

PHH v. CFPB En Banc Oral Argument Recap: Who Won?

Consumer Financial Services Alert

Hinshaw Alert | 5 min read

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The Skinny on the Scuffle

During the 1 hour and 36 minute debate held on May 24, the parties and the full D.C. Circuit Court engaged in a lively and passionate back and forth, mostly over the constitutionality of the Bureau. A very small portion of the debate reflected discussion regarding the underlying RESPA issues, including applicable statute of limitations.

As is usually the case with debate over cases with powerful implications like this one, the judges asked in depth questions on both sides making the outcome difficult to predict. Some of the judges hinted at the necessity of the Supreme Court to decide at least some of the issues.

The major debate was centered on: (1) the diminishment, if any, of the President's ability to faithfully execute the laws; (2) the effect and nature of the for-cause removal provisions; (3) the single director structure v. multi-member commission structure; (3) the effect and nature of the Bureau's other structural features, such as budget & appropriations; and, (4) departure, if any, from historical traditions and ideals.

The Key Cases Discussed

The questions lobbied from the court mostly asked the parties to opine on the precedential value and contours of the following cases:

- *Humphrey's Executor v. United States* – In 1935, the United States Supreme Court ruled that the president could not remove a member of the Federal Trade Commission at will, in part because the president still had the ability to execute the functions of his office.
- *Morrison v. Olsen* – In 1988, the United States Supreme Court upheld the constitutionality of the U.S. Office of Independent Counsel, including with the ability to make indictments of the President's cabinet. Even though

the President could not remove the independent counsel at will, it was still under the control of the Executive.

- *Free Enterprise Fund v. Public Company Accounting Oversight Board* – In 2010, the United States Supreme Court held that the “dual layers of for cause protection” was unconstitutional. The Oversight board could only be removed for “good cause” and the officers of the SEC could only be removed for inefficiency, neglect of duty, or malfeasance in office.”

The United States’ Position

The United States [stuck to its script](#) in arguing that a multi-member commission is the way to resolve the Bureau’s unconstitutional structure. Even when baited to suggest other approaches to provide balance to the Bureau’s structure, the DOJ’s attorney wouldn’t bite and pivoted back to the multi-member commission.

The Most Noteworthy Questions, Hypotheticals, & Quotes

I think the following sample of quotes, which to me are most memorable from the argument, tell the story well, make you think, and if you get down far enough in my list, you will even see the one place people laughed:

- “Even if I agreed with you that there is a serious risk from the for cause removal provision of this director. . . I don’t see how, as a Judge on an appeals court, bound by *Morrison* and *Humphrey’s* [Executor] that I can go there. I just don’t see where this court gets that flexibility.”
- “The question isn’t how serious [a potential \$10 million penalty is], it’s how seriously it limits the president’s power.”
- “I thought the problem here is that Congress took away from the president the authority to enforce all these different statutes and invested it in one.”
- “*Free Enterprise Fund* says, I think, look at history—what are the historical roots for something like this, look at the effect on individuals who are regulated, and look at the effect on presidential power—in other words is there a further diminishment of power beyond that of *Humphrey’s* Executor.”
- “Does the dead hand of the past president in controlling the agency matter?”
- “If you have a fairly robust authority to remove the one person there—not every president is going to get to do it, I grant you that, but some presidents are—and you compare it to a situation in which there are multiple members, and there is a greater likelihood that each president can remove one, but perhaps depending on the terms, a lesser likelihood that each president can remove a majority, then aren’t we at kind of a wash?”
- “Which is the greater intrusion of Presidential power? The replacement of someone of your choice for the Bureau or forcing the President to appoint someone from the other party to the [Federal Trade] Commission?”
- “President Trump appoints someone in July, 2018. That person serves until July 2023. The new President might be a different party, might have run on a platform of consumer protection, might be the person who created the consumer protection agency (audible laughter), and will not have the authority to do anything about that for 3 years, contra how he or she would be able to handle all of these other agencies. And that’s a reality. Now, let’s say he goes 2 terms. Then it goes to 2028. So the president who comes in in 2024, and might have run on a platform of consumer protection, can’t do it for 4 years, until right before the 2028 election. And so, I look at that reality, and I say, that sounds crazy as a matter of constitutional text, history, structure, and

common sense, frankly. And so why would we buy into a concept that's going to lead to this oddity that we've never had before?"

- "When you combine all [the structural features regarding appropriations, communications, budget, etc...], isn't it a different institution with a greater threat to the president's executive control?"
 - "If you look at each of those other restrictions, none of them restricts the President whatsoever...Each of those things analyzed separately is a zero with respect to the for cause removal argument...So when you add them all together you are adding zero + zero + zero + zero, and at the end of the day, when you add all those zero's together, you're still there with zero."
- "There has never been an agency like this. The zero + zero + zero + zero, all of those things that Congress carefully put in the statute to ensure the independence of this agency are not zero's. They are significant in each and every respect and the sum total of that bequest of authority to this agency creates the most powerful agency."

[Read the basics that set the stage for the en banc hearing.](#)

Listen to the oral argument.

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