CFPB ruling ignores decades of Supreme Court precedent

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In a stunning exercise of conservative judicial activism, the U.S. Court of Appeals for the District of Columbia Circuit on Oct. 11 declared unconstitutional a key provision of the federal Consumer Financial Protection Board.

In the wake of the deep recession precipitated in part by subprime mortgages and highly risky economic transactions by financial institutions, Congress passed the Dodd-Frank Wall Street Reform Act in 2010. The law regulates the practices of Wall Street to prevent another financial crisis. Dodd-Frank created the CFPB to enforce the act.

The CFPB is headed by a director who is nominated by the president, confirmed by the Senate, and who can be removed by the president for just cause. The Supreme Court long has upheld the constitutionality of Congress creating federal agencies whose heads can removed from office only by the president and only for just cause. This is to provide the directors of the agencies a degree of insulation from direct political pressure and enhance the likelihood that agencies will regulate based on their best judgments and not in response to political pressures.

In Humphrey’s Executor v. United States, in 1935, the Supreme Court unanimously upheld the ability of Congress to limit the removal of a commissioner of the Federal Trade Commission. Under the Federal Trade Commission Act, the president may fire a commissioner only for "inefficiency, neglect of duty, or malfeasance in office." The court explained that Congress, pursuant to its powers under Article I of the Constitution, may create independent agencies and insulate their members from presidential removal unless good cause for firing exists. The court declared: "The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime."

In many subsequent cases, the Supreme Court has reaffirmed this. For example, in 1988’s Morrison v. Olson, the court in a 7-1 decision upheld the constitutionality of limits on the president’s ability to remove the independent counsel, the office created to investigate alleged wrongdoing by the president or high-level executive officials. The law creating the independent counsel provided that he or she could be removed by the attorney general only for cause. In upholding the law, the court stressed that the independent counsel, who exists to investigate and prosecute alleged wrongdoing in the executive branch of government, ideally should be independent of the president. The court also emphasized that the statute does not prohibit all removal; rather, it allows the attorney general to fire an independent counsel for "good cause." Hence, the court concluded that the limits on the removal of the independent counsel did not violate the Constitution.
These cases should leave no doubt that it was constitutional for Congress to protect the director of the CFPB from removal unless there is just cause for firing. But in a 2-1 decision, in *PHH Corporation v. Consumer Financial Protection Board*, two conservatives judges on the D.C. Circuit - Brett Kavanaugh and Raymond Randolph - declared this unconstitutional. In doing so, they expressed their disagreement with the Supreme Court’s having allowed limits on presidential removal power. They began their opinion by declaring: “The independent agencies collectively constitute, in effect, a headless fourth branch of the U.S. Government. They exercise enormous power over the economic and social life of the United States. Because of their massive power and the absence of Presidential supervision and direction, independent agencies pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances.”

But how can federal court of appeals judges disregard decades of Supreme Court precedents? Judge Kavanaugh, writing for the court, said that the earlier cases, like *Humphrey’s Executor*, involved multi-member commissions whereas the CFPB has just one director. Kavanaugh’s opinion focuses on the novelty of having a single director who can be removed only for just cause.

The fact that it is novel does not mean that it is unconstitutional, otherwise innovation in government would be impossible. The same rationale that supports insulation of a multi-member commission applies to a single director. More importantly, a single director insulated from removal is not unique to the CFPB and it has been previously upheld by the Supreme Court. The independence counsel, for example, was an individual appointed by a panel of federal judges and could be removed only for just cause. There was not a multi-member body.

How does the D.C. Circuit distinguish the independent counsel law and the Supreme Court decision upholding it? The court says that the Supreme Court was wrong in *Morrison v. Olsen* and that Justice Antonin Scalia’s solo dissent got it right. Judge Kavanaugh wrote: “the independent counsel experiment ended with nearly universal consensus that the experiment had been a mistake and that Justice Scalia had been right back in 1988 to view the independent counsel system as an unconstitutional departure from historical practice and a serious threat to individual liberty.”

I certainly do not share the court’s judgment that there was nearly universal consensus that the independent counsel law was a mistake or that Scalia was right. I believe that the law was desirable and that the other seven justices who were the majority in *Morrison v. Olsen* got it right. When there are allegations of wrong-doing by the president or high level executive officials, there should be an investigation by someone independent of the president. But regardless, it is not for a federal court of appeals to disregard a Supreme Court decision by concluding that the dissent was more persuasive.

Also, there are other federal agencies with a single head who can be removed only for cause by the president, such as the Social Security Administration, the Office of the Special Counsel, and the Federal Housing Finance Agency. But the court dismisses these as all being too recent to matter.

Simply put, the Supreme Court has allowed Congress to create federal agencies whose directors can be removed only for just cause to enhance independent decision-making. That is the structure of the CFPB and it should have been upheld. I hope that the D.C. Circuit will grant en banc review and quickly reverse the panel’s opinion. Congress and the president should be allowed to create mechanisms like in Dodd-Frank to best ensure enforcement of the law.