

## Legal Sidebar

# Constitutional Limits to Agency Independence

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Congressional authority to establish federal agencies with independence from political control is under scrutiny in a case pending before the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit). At issue in *PHH Corp. v. CFPB* is whether the Consumer Financial Protection Bureau's (CFPB) structure violates the constitutional principle of separation of powers. The CFPB is headed by a single director who enjoys a certain amount of protection from removal by the President, and the agency is funded outside of the annual appropriations process. As elaborated below, PHH claims that the restrictions on the President's power to remove the Director improperly encroach on the executive power vested in the President under Article II of the Constitution, and that the combination of insulation from executive control and independence from yearly congressional appropriations violates separation of powers by shielding the agency from "democratic accountability."

The Constitution divides the power of the federal government among the legislative, judicial, and executive branches. While the text does not contain a "separation of powers" provision, the Supreme Court has [recognized](#) a separation of powers principle that underlies the constitutional division of the federal government's authority. Among other things, this doctrine prevents one branch of government from impermissibly [encroaching](#) on the powers of another or inappropriately [delegating](#) its own authority to another branch of government. These limits, in turn, shape the structure of federal agencies that exercise governmental power.

For example, a recurring theme in separation of powers cases is the extent to which Congress may impose restrictions on the President's power to remove executive officers. [Article II](#) of the Constitution vests the executive power in the President, and the President is authorized to keep executive officers accountable by removing them. However, the Supreme Court has recognized that this power is not absolute. In *Humphrey's Executor v. United States*, the Court held that Congress could establish independent agencies overseen by officers whom the President could only remove for "good cause." The Court upheld similar restrictions on the President's authority to remove lower-level officials in *Morrison v. Olson*. In *Free Enterprise Fund v. Public Company Oversight Board*, however, it invalidated the combination of these two otherwise permissible features – removal restrictions on both the principal and certain inferior officers within a single agency – as violating Article II's vesting of executive power in the President because it improperly impeded his "constitutional obligation to ensure the faithful execution of the laws."

Another constitutional provision that informs separation of powers is Article I's prohibition on drawing money from the Treasury unless authorized by "[Appropriations made by Law](#)." Congress thus has the "power of the purse" and controls the funding of executive branch agencies. While the Court has not faced a challenge to an independent agency receiving funds outside of the annual appropriations process, various federal entities, such as the Federal Reserve Board, are currently [funded](#) through their own earnings, rather than through the appropriations process.

The CFPB was established by the [Dodd-Frank Wall Street Reform and Consumer Financial Protection Act](#), which consolidated and expanded federal regulation of consumer financial products. Broadly, [the Act gave the CFPB](#) rulemaking, supervisory, and enforcement power over certain financial institutions. It also bestowed rulemaking and enforcement power under various consumer financial protection statutes, and more generally the authority to deter unfair, deceptive, or abusive practices by regulated entities. In this case, the Director of the CFPB concluded that a mortgage lender, PHH, violated the Real Estate Settlement Procedures Act, imposed injunctive relief to prevent further violations, and required PHH to disgorge "kickback payments" it had received in violation of the Act. PHH appealed

the decision to the D.C. Circuit, claiming that, among other things, the agency's structure violates separation of powers.

The legislation establishing the CFPB provided the agency with a structure intended to ensure independence from the political influence of Congress and the President. The CFPB is headed by a [single Director](#) who is appointed by the President to a five-year term and removable by the President only for cause. Although established within the Federal Reserve System, the agency is considerably independent from the Federal Reserve Board's authority, and the Federal Reserve Board is [barred](#) from intervening in the CFPB's decisions or directing its employees. However, a supermajority of the Financial Stability Oversight Council—of which the Chairman of the Federal Reserve is a voting member—[may veto](#) CFPB regulations that would put the safety of the banking system or the financial system's stability at risk. Finally, the agency is [funded](#) via a transfer from the Federal Reserve System's earnings, rather than through annual appropriations.

PHH [argues](#) that the combination of these features insulates the agency from "democratic accountability" and violates separation of powers. First, PHH claims that while *Humphrey's Executor* upheld removal restrictions for nonpartisan, multi-member expert boards, its logic does not support upholding the restrictions here because the CFPB is headed by a *single* director and is not intended to be "non-partisan." Further, PHH argues that just as the combination of two otherwise-permissible removal restrictions in *Free Enterprise* violated separation of powers, the marriage of removal restrictions with an independent funding stream is entirely unprecedented and grants the agency novel freedom from both presidential and congressional control. In response, the [CFPB](#) disputes PHH's reading of *Humphrey's Executor*, arguing that the Court upheld removal restrictions for agency heads because of the functions the officers performed, which mirror the duties of the CFPB Director. In addition, the CFPB distinguishes the principles announced in *Free Enterprise* – in that case, two otherwise-permissible removal restrictions combined to impede the President's power under Article II. Here, in contrast, "each branch retains its constitutional powers" because the removal restriction does not reduce Congress's authority over appropriations under Article I, and the independent funding mechanism does not hamper the President's Article II duty to execute the law.

At oral arguments before a panel of the D.C. Circuit, Judge Kavanaugh, who has [articulated a broad reading](#) of *Free Enterprise* in the past, [questioned](#) CFPB's counsel about the nature of the agency's independence. In particular, he focused on whether restrictions on the President's removal power were permissible for agencies headed by a single director. He noted that historically, most removal restrictions for independent agencies applied to multi-member commissions, rather than agencies with a single head. The justification being, he noted, that while typical agency heads must be subject to presidential control, removal restrictions are appropriate for a multi-member board because it is nonpartisan or bipartisan.

Resolution of the case may have important implications for the structure of the executive branch and the scope of presidential control over "independent" agencies. Several other agencies, whose principal officers enjoy removal protection, are also headed by a single director, including the [Social Security Administration](#), the [Office of Special Counsel](#), and the [Federal Housing Finance Agency](#). Further, given the D.C. Circuit's exclusive jurisdiction to hear challenges to a variety of federal agency actions, the court's reading of *Free Enterprise* will be an important guidepost concerning future challenges to agency structural features.

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