



D.C. Circuit Upholds as Constitutional the Structure of the CFPB – Part II

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As discussed in [Part I](#) of this two-part Sidebar, the en banc U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued a decision last week upholding the structural design of the Consumer Financial Protection Bureau (CFPB). The court ruled in *PHH Corp. v. CFPB* that the features of independence granted to the agency in the Dodd Frank Act, including a provision that limits the circumstances in which the President can remove the CFPB Director, do not violate Article II’s vestment of executive power in the President. While Part I discusses the court’s majority opinion, this part examines several of the separate opinions from *PHH* that take a different view of the constitutional issues at stake in the case. The Sidebar then concludes with some considerations for Congress, including the potential impact of the decision for the independence of federal agencies and the possibility of Supreme Court review of the en banc ruling.

The lengthy *PHH* decision included several separate opinions that departed significantly from the majority’s approach and could be a preview of how the Supreme Court could evaluate the underlying constitutional issue on appeal.

Concurring Opinions

Judge Thomas B. Griffith, for example, [concurred](#) in the judgment only, hinging his ultimate conclusion that the removal restrictions for the CFPB Director were constitutional on a different interpretation of the removal restrictions than his colleagues. While the panel majority appeared to assume that the “for-cause” removal restrictions for the CFPB Director did limit the President’s power to remove the Director, Judge Griffith questioned that assumption. Specifically, he interpreted the statutory removal grounds for the CFPB Director – for inefficiency, neglect of duty, or malfeasance in office – to impose only a “minimal restriction on the President’s removal power,” permitting the removal of the Director even for “ineffective policy choices.” For Judge Griffith, executive branch officers are inefficient when they “fail[] to produce or accomplish the agency’s ends,” as interpreted by the President within the terms set by Congress. Because the statute authorizes removal of the CFPB Director on what the concurrence viewed to be fairly broad grounds, he reasoned that the statute does not unduly intrude on the President’s ability to execute the law. As a practical matter, while Judge Griffith’s opinion agreed with the panel majority’s final judgment, the logic of his reasoning seems to arrive at a result similar to that of Judge Brett Kavanaugh’s

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dissent (discussed below). Whereas Judge Kavanaugh would have severed the removal restrictions for the CFPB Director, allowing the President to remove the Director for any reason whatsoever, Judge Griffith would have left the agency structure intact, but approve the President's discretion to remove the CFPB Director for nearly as wide a range of reasons as Judge Kavanaugh's remedy would have allowed.

In another concurring opinion, Judge Robert L. Wilkins also [concurred](#) with the majority, but offered another reason why he thought the CFPB's structure was constitutional. In his view, cases like *Humphrey's Executor* teach that officials who exercise quasi-legislative or quasi-adjudicative functions may be shielded from removal at will without violating Article II. For Judge Wilkins, adjudications must be insulated from political pressure in order to ensure a fair hearing for private citizens to comport with the Constitution's due process requirements. Because the CFPB Director's role in the proceedings below was largely adjudicative, Judge Wilkins concluded that for-cause removal restrictions were appropriate and did not intrude on the President's authority under Article II. Judge Wilkins also registered his disagreement with Judge Griffith's conclusion that "inefficiency," for purposes of the Director's removal protections, "is properly construed to allow removal for mere policy disagreements."

Dissenting Opinions

Judge Kavanaugh [wrote](#) a dissenting opinion, reiterating his belief – expressed in his earlier [panel opinion](#) – that the CFPB's structure violates Article II's vestment of executive power in the President. For Judge Kavanaugh, *Myers* establishes the general rule that the President is vested with authority to remove executive branch officers, subject only to certain exceptions established in *Humphrey's Executor* and its progeny.

Judge Kavanaugh focused on three primary factors that undergirded his conclusion that an independent agency with a single director is unconstitutional. First, he emphasized the novelty of the CFPB's structure – most independent agencies are headed by multiple members, rather than a single director. In Judge Kavanaugh's view, this departure from historical practice indicated a potentially serious constitutional defect. Importantly, Judge Kavanaugh's conclusions about the novelty of the CFPB departed from the majority's understanding of historical practice. For the majority panel, the CFPB's structure was hardly unique as the [Comptroller of the Currency](#) – another financial regulator – is also headed by a single person who is "insulated from removal." Judge Kavanaugh, however, considered the Comptroller of the Currency to be removable by the President at will, quite unlike the CFPB Director. The second factor informing Judge Kavanaugh's conclusion was that the concentration of power in a single, unaccountable Director poses a serious threat to liberty. While other independent agency heads may have removal protections, the dissent argued that their multi-member structure demands consensus and acts as a check on the whims of an independent, individual agency head. Third, Judge Kavanaugh argued, removal protections for a single-Director agency head diminishes the President's Article II power to control the executive branch beyond what has been judicially approved for multi-member independent agencies. According to the dissent, in multi-member commissions with statutory removal protections, the President usually may appoint and remove the chair of the agency, ensuring some influence over the agency's direction; with the CFPB, however, the President may not alter the head of the agency until the end of the five-year term, which means, at least in some cases, a President might not ever be permitted to align the agency with his own policy goals.

Judge Karen L. Henderson also dissented. Similar to Judge Kavanaugh, she reasoned that restrictions on the President's removal power are the exception, not the rule, and the CFPB's structure did not match the exceptions that the Supreme Court previously approved. For Judge Henderson, the CFPB is quite unlike the FTC approved in *Humphrey's Executor*: the CFPB's funding stands outside the appropriations process; and the agency is not headed by a non-partisan body of experts. Likewise, in contrast with Judge Wilkins' opinion, although certain agencies formed to adjudicate claims [may have for-cause removal restrictions](#), the CFPB is not primarily an adjudicatory entity and therefore cannot be afforded with removal protections. Finally, Judge Henderson distinguished *Morrison*, reasoning that removal

restrictions [may be appropriate](#) for government officers with fairly limited jurisdiction and power, but Congress has bestowed immense power on the CFPB that far outstrips an Independent Counsel. While Judge Kavanaugh's proposed remedy for the constitutional infirmity of the Dodd-Frank Act was to sever the provision shielding the CFPB Director from removal, Judge Henderson would have severed all of Title X of Dodd Frank because she thought Congress would not have created the CFPB in the first place if it did not have independence from the President.

Potential Considerations for Congress

Whether the court's en banc decision will stand as the final outcome in the litigation is uncertain. As noted in Part I of the Sidebar, while the en banc court reversed the earlier panel opinion's constitutional ruling regarding the structure of the CFPB, it reinstated that panel's opinion with respect to its interpretation of the [Real Estate Settlement Procedures Act](#) (RESPA) and its application to PHH. By doing so, the en banc opinion overturned the CFPB order against PHH. In other words, PHH is the prevailing party with respect to its challenge on statutory grounds of the CFPB's enforcement action. It can be [difficult](#) for prevailing parties to obtain Supreme Court review of a judgment in their favor; absent compelling policy reasons to do so, the Court tends to preserve its resources to reviewing cases wherein a party appeals a judgment rendered against them. Likewise, while the government is the losing party with respect to the underlying statutory issue, it is unclear whether either the CFPB or the President seeks to contest the court's reading of RESPA, as the initial enforcement action occurred under the prior administration and a different CFPB director. Complicating matters further, the Justice Department [considers](#) the CFPB's structure to violate the Constitution, so it may not defend that aspect of the law if the Supreme Court were to grant certiorari.

Nonetheless, the *PHH* decision involves significant constitutional issues that go to the core of the separation of powers and Congress's authority to structure independent agencies which in and of itself [may](#) warrant Supreme Court review. Were the Court to review the case, no matter its ruling, the implications for the separation of powers would likely be substantial. The majority's opinion, viewed together with Judge Wilkins' concurrence, might represent a functional read of Congress's ability to structure agencies with independence from the President, wherein Congress has the flexibility to do so as long as the basic features of agency independence previously upheld by the Supreme Court are followed. In contrast, Judge Henderson and Kavanaugh's opinions apply a much more formalist approach to agency independence; for them, the few exceptions to the President's baseline power to remove executive branch officers at will must be interpreted strictly. That said, Judge Griffith's perspective adds another layer to a long unresolved legal question – on what grounds may the President remove an agency head with statutory for-cause removal protection? Were the Supreme Court to adopt Judge Griffith's course, it would preserve the statutory structure of the CFPB created by Congress, but mark a crucial development in the efficacy of statutory features of independence that Congress has long imposed on the President. Because of the potential import of these legal questions, stay tuned for further developments regarding the status of independent agencies.

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