

## COUNTERFLOW

By Steve Huntoon

# Kavanaugh on FERC: Keg Half Full



In the run-up to the Kavanaugh denouement, our industry was not spared claims of disaster from confirmation.

In our case, the claim was that Judge Brett Kavanaugh had it in for independent regulatory

agencies like FERC, and the implication was that he might somehow persuade four other justices to override many decades of Supreme Court precedent upholding the constitutionality of such agencies.

Now, whatever else the merits or lack thereof of Kavanaugh as a Supreme Court justice (and no, I'm not going there, so please put the ricin away),<sup>1</sup> this particular claim is basically wrong.

The claim is grounded in Kavanaugh's opinion in *PHH Corp. v. Consumer Financial Protection Bureau*, in which a mortgage lender challenged the delegation of executive branch powers to an agency headed by a single person — instead of to a multi member agency.

Some press promoted the notion that this opinion is an existential threat to all independent regulatory agencies. Utility Dive,<sup>2</sup> for example, quotes Joel Eisen, an energy law professor at the University of Richmond, as saying: "In that opinion, he called into question the entire concept of the modern independent regulatory agency, and of course FERC is one such agency." Now, of course, Eisen is entitled to his opinion, but the referenced Kavanaugh opinion, read in its entirety, does not support that sweeping interpretation.

In fact, quite the opposite. The opinion repeatedly stressed the difference between multi member agencies and those headed by a single person:

"In other words, to help preserve individual liberty under Article II, the heads of executive agencies are accountable to and checked by the president, and the heads of independent agencies, although not accountable to or checked by the president, are at least accountable to and checked by their fellow commissioners or board members. No head of either an executive agency or an independent agency operates unilaterally without any check on his or her authority. Therefore, no independent agency exercising substantial executive authority has ever been headed by a single person.

"Until now. ...

"Because the CFPB is an independent agency headed by a single director and not by a multi member commission, the director of the CFPB possesses more unilateral authority — that is, authority to take action on one's own, subject to no check — than any single commissioner or board member in any other independent agency in the U.S. government. Indeed, as we will explain, the director enjoys more unilateral authority than any other officer in any of the three branches of the U.S. government, other than the president."

FERC got an honorable mention as a multi member agency Kavanaugh did not have a problem with:

"Have there been any independent agencies headed by a single person? Prior to oral argument, in an effort to be comprehensive, the court issued an order asking the CFPB for all historical or current examples it could find of independent agencies headed by a single person removable only for cause. The CFPB found only three examples ... the three examples are different in kind from the CFPB and other independent agencies such as the FCC, the SEC and FERC" (emphasis added).

Kavanaugh emphasized this distinction, again mentioning FERC, on the second day of his confirmation hearing in response to questions from Sen. Amy Klobuchar (D-Minn.), saying in that opinion "all I was talking about was a single-headed independent agency," and distinguishing that agency from the "SEC, FTC, FERC, NLRB, the Fed" that "are all multi-member agencies."<sup>3</sup>

Over the decades Congress has assigned Executive Branch powers to dozens of independent regulatory agencies.<sup>4</sup> In our ever increasingly complex society we are ever increasingly reliant on these agencies to perform countless governmental functions.

The notion that we could or would ever return to a time when Congress passed highly prescriptive legislation on everything so the



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Executive Branch would just perform ministerial administration is a joke.

Judge, now Justice, Kavanaugh knows that, and so does every other justice on the Supreme Court.

So FERC, and all of us who rely on and respect you, sleep soundly. The keg is half full. ■

<sup>1</sup> For anyone who does not know where the keg reference comes from, please see one of the funniest SNL sketches with Matt Damon as Kavanaugh here, <https://www.youtube.com/watch?v=VRJecfRxb8>. Again, I'm not taking a position on his confirmation, but hysterical is hysterical.

<sup>2</sup> <https://www.utilitydive.com/news/kavanaugh-pick-threatens-epa-policies-ferc-authority-lawyers-say/527552/>.

<sup>3</sup> <https://www.c-span.org/video/?449705-11/supreme-court-nominee-brett-kavanaugh-confirmation-hearing-day-2-part-3&start=850> (video starting about minute 14).

<sup>4</sup> From the opinion: Interstate Commerce Commission (1887), Federal Reserve Board (1913), Federal Trade Commission (1914), U.S. International Trade Commission (1916), Federal Deposit Insurance Corporation (1933), Federal Communications Commission (1934), National Mediation Board (1934), Securities and Exchange Commission (1934), National Labor Relations Board (1935), Federal Maritime Commission (1961), National Transportation Safety Board (1967), National Credit Union Administration (1970), Occupational Safety and Health Review Commission (1970), Postal Regulatory Commission (1970), Consumer Product Safety Commission (1972), Nuclear Regulatory Commission (1974), Federal Energy Regulatory Commission (1977) [somehow ignoring the creation of predecessor Federal Power Commission in 1920 - ouch!], Federal Mine Safety and Health Review Commission (1977), Federal Labor Relations Authority (1978), Merit Systems Protection Board (1978), Defense Nuclear Facilities Safety Board (1988), National Indian Gaming Commission (1988), Chemical Safety and Hazard Investigation Board (1990), Surface Transportation Board (1995), and Independent Payment Advisory Board (2010).