THE CONSUMER FINANCIAL PROTECTION BUREAU'S SINGLE-DIRECTOR STRUCTURE: A VIABLE AND CONSTITUTIONAL REGULATORY APPROACH?

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About the Author

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Summary of Submission

Riherd's project examines the constitutionality of the single-director structure of the Consumer Financial Protection Bureau (CFPB). By invoking key precedent cases from a span of 100 years of jurisprudence, such as *Humphrey's Executor v. United States*, Riherd explores the history of cause removal provisions and the President's Article II Section III powers. Riherd concludes his analysis with a pragmatic and viable recommendation to restructure the Bureau to be a bipartisan commission, and highlights the ongoing need for effective and predictable economic regulation, especially post-Great Recession.

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Introduction

The 2008 financial crisis left 8.8 million Americans unemployed, disillusioned, and uncertain about the future.[48] When the dust settled, the S&P 500 Index had lost $6.9 trillion in investor wealth, the fourth largest investment bank in the U.S. had filed for bankruptcy, and policymakers were faced with a single question from the American public: How do we prevent this from ever happening again?[49]

Following the 2008 crash, the Obama administration commenced upon an unprecedented "overhaul of the financial regulatory system."[50] Prominent among the reform was the birth of the Consumer Financial Protection Bureau (CFPB), an agency tasked with ensuring consumer safety in the financial sector.[51] Unlike any existing government agency, the CFPB would become the first independent executive agency headed by a single director shielded by "for cause" removal provisions.[52]

Since the CFPB's inception, businesses and constitutional theorists have attacked the agency's structure on constitutional grounds. Central to the debate is whether or not such an agency violates the president's duty to "take care" that the laws are faithfully executed.[53] The case of the CFPB, however, extends beyond constitutional concerns. With the Bureau's potential to 1) determine the future of the financial sector and 2)

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[48] The defining feature of the Financial Crisis relevant to this paper is the role investment banks played in issuing risky, unchecked financial derivatives to the public (e.g. CDOs, synthetic CDOs, etc.). The focus on corrupt banking practices leading up to the 2008 crash is not meant to mitigate the impact of a multitude of other factors and agents that contributed to the crisis: a) historically low interest rates, b) predatory mortgage lending practices (targeting of subprime borrowers), c) prevailing creditor certainty in the ability to sell subprime loans to banks, d) the public living beyond their means, etc.

[49] For additional information regarding the economic impact of the financial crisis see Goodman, Mance, Hurd, and Rohwedder sources.

[50] "Remarks on Financial Regulatory Reform," Administration of Barack Obama (June 17, 2009).

[51] The CFPB's creation was based off an idea proposed by former Harvard Law professor and current senator Elizabeth Warren. Warren argued for a "Financial Product Safety Commission" analogous to the Consumer Product Safety Commission. See Warren and the Dodd-Frank Wall Street Reform and Consumer Protection Act below.

[52] See 12 U.S.C. § 5491(c)(3). Establishment of the Bureau of Consumer Financial Protection. ("The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office").

[53] See U.S. Const., Art. 2, section 3, cl. 5 ("take care that the Laws be faithfully executed").

reconceptualize the use of government agencies, the validity of the CFPB should figure prominently in the minds of Wall Street executives, financial regulators, legal scholars, and the public alike.[54]

This paper will examine the arguments currently facing the Supreme Court in favor of and against the CFPB's authority structure by defining and applying over 100 years of Supreme Court jurisprudence.[55] The analysis will culminate in a recommendation to restructure the CFPB into a multi-member, bipartisan commission in order to promote stable regulation and industry accountability.

History

Early 20th Century Cases - Defining Executive and Independent Agencies

The president's authority over agency directors was first defined in the SCOTUS case *Myers v. United States* (1926). Following President Woodrow Wilson's removal of Postmaster Frank S. Myers prior to the completion of his term, the Supreme Court ruled that Article II of the U.S. Constitution permitted the president to *freely* remove officers who are "units of the executive department."[56] Essential to the Court's ruling was a strict reading of Article II Section III of the U.S. Constitution: Any obstruction to the president's ability to "take care that the Laws be faithfully executed" is unconstitutional.[57] Today, the *Myers* decision persists in the form of the modern **executive agency**—a government agency exercising purely executive functions through a single director who is freely removable.

Building off the decision set forth in *Myers*, the Supreme Court introduced the notion of an independent agency in *Humphrey's Executor v. United States* (1935). Following President Roosevelt's politically-biased

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[54] Patricia A. McCoy, "Inside Job: The Assault on the Structure of the Consumer Financial Protection Bureau," *Minnesota Law Review* 103, no.6 (2019): 2543-2615.
Since the CFPB's inception more than 200 public enforcement actions have been taken, securing "almost 12 billion dollars in relief for consumers." Given the breadth of the agency's jurisdiction, the case of the CFPB figures prominently in the future of the financial industry. Likewise, the CFPB is granted large jurisdiction across the financial sector by combining the previous functions of the Board of Governors of the Federal Reserve, the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and select functions of the Department of Housing and Urban Development and the Federal Trade Commission.

[55] The Supreme Court agreed to hear *Seila Law v. Consumer Financial Protection Bureau* on October 18th, 2019.

[56] Myers v. United States, 1926 U.S. LEXIS 35 (1926).

[57] Ibid.

removal of William Humphrey as a commissioner of the Federal Trade Commission (FTC), Humphrey challenged his dismissal according to the Federal Trade Commission Act. As stated in the act, a commissioner can only be removed for "inefficiency, neglect of duty, or malfeasance in office."[58] The Supreme Court ruled in favor of Humphrey stating that Congress's inclusion of cause removal provisions was constitutional via a two-step process. First, the Supreme Court employed a four-part test to determine whether the FTC may be considered an independent agency, asking does it 1) have a partisan leaning, 2) deal with a uniquely expert subject matter, 3) exercise quasi-legislative duties, and 4) exercise quasi-judicial duties? Second, the court determined that, since the FTC is sufficiently independent and distinct from the executive branch, it follows that cause removal provisions do not *significantly* inhibit the president's Article II duties. As a result, the *Humphrey* case gave rise to the notion of an **independent agency**—a government agency that enjoys some degree of autonomy with a commission of experts that has cause removal protections.

The 21st Century Case - The Boundary on Cause Removal Provisions

After reaffirming the *Humphrey* decision throughout the 20th century, the Court established a limit on cause removal protections in *Free Enterprise Fund v. Public Company Accounting Oversight Board (PCAOB)* (2010).[59] Existing beneath the SEC as an independent agency, the PCAOB's five-member commission enjoyed cause removal protections and was only removable by SEC commissioners who likewise enjoyed cause removal provisions. The Supreme Court held that dual cause removal protections shielding the PCAOB's commission substantially limited the president's ability to fulfill his Article II duties.

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[58] See U.S. Code § 41 (Federal Trade Commission established).

[59] Twenty-eight years after the *Humphrey* decision the Court reaffirmed *Humphrey* as the guiding precedent for questions of presidential removal in *Wiener v. United States* (1958). Following President Eisenhower's removal of Mr. Weiner from the War Claims Commission, the Court held that despite the absence of cause removal protections in the commissions enabling act, the president does not have the right to remove heads of independent agencies lacking such provisions. Fifty-one years following the *Humphrey* decision the Court again reaffirmed *Humphrey* as the guiding case regarding agency director removal in *Bowsher v. Synar* (1986). The Court declined to hold that the president must have unrestrained power of removal of independent agency heads in order to fulfill his or her Article II duties. Fifty-four years following *Humphrey*, the Court affirmed the *Humphrey* decision in *Morrison v. Olson* (1988). The Court ruled that an independent counsel subject to a higher executive authority enjoys cause removal protections from the president due to his or her position as an inferior officer. Since Congress did not renew the Independent Counsel Act in 1999, reference to *Morrison* in favor of the CFPB is tenuous, though connections may be drawn to the modern-day Office of Special Counsel.

Analysis

Arguments Against the Constitutionality of the CFPB's Structure

Opponents of the CFPB's single-director structure will argue the following:

- <u>Legal:</u> *Free Enterprise*'s concern over novel regulatory structures is valid and applicable.
- <u>Legal:</u> The single-director model is sufficient to void a direct application of *Humphrey.*
- <u>Legal:</u> The CFPB threatens individual liberty due to its insufficient accountability.
- <u>Practical:</u> The Unitary Executive Model leads to efficient execution of executive power.

Opponents of the CFPB's authority structure will argue that in the absence of sufficient constitutional clarity concerning novel regulatory structures, the courts must turn to established principles and practices. Opponents will begin by affirming the novelty of the CFPB: "no independent agency exercising substantial authority has ever been headed by *a single person.*"[60] Opponents will continue by citing that—in cases concerning the separation of powers—it is precedent to adhere to long-standing practices.[61] In particular, opponents will cite the language of *Free Enterprise*: "Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity." After affirming the Court's precedent of approaching novelty with caution, opponents will claim that multi-member commissions exist historically for a reason, namely that they prevent an unconstitutional accumulation of power in a single individual who is not held directly accountable to the people.[62]

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[60] PHH Corp. v. CFPB, 36 D.C. Cir. (Oct. 11, 2016).
There are three independent agencies that are headed by a single director: the Federal Housing Agency, the Social Security Administration, and the Office of Special Counsel. Opponents of the CFPB will argue that 1) the FHA does not exercise executive authority, 2) the SSA "lacks unilateral authority to bring law enforcement actions against private citizens," and 3) the OSC "does not have authority to enforce laws against private citizens, and does not have the power to impose fines and penalties on private citizens." As a result, it can be said that no independent agency exercising *substantial executive authority* has ever been headed by a single person.

[61] Opponents of the CFPB's structure will cite *NLRB v. Noel Canning* (2014) in which case the Supreme Court held that "recess appointments in Senate recesses of fewer than 10 days were presumptively unconstitutional under Article II. 134 S. Ct. 2550, 2567, slip op. at 21 (2014)." The court in *NLRB v. Noel Canning* stated the following: "Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions regulating the relationship between Congress and the President."

[62] PHH Corp. v. CFPB, 36 D.C. Cir. (Oct. 11, 2016). *PHH Corp v. CFPB* outlines the ways in which a single-director model further diminishes presidential executive authority: "A President may be stuck for his or her entire four-year term with a single Director appointed by a prior President with different views. Generally, the members of multi-member agencies serve staggered terms, and the President will at least have an opportunity to appoint some new commissioners over the course of his or her first term."

Challengers of the CFPB model will likewise reject a straightforward application of *Humphrey*. In particular, opponents will argue that the presence of a single director foundationally distinguishes the CFPB from the case of the FTC multi-member commission. However, in the event that *Humphrey* is taken as precedent, opponents will respond by citing the fact that a four-year president with a five-year CFPB director can theoretically sperve his entire term with a director whose views oppose his or her own. Opponents will claim that such a scenario leads to a "further diminishment of presidential power" that would not have been upheld by the court in the *Humphrey* decision.[63]

Additionally, opponents will hold that an independent agency led by a single director lacks sufficient accountability and poses a significant threat to individual liberty by violating the system of checks and balances. In particular, opponents will argue that the independent, single-director model results in unchecked authority, an abuse of power, and arbitrary decision-making. The opposition will support its claim by citing the ineffectiveness of the Consumer Advisory Board and the Financial Stability Oversight Council as substitutes for the traditional check provided by multi-member commissions.[64] Challengers will therefore argue to change the CFPB to either a multi-member commission or an executive agency.[65]

Finally, opponents will claim that the Unitary Executive Model results in the most efficient exercise of executive authority.[66] Jolina Cuaresma asserted that when the president acts as a "'unitary actor' in control of the executive branch, the president can set forth a consistent policy view across all agencies." For many scholars, such a model allows for maximum efficiency, coherent policies, and significant accountability.[67] In

[63] Opponents will likewise cite the extensive sources of independence and power enjoyed by the CFPB: 1) No OIRA review of economically significant rules, 2) Director Only Removable for Cause, 3) Funding Outside of Congressional Control, 4) Independent Litigation Authority, 5) Adjunctive Authority, and 6) Broad Jurisdiction.

[64] Opponents will argue 1) the director is not required to act by the Consumer Advisory Board and 2) an unreasonably high standard is required (two-thirds majority) for the FSOC to veto regulations proposed by the CFPB director. See *PHH Corp v. CFPB.*

[65] PHH Corp. v. CFPB, 36 D.C. Cir. (Oct. 11, 2016).

[66] The Unitary Executive Model represents the legal belief that "the executive branch should be recognized as a large, bureaucratic institution that recognizes the chief executive as sitting at the top of that institution." Accordingly, the president must possess "tremendously broad supervisory, managerial, administrative, and enforcement powers over all administrative agencies" (Cuaresma).

[67] Cuaresma cites the following: Steven G. Calabresi, The Vesting Clauses as Power Grants, 88 NW. U. L. Rev. 1377, 1378-86 (1994); Frank B. Cross, Executive Orders 12,291 and 12,498: A Test Case in Presidential Control of Executive Agencies, 4 J.L. & Pol. 483, 499-504 (1988); Henry P. Monaghan, The Protective Power of the Presidency, 93 Colum. L. Rev. 1, 14-15 (1993); Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 597-99, 643-50 (1984).

relation to the CFPB, opponents will claim that—since the CFPB exercises extensive executive authority—it is vital the Bureau is brought under the direct control of the president.[68]

Arguments for the Constitutionality of the CFPB's Structure

Proponents of the CFPB's single-director structure will argue the following:

- Legal: *Free Enterprise* did not signal a departure from the *Humphrey* decision.
- Legal: The case of the CFPB warrants a direct application of the *Humphrey* decision.
- Legal: There exists sufficient accountability to deny a checks and balances violation.
- Practical: An independent, single-director model is necessary for regulatory effectiveness.

Supporters of the CFPB's structure of authority will argue that the Supreme Court's decision in *Free Enterprise* did not indicate a departure from *Humphrey*. Rather, proponents will hold that the Supreme Court overturned the PCAOB via a direct application of *Humphrey* (i.e., dual cause removal provisions substantially limited the president's ability to hold the five-member board accountable).[69] Accordingly, proponents will deny that the court intended to develop a "novelty-as-unconstitutional" framework in *Free Enterprise*.[70] Proponents will further claim that *Free Enterprise* is sufficiently distinct and therefore inapplicable to the case at hand. Hosea Harvey explained that "to make the CFPB's situation analogous to the PCAOB's, the remaining removal power in a CFPB challenge would have to vest in the Federal Reserve as only this would mirror the SEC's control over the PCAOB."

By refusing to acknowledge a departure from *Humphrey* following *Free Enterprise*, proponents will claim that *Humphrey* remains the essential case for assessing the CFPB's structure. As a result, proponents will apply the following two-step process:

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[68] The extensive executive authority of the agency is referenced repeatedly throughout the first *PHH Corp v. CFPB* decision: "The Director unilaterally enforces 19 federal consumer protection statutes, covering everything from home finance to student loans to credit cards to banking practices."

[69] Proponents will cite the language of *Free Enterprise* referring to the restriction of the president's Article II powers: "That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such power, the president could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else."

[70] Hosea H. Harvey, "Constitutionalizing Consumer Financial Protection: The Case for the Consumer Financial Protection Bureau," *Minnesota Law Review* 103, no.6 (2019): 2429-2476.

1) The CFPB meets the requirements of an independent agency as it a) may be considered non-partisan, b) is composed of a body of experts, c) performs sufficient legislative responsibilities, and d) performs sufficient judicial responsibilities.[71]
2) The president's Article II powers are not practically limited by cause removal protections due to the fact that a) the CFPB is sufficiently independent and b) the director serves a limited term of five years.

In response to the argument that a single-director model lacks a sufficient check on power due to the absence of a multi-member board, proponents will reference a list of accountability measures in place that subject the CFPB director to other agencies and branches. In particular, proponents will cite that 1) the Financial Stability Oversight Council reserves the power to overturn CFPB regulations and 2) the director must biannually testify before Congress and submit annual reports to congressional committees.[72]

Finally, proponents will hold that holacracy—distributed expert functions—outweighs hierarchy when it comes to effective governmental action via agencies.[73] Supporters of the CFPB will therefore reject the Unitary Executive Model by claiming that agencies are most effective when they are highly specialized and protected from politics. Additionally, proponents will argue for a single-director structure on the belief that multi-member commissions result in regulatory delays; in particular, supporters will cite the fact that the SEC (a multi-member commission) has "yet to meet over 20% of its statutorily-mandated rulemaking deadlines."[74]

[71] Since the CFPB is situated within the Federal Reserve (an insulated, non-partisan body), it is fair to assume the CFPB is likewise insulated from the Executive and Legislative branches. Additionally, the top five states for consumer complaints reflect both predominantly liberal and conservative states (California, Florida, Texas, New York, and Georgia). See *Complaint Snapshot: 50 State Report* below. Harvey notes that the expertise element of the CFPB could be challenged due to the lack of experience in the financial services industry possessed by prior directors (e.g. Cordray, Mulvaney, etc.). However, since there is a) an absence of a clear and discernable definition of *expertise* and b) the prevalence of expertise within the agency, the expertise element may be said to be met. The CFPB possesses substantive rule making power. See 12 U.S.C. § 5491(c)(3) (Establishment of the Bureau of Consumer Financial Protection). The CFPB has historically used its judicial authority to provide relief to aggravated parties (McCoy).

[72] Other accountability measures include: 1) the CFPB is statutorily capped, 2) CFPB rules are subject to the Small Business Regulatory Enforcement Act's small business panel review process, and 3) Congress can overturn the CFPB's rules with legislation under the Congressional Review Act. See McKendry below. For an exhaustive list of measures, see "CFPB Accountability Measures" below.

[73] According to Harvey, holacracy refers to an emphasis on decision making not beholden to excessive executive oversight (e.g. independent agencies with expert functions enjoying freedom from the executive branch).

[74] Hosea H. Harvey, "Constitutionalizing Consumer Financial Protection: The Case for the Consumer Financial Protection Bureau," *Minnesota Law Review,* 103 (2019): 2429.

Recommendations and Implications

Jolina Cuaresma notes that it would be no surprise if the Supreme Court ruled against the CFPB during the current term given Justice Kavanaugh's position regarding the Bureau as well as "the other sitting Justices' position on separations-of-power, nondelegation, and the modern administrative state."[75] As a result, it is likely that the CFPB will be dissolved completely or absorbed under the direct authority of the president as an executive agency.[76] The economic consequences of the latter scenario are profound: administration changes involving political party transfer will result in an unstable CFPB that cycles between minimum and maximum regulation. As Cuaresma notes, such instability discourages financial investment.[77]

Given the need for regulatory stability, Congress and the Court's best option is to restructure the CFPB to a multi-member, bipartisan, authority structure with staggered terms for commission members.[78] In doing so, the CFPB would avoid a "wholesale change" in leadership with nearly every election cycle, ensuring the CFPB's protection from the uncertainties of political party turnover.[79]

The role unchecked financial derivatives played in the 2008 crisis serves as a reminder of the need for effective financial oversight. Regulation, however, must remain predictable; oscillating degrees of regulation stymie economic growth. The CFPB, therefore, must remain shielded from the whims of politics—it must *freely* and *predictably* ensure the protection of consumers and foster the continual advancement of the financial sector at large.

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[75] Cuaresma cites *Gundy v. United States* and *Kisor v. United States*. For an explanation of the Justices' views according to these cases, see Cuaresma below (endnote 207 of the article). Justice Kavanaugh figured prominently in the first *PHH Corp v. CFPB* decision.
[76] Jolina C. Cuaresma, "Commissioning the Consumer Financial Protection Bureau," *Loyola Consumer Law Review* 31, no. 3 (2019): 426-491.
[77] Cuaresma states that stable regulation leads to a predictable business environment; as a result, companies are encouraged to invest in R&D while venture capitalist and private equity firms are invited to invest.
[78] The concern for regulatory stability is not unwarranted. When President Trump appointed Mick Mulvaney as acting director following the resignation of Richard Corday, he foreshadowed what an executive CFPB would look like (i.e., an agency in which the ideology of the CFPB's director radically changes according to the affiliation of the controlling party). The regulatory result was significant: Mulvaney asked for $0 in funding his first quarter compared to the $217.7 million requested by Corday the quarter prior. See Rozsa below. It is important to note that, contrary to the failings of the SEC, multi-member, bipartisan commissions do not necessarily experience excessive delays. The CFTC (an agency possessing a leadership structure similar to that of the SEC) has met all but six of its fifty-one mandatory rulemaking deadlines. See Cuaresma (endnote 260).
[79] Cuaresma, "Commissioning," 426-491.

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