</sup> Circuit Court of Appeals ruled that the administrative law judges (ALJs), selected through an internal administrative process, were not constitutionally appointed. Under the Appointments Clause of the U.S. Constitution, the President is responsible to nominate principal officers with the consent and advice of the Senate and to appoint inferior officers without consulting the legislature. The court held that, as the ALJs carry out “[important functions](#),” they constitute inferior officers, not merely employees, and must be appointed by the President, a court of law, or a department head.

The ruling in *Bandimere* raised the question of whether the entire ALJ system is at risk, which could affect many agencies and over one thousand judges. In his dissenting opinion, Judge Monroe McKay wrote that the holding “[effectively rendered invalid thousands of administrative actions](#).”

Similarly, the U.S. Court of Appeals for the District of Columbia Circuit, in *PHH Corp. v. CFPB*, held that the Consumer Finance Protection Bureau (CFPB) is unconstitutionally structured because the President is only permitted to remove the director for-cause. In this case, the court rejected a mortgage lender’s argument that this provision rendered the CFPB entirely unconstitutional. Instead, the court chose a minimal remedy, severing the for-cause based on the reasoning that Congress would likely “have preferred what is left of its statute to no statute at all.” Additionally, while the court vacated CFPB’s order on other grounds, the plurality specified that the constitutional ruling “[will not halt the CFPB’s ongoing operations or the CFPB’s ability to uphold the \\$109 million order against PHH](#).”

While the agency in *Bandimere* has appealed to the U.S. Supreme Court, many question whether an unconstitutional ruling will have any effect on Dodd-Frank requirements or the financial regulatory agencies. In *PHH Corp.*, the court ruled narrowly to avoid overturning or preventing the work of the CFPB. This is an example of how constitutional rulings could pose considerable practical problems, as such requiring “[dismantling vast apparatus of the government](#)” and how the judiciary, even at the highest level, is often resistant to such consequences.

President Trump, Congress, and the new leaders recently appointed to head federal agencies have indicated their intention to repeal or scale-back Dodd-Frank requirements, revoke regulations, and curtail other agency actions. Thus, while the courts may make grand declarations about the constitutionality of financial regulations, it appears that the major, programmatic changes will not stem from judicial decisions.