Legal Backgrounder

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PHH v. CFPB: D.C. Circuit Endorses Frontal Assault on Constitution's Structural Protections

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The Consumer Financial Protection Bureau (CFPB) is the first of its kind: an independent agency exercising substantial executive authority and headed not, as has been the historical norm for such agencies, by a bipartisan multi-member commission or board, but by a single individual. At the CFPB's helm is a director who is protected from presidential supervision and control by a statutory for-cause removal provision. The agency is likewise unchecked by Congress's power over the budget, as it draws its funding directly from the Federal Reserve. Thus, the Director is unaccountable to *anyone* elected by the people and wholly immune from oversight or correction by the citizenry.

This frontal assault on popular sovereignty is particularly egregious because, tasked with enforcing more than a dozen statutes, the Director of the CFPB wields extraordinarily broad, coercive power over the public. "Measured in terms of unilateral power, the Director of the CFPB is the single most powerful official in the entire U.S. Government, other than the President." *PHH Corp. v. CFPB*, 881 F.3d 75, 173 (D.C. Cir. 2018) (*en banc*) (Kavanaugh, J., dissenting). And "within his jurisdiction, he is even more powerful than the President." *Ibid.* He is, in essence, "the President of Consumer Finance." *Ibid.*

This unilateral power should be enough to give anyone pause about the CFPB's consistency with the constitutional design. Yet faced with this constitutional anomaly in *PHH Corp. v. CFPB*, the *en banc* U.S. Court of Appeals for the D.C. Circuit went out of its way to vacate a panel opinion and reject a constitutional challenge to the CFPB's structure, in the face of the powerful, well-reasoned dissenting opinions of Judges Kavanaugh and Henderson. In doing so, the majority misapplied the core structural protections of the Constitution and undermined the liberty of the People that those protections secure.

Congress created the CFPB in response to the 2008 financial collapse, in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The agency is the brainchild of Senator Elizabeth Warren, who sought to consolidate regulation of consumer financial services within a single, quick-punching agency that could regulate everything from credit cards to personal loans to residential mortgages.*

* *See* Lydia DePillis, *A Watchdog Grows Up: The Inside Story of the Consumer Financial Protection Bureau*, Wash. Post, Jan. 11, 2014, https://www.washingtonpost.com/news/wonk/wp/2014/01/11/a-watchdog-grows-up-the-inside-story-of-the-consumer-financial-protection-bureau/?utm_term=.5b680dda2a58 ("The bureau began as an idea published in 2007 in Democracy Journal ... . Its author, a Harvard Law School bankruptcy professor named Elizabeth Warren.")

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The resulting CFPB is a behemoth, implementing and enforcing nineteen consumer-protection statutes, collecting massive amounts of data and information, and holding power over vast swaths of the U.S. economy.

The first Director of the CFPB revealed a penchant for heavy-handed, *ultra vires* enforcement tactics. Take the *PHH* case. PHH Corp. is a mortgage lender whose conduct was perfectly legal under a longstanding statutory interpretation by the Department of Housing and Urban Development. When the CFPB took over, the Director came up with a new interpretation that was much harsher on lenders. The Director then applied it *retroactively* against PHH, sanctioning it for actions taken *before* the CFPB changed the law.

Making matters worse, the CFPB ran roughshod over the three-year statute of limitations. The CFPB claimed that Dodd-Frank had eliminated any limitations periods whatsoever for administrative enforcement of the CFPB's nineteen statutes. Through these shenanigans, the Director ultimately imposed a $109 million penalty against PHH.

Saddled with this unforeseeable liability, PHH challenged the order in the D.C. Circuit. PHH contested the CFPB's statutory interpretation, its retroactive application, and its claimed freedom from any limitations period. A panel of the D.C. Circuit agreed with PHH on all those grounds, calling out the agency for its absurd positions and regulatory gamesmanship.

PHH also argued that the CFPB was unconstitutional because of its unprecedented structure. Here, too, the panel agreed, but the full D.C. Circuit faltered, taking the case *en banc* and upholding the agency's constitutionality. This ruling is unfortunate, both for those subject to the uncontrolled whims of an unelected bureaucrat, and for anyone who takes seriously the constitutional division of powers and the liberty interests that those divisions secure.

Start with constitutional First Principles. To guard against tyranny, the Constitution divides governmental power among the three branches. "The executive Power" is vested in one person alone: the "President of the United States of America," who "shall take Care that the Laws be faithfully executed." Art. II §§ 1, 3. This enhances liberty and ensures that the People remain sovereign by knowing which officials to hold responsible for unpopular or ineffective governmental actions and correcting those actions through the ballot box. Of course, the President cannot execute the laws without assistance. The Constitution therefore contemplates that the President will appoint "Officers of the United States." Art. II § 2 cl. 2. Those officers draw their authority from the President, not the other way around. The People know that the buck stops with the President. *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 493 (2010).

Drawing on these principles, the Supreme Court held in *Myers v. United States*, 272 U.S. 52 (1926), that the President is empowered to supervise and remove—at will—subordinate principal officers in the Executive Branch. Otherwise the President cannot ensure faithful execution of the laws. A decade later, in *Humphrey's Executor v. United States*, the Court crafted an exception to *Myers* and endorsed the modern independent agency. According to the Court, Congress could prohibit the President from at-will removal of officials appointed to the bipartisan multi-member Federal Trade Commission because that agency exercised "quasi-legislative" or "quasi-judicial," rather than "executive," power. 295 U.S. 602, 628–29 (1935). The Court again modified the rule in *Morrison v. Olson*, 487 U.S. 654 (1988).

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Morrison upheld the office of the independent counsel within the Department of Justice, even though its functions were purely executive. Congress's removal restrictions did not "impede the President's ability to perform his constitutional duty," the Court said, because the independent counsel was an inferior officer—subordinate to the Attorney General—with a narrow scope of power and a temporary position. *Id.* at 691.

Now consider how the CFPB fits within this constitutional backdrop. At the head of the CFPB is not a bipartisan multi-member board acting, as multi-member bodies do, in a collaborative quasi-legislative capacity, but just one person, the Director, vigorously steering the agency in the direction he alone deems appropriate. Moreover, the Director, unlike the independent counsel in *Morrison*, is a principal officer in a permanent office with vast jurisdiction over a broad segment of the national economy. The President cannot remove the Director at will, but only for "inefficiency, neglect of duty, or malfeasance in office." This precludes a newly elected President from immediately replacing the Director with someone holding shared policy views or even, as in the case of the traditional multi-member independent agency structure, influencing the direction of the agency by designating its chairman. And because of the Director's five-year term, a President may lack any opportunity for a replacement during the President's entire four-year term. That leaves the Director free to pursue his own policy agenda, even if it runs blatantly contrary to the policy views of the President and the American public that elected him.

The Director is free from another important constraint: Congress's control over the budget. As Judge Henderson's dissent in *PHH* explains, Congress "so valued the CFPB's independence that it forfeited its *own* oversight by exempting the agency from appropriations," instead funding the agency independently through the Federal Reserve. 881 F.3d at 162.

Why was independence so important? Precisely because it blocks political accountability. The Congress that created the CFPB understood that political priorities change. Presidential elections happen. To prevent a newly elected President from changing the direction of the CFPB, and to prevent even a future Congress from withholding funds from a runaway agency, the Dodd-Frank Congress took extreme measures to ensure that the Director could preside over the realm of consumer finance with no constitutional checks.

This might create some amount of regulatory continuity, but it is at war with a constitutional system premised on popular sovereignty. There is simply no room within the allocation of constitutional powers for the Director of the CFPB: a single unelected bureaucrat heading an agency with sweeping power, unaccountable to the President, untethered to Congress's power of the purse, roving about the country with a full arsenal of potent enforcement weapons.

The dissents of Judges Kavanaugh and Henderson get this right. Judge Kavanaugh emphasizes that the CFPB is headed by a single Director, not a multi-member board. That feature places the CFPB beyond the exception created in *Humphrey's Executor*. As he explains, the "CFPB's concentration of enormous executive power in a single, unaccountable, unchecked Director not only departs from settled historical practice, but also poses a far greater risk of arbitrary decision making and abuse of power, and a far greater threat to individual liberty, than does a multi-member independent agency." 881 F.3d at 166.

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Judge Henderson focuses more on the appropriations issue. Direct funding from the Federal Reserve "frees the agency" from "Congress's most effective means" of oversight, "short of restructuring the agency." *Id.* at 138. The problem with the CFPB, then, is that it combines several problematic structural features: exemption from appropriations, a single Director with five-year tenure protection, and "sweeping rulemaking and enforcement powers over an entire sector of the economy." *Id.* at 155. The constitutional principle of "consent of the governed is a sham," Judge Henderson concludes, "if an administrative agency, by design, does not meaningfully answer for its policies to either of the elected branches." *Id.* at 137.

The majority gets things badly wrong, claiming that "*Morrison* and *Humphrey's Executor* stand in the way" of ruling against the CFPB. *Id.* at 93. Those cases, according to the majority, establish exceedingly broad permission for Congress to limit the President's removal power as long as Congress does not take for itself the power to remove executive officials outside the impeachment process. *Id.* at 87–88. Further, the majority said, the CFPB is authorized by *Morrison* because "Congress validly decided that the CFPB needed a measure of independence." *Id.* at 92

The majority reads those cases much too broadly and places more weight on them than they can bear. *Humphrey's Executor* and *Morrison* upheld innovations that strayed far from the constitutional design. Both opinions have drawn sharp criticism and are widely viewed as conflicting with the text and structure of the Constitution. *See id.* at 176 n.3, 179 n.7 (Kavanaugh, J., dissenting).

But even under that forgiving precedent, the D.C. Circuit's attempt to squeeze the CFPB into the *Morrison* framework is thoroughly unconvincing. *Morrison* reasoned that "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty." 487 U.S. 654, 691 (1988). The independent counsel did not so impede the President because (1) she was an inferior officer subordinate to the Attorney General, (2) her post was temporary and tied to a specific investigation, (3) her jurisdiction was narrow, and (4) she lacked "policymaking or significant administrative authority." *Id.* at 691.

The Director of the CFPB flunks every part of that test. No one claims that the Director is an inferior officer. The Director's five-year tenured position is far from temporary and not tied to any specific investigation. The scope of his authority is staggeringly broad. And in exercising those powers, the Director unquestionably wields policymaking and significant administrative authority. Rather than salvaging the CFPB, *Morrison* requires its invalidation.

Whether the Supreme Court will correct the D.C. Circuit's facially erroneous opinion is not entirely clear, since the opinion upheld an Act of Congress and there is, thus far, no "circuit split." Yet the Court granted review in the *Free Enterprise Fund* case in the same circumstances, in order to correct a basic separation-of-powers error. Since the *PHH* decision's error is even more obvious and dangerous, the Supreme Court should quickly correct a ruling that allows the CFPB Director to brandish vast power loosed from the bedrock constitutional constraints that anchor our system of government by consent.