United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 24, 2017 Decided January 31, 2018

No. 15-1177

PHH CORPORATION, ET AL.,
PETITIONERS

v.

CONSUMER FINANCIAL PROTECTION BUREAU,
RESPONDENT

Opinion of the Court filed by *Circuit Judge* PILLARD:

Introduction

The 2008 financial crisis destabilized the economy and left millions of Americans economically devastated. Congress studied the causes of the recession to craft solutions; it determined that the financial services industry had pushed consumers into unsustainable forms of debt and that federal regulators had failed to prevent mounting risks to the economy, in part because those regulators were overly responsive to the industry they purported to police. Congress saw a need for an agency to help restore public confidence in markets: a regulator attentive to individuals and families. So it established the Consumer Financial Protection Bureau.

Congress's solution was not so much to write new consumer protection laws, but to collect under one roof existing statutes and regulations and to give them a chance to work. Congress determined that, to prevent problems that had handicapped past regulators, the new agency needed a degree of independence. Congress gave the CFPB a single Director protected against removal by the President without cause. That design choice is challenged here as an unconstitutional impediment to the President's power.

To analyze the constitutionality of the CFPB's independence, we ask two questions:

First, is the means of independence permissible? …

Second, does "the nature of the function that Congress vested in" the agency call for that means of independence? …

Background

The 2008 financial crisis cost millions of Americans their jobs, savings, and homes. The federal commission that Congress and the President chartered to investigate the recession found that, by 2011, "[a]bout four million families have lost their homes to foreclosure and another four and a half million have slipped into the foreclosure process or are seriously behind on their mortgage payments." All told, "[n]early $11 trillion in household wealth has vanished, with retirement accounts and life savings swept away." Id. In Congress's view, the 2008 crash represented a failure of consumer protection. The housing bubble "was precipitated by the proliferation of poorly underwritten mortgages with abusive terms," issued "with little or no regard for a borrower's understanding of the terms of, or their ability to repay, the loans." Federal bank regulators had given short shrift to consumer protection as they focused (unsuccessfully) on the "safety and soundness" of the financial system and, post-crisis, on the survival of the biggest financial firms. Congress concluded that this "failure by the Prudential regulators to give sufficient consideration to consumer protection . . . helped bring the financial system down."

Congress responded to the crisis by including in the Dodd-Frank Wall Street Reform and Consumer Protection Act a new regulator: the Consumer Financial Protection Bureau. Congress gave the new agency a focused mandate to improve transparency and competitiveness in the market for consumer financial products, consolidating authorities to protect household finance that had been previously scattered among separate agencies in order to end the "fragmentation of the current system" and "thereby ensur[e] accountability." …

To lead this new agency, Congress provided for a single Director to be appointed by the President and confirmed by the Senate. Congress designed an agency with a single Director, rather than a multi-member body, to imbue the agency with the requisite initiative and decisiveness to do the job of monitoring and restraining abusive or excessively risky practices in the fast-changing world of consumer finance. A single Director would also help the new agency become operational promptly, as it might have taken many years to confirm a full quorum of a multi-member body.

The Director serves a five-year term, with the potential of a holdover period pending confirmation of a successor. The President may remove the Director "for inefficiency, neglect of duty, or malfeasance in office," i.e., for cause. By providing the Director with a fixed term and for-cause protection, Congress sought to promote stability and confidence in the country's financial system.

Congress also determined "that the assurance of adequate funding, independent of the Congressional appropriations process, is absolutely essential to the independent operations of any financial regulator." Congress has provided similar independence to other financial regulators, like the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the National Credit Union Administration, and the Federal Housing Finance Agency, which all have complete, uncapped budgetary autonomy. Congress authorized the CFPB to draw from a statutorily capped pool of funds in the Federal Reserve System rather than to charge industry fees or seek annual appropriations from Congress as do some other regulators. The Federal Reserve is required to transfer "the amount determined by the Director [of the CFPB] to be reasonably necessary to carry out the authorities of the Bureau," up to twelve percent of the Federal Reserve's total operating expenses. If the Bureau requires funds beyond that capped allotment, it must seek them through congressional appropriation. …

On January 29, 2014, the CFPB filed a Notice of Charges against PHH, a large mortgage lender, and its captive reinsurer, Atrium. The CFPB alleged that "[t]he premiums ceded by [mortgage insurers] to PHH through Atrium: (a) were not for services actually furnished or performed, or (b) grossly exceeded the value of any such services," and that the premiums were instead "made in consideration of PHH's continued referral of mortgage insurance business."

The CFPB borrowed an administrative law judge (ALJ) from the Securities and Exchange Commission (SEC) to adjudicate the charges. The ALJ issued a Recommended Decision concluding that PHH and Atrium violated the Real Estate Settlement Procedures Act of 1974 (RESPA) because they had not demonstrated that the reinsurance premiums Atrium collected from insurers were reasonably related to the value of its reinsurance services. The ALJ recommended that the Director order disgorgement of about $6.4 million.

On review of the ALJ's recommendation, the CFPB Director read RESPA to support a broader finding of misconduct and a substantially larger remedy. The Director held that a payment is "bona fide" and thus permitted (…) only if it is "solely for the service actually being provided on its own merits," and not "tied in any way to a referral of business." Thus, even if the reinsurance premiums had been reasonably related to the value of the reinsurance services that Atrium provided, PHH and Atrium could still be liable under the Director's reading of RESPA insofar as their tying arrangement funneled valuable business to Atrium that it would not have garnered through open competition. …

This court stayed the Director's order pending review. In October 2016, a three-judge panel vacated the Director's decision and remanded for further proceedings. 839 F.3d 1, 10 (D.C. Cir. 2016). A divided panel's majority held that providing for-cause protection to the sole director of an independent agency violates the Constitution's separation of powers.

Precedent and History Establish the Constitutionality of the CFPB

The Court has consistently upheld ordinary for-cause removal restrictions like the one at issue here, while invalidating only provisions that either give Congress some role in the removal decision or otherwise make it abnormally difficult for the President to oversee an executive officer.

In the first modern removal-power decision, *Myers v. United States*, the Court held that Congress could not condition presidential removal of certain postmasters on the Senate's advice and consent, explaining that the President has "the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate." 272 U.S. at 106. Without interpreting the Take Care Clause as such, the Court in *Myers* appeared to assume the Clause dictated illimitable removal power in the President. PHH deploys that conception of illimitable removal power against the CFPB.

But the Supreme Court since *Myers* has cabined that decision's apparent reach, recognizing the constitutionality of some measure of independence for agencies with certain kinds of functions. The Court in *Morrison*, *Wiener*, and *Humphrey's Executor* explicitly and repeatedly upheld for-cause removal restrictions in a range of contexts where the Constitution tolerates a degree of independence from presidential control. The Court's latest removal-power decision, *Free Enterprise Fund*, applied the same analysis developed in those cases to strike an especially onerous set of removal restraints. …

The Court's removal-power doctrine supports Congress's application of a modest removal restriction to the CFPB, a financial regulator akin to the independent FTC in *Humphrey's Executor* and the independent SEC in *Free Enterprise Fund*, with a sole head like the office of independent counsel in *Morrison*.

It was only nine years after *Myers*, in *Humphrey's Executor*, that the Court unanimously upheld a provision of the Federal Trade Commission Act protecting FTC Commissioners from removal except for "inefficiency, neglect of duty, or malfeasance in office." *Humphrey's Executor* explained that *Myers* was limited; it required only that the President be able to remove purely executive officers without congressional involvement. By contrast, where administrators of "quasi legislative or quasi judicial agencies" are concerned, the Constitution does not require that the President have "illimitable power" of removal. The *Humphrey's Executor* Court drew guidance from the founding era, when James Madison (otherwise a strong proponent of the removal power) argued that an official who "partakes strongly of the judicial character . . . should not hold . . . office at the pleasure of the Executive branch of the Government." 5 The Writings of James Madison 413 (Hunt ed., 1904. Because Congress may require quasi-legislative and quasi-judicial administrators "to act in discharge of their duties independently of executive control," it may "forbid their removal except for cause" during a fixed term in office.

(…)

The for-cause protection shielding the CFPB's sole Director is fully compatible with the President's constitutional authority.

Congress validly decided that the CFPB needed a measure of independence and chose a constitutionally acceptable means to protect it. First, the removal restriction here is wholly ordinary—the verbatim protection approved by the Supreme Court back in 1935 in *Humphrey's Executor* and reaffirmed ever since. The provision here neither adds layers of protection nor arrogates to Congress any role in removing an errant official. Second, the CFPB Director's autonomy is consistente with a longstanding tradition of independence for financial regulators, and squarely supported by established precedent. The CFPB's budgetary independence, too, is traditional among financial regulators, including in combination with typical removal constraints. PHH's constitutional challenge flies in the face of the Supreme Court's removal-power cases, and calls into question the structure of a host of independent agencies that make up the fabric of the administrative state.

There is nothing constitutionally suspect about the CFPB's leadership structure. *Morrison* and *Humphrey's Executor* stand in the way of any holding to the contrary. And there is no reason to assume an agency headed by an individual will be less responsive to presidential supervision than one headed by a group. It is surely more difficult to fire and replace several people than one. And, if anything, the Bureau's consolidation of regulatory authority that had been shared among many separate independent agencies allows the President more efficiently to oversee the faithful execution of consumer protection laws. Decisional responsibility is clear now that there is one, publicly identifiable face of the CFPB who stands to account—to the President, the Congress, and the people— for all its consumer protection actions. The fact that the Director stands alone atop the agency means he cannot avoid scrutiny through finger-pointing, buck-passing, or sheer anonymity. What is more, in choosing a replacement, the President is unhampered by partisan balance or ex-officio requirements; the successor replaces the agency's leadership wholesale. Nothing about the CFPB stands out to give us pause that it—distinct from other financial regulators or independent agencies more generally—is constitutionally defective.

1. For-Cause Removal

Applying the Court's precedents to this case, we begin by observing that the CFPB Director is protected by the very same standard, in the very same words – "inefficiency, neglect of duty, or malfeasance in office" – as the Supreme Court sustained in *Humphrey's Executor*. (…) CFPB's for-cause protection is therefore unlike any removal restriction that the Court has ever invalidated as impermissibly restricting executive authority. In every case reviewing a congressional decision to afford an agency ordinary for-cause protection, the Court has sustained Congress's

decision, reflecting the settled role that independent agencies have historically played in our government's structure.

In analyzing where Congress may deploy such for-cause protection, the Supreme Court looks to "the character of the office" and the "proper functioning of the agency or official." As seen through that lens, the CFPB's function is remarkably similar to that of the FTC, a consumer protection agency that has operated for more than a century with the identical for-cause protection, approved by a unanimous Supreme Court.

(…)

2. Budgetary Independence

Congress's commitment to independence for financial regulators is also reflected in the CFPB's budgetary set-up. PHH and some of its amici protest Congress's choice to allow the CFPB to claim funds from the Federal Reserve rather than through the congressional appropriations process. …

The CFPB's independent funding source has no constitutionally salient effect on the President's power. The Supreme Court has recently dismissed issues including "who controls the agency's budget requests and funding" as "bureaucratic minutiae"—questions of institutional design outside the ambit of the separation-of-powers inquiry. The fact that "the director need not ask the President for help negotiating appropriations from Congress" is neither distinctive nor impermissible. Just as financial regulators ordinarily are independent of the congressional appropriations process, so, too, they typically are exempt from presidential budgetary oversight. That ensures the measure of permissible independence instituted by for cause protection is not effectively eroded by virtue of budgetary dependence on the President. The requirement that the CFPB seek congressional approval for funding beyond the statutory cap makes it more constrained in this regard than other financial regulators.

PHH suggests that, even if budgetary independence and for-cause removal protection are not separately unconstitutional, their combination might be. But that combination is not novel. And, in any event, for two unproblematic structural features to become problematic in combination, they would have to affect the same constitutional concern and amplify each other in a constitutionally relevant way. (…) The CFPB's budgetary independence primarily affects Congress, which has the power of the purse; it does not intensify any effect on the President of the removal constraint.

(…)

3. Multi-Member vs. Single Director

We are nevertheless urged that the constitutionality of for cause removal turns on a single feature of the agency's design: whether it is led by an individual or a group. But this line of attack finds no home in constitutional law….

PHH's emphasis on the CFPB's leadership by a Director rather than a board defies historical practice as well. The Comptroller of the Currency, for example—an independent federal financial regulator with statutory removal protection dating back 150 years—is also headed by a single director, insulated from removal. Historical practice of independent agencies, including the earliest examples of independent financial regulators which operated under single heads, suffices to place the CFPB on solid footing.

Fundamentally, Congress's choice—whether an agency should be led by an individual or a group—is not constitutionally scripted and has not played any role in the Court's removal-power doctrine. As discussed above, the cases focus on "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty," *Morrison*, 487 U.S. at 691, or, put otherwise, whether the President's "ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired," *Free Enterprise Fund*, 561 U.S. at 496. Preserving lines of accountability within the executive branch ensures that the public can "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." The Federalist No. 70, at 476 (Alexander Hamilton) (J. Cooke ed. 1961). On this measure, the constitutionality of the CFPB's structure is unaffected by the fact that it is led by a single Director.

As a practical matter, considering the impact on presidential power, the line of accountability at the CFPB is at least as clear to the observing public as at multi-headed independent agencies, and the President's control over the CFPB Director is at least as direct.

PHH has not identified any reason to think that a single-director independent agency is any less responsive than one led by multiple commissioners or board members. If anything, the President's for-cause removal prerogative may allow more efficient control over a solo head than a multi-member directorate. Consider the case of *Humphrey's Executor*. There, President Roosevelt attempted to remove an FTC Commissioner based on policy disagreements. Of course, the Supreme Court put a stop to the President's effort to sway the agency, upholding the Commissioner's removal protection. But had the Court not so held, perhaps that would not have been the last of the personnel changes at the FTC. Removal of just one Commissioner by the President might not have had any substantial effect on the multi-member body's direction, which he so strongly disfavored. The President might have had to remove multiple Commissioners in order to change the agency's course.

By contrast, the CFPB Director's line of accountability to the President is clear and direct. Before Congress established the Bureau, multiple agencies—most of them independent— had jurisdiction over consumer financial protection, and that dispersion hampered executive ability to diagnose and respond to problems. The creation of the CFPB, with the centralization of previously scattered powers under common leadership, enhanced public accountability and simplified the President's ability to communicate policy preferences and detect failings. Now, if the President finds consumer protection enforcement to be lacking or unlawful, he knows exactly where to turn. If the offending conduct is rooted in the Director's failure to carry out the prescribed work of the agency, the President can remove the Director for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c). The President need only remove and replace a single officer in order to transform the entire CFPB and the execution of the consumer protection laws it enforces. Thus, just as the Framers "consciously decid[ed] to vest Executive authority in one person rather than several" so as to "focus, rather than to spread" responsibility and thereby "facilitat[e] accountability" to the people, *Clinton v. Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring), Congress's creation of an independent agency led by a single Director would appear to facilitate the agency's accountability to the President.

(…)

The Supreme Court's removal-power decisions have, for more than eighty years, upheld ordinary for-cause protections of the heads of independent agencies, including financial regulators. That precedent leaves to the legislative process, not the courts, the choice whether to subject the Bureau's leadership to at-will presidential removal. Congress's decision to provide the CFPB Director a degree of insulation reflects its permissible judgment that civil regulation of consumer financial protection should be kept one step removed from political winds and presidential will. We have no warrant here to invalidate such a time-tested course. No relevant consideration gives us reason to doubt the constitutionality of the independent CFPB's single-member structure. Congress made constitutionally permissible institutional design choices for the CFPB with which courts should hesitate to interfere. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). The petition for review is granted in part and denied in part, and the case is remanded to the agency for further proceedings.

GRIFFITH, *Circuit Judge* concurring in the judgement:

…For-cause removal protections are generally considered the defining feature of independent agencies. See *Free Enterprise Fund*, 561 U.S. at 483.3 But not all removal protections are created equal. Here, the President may remove the CFPB Director for "inefficiency, neglect of duty, or malfeasance in office." Until we know

what these causes for removal mean and how difficult they are to satisfy, we cannot determine whether the CFPB's novel structural features unconstitutionally impede the President in his faithful execution of the laws. (…) [I]f it is the Director's removal protection that prompts our examination of the CFPB's constitutionality, we must necessarily ask: How much does this removal protection actually constrain the President? If the Director is only marginally more difficult to remove than an at-will officer, then it is hard to imagine how the single-Director structure of the CFPB could impermissibly interfere with the President's supervision of the Executive Branch.

(…)

The INM standard provides a broad basis for removing the CFPB Director, but what steps must the President take to effect such a removal? It appears well-settled that an officer with removal protection is entitled to notice and some form of a hearing before removal. Although the Supreme Court has not defined the precise contours of this process, there is little reason to think it would impose an onerous burden on the President. Afterwards, removal would be permissible if the President determined that the CFPB Director had been ineffective or incapable of "producing the desired effect." Because removing an officer for "inefficiency" is a removal for cause, the President should identify what the Director did that was inefficient. In other words, the President should identify the action taken by the Director that constitutes the cause for which he is being removed. Then the President must simply offer a reasoned, non-pretextual explanation of how those actions were inefficient.

In practical effect, my approach yields a result somewhat similar to Judge Kavanaugh's proposed remedy. He would sever the for-cause provision from the CFPB's authorizing statute, making the Director removable at will. My interpretation of the INM standard would not disturb Congress's design of the CFPB, but it would allow the President to remove the Director based on policy decisions that amounted to inefficiency. In addition, my analysis of the INM standard would likely have broader implications. For example, the definition of "inefficiency" presented here would presumably apply to other independent agencies protected by the INM standard. And while I conclude here that the INM standard is a permissible restriction on the President's ability to remove the CFPB Director, other removal standards—particularly those lacking the "inefficiency" ground—may not be defensible under *Humphrey's Executor* and *Morrison*.

KAVANAUGH, *Circuit Judge*, with whom *Senior Circuit Judge* RANDOLPH joins, dissenting:

This is a case about executive power and individual liberty.

To prevent tyranny and protect individual liberty, the Framers of the Constitution separated the legislative, executive, and judicial powers of the new national government. To further safeguard liberty, the Framers insisted upon accountability for the exercise of executive power. The Framers lodged full responsibility for the executive power in a President of the United States, who is elected by and accountable to the people. The first 15 words of Article I speak with unmistakable clarity about who controls the executive power: “The executive Power shall be vested in a President of the United States of America.” U.S. CONST. art. II, § 1. And Article II assigns the President alone the authority and responsibility to “take Care that the Laws be faithfully executed.” Id. § 3. The purpose “of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom.” *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting).

… [I]ndependent agencies exercise executive power by bringing enforcement actions against private citizens. Those agencies often promulgate legally binding regulations pursuant to statutes enacted by Congress, and they adjudicate disputes involving private parties. So those agencies exercise executive, quasi-legislative, and quasi-judicial power.

The independent agencies collectively constitute, in effect, a headless fourth branch of the U.S. Government. They hold enormous power over the economic and social life of the United States. Because 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.

To mitigate the risk to individual liberty, the independent agencies historically have been headed by multiple commissioners or board members. In the Supreme Court’s words, each independent agency has traditionally been established as a “body of experts appointed by law and informed by experience.” *Humphrey’s Executor*, 295 U.S. at 624. Multi-member independent agencies do not concentrate all power in one unaccountable individual, but instead divide and disperse power across multiple commissioners or board members. The multi-member structure thereby reduces the risk of arbitrary decisionmaking and abuse of power, and helps protect individual liberty.

In other words, the heads of executive agencies are accountable to and checked by the President; and the heads of independent agencies, although not accountable to or checked by the President, are at least accountable to and checked by their fellow commissioners or board members. No independent agency exercising substantial executive authority has ever been headed by a single person.

Until now.

… The Director of the CFPB wields enormous power over American businesses, American consumers, and the overall U.S. economy. The Director unilaterally implements and enforces 19 federal consumer protection statutes, covering everything from home finance to student loans to credit cards to banking practices.

The Director alone may decide what rules to issue. The Director alone may decide how to enforce, when to enforce, and against whom to enforce the law. The Director alone may decide whether an individual or entity has violated the law. The Director alone may decide what sanctions and penalties to impose on violators of the law.

Because the CFPB is an independent agency headed by a single Director and not by a multi-member commission, the Director of the CFPB possesses more unilateral authority –- that is, authority to take action on one's own, subject to no check –- than any single commissioner or board member in any other independent agency in the U.S. Government. Indeed, other than the President, the Director enjoys more unilateral authority than any other official in any of the three branches of the U.S. Government.

That combination –- power that is massive in scope, concentrated in a single person, and unaccountable to the President –- triggers the important constitutional question at issue in this case.

(...)

Because the Director acts alone and without Presidential supervision or direction, and because the CFPB wields broad authority over the U.S. economy, the Director enjoys significantly more unilateral power than any single member of any other independent agency. By 'unilateral power,' I mean power that is not checked by the President or by other commissioners or board members. Indeed, other than the President, the Director of the CFPB is the single most powerful official in the entire U.S. Government, at least when measured in terms of unilateral power. That is not an overstatement. What about the Speaker of the House? The Speaker can pass legislation only if 218 Members agree. The Senate Majority Leader? The Leader typically needs 60 Senators to invoke cloture, and needs a majority of Senators (usually 51 Senators or 50 plus the Vice President) to approve a law or nomination. The Chief Justice? The Chief Justice must obtain four other Justices' votes in order to prevail. The Chair of the Federal Reserve? The Chair often needs the approval of a majority of the Federal Reserve Board. The Secretary of Defense? The Secretary is supervised and directed and removable at will by the President. On any decision, the Secretary must do as the President says. So too with the Secretary of State, and the Secretary of the Treasury, and the Attorney General.

To be sure, the Dodd-Frank Act requires the Director to establish and consult with a 'Consumer Advisory Board.' But the advisory board is just that: advisory. … The Director need not heed the Board's advice. Without the formal authority to block unilateral action by the Director, the Advisory Board does not come close to the

kind of check provided by the multi-member structure of traditional independent agencies.

The Act also, in theory, allows a supermajority of the Financial Stability Oversight Council to veto certain regulations of the Director. But by statute, the veto power may be used only to prevent regulations (not to overturn enforcement actions or adjudications); only when two-thirds of the Council members agree; and only when a particular regulation puts 'the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk,' a standard unlikely to be met in practice in most cases.

(...)

In considering the Presidential power point, keep in mind that the CFPB repeatedly compares itself to the FTC. That comparison is wrong as a matter of history and liberty, as discussed above. But the comparison is also wrong as a matter of Presidential authority. When the three-judge panel first heard this case in 2016, some of the threats to Presidential power may have appeared theoretical. In 2017, those threats became much more concrete. In January 2017, the President designated new Chairs of the FTC, FCC, SEC, and NLRB, among other multi-member independent agencies. Meanwhile, the President was legally unable to designate a new CFPB Director. The President's inability to do so led to a variety of episodes throughout 2017 that highlighted the diminution of Presidential power over the CFPB, as compared to the President's power over the traditional multi-member independent agencies. For example, during 2017, the Director of the CFPB took several major actions contrary to the President's policy views.

(...)

The CFPB violates Article II of the Constitution because the CFPB is an independent agency that exercises substantial executive power and is headed by a single Director. We should invalidate and sever the for-cause removal provision and hold that the Director of the CFPB may be supervised, directed, and removed at will by the President. I respectfully dissent.