



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

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The entire U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued a potentially important [decision](#) on January 31, upholding the structural design of the Consumer Financial Protection Bureau (CFPB). The en banc court held by a vote of 7-3 that the agency’s various statutory elements of independence, including a provision that limited the President’s authority to remove the CFPB Director, do not infringe upon the President’s powers under [Article II](#) of the Constitution. The decision, [PHH Corp. v. CFPB](#), comes after a previous (but since [vacated](#)) three-judge panel [decision](#) held that providing removal protections to the sole director of the CFPB violated the Constitution. Although the en banc court rejected the earlier panel’s constitutional reasoning, the D.C. Circuit nonetheless reinstated the previous decision’s statutory holding, which had invalidated the CFPB’s interpretation of the [Real Estate Settlement Procedures Act](#) of 1974 (RESPA). The D.C. Circuit’s latest decision therefore effectively rejected the CFPB enforcement action that gave rise to the case, but reaffirmed, and may expand, what is likely Congress’s chief tool for ensuring agency independence: the use of “[for-cause](#)” removal protections. This two-part Sidebar series begins with a brief summary of the Supreme Court’s views of the President’s removal power before addressing the [PHH](#) litigation and the en banc majority opinion. [Part II](#) of this series will address some of the separate opinions issued in the case and then highlight certain implications for Congress.

## The Removal Power

Although not explicitly provided for in the Constitution, the President’s authority to remove subordinate executive branch officials has been viewed as central to his ability to carry out his Article II powers. The scope of the removal power, and Congress’s authority to restrict the power through statute in order to insulate an agency from presidential influence, has been the subject of several, seemingly conflicting Supreme Court opinions in which the Court has sought to balance the competing interests of independence and accountability. In the 1926 decision of [Myers v. United States](#), the Court invalidated a law that prohibited the President from removing certain executive officials without the consent of the Senate. The [Myers](#) opinion adopted a strong conception of the removal power, holding that the Constitution conferred it “exclusive[ly]” to the President. However, the Court significantly limited the breadth of [Myers](#) in a series of subsequent opinions beginning in 1935 with [Humphrey’s Executor v. United States](#). In those cases, the Court held that Congress could either explicitly or implicitly limit the President’s authority to remove members of independent agencies engaged in “quasi-judicial or quasi-

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legislative” functions by requiring that such officials may only be removed for “inefficiency, neglect of duty, or malfeasance in office.” The use of “for-cause” removal protections to insulate an agency official from the President’s control was again upheld in 1998 in *Morrison v. Olson*, but this time as applied to the Independent Counsel, a single independent official rather than a member of an independent commission. In addition, in addressing when Congress may utilize for-cause restrictions, the *Morrison* decision appears to have moved the Court away from the “quasi-judicial or quasi-legislative” standard used in *Humphrey’s Executor* and toward a standard more focused on whether the law impeded the President’s ability to “perform his constitutional duty.” In its latest removal case from 2010, *Free Enterprise Fund v. Public Company Oversight Board*, the Court gave new life to the President’s removal power by invalidating an “unusual” scheme that had protected certain executive officials with dual-layers of for-cause restrictions on the grounds that it “impaired” the President’s “ability to execute the laws...by holding his subordinates accountable for their conduct....”

### The *PHH* Litigation

[Previous Sidebars](#) have discussed the facts and background of the *PHH* case. In short, the case arose after PHH, a mortgage lender subject to a CFPB enforcement action, challenged the CFPB’s enforcement actions against the lender on both statutory and constitutional grounds. The constitutional issue focused on several [provisions](#) of the Dodd Frank Wall Street Reform and Consumer Protection Act (Dodd Frank Act) that established a CFPB Director with a fixed five-year term accompanied by “for-cause” removal protections. The removal protections mirror those that were upheld in *Humphrey’s Executor*—namely that the President may only remove the Director “for inefficiency, neglect of duty, or malfeasance in office.” However, PHH argued that the CFPB design diverged from previously upheld removal protections because, among other things, it provided for-cause protections to (1) a “sole director” of an independent agency who (2) wields significant unilateral regulatory and enforcement powers and (3) is also protected by other structural features of independence, such as an independent funding stream.

In the fall of 2016, a [panel opinion](#) of the D.C. Circuit written by Judge Brett Kavanaugh vacated the CFPB order, concluding both that the CFPB’s decision was inconsistent with RESPA and that endowing the CFPB Director with for-cause removal protections violated the separation of powers by creating an unchecked and unaccountable executive official that was not subject to adequate supervision by the President. With regard to the constitutional issue, the 2016 opinion distinguished *Humphrey’s Executor*, arguing that unlike the removal protections at issue in that case, which concerned an independent multi-member commission, affording those same protections to a unitary director unconstrained by fellow board members was contrary to the principles of executive accountability that are central to presidential power. The opinion also argued that the CFPB structure was a “gross departure from settled historical practice” because, in Judge Kavanaugh’s view, “[u]ntil this point in U.S. history, independent agencies exercising substantial executive authority have all been multi-member commissions or boards.” In order to remedy the violation, the opinion invalidated the for-cause protections, thereby making the Director removable by the President at will. That opinion, however, was [vacated](#), when the full D.C. Circuit agreed to hear the appeal en banc.

The en banc majority [opinion](#) adopted a different perspective than the earlier panel decision. Whereas the panel opinion viewed the CFPB as an unconstitutional anomaly, the en banc majority viewed (1) the agency as “neither distinctive nor novel” and (2) the removal protections provided to the Director as consistent with existing precedent and historical practice. In assessing the validity of the CFPB’s structure and independence, the opinion centered on two questions, asking: (1) whether the “means” of creating the CFPB’s independence—centrally the for-cause removal protections for the CFPB Director—are permissible; and (2) whether the agency’s “functions” are of the nature or type that Congress may employ for-cause protections without infringing on the President’s Article II powers.

### The Means of Independence

The majority [opinion](#) found the Director's for-cause removal protections to be "fully within the bounds of [] precedent and history," describing the protections as "wholly ordinary" and a "consistently approved" means for Congress to shield the CFPB from presidential control. Indeed, the court suggested that PHH's argument to the contrary "flies in the face of the Supreme Court's removal power cases." In support of this conclusion, the court relied on *Humphrey's* and *Morrison* as establishing a general rule that "for-cause" removal restrictions are a permissible tool by which Congress can provide an agency with independence. Even *Free Enterprise Fund* was no departure from the Court's general approach, the opinion argued, because it permitted the more "standard" single layer of for-cause protections for members of the Securities Exchange Commission (SEC) to remain in place. The en banc court noted that it is only when Congress has attempted to reserve a role for itself in the removal of an official like in *Myers*, or where the law has made it "abnormally difficult for the President to oversee an executive officer" like in *Free Enterprise Fund* that the Supreme Court has invalidated a removal provision. The CFPB provision did neither, and therefore could not, under a standard established in *Morrison*, be viewed in the majority's opinion as "imped[ing] the President's ability to perform his constitutional duty."

The en banc majority also viewed the distinction between providing for-cause protections to a sole agency head, as opposed to a member of a board or commission, to be "irrelevant," "untenable," and with "no footing in precedent, historical practice, constitutional principle, or the logic of presidential removal power." If the concern was the President's ability to direct and supervise his subordinates in order to hold them accountable for their execution of the law, the majority opinion reasoned that the CFPB's single director framework, by consolidating all power in a particular individual, actually afforded the President "more efficient control" over the agency than he would have asserted over a multi-member board. "Now," the court stated, "if the President finds consumer protection enforcement to be lacking or unlawful, he knows exactly where to turn." Moreover, the court asserted that a conclusion that Congress may not provide a sole agency director with for-cause removal protections would be in direct tension with *Morrison*, which explicitly approved such a provision for an entity headed by one person.

### **The Functions of the Agency**

While the court [determined](#) that ordinary for-cause removal protections are a permissible means of providing an agency with independence, it also noted that "it is beyond question that there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role." For example, the court noted that "nobody would suggest" that Congress could impose for-cause removal protections upon cabinet officials such as the Secretary of State or Secretary of Defense. Therefore, the court had to consider whether the CFPB performed the type of executive functions that could be insulated from presidential control without impermissibly infringing on the President's ability to supervise subordinate officials and oversee the faithful execution of the laws. Viewing the CFPB's functions as mainly focused on financial regulation, the court determined that the agency could be categorized as part of a long line of financial regulatory agencies that enjoyed the benefit of limitations on political influence and which the court viewed as "exemplars of appropriate and necessary independence," such as the FTC, the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Federal Housing Finance Authority, the Office of Comptroller of the Currency, and the SEC. The opinion noted that the independence of financial regulators "is so well established by tradition and precedent that courts have assumed these agencies' heads have removal protections even in the absence of clear statutory text so directing." As a result, the en banc majority concluded that "like other independent federal financial regulators designed to protect the public interest . . . the CFPB is without constitutional defect."

Additional concurring and dissenting opinions in *PHH*, as well as some considerations for Congress, will be discussed in Part II of this Sidebar.

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