

1 UNITED STATES COURT OF APPEALS  
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3 - - - - - X  
4 PHH CORPORATION, ET AL., :  
5 Petitioners, :  
6 v. : No. 15-1177  
7 CONSUMER FINANCIAL PROTECTION :  
8 BUREAU, :  
9 Respondent. :  
10 - - - - - X

Wednesday, May 24, 2017

Washington, D.C.

11  
12  
13 The above-entitled matter came on for oral argument  
pursuant to notice.

14 BEFORE:

15  
16 CIRCUIT JUDGES HENDERSON, ROGERS, TATEL, BROWN,  
17 GRIFFITH, KAVANAUGH, SRINIVASAN, MILLETT, PILLARD,  
WILKINS, AND SENIOR CIRCUIT JUDGE RANDOLPH

18 APPEARANCES:

19 ON BEHALF OF THE PETITIONERS:  
20 THEODORE B. OLSON, ESQ.

21 ON BEHALF OF THE AMICUS CURIAE:  
22 HASHIM M. MOOPPAN, ESQ.

23 ON BEHALF OF THE RESPONDENT:  
24 LAWRENCE DEMILLE-WAGMAN, ESQ.

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Hashim M. Mooppan, Esq. On Behalf of the Amicus Curiae United States Of America	27
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P R O C E E D I N G S

1  
2 THE CLERK: Case number 15-1177, PHH Corporation,  
3 et al., Petitioners v. Consumer Financial Protection Bureau.  
4 Mr. Olson for the Petitioners; Mr. Mooppan for the Amicus  
5 Curiae United States of America; and Mr. DeMille-Wagman for  
6 the Respondent.

7 JUDGE HENDERSON: Mr. Olson, good morning.

8 ORAL ARGUMENT OF THEODORE B. OLSON, ESQ.

9 ON BEHALF OF THE PETITIONERS

10 MR. OLSON: Thank you, Your Honor. May it please  
11 the Court. The issue before the Court today was considered  
12 and decided by our founders on three separate occasions in  
13 1787, 1788, and 1789 by a vote of seven states to three at  
14 the Constitutional Convention, again, as a key part of the  
15 ratification debates the very next year, and yet again  
16 during the very first Congress. On each occasion the  
17 Founders voted for a single individual rather than a  
18 plurality in the presidency as the structure best calculated  
19 to ensure a strong, vigorous, and accountable Executive.  
20 Article II could not be clearer, the President alone shall  
21 take care that the laws be faithfully executed. That  
22 obligation according to James Madison, and the Supreme Court  
23 just seven years ago in *Free Enterprise Fund* empowers the  
24 President to keep Executive Branch officers accountable by  
25 holding them, and having the power to remove them from

1 office --

2 JUDGE GRIFFITH: Mr. Olson didn't that all

3 change --

4 MR. OLSON: -- if necessary.

5 JUDGE GRIFFITH: -- with *Humphrey's Executor*?

6 MR. OLSON: Pardon me?

7 JUDGE GRIFFITH: Didn't that all change with

8 *Humphrey's Executor*?

9 MR. OLSON: The case that I just quoted is *Free*  
10 *Enterprise Fund*, that is many years later than *Humphrey's*  
11 *Executor*. And what *Free Enterprise* did, *Free Enterprise*  
12 *Fund* did is make it clear that there have been exceptions  
13 which the Court determined not to revisit in *Free Enterprise*  
14 *Fund*, but that there have been exceptions under certain  
15 narrow circumstances, *Humphrey's Executor* is one of them,  
16 the *Morrison v. Olson* case is another, but that experiments  
17 by Congress in taking power away from the President,  
18 diminishing powers of the presidency are limited to those  
19 exceptions. And the baseline --

20 JUDGE GRIFFITH: What's the power of the  
21 presidency that is uniquely diminished in this instance?  
22 *Humphrey's Executor* recognized a significant diminishment in  
23 power by injecting the for cause for removal, how is this  
24 any worse than that?

25 MR. OLSON: *Humphrey's Executor* decided in 1935

1 examined an agency that, where it was described by the  
2 Supreme Court in that case as having limited jurisdiction,  
3 exercising quasi-legislative, and quasi-judicial powers. It  
4 didn't have the powers that the FCC subsequently had to  
5 enforce the laws, and was considered --

6 JUDGE GRIFFITH: Wait, but in *Morrison* that was  
7 later described as executive power. The distinction  
8 *Humphrey's Executor* was making between quasi-legislative,  
9 quasi-judicial, there was Executive power, there's very  
10 little distinction between the power exercised by the FTC in  
11 *Humphrey's Executor*, and the power being exercised here,  
12 they're both Executive.

13 MR. OLSON: Well, at the time the Supreme Court  
14 examined the FTC in 1935 it had limited powers, it's been  
15 given more power subsequent to that. And you're right, in  
16 the *Morrison* case that was clearly Executive power, but it  
17 was an inferior officer with limited tenure, with a limited  
18 scope of jurisdiction, and what *Free Enterprise Fund* says is  
19 that --

20 JUDGE TATEL: But in *Morrison* --

21 MR. OLSON: -- we are going to limit intrusions by  
22 the legislature on the principle exclusive power of the  
23 President to be accountable faithfully to execute the laws  
24 to those limited exceptions, and if any --

25 JUDGE GRIFFITH: Right. But what I'm asking is

1 how is this different in terms of diminishing the power of  
2 the President, how is this different --

3 MR. OLSON: This agency --

4 JUDGE GRIFFITH: -- than *Humphrey's Executor*?

5 MR. OLSON: This agency goes further than anything  
6 Congress has ever attempted to do in history.

7 JUDGE GRIFFITH: Well, that's speaking to the  
8 power of the agency, I'm speaking to the power of the  
9 President. How is the President's power any further  
10 diminished in this case than it was in *Humphrey's Executor*?  
11 The same removal language?

12 MR. OLSON: Well, but the Congress itself  
13 understood and recognized that it was going further than it  
14 was ever been before.

15 JUDGE GRIFFITH: In limiting the President's  
16 power?

17 MR. OLSON: In limiting the President's power in  
18 the following ways, first of all, the removal power is  
19 limited, it's a single person, it's all vested in one  
20 person, as opposed to being distributed to several people,  
21 some of which would be appointed by every President --

22 JUDGE GRIFFITH: That would seem to be to  
23 strengthen the President's power, if you only have to get  
24 rid of one person to reshape an agency that seems to be  
25 strengthening.

1           MR. OLSON: But what that debate in 1787 focuses  
2 us on is that when you concentrate power in one individual  
3 you have a concentration of power. And *Humphrey's Executor*  
4 recognized, and this Court recognized in the Panel decision  
5 that you disburse the power among five individuals, the  
6 power in this Bureau, the Director of this Bureau can hold  
7 office for five years, he can't be replaced by the President  
8 without the permission of the Senate, a holdover, it stays  
9 there as long as possible, Congress authority with  
10 respect --

11           JUDGE KAVANAUGH: That's different.

12           JUDGE TATEL: Mr. Olson, would your view of the  
13 case --

14           JUDGE KAVANAUGH: That's different from how all  
15 the other independent agencies operate, right? Because they  
16 all have, I thought in your brief you say they all have  
17 multiple members with staggered terms, as well as the  
18 President's ability to designate a Chair in most of those  
19 independent agencies. And so, we have a real time example,  
20 the FTC, the FCC, the SEC, the NLRB, the FERC all within a  
21 week of the inauguration the Chair was re-designated.

22           MR. OLSON: Well, that's absolutely right, but  
23 it's --

24           JUDGE KAVANAUGH: That can't happen here.

25           MR. OLSON: -- it's important here, in answer to

1 your question, Judge Griffith, and to put this agency in  
2 context, congressional power with respect to appropriations  
3 is removed, the power to appoint every single person in the  
4 agency without controlling, without the Senate involvement  
5 is invested in the Director. The Director has restricted by  
6 statute from even communicating with the President with  
7 respect to --

8 JUDGE GRIFFITH: And those are all right, but I  
9 don't think it's answering my question, how does that  
10 further diminish the President's removal power, which was --

11 MR. OLSON: What I'm attempting to say is that all  
12 of these statutes, one of which takes the power of the  
13 President to control what the Director says with respect to  
14 pending legislation, with respect to interpreting statutes,  
15 with respect to the power that's vested in OMB by the  
16 President, with respect to looking at regulations, and  
17 controlling what happens, the statute specifically says the  
18 exclusive power to interpret statutes, to decide what to  
19 prosecute is in this Director so that combination --

20 JUDGE GRIFFITH: How about would you address  
21 the -- I thought the major argument had to do with the  
22 number of the Directors, that somehow that there's a  
23 constitutional flaw here because we only have one Director  
24 who can be removed for cause --

25 MR. OLSON: That is not --



1 JUDGE GRIFFITH: -- as opposed to three?

2 MR. OLSON: With respect, Judge Griffith, that is  
3 not at all the compact that was created by Congress with  
4 respect to this agency. It gave this Director, one  
5 individual, and that goes to your point, but that's not the  
6 only thing, this individual is given by a series of  
7 statutes, all of which were intended by Congress to make  
8 this agency completely independent of the President, and  
9 completely unaccountable to the President, so that the  
10 President under *Free Enterprise Fund* the test is is --

11 JUDGE MILLETT: But that doesn't make, that just  
12 doesn't make sense to me. First of all, Chief Justice  
13 Roberts said in *Free Enterprise* that the diffusion of power  
14 diffuses accountability, so having one person is more  
15 accountable than having three or five. And secondly, it's  
16 not as though there's no accountability, they, even for  
17 appropriations the Director has to go every year before  
18 different committees and testify, and justify the  
19 expenditures that are done. And I don't even understand  
20 what the role, the argument you're making about the budget  
21 source has to do with diminishing the President's power?

22 MR. OLSON: It's the accumulation of power, Judge  
23 Millett, and this agency does not have to go --

24 JUDGE MILLETT: But most banking agencies do not  
25 have annually appropriated budgets, is that correct?

1           MR. OLSON: Executive agencies have to deal with  
2 the Office of --

3           JUDGE MILLETT: Most banking regulatory agencies  
4 have annual appropriations, or do they have self-funding  
5 mechanism?

6           MR. OLSON: Each of them are different, some of  
7 them have, the FED for example, doesn't have to go, because  
8 it has a separate way of appropriating, so these, each one  
9 is different.

10          JUDGE MILLETT: So, this Board, this Director is  
11 more accountable than say the Federal Reserve Board, or a  
12 number of other regulatory --

13          MR. OLSON: How is this --

14          JUDGE MILLETT: -- comptroller.

15          MR. OLSON: How is this Director accountable to  
16 anyone? The President, if the President wishes to say so  
17 anything that this Bureau does, if the President wishes to  
18 say so don't look at me, I'm not a --

19          JUDGE MILLETT: No, but that's not, that's -- so,  
20 that's an attack on all independent agencies, if you say for  
21 cause removal gets you there, that means we have to, which  
22 we can't do --

23          MR. OLSON: That is a serious --

24          JUDGE MILLETT: -- but say they're all down,  
25 but --

1 MR. OLSON: That is a serious problem.

2 JUDGE MILLETT: But assuming we can't do that, and  
3 I know you preserve your arguments for another forum, we  
4 can't do that, then isn't the fact that the President can  
5 replace this with frequency each President is going to be,  
6 not 100 percent, but most Presidents are going to get to  
7 replace this person when they've got only a five year term,  
8 and for cause can be found on this individual, and they can  
9 be removed, so that's no different than this. And what's  
10 worse in *Humphrey's Executor* when you have these multi-  
11 member ones is even, is many of them specify that there have  
12 to be so many people from each party, so isn't a worse  
13 intrusion on presidential power to say that okay, it's a  
14 rotating membership, you get to make an appointment, but you  
15 have to appoint somebody from the opposite party, you don't  
16 have that here where the Bureau Director slot comes open as  
17 it will next year the President has more authority and more  
18 discretion than the FTC, right?

19 MR. OLSON: If this, actually, if this term ends  
20 next year with respect to this Director, but unless the  
21 Senate decides to approve the presidential appointment this  
22 Director can serve another 10 or 15 years. The President --

23 JUDGE MILLETT: A number of other statutes do  
24 that, too.

25 MR. OLSON: Well, the Panel decision in this case

1 talked about the various ways in which a multi-person body,  
2 such as the Federal Trade Commission and the other  
3 commissions that we all know about, have to diffuse power  
4 because they have to talk to one another, there are  
5 individual staggered appointments over time so the President  
6 has input over a period of time, there's power with respect  
7 to selecting the Chairman, there's responsibility to, for  
8 individuals to talk to one another before making  
9 decisions --

10 JUDGE MILLETT: And that's a constitutional list?

11 MR. OLSON: -- all of those go to --

12 JUDGE TATEL: Yes.

13 MR. OLSON: I understand the principle that  
14 restricting the President's removal power is a very serious  
15 intrusion on Article II power, we object to that, we would  
16 make that point here except that as you point out this Court  
17 can't change *Humphrey's Executor*, but we wish it could. But  
18 the fact is --

19 JUDGE TATEL: We also can't, we also, Mr. Olson,  
20 can't change *Morrison v. Olson*. And *Morrison* was a single  
21 for cause official. Now, you say that it's different  
22 because the independent counsel's authority was limited and  
23 narrow, right?

24 MR. OLSON: It was a limited scope --

25 JUDGE TATEL: Yes.

1 MR. OLSON: -- of jurisdiction --

2 JUDGE TATEL: Right, but the Court itself in  
3 *Morrison* analogized the independent counsel to  
4 administrative agencies like the FTC which have civil  
5 enforcement power, just like this one. It said it was just  
6 like the FTC. And in terms of its power, I mean, what could  
7 be more powerful than an independent counsel who can indict  
8 the highest officials of the President's cabinet?

9 MR. OLSON: That is correct, and that was  
10 Executive power --

11 JUDGE TATEL: Right.

12 MR. OLSON: -- and it was the jurisdiction of the  
13 independent --

14 JUDGE TATEL: Well, it's much more powerful than  
15 the Bureau.

16 MR. OLSON: Pardon me?

17 JUDGE TATEL: It's much more powerful, in terms of  
18 its ability the independent counsel's ability to impair the  
19 power of the President, which is the critical question here,  
20 right? That's the question we have to ask, the independent  
21 counsel was much more threatening to the President of the  
22 United States than this Bureau?

23 MR. OLSON: Well, Judge Tatel, we submit --

24 JUDGE TATEL: Is that right?

25 MR. OLSON: We object to restricting the

1 President's power faithfully to execute the laws, there is a  
2 problem in the independent counsel statute, it is a problem  
3 with the FTC, but what the Supreme Court said in *Free*  
4 *Enterprise Fund* is whatever the flaws with respect to those,  
5 or whatever the limitations with respect to those decisions  
6 they are not before us because the parties did not ask us to  
7 look at them. But for --

8 JUDGE TATEL: But we're lower, we're an appeals  
9 court, and we're bound by Supreme Court precedent, including  
10 *Morrison v. Olson*, and I just, I have not seen an argument  
11 in your brief, even if I agreed with you that there's a  
12 serious risk from the for cause removal provision for this  
13 Director, even if I agreed with you I don't see how as a  
14 judge on an Appeals Court bound by *Morrison*, and *Humphrey's*  
15 that I can go there. I just don't, I don't see where this  
16 Court gets that flexibility.

17 MR. OLSON: That's right. And so, I understand  
18 the point --

19 JUDGE TATEL: Right.

20 MR. OLSON: -- and I understand the restriction  
21 that we're faced with because this is an intermediate  
22 appellate court.

23 JUDGE TATEL: Right.

24 MR. OLSON: So, what it comes down to is unless  
25 you say this decision is dictated by *Humphrey's Executor* and

1 the *Morrison* case --

2 JUDGE TATEL: Right.

3 MR. OLSON: -- and everything that this Director  
4 is given, this Agency is given, all this power is subsumed  
5 and just like and no further than *Humphrey's Executor* or  
6 *Morrison* then we're bound by that and it'll have to be  
7 decided by the Supreme Court. But what we submit --

8 JUDGE TATEL: Right, and I haven't --

9 JUDGE KAVANAUGH: But the question, the question  
10 is, I thought the question --

11 JUDGE TATEL: Excuse me, I haven't heard --

12 JUDGE HENDERSON: Wait, wait.

13 JUDGE TATEL: I haven't heard from you yet an  
14 argument for how I can conclude that we're not bound by  
15 that. The only thing I've seen in your brief is that the  
16 independent counsel was limited in tenure, tenure limited  
17 and a focus power.

18 MR. OLSON: And was an inferior officer, an --

19 JUDGE TATEL: Yes.

20 MR. OLSON: -- inferior officer of the United  
21 States.

22 JUDGE TATEL: Right. Therefore what?

23 MR. OLSON: And had a limited tenure with respect  
24 to one investigation, it was an intrusion --

25 JUDGE TATEL: Yes, but that investigation was --

1 but, again, the question is we have to ask the question what  
2 is the affect, to what extent does it impair the power of  
3 the President to see that the laws are faithfully executed?  
4 That's the question. Doesn't make any difference how long  
5 the tenure is, but in that case the independent counsel had  
6 the ability to indict and prosecute the highest officials of  
7 the President's government. I mean, I can't imagine  
8 anything that would more significantly impair the power of  
9 the President than that. Yet, the Court said --

10 MR. OLSON: Well, I --

11 JUDGE TATEL: -- that was okay.

12 MR. OLSON: I submit to you that the limitation of  
13 the narrow limitation with respect to the powers of that  
14 independent counsel, and I understand the --

15 JUDGE TATEL: Right.

16 MR. OLSON: -- power to indict is a serious power  
17 which the CFPB doesn't have --

18 JUDGE TATEL: Right.

19 MR. OLSON: -- although the CFPB does have the  
20 power to impose penalties of \$10 million per violation, and  
21 that is a serious problem. The powers that are given to the  
22 CFPB and this Bureau include criminal prosecution --

23 JUDGE TATEL: You keep saying it's serious, but  
24 you -- you keep saying it's serious, but the question isn't  
25 how serious it is, it's how seriously it limits the



1 President's power, that's the question. That's the  
2 question.

3 MR. OLSON: I'll put it this way, because I think  
4 that you have to look at the broad powers that are given to  
5 this Agency and decide whether they are only within the  
6 scope of *Humphrey's Executor* or *Morrison*. The Supreme Court  
7 was very serious seven years ago when it said we're not  
8 going any further than that, and any further experimentation  
9 has to be looked at very carefully in the context of  
10 history, and this Agency has more powers with, than --

11 JUDGE GRIFFITH: If we just confine our self to --

12 JUDGE KAVANAUGH: Looked at three things, I mean,  
13 we here are analyzing, I think, correct me if I'm wrong, the  
14 contours of the *Humphrey's* exception, as you would describe  
15 it, or the contours of *Humphrey's*, don't even have to use  
16 the word exception, what are the contours of *Humphrey's*.

17 MR. OLSON: And I would agree with you about an  
18 exception.

19 JUDGE KAVANAUGH: All right. And so, *Free*  
20 *Enterprise Fund* says, I think, look at history, what's the  
21 historical roots for something like this? Look at the  
22 effect on individuals who are regulated, we talked about  
23 that a lot in the Panel decision, and look at, as Judge  
24 Tatel says, the effect on presidential power, in other  
25 words, is there a further diminishment of presidential power

1 beyond that already effectuated by *Humphrey's Executor*? And  
2 *Free Enterprise Fund* said yes, it's maybe arithmetic, maybe  
3 it's minor, but it's further diminishment of presidential  
4 power than *Humphrey's Executor* alone. And here the question  
5 seems to me is what's the further diminishment of  
6 presidential power that Judge Tatel was asking, what's the  
7 further diminishment, and this is more comment, and you can  
8 respond to it than a question, but it seems we have to  
9 compare to how the multi-member agencies operate, and on  
10 presidential control in the multi-member agencies they  
11 turnover quickly with a new President. So, the President  
12 gets to designate the Chair, we've seen that with all the  
13 independent agencies, the multi-member, multiple members  
14 means staggered terms. And this does not turnover quickly,  
15 and the question is does that matter? I think that, the  
16 question Judge Tatel was asking you --

17 JUDGE TATEL: Thank you for answering my question.

18 JUDGE KAVANAUGH: I'm trying to.

19 MR. OLSON: And that does answer the question as  
20 far as it goes. But the statute went further than that, it  
21 limited the President's ability to control or have anything  
22 to do with communications with Congress, it took away any  
23 power with respect to the budget and the process of  
24 appropriation, it took away power from the President to have  
25 anything to do with the interpretation --

1           JUDGE KAVANAUGH: I'm focused on something more  
2 specific. If you look at the FCC today that's, the issue  
3 we're describing here is not going on with the FCC, or the  
4 FTC, or the FERC, or the SEC, or the NLRB, you can go down  
5 the list. And why is that? It's because the way Congress  
6 has historically structured these independent agencies,  
7 these multi-member independent agencies is that there's, as  
8 all the studies and all the academics have shown there's  
9 quick turnover at a new administration. This one will not,  
10 in fact, after the 2020, after this next appointment it'll  
11 go to the third year of the next President, and if there's  
12 an appointment in 2023 it's going to go to the fourth year  
13 of the next President. With that President who might have  
14 run on a platform of consumer protection having to live with  
15 President Trump's appointee as Consumer --

16           MR. OLSON: That's precisely the point, and  
17 that's --

18           JUDGE KAVANAUGH: Well, and here's the question,  
19 does that matter? Does the kind of dead hand of the past  
20 President in controlling the Agency which we don't have with  
21 FCC, FTC, does that matter?

22           MR. OLSON: It does matter, it's both here and  
23 now, restriction and diminishment of the President's power,  
24 and it is diminishment of the President's power in the  
25 future. The points that you're making are absolutely

1 correct.

2 JUDGE GRIFFITH: Well, Mr. Olson --

3 MR. OLSON: But you have to look --

4 JUDGE PILLARD: But now, Mr. Olson, what --

5 JUDGE GRIFFITH: Does that suggest that staggered  
6 terms are constitutionally required, then?

7 MR. OLSON: No. What the Court I think is saying  
8 in *Free Enterprise Fund* is if it is not narrowly constrained  
9 to *Humphrey's Executor* and *Morrison* that is, you cannot go  
10 any further than that.

11 JUDGE SRINIVASAN: But it seems like it has, it  
12 seems like it has to be narrowly constrained in a way that  
13 matters with respect to the diminishment of presidential  
14 power, and on that question, I'm not quite sure I understand  
15 the distinction between a situation in which you can remove,  
16 or the President can remove 100 percent of the principal  
17 officers, i.e. the one person --

18 MR. OLSON: Well, he can't remove, he can't remove  
19 the --

20 JUDGE SRINIVASAN: Well, but some President can.  
21 I get that it's five years, so there's an 80 percent chance  
22 if I'm doing the math right that one President will have the  
23 opportunity. I don't know, my dad was a math professor, I'm  
24 not.

25 MR. OLSON: Unless he decides not to leave.

1           JUDGE SRINIVASAN: So, but my question is this,  
2 that if you have a fairly robust authority to remove the one  
3 person there, not every President is going to get to do it,  
4 I grant you that, but some Presidents are, and you compare  
5 it to a situation in which there's multiple members, and  
6 there's a greater likelihood that each President can remove  
7 one, but perhaps depending on the terms a lesser likelihood  
8 that each President can remove a majority, then aren't we at  
9 kind of a wash? Why, if you hold everything else constant,  
10 if you hold everything else constant, and I think I could  
11 construct the mathematical formula in a way that would do  
12 this, and the only difference is you remove one person and  
13 that's everybody, or you remove one to two and that may or  
14 may not be a majority, is there really a difference there in  
15 terms of diminishment of presidential power?

16           MR. OLSON: I believe that what the Supreme Court  
17 said in *Free Enterprise Fund* is that the baseline, what was  
18 decided in 1787, '88, and '89 is the baseline, is the  
19 President can't be accountable if he doesn't have the power  
20 to remove. Congress has decided to restrict the power to  
21 remove, it has created an individual that our President, a  
22 President can appoint for five years the next --

23           JUDGE PILLARD: But, so Mr. Olson, the Federal  
24 Reserve Board goes down under your view? The Federal  
25 Reserve Board because they're 14-year terms, and I guess

1 there are seven members, so no President has the authority  
2 to appoint a majority therefore to control, and therefore to  
3 have these policy preferences reflected?

4 MR. OLSON: The Chairman is not, does not --

5 JUDGE PILLARD: I understand that.

6 MR. OLSON: All right.

7 JUDGE PILLARD: But the number of the Board, I  
8 mean, you don't have presidential control. And am I  
9 understanding because this, there's a pattern in the  
10 financial regulatory agencies of actually wanting to have  
11 some amount of separation, and as I take it it's consistent  
12 with the Constitution, and with the Executive's authority to  
13 take care that the laws be faithfully executed to have those  
14 people removable for inefficiency, for, you know,  
15 malfeasance in office, neglect of duty, but not have them  
16 removable because the President disagrees as a policy matter  
17 with, so it's trying to avoid financial cronyism in favor of  
18 faithful execution of the laws, and you're saying that  
19 that's out of bounds.

20 MR. OLSON: That is out of bounds. We have, we  
21 elected a unitary President, I went back through the debates  
22 between June 1 and June 4, 1787, this was debated then, and  
23 the vote was seven to three because execution of the laws  
24 isn't just enforcement of the laws, indicting someone, it is  
25 policy decisions with respect to how those laws are

1 enforced.

2 JUDGE MILLETT: But so, Mr. Olson --

3 MR. OLSON: Judge Kavanaugh makes the point --

4 JUDGE MILLETT: -- it's July, 2018, and the  
5 President has the ability to replace the Director of this  
6 Bureau with anyone he wants for a nomination, has the  
7 ability to do that. Yes, there's Senate confirmation, that  
8 happens often. And let's imagine that a democratic seat  
9 opens up on the FTC Commission, and the President gets to  
10 fill that one, but by statute has to appoint someone that's  
11 from the democratic party, that's in the statute that was  
12 upheld in *Humphrey's Executor*, my question to you is which  
13 is the greater intrusion on presidential power, the  
14 replacement of someone of your choice for the Bureau, or  
15 forcing the President to appoint someone of another party  
16 for the Commission?

17 MR. OLSON: In the first place on that date that  
18 you referred to the President may or may not be able to  
19 appoint a new Director of this Bureau. If he does not  
20 leave, if the Senate does not give permission to the person  
21 that he decides to nominate --

22 JUDGE MILLETT: That's the same for the Federal  
23 Reserve Board --

24 MR. OLSON: -- that person may be there for  
25 another several years.

1           JUDGE MILLETT: That's the same for the Federal  
2 Reserve Board, and a number of other agencies. But I do  
3 want to get back to my question, which is put all that  
4 aside, I'm just asking you when the President is making  
5 this, exercising this power of appointment, which is the  
6 greater intrusion, appointing the Bureau Director for anyone  
7 he chooses, or appointing someone from another party?

8           MR. OLSON: If you take as the word the decisions  
9 that were made, why we're talking about, and the decisions  
10 that were reaffirmed seven years ago by the United States  
11 Supreme Court, yes, the power of appointment is extremely  
12 important. But the Court goes on to say that it is the  
13 power that can remove, the Court said earlier in the *Bowsher*  
14 case --

15           JUDGE MILLETT: Okay, the power to remove is the  
16 same for the FTC Commissioners and the Director of the  
17 Bureau. So, I guess I'm wondering why you're not answering  
18 my question? Wouldn't you, would you -- I'll try more  
19 leading questions. Would you agree that the President has  
20 more of the essentially appointment power in replacing the  
21 Director of the Bureau than replacing a member of the  
22 Commission who has to be by statute from another party?

23           MR. OLSON: A particular President at a particular  
24 point in time under the right circumstances may have more  
25 power with respect to that individual, the next President



1 may not because that President, over for five years, that  
2 power may not be there. What I -- and I'd like to reserve  
3 the remainder of my time for rebuttal.

4 JUDGE TATEL: Well, I have one, I have just one  
5 quick question. To return to my perspective from the perch  
6 of a lowly appeals court judge, this debate about the  
7 difference between multi-member agencies and a single-member  
8 is fascinating, but I don't understand how we can take  
9 account of that given that *Morrison* not only upheld a for  
10 cause provision for a single-headed agency, but said it  
11 exercises powers analogous to the FTC. In other words, you  
12 know, you need to go back to the Supreme Court, I think, and  
13 say wait a minute, you need, to the Court, you need to take  
14 a more careful look at this. These single-headed agencies  
15 are very, very different, but from where we sit, Mr. Olson,  
16 I just don't see how we can go beyond what the Court has now  
17 said.

18 MR. OLSON: What I would say to this --

19 JUDGE TATEL: So, what is the answer to that?

20 MR. OLSON: I would say -- well, I can only  
21 answer --

22 JUDGE TATEL: And assume I agree with you about  
23 the concern.

24 MR. OLSON: -- if you feel --

25 JUDGE TATEL: Yes.

1 MR. OLSON: -- if you conclude --

2 JUDGE TATEL: Right.

3 MR. OLSON: -- that this goes no further than  
4 *Humphrey's Executor* and *Morrison v. Olson* then the next step  
5 is the Supreme Court.

6 JUDGE TATEL: Yes.

7 MR. OLSON: But I submit this Agency given its  
8 collective powers, one individual who can appoint everybody,  
9 doesn't have to go to the President for a subordinate  
10 officer, can hire and fire people, that has a power that is  
11 nowhere else in the federal government, or very, very  
12 limited places, if you take this, answer it this way, Judge  
13 Tatel --

14 JUDGE TATEL: Yes.

15 MR. OLSON: -- if the powers that are given to the  
16 EPA, and to the Treasury Department, and to the Anti-Trust  
17 agencies and so forth, all are vested in one individual,  
18 this Director, why not? If it can be done with him it can  
19 be done with other people, and then what is left of the  
20 Executive power? And I'd like to reserve the balance of my  
21 time?

22 JUDGE HENDERSON: All right.

23 MR. OLSON: Thank you.

24 JUDGE HENDERSON: Mr. Mooppan.

25 ORAL ARGUMENT OF HASHIM M. MOOPPAN, ESQ.

1 ON BEHALF OF THE AMICUS CURIAE UNITED STATES OF AMERICA

2 MR. MOOPPAN: May it please the Court. Judge  
3 Griffith, your observation at the outset of the argument  
4 that the functions that the FTC performed are Executive in  
5 nature is a critical observation because what it tells us is  
6 that rationale of *Humphrey's Executor* cannot be based on the  
7 functions of the FTC, it must be based on something else,  
8 and we would submit that what that something else is is the  
9 structural features of the FTC, and that is because what the  
10 Court was concerned about was that multi-member bodies  
11 functions as --

12 JUDGE GRIFFITH: But the Court never framed its  
13 analysis in those terms, right? This is we're going back  
14 trying to read into it, but they never made these arguments  
15 about the distinction between multi-member and single, did  
16 they?

17 MR. MOOPPAN: I don't think that's a fair reading  
18 of the entire opinion, Your Honor. I think if you read the  
19 entire opinion, not just the section that discusses the  
20 constitutional analysis, but the section that talks about  
21 why Congress made this entity the way it was, the Court did  
22 emphasize that it was a multi-member body that was --

23 JUDGE TATEL: Well, why wouldn't the Court have  
24 discussed that in the constitutional section if it was  
25 relevant? I mean, it's not there.

1           MR. MOOPPAN: Well, it is there, Your Honor, in  
2 the sense --

3           JUDGE TATEL: In the constitutional section?

4           MR. MOOPPAN: In two senses it is, the first sense  
5 that the opinions, that part of the opinion starts by saying  
6 it's an administrative body that has the certain functions,  
7 and we think that when they're talking about it being an  
8 administrative body part of what they're getting at is that  
9 it is a multi-member deliberative body, and at the end of  
10 that analysis it ends by saying officers of this type,  
11 officers of this character. And what that has to be getting  
12 at is what the Court's rationale was, was that these are  
13 sort of different from Executive agencies.

14           JUDGE GRIFFITH: But there's a more elegant  
15 explanation, and that is that's the body they were dealing  
16 with, they happened to have in front of them a multi-member  
17 body.

18           MR. MOOPPAN: That's exactly right, Your Honor,  
19 and I think we should read the Supreme Court's cases based  
20 on the facts that were before them, and not just blindly  
21 assume that those facts aren't relevant.

22           JUDGE GRIFFITH: But what is the constitutional  
23 provision at stake here? What provision of the Constitution  
24 are we looking at?

25           MR. MOOPPAN: Article II, Your Honor. And the

1 point is that the Executive --

2 JUDGE GRIFFITH: The removal power, right?

3 MR. MOOPPAN: Yes.

4 JUDGE GRIFFITH: The removal power.

5 MR. MOOPPAN: The general rule is that principal  
6 executive officers must be removable by the President at  
7 will. *Humphrey's Executor* recognized a narrow exception to  
8 that as *Free Enterprise Fund* emphasized, and the rationale  
9 of that exception has to be based on the structural  
10 features.

11 JUDGE WILKINS: But how is that, how is your rule  
12 even correct under *Free Enterprise*? Because in *Free*  
13 *Enterprise* the Supreme Court, assume for the sake of the  
14 argument that SEC Commissioners were protected by the  
15 *Humphrey's Executor* good cause provisions, the Supreme Court  
16 also held that that was sufficient control of the President  
17 over SEC Commissioners who indirectly then gave the  
18 President sufficient control over the PCOB. So, if there  
19 was an exception that was created, it wasn't just for, I  
20 mean, you know, it was at least recognized again in *Free*  
21 *Enterprise Fund*.

22 MR. MOOPPAN: The FCC like the FTC is a multi-  
23 member body, and so the rationale of it being limited to the  
24 sort of deliberative bodies that could credibly be  
25 characterized at least by the Supreme Court in 1935 as

1 quasi-legislative, we're not taking issue with that in this  
2 Court, and this Court, of course, can't revisit *Humphrey's*.  
3 But what we are suggesting is if you don't adhere to that  
4 structural feature there's no limiting principle to  
5 *Humphrey's*. As Judge Griffith noted, these functions, the  
6 functions that the FTC had, and the functions that the CFPB  
7 have are the exact same functions that the Secretary of the  
8 Treasury has.

9 JUDGE TATEL: Then what do we do --

10 JUDGE WILKINS: But SEC Commissioners are  
11 principal officers, right?

12 JUDGE TATEL: -- what do we do with, what do we do  
13 with *Morrison v. Olson* as an inferior Court? We're bound by  
14 *Morrison*, correct?

15 MR. MOOPPAN: So, I think the answers to both of  
16 those --

17 JUDGE TATEL: You agree we're bound by *Morrison*?

18 MR. MOOPPAN: Yes, you are, Your Honor. And the  
19 key to *Morrison v. Olson* is that that case did not involve  
20 principal officers, it involved inferior officers. And when  
21 you look at *Free Enterprise Fund* that is exactly how *Free*  
22 *Enterprise Fund* described the cases, it starts by talking  
23 about the general rule under Article II in *Myers*, it says  
24 that *Humphrey's* exact words is an exception for principal  
25 officers, and then it turns to inferior officers and talks

1 about *Perkins* and *Morrison*. *Free Enterprise Fund* precludes  
2 reading *Morrison* as a free-sweeping exception that would  
3 apply to principal --

4 JUDGE TATEL: Is a what?

5 MR. MOOPPAN: -- officers. And again, Your Honor,  
6 if it were otherwise the logic of the CFPB's position  
7 necessarily suggests that there could be a for cause  
8 restriction for the Secretary of the Treasury, or the  
9 Secretary of the Labor Department, or the Secretary of  
10 Health and Human Services because all of them perform the  
11 exact same types of functions, and I just don't think anyone  
12 has ever read *Humphrey's Executor* to do that, and I don't  
13 think anyone could read *Free Enterprise Fund* --

14 JUDGE WILKINS: Is the SEC Commissioner a  
15 principal officer?

16 MR. MOOPPAN: I'm sorry?

17 JUDGE WILKINS: Is an SEC Commissioner a principal  
18 officer?

19 MR. MOOPPAN: Yes, they are, Your Honor.

20 JUDGE WILKINS: So, *Free Enterprise Fund*  
21 recognized that the *Humphrey's Executor* protections could  
22 apply to principal officers there?

23 MR. MOOPPAN: Yes. Yes, the sole exception that  
24 the Supreme Court has ever recognized for a for cause  
25 restriction for a principal officer is the *Humphrey's*

1 *Executor* exception, and the key we submit to that exception  
2 is that it is a multi-member regulatory body.

3 JUDGE KAVANAUGH: So, why did they do it?

4 JUDGE SRINIVASAN: Okay. So, just so I'm  
5 understanding the Government's position, so if you're  
6 focusing on the multi-member composition of the Agency, so  
7 your view is that the switch between multi-member and single  
8 director does all the work, and it does all the work in the  
9 sense that the switch from a multi-member agency to a single  
10 director agency diminishes presidential power, it has to,  
11 right? Under your view?

12 MR. MOOPPAN: We have two points, Your Honor.  
13 Yes, it does, but also it doesn't matter. And they're a  
14 flipside to the same coin. The key is that *Humphrey's*  
15 *Executor* is already a significant intrusion on presidential  
16 power, but it had a rationale. The rationale we submit had  
17 to be because it was quasi-legislative because of its  
18 structure. If that structure is not there, then the  
19 rationale for the exception doesn't obtain, and therefore  
20 the intrusion that *Humphrey's Executor* already justified is  
21 not justified here.

22 JUDGE TATEL: Suppose we don't agree with that?

23 MR. MOOPPAN: If you don't --

24 JUDGE TATEL: Suppose we don't agree with that?

25 MR. MOOPPAN: If you don't agree with that the



1 second --

2 JUDGE TATEL: Suppose we don't think the multi-  
3 headed agency was critical in *Humphrey's*, then what? Then  
4 do you lose?

5 MR. MOOPPAN: Well, that is the basis -- our  
6 submission is based on the critical difference --

7 JUDGE TATEL: Okay.

8 MR. MOOPPAN: -- between a multi-member --

9 JUDGE TATEL: But if we don't agree then do you  
10 have a backup argument?

11 MR. MOOPPAN: We have not submitted a backup  
12 argument in this case, Your Honor. But if I could go back  
13 to the second half of my answer, Judge Srinivasan, it's that  
14 the switch between multi-member and single, and to the  
15 agencies actually does diminish the President's power, and  
16 the reason is --

17 JUDGE SRINIVASAN: No disrespect, you disagree  
18 with the Panel opinion?

19 MR. MOOPPAN: I don't, I didn't --

20 JUDGE KAVANAUGH: But that's not right. The Panel  
21 opinion --

22 MR. MOOPPAN: I didn't --

23 JUDGE KAVANAUGH: -- said this at 58, the --

24 MR. MOOPPAN: Right. I didn't read the Panel --

25 JUDGE KAVANAUGH: -- diminishes President --

1 MR. MOOPPAN: -- opinion to be taking a position  
2 one way or the other on the question, but --

3 JUDGE KAVANAUGH: It did, on page 58 it said --

4 MR. MOOPPAN: Okay.

5 JUDGE KAVANAUGH: -- it diminishes President.

6 MR. MOOPPAN: I stand corrected, Your Honor. But  
7 if I could --

8 JUDGE KAVANAUGH: The question misdescribed it.

9 MR. MOOPPAN: If I could explain why we think that  
10 there isn't a greater intrusion on the President's power  
11 from having a single entity? The quintessential hallmark of  
12 Executive power is the ability to act with vigor and  
13 dispatch, the Founders made that very clear repeatedly and  
14 that's why they vested in the unitary Executive. When you  
15 have a principal officer who can act with that vigor and  
16 dispatch, who can unilaterally make Executive decisions  
17 across a whole swath of the economy, but then you remove the  
18 accountability, that is a critical intrusion on the  
19 President's power, and you could give it when you instead on  
20 the other hand a deliberative body, a multi-member body. It  
21 might, to be sure, Judge Millett, it's less accountable in a  
22 sense, but you could view it as less of an intrusion on the  
23 President's power because it's not the quintessential nature  
24 of vigor and dispatch that characterizes Executive action.

25 JUDGE MILLETT: Well, it's less appointable, it's

1 less removable, and as you say it's less accountable, less  
2 removable, and less appointable, and so that seems to me a  
3 problem then to say that this thing is, that you have to say  
4 this is worse than that, and --

5 MR. MOOPPAN: Well, so, again, we have two  
6 different points, the first point is that the rationale for  
7 *Humphrey's* just doesn't obtain here, so even if it's the  
8 same level of intrusion on the President's power, if the  
9 justification that was put forth in *Humphrey's* doesn't  
10 obtain here then that level of intrusion is not valid in  
11 this circumstance.

12 JUDGE MILLETT: Then what happens to the Social  
13 Security Administrator?

14 MR. MOOPPAN: Your Honor, we haven't taken a  
15 position on that in this case.

16 JUDGE MILLETT: That's a single head of a body  
17 that controls 24 percent of the national budget, and  
18 probably a half to three-quarters of the American  
19 population.

20 MR. MOOPPAN: And so, what I will say is that our  
21 position suggests that, our position dictates that the  
22 *Humphrey's Executor* exception itself does not apply to the  
23 Social Security Administration, but that does not  
24 necessarily answer the question whether there might be some  
25 other exception which justifies them.

1 JUDGE MILLETT: What other exception?

2 MR. MOOPPAN: Much as in *Free Enterprise Fund*, the  
3 Supreme Court recognized that the double for cause there was  
4 a problem, but it didn't purport to say it was adopting a  
5 rule for every double for cause, it noted many other  
6 agencies that have, or officers that have double for cause,  
7 and dispute Justice Breyer's objection that the Court wasn't  
8 weighing in on each and every one of those, the Court said  
9 they would take them one at a time as the cases came.

10 JUDGE MILLETT: So, how would we write an opinion  
11 here that would say that the Bureau, the Director of the  
12 Bureau is constitutionally impermissible under *Humphrey's*  
13 *Executor*, but would, in doing so would adopt a rule that  
14 would protect independent counsels, Social Security  
15 Administrators, and the other, any other single heads?

16 MR. MOOPPAN: So, the key would be the first step  
17 of the analysis would be to say that the *Humphrey's Executor*  
18 rationale itself doesn't obtain because it's a single-headed  
19 agency, and at that point I think the next step would be to  
20 say nothing about the CFPB militates in favor and exception  
21 because on every other metric it is a quintessential  
22 Executive agency, it operates with a wide swath of  
23 jurisdiction, engaging in enforcement against --

24 JUDGE MILLETT: Is that different from the Social  
25 Security Administration?

1           MR. MOOPPAN: -- private parties. Some of those  
2 factors are not implicated by Social Security, the Office of  
3 Special Counsel, and the others, we're not necessarily  
4 suggesting those distinctions ultimately matter, we haven't  
5 taken a position on that, and they should be decided in a  
6 future case, but the decision in this case will not resolve  
7 that, all you need to do in this case is to recognize that  
8 once you take from a multi-member to a single entity the  
9 CFPB Director is just not distinguishable from the Secretary  
10 of the Treasury, the Secretary of Labor, and unless this  
11 Court is prepared to say that *Humphrey's Executor* means that  
12 a for cause restriction is permissible for cabinet  
13 secretaries, a position that I don't think any fair reading  
14 of *Free Enterprise Fund* or *Morrison* would lead to, but --

15           JUDGE WILKINS: But that's not in any statute.

16           MR. MOOPPAN: I'm sorry?

17           JUDGE WILKINS: I mean, no statute says that  
18 cabinet secretaries have the *Humphrey's Executor*.

19           MR. MOOPPAN: That's right, Your Honor, but if the  
20 CFPB's position prevails in this case it would be a green  
21 light for Congress to do that tomorrow.

22           JUDGE MILLETT: The Postmaster General used to be  
23 a member of the cabinet, and then --

24           MR. MOOPPAN: I'm sorry?

25           JUDGE MILLETT: -- Congress changed that, and is

1 now removeable under a sort of for cause standard.

2 MR. MOOPPAN: I'm sorry, which -- I'm sorry, I  
3 didn't hear which agent?

4 JUDGE MILLETT: The Postmaster General used to be  
5 a member of the cabinet, and then Congress changed its  
6 status, so it can't just be that, you know, you look and say  
7 this looks like something a cabinet member might do, and  
8 therefore you can't do it, can you, or are you not defending  
9 that either?

10 MR. MOOPPAN: I'm not sure about the current  
11 structure of the Postmaster General, Your Honor, but I would  
12 say that I don't think any fair reading of *Free Enterprise*  
13 *Fund*, or even *Morrison* would suggest that a for cause  
14 restriction on the Secretary of the Treasury is consistent  
15 with Article II or *Myers*. Certainly, *Humphrey's Executor*  
16 didn't suggest that, and no one has ever understood it to be  
17 that way.

18 JUDGE KAVANAUGH: On the history, one of the --

19 MR. MOOPPAN: The history would --

20 JUDGE KAVANAUGH: So, on history generally, one of  
21 the things we have to take account of *Free Enterprise Fund*  
22 tells us it's the history, and obviously that's one of the  
23 things we focused on at the Panel level. And the question,  
24 I think that some of the questions raised this, is that  
25 history where Congress has always done it multi-member with,

1 you know, one or two exceptions for 100 years, was that an  
2 accident, or is there a reason that Congress did it? And,  
3 you know, what do you think? Because you've gotten a lot of  
4 questions about there's really no difference, but why if  
5 there's really no different why was this repeated over and  
6 over again?

7 MR. MOOPPAN: That's exactly right, Your Honor. I  
8 think the reason -- it was bad.

9 JUDGE KAVANAUGH: But it's not, it's a lie. Why  
10 though?

11 MR. MOOPPAN: The reason why it was repeated over  
12 and over again is as some of the reports that we've cited in  
13 our brief and that the Panel opinion cited, the notion of an  
14 independent agency was inextricably bound together with the  
15 idea that it was this permanent deliberative body, that is  
16 why again and again --

17 JUDGE KAVANAUGH: Why do you think that was? I  
18 mean, what -- and because it could be a permanent  
19 deliberative body of one.

20 MR. MOOPPAN: Well, I think, Your Honor, because a  
21 single individual can act with the sort of quintessential  
22 vigor and dispatch that characterizes Executive agencies,  
23 and principal officers, and the idea that that was  
24 permissible is a radically different notion than the idea  
25 that you could have a multi-member body that lacks the vigor

1 and dispatch of the Executive --

2 JUDGE MILLETT: So, the Constitution requires --

3 JUDGE GRIFFITH: Is vigor and dispatch the issue  
4 here? I thought the problem here is that Congress took away  
5 from the President the authority to enforce a whole range of  
6 statutes, right, and put it in someone who could only be  
7 terminated for cause, that's the trenching upon the  
8 President's power, not whether the agency is run by one, or  
9 five, or 10, the crime, yes, crime is not the word, but the  
10 trenching occurred when Congress took away from the  
11 President the authority to enforce these statutes, right?

12 MR. MOOPPAN: I agree with Your Honor, but the  
13 question is why in *Humphrey's Executor* the Supreme Court  
14 upheld that limitation. And all I'm suggesting is that if  
15 you read the opinion as a whole it cannot be based on the  
16 functions, because as Your Honor suggested those functions  
17 are quintessentially Executive, and so the only rationale  
18 that makes sense, and it is a rationale that's borne out, if  
19 you read the opinion it's a whole in terms of why Congress  
20 created this agency, is because it was a multi-member body  
21 that functioned in a deliberative fashion --

22 JUDGE KAVANAUGH: That was based on a notion, to  
23 pick up on Judge Tatel and Judge Griffith's questions, I  
24 think that was based on a notion if you read *Humphrey's*, and  
25 it's an odd notion from today's perspective, but this idea



1 that we're creating a quasi-legislature, kind of a mini-  
2 legislature, and also a mini-appellate court all in, as well  
3 as having some law enforcement functions, right? So, all in  
4 one, so when you think about a legislature, multiple people  
5 compel a court, multiple people. But then *Morrison* drop  
6 kicks that rationale, and that's no longer --

7 JUDGE TATEL: Right.

8 JUDGE KAVANAUGH: -- the governing rationale. And  
9 the question is does the vision, the Justice Sutherland's  
10 odd vision of the quasi-legislature, quasi-appellate court,  
11 still carry through after *Morrison*, and why should it?

12 MR. MOOPAN: Well, because *Free Enterprise Fund*  
13 says it does, Your Honor. If you read the way *Free*  
14 *Enterprise Fund* discusses the case law, when it discusses  
15 *Humphrey's* it revives the quasi-legislative, quasi-judicial  
16 distinction as the rationale of *Humphrey's*, and it relegates  
17 *Morrison* as a case about inferior officers. It does not  
18 suggest that *Morrison* is a free-floating test that says that  
19 even for principal officers for cause --

20 JUDGE KAVANAUGH: We wouldn't, we wouldn't have,  
21 we wouldn't have a legislature of one, that's unthinkable;  
22 we wouldn't have an appellate, we wouldn't have a Supreme  
23 Court, imagine a Supreme Court of one. I don't think anyone  
24 would want that, depending on who it is. And that's what  
25 *Humphrey's* thought they were creating, but I think the

1 problem, the problem that Judge Tatel's raising is that that  
2 rationale seemed to have submerged, what you're saying is  
3 *Free Enterprise Fund* redrew that line?

4 MR. MOOPPAN: I'm saying two things, one is that  
5 *Free Enterprise Fund* did redraw that line; and the second is  
6 that if *Free Enterprise Fund* didn't draw that line it would  
7 necessarily lead to the problem of does this mean that  
8 *Humphrey's Executor* unknown to everyone until today means  
9 that you can impose for cause restrictions on cabinet  
10 officers, core Executive function. Even *Morrison* says that  
11 even in the context of inferior officers that there are  
12 certain officials who can't be subject to for cause  
13 restrictions, and I would have thought it would be in  
14 conceivable that, for example, the Treasury Secretary could  
15 be subject to for cause removal restriction. But CFPB has  
16 offered no limiting principle that wouldn't reach the  
17 Treasury Secretary, and its Amici not only conceded would,  
18 they openly embrace the notion it would.

19 JUDGE PILLARD: But Mr. Mooppan, isn't the idea of  
20 the cabinet officers, that President's control over them is  
21 what, that he needs the cabinet officers so that he can take  
22 care that the law is faithfully executed, and the Treasury  
23 Secretary isn't an analog to the Director of the CFPB to the  
24 extent that the Treasury Secretary is the person to whom the  
25 President turns for advice on trade policy, domestic policy,

1 all kinds of things that the President constitutionally has  
2 to do; whereas, here you have somebody whose charge is  
3 limited to carrying out anti-fraud statutes in the financial  
4 sector, and that's something where there's a charter, do  
5 these laws do them impartially, carry them out effectively,  
6 if you're inefficient, if you fall down in that I'm going to  
7 remove you, but go have at it, that's a very different kind  
8 of function, and it doesn't seem to me clear why that  
9 impinges on the take care authority and responsibility of  
10 the Executive.

11 MR. MOOPPAN: I don't think that's true for most  
12 cabinet secretaries, Your Honor. It might be true that  
13 certain cabinet secretaries implement the President's  
14 inherent Article II powers, such as Secretary of State, or  
15 Secretary of Defense, but the Labor Secretary, or the Health  
16 and Human Services Secretary are not implementing any  
17 inherent Article II power, they're implementing acts of  
18 Congress no different than the acts of Congress that the  
19 CFPB Director is implementing.

20 JUDGE RANDOLPH: Before you sit down, how does the  
21 exemption from the appropriations process play into your  
22 argument?

23 MR. MOOPPAN: We don't rely on that position, Your  
24 Honor. We think that the key here is that it's a multi-  
25 member agency, and that it's not a multi-member agency, and

1 therefore the rationale of *Humphrey's* doesn't obtain, and  
2 there's a greater intrusion on the President's power because  
3 of that.

4 JUDGE KAVANAUGH: On the cabinet --

5 JUDGE RANDOLPH: You would agree, would you not,  
6 that the exemption from the appropriations process it  
7 doesn't deal with the Executive, but it diminishes the  
8 constitutional function of Congress?

9 MR. MOOPPAN: I suppose that's right, Your Honor.  
10 But again, in terms of the Article II analysis we're not  
11 relying on the exemption from budgetary authority.

12 JUDGE MILLETT: And I just want to --

13 JUDGE BROWN: Why does your analogy have to be  
14 cabinet secretaries? I mean, I can see the argument that  
15 those are not the same, but it seems to me that the logic of  
16 what's going on here is that if you can have this single  
17 Director who is only removeable for cause, who takes under  
18 his purview a huge part of what clearly needs to be the  
19 business of executive agencies, couldn't you just have four  
20 or five or six of those that take all of this thing by  
21 subject matter, right? And then you would end up with a  
22 nominal President, and a bunch of single Directors  
23 accountable to no one?

24 MR. MOOPPAN: That's exactly right, Your Honor.  
25 And let me just with one final point segue the point that

1 Judge Tatel had made earlier, because it's tied to that,  
2 which is it's true that intrusions on the President's  
3 officers in cases like *Morrison* do wound the President, but  
4 it's important to remember that the powers of the President  
5 are vested in him not just for his own sake, but for the  
6 people, to ensure accountability to the people. Wiping out  
7 the President's ability to control an agency that regulates  
8 vast swaths of the economy is a much more serious intrusion  
9 on the President's Executive power --

10 JUDGE MILLETT: I just want to clarify --

11 MR. MOOPPAN: -- than whether any individual  
12 cabinet member can be prosecuted. Individual cabinet  
13 members can be replaced, the ability to regulate the entire  
14 economy, that can't be changed, and that's what the Court  
15 was talking about in *Morrison* when it said it was limited  
16 tenure and limited jurisdiction.

17 JUDGE KAVANAUGH: The cabinet's not a statutory  
18 concept, correct?

19 MR. MOOPPAN: That's correct, Your Honor.

20 JUDGE KAVANAUGH: It's just a custom?

21 MR. MOOPPAN: That's right. And I take Judge  
22 Brown's -- I --

23 JUDGE KAVANAUGH: And individual Presidents can  
24 put people in and, and do put people in and out of the  
25 cabinet based on lots of things?

1 MR. MOOPPAN: Yes. I was using --

2 JUDGE KAVANAUGH: But the point of Judge Brown's  
3 question is the entire domestic policy of the United States  
4 could be put, and enforcement of all laws that are domestic,  
5 at least, carving out say defense and state, could be put  
6 under one or more independent agency heads.

7 MR. MOOPPAN: That's absolutely right, Your Honor.  
8 I wasn't using the cabinet in any sort of structural sense,  
9 just as a list of --

10 JUDGE MILLETT: I just want to clarify --

11 MR. MOOPPAN: -- very important agencies that it's  
12 inconceivable that *Humphrey's Executor* justified imposing  
13 for cause restrictions for.

14 JUDGE MILLETT: I just wanted to clarify your  
15 point on that. Would it be, would your position be the same  
16 if instead of making the head of HHS removeable for cause  
17 they replaced the head of HHS with a three-member body  
18 removeable for cause --

19 MR. MOOPPAN: So --

20 JUDGE MILLETT: -- would that be, that would be  
21 okay? Your concern here is replacement by single  
22 individuals?

23 MR. MOOPPAN: Under -- if Congress were to do that  
24 it would fall within the rationale of *Humphrey's Executor*,  
25 and I think then it would be much more likely that we would

1 be heading to the Supreme Court to revisit *Humphrey's*  
2 *Executor*. But I think --

3 JUDGE MILLETT: No, but if you --

4 MR. MOOPPAN: -- it is no, it's no surprise that  
5 that is a hypothetical, restructuring the cabinet  
6 secretaries would be, especially the, you know, the long-  
7 standing agencies would be a dramatic step; whereas,  
8 slapping a for cause restriction on those agencies would be  
9 a lot easier to do, and it is notable that no one has ever  
10 tried to do that in the 70 or 80 years since *Humphrey's*  
11 *Executor*.

12 JUDGE KAVANAUGH: What about making the Department  
13 of Justice an independent agency?

14 MR. MOOPPAN: I doubt that that could be done,  
15 because I think the Department of Justice probably does  
16 implement at least some of the --

17 JUDGE MILLETT: Right, but the problem --

18 MR. MOOPPAN: -- President's inherent Article II  
19 powers.

20 JUDGE MILLETT: -- but the problem there I think  
21 you would say is not that it's multi-member versus single,  
22 it's that there are just some things, like *Myers* said, that  
23 have to be removeable at will. So, when we talk about the  
24 cabinet members, the problem there is more function, which  
25 is a line you don't want to draw, rather than you'd, I think

1 you'd object as much to the multi-member as a single.

2 MR. MOOPPAN: So, it's possible, Your Honor, that  
3 courts could try to draw those lines, but it would be very  
4 difficult to do so precisely because, as Judge Griffith  
5 noted at the outset, those functions are Executive in  
6 nature. So, then you would have to draw some sort of line  
7 about which functions are too big, and which functions are  
8 not, and that is not the sort of bright line and clear  
9 distinctions that the Supreme Court has made clear are very  
10 important in separation of powers disputes, because they  
11 will be the only things that are judicially defensible in  
12 the heat of inter-branch conflict.

13 JUDGE HENDERSON: All right. Thank you.

14 MR. MOOPPAN: Thank you very much.

15 JUDGE HENDERSON: Mr. DeMille-Wagman.

16 ORAL ARGUMENT OF LAWRENCE DEMILLE-WAGMAN, ESQ.

17 ON BEHALF OF THE RESPONDENT

18 MR. DEMILLE-WAGMAN: Judge Henderson, and may it  
19 please the Court. Before I forget I'd like to address one  
20 point that was raised by PHH here, and that deals with the  
21 hold over provision in the Consumer Financial Protection  
22 Act. The Consumer Financial Protection Act gives the  
23 Director a five-year term, and it provides that after that  
24 five-year term the Director may hold over until a successor  
25 has been appointed and confirmed. But this Court explained



1 in *Swan v. Clinton*, 1996 decision, 100 F.3d 973 that where a  
2 statute permits an official to hold over, this Court will  
3 not infer that for cause removal protection applies during  
4 the hold over period unless the statute makes specific  
5 provision for that. And there is no provision for that in  
6 the Consumer Financial Protection Act.

7 JUDGE KAVANAUGH: That's the position of the  
8 Agency, removable at will when the term expires?

9 MR. DEMILLE-WAGMAN: That is our position, Your  
10 Honor. Yes. So, after his five-year term expires in July  
11 of next year, yes, he is removable at will by the President.

12 Now, Judge Srinivasan, you raised the point about  
13 that the President may have more control over the head of  
14 the Bureau than he does over the five members of the Federal  
15 Trade Commission, and in fact, we have done the math there.  
16 The Bureau, as you said, with respect to the Bureau the  
17 President has an 80 percent chance, four-fifth chance to  
18 have an opportunity to be guaranteed an opportunity to  
19 replace the Bureau's Director. With respect to the five  
20 members of the Federal Trade Commission who serve staggered  
21 seven-year terms, it's a four-sevenths chance that he is  
22 guaranteed an opportunity to replace a majority of the  
23 Board, that's 58 percent.

24 JUDGE KAVANAUGH: But the history and tradition  
25 and culture and law of independent agencies, and you know

1 this very well, obviously, is that they turn over to control  
2 by the President's party either immediately, as happened  
3 when President Trump came in with almost all the independent  
4 agencies, or pretty quickly, and that is in part because of  
5 the staggered terms, in part because of the Chair  
6 designation. So, the FTC, like I said, the FCC, all of  
7 those have turned over and are now controlled by the party  
8 of the President, and that's been the practice as I  
9 understand it going way back, and that doesn't happen with  
10 this agency, and the question I guess I have is doesn't that  
11 matter? Doesn't that matter? In other words, that there's  
12 a turnover in the others and not here?

13 MR. DEMILLE-WAGMAN: Turnover isn't guaranteed,  
14 and I'd like to point out that with respect to the FTC, at  
15 the time of *Humphrey's Executor* the President could not --

16 JUDGE KAVANAUGH: I understand that. This came  
17 into being in the late '40s as a practice, as I understand  
18 it, in the turnover and the Chair designation provisions.  
19 But since then, as I understand it, there's been a  
20 tradition, and that's why all of those independent agencies  
21 quickly became headed by Trump designated chairs within a  
22 week of the inauguration, that has not happened, and cannot  
23 happen with the CFPB, and to my mind that seems like if the  
24 question boils down to okay, we have the history, and we  
25 have the effect on liberty, but is there a real effect on

1 the President? That seems like a further diminution of  
2 presidential authority, in other words, preventing that  
3 process that takes place at the other agencies. But I want  
4 your response to that because I know there are answers to  
5 that?

6 MR. DEMILLE-WAGMAN: My understanding, Your Honor,  
7 is that the President has no automatic authority to change  
8 the Chairman of the Board of Governors to the Federal  
9 Reserve System, that term expires next February, and the  
10 agency that controls the monetary policy of the United  
11 States. And back to the mathematics, Judge Srinivasan, with  
12 respect to the Board of Governors of the Federal Reserve  
13 System, and as Judge Pillard noted, because there are seven  
14 members who serve staggered 14-year terms the President is  
15 never guaranteed an opportunity, never guaranteed an  
16 opportunity to appoint a controlling majority. It's true  
17 that on occasion that positions may turn over, and there may  
18 be vacancies, but that's not --

19 JUDGE KAVANAUGH: But the agencies, I agree the  
20 FED is an interesting hybrid, and the agencies that are  
21 analogous to this one there is historically the immediate  
22 turnover. And here's the problem, the end of, the last  
23 seven pages of *Morrison v. Olson* dissent are very  
24 instructive on this, because Justice Scalia there didn't  
25 just analyze all the history, and he said and here's what

1 going to happen, here's what's going to happen, and he laid  
2 it out, and then the next 10 years it was like he had  
3 written a script for what was going to happen. And everyone  
4 realized oh, well, this is a problem. So, here's what I,  
5 and I want to try to put myself in those shoes and try to  
6 figure out what's going to happen. So, President Trump  
7 appoints someone in 2018, July, 2018, that person serves  
8 till July of 2023; the new President, might be a different  
9 party, might have run on a platform of consumer protection,  
10 might be the person who created the Consumer Protection  
11 Agency, and will not have the authority to do anything about  
12 that for three years, contra how he or she would be able to  
13 handle all these other independent agencies, and that's a  
14 reality. Now, let's say he goes two terms, then it goes  
15 till 2028, and so, the President who comes in in 2024 can't,  
16 and might have run on a platform of consumer protection, all  
17 these, can't do it for four years, till right before the  
18 2028 election. And so, I look at that reality and I say  
19 that sounds crazy as a matter of constitutional text,  
20 history, structure, and common sense, frankly. And so, why  
21 would we buy into a concept that's going to lead to this  
22 oddity that we've never had before, that's where the history  
23 plays into my thinking about this, too. We've never had  
24 this before, and boy, this seems to affect liberty, at least  
25 I think it does, it seems to diminish presidential power,

1 but it leaves this bizarre situation where a key element of  
2 the President's platform, the President can't do anything  
3 about it.

4 MR. DEMILLE-WAGMAN: But that's no different with  
5 respect to other agencies where the President doesn't get an  
6 opportunity to appoint a controlling majority of those  
7 Boards. It may be that with respect to the Federal Trade  
8 Commission --

9 JUDGE KAVANAUGH: It may be, but the real, what  
10 we're living through, this is why this argument is timely as  
11 compared to a year ago, we just lived through a real time  
12 example of how this works with the other agencies, and I've  
13 got the charts of all, you know, they've all, almost all  
14 turned over, or will turnover, almost all of them did right  
15 in the first week of the presidency. And so, that just  
16 gives me pause about the ramifications of this, because I  
17 think a lot of the Amicus when we're here in 2022 are going  
18 to say oh, wait, we want that CFPB Director who was  
19 appointed by President Trump, we want that person out, and  
20 all the positions are going to be like this, and that was  
21 Justice Scalia's wisdom in *Morrison* to see how it would  
22 impact or affect, have an effect in the future, and I think  
23 we need to think about those consequences.

24 MR. DEMILLE-WAGMAN: Your Honor, *Humphrey's*  
25 *Executor* and *Morrison v. Olson*, the point they make is that

1 what's crucial for the President is that the President is  
2 that the officials be sufficiently accountable. The  
3 President's removal authority, those cases make clear, the  
4 President's removal authority is not illimitable, is not  
5 illimitable --

6 JUDGE KAVANAUGH: I agree, so let --

7 MR. DEMILLE-WAGMAN: -- it can be --

8 JUDGE KAVANAUGH: -- let me give you a couple of  
9 questions on hypos just to see where this is going, besides  
10 the hypo I just gave, which is problematic, I think. Could  
11 Congress pass a statute saying the majority of the  
12 Commissioners of an independent agency, a multi-member one,  
13 must be of the opposite party from the President?

14 MR. DEMILLE-WAGMAN: I don't know, Your Honor.  
15 That's -- I don't know whether the President could do that.

16 JUDGE KAVANAUGH: The Congress, could the Congress  
17 do that, pass a statute saying a majority of the members of  
18 the independent agency must be of the opposite party from  
19 the President?

20 MR. DEMILLE-WAGMAN: I don't know, Your Honor.  
21 That issue has not been raised here.

22 JUDGE KAVANAUGH: That's de facto what's happened  
23 here.

24 JUDGE ROGERS: The other thing I think we have to  
25 be careful about, don't we, is history versus what statutes

1 provide. A lot of people resign before their terms are up,  
2 and theory was have these six-year terms in most of these  
3 agencies, so you wouldn't get this automatic turnover. And  
4 at least during my lifetime I've seen a lot of people resign  
5 early, so I don't think that history is quite as solid as is  
6 suggested in terms of the diminution of presidential power,  
7 and that's what we're, the issue here, isn't it?

8 JUDGE PILLARD: Let me ask you a different -- I'm  
9 sorry, if you want to respond to that?

10 JUDGE KAVANAUGH: Do you have a response?

11 MR. DEMILLE-WAGMAN: Yes, Judge Rogers. I think  
12 the key here is whether, and the issue that's been raised is  
13 whether just as a matter of what it says in the Consumer  
14 Financial Protection Act, whether that Act, the structure  
15 created by the Act, not in terms of what happens, the  
16 Bureau's Director could resign, but whether the Act in and  
17 of itself is unconstitutional because of the way it  
18 structures it, yes, it may be that it --

19 JUDGE PILLARD: Mr. DeMille-Wagman, what is your  
20 response to the United States' assertion that if your  
21 position is correct then Congress could choose to make  
22 Secretary of the Treasury removable only for cause?

23 MR. DEMILLE-WAGMAN: Your Honor, I don't have an  
24 answer to that question, and I don't think this Court in  
25 this case needs to answer that question. For 130 years

1 Congress has created a wide variety of administrative  
2 agencies, structured somewhat differently, headed by  
3 sometimes three, sometimes five, sometimes seven or 11  
4 officials --

5 JUDGE GRIFFITH: But they've never done anything  
6 quite like this. Let me get you to react from one sentence  
7 from the blue brief at 26 and see if you agree with this?  
8 Never before has so much federal power been concentrated in  
9 the hands of one person so thoroughly shielded from  
10 constitutional accountability. React to that, is that true,  
11 or not, and does it make a difference?

12 MR. DEMILLE-WAGMAN: It doesn't make a difference,  
13 Your Honor, because that's not the basis --

14 JUDGE GRIFFITH: No, but is it true for --

15 MR. DEMILLE-WAGMAN: Is it true in terms of how  
16 much power --

17 JUDGE GRIFFITH: Yes.

18 MR. DEMILLE-WAGMAN: -- the Bureau has? The  
19 Bureau, as I said, there's, there's --

20 JUDGE GRIFFITH: No, it's not just the Bureau, the  
21 Director --

22 JUDGE KAVANAUGH: The person.

23 JUDGE GRIFFITH: -- of the Bureau? Is it true  
24 that never before has so much federal power been  
25 concentrated in the hands of one person so thoroughly



1 shielded from constitutional accountability?

2 MR. DEMILLE-WAGMAN: I don't know, Your Honor, and  
3 I wouldn't like to speculate as to the power of the Chairman  
4 of the Federal Reserve Board, which is a very powerful  
5 position.

6 JUDGE KAVANAUGH: How about if Congress passes a  
7 statute before the next appointment of the CFPB Director and  
8 says that the next CFPB Director will have a 30-year term,  
9 is that constitutional?

10 MR. DEMILLE-WAGMAN: Your Honor, in the *Shurtleff*  
11 case the, a 19-3 decision of the Supreme Court, the Court  
12 had to deal with a situation where there was no tenure limit  
13 whatsoever, and the Court held that that was problematic,  
14 that the President therefore could remove that official, it  
15 was an appraiser --

16 JUDGE KAVANAUGH: And that's no tenure limit.

17 MR. DEMILLE-WAGMAN: -- at will.

18 JUDGE KAVANAUGH: I'm talking about a term, and  
19 shorten it to 20 if that makes it better, a 20-year term for  
20 the next CFPB Director whom the President will appoint in  
21 July of 2018, if Congress passes that is that, I think the  
22 logic of your position is that's fine, anything goes?

23 MR. DEMILLE-WAGMAN: No, I wouldn't say that's the  
24 logic of my position.

25 JUDGE KAVANAUGH: Okay.

1 MR. DEMILLE-WAGMAN: I don't know what --

2 JUDGE KAVANAUGH: Then what is the limit we could  
3 draw that would say a 20-year is too much? What would that  
4 be based on, history? Well, you don't like to look at  
5 history, so what would it be based on?

6 MR. DEMILLE-WAGMAN: This Court, this Court -- I  
7 do like to look at history. I'm trying to draw in the  
8 history here if I can finish this, but --

9 JUDGE KAVANAUGH: I meant that, that sounded worse  
10 than I meant it. Okay.

11 MR. DEMILLE-WAGMAN: No, no, no. What this Court  
12 has to deal with here is a Director who has a five-year  
13 term, Federal Trade Commissioners serve seven-year terms.  
14 I'm not going to speculate as to whether if it were a 10-  
15 year term, or if it were a 15-year term, you can draw me out  
16 in hypotheticals and make them trickier and trickier.

17 JUDGE KAVANAUGH: My point is simply I think  
18 there's no limit, if you don't look at historical practices  
19 at least some kind of an anchor here, and whose ox is going  
20 to get gored, you know, that's going to shift.

21 MR. DEMILLE-WAGMAN: No, Your Honor, the anchor  
22 here is that with all these agencies, all are different, no  
23 two are exactly the same, but --

24 JUDGE SRINIVASAN: Can I ask you this question, on  
25 the example of one person for 20 years, do you think, if

1 that's a problem do you think it's a meaningfully different  
2 problem than another statute which says two persons for 20  
3 years, non-staggered?

4 MR. DEMILLE-WAGMAN: I think it could be a  
5 different issue. Again, I don't know. We have one person  
6 here for five years, these two agencies, with all the  
7 agencies that the Government has created it's hard to see  
8 that two agencies are more similar than the Bureau and the  
9 Federal Trade Commission, and the Federal Trade Commission's  
10 for cause removal provision, which is virtually identical to  
11 the for cause removal provision in the Consumer Financial  
12 Protection Act, was upheld in the *Humphrey's Executor* case.  
13 What the Court has looked to is accountability, and whether  
14 the President can take care that the laws be faithfully  
15 executed, and the Court held that so long as the President  
16 could remove the official, at least for good cause, the  
17 President has sufficient authority.

18 JUDGE GRIFFITH: But the courts also warned us  
19 about novelty in this area, hasn't it? We're suspicious of  
20 significant changes, and this is a significant change,  
21 right? There's nothing quite like this.

22 MR. DEMILLE-WAGMAN: No two agencies are exactly  
23 alike, and the one versus five, one versus multi-member was  
24 never a consideration in any of the, in any of the Supreme  
25 Court cases discussing for cause removal.

1           JUDGE GRIFFITH: Because we haven't had a one  
2 before, this is the first one, right?

3           MR. DEMILLE-WAGMAN: But there's nothing, the  
4 *Humphrey's Executor* case focused on the functions of the  
5 Federal Trade Commission with respect to its analysis of the  
6 constitutionality of for cause removal, not the agency  
7 structure. And there's no reason to believe that the  
8 President has less accountability over an agency, an agency  
9 with, that's headed by a single Director as opposed to a  
10 multi-member commission.

11           JUDGE KAVANAUGH: That's where the terms used in  
12 *Humphrey's Executor* may be a clue about the structure. So,  
13 they referred to it as quasi-legislative, and quasi-  
14 judicial, and you look at the history, where do those terms  
15 come from? What were they thinking? They were thinking  
16 about independent agencies as essentially a combination of  
17 functions, and would recreate in one group a legislature and  
18 a court, among other things. And the model, the reason I  
19 believe they had the multiple members is because  
20 legislatures have multiple members, appellate courts have  
21 multiple members, the idea of the deliberation and  
22 recreating that. And when you divorce -- and so, when you  
23 say *Humphrey's Executor* didn't say anything about it, I  
24 think it said a lot about it when it used the terms quasi-  
25 legislative, and quasi-executive, and you go to the members

1 of Congress, why did Senator Newlands focus so heavily on I  
2 want a multi-member agency, if it's single member, that has  
3 to be executive, it's because they were recreating this  
4 deliberative body, and that's gone when you just have one  
5 person. And they also were trying to get bipartisan bodies,  
6 and that's been the tradition, as well. One person can't  
7 simultaneously be both parties most of the time.

8 MR. DEMILLE-WAGMAN: Actually, it's not  
9 bipartisan, it's not even bipartisan at the Federal Trade  
10 Commission. Federal Trade Commission says no more than  
11 three members of one political party, and in fact, during  
12 the Reagan administration when President Reagan had a  
13 vacancy and three Republicans already on the Commission he  
14 appointed an independent, and that his next appointment was  
15 someone who was described as a Reagan Democrat. So, in  
16 fact, it's not a matter of bipartisan commissions, and the  
17 Board of Governors of the Federal Reserve System has no  
18 partisanship qualifications, it's in fact a geographic  
19 qualification, members of the Board of Governors have to  
20 come from different Federal Reserve Districts.

21 JUDGE TATEL: When I asked Mr. Olson why this case  
22 wasn't controlled by *Morrison* his answer was that the  
23 Director, that there's more than just limitations on  
24 removal, that unlike the independent counsel the statute  
25 removes from the President any authority over budget,

1 appropriations, communications with Congress, there's all  
2 these other aspects of the structure of the Bureau that when  
3 combined with the removal power distinguish it from *Morrison*  
4 and make it unconstitutional. What's your answer to that?

5 MR. DEMILLE-WAGMAN: Your Honor, with respect to  
6 the funding, the Bureau is funded much like other financial  
7 regulatory agencies, must like two-thirds of the Government  
8 outside the annual appropriations process.

9 JUDGE TATEL: But those other agencies don't have  
10 for removal restrictions.

11 MR. DEMILLE-WAGMAN: Have what?

12 JUDGE TATEL: For cause restrictions, this one  
13 does.

14 MR. DEMILLE-WAGMAN: No, they do, Your Honor.

15 JUDGE TATEL: So, you can't compare -- well, go  
16 ahead, then.

17 MR. DEMILLE-WAGMAN: They do, and in fact, the  
18 public company accounting oversight board in *Free Enterprise*  
19 was funded outside of the annual appropriations process,  
20 that puts no restriction whatsoever on the President, the  
21 President is always free in his budget to propose anything  
22 he wants to with respect to the Bureau, and in fact it puts  
23 no restriction on Congress either because Congress, as the  
24 Panel in this case recognized Congress is free at any time  
25 to change the source of the Bureau's funding, or even to

1 eliminate the Bureau's funding all together.

2           JUDGE TATEL: I got that, but his point is that  
3 maybe each of these individually isn't enough, but when you  
4 combine them all the restriction on removal, the five-year  
5 term, which means a President might not be able to appoint  
6 someone at all, and all the budget limitations, and the  
7 other restrictions, that those all add up to distinguishing  
8 this case. I'm not asking you about the merits, I'm just  
9 asking you the question about whether or not *Morrison*  
10 controls this case, and why Mr. Olson's answer isn't a  
11 pretty good reason why it doesn't, because when you add all  
12 of these up, all the differences from Olson it's a different  
13 institution, which is with a greater threat to the ability  
14 of the President to execute the laws, that's his argument.

15           MR. DEMILLE-WAGMAN: *Morrison* does control this  
16 case, Your Honor, and if you look at each of those other  
17 restrictions none of them restricts, we could go through one  
18 by one, but none of them restricts the President whatsoever.  
19 The fact that -- and we went through the budgeting  
20 authority, and with respect to whether certain committees  
21 and Congress can oversee the Bureau's budget, that has no  
22 effect on the President's authority. What the Court held in  
23 *Morrison* is that if the President can remove an official at  
24 least for cause, the President has sufficient authority.

25           Now, the PHH has also made some arguments that the

1 Bureau is somehow more powerful than the Federal Trade  
2 Commission was in 1935, I would draw this Court's attention  
3 to this Court's decision in *National Petroleum Refiners v.*  
4 *FTC*, it's cited in PHH's reply brief at page six, the case  
5 is at, I believe it's at 483 F.2d 672, the issue in that  
6 case is whether the Federal Trade Commission had the  
7 authority to issue substantive rules, and substantive rules  
8 is one of PHH's focus, they say Federal Trade Commission  
9 couldn't issue rules in 1935, but the Bureau issues  
10 substantive rules. What this Court held, and this Court was  
11 asked to consider whether the Federal Trade Commission based  
12 upon basically the original FTC statute as it was enacted in  
13 1914, whether the Federal Trade Commission had rule-making  
14 authority, ultimately, this Court in 1973 concluded that it  
15 did, but before reaching that conclusion this Court observed  
16 that, and to use this Court's words, it was but a quibble to  
17 distinguish the pervasiveness of the FTC's authority, even  
18 assuming it didn't have rule-making authority, it was but a  
19 quibble to distinguish the pervasiveness of that authority  
20 from that of other regulatory agencies that could engage in  
21 a substantive rule-making. And the Court also noted there  
22 on the same page, I think it's at page 685, the Court noted  
23 that the Federal Trade Commission based solely on its  
24 authority to pursue administrative adjudication resulting in  
25 cease and desist orders, based solely on that authority the



1 Federal Trade Commission exerted what this Court referred to  
2 as a powerfully regulatory effect over business practices  
3 subject to its authority. And note, that in 1935 and still  
4 today the Federal Trade Commission has authority over  
5 virtually the entire economy, whereas, the Bureau has  
6 authority over consumer financial products and services.

7 JUDGE ROGERS: Go back to Judge Tatel's question,  
8 and something Judge Millett mentioned earlier.

9 MR. DEMILLE-WAGMAN: Yes, Your Honor.

10 JUDER ROGERS: In response to the blue brief's  
11 point about taking all of these things together, your  
12 response in part is well, Congress could always change the  
13 statute, and I appreciate that. You say, you know, the  
14 President isn't limited in the appropriations process, but  
15 he is, all right, there's an independent source of funding.  
16 So, is part of the response here that it is true there's an  
17 accumulation here, but Congress put this Bureau, or made it  
18 part of the Federal Reserve System, and that system in  
19 itself is unique in a number of different ways. So, while  
20 we can compare the powers of individual agencies, look at  
21 the powers, sort of the central bank concept and the power  
22 of the Federal Reserve, in that area at least so far it's  
23 been different. So, the combination doesn't have  
24 necessarily the same impact on impairing the President's  
25 power that it might outside of the Federal Reserve System,

1 or is that a flawed analysis, as well?

2 MR. DEMILLE-WAGMAN: I think, Your Honor, my  
3 answer would be that it's not that Congress can change these  
4 provisions, it is that these other provisions that they  
5 point to have no impact whatsoever on the power of Congress,  
6 or on the power of the President, so they have no impact on  
7 the separate of powers issue.

8 JUDGE ROGERS: Just reject the combination  
9 argument.

10 MR. DEMILLE-WAGMAN: I do, because each of those  
11 things analyzed separately analyze --

12 JUDGE ROGERS: That's my point.

13 MR. DEMILLE-WAGMAN: No, each one analyzed --

14 JUDGE ROGERS: You can't separate them out, but  
15 viewed in their totality it's just too much, and so the  
16 response I'm trying to get from you is whether because it's  
17 part of the Federal Reserve System that is sort of an  
18 exception that historically has been recognized in our  
19 governmental system?

20 MR. DEMILLE-WAGMAN: No, I don't think I would, I  
21 would say that, Your Honor. What I would say is that the  
22 way the combination issue is resolved is that each of the  
23 things separately is a zero with respect to the for cause  
24 removal argument, so when you add them all together you're  
25 adding zero plus zero plus zero plus zero, and at the end of

1 the day when you add all those zeros together you're still  
2 there with zero. The for, and the for cause removal  
3 provision, the Supreme Court has explained in *Humphrey's*  
4 *Executor* and *Morrison v. Olson* that that does not unduly  
5 impinge on the President's authority to take care that the  
6 laws be faithfully executed.

7 JUDGE RANDOLPH: I wanted to ask you a question a  
8 little off the constitutional subject because it's a subject  
9 that is argued back and forth in the brief. Is it still the  
10 Bureau's position that no statute of limitations applies to  
11 it, that it can bring cases such as this 10 years, 20 years,  
12 30 years after the cause of action accrued?

13 MR. DEMILLE-WAGMAN: No, Your Honor, and I think  
14 we had some discussion about this during the Panel  
15 discussion, and we had not fully briefed that out, we've  
16 discussed this a little more now. Their argument is that  
17 with respect to RESPA, RESPA's three-year statute of  
18 limitations applies. Now, if you look in the statutory  
19 addendum that PHH provided --

20 JUDGE RANDOLPH: I know, your position not only  
21 applies to actions in court, but I'm asking you for the  
22 administrative --

23 MR. DEMILLE-WAGMAN: Yes.

24 JUDGE RANDOLPH: -- proceedings is it still the  
25 Bureau's position that no statute of limitation applies?

1 MR. DEMILLE-WAGMAN: Yes, there is a statute of  
2 limitations, it's the statute of limitations in the Judicial  
3 Code, 28 U.S.C. 2462.

4 JUDGE RANDOLPH: 2462.

5 MR. DEMILLE-WAGMAN: Yes. That imposes --

6 JUDGE RANDOLPH: Do you say that applies in this  
7 case?

8 MR. DEMILLE-WAGMAN: It applies, but it has no  
9 effect because the Bureau did not challenge any conduct,  
10 that's a five-year statute of limitations, the Bureau did  
11 not challenge any conduct that occurred more than five years  
12 before the tolling agreement that PHH signed in 2012.

13 JUDGE RANDOLPH: No, no, no. The reason I raise  
14 that is there is a case pending in the Supreme Court  
15 involving that very statute, and --

16 MR. DEMILLE-WAGMAN: Correct.

17 JUDGE RANDOLPH: -- the question is whether it  
18 applies to disgorgement cases, and this is a disgorgement  
19 case.

20 MR. DEMILLE-WAGMAN: That's right, Your Honor.

21 JUDGE RANDOLPH: So, you're taking a position that  
22 it does apply?

23 MR. DEMILLE-WAGMAN: No, I'm saying --

24 JUDGE RANDOLPH: So, your position is there's no  
25 statute of limitations?

1           MR. DEMILLE-WAGMAN: No, the statute, the five-  
2 year statute of limitations applies, and with respect to  
3 other injunctive relief, if the Bureau is seeking, the  
4 Bureau is seeking disgorgement, if the Supreme Court  
5 determines in the *Kokesh* case that disgorgement is,  
6 disgorgement particularly that goes to the Treasury is  
7 covered by the statute of limitations in the Judicial Code,  
8 that would apply, although we meet, we're within the five-  
9 year statute of limitations, with respect --

10           JUDGE KAVANAUGH: Keep going. Keep going.

11           MR. DEMILLE-WAGMAN: Yes, Your Honor? With  
12 respect to other, with respect to other equitable relief we  
13 might seek, such as an injunction, or perhaps consumer  
14 redress, that's equitable relief, and equitable provisions  
15 would apply. If the Bureau attempted to challenge conduct  
16 that occurred 20 years ago and had ceased 20 years ago,  
17 equitable provisions would limit the Bureau's authority.  
18 But if the conduct is ongoing or likely to recur, and there  
19 was a finding here in the Director's decision that PHH's  
20 conduct was likely to recur, the Bureau is entitled to get  
21 injunctive relief for that.

22           JUDGE PILLARD: Mr. DeMille-Wagman, there's also a  
23 notice issue in the statutory part of this case, what is  
24 your position that the, that PHH was on notice that this  
25 kind of captive reinsurance was unlawful?

1 MR. DEMILLE-WAGMAN: They based that argument  
2 primarily on this 1997 letter --

3 JUDGE PILLARD: Right. I'm asking you really a  
4 slightly different question, which is what is the  
5 affirmative source, if I'm an actor in this market and I'm  
6 trying to figure out can I do this, what would be your  
7 reading of what would say to me no?

8 MR. DEMILLE-WAGMAN: What would say to you no?

9 JUDGE PILLARD: Yes.

10 MR. DEMILLE-WAGMAN: The statute, Your Honor. The  
11 statute itself. Section 8A of RESPA, and it's in that  
12 statutory addendum that PHH provided, it's on page three, if  
13 you look in the left hand column at the bottom, Section 8A  
14 is 12 U.S.C. 2607a it says that no person shall give, no  
15 person shall accept a fee, kickback, or thing of value for  
16 referrals of real estate settlement service business.

17 JUDGE PILLARD: And then they point to 8c-2.

18 MR. DEMILLE-WAGMAN: They point to 8c-2. Section  
19 8c-2 says that nothing in this section, Section 8, shall be,  
20 shall be construed to, as prohibiting the payment to any  
21 person of a bona fide salary, compensation, or other payment  
22 for among other things services actually performed here.  
23 So, there are two requirements there, they could read that  
24 from the statute. Services actually performed means that  
25 you can't have a huge payment for token services, the price

1 paid must be commensurate with the value of the services.  
2 And then there's another requirement, and that requirement  
3 is bona fide, what does bona fide mean? It means in good  
4 faith. And as the Supreme Court explained in *McDonald v.*  
5 *Thompson*, we discuss that in our brief at page 38 of our red  
6 brief before this Court, what the Supreme Court explained  
7 was that in a remedial statute like this one bona fide means  
8 in good faith not for purposes of evasion, but that's  
9 exactly what PHH was doing when it set up its reinsurance,  
10 its reinsurance operation.

11 JUDGE KAVANAUGH: Can I ask another question on  
12 your zero plus zero plus zero?

13 MR. DEMILLE-WAGMAN: Sure, Your Honor.

14 JUDGE KAVANAUGH: Which I was intrigued by. So,  
15 if the SEC, if Congress decides to combine the SEC and the  
16 FTC and the FCC and the CFPB into one single agency, for  
17 example, zero plus zero plus zero plus zero, that's fine as  
18 an independent agency?

19 MR. DEMILLE-WAGMAN: No, the issue there, again,  
20 with respect to each agency, what functions the agency  
21 performs. And note that during the *Humphrey's Executor*  
22 case, while that case was moving forward Congress in fact  
23 assigned regulation of securities to the Federal Trade  
24 Commission for a period of time, it was, that may have been  
25 one of the reasons that Roosevelt wanted to get rid of

1 *Humphrey's* is that he --

2 JUDGE KAVANAUGH: Did you have an answer? That  
3 would be okay? I couldn't, I didn't get the answer.

4 MR. DEMILLE-WAGMAN: No, you'd have to look at the  
5 functions of the agency. The functions of an agency that  
6 combined with the FTC does, what the FCC does, and what  
7 other agencies do all combined together would be very  
8 different, and so you'd have to look at the functions that  
9 the agency performs. But here, the Bureau performs  
10 functions that remarkably similar to what the Federal Trade  
11 Commission does. So, this Court need go no further than  
12 *Humphrey's Executor* and *Morrison v. Olson*, and those cases,  
13 those cases decide this case.

14 JUDGE BROWN: All those zeros were added to a  
15 discussion about for cause removal, and you were arguing, or  
16 at least perhaps you were just relying on precedent that  
17 says there's no problem with for cause removal, right? That  
18 does not diminish the President's ability to hold officials  
19 accountable. Can you give me any example where an agency  
20 head has been actually successfully removed for cause?

21 MR. DEMILLE-WAGMAN: I cannot, Your Honor. It's  
22 my understanding -- I cannot, but my understanding is that  
23 what happens in a situation like that is that when there's,  
24 the President begins to pursue for cause removal the  
25 official simply resigns. But I cannot give you an example.



1 JUDGE KAVANAUGH: And that's not what happened to  
2 Humphrey.

3 MR. DEMILLE-WAGMAN: Beg your pardon?

4 JUDGE KAVANAUGH: That didn't happen to Humphrey.

5 MR. DEMILLE-WAGMAN: Humphrey actually did leave  
6 the Agency, and what he was trying to do --

7 JUDGE KAVANAUGH: Not when he got the letter from  
8 President Roosevelt he didn't leave.

9 MR. DEMILLE-WAGMAN: He actually --

10 JUDGE KAVANAUGH: That asked I ask you be, you  
11 know, depart your office, he didn't leave.

12 MR. DEMILLE-WAGMAN: And he did, and so what  
13 happened in this case was he was suing for back pay --

14 JUDGE KAVANAUGH: All right.

15 MR. DEMILLE-WAGMAN: -- so he was gone.

16 JUDGE BROWN: I asked this question because there  
17 was a letter that was reportedly sent to President-Elect  
18 Trump, and from some Congress people who said since the  
19 founding of our Republic no President has ever removed an  
20 independent agency head for cause, and warning him that for  
21 cause removal is an extraordinary remedy whose use must be  
22 subjected to enhanced congressional, judicial, and public  
23 scrutiny. Now, I don't know if they're right about that,  
24 but it seems to me if for cause removal is in effect  
25 something that is never used successfully, arguably it does

1 diminish presidential authority?

2 MR. DEMILLE-WAGMAN: Your Honor, the issue is not  
3 diminution of presidential authority, it's whether the  
4 President retains sufficient authority to make sure that the  
5 laws are faithfully executed.

6 JUDGE BROWN: However you want to say it, if you  
7 can't remove them --

8 JUDGE KAVANAUGH: You --

9 JUDGE BROWN: -- then it has some effect?

10 MR. DEMILLE-WAGMAN: I note that those Congressmen  
11 may have said that it's something that can't, that the  
12 President can't use, but I would note that --

13 JUDGE KAVANAUGH: But you said I think in response  
14 to my question in Humphrey leaving soon thereafter that  
15 actually, they do have to leave if a President removes you  
16 for cause, regardless of whether you disagree, and you're  
17 only entitled to back pay, not an injunction, is that your  
18 position?

19 MR. DEMILLE-WAGMAN: The President didn't remove  
20 Humphrey for cause, right? He removed Humphrey because he  
21 said --

22 JUDGE KAVANAUGH: Put aside Humphrey, but is your  
23 position that if you're removed for cause you can get an  
24 injunction, or only can get back pay?

25 MR. DEMILLE-WAGMAN: I don't know, Your Honor,

1 what procedures could apply. I think some agencies specify  
2 certain procedures for for cause removal.

3 JUDGE KAVANAUGH: That's Judge Brown's point, I  
4 think it's not happened, right, before?

5 MR. DEMILLE-WAGMAN: It has not happened. I don't  
6 know that it has happened. However, I would note that in  
7 the Panel's, the Panel's decision cites the Cushman volume  
8 on independent regulatory agencies, and Cushman at least  
9 when he was doing his analysis of independent regulatory  
10 agencies thought that for cause removal did amount to  
11 something, I believe it's at pages 644 and 645 of his text.

12 JUDGE KAVANAUGH: Amounted to some kind of -- I  
13 missed your word, amounted to some kind of?

14 MR. DEMILLE-WAGMAN: It's not a nothing, Your  
15 Honor, it's a power that the President does have to make  
16 sure that officials are operating honestly, or operating  
17 competently, and so on. I agree, Judge Brown, however, I am  
18 aware of no instance where a President has actually  
19 exercised that power.

20 JUDGE WILKINS: It seems, you know, I'm trying to  
21 figure out how this cuts, just to follow up on Judge Brown's  
22 question, because I thought about this, and I've seen Law  
23 Review articles and other commentary that say that even  
24 though there is the for cause protection under *Humphrey's*  
25 *Executor*, basically, the only remedy that's available is

1 back pay, and then, and they're saying that, that there's  
2 never been a case where a court has enjoined a President,  
3 and lots of commentators believe that no court would have  
4 jurisdiction to enjoin a President. So, how does that cut  
5 if, in our analysis if, does that mean that really this is  
6 kind of a toothless protection, or does that mean that --  
7 well, how does it cut? How should we think about that?

8 MR. DEMILLE-WAGMAN: I mean, I don't think it's  
9 toothless, I think that with respect to the analysis of the  
10 separation of powers issue the Court has held that as long  
11 as the President can remove an official at least for cause,  
12 he can assure that that official is performing his or her  
13 duties in a manner in accordance with a statute. He may not  
14 be able to remove the official simply for policy  
15 disagreements, that's what --

16 JUDGE SRINIVASAN: Didn't the majority opinion in  
17 *Morrison* say that? That it, the majority opinion in --

18 MR. DEMILLE-WAGMAN: That he could not remove  
19 them.

20 JUDGE SRINIVASAN: -- *Morrison* relied on the  
21 President's ability to remove for cause as a meaningful --

22 MR. DEMILLE-WAGMAN: Yes.

23 JUDGE SRINIVASAN: -- authority --

24 MR. DEMILLE-WAGMAN: Yes. Yes, Your Honor.

25 JUDGE SRINIVASAN: -- on the part of the

1 President?

2 MR. DEMILLE-WAGMAN: Yes, it did, and I think that  
3 both *Humphrey's Executor*, and I believe also *Morrison*  
4 indicated that he cannot, the one thing they, the one thing  
5 that the Court has decided is you can't remove them just for  
6 policy reasons.

7 JUDGE KAVANAUGH: Is policy disagreement cause?

8 MR. DEMILLE-WAGMAN: Well, Your Honor, I think  
9 that that was what happened in *Humphrey's Executor*, and the  
10 Court said no there. I think, I believe that Roosevelt's  
11 letter is something, said something like I would like to  
12 have a man there who is, who sees eye to eye with me I think  
13 is what he said, so I don't think so.

14 JUDGE KAVANAUGH: *Free Enterprise Fund* reaffirmed  
15 that understanding, I believe that.

16 MR. DEMILLE-WAGMAN: I believe that's correct. I  
17 believe that's correct.

18 JUDGE KAVANAUGH: Policy disagreement is not --

19 JUDGE WILKINS: But I guess my point is that even  
20 though that's what the Court held in *Humphrey's Executor*,  
21 now, it was Humphrey's executor because Humphrey died, but  
22 let's suppose he was still alive when the Court made its  
23 decision, he wasn't going to get his job back. I mean, so I  
24 guess what I'm saying is as long as a President is willing  
25 to cut a check for pay for the rest of the term, even if a

1 court disagrees with him later he can still, he can still  
2 get rid of the person, even with the *Humphrey's Executor*  
3 protection, right?

4 MR. DEMILLE-WAGMAN: That may be, Your Honor. I  
5 just don't know how that would play out were that to ever  
6 happen, and of course, that's not the issue here because  
7 here we're just looking at the, not at a situation as  
8 applied, but just that the statute on its face. Are there  
9 any more questions?

10 JUDGE HENDERSON: All right. Thank you, Mr.  
11 DeMille-Wagman. How much time does Mr. Olson --

12 MR. DEMILLE-WAGMAN: Thank you.

13 JUDGE HENDERSON: -- have?

14 THE CLERK: Two minutes and 45 seconds.

15 JUDGE HENDERSON: Okay.

16 ORAL ARGUMENT OF THEODORE B. OLSON, ESQ.

17 ON BEHALF OF THE PETITIONERS

18 MR. OLSON: I didn't hear the answer.

19 THE CLERK: Two minutes and 45 seconds.

20 MR. OLSON: There has never been an Agency like  
21 this. The zero plus zero plus zero, all of those things  
22 that Congress carefully put in the statute to ensure the  
23 independence of this Agency are not zeros, they are  
24 significant in each and every respect, and the sum total of  
25 that bequest of authority to this Agency creates the most

1 powerful Agency. This Agency is given the power to enforce  
2 19 separate consumer finance statutes that come from all  
3 different agencies when this Act was created, this is a very  
4 powerful Agency. Now, does the President under *Free*  
5 *Enterprise Fund* have the authority to be accountable to how  
6 those decisions with respect to those 19 statutes are made?  
7 The President has none. To use the words of a Panel  
8 decision in this Court, and the Supreme Court in *Free*  
9 *Enterprise Fund*, the buck stops somewhere else. The  
10 President can say I can't do anything about that, unless he  
11 steals money, or does something like that I cannot remove  
12 him.

13           Now, we start with the proposition that what the  
14 President, what the, this Agency is doing is performing  
15 Executive functions, there's no question about it, very  
16 broad Executive functions. There is no stopping point, it  
17 could be the Treasury Department, it could be the  
18 Environmental Protection Agency, it could be any other  
19 agency of the Federal Government and we could have the same  
20 arguments that we're having here. What the --

21           JUDGE RANDOLPH: In fact, it already is part of  
22 HUD. HUD was a --

23           MR. OLSON: HUD, part of HUD was taken from --

24           JUDGE RANDOLPH: Taken from --

25           MR. OLSON: -- was taken and given to this Agency,

1 and a bunch of other agencies, too. And what, the Supreme  
2 Court said in *Stern v. Marshall*, it said that illegitimate  
3 and unconstitutional practices get their first footing by  
4 silent approaches and slight deviations from the legal modes  
5 of procedure. That's what the Supreme Court said. Now, I  
6 submit this is neither silent nor slight, as Justice Scalia  
7 would have said, you're anticipating what I'm about to say,  
8 this wolf comes as a wolf. The principle that the CFPB  
9 advances would allow the entire Executive Branch to be  
10 swallowed up by, quote, independent agencies. Congress will  
11 do this, what was said in the Federalist Papers about the  
12 impetuous vortex, Congress will do this all the time, and --

13 JUDGE TATEL: All great, those are all great  
14 arguments against *Humphrey's Executor*.

15 MR. OLSON: Yes, and so *Free* --

16 JUDGE TATEL: But --

17 MR. OLSON: No, what *Free Enterprise Fund* looked  
18 at *Humphrey's Executor*, looked at the context of *Humphrey's*  
19 *Executor*, said this is going to be a body of experts  
20 exercising quasi-judicial, and quasi-legislative functions,  
21 and it had at that time in 1935 --

22 JUDGE MILLETT: But to be clear they said that  
23 they would acquire the expertise during their tenure, they  
24 weren't to be, they weren't, didn't have to be chosen based  
25 on expertise.



1 MR. OLSON: I'm not, I --

2 JUDGE MILLETT: Can *Humphrey's Executor* --

3 MR. OLSON: I didn't quite hear that question?

4 JUDGE MILLETT: They don't get hired based on  
5 expertise, it was that, the rationale the Supreme Court said  
6 is that they would acquire expertise because of length of  
7 tenure. But my quick question to you is just to be clear,  
8 putting aside your objections to *Humphrey's Executor*, which  
9 you have definitely reserved, and you also agree we can't  
10 decide, so if we assume *Humphrey's Executor* remains good law  
11 would the CFPB, would you still have a constitutional  
12 argument if it were headed by two or three people instead of  
13 one?

14 MR. OLSON: We're accepting the outcome in  
15 *Humphrey's Executor*. This Agency goes vastly further than  
16 that, Congress intended it to --

17 JUDGE MILLETT: So, identify two or three would  
18 you still say --

19 MR. OLSON: Pardon me?

20 JUDGE MILLETT: If it were headed by a multi-  
21 member body --

22 MR. OLSON: In my judgment --

23 JUDGE MILLETT: -- would it make a difference to  
24 you?

25 MR. OLSON: -- it makes no difference. The fact

1 is I do agree with the Panel decision that when you disburse  
2 the power to several different individuals, stagger the  
3 terms, it has effects that limit the authority of any  
4 individual. This is different. I would go further, as you  
5 can tell from our briefs, much further than what the Panel  
6 decision was willing to do because of all of these other  
7 authorities, severing just the removal provision does not  
8 take out all these zeros which are not zeros that are given  
9 to the Agency. There is no doubt that this is Executive  
10 functions, the Founders of our country in 1787, 1788, 1789  
11 made the same decision over and over again, we will not have  
12 a plural Executive. What we have in the CFPB is a plurality  
13 of the Executive, and there is no stopping point.

14           Now, I understand that we're bound, as we stand  
15 here today by *Humphrey's Executor* and *Morrison v. Olson*, but  
16 when the Supreme Court analyzed that in *Free Enterprise Fund*  
17 it made it very clear those issues aren't before us because  
18 we weren't asked to do it, but was very skeptical about  
19 those intrusions into the Executive authority because  
20 there's no stopping point, and the Supreme Court instructed  
21 that that is as far as it's going to go. And our submission  
22 is that this Agency, this Director, this individual who can  
23 hire and fire at will, there's no Senate participation in  
24 the, of the officers beneath him, he has authority that is  
25 in no other agency, hire and fire people, and pay them what,

1 basically whatever he wants to do. He doesn't have to  
2 communicate with the White House with respect to pending  
3 legislation, he can bring enforcement actions without  
4 checking with anybody, he has broad litigation authority.  
5 Now, each one of those things you could try to unpack those,  
6 I understand why my opponent would like to take them one at  
7 a time and say it's no big deal, no big deal, but you put --  
8 and at each, each of those things are a big deal, but when  
9 you put them all together it is a very big deal, and there  
10 is no stopping point. And this Court, I submit, is bound by  
11 the limitations prescribed in *Free Enterprise Fund* don't go  
12 any further unless you can fit it within the narrow confines  
13 of *Humphrey's Executor* and *Morrison*, which is an inferior  
14 officer, it is nothing like what we have here today. So, we  
15 submit that this Agency is manifestly unconstitutional,  
16 squarely inconsistent with Article II of the Constitution.

17 I have to say one more thing is that the, we,  
18 because there are very, very important interpretations of  
19 the statute that were articulated in the Panel opinion,  
20 which are basically not challenged here, I heard a little  
21 bit about that, but not very much, it's very, very important  
22 that whatever happens that the decisions on those issues be  
23 reinstated, and the issue that was mentioned in footnote 30  
24 on page 100 will be resolved, as well, if that's possible.  
25 Because those decisions with respect to the statute that

1 were manifestly incorrect, not a close case, according to  
2 what the Panel, unanimous part of the Panel decision said,  
3 need to be reinstated because they're very important to an  
4 industry. This is, people have to understand what the rule  
5 of law is. And, but at the bottom, this is an, those  
6 violations of statutes, those violations of due process  
7 requirements, those eliminations of the statute of  
8 limitations, all the other errors that were made that are  
9 articulated in that Panel opinion are the product of an  
10 unconstitutional agency. When you create those kind of  
11 agencies this is what happens, because no one is accountable  
12 for them, and that has to change.

13 JUDGE HENDERSON: Al right. Thank you.

14 (Whereupon, at 12:15 p.m., the proceedings were  
15 concluded.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



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Paula Underwood

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June 1, 2017

DEPOSITION SERVICES, INC.