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Constitutionalizing Consumer Financial Protection: The Case for the Consumer Financial Protection Bureau

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Article

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INTRODUCTION

Since its inception, the imminent death of the Consumer Financial Protection Bureau (CFPB or Bureau) has been as exaggerated as the (first) death of Mark Twain.[1] The Bureau,[2] part of Congress's response to the 2008 financial crisis, is an independent executive agency responsible for consumer financial protection.[3] The CFPB attempts to "regulate[] the offering and provision of consumer financial products [and] services," while

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1. Frank Marshall White, *Mark Twain Amused: Humorist Says He Even Heard on Good Authority that He Was Dead,* N.Y.J. (June 2, 1897), https://cdn.loc.gov/service/sgp/sgpbatches/batch_dlc_delancey_ver02/data/sn83030180/print2444/1897060201/0181.pdf. Mark Twain's off-misquoted letter reads: "James Ross Clemens, of St. Louis, a cousin of mine, was seriously ill two or three weeks ago in London, but is well now. The report of my illness grew out of his illness. The report of my death was an exaggeration." *Id.*

2. Hereinafter, I refer to the Bureau under its most well-known colloquial moniker, CFPB, rather than the Bureau's "official legal name." *See, e.g.*, Kathy Kraninger (@CFPBDirector), TWITTER (Dec. 19, 2018, 12:48 PM), https://twitter.com/CFPBDirector/status/1075493112418570240 (exploring the Bureau's ongoing dialogue about its legal name versus its branded name).

3. 156 CONG. REC. 9839 (2010) (statement of Rep. Holt); *see also About Us,* CFPB, http://www.consumerfinance.gov/about-us (last visited April 14, 2019). The Bureau's genesis is described best by Oren Bar-Gill and Elizabeth Warren. *See* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008).

ensuring that consumers are empowered to "make better informed financial decisions."[4] The CFPB's design-features were needed, in part, to consolidate regulatory authority and other functions from numerous other federal regulatory agencies.[5] Furthermore, because its design-features include insulation from congressional appropriation review and for-cause executive removal power, the agency is largely protected from outside influence, except perhaps during the nomination process of its singular director.[6] The Bureau has been the subject of many critiques—political and legal, empirical and anecdotal—about each and every part of its operations, spanning employment decisions,[7] the recess appointment power,[8] the validity of a five-member structure,[9] its ability to regulate certain industries[10] or

4. *About Us*, *supra* note 3.

5. Megan Slack, *Consumer Financial Protection Bureau 101: Why We Need a Consumer Watchdog*, WHITE HOUSE (Jan. 4, 2012), https://obamawhitehouse.achives.gov/blog/2012/01/04/consumer-financial-protection-bureau-101-why-we-need-consumer-watchdog.

6. Congress generally controls agency budget reviews, and that relationship can be understood to give Congress substantive authority over the agency. The CFPB operates within the Federal Reserve and is not required to submit to congressional budget allocation review. The CFPB was also created with a provision restricting the President's removal power over the Director to only situations where just-cause exists, limiting executive influence. 12 U.S.C. § 5491(c)(3) (2012) ("The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office."). The Director of the CFPB serves a five-year term and must be nominated by the President and approved by the Senate. *Id.* § 5491(b)–(c) (outlining the term and nomination process of the Director).

7. *See* Class Action Complaint & Demand for Jury Trial, Jones v. Mulvaney, No. 18-2132 (D.D.C. Sept. 13, 2018) (commencing a class action complaint against the CFPB's internal employment practices); *see also* Barbara S. Mishkin, *Director Cordray to Testify at July 30 House Hearing on Alleged CFPB Employee Discrimination*, BALLARD SPAHR (July 28, 2014), https://www.consumerfinancemonitor.com/2014/07/28/director-cordray-to-testify-at-july-30-house-hearing-on-alleged-cfpb-employee-discrimination.

8. *See, e.g.*, CFPB v. Gordon, 819 F.3d 1179 (9th Cir. 2016) (challenging the CFPB's enforcement power under improper recess appointments); *see also* Barbara Mishkin, *Director Cordray Ratifies Pre-Confirmation Actions*, BALLARD SPAHR (Aug. 30, 2013), https://www.consumerfinancemonitor.com/2013/08/30/director-cordray-ratifies-pre-confirmation-actions.

9. *The Bureau of Consumer Financial Protection's Unconstitutional Design: Hearing Before H. Subcomm. on Oversight & Investigations*, 155th Cong. 5–8 (2017) (statement of Adam J. White, Research Fellow, The Hoover Institute), https://financialservices.house.gov/uploadedfiles/03.21.2017_adam_white_testimony.pdf.

10. Kit Addleman & Billy Marsh, *Auto Finance Companies Now Subject to CFPB Supervisory Authority,* HAYNES BOONE (July 14, 2015), http://www.haynesboone.com/Alerts/auto-finance-companies-now-subject-to-cfpb.

certain financial products,[11] privacy considerations,[12] and a host of other concerns, such as whether its actions reduce access to credit or financial products.[13] These concerns appear motivated by an array of ideological and legal considerations. But, perhaps these concerns arose because the Bureau was remarkably effective at its inception and engaged in regulatory practices that threatened entrenched bureaucratic interests and industry stakeholders.[14] It also appears to have been an effective advocate for racial justice, promoting both credit access and anti-discrimination principles,[15] something its critics may have found problematic.

11. Astra Taylor, *Why It's So Hard to Regulate Payday Lenders*, NEW YORKER (Aug. 6, 2016), https://www.newyorker.com/business/currency/why-its-so-hard-to-regulate-payday-lenders.

12. James Shreve, *CFPB Final Rule Cuts Costs and Headaches from Annual Privacy Notices*, THOMPSON COBURN (Aug. 21, 2018), https://www.thompsoncoburn.com/insights/blogs/cybersecurity-bits-and-bytes/post/2018-08-21/cfpb-final-rule-cuts-costs-and-headaches-from-annual-privacy-notices.

13. Todd Zywicki, *The CFPB Could Be a Force for Good*, WALL ST. J. (Feb. 19, 2018), https://www.wsj.com/articles/the-cfpb-could-be-a-force-for-good-1519070012?mod=djkeyword&tesla=y; *see also* Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 18 GEO. WASH. L. REV. 856, 856 (2013) ("The CFPB's structure virtually guarantees the manifestation of those pathologies in practice: excessive risk aversion, agency imperialism, and tunnel vision."). For a reflective review of these critiques and others, see Todd J. Zywicki, *The Dodd-Frank Act Five Years Later: Are We More Stable?* (Geo. Mason L. Studies Res. Paper No. LS 15-10, 2015), https://ssrn.com/abstract=2651942 (utilizing author's Congressional testimony about the status of consumer financial protection efforts).

14. *See, e.g.*, Leonard J. Kennedy et al., *The Consumer Financial Protection Bureau: Financial Regulation for the Twenty-First Century*, 97 CORNELL L. REV. 1141 (2012); *see also* Christopher Lewis Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 TUL. L. REV. 1057 (2016) (evaluating CFPB's track record for enforcing financial protection laws); Gretchen Morgenson, *The Watchdog Protecting Consumers May Be Too Effective*, N.Y. TIMES (Feb. 10, 2017), https://www.nytimes.com/2017/02/10/business/consumer-financial-protection-bureau-gretchen-morgenson.html (detailing debates on effectiveness and success of CFPB enforcement actions).

15. *See, e.g.*, Press Release, CFPB, CFPB and DOJ Take Action Against National City Bank for Discriminatory Mortgage Pricing (Dec. 23, 2013), https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-take-action-against-national-city-bank-for-discriminatory-mortgage-pricing (announcing CFPB's $35 million settlement of complaint against National City Bank "for charging higher prices on mortgage loans to African-American and Hispanic borrowers than similarly creditworthy white borrowers between the years 2002 and 2008"); *see also* Press Release, CFPB, CFPB and DOJ Order Hudson City Bank to Pay $27 Million to Increase Mortgage Credit Access in Communities Illegally Redlined (Sept. 24, 2015), https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-order-hudson-city-savings-bank-to-pay-27-million-to

These voluminous critiques and robust defenses of the Bureau have, however, bypassed a more foundational question: whether the CFPB's structure and design are consistent with the Supreme Court's constitutional jurisprudence. Though many recent cases have raised the constitutional question, it has been underdeveloped in legal scholarship. Reviewing the totality of such cases provides a framework for understanding—and ultimately rejecting—the constitutional concerns of its critics.

The CFPB's constitutional critics argue that: (1) Article II's Take Care and Appointments Clauses (Sections 2 and 3) and the Supreme Court's prior precedents require independent commissions and agencies to have a five-member form to satisfy the Supreme Court's prior agency jurisprudence; (2) the novelty of the CFPB's structure is presumptively unconstitutional absent clear historical precedent that agencies are routinely structured this way; (3) the accrued power in the CFPB's director violates Article II because the President has limited removal power over the Director; (4) the Director's accrued powers are a grave, general threat to personal liberty as guaranteed by the Constitution, because other branches of government cannot exercise sufficient control over the CFPB's actions, violating the principle of separation of powers; and more subversively, (5) independent agencies should *all* be found to be unconstitutional because they restrict the President's ability to faithfully execute the laws or violate separation of powers principles. Much of these critiques can be collapsed into the brusque conclusion of one such critic, then-D.C. Circuit Judge Kavanaugh: "[T]he CFPB is unconstitutionally structured because it is an independent agency headed by a single Director."[16]

Between 2016 and 2018, these aforementioned alleged constitutional infirmities were argued in a variety of courts, but almost every court found them unpersuasive or insufficient to declare the CFPB's structure unconstitutional.[17] The most direct

-increase-mortgage-credit-access-in-communities-illegally-redlined (announcing CFPB's settlement with Hudson City Savings Bank for "$27 Million to Increase Mortgage Credit Access in Communities Illegally Redlined").

16. PHH Corp. v. CFPB (*PHH-1*), No. 15-1177, slip op. at 36 (D.C. Cir. Oct. 11, 2016) (vacated).

17. Courts have consistently held that the CFPB structure is constitutional. *See* CFPB v. Think Fin., LLC, No. CV-17-127-GF-BMM, 2018 WL 3707911, at *2 (D. Mont. Aug. 3, 2018); CFPB v. All Am. Check Cashing, Inc., No. 3:16-CV-356-WHB-JCG, at *2–4 (S.D. Miss. Mar. 27, 2018) (holding the CFPB structure as constitutional with interlocutory appeal on constitutional question granted Mar. 27, 2018); CFPB v. Nationwide Biweekly Admin., Inc., No. 15-CV-2106-RS, 2017 WL 3948396, at *1 (N.D. Cal. Sept. 8, 2017), *appeal*

and engaged constitutional challenge, *PHH v. CFPB*, first produced a divided D.C. Circuit panel decision (*PHH-1*) that found the CFPB's structure unconstitutional,[18] then a divided en banc decision (*PHH-2*) that found otherwise.[19] But, on June 8, 2018, Director Mick Mulvaney dismissed the underlying enforcement action in *PHH-2*.[20]

Although nothing is ever certain in the certiorari process, let me make a bold prediction: the constitutional challenge to the CFPB will soon reach the Supreme Court.[21] And, there is reason

docketed, No. 18-15431 (9th Cir. Mar. 15, 2018); CFPB v. TCF Nat'l Bank, No. 17-166 (RHK/DTS), 2017 WL 6211033, at *1 (D. Minn. Sept. 8, 2017); CFPB v. Seila Law, LLC, No. 8:17-CV-01081-JLS-JEM, 2017 WL 6536586, at *1 (C.D. Cal. Aug. 25, 2017), *appeal docketed*, No. 17-56324 (9th Cir. Sept. 1, 2017); CFPB v. Navient Corp., No. 3:17-CV-101, 2017 WL 3380530, at *1 (M.D. Pa. Aug. 4, 2017); CFPB v. Future Income Payments, LLC, 252 F. Supp. 3d 961 (C.D. Cal. 2017), *stayed pending appeal*, No. 17-55721, 2017 WL 2622774 (9th Cir. June 1, 2017); CFPB v. NDG Fin. Corp., No. 15-CV-5211 (CM), 2016 WL 7188792, at *1 (S.D.N.Y. Dec. 2, 2016), *reconsideration denied,* No. 15-CV-5211 (CM), 2016 WL 7742784 (S.D.N.Y. Dec. 19, 2016); CFPB v. CashCall, Inc., No. CV-15-7522-JFW-RAOx, 2016 WL 4820635, at *1 (C.D. Cal. Aug. 31, 2016), *appeal filed*, No. 18-55479, at *1 (9th Cir. Apr. 12, 2018); CFPB v. ITT Educ. Servs., Inc., 219 F. Supp. 3d 878 (S.D. Ind. 2015), *appeal dismissed for lack of jurisdiction*, No.15-1761, 2016 WL 9447163, at *1 (7th Cir. 2016); CFPB v. Frederick J. Hanna & Assocs., 114 F. Supp. 3d 1342 (N.D. Ga. 2015); CFPB v. Morgan Drexen, Inc., 60 F. Supp. 3d 1082 (C.D. Cal. 2014). *But see* CFPB v. RD Legal Funding, No. 17-CV-890 (LAP) (S.D.N.Y. June 21, 2018) (presently on appeal); CFPB v. D&D Mktg., No. 2:15-CV-09692, 2016 WL 8849698, at *1 (C.D. Cal. Nov. 17, 2016), *interlocutory appeal granted*, No. 17-55709, 2017 WL 597428 (9th Cir. May 17, 2017) (including an initial finding that the CFPB is unconstitutional). Both of these two cases rely on *PHH-1* for their analysis.

18. *See PHH-1*, slip op.

19. PHH Corp, v. CFPB (*PHH-2*), No. 15-177, slip op. (D.C. Cir. Jan. 31, 2018) (en banc).

20. *See* In the Matter of PHH Corp., CFPB No. 2014-CFPB-0002 (2018) (ordering dismissal of underlying charges in *PHH-2* at the request of Acting CFPB Director Mulvaney).

21. Court practitioners and academics have settled on a number of reasons that make cert more likely for any case, chief among them: divisions between lower courts (particularly between circuits), an issue of nationwide importance, and a misapplication of Supreme Court precedent. All of these are arguably present with respect to the CFPB's constitutional challenges. *See, e.g.*, Diane L. McGimsey & Judson O. Littleton, *Expert Q&A on Seeking or Opposing Certiorari in the U.S. Supreme Court*, THOMSON REUTERS: PRAC. L. (2018), https://www.sullcrom.com/files/upload/McGimsey_Littleton_Practical_Law_Certiorari_Supreme_Court_2018.pdf (discussing cert grant factors). And, in January and March 2019, respectively, two courts evaluating challenges to the CFPB on constitutional grounds heard oral arguments. *See* CFPB v. Seila Law, LLC, No. 8:17-CV-01081-JLS-JEM, 2017 WL 6536586 (C.D. Cal. Aug. 25, 2017), *appeal docketed*, No. 17-56324 (9th Cir. Sept. 1, 2017); *see also* CFPB v. All Am. Check Cashing, Inc., No. 3:16-CV-356-WHB-JCG (5th Cir. 2019).

for the CFPB's advocates to be concerned over the Court's response. The chief constitutional critic of the CFPB happens to be newly appointed Justice Brett Kavanaugh, who authored *PHH-1* and vigorously dissented in *PHH-2*.[22] Further, some scholars and judges have suggested a recent Supreme Court case, *Free Enterprise Fund v. Public Co. Accounting Oversight Board* (*Free Enterprise*),[23] discussed below, indicates that the Court may now welcome a wholesale revision to its Article II jurisprudence, consistent with Justice Kavanaugh's broad approach. So, despite a hundred years of executive agency jurisprudence, which could (or should) have provided clarity, the continued existence of the CFPB is an open constitutional question. Therefore, in the midst of a national debate about the CFPB's effectiveness and legitimacy, with at least one Supreme Court Justice convinced of its constitutional failings, and a symposium dedicated to reflecting on Dodd-Frank ten years later, now is an ideal time to situate the CFPB within the Supreme Court's 100 years of executive agency jurisprudence. Further, constitutional attacks on the CFPB should also worry those who value the federal government's ability to create and sustain independent administrative agencies that are free from congressional and executive control in turbulent political times.

This Article proceeds as follows. First, the Article traces a history of the Supreme Court's executive agency jurisprudence and outlines a framework to understand where the Bureau is situated in relation to prior precedents. Next, the Article focuses on reframing the debate by situating the CFPB's constitutionality within the foundational executive agency case, *Humphrey's Executor*. Following that, it analyzes the D.C. Circuit's dual opinions in *PHH-1* and *PHH-2*, focusing on defending the CFPB from its legal critics. Concluding briefly, for reasons different than many of its critics, the Article calls for a revision to the CFPB's structure by changing to the five-member commissioner structure common among other regulatory agencies. Switching to a five-member commission may also solve, in part, any remaining open questions surrounding the constitutionality of the Bureau's structure, notwithstanding that it already survives constitutional muster. Further, the CFPB will be more effective in its

22. *See, e.g.*, Emily Stewart, *Consumer Advocacy Groups Are Extremely Worried About Brett Kavanaugh*, VOX (July 11, 2018), https://www.vox.com/policy-and-politics/2018/7/11/17556120/brett-kavanaugh-elizabeth-warren-cfpb-regulations.

23. 561 U.S. 477 (2010).

mission for many reasons, including one often ignored by proponents and critics: a five-member commission structure is more likely to be comprised of a diversity of voices, which will lead to a broader and more inclusive perspective on the Bureau's mission, because, in part, it will more accurately reflect the diversity of the consumer marketplace that the CFPB regulates.[24]

I. 100 YEARS OF SOLITUDE: INDEPENDENT AGENCIES AND THE CONSTITUTION

The roots of the CFPB's constitutional crisis began more than a century ago. The Smithsonian Institution and the Interstate Commerce Commission, two of the earliest independent executive agencies, were formed in the mid-1800s.[25] The trend of distributing power and responsibility to "independent" government agencies operating outside of the traditional three-branch structure accelerated through the 1930s as President Franklin Delano Roosevelt and his New Deal sought to enhance federal power. The trend was effectuated through numerous government-sponsored programs, administered through bureaucratic agencies, and regulated through others.[26]

Independent executive agencies differ from traditional executive agencies in a few ways, but for our purposes—most importantly—their agency heads are not typically subject to the at-will presidential removal power, which is derived from Article II and Supreme Court interpretations of the Article's limits.[27]

24. *See, e.g.*, David A. Carter et al., *Corporate Governance, Board Diversity, and Firm Value*, 38 FIN. REV. 33 (2003) (examining the relationship between board diversity and a company's firm value for the Fortune 1000 group of companies).

25. *Interstate Commerce Commission*, FED. REG., https://www.federalregister.gov/agencies/interstate-commerce-commission (last visited April 14, 2019) (noting the Interstate Commerce Commission was the first regulatory commission in U.S. history and was established in the 1880s); *Our Organization*, SMITHSONIAN, https://www.si.edu/about/administration (last visited April 14, 2019) (noting that the Smithsonian Institution was established by Congress in 1846).

26. *President Franklin Delano Roosevelt and the New Deal, 1933–1945*, LIBR. CONGRESS, http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/depwwii/newdeal (last visited April 14, 2019); *see also* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 70 (1966).

27. U.S. CONST. art. II, § 2. ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United

Scholars and courts agree that Article II, Section II provides for a robust appointment power—and thus an inherent removal power. But while acknowledging that Section III requires that the President "take Care that the Laws be faithfully executed,"[28] they disagree intensely about the broad contours of each Section, particularly when applied to independent agencies. Since part of ensuring faithful execution of the laws must involve the ability to remove senior agency political appointees to ensure consistent application of the law, a broad argument for presidential power under Article II suggests that Congress may not place limits on the President's ability to remove appointees who serve in an executive capacity and are approved by the Senate.

Thus, the history of constitutional challenges relevant to independent agencies like the CFPB rests on a constitutional analysis that is both fixed and evolving. Earlier cases like *Humphrey's Executor*,[29] discussed below, wrestled with broader questions of agency design and whether the Constitution permitted independent agencies to exist at all, absent a clear home for them within one of the three branches of government. Earlier and later cases also confronted Article II questions—namely, whether the executive's responsibility to faithfully execute the law or the executive's appointment power were encroached upon by the relevant agency's design or by Congress eliminating the President's power to remove political appointees. Some later cases bypassed the design question to focus more squarely on the type of removal provision and whether the absence or presence of certain removal terms was inconsistent with Article II. When an unconstitutional structure was found, these cases looked next at what the appropriate remedy would be—either the removal of the impermissible restriction, or the invalidation of the entire

States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."); U.S. CONST. art. II, § 3 ("He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.").

28. U.S. CONST. art. II, § 3.

29. Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

agency. Though not universally agreed upon, it is generally accepted that *Humphrey's* is still the primary authority on both questions—subject to the interpretation of how later cases change the removal analysis and the remedy. Therefore, it is useful to situate this framework within the evolving line of independent agency jurisprudence, which begins with *Myers v. United States*.

A. *MYERS* AND *HUMPHREY'S*—THE CONSTITUTIONAL FRAMEWORK

The first Supreme Court case to address the constitutionality of an independent agency's structure focused on whether the President could remove an agency's head at will despite good-cause restrictions.[30] In *Myers*, the President directed that Postmaster Frank S. Myers be terminated before his term was finished.[31] Myers contended that there had been no good cause for his removal and that the removal was thus invalid.[32] The *Myers* Court held that the President had the power to remove, for any reason, any postmaster he had appointed with the advice and consent of the Senate, without regard to "cause."[33] The *Myers* Court relied on the power of removal inherent in the general Article II appointment power and determined that any condition that stopped the President from utilizing his full constitutional powers to see the law faithfully executed was unconstitutional.[34]

Nine years after *Myers*, *Humphrey's* substantially refined the scope of the executive power of removal, specifically in the context of independent agency constitutionality.[35] The *Humphrey's* decision arose out of President Roosevelt's attempt to remove William Humphrey, a Commissioner of the Federal Trade Commission (FTC or Commission), shortly after the President took office.[36] The *Humphrey's* Court reviewed provisions of the Federal Trade Commission Act (FTC Act) to evaluate whether its design was constitutional and whether the "for-cause" removal restrictions for FTC Commissioners unduly restricted or

30. Myers v. United States, 272 U.S. 52, 106–08 (1926).

31. *Id.* Myers was a Senate-confirmed "first-class" Postmaster in Oregon and was removed by the Postmaster General at the direction of the President prior to the expiration of his term. *Id.* at 106.

32. *Id.*

33. *Id.* at 163–64.

34. *Id.* at 163–66.

35. *See* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

36. *Id.* at 618–19.

limited President Roosevelt's Article II powers.[37] The *Humphrey's* Court then determined that the FTC Act did indeed restrict the presidential power of removal because it required one or more specified causes to justify removal.[38] The Court, using a four-part analysis, nonetheless held that these provisions, because of the agency's design features and independence, were constitutionally valid.[39] The four-part "*Humphrey's* Test" for determining an agency's constitutional "independence" asks whether the agency: (1) is nonpartisan; (2) deals with uniquely expert subject matter or skills; and engages in duties which function as either (3) quasi-judicial or (4) quasi-legislative tasks.[40] The Court thus effectively required that an initial inquiry into whether an "independent" government agency is constitutional should begin with the four-part framework prior to and separate from determining whether an official's removal process violates Article II.

Humphrey's and *Myers* considered similar factual scenarios regarding the President's power to remove the head of an executive agency, but diverged in defining the scope of that power.[41] Whereas the reasoning in *Myers* favored an unrestricted view of the executive power of removal regardless of the commission's character, *Humphrey's*, while not overruling *Myers* directly, declined to recognize a broad and unlimited Article II executive removal power.[42] Instead, the Court in *Humphrey's* drew a distinction between the wholly executive functions of the postmaster involved in *Myers*, and the quasi-legislative and quasi-judicial hybrid functions of the Commissioner of the FTC. Meaning, its validation of the FTC's design and independence mitigated some Article II concerns.[43] *Humphrey's* has since been interpreted to mean that the President may not remove independent agency commissioners for political reasons. Rather, he is restricted to instances where there is good cause (defined as "inefficiency, neglect of duty, or malfeasance in office").[44]

Ten years later, in *Wiener v. United States*, the Court clarified that *Humphrey's*, not *Myers*, remained the appropriate

37. *Id.* at 619.
38. *Id.* at 626.
39. *Id.* at 627–31.
40. *Id.*
41. *See id.* at 618–19; Myers v. United States, 272 U.S. 52, 106–08 (1926).
42. *See Humphrey's Ex'r*, 295 U.S. at 627–31; *Myers*, 272 U.S. at 163–66.
43. *See Humphrey's Ex'r*, 295 U.S. at 629. The Commissioner of the FTC was responsible for adjudicatory duties. *Id.*
44. *Id.*

benchmark.[45] The Court narrowly confined the scope of the *Myers* decision to include only "purely executive officers" like the postmaster and held that the Court "'disapproved' the expressions in Myers supporting the President's inherent constitutional power to remove members of quasi-judicial bodies."[46] In short, *Wiener* clarifies that if an independent agency's design engages multiple functions pursuant to the *Humphrey's* framework and if Congress's intent regarding removal is clear, agency head removal restrictions are constitutionally sound.[47]

B. THE HALF-CENTURY CASES: *BOWSHER* AND *MORRISON*

A half-century after *Humphrey's*, the Reagan Administration's anti-regulatory agenda necessitated that it, first, vigorously defend the executive's Article II powers and, second, ask the Supreme Court to finally find independent agencies unconstitutional.[48] The administration's arguments somewhat shifted the nature of the inquiry from the *Humphrey's* test's four parts to the specific position of the agency head within the hierarchy; namely, whether he or she is a principal officer or an inferior officer subject to the President's control.[49] This is important because, per the Appointments Clause, the President is charged with appointment, and, by implication, removal, of all principal officers of the United States. Conversely, inferior officers can be appointed by Congress, a congressional delegation of power to the President, or a department head.[50] If an agency's removal or appointment process does not comport with the Appointments Clause, that process is unconstitutional because it either raises Article II concerns or implicates separation of powers principles.

The Reagan Administration's opportunity to challenge *Humphrey's* came in *Bowsher v. Synar*, where provisions of the Balanced Budget and Emergency Deficit Control Act of 1985 empowering the Comptroller General to prepare and submit a report detailing deficit reductions for a fiscal year were challenged

45. *See* Wiener v. United States, 357 U.S. 349 (1958).

46. *Id.* at 352.

47. *Id.* at 353–54.

48. *See infra* notes 51–72 and accompanying text. The administration's actions during a Congressional investigation, pursuant to the counsel of Office of Legal Counsel head Ted Olson, also led to another landmark (but oft-critiqued) executive power case, *Morrison v. Olson*, 487 U.S. 654 (1988). This case is discussed *infra* notes 58–72 and accompanying text.

49. *Morrison*, 487 U.S. at 672–77; Bowsher v. Synar, 478 U.S. 714, 718–24 (1986); Buckley v. Valeo, 424 U.S. 1, 120–29 (1976).

50. *Morrison*, 487 U.S. at 672–77.

as unconstitutional.[51] Only Congress was able to remove the Comptroller General, and only by impeachment or through a joint resolution due to good cause.[52] Responsibility for execution of the Act was reserved to the Comptroller General while Congress retained ultimate control over that execution.[53] Because of these provisions, the Justice Department made two arguments: first, that Congress could not grant itself removal power over an executive officer; and second, that the President must have the power to remove the Comptroller General *at will* because he performs executive functions.[54] The second of these arguments' success would have been considered a major victory for the Reagan Administration, and would have reinvigorated *Myers* for the first time in over fifty years.

Instead, the *Bowsher* Court determined that the Comptroller General had been unconstitutionally delegated executive powers because Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws, other than through impeachment.[55] While acknowledging that Congress cannot delegate itself power to remove an executive officer, the Court *declined to hold* that the President must have unrestrained removal power over *all* executive officers.[56] In so ruling, the *Humphrey's* "for-cause" analysis was largely reinforced as precedent.[57]

In *Morrison*, the Assistant Attorney General for the Office of Legal Counsel (Ted Olson) sued an independent counsel who had been given authority to investigate whether the attorney general violated federal law.[58] Olson argued that the Office took executive powers away from the President and assigned them to a fourth branch of government that was not answerable to anyone, implicating Article II and separation of powers principles.[59] But the Court held that the independent counsel provision of the Act did not violate separation of powers principles because although the President's removal power was restrained, the restraint did not cause power to flow to another branch.[60] Although

51. *See Bowsher*, 478 U.S. at 719.
52. *Id.* at 720.
53. *Id.* at 732–33.
54. *Id.* at 719–21.
55. *Id.* at 726.
56. *Id.* at 760 (White, J., dissenting).
57. *See id.* at 739–40.
58. Morrison v. Olson, 487 U.S. 654, 665–69 (1988).
59. *Id.* at 660.
60. *Id.* at 673–77.

the independent counsel had discretion to disagree with the attorney general and ultimately prevent executive control, which may seem to imply the individual is a principal officer, the Act implied the agency head sits in a relatively inferior position because it authorized the attorney general to remove the counsel.[61] Furthermore, because the nature of the duties performed by the independent counsel was largely investigative, and the duration of those duties was limited and defined, they did not qualify as quasi-legislative under a *Humphrey's* analysis.[62]

The *Morrison* Court determined that an inferior officer, as categorized by the Appointments Clause, possesses the following three characteristics: that officer (1) is subject to removal by a higher executive branch official; (2) is empowered by the Act to perform only certain, limited duties; and (3) holds an office that is limited in jurisdiction and limited in tenure.[63] When analyzing the principal/inferior officer distinction using the *Morrison* standard, if an individual agency head meets all three of the requirements, that person is an inferior officer whose appointment—and thus removal—is not solely within the purview of the executive branch.[64] Conversely, if an agency head fails to meet any of the prongs, the person/position is a principal officer.[65]

The *Morrison* Court also rejected the argument that the good-cause protections were unconstitutional infringements on the President's power.[66] The Court dismissed the view that the use of executive power itself prohibits Congress from prescribing good-cause removal qualifications.[67] In this regard, the Court questioned the basis for earlier decisions in *Myers* and *Humphrey's* that whether the officer must be removable at will turned solely on whether the agency was responsible for purely executive duties or those of a quasi-legislative or quasi-judicial nature.[68] Instead, the Court found the key question to be whether "the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."[69] When the Court applied this test, it found that in practice it was

61. *Id.* at 670–72.
62. *Id.*
63. *Id.* at 671–72.
64. *Id.* at 671–74.
65. *Id.* at 671–73.
66. *Id.*
67. *Id.*
68. *Id.* at 688–90.
69. *Id.* at 690.

unlikely that good-cause restrictions would significantly inhibit the President's ability to see the law faithfully executed.[70] In doing this, the *Morrison* Court somewhat weakened its decision by reasoning that there remained ample authority for the executive to ensure subordinate officers were competent. While maintaining the constitutionality of independent agencies, the just-cause provisions now must be interpreted to leave the President significant power to terminate and influence those whom the provisions protect.[71] Later cases, including *Buckley* and *Mistretta*, have raised Article II and separation of powers concerns, though neither applies directly to the CFPB's present predicament.[72]

C. THE LATEST WRINKLE—*FREE ENTERPRISE*

The most recent iteration of this constitutional discourse about Article II removal power involves the complexity of a removal power restriction.[73] The Sarbanes-Oxley Act created the five-member Public Company Accounting Oversight Board (PCAOB) to improve accounting oversight and authorized the Securities Exchange Commission (SEC) to select the PCAOB board members.[74] In *Free Enterprise*, a nonprofit organization and an accounting firm claimed that the Sarbanes-Oxley Act defied both separation of powers principles and the Appointments Clause in how it structured the PCAOB's removal process.[75] The PCAOB board members were separated from the President's reach by two degrees: first through the inclusion of a for-cause removal provision, and second, by vesting decision-making power for removal in the SEC, rather than in the President.[76] The Supreme Court held that the dual for-cause limitations on removal were constitutionally infirm because they ultimately

70. *Id.* at 691–92.

71. *See id.*

72. *Buckley*'s Article II analysis revolved around limitations on the President's appointment power, not the removal power. *See* Buckley v. Valeo, 424 U.S. 1 (1976). *Mistretta*'s analysis centered in part on finding a non-delegation of Congressional power, an issue not present with respect to the CFPB. *See* Mistretta v. United States, 488 U.S. 362, 371–80 (1989).

73. *See generally* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010).

74. More broadly, the PCAOB's mission is "to oversee the audits of public companies . . . in order to protect investors and further the public interest in the preparation of informative, accurate, and independent audit reports." *See Mission, Vision, and Values*, PCAOB, https://pcaobus.org/About/History/Pages/mission-vision-values.aspx (last visited April 14, 2019).

75. *See Free Enter. Fund*, 561 U.S. at 487.

76. *Id.* at 484–87.

prohibited the President from controlling subservient executive officers.[77]

Free Enterprise offered the most extensive discussion of presidential power over the structure of administrative agencies since *Myers*. It held that the relationship between the President, the SEC, and the PCAOB was inconsistent with the President's Article II powers.[78] In doing so, the Court did not rely on any of the common reasons used in past decisions for determining whether an agency's design features were unconstitutional.

Whereas in earlier cases only one level of good-cause protection separated the President from removing the individual officer, *Free Enterprise* reasoned that a second degree of separation, which resulted in the President not being able to decide whether the requisite cause exists, is unconstitutional because it effectively removes the President from direct influence over removal altogether.[79] In the earlier cases in which agency structure was deemed constitutional, a single layer of separation had existed where the President—or a subordinate that he could remove at will—could judge conduct to determine if good cause existed for removal.[80] The second layer, in its obstruction of the executive's Article II duty to see that the law be faithfully executed, is unconstitutional.[81] The primary issue was not that Congress retained too *much* control (as in *Bowsher*), but rather that it did not provide the President *enough* control.[82]

Thus, the constitutional issue with the PCAOB did not emerge merely because a good-cause provision existed. Rather, it was the addition of the second inhibiting provision that further removed the President from the decision-making process.[83] While a single level of protection still allows the President to make a good-cause assessment, the vesting of the judgment process outside the direct control of the executive leaves the President helpless and unable to intervene.[84] Although able to review the outside agency's good-cause decision, his opinion would be meaningless unless the good-cause determination made was a

77. *Id.* at 492.
78. *Id.* at 495.
79. *Id.* at 501.
80. *Id.* at 494–96.
81. *Id.* at 490–92.
82. *Id.* at 513–14.
83. *Id.*
84. *Id.* at 495–97.

gross neglect of duty.[85] Thus, even without Congress delegating removal power or appointment power to itself, or retaining a veto power over the agencies' actions, the PCAOB's design was unconstitutional.[86] However, even after deeming the dual for-cause limitations to contravene the Constitution's separation of powers, *Free Enterprise* determined the restrictions to be severable from the statute and the remainder enforceable.[87]

The holding of *Free Enterprise* did *not* concern the novelty of the administrative design (the structure itself), but rather whether the removal structure contravened the Constitution by substantially burdening the President in meeting his Article II charge to see that the law is faithfully executed.[88] Instead of the usual issue in constitutional removal challenges—Congress vesting removal power in itself—*Free Enterprise* involved vesting the remaining removal power in a *separate body*, an agency that was not compelled to follow the position urged by the President.[89] But a removal or design feature can be new or atypical while still enabling the President to meet all of his constitutional obligations. While novelty can theoretically be weighed as a small component of the constitutional analysis, it should not supplant accepted precedent as the primary determinant. This is true for a number of reasons, and therefore "legislative novelty is not evidence and should not be used as evidence that a statute is unconstitutional on federalism or separation-of-powers grounds."[90]

Seeing *Free Enterprise* as a long overdue redemption of *Myers* is misguided. *Free Enterprise* represents an outer limit, setting a specific, appropriate boundary for how much Congress can limit the President's removal powers beyond "for cause."[91] Further, the unusual relationship design among the President, the

85. *Id.* at 496–97.

86. *Id.*

87. *Id.* at 510–25.

88. *Id.* at 483–84.

89. *See id.* Vesting in a separate non-branch body is different than earlier Supreme Court cases where the removal power remained within the legislative branch or one of its agents. Whereas those cases highlighted that Congress retaining power intended for the executive was unconstitutional, *Free Enterprise* instead focused on the lack of power that remained with the President. *See generally id.*

90. Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1412 (2017) (tracing the rise of the statutory-novelty-is-presumptively-constitutionally-bad jurisprudence and concluding that courts' more frequent invocations of novelty as proof of unconstitutionality lack evidence).

91. *Free Enterprise* is applicable in the rare instance where the agency head

SEC, and the PCAOB should prevent widespread adoption of its holding as applied to the CFPB.[92] Because the structure of the agency-design at issue in *Free Enterprise* (the PCAOB) was extremely unusual, that case's holding is limited to a narrow set of circumstances centered on the double-burdened removal power.[93] The CFPB, and every other independent agency that is subject to removal restrictions, vests the remaining power in the President alone.[94] Thus, the CFPB, the Federal Reserve, and the President have a sufficiently dissimilar relationship from that present in *Free Enterprise*.[95] Two layers of separation for removal is not the same as one.[96] No independent agency head, including the Director of the CFPB, is afforded as much protection from Presidential oversight as was true in *Free Enterprise*, and thus the case's application to the CFPB is particularly suspect.

D. FROM *HUMPHREY'S* TO *FREE ENTERPRISE*—THE UNITARY EXECUTIVE FRAMEWORK

The aforementioned post-*Humphrey's* cases have at their core one fundamental philosophical principle embedded within an Article II constitutional lens. Much of the critique of independent agencies from *Humphrey's* to *Free Enterprise* centers around a scholarly approach called the unified or unitary executive model and determining whether the Supreme Court's agency jurisprudence discussed above is consistent with that approach.[97] Within that tradition, scholars argue that the Constitution demands 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. Like any corporation, the organizational structure of a unitary executive would

in question is beyond direct presidential control by multiple layers. *Free Enter. Fund*, 561 U.S. at 547.

92. *Id.* at 478–90.

93. *See id.* at 483–92.

94. The President can remove the Director for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3) (2012).

95. *See, e.g.*, Hans Bader, Free Enterprise Fund v. PCAOB*: Narrow Separation-of-Powers Ruling Illustrates That the Supreme Court Is Not "Pro-Business"*, CATO SUP. CT. REV. 269 (2010), http://object.cato.org/sites/cato.org/files/serials/files/supreme-courtreview/2010/9/bader-pcaob_0.pdf.

96. *See id.* at 277.

97. See Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051 (1999) for a richer discussion of this debate and the definition that follows.

resemble a pyramid, and according to some scholars, our Constitution demands it.[98] Executive hierarchy is the governing principle of this framework, as best exemplified by Justice Scalia's dissent in *Morrison*.[99]

As these advocates see it, because Article II provides that the chief executive must see that the laws are faithfully executed, the President has the obligation to ensure that his orders are followed by his chosen high-level officials.[100] These scholars and advocates view the President, given his role as the nationally elected official head of the federal government, as possessing tremendously broad supervisory, managerial, administrative, and enforcement powers over all administrative agencies.[101] Therefore, the President sits at the top of the executive pyramid and *all* administrative agencies must be subject to his control. Scholars, judges, and political leaders celebrate this approach for many reasons, one of which is that such an arrangement makes for efficient government. The chief executive can set coherent priorities, allocate limited resources, balance competing policy goals, and resolve both inter- and intra-agency conflicts effectively and efficiently when he has complete corporate governance authority entrusted to him.

But Supreme Court agency jurisprudence has largely rejected this approach, notwithstanding well-known critiques lauded by scholars and judges alike.[102] Agency jurisprudence relies (correctly) on valuing administrative competency, as exemplified in *Humphrey's*. Contemporary accounts of the growth of the administrative state during the mid-1900s reinforce this view.[103] But the theoretical underpinnings of administrative

98. *See* 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).

99. *See* Morrison v. Olson, 487 U.S. 654, 697–734 (1988) (Scalia, J., dissenting).

100. Indeed, many scholars have long argued that Presidents were granted deliberately broad and persuasive mechanisms for executive branch control. *See generally, e.g.*, Steven G. Calabresi & Saikrisha B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

101. *See* Strauss, *supra* note 98, at 609.

102. *See generally id.*

103. *See* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 15 (1938); *see also* Stephen Breyer, *Problems and Possibilities in the Administrative State—Afterword*, 92 YALE L.J. 1614, 1615–16 (1983).

competency, as seen in cases like *Humphrey's*, were indeed slightly undermined over time as agencies branched out beyond their expertise to make decisions that "may properly belong in the political rather than the regulatory sphere."[104] Perhaps holacracy, not hierarchy, is the most effective framework for analysis.[105]

Notwithstanding certain protestations, there is ample evidence that the framers of the Constitution wanted to limit the President's authority over various officials who would implement Congress's laws.[106] Historical accounts demonstrate that the power of presidential removal was not even discussed formally at the constitutional convention.[107] Presidents have respected this "anti-removal" framework, more or less, since its inception.[108] Independent agencies exist for a reason—they do their best work supported by field experts, freed from political winds, and in specific tasks, functions, and industries that Congress deems it appropriate to regulate. In recent times, perhaps there is such a thing as too much concentrated executive power. This is why it is important to remember that advocates of a unified executive framework operate theoretically, inasmuch as evidence of the framers' intent to create a hierarchical all-powerful executive is contradicted by much historical evidence. While a unified executive might be more efficient through the lens of theory, "it cannot be disputed that the original understanding of the presidency called for much less presidential authority than is

104. *See* Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 426 (1990).

105. Holacracy, the organizational structure adopted by Zappos and other organizations, allows for "distributed decision making while giving everyone the opportunity to work on what they do best." *See* Jacob Morgan, *The 5 Types of Organizational Structures: Part 5, Holacratic Organizations*, FORBES (July 20, 2015), https://www.forbes.com/sites/jacobmorgan/2015/07/20/the-5-types-of-organizational-structures-part-5-holacratic-organizations/#478fe5a548a2. An emphasis on distributed expert functions, with collaboration, produces better decision making without executive oversight. *Id.*; *see also, e.g.*, Matthew T. Bodie, *Holacracy in Corporate Law*, 42 DEL. J. CORP. L. 619, 624 (2018).

106. See generally the extensive discussion in Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

107. M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION (1911); *see also* THE FEDERALIST No. 77, at 459 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

108. More recently—even as the "unified executive" model became more prominent within certain circles—Presidents Ford, Carter, and Reagan all refrained from including independent agencies within the scope of executive orders concerned with using a cost/benefit analysis to shape regulatory policy. *See* Exec. Order No. 12,291, 3 C.F.R. § 127 (1982); Exec. Order No. 12,044, 3 C.F.R. § 152 (1979); Exec. Order No. 11,821, 3 C.F.R. § 203 (1974).

taken for granted today."[109] Instead, as advocates of the CFPB see it, to be independent is to be mission-centered. And to be independent in this fractured political climate might be more important than ever. For all of the above reasons, the Supreme Court rightly set out the appropriate precedential framework in *Humphrey's*.

II. VIEWING THE CFBP THROUGH THE PROPER LENS: *HUMPHREY'S*

There has been only one Supreme Court decision in the eighty-four years preceding *Free Enterprise* holding a removal restriction to be unconstitutional and none that explicitly rejected an agency's design as constitutionally defective. Thus, the design framework presented in *Humphrey's* and molded over the last century has guided all of the prior Supreme Court decisions and is the essential component of any analysis.[110]

The initial step in the *Humphrey's* analysis, which looks at whether an agency's removal structure is constitutional, is to determine the nature of the core functions that the agency performs.[111] In instances where the activity is wholly executive in nature, *Humphrey's* and *Myers* agree that the executive power of removal—inherent in the appointment power—cannot be inhibited.[112] Further, if the activities are considered quasi-legislative or quasi-judicial, a just-cause provision qualifying the presidential removal power comports with the Constitution.[113] As other cases following *Humphrey's* have shown, even without an explicit provision disallowing removal for political disagreement, the principle is deemed implicit.[114] Thus, when dealing with an independent agency engaged in activities outside the executive

109. Cass R. Sunstein, *An Eighteenth Century Presidency in a Twenty-First Century World*, 48 ARK. L. REV. 1, 3 (1995).

110. Indeed, *Humphrey's* is cited on the first page of the *PHH-2* decision, even prior to the introduction. *See PHH-2*, No. 15-177, slip op. at 5 (D.C. Cir. Jan. 31, 2018) (en banc); *see also* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 778 (2013) (noting that the constitutional status of independent agencies stems from *Humphrey's*); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 94 (1986) (noting *Humphrey's* has been viewed as the fundamental constitutional charter of the independent regulatory commissions).

111. Humphrey's Ex'r v. United States, 295 U.S. 602, 618–32 (1935).

112. *Id.* at 618–32; Myers v. United States, 272 U.S. 52, 106–08 (1926).

113. *Myers*, 272 U.S. at 135.

114. *See, e.g.*, Synar v. United States, 626 F. Supp. 1374, 1398 (D.D.C. 1986), *aff'd*, 478 U.S. 714 (1986) (noting that *Humphrey's* "sought to provide wholesale . . . protection against political intervention").

sphere, legislation can prevent the President from utilizing at-will removal power.

In addition to the nature of the activities performed, the court in *Humphrey's* reasoned that in order for an independent agency to comfortably fit within a separation of powers framework, that agency must be nonpartisan and possess some unique expertise in the area.[115] Considering this, the *Humphrey's* analysis can be further broken down into four component questions. Does the agency have a prevailing political ideology or partisan leaning? Does the agency possess a particular expertise or knowledge regarding the subject matter under the purview of the agency? Does the agency perform legislative responsibilities? And does the agency perform judicial duties?[116] Answering these four questions should determine whether the agency's "independent" design is constitutional and whether such structure may impermissibly constrain removal power.[117]

A. THE CFPB AS AN INDEPENDENT, NONPARTISAN, EXPERT, QUASI-LEGISLATIVE, QUASI-JUDICIAL BODY

The CFPB is entrusted with an extensive set of duties that—in its different capacities—touch not only executive activity, but legislative and judicial ones as well.[118] Executive duties are those which further the executive's responsibility to see that the law is faithfully executed, and include law enforcement roles.[119] Legislative responsibility is rule- or law-making power.[120] The judiciary's duty is to resolve disputes.[121] The CFPB's responsibilities include creating and enforcing rules for financial institutions, examining bank activity, overseeing financial product and service creation, monitoring American markets, and receiving,

115. *Humphrey's Ex'r*, 295 U.S. at 624.

116. *See id.* at 618–35.

117. *See id.* While these four components must be considered to satisfy the *Humphrey's* analysis, their consideration only represents the initial method used by the Supreme Court to determine whether an agency is constitutionally independent from the executive. Throughout the last fifty years, the Court has used different cases to extend or transform that analysis, depending on other factors discussed *infra*. Free Enter. Fund v. Pub. Co. Accounting, 561 U.S. 477, 483–92 (2010); Morrison v. Olson, 487 U.S. 654, 672–75 (1988); Bowsher v. Synar, 478 U.S. 714, 717–24 (1986); Buckley v. Valeo, 424 U.S. 1, 120–29 (1976).

118. The CFPB engages in law enforcement duties, law making duties, and conflict resolution duties. *See About Us: The Bureau*, CFPB, http://www.consumerfinance.gov/about-us/the-bureau (last visited April 14, 2019).

119. Myers v. United States, 272 U.S. 52, 106–08 (1926).

120. *Id.*

121. *Id.*

resolving, and analyzing consumer complaints.[122] These duties define the CFPB's nature, and encompass all three branches of the federal government. It is therefore not merely an executive agency, but an independent quasi-legislative and quasi-judicial body.[123] In order to determine if the removal structure of the CFPB is constitutional, these characteristics must be considered.

1. Nonpartisan

One of the main pillars of *Humphrey's* is that an independent commission must be designed to be nonpartisan and free from political or branch influence.[124] This serves as a way to ensure its actions are neutral and objective.[125] The CFPB, situated within the Federal Reserve (itself an insulated, nonpartisan body), is largely independent from both the executive and legislative branches. Whereas Congress is typically responsible for budget appropriations and allocation, the CFPB largely operates outside of those controls.[126] Similarly, because of the just-cause provision regarding presidential removal, the CFPB director is free of coercive influence from the executive branch. Because the CFPB is largely an independent creature operating outside the direct control of Congress or the President, it comports with the first requirement of the *Humphrey's* four-part analysis.

But, various commentators still imply that the CFPB is partisan, with a clear ideological line dividing its perceived support from Democrats and detractions by Republicans.[127] Although the CFPB may seem partisan because of the ideological divide in support from members of Congress, the relative enthusiasm of

122. *About Us: The Bureau*, *supra* note 118.

123. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 618–32 (1935) (discussing characteristics of agencies that act with quasi-legislative and quasi-judicial duties).

124. *See id.* at 624; *see also* Daniel A. Crane, *Debunking* Humphrey's Executor, 83 GEO. WASH. L. REV. 1835, 1837 (2015) (arguing that the assumptions about the FTC in *Humphrey's* are no longer true).

125. Crane, *supra* note 124, at 1852.

126. 12 U.S.C. § 5497 (2012). *But see* Press Release, Fin. Servs. Comm., CFPB Lacks Oversight and Accountability (June 18, 2013), https://web.archive.org/web/20170516101416/http://financialservices.house.gov/news/documentsingle.aspx?DocumentID=339512 (critiquing this structure).

127. Michael Hiltzik, *Consumer Protection: Why Do Republicans Hate the CFPB So Much?*, L.A. TIMES (July 23, 2015), http://www.latimes.com/business/hiltzik/la-fi-mh-cfpb-republicans-20150723-column.html. But if regulating consumer finance is inherently ideological, why isn't regulating "trade" or "commerce," or being a member of the Federal Reserve system also inherently ideological?

the major parties for the agency's mission is not the type of partisan behavior intended to be considered in the *Humphrey's* analysis.[128] Prior to the recent ascension of Director Mulvaney, Republicans denounced the CFPB as a "runaway agency" and advocated its abolishment,[129] but the Bureau itself is isolated from influence and does not reflect a material ideological bias in its function.[130] The rules and requirements prescribed by the CFPB are not inherently more favorable to a particular ideological lean, but rather are aimed at providing financial protection to all consumers without regard to party affiliation or region.[131] The disputes resolved and remedies provided do not favor a partisan bias, but reflect a concern for consumers as an undivided group.[132] This fact, in addition to the agency's separation from both congressional appropriation review and executive at-will removal, satisfies the objectivity requirements of *Humphrey's* and confirms the CFPB as an independent, nonpartisan body.[133] *Humphrey's* next requires an inquiry into the expertise associated with the agency.[134]

128. *See* Crane, *supra* note 124, at 1843–46 (noting that nonpartisan behavior is evaluated in light of political decisional modes).

129. Hiltzik, *supra* note 127.

130. *But see* Phil Hall, *Study Shows CFPB Staff Donations Aimed at Democratic Candidates*, NAT'L MORTGAGE PROF. MAG. (Nov. 28, 2017), https://nationalmortgageprofessional.com/news/65240/study-shows-cfpb-staff-donations-aimed-democratic-candidates (suggesting CFPB employees contribute more to Democrats than Republicans). However, the data from this report is very misleading. Because of recurring low-dollar contributions, individuals appear multiple times in the database. For example, a random sample of the first 200 entries shows that two CFPB employees accounted for eight percent of the *entire span* of contributions since the CFPB's inception. Given the sheer volume of employees (a yearly average of roughly 1300, not including turnover), this does not appear to be persuasive evidence of the entire Bureau's political lean.

131. Indeed, the CFPB's most recent three-year state-by-state accounting of consumer complaint volume identifies a political rainbow in the top five by volume: California, Florida, Texas, New York, and Georgia. *See* CFPB, COMPLAINT SNAPSHOT: 50 STATE REPORT 2 (2018), https://www.consumerfinance.gov/documents/6867/bcfp_50-state-report_complaint-snapshot_2018-10.pdf.

132. *See Consumer Financial Protection Bureau*, CTR. FOR RESPONSIBLE LENDING, http://www.responsiblelending.org/consumer-fin-protection-agency (last visited April 14, 2019) (noting initiatives directed to military members and their families, older Americans, and equal access to credit initiatives).

133. *See* Crane, *supra* note 124, at 1852 (discussing the detached, objective, non-partisan requirement of *Humphrey's*).

134. Humphrey's Ex'r v. United States, 295 U.S. 602, 624 (1935).

2. Unique Expertise

The second principle of *Humphrey's* requires that an independent agency be engaged in work in which it has unique expertise.[135] For expertise to justify independence from the executive power of removal, the effectiveness of an independent agency in its outside position must be compared to its potential effectiveness were it situated wholly within the executive branch.[136] The unique expertise analysis assumes that the best and brightest minds will be more likely to assist with independent agency work as opposed to executive agency work. Should this assumption not be sound, and the expertise advantage not actually materialize, it would weigh against finding that the agency's work qualifies it for treatment as an independent agency that may constitutionally operate without its director being subject to at-will presidential removal power.[137]

With the brief history of the CFPB, there are not many names to consider when addressing leadership expertise, or the agreed upon definition of what the Supreme Court thinks "expertise" means.[138] Some suggest that expertise is a function of longevity in a narrow bureaucratic space, focused upon a particular industry or task over time.[139] Thus, long-lasting presence at an agency, coupled with low employee turnover, standing alone, might constitute expertise. But, a narrow reading of *Humphrey's* suggests the Court originally viewed the "experts" as the commissioners themselves, who would accumulate focused bureaucratic expertise over time due to their insulation from executive influence.[140] Another view is that, with respect to specialized

135. *Id.*

136. Crane, *supra* note 124, at 1857.

137. *Id.* at 1856.

138. Before Richard Cordray became the first official Director of the CFPB, the agency was initially led by Elizabeth Warren, its creator, and later Raj Date, in the role of special advisor for the CFPB. *See* Daniel Bush, *What Is the Consumer Financial Protection Bureau, Anyway?*, PBS (Nov. 27, 2017), https://www.pbs.org/newshour/economy/making-sense/what-is-the-consumer-financial-protection-bureau-anyway.

139. *See, e.g.*, Datla & Revesz, *supra* note 110, at 777 (indicating long term employment and narrow subject areas for work correlate with "impartial expertise").

140. *See Humphrey's*, 295 U.S. at 624 (quoting, with approval, Senate testimony that "[i]t is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness"); *see also* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 434 (1995) ("The Court viewed Humphrey as an 'expert' . . . .").

agencies, expertise can be associated with avoidance of industry capture.[141] In that sense, the CFPB's leadership is largely consistent with that goal, with few having served in leadership capacities at the CFPB's regulated entities. Yet another formulation means that employees enter with, or are expected to acquire, a specialized professional skill or set of industry-specific insights.[142] In short, both the legal and functional meaning of bureaucratic expertise is uncertain.[143] Here, focusing on two of the aforementioned understandings of expertise—director-level expertise and staff-level expertise—suggests some divergence from, yet consistency with, the *Humphrey's* framework.

First, so far as "expertise" is intended to refer to the Director, the application of *Humphrey's* is not without challenge. The CFPB's first Director, Richard Cordray, was previously a Marshall Scholar at the University of Oxford and editor-in-chief of the University of Chicago Law Review.[144] Specific to consumer protection, Cordray, in his role as Ohio's Attorney General, recovered over two billion dollars for his constituents and gained valuable experience and expertise regarding the adjudication and handling of consumer complaints.[145] Although he has an impressive résumé,[146] it is debatable whether his edge in that specific area is enough to qualify him as a unique expert on the subject matter of the CFPB. Next, Director Mulvaney had significant expertise as well,[147] though his approach to regulation and enforcement strongly differed from that of Director

141. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 27 (2010).

142. *See id*. at 47–48 (discussing mandatory qualifications for certain agency roles, such as the requirement that the PCAOB have at least two certified public accountants or that the majority of the Surface Transportation Board have professional backgrounds in transportation).

143. For a much more comprehensive exegesis, see Michael E. Levine, *Revisionism Revised? Airline Deregulation and the Public Interest*, 44 LAW & CONTEMP. PROBS. 179 (1981).

144. Press Release, The White House, President Obama Announces Richard Cordray As Director of the Consumer Financial Protection Bureau (July 17, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/07/17/president-obama-announces-richard-cordray-director-consumer-financial-pr.

145. Aaron Marshall, *Wall Street Businesses Have Returned Money to Ohio, But Richard Cordray Overstates the Total*, POLITIFACT (July 26, 2010), https://www.politifact.com/ohio/statements/2010/jul/26/richard-cordray/wall-street-businesses-have-returned-money-ohio-ri.

146. *See* Press Release, The White House, *supra* note 144.

147. *Mick Mulvaney*, WHITE HOUSE, https://www.whitehouse.gov/people/mick-mulvaney (last visited April 14, 2019) (noting that Mulvaney graduated from Georgetown University with honors, attended law school at the University

Cordray. Perhaps he is not quite a "unique expert" either, given that he has not previously worked in a "consumer protection" or banking-related regulatory body or agency. And yes, the CFPB's most recently confirmed director, Kathleen Kraninger, was critiqued for her lack of expertise in consumer protection.[148]

Nonetheless, given the size of the Bureau, it is reasonable to assume that the unique expertise cited in *Humphrey's* could extend to the senior and line-staff, not merely the Director. In short, even if the Director is a partisan appointment, "[c]areer staff supply the agency expertise."[149] Here, it appears that the CFPB's senior and junior staff are uniquely expert by any conventional measure, many having served in prior academic, enforcement, supervision, rule-making, or advising roles centered squarely in the CFPB's regulatory space.[150] So while there may

of North Carolina on a full academic scholarship, and opened his own law firm).

148. *See, e.g.*, Emily Stewart, *The Senate Just Confirmed a Director for CFPB Who Has No Background in Consumer Issues*, VOX (Dec. 6, 2018), https://www.vox.com/policy-and-politics/2018/12/6/18127487/kathy-kraninger-cfpb-mick-mulvaney.

149. *See* Jim Wedeking, *The Ozone Rule That Wasn't: How EPA Makes Decisions*, A.B.A. (Aug. 29, 2016), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2011_12/january_february/ozone_rule_that_wasnt_how_epa_makes_decisions (noting that while EPA administrators have not always had scientific credentials, career staff supply the agency expertise).

150. One methodology for assessing leadership expertise is to examine the qualifications of a number of senior members of any given division or department. To that end, the head of CFPB's Supervision Policy, Peggy Twohig, was previously Director of the Office of Consumer Protection at the Department of the Treasury. *Peggy L. Twohig Biography*, PRAC. L. INST., https://www.pli.edu/Content/Faculty/Peggy_L_Twohig_/_/N-4oZ1z12d0o?ID=PE985835 (last visited Feb. 26, 2019). The CFPB's head of Research, Markets & Regulations, Tom Pahl, spent fifteen years at the FTC and served briefly as the FTC's chief Consumer Protection Officer. Stephanie Eidelman, *Tom Pahl Returns to CFPB, Will Oversee Debt Collection Rulemaking at Critical Juncture*, INSIDEARM (Apr. 19, 2018), https://www.insidearm.com/news/00043907-tom-pahl-returns-cfpb-will-oversee-debt-c. The Bureau's head of enforcement, Kristen Donoghue, previously had roles as enforcement attorney, assistant litigation deputy in the office of enforcement, assistant deputy director for policy and strategy in the office of enforcement, deputy enforcement director, and finally principal deputy enforcement director. Ben Lane, *CFPB Promoting Kristen Donoghue to Be New Head of Enforcement*, HOUSINGWIRE (Nov. 8, 2017), https://www.housingwire.com/articles/41768-cfpb-promoting-kristen-donoghue-to-be-new-head-of-enforcement. The CFPB's Fair Lending director, Patrice Ficklin, charged with ensuring fairness in mortgage markets, among others, previously served as Associate General Counsel at Fannie Mae during the mortgage crisis. Press Release, CFPB, Treasury Department Announces Senior Leadership Hires for the Consumer Financial Protection Bureau (May 11, 2011), https://www.consumerfinance.gov/about-us/newsroom/treasury-department-announces-senior-leadership-hires-for-the-consumer-financial-protection-bureau. Finally,

not be a clearly discernable methodology for establishing "expertise," the CFPB's staff should easily pass muster.[151] However, in the absence of clarity about how each of these components should be weighed, and even if the unique expertise was not fully discernible, not all four *Humphrey's* components should be required to justify an agency's status as constitutionally independent.

3. Wholly Executive Functions

The third component of the *Humphrey's* quartet requires determining the degree to which the agency performs non-executive functions. The more prevalent such functions are, the more likely its constitutional basis.[152] Agencies that are quasi-legislative are not subject to unrestrained presidential removal power due to separation of powers principles.[153] The ability to make laws and rules is clearly legislative; and when possessed by an agency, this ability clearly extends its functions beyond a purely executive scope.[154] However, there is a distinction between mere procedural rules and those that have substantive effect.[155] The CFPB has significant, substantive rule-making power.[156]

The quasi-legislative nature of the CFPB is found in its history of writing rules, which is functionally a legislative act.[157] For example, in response to the heightened levels of payment delinquency and foreclosure that occurred after the 2008 housing crisis, the CFPB enacted the "Ability-to-Repay" rule intended to protect consumers from aggressive mortgage lending.[158] Other

its former head of Research, Sendhil Mullainathan, received a MacArthur "Genius" award. *Id.* These qualifications and many others suggest a uniquely expert team dedicated to consumer financial protection.

151. Crane, *supra* note 124, suggests that another method would be to compare the line staff expertise to staff expertise at a similarly situated purely executive agency, which could be, in this case, the Office of the Comptroller of the Currency. *See id.* at 1856–59. If the staff at the CFPB were not objectively "more expert," this would, as Crane argues, undermine the case for valuing independence. *See id.*

152. Humphrey's Ex'r v. United States, 295 U.S. 602, 618–34 (1935); Crane, *supra* note 124, at 1836–37.

153. *Humphrey's Ex'r*, 295 U.S. at 618–34.

154. Myers v. United States, 272 U.S. 52, 106–08 (1926).

155. *Humphrey's Ex'r*, 295 U.S. at 618–32.

156. *See* Susan Dudley, *Is the Consumer Financial Protection Bureau Unconstitutional?*, FORBES (Apr. 15, 2016), http://www.forbes.com/sites/susandudley/2016/04/15/is-the-consumer-financial-protection-bureau-unconstitutional/#ef38ed651b39.

157. *Id.*; *see also Myers*, 272 U.S. at 106–08.

158. Ability to Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 6407, 6407–09 (Jan. 30, 2013).

provisions added protections for consumers against other "abusive" terms and products offered by lenders, clarified consumer disclosure laws, and attempted to outlaw arbitration clauses in certain consumer contracts.[159] When the CFPB is acting in this law-making capacity, it is not performing an executive duty within the authority of the President, but accomplishing a legislative task more akin to Congress's work. While sporadic legislative activity is not sufficient to deem the agency quasi-legislative,[160] given the pervasive rule-making powers held and used by the CFPB, it is proper to classify the CFPB as quasi-legislative. It thus meets the third criterion of *Humphrey's* four-part test for determining whether an agency can constitutionally operate independent from unrestrained executive authority.

4. Quasi-Judicial Responsibilities

The final component of *Humphrey's* mirrors the third and asks whether the agency has quasi-judicial responsibilities.[161] If its duties encompass substantial adjudicatory functions, the office cannot be said to be purely executive in nature.[162] The CFPB is responsible for consumer complaints and often resolves those disputes in a judicial fashion.[163] By adjudicating disputes, levying penalties, and awarding relief, the CFPB is acting as a quasi-judicial body. The underlying enforcement matter in *PHH* is obviously one such example, notwithstanding its disputed interpretation of the Real Estate Settlement Procedures Act.[164]

Similar to an agency's use of legislative powers, arguments have been made that judicial power, if not actually used, should not make an agency quasi-judicial.[165] This argument is not applicable to the CFPB though, which has historically, even aggressively, used these powers.[166] It has fined financial institutions that violated its rules, and awarded relief to aggrieved consumer parties.[167] Considering this clear and substantive adjudicatory activity, the CFPB should also be considered a quasi-

159. *Id.* at 6413, 6419.

160. *See* Dudley, *supra* note 156.

161. Humphrey's Ex'r v. United States, 295 U.S. 602, 618–33 (1935); Crane, *supra* note 124, at 1835–36.

162. Myers v. United States, 272 U.S. 106, 106–10 (1926).

163. *See About Us: The Bureau*, *supra* note 118.

164. *See PHH-2*, No. 15-177, slip op. (D.C. Cir. Jan. 31, 2018) (en banc).

165. *See* Crane, *supra* note 124, at 1863–68.

166. The CFPB and its Director are actively involved in the adjudication of disputes, and do not merely possess such a power in theoretical terms.

167. *About Us: The Bureau*, *supra* note 118.

judicial body. This designation allows the CFPB to meet the fourth and final *Humphrey's* prong for identifying a constitutionally sound independent agency.

Having considered all four elements of *Humphrey's*, it appears that the CFPB very likely meets at least three of the criteria and possibly all four. The CFPB operates free from direct reliance on or influence by Congress or the executive branch.[168] In its rule-making duties, the CFPB exhibits undeniable legislative traits and thus the agency should be considered quasi-legislative. Similarly, its adjudicatory responsibilities are judicial in nature and should qualify the Bureau as quasi-judicial. Although the necessity of the independence of the CFPB from the executive branch as a means of attracting and retaining the best subject matter experts is uncertain, not clearly meeting one of the four components should not be fatal to the agency's justification of its constitutionally validated status, given that there is no precedent that suggests that meeting all four components is required. Thus, on balance, the CFPB is constitutional under the *Humphrey's* analysis.[169]

B. THE CFPB DIRECTOR AS A PRINCIPAL EXECUTIVE OFFICER

There could, in theory, be additional reasons to question the CFPB's constitutionality under the "Principal-Inferior Officer" analysis engaged by *Morrison*[170] and its progeny, including *Free Enterprise*.[171] However, nobody would seriously consider the Director of the CFPB to be an inferior officer and for that reason protected from removal. To determine whether an officer was principal or inferior, the *Morrison* Court offered three criteria to

168. This is less true when its current Director occupies a formal role within the Executive Branch, as was true for a time in the Trump Administration.

169. A separate analysis focused on the Supreme Court's "blending" dicta would yield the same conclusion. See Justice Holmes's opinions in *Meyers v. United States*, 272 U.S. 52, 88 (1926) (Holmes, J., dissenting) and *Springer v. Philippine Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting), where he referenced "spider's webs" and shaded penumbras to characterize the lack of strong constitutional separation of powers provisions. Similarly, in *Buckley v. Valeo*, the Court said that the Constitution does not require a "hermetic sealing off of the three branches of government," 424 U.S. 1, 121 (1976), and noted in *Mistretta v. United States* that it expects "that the coordinate Branches will converse with each other on matters of vital common interest." 488 U.S. 361, 408 (1989). For these reasons and others, many administrative law scholars also argue against a rigid unitary actor approach to separation of powers issues.

170. Morrison v. Olson, 487 U.S. 654 (1988).

171. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010).

consider. Under the Appointments Clause, an inferior officer: (1) is subject to removal by a higher executive branch official; (2) is empowered by the Act to perform only limited, certain duties; and (3) holds an office that is limited in jurisdiction and limited in tenure.[172] If an agency head meets all three criteria, she is an inferior officer. If she fails any of the three criteria, she is a principal officer.[173]

Analyzing the CFPB under the *Morrison* standard confirms that the director is a principal officer. The director is not subject to removal at will by any individual, and is subject only to the President's removal for good cause.[174] Without having a superior officer who is able to remove the director, it cannot be said that she is subject to removal by a higher executive branch official.[175] The duties that the director performs are varied and numerous. As opposed to the limited duties of an inferior officer, the director engages in conduct that spans all three branches. In addition, the position's tenure lasts beyond a single presidential cycle and its jurisdiction regarding consumer protection is vast. Accordingly, since the director does not meet any of the three prongs, it is evident that the CFPB is headed by a principal officer as defined by the Appointments Clause. Because of this, when considering the inferior/principal officer distinction in *Morrison*, the CFPB's Director, though a principal officer, is not constitutionally required to be removable at will by the President so long as whatever removal power still remaining vests with the President.[176] Finally, the Court made clear in *Morrison* that despite the exercise of discretion by the Independent Counsel, "we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President."[177] To support that proposition, it cited the similar restrictions on removal

172. *Morrison*, 487 U.S. at 672–75.

173. *Id.*

174. Under *Morrison*, failing a single prong requires that the officer be deemed principal. *Id.*

175. *See Morrison*, 487 U.S. at 671–72.

176. In fact, Congress has also been deferential to presidential power even within the administrative agency regime structure. With respect to the FTC, for example, almost forty years after the FTC's enabling Act, Congress saw fit to expand presidential control. The President is now allowed to name the Chairman from among sitting commissioners and the Chairman has increased powers. Reorganization Plan No. 8 of 1950, 64 Stat. 1264 (1950). Similarly, Congress gave the CFPB broad authority in its regulated space.

177. *Morrison*, 487 U.S. at 691–92.

power in the authorizing statute of the FTC; these exact same restrictions exist with respect to the CFPB.[178] The lack of ability to unilaterally remove the head of the CFPB, given the alternative means of removal and other methods of executive influence, does not significantly deprive the President of his or her ability to take care that the law be faithfully executed.

III. ALT-*HUMPHREY'S*—ACTIVIST JUDGES ATTEMPT TO OVERCOME THE *HUMPHREY'S*-HUMP

Because *Humphrey's*, standing alone, should be sufficient precedent to find the Bureau constitutional, it is tempting to end the analysis here. However, a growing body of scholars, lawyers, judges, and now Supreme Court Justices, seems to suggest that the Supreme Court should either overrule *Humphrey's* or that the CFPB's structure is so fundamentally different from that contemplated in *Humphrey's* that it warrants especially close scrutiny for a host of other reasons. The D.C. Circuit's opinions in *PHH-1* and *PHH-2* and the growing body of courts using them as precedent suggest the sort of inter-circuit conflict that will merit Supreme Court review. And, while *PHH-2* provides ample persuasive reasoning that the CFPB sits on firm constitutional ground pursuant to *Humphrey's* and other factors, it is useful to reflect more broadly on the flawed *PHH-1* arguments lest they continue to persuade or influence courts moving forward. To engage this argument and explore its fallacies, one must also focus on its many assumptions and unusual persuasive techniques.

In *PHH-1*, the panel refused to adhere to the historical precedent set in *Humphrey's* and instead quasi-embraced the reasoning—or perhaps the quiet aspirational spirit—of the Supreme Court's decision in *Free Enterprise*.[179] In doing so, the *PHH-1* court determined that the structure of the CFPB is unconstitutional because it is an extremely powerful independent agency headed by a single individual outside of the President's direct

178. There are plenty who view *Morrison* as no longer favored by the Court. And, within a unified executive framework, it is true that the Court's view regarding the unique above-the-law nature of the Independent Counsel would deserve to be fully re-examined if the Independent Counsel statute still existed. *See* Lee S. Liberman, Morrison v. Olson*: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 314–17 (1989). It may be inconsistent to find, on the one hand, that the President has the power to control the Executive Branch with wide discretion (including over termination) but not revisit whether the President has the power to terminate, say, the Director of the CFPB.

179. *See PHH-1*, No. 15-1177, slip op. at 9–10 (D.C. Cir. Oct. 11, 2016).

chain-of-command and that its current structure "threatens individual liberty."[180] It is no surprise that the decision in *PHH-1*, while still vaguely referencing the standards developed in most of the aforementioned cases, focused intensely on invoking unusual arguments about how the CFPB's design features threaten liberty and violate historic commission membership norms rather than performing a more case-centric analysis.[181]

A. SIMILARITIES BETWEEN THE CFPB AND THE FTC

But first, a reminder. The *Myers* and *Humphrey's* frameworks for determining the constitutionality of a removal provision of an independent agency head have been the guiding precedent for eighty-three years. As such, independent agencies may be consistently upheld as constitutional under *Humphrey's*.[182] Similar to the CFPB, the FTC has been generally considered an agency with multiple functions that slice across all three branches of the federal government. It serves as a quasi-legislative body with regard to rulemaking. It serves as a quasi-judicial body through its administrative judges and hearings. It serves as a quasi-executive body through civil enforcement mechanisms in the courts. Like the CFPB's enabling statute, the FTC Act extensively discussed Congress's goal of ensuring that the Commission would remain independent and nonpartisan.[183] The Senate Committee report explained that the Commission was being created, in part, to replace an existing executive branch office. The advantage of replacing that office, the Committee noted, was that the FTC could then be free from partisanship and exercise its independence from the President.[184] The Committee report's appendix quotes the bill's chief sponsor's description of the proposed Commission as "independent of executive authority, except in its selection, and independent in character."[185] The House Committee report similarly emphasized the FTC's independence when it noted "the bill removes entirely from the control of the President and the Secretary of Commerce the investigations conducted and the information acquired by the commission."[186]

180. *Id.* at 59.

181. *See id.* at 9–10.

182. All challenges to independent agencies using *Myers* and *Humphrey's* analysis failed until *Free Enterprise*.

183. *See* S. REP. NO. 63-597, at 11 (1914).

184. *Id.*

185. *Id.* at 22.

186. H.R. REP. NO. 63-533, at 3 (1914).

When the Supreme Court revisited the legislative history, it came to the correct conclusion that the floor debates in favor of independence "were long and thorough and contain nothing to the contrary."[187] Because the FTC is so similar to the CFPB and because the legislative histories and purposes uniquely align, for the D.C. Circuit in *PHH-1* to determine that the CFPB was unconstitutional, it was forced to look elsewhere for precedent by suggesting that the CFPB's singular director structure rendered it completely inapplicable to *Humphrey's* on that basis alone.[188] And when applying *Free Enterprise*, the *PHH-1* court took a narrow holding of a factually distinct case[189] and applied dicta liberally to circumvent preparing a thorough *Humphrey's* analysis—one which would have clearly forced it to acknowledge that the CFPB, like all but one challenged agency before it, was a valid independent agency able to constitutionally operate outside the direct control of the President.

Much of the *PHH-1* Court's analysis focused on the CFPB's perceived lack of accountability. But the CFPB may in fact be the most accountable executive agency—independent or otherwise—in two key areas: transparency within the branches and accountability to its mission stakeholders (regulators and regulated entities).[190]

B. MEASURES ENSURING THE CFPB'S ACCOUNTABILITY

With respect to inter-branch accountability, there are numerous liberty-enhancing safeguards. The director must testify before Congress, twice a year, in both Houses.[191] The CFPB must issue annual reports to congressional committees and the President, which require it to justify its expenses,[192] its rulemaking,[193] and its enforcement and supervisory functions,[194] and then discuss the prior year's consumer complaints,[195] financial

187. Humphrey's Ex'r v. United States, 295 U.S. 602, 625 (1935).

188. *See PHH-1*, No. 15-1177, slip op. at 9 (D.C. Cir. Oct. 11, 2016) (vacated).

189. *See id.* at 34, 41–44.

190. Advocates for the CFPB have recognized the importance of these protections and provided substantial insight for this analysis. *See Accountability of the Consumer Financial Protection Bureau*, CONSUMER FED'N AM., https://consumerfed.org/pdfs/CFPB-Accountability-fact-sheet-6-11.pdf (last visited April 14, 2019).

191. 12 U.S.C. § 5496(a) (2012).

192. *Id.* § 5496(c)(2).

193. *Id.* § 5496(c)(3).

194. *Id.* § 5496(c)(5).

195. *Id.* § 5493(b)(3)(C).

literacy,[196] and its monitoring efforts.[197] The CFPB is subject to audit by the Comptroller General and the Government Accountability Office, and the Comptroller separately submits its audit to Congress and the President.[198] The Bureau's enforcement actions can be challenged in federal court,[199] its rules are subject to the standard Administrative Procedure Act process,[200] and it must submit quarterly spending reports to the Office of Management and Budget.[201] Congress can overturn the CFPB's rules with legislation under the Congressional Review Act, and it has repeatedly done so.[202] Should time grant it 20/20 hindsight, the CFPB can also later repeal its own quasi-legislative acts.[203] Further, the Financial Stability Oversight Council (FSOC) can stay or set aside any rules that interfere with the "safety and soundness" of the banking system.[204] Pending an FSOC vote, the Secretary of the Treasury is empowered, upon the request of any FSOC member, to stay the effective date of any Bureau rule.[205]

With respect to accountability to stakeholders, there is a large number of statutory protections. The CFPB must consult with a dizzying array of federal regulators prior to proposing rules;[206] incorporate regulators' objections into the rulemaking

196. *Id.* § 5493(d)(4)(A)–(B).

197. *Id.* § 5512(c)(3)(A).

198. *Id.* § 5497(a)(5)(A)–(B).

199. *Id.* § 5563(b)(4).

200. *See* Administrative Procedure Act, 5 U.S.C. §§ 551–59 (2012).

201. 12 U.S.C. § 5497(a)(4)(A).

202. *See, e.g.*, H.J. Res. 111, 115th Cong. (2017) (rejecting the CFPB's arbitration rule); *see also* Press Release, CFPB, CFPB to Hold Auto Lenders Accountable for Illegal Discriminatory Markup (Mar. 21, 2013), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-to-hold-auto-lenders-accountable-for-illegal-discriminatory-markup (discussing its former guidance about fair lending and indirect auto lenders and noting the repeal of such guidance by Congress in May 2018).

203. *See* William Hoffman, *CFPB to Reconsider or Repeal Auto Title Lending Rule*, AUTO FIN. NEWS (Jan. 17, 2018), https://www.autofinancenews.net/cfpb-to-reconsider-or-repeal-auto-title-lending-rule.

204. 12 U.S.C. § 5513(a).

205. *Id.* § 5513(c)(1)(A).

206. *Id.* § 5512(b)(2)(B) ("[T]he Bureau shall consult with the appropriate prudential regulators or other Federal agencies prior to proposing a rule and during the comment process regarding consistency with prudential, market, or systemic objectives administered by such agencies . . . ."); *id.* § 5531(e) ("In prescribing rules under this section, the Bureau shall consult with the Federal banking agencies, or other Federal agencies, as appropriate, concerning the consistency of the proposed rule with prudential, market, or systemic objectives administered by such agencies.").

record;[207] share examination data[208] and complaints;[209] conduct a cost benefit analysis for proposed rules;[210] include the impact of such rules on small banks, credit unions, and rural consumers;[211] and contemplate the consequences of "unduly burdensome regulations."[212] It also must notify the Attorney General when commencing enforcement actions.[213] It must consult with federal and state regulators to minimize the regulatory burden for large institutions.[214] It must give small businesses previews of new proposals prior to the general public as well.[215] It must reassess its rules, with required public comment, within five years of implementation.[216] Finally, it must submit its budget requests—a budget that is statutorily capped[217]—to the Federal Reserve even though it is funded separately from congressional appropriations.[218] The dizzying array of both inter-branch and public-facing accountability measures are real. As such, they render the CFPB's critics' hyperbole—such as the "director is in fact answerable to no one[,] . . . not subject to any meaningful executive-branch oversight [and] . . . insulated from . . . any real legislative oversight"[219]—downright comical, even alt-factual.

C. *PHH-1*'S FLAWED RELIANCE ON HISTORICAL ANALYSIS OF AGENCY STRUCTURE

The *PHH-1* court reasoned that, although the Supreme Court had never held that agencies headed by a single person *could not* be independent, historical evidence showed that inde-

207. *Id.* § 5512(b)(2)(C).
208. *Id.* § 5512(c)(6)(C)(i).
209. *Id.* § 5493(b)(3)(A).
210. *Id.* § 5512(b)(2)(A)(i).
211. *Id.* § 5512(b)(2)(A)(ii).
212. *Id.* § 5511(b)(3).
213. *Id.* § 5564(d)(1).
214. *Id.* § 5515(b)(2).
215. Consumer Financial Protection Act of 2010, Pub. L. No. 111-203, § 1100G, 124 Stat. 1955, 2112; Small Business Regulatory Enforcement Fairness Act of 1996, S. 942, 104th Cong. § 404 (1996).
216. 12 U.S.C. § 5512(d)(1)–(3).
217. *Id.* § 5497(a)(2)(A)(iii).
218. *Id.* § 5497(a)(1).
219. Brief of the Cato Institute as Amicus Curiae in Support of Defendants-Appellants at 4, CFPB v. All Am. Check Cashing, Inc., No. 18-60302 (5th Cir. July 9, 2018). That the CATO Institute can say "[t]he director is, uniquely in our government, accountable to literally no one" with a straight face demonstrates the weakness of its—and others'—positions. *See id.* at 12.

pendent agencies are almost exclusively headed by multi-member committees and that such historical precedent was relevant.[220] This "unitary director" structure, according to *PHH-1*, is not only extremely uncommon, but also more susceptible to corruption and arbitrary decision-making than a multi-member committee, and represents an amount of unilateral power offensive to separation of powers principles.[221] Referencing that historical precedent vaguely and repeatedly, the court decided that the novelty of the structure of the CFPB—it being the only independent agency wielding significant executive power while led by a single individual—weighed against it when considering its constitutionality.[222] The court's suggestion that Supreme Court dicta hinted that novelty might be a relevant factor was not new,[223] but was also untethered from a robust analysis of the facts as applied to relevant law, most notably *Humphrey's*.

As the *PHH-1* court saw it, there has never before been an independent agency headed by a single individual who possesses powers as significant as those vested in the CFPB. Further, its director is protected from removal by the President by a just-cause provision, and without a multi-member committee, it is also allegedly free from any other legitimate check or balance—threatening liberty as we know it.[224] Whereas historically independent agencies have been led by multi-member committees made up of colleagues who provided each other's checks and balances, the Director of the CFPB is able to uniformly determine "what rules to issue; how to enforce, when to enforce, and against whom to enforce the law."[225] But the *PHH-1* court's rhetoric is particularly amusing given the many above-mentioned statutory provisions restricting the CFPB's ability to issue rules, the timing of rules, and the various categories of entities that are not subject to its reach.

The *PHH-1* court also addressed the select few independent agencies that exist with an individual serving as the agency

220. *PHH-1*, No. 15-1177, slip op. at 36–38 (D.C. Cir. Oct 11, 2016) (vacated) (citing examples of invocations of history, but largely ignoring the Court's agency cases).

221. *Id.* at 43–44.

222. *Id.* at 43

223. *See, e.g.*, Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2139 (2015).

224. *PHH-1*, slip op. at 23–26.

225. *Id.* at 7.

head, and reasoned that because all similar agencies were created or reorganized recently, they suffer from the same constitutional problems that the CFPB does—solely because they too lack established historical precedent.[226] All of these independent offices or agencies—the recently revised Social Security Administration, the Office of Special Counsel, and the Federal Housing Finance Agency—were created after 1978, with the FHFA created in 2008.[227] In addition to the recent creation of these agencies, the law enforcement and penalty assessing powers of the CFPB are absent from the Social Security Administration and the Office of Special Counsel.[228] Thus, although there are rare examples of independent agencies headed by individuals, they are contemporary creations and they are fundamentally less powerful than the CFPB.[229]

The *PHH-1* court also used an unwieldy and ahistorical combination of analysis from *Free Enterprise* to reason that novel agency structures are inherently constitutionally problematic due to a lack of precedent, and that when the constitutional text does not provide sufficient clarity, a long-standing established practice "is a consideration of great weight."[230] The structure of the CFPB deviated from the settled historical practice of having multi-member committees lead independent agencies.[231] Because of its fundamental differences from the typical structure of an independent agency, coupled with its potential for arbitrary decisions that could threaten individual liberty, the court refused to extend the *Humphrey's* precedent to the CFPB.[232] But the *PHH-1* court's warped view of unchecked power threatening liberty assumed away the many checks and balances and accountability mechanisms built into the CFPB. The *PHH-1* court

226. *Id.* at 29–35. That said, many banking and financial regulatory frameworks, while not "independent" from the executive in the Constitutional sense, do have single directors or more unitary hierarchies, such as the Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, National Credit Union Association, and the Federal Reserve's Division of Supervision and Regulation. And, many of these singular financial-regulator offices have existed longer than most independent agencies. Thus, one might conclude from these long-standing regulatory arrangements that, at least with respect to the financial sector, having a singular-regulator is more common than it might be for other regulated industries.

227. *Id.* at 29. The Independent Counsel statute was not renewed. *Id.* at 31.

228. *Id.* at 32 n.5.

229. *Id.* at 34.

230. *See id.* at 39–40.

231. *Id.* at 43.

232. *Id.* at 9–10.

may have invoked the specter of a liberty-squashing regulatory boogeyman, but the truth is, in fact, the opposite.

D. *PHH-1*'S MISTAKES: IMPROPER APPLICATION OF *FREE ENTERPRISE*, AND OVEREMPHASIS ON "HISTORY" AND "LIBERTY"

Ultimately, the *PHH-1* court continued to pay lip service to *Free Enterprise* at the remedy stage, and concluded that although the structure of the CFPB is unconstitutional in its current format, the proper remedy was merely to strike the just-cause provision, making the Director of the CFPB removable at will by the President and turning the CFPB into a traditional executive agency.[233] In doing so, it refused to foist any substantive change upon the CFPB's operations or scope. The court recognized it had an alternative option, that is, instead of removing the just-cause provision and turning the CFPB into a traditional executive agency, it could have changed the single-director structure into a multi-member committee, turning the CFPB into a constitutionally acceptable independent agency.[234] However, the court reasoned that such a change would involve more potential issues and create additional problems for the agency in the short term, and left such a decision up to Congress.[235] In addition, the court cited recent precedent demonstrating that severing the problematic provision is the most common remedy for this type of constitutional ill.[236]

With the *PHH-1* opinion judicially dead (but still living as theory), an entirely new—but tenuous—critical framework has emerged. Rather than grounding their reasoning in *Myers*, *Humphrey's*, and their progeny, courts and scholars instead choose to embrace more recent decisions and tether their rhetoric to a suspicion of the constitutional infirmity of novel structures, specifically the CFPB's deviation from the tradition of multi-member committees heading independent agencies.[237] In short, dicta and a cursory glance at *Free Enterprise* allow these

233. *Id.* at 69.

234. *Id.* at 68–69. The *PHH-1* court, recognizing the application of *Humphrey's* could not be completely ignored, seemed willing to suggest that a CFPB with five directors would be virtually identical in structure to the FTC, rendering it Constitutional. *Id.* Further, because the *PHH-1* court equated design "novelty" with suspect Constitutional footing, the change to a more historically-familiar design would remove one of that court's key criteria for finding the CFPB unconstitutional.

235. *Id.*

236. *Id.* at 66–67.

237. *See, e.g.*, *id.* at 8–9.

critics to reason that new and atypical agency structures are inherently constitutionally problematic.[238] But *Humphrey's* cannot be that easily ignored.

The *PHH-1* court cited *Free Enterprise* in order to avoid *Humphrey's*, but failed to appreciate that the court in *Free Enterprise* undertook an extensive *Humphrey's* analysis—even beginning its opinion by restating its agreement with *Humphrey's* and noting "[we] held that Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause."[239] The *Free Enterprise* Court determined that under that analysis, the PCAOB removal structure prevented the President from faithfully executing the law.[240] It did not simply state that because the two degrees of separation structure was new, it was unconstitutional, but rather it applied an Article II analysis, focusing on the "inferior officer" distinction, and only then determined that the removal provisions were unconstitutional.[241] In addition, the Court in *Free Enterprise* did not hinge its decision on whether the agency was led by an individual or a multi-member committee. The only issue after having determined that the nature of the agency met the four criteria of *Humphrey's* was whether the removal structure prevented the President from meeting his Article II responsibilities.[242]

Finally, the holding in *Free Enterprise* would seem to be inapplicable to the CFPB because the agency removal structure and corresponding relationships involving the CFPB are funda-

238. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 505–06 (2010) (suggesting that a lack of historical precedent is a constitutional problem is a dangerous game). The road from *Plessy v. Ferguson*, 163 U.S. 537 (1896) to *Brown v. Board of Education*, 347 U.S. 483 (1954), as with the journey from *Bowers v. Hardwick*, 478 U.S. 186 (1986) to *Romer v. Evans*, 517 U.S. 620 (1996) to *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), should remind us that referencing the norms of the past as a Constitutional status-quo baseline is not always the wisest approach to preserving individual liberty or upholding the Constitution. As Justice Scalia's dissent in *Romer* reminds us, the *Bowers* court held that the Constitution did not ensure the right to "what virtually all States had [prohibited] from the founding of the Republic." *Romer*, 517 U.S. at 640 (Scalia, J., dissenting). The Taney court similarly referenced the "histories of the times" as a basis for denying Dred Scott his Constitutional rights. *See* Dred Scott v. Sandford, 60 U.S. 393, 407 (1856).

239. *Free Enter. Fund*, 561 U.S. at 483.

240. *Id.* at 484.

241. *See id.*

242. *Id.* at 496.

mentally different from those of the PCAOB. Whereas the structure of the PCAOB prevented the President from having substantive input in the good-faith determination of cause, the CFPB's structure and framework does no such thing. In *Free Enterprise*, the President had no legitimate way to influence the decision-making process and would have had his ability to perform his constitutional duties severely impacted by the SEC usurping his power.[243] Conversely, the President determines whether there is just-cause to remove the Director of the CFPB. Because the President has direct input regarding the just-cause determination, he is able to effectively enforce the laws. 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. Although *Free Enterprise* has been a good development for *Myers* enthusiasts because it offers courts a potential Maginot Line for resisting congressional overreach and will likely continue to be invoked in future challenges to removal, the appropriateness of its application to the now-resolved *PHH* case and to future cases involving other dissimilar agencies seems tenuous. *Not all new or atypical structures are inherently unconstitutional*. The novelty issue is most salient when the structure stops the President from being able to faithfully execute his Article II powers.[244] Whereas the design of the PCAOB's removal process was convoluted and likely to burden the President, the single layer of good-cause restriction for the CFPB's director also comports with the other post-*Humphrey's* independent agencies that have had their constitutionality upheld.[245]

The holding of *Free Enterprise* was narrow because it maintained conformity with *Humphrey's* and *Myers*—which is why the factual differences between the CFPB and the PCAOB are so critical. Whereas the President had no direct control over PCAOB board members, the President determines whether there is just cause to remove the Director of the CFPB. This ability to determine if cause exists has been consistently upheld under *Humphrey's* as sufficient for the President to meet his Article II responsibilities. The inability to meet these responsibilities under the two-degrees of separation structure was the ultimate

243. *Id.*; Bader, *supra* note 95, at 277.

244. *See Free Enter. Fund*, 561 U.S. at 484.

245. The CFPB operates with a single layer of just-cause removal separation from the President. The PCAOB in *Free Enterprise* had two layers of separation.

reason that the PCAOB was deemed unconstitutional, *not* because the agency's structure was novel.[246] To apply *Free Enterprise* differently is to distort its holding and its purpose. Had this been an issue of first impression with no set precedent to follow, the *PHH-1* court's reasoning might be sufficient. But with such a well-established framework already in place, it was the court's role to thoroughly apply the law that the Supreme Court has repeatedly endorsed. That analysis must flow through *Humphrey's*.

Finally, the rhetorical flourish of the *PHH-1* court (and the *PHH-2* minority) is particularly concerning given its unwillingness to engage precedent—and even other members of the court. The *PHH-1* court invoked "history" seventy-eight times in its more than one hundred pages. It cited *Free Enterprise* forty-eight times, more than it cited *Humphrey's*, the foundational case in this line of jurisprudence. Similarly, the court invoked "liberty" fifty-three times—more than it cited or referenced *Myers*, *Bowsher*, *Youngstown Steel*, *Buckley*, and *Mistretta* combined.[247] The opinion's references to "history" and "liberty" combined eclipse its reference to all relevant case law, including *Free Enterprise* and *Humphrey's*.[248] Put differently, the court's unusually heavy reliance on historical analysis and abstract liberty principles obfuscated what it did not do: it did not directly engage the Supreme Court's 100 years of executive agency jurisprudence. This was the recipe for a flawed analysis.

The *PHH-1* court simply gave too much persuasive impact to the theoretical value of a unitary executive. As a lower court accurately noted, "[t]he President is not required to execute the laws; he is required to take care they be executed faithfully."[249] Perhaps *Humphrey's* was not nearly as wide-ranging as some commentators suggest, which allowed the *PHH-1* court to ground its analysis in a limited way. At the core of *Humphrey's*, the Court held that the FTC acts in part quasi-legislatively and in part quasi-judicially, but that it "exercises no part of the executive power vested by the Constitution in the President."[250] Based upon that demarcation of authority and responsibility, the

246. *See id.*

247. The court invoked "liberty" fifty-three times, compared to *Myers* (18), *Bowsher* (8), *Youngstown* (7), *Buckley* (4), and *Mistretta* (2). *See PHH-1*, No. 15-1177, slip op. (D.C. Cir. Oct. 11, 2016) (vacated).

248. *PHH-1* makes 131 references to history or liberty as compared to 128 references to relevant case law. *See id.*

249. SEC v. Blinder, Robinson & Co., 855 F.2d 677, 682 (10th Cir. 1988).

250. Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935).

Court found that the FTC's executive functions at the time were largely incidental to the other core functions and that in any case the Commission did not exercise executive power "in the constitutional sense".[251] The regulatory and political environment, and the FTC's core functionality have changed since *Humphrey's*. Perhaps the findings that the core functionality of the FTC was definitely non-executive was at least part of the basis for the Court's decision in *Humphrey's*, although it has never held that to be significant in its agency jurisprudence to date. But, until the Supreme Court says otherwise, the CFPB should be seen as independent from undue branch influence, nonpartisan, uniquely expert, and possessing quasi-judicial and legislative duties. Thus, it satisfies the criteria to constitutionally avoid the reach of unrestrained at-will presidential removal power.[252]

E. WHY *PHH-1* STILL MATTERS

Although *PHH-1* was reversed en banc, its primary author, Justice Kavanaugh, was not persuaded by the full court's analysis. The *PHH-1* majority's refusal to critically engage other points of view or the entirety of what became the *PHH-2* majority's analysis suggests a deep intractability to the legal divide—almost to the point of absurdity.[253] The *PHH-2* court correctly rejected the *PHH-1* framework, restoring *Humphrey's* to its rightful place in this jurisprudence. That said, other courts continue to consider these claims with varying levels of analysis, with some still relying on the now-withdrawn opinion from *PHH-1*.[254] Continued reference to *PHH-1* is misguided; rhetorical appeals to liberty and history are not sufficient to overcome the Supreme Court precedent that overwhelmingly favors the CFPB.[255]

251. *Id.*

252. *See* Crane, *supra* note 124.

253. The dissent in *PHH-2* so intently refuses to engage its critics or the court's majority that large parts of its analysis, in fact, most of it, is simply wholesale cut and pasted from *PHH-1* word-for-word as if *PHH-2*'s majority opinion doesn't even exist. This suggests that its author is not only unpersuaded but does not see the need to pretend that the other arguments are even worth considering.

254. *See supra* note 19; *see also* CFPB v. RD Legal Funding, No. 17-CV-890 (LAP) (S.D.N.Y. June 21, 2018) (presently on appeal); CFPB v. D&D Mktg., No. 2:15-CV-09692, 2016 WL 8849698, at *1 (C.D. Cal. Nov. 17, 2016), *interlocutory appeal granted*, No. 17-55709, 2017 WL 597428 (9th Cir. May 17, 2017) (including an initial finding that the CFPB is unconstitutional).

255. This is especially so when that history is not nearly as persuasively one-sided as the *PHH-1* court suggested. *See, e.g.*, 1 ANNALS OF CONG. 611–12 (1789)

F. NEXT STEPS—MOVING TO A FIVE-MEMBER COMMISSION

Much of *PHH-1* centers around Justice Kavanaugh's belief that the novelty of the director-structure is almost prima facie evidence of the CFPB's unconstitutionality.[256] As explained above, these arguments are simply inconsistent with the Supreme Court's independent agency jurisprudence. Thus, while Justice Kavanaugh and ideological opponents of the CFPB may have been wrong on the constitutional issues, they were right on one point: the singular director structure is deficient.

The singular director structure is deficient not because it is unconstitutional, but because it is undesirable, and its political costs outweigh its perceived administrative benefits. A singular director is more susceptible to insular decision-making, partisan influence, and abuse than a multi-member commission with a staggered membership and bipartisan appointment structure. In 2011, congressional Republicans proposed a sensible multi-member replacement, articulating various reasons for its greater likelihood of success: first, a commission with staggered terms provides greater leadership stability over time; and second, a commission structure promotes greater consistency in rule-making and administration.[257] Congressional Republicans presciently argued that:

> [A] single director will set up a situation in which the leadership of the CFPB will be subject to the variances in ideology from one administration to another when the director is appointed. Consumers stand to lose the most if we have a situation in which the directorship of the CFPB swings back and forth between the extremes of the political spectrum.[258]

But now that the political pendulum has swung toward the Republican party and a Republican-appointed CFPB director sits in the chair, is it terribly surprising that its initial detractors

(statement of James Madison) (noting that "there may be strong reasons why an officer [such as the Comptroller of the United States] should not hold his office at the pleasure of the Executive branch" if one of his "principal dut[ies] . . . partakes strongly of the judicial character"); *see also* Free Enter. Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 514–49 (2010) (Breyer, J., dissenting).

256. *See PHH-1*, No. 15-1177, slip op. at 29, (D.D.C. Apr. 12, 2016) (vacated) ("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."); *see also id.* at 64 ("[W]e therefore conclude that the CFPB is unconstitutionally structured because it is an independent agency headed by a single Director.").

257. *See* 157 CONG. REC. 11,698 (2011) (statement of Rep. Capito).

258. *Id.*

now think the single-director structure is solidly constitutional?[259]

As we have seen in recent years, a singular director model can become effectively partisan. Visions that a singular director structure would yield more rapid and efficient lawmaking did not come to pass.[260] And so, with a political turn-about and a singular director, it is to be expected that a partisan appointment by a new President could bring about "a chilled CFPB law enforcement program [that] will lead to a disempowered, less affluent America."[261] In fact, enforcement actions steeply dropped during Director Mulvaney's tenure; it remains too soon to determine whether his successor shares his enforcement approach.[262]

But in this political climate, there may be a bipartisan opportunity to shift the singular director model to a multi-member model similar to other federal agencies. As the *PHH-1* court noted, such a change is well within congressional power.[263] If Congress were to replace the singular director position with a multi-member commission, the removal structure would no longer be atypical, and the agency could once again be recognized as independent—even by its critics. Such a distinction would allow the multi-member commission to operate more effectively generally, consistent with lessons also gleaned from business

259. *See, e.g.*, Brief of Plaintiff-Appellee CFPB at 24, 40, CFPB v. All Am. Check Cashing, Inc., No. 3:16-CV-356-WHB-JCG (5th Cir. Sept. 10, 2018) (arguing that its singular director structure is firmly constitutional).

260. *See, e.g.*, 156 CONG. REC. 6237 (2010) (statement of Sen. Whitehouse) ("We need a regulator in place who can monitor the market and act quickly when there is a consumer hazard."); 156 CONG. REC. 12,436 (2010) (statement of Rep. Meeks) ("Led by an independent director, this office will be able to act swiftly so consumers will not need to wait . . . to receive protection from unscrupulous behavior.").

261. Christopher L. Peterson, *The Risk of an Anti-Consumer CFPB*, DEMOCRACY (Dec. 21, 2017), https://democracyjournal.org/arguments/the-risk-of-an-anti-consumer-cfpb.

262. There were fifty-six enforcement actions in 2015; forty-two in 2016; thirty-two in 2017; and just six through September 30, 2018. *See* Jeff Bater, *Enforcement Actions Drop Sharply at Trump-Led CFPB*, BLOOMBERG BNA (Oct. 11, 2018), https://www.bna.com/enforcement-actions-drop-n73014483278.

263. *PHH-1*, No. 15-1177, slip op. at 69 (D.D.C. April 12, 2016) (vacated) ("[I]f Congress prefers to restructure the CFPB as a multi-member independent agency rather than as a single-Director executive agency, Congress may enact new legislation that creates a Bureau headed by multiple members instead of a single Director.").

and social-science literature about better and more effective governance structures.[264] It would mitigate capture concerns, such as they exist, from both sides of the aisle.[265] And, it would prevent the long-term reign of a director opposed to the CFPB's mission as interpreted by its advocates.[266] Finally, of course, such a change fundamentally undercuts the logic in *PHH-1*, among other cases.[267] Yes, ultimately the Supreme Court could also constitutionally blue-pencil the removal clause to save the CFPB, but severing it would of course make the CFPB a completely political agency, something it was structured to entirely avoid.

CONCLUSION

The stakes are high. Some of the CFPB's most important actions are rooted in its executive independence and can fairly be seen as implementing a broad economic and racial equality framework for consumers, regardless of who holds our nation's highest office.[268] To the extent that the Bureau becomes merely an arm of the executive and subject to its whims, its nonpartisan focus and racial-equity impact will be substantially imperiled.[269]

264. *See, e.g.*, Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1, 12–19 (2002) (reviewing evidence). *But see* Daniel E. Ho, *Measuring Agency Preferences: Experts, Voting, and the Power of Chairs*, 59 DEPAUL L. REV. 333 (2010) (finding, among other things, that even multi-member commissions can prove to be highly dysfunctional and that the leadership of such (e.g. the Chair) holds the most influence and power).

265. *See generally* Barkow, *supra* note 141, at 17–18.

266. *See, e.g.*, CFPB, BUREAU OF CONSUMER FINANCIAL PROTECTION STRATEGIC PLAN FY 2018-2022, at 2 (Feb. 12, 2018), https://www.consumerfinance.gov/documents/6208/cfpb_strategic-plan_fy2018-fy2022.pdf (purporting that Director Mulvaney will fulfill statutory obligations but "will go no further").

267. Though as the *PHH-2* court noted, "Congress's choice—whether an agency should be led by an individual or a group—is not constitutionally scripted and has not played any role in the [Supreme] Court's removal-power doctrine." *PHH-2*, No. 15-1177, at 43 (D.C. Cir. Jan. 31, 2018) (en banc).

268. *See, e.g.*, Press Release, CFPB, Consumer Financial Protection Bureau and Department of Justice Action Requires BancorpSouth to Pay $10.6 Million to Address Discriminatory Mortgage Lending Practices (June 29, 2016), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-and-department-justice-action-requires-bancorpsouth-pay-106-million-address-discriminatory-mortgage-lending-practices (describing CFPB's Consent Order with BancorpSouth regarding mortgage lending discrimination claims); *Toyota Motor Credit Corporation Settlement*, CFPB (Feb. 2, 2016), https://www.tmccsettlement.com (describing CFPB's Consent Order with Toyota Motor Credit regarding discrimination claims alleged by motor-vehicle purchasers).

269. *See, e.g.*, Eric Levitz, *The Trump Administration Just Made Life Easier for Racist Lenders*, N.Y. MAG. INTELLIGENCER (Feb. 1, 2018), http://nymag

That said, the constitutional death of the CFPB and other independent government agencies is greatly exaggerated, like Mark Twain's first death.[270] The Supreme Court has affirmed the constitutionality of independent agencies regularly since *Humphrey's*. In the rare instances that it has not, only the offending provision has been removed, while the remaining structure stayed valid. Though *PHH-1* created a stir by avoiding precedent and invoking rhetoric of history and novelty, the *PHH-2* court correctly identified the key issues and found the Bureau's structure sound.[271] When applying each piece of the constitutional analysis under *Humphrey's* and its progeny, the CFPB qualifies as the type of agency that is constitutionally able to function independently without unfettered presidential oversight. It is nonpartisan, uniquely expert, quasi-judicial, and quasi-legislative—removing it from the exclusive domain of the executive. The CFPB conforms to established requirements: it does not vest ultimate removal power in itself; it does not vest removal power in a third party other than the President; it is not protected from presidential oversight by more than one layer; it also does not burden the President's ability to perform his or her constitutional duties to enforce the law. And, even in these partisan times, the executive still acknowledges that its law enforcement power does not extend over independent agencies.[272]

.com/intelligencer/2018/02/the-white-house-just-made-life-easier-for-racist-lenders.html (describing Director Mulvaney's announcement in February 2018 that he would transfer the Office of Fair Lending and Equal Opportunity from the Supervision, Enforcement, and Fair Lending Division to the Director's Office, where it will become part of the Office of Equal Opportunity and Fairness and focus solely on advocacy, coordination, and education, but not enforcement actions); *see also* Kate Berry & Rachel Witkowski, *Senate Dems to Mulvaney: How Did Embattled Aide Get CFPB Job?*, AM. BANKER (Oct. 3, 2018), https://www.americanbanker.com/news/senate-dems-to-mulvaney-how-did-embattled-aide-get-cfpb-job. Since Director Mulvaney took office on November 27, 2017 and December 1, 2018, the CFPB filed zero fair lending enforcement actions.

270. *See supra* note 1 and accompanying text; *see also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010); *PHH-1*, No. 15-1177, slip op. (D.C. Cir. Oct. 11, 2016) (vacated). These cases endorse the principle of allowing an offensive provision to be excised from the remaining good law. This effectively ensures that substantive agency actions and purposes will remain enforceable.

271. The *PHH-2* court's analysis is consistent with a longitudinal historical review. *See* Strauss, *supra* note 98, at 597 (noting the "text and structure of the Constitution impose few limits on Congress's ability to structure administrative government").

272. For example, President Trump issued an Executive Order which proposed sweeping new rules for executive agency rulemaking, most notably that: "(a) Unless prohibited by law, whenever an executive department or agency

Vague threats against liberty are not enough to ignore a hundred years of agency solitude. When asked to invalidate a statutory provision "that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, [the Supreme Court] should only do so for the most compelling constitutional reasons."[273] None are found here.

If the Supreme Court were to find otherwise and permit even greater concentrations of presidential power over independent agencies, the President would certainly conform them to his political will as soon as possible after taking office. Such an unexpected result would certainly surprise the original sponsors of the FTC Act, as well as those who created the CFPB. Just as was true with the FTC, the Supreme Court has long since settled the idea that "Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing."[274] To protect the CFPB's legacy, and by extension, other independent agencies, scholars and judges

(agency) publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed." Exec. Order No. 13,771, 82 Fed. Reg. 9339, 9339 (Jan. 30, 2017). The Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) is responsible for interpretation of the Executive Order. The accompanying clarification from the Trump administration's OIRA contains a Q&A, as follows:

> Q: Do Section 2's requirements apply to significant regulatory actions of independent agencies? A: No, the requirements of Section 2 apply only to those agencies required to submit significant regulatory actions to OIRA for review under EO 12866. Nevertheless, we encourage independent regulatory agencies to identify existing regulations that, if repealed or revised, would achieve cost savings that would fully offset the costs of new significant regulatory actions.

Memorandum from Dominic J. Mancini, Office of Mgmt. & Budget, Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducting Regulation and Controlling Regulatory Costs" (Feb. 2, 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/briefing-room/presidential-actions/related-omb-material/eo_iterim_guidance_reducing_regulations_controlling_regulatory_costs.pdf; *see also* Stephanie Eidelman, *Interim Guidance Says 2-for-1 Regulation Rule Doesn't Apply to CFPB*, INSIDEARM (Feb. 15, 2017), https://www.insidearm.com/news/00042622-interim-guidance-says-2-1-regulation-rule (discussing EO 13,771's applicability to the CFPB).

273. Bowsher v. Synar, 478 U.S. 714, 736 (1986) (Stevens, J., concurring); *see also* Mistretta v. United States, 488 U.S. 361 (1989) (deeming sentencing guidelines constitutional because Congress did not delegate legislative power to the agency, nor did they offend the separation of powers doctrine).

274. Wiener v. United States, 357 U.S. 349, 356 (1958).

should reexamine their understanding of the consequences of reifying a unitary-executive framework, and also square their critiques of the CFPB more thoroughly within the last century's larger body of Supreme Court independent agency jurisprudence.

Should any of the current CFPB cases reach the Supreme Court, as I expect one will, the Court should reaffirm its traditional *Humphrey's*-centric agency analysis and determine that the CFPB is structurally constitutional, while rejecting the novelty-as-unconstitutional approach. While the foundational cases will surely receive attention from the Court, the appeal may nonetheless turn on its evolving interpretation of *Free Enterprise* and its applicability to the CFPB. The CFPB's structural similarity to the agencies present in prior Supreme Court decisions that upheld removal restrictions will likely outweigh the tenuous application of *Free Enterprise* to the CFPB as occurred in *PHH-1*. In its consideration of the CFPB's constitutionality, the Supreme Court will have the opportunity to further define (1) the contours of the President's removal power, (2) its process for identifying constitutionally permissible independent agency design structures, and (3) the proper role of *Humphrey's* and its progeny. Through its grounded principles and application of precedent, the Court should find that the foundation of the CFPB, whether a five-person or one-person structure, is settled on firm constitutional ground.