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The risks of the unitary executive

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Kavanaugh has written many insightful opinions, but the one that best exemplifies both the strengths and the weaknesses of his jurisprudence may be his recent dissent in *PHH Corporation v. Consumer Financial Protection Bureau*. The opinion showcases his careful reasoning, but also highlights a shortcoming of his devotion to “unitary executive” theory.

PHH Corporation involves a challenge to the constitutionality of the Consumer Financial Protection Bureau, a powerful financial regulatory agency headed by a single director appointed by the president for a five-year term, during which he or she can only be removed “for cause.” As Kavanaugh explains, the Constitution lodges all “executive” power in the hands of the president. Independent agencies such as the CFPB, he says, are “a headless fourth branch of the U.S. Government” that poses “a significant threat to individual liberty and to the constitutional system of separation of powers.”

While the Supreme Court has upheld some independent agencies, the CFPB goes beyond those cases because it is headed by a single director. Kavanaugh fears that the “CFPB’s concentration of enormous power in a single unaccountable, unchecked Director poses a far greater risk of . . . abuse of power, and a far greater threat to individual liberty, than a multimember independent agency.”

But Kavanaugh does not consider the possibility that concentrating even greater power in the hands of a single person — the president — *also* poses grave risks. The “unitary executive” theory underlying his opinion made sense in a world where the executive branch was confined to the comparatively narrow range of powers granted by the original meaning of the Constitution. It is far more problematic today, including on originalist grounds.

Federal agencies now regulate almost every aspect of American life. If the president has near-total control over them, he or she has much greater power than originally granted — more than can safely be entrusted to any one person. So long as the executive wields authority far beyond the original meaning, Congress should be allowed to insulate some of it from total presidential control to prevent excessive concentration of power.

That doesn’t mean Kavanaugh was wrong about the CFPB, which is indeed an extreme case. But application of the unitary executive theory to powers not originally given to the federal government is a notable flaw in Kavanaugh’s jurisprudence.

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