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Structural and Procedural Concerns Regarding CFPB Rulemaking; How Can the Agency's Substantial Discretion and Independence Be Reconciled with Adequate Oversight and Accountability?

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December 3, 2010

- The Dodd-Frank financial reform legislation endows the Consumer Financial Protection Bureau (CFPB) with notably high levels of regulatory discretion and structural independence

- This paper outlines a number of significant policy concerns implicated by the CFPB's discretion and independence

- The CFPB is empowered to regulate without any Presidential control; and without any OMB oversight under Executive Order 12,866 (regarding regulatory review and cost-benefit analysis, etc.)

  - While Dodd-Frank requires CFPB to consider the costs/benefits of its regulations, such internal review is not likely to be as meaningful as having to answer directly to the White House (which inevitably would seek to balance the benefits of regulation against the impacts on economic growth, innovation and jobs)

  - While the Financial Stability Oversight Council, a multi-agency group established by Dodd-Frank, may set aside certain CFPB regulations, it may only do so to the extent the CFPB regulations threaten the stability of the financial system or the economy (which would presumably, and hopefully, be exceedingly rare)

- Query: Is the CFPB so "novel" in structure, independence and power as to transform it from the type of independent agency previously upheld by the Supreme Court into one that unconstitutionally impairs the power (and obligations) of the President?

  - In *Free Enterprise Fund v. PCAOB*, the Supreme Court recent determined that Presidential authority to remove an official "for cause" was sufficient to abate the constitutional infirmity associated with an independent agency addressing the accounting industry, but the Court was influenced by the extensive control and oversight to be exercised by the SEC (and of course the PCAOB's authority is substantially more narrow than that of the CFPB)

- See attached excerpts from the Court's opinion discussing the President's power and responsibility: "The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws."

- Consider the following attributes of the CFPB to assess whether it possesses potentially unchecked authority:

- In *Humphrey's Executor,* the Supreme Court upheld the FTC's constitutionality based on (i) the Court's assessment that the FTC was a quasi-legislative and quasi-judicial agency, rather than an executive one, and (ii) the President retained the power to remove the FTC's Chairman for cause

  - Given the CFPB's significant regulatory authority, is it "quasi-legislative" and "quasi-judicial" as the Supreme Court described the FTC, or is the CFPB primarily "executive" in nature?

  - In addition, the CFPB is headed by a sole Director, unlike the FTC, which is headed by multiple-member Commission that votes on agency actions as a collegial body

    - Voting as a collegial body introduces a modicum of restraint on the exercise of rulemaking authority and enforcement power

  - Unlike the SEC with respect to the PCAOB, the Federal Reserve is expressly prohibited from exercising any control or authority over the CFPB

- CFPB's discretion and independence is considerably more pronounced than that of the FTC:

  - CFPB's discretion is not constrained by Magnuson-Moss, which continues to limit the FTC's ability to engage in general rulemaking

    - The CFPB may engage in relatively flexible, and deferential notice and comment rulemaking under the Administrative Procedure Act

  - CFPB authority extends to uncharted "abusive" practices (as well as the more familiar standards relating to "unfair and deceptive" practices)

    - This could arguably result, for example, in the CFPB deciding to impose significant new "know your customer" suitability requirements on a wide range of financial institutions – does Congress intend the CFPB to make such discretionary judgments that could transform vast swaths of financial activity free of Presidential oversight?

- The CFPB is not subject to meaningful budgetary discipline from Congress (or OMB), since CFPB is effectively self-funding

- The CFPB is a completely free actor with respect to legislative recommendations to Congress and congressional testimony:

    - Dodd-Frank provides that congressional testimony by the CFPB Director must state that it "do[es] not necessarily represent the views . . . of the President"

    - Dodd-Frank prohibits the President from reviewing any legislative recommendations or comments the CFPB Director may provide to Congress

- Judicial review and congressional oversight will be necessary to provide some accountability

- If the CFPB's constitutionality were to be challenged in court, there are a number of relevant constitutional provisions:

    - The President's unique constitutional obligation to "take care" that the laws are faithfully executed (and Separation of Powers generally)

    - Appointments Clause issues regarding the President's authority to appoint and oversee government officials exercising substantial executive authority

    - The "necessary and expedient" clause authorizing the President to direct legislative recommendations to Congress

    - Appropriations Clause issues regarding the lack of ongoing congressional control over CFPB spending

    - Non-delegation issues arising when Congress delegates undue *legislative* authority to an executive agency (especially one independent of the Chief Executive)

- The Congressional Review Act, 5 USC 801, is also available (in addition to Congress' general legislative and oversight authority)

    - The CRA provides a process for Congress to adopt joint resolutions of disapproval if and when it wishes to object to agency rulemaking on cost/benefit or other grounds (for any rule designated by OMB as having an annual impact on the economy of $100 million or more)

- The CRA process, including OMB designation of major rules, applies to independent agencies such as the CFPB, see http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m99-13.pdf (*see* memo on the CRA process issued by then, and once again current, OMB Director Jacob Lew)

- The Unfunded Mandates Reform Act, 2 USC 1501 note, requires agencies to prepare a benefit-cost analysis for any proposed and final rule "that may result in the expenditure . . . by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year."

  - The agency must "identify and consider a reasonable number of regulatory alternatives and from those alternatives select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule."

  - OMB reports annually to Congress on agency compliance with these requirements.

Free Enterprise Fund v. PCAOB

[Excerpts from Supreme Court's Decision of June 28, 2010 (noted omitted, emphasis added)] http://www.supremecourt.gov/opinions/09pdf/08-861.pdf

We hold that such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President. The President cannot "take Care that the Laws be faithfully executed" if he cannot oversee the faithfulness of the officers who execute them. Here the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly. That judgment is instead committed to another officer, who may or may not agree with the President's determination, and whom the President cannot remove simply because that officer disagrees with him. This contravenes the President's "constitutional obligation to ensure the faithful execution of the laws."

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By contrast, the Court characterized the FTC [in *Humphrey's Executor*] as "quasi-legislative and quasi-judicial" rather than "purely executive," and held that Congress could require it "to act . . . independently of executive control."

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This novel structure [of the PCAOB] does not merely add to the Board's independence, but transforms it. Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. **The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.**

* * *

Indeed, if allowed to stand, this dispersion of responsibility could be multiplied. **If Congress can shelter the bureaucracy behind two layers of good-cause tenure, why not a third?** At oral argument, the Government was unwilling to concede that even *five* layers between the President and the Board would be too many. Tr. of Oral Arg. 47–48. **The officers of such an agency—safely encased within a Matryoshka doll of tenure protections—would be immune from Presidential oversight, even as they exercised power in the people's name.**

Perhaps an individual President might find advantages in tying his own hands. But the separation of powers does not depend on the views of individual Presidents, see *Freytag* v. *Commissioner*, 501 U. S. 868, 879–880 (1991), nor on whether "the encroached-upon branch approves the encroachment," *New York* v. *United States*, 505 U. S. 144, 182 (1992). **The President can always choose to restrain himself in his dealings with subordinates. He cannot, however, choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending that they are not his own.**

The diffusion of power carries with it a diffusion of accountability. The people do not vote for the "Officers of the United States." Art. II, §2, cl. 2. They instead look to the President to guide the "assistants or deputies . . . subject to his superintendence." The Federalist No. 72, p. 487 (J. Cooke ed. 1961) (A. Hamilton). **Without a clear and effective chain of command, the public cannot "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall."** *Id.,* No. 70, at 476 (same). That is why the Framers sought to ensure that "those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." 1 Annals of Cong., at 499 (J. Madison).

By granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts. The Act's restrictions are incompatible with the Constitution's separation of powers.

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No one doubts Congress's power to create a vast and varied federal bureaucracy. But where, in all this, is the role for oversight by an elected President? The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws. And the "'fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution,'" for "'[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.'" *Bowsher*, 478 U. S., at 736 (quoting *Chadha*, 462 U. S., at 944).

One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people. This concern is largely absent from the dissent's paean to the administrative state. That arrangement is contrary to Article II's vesting of the executive power in the President. **Without the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct. He is not the one who decides whether Board members are abusing their offices or neglecting their duties. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith. This violates the basic principle that the President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it," because Article II "makes a single President responsible for the actions of the Executive Branch."** *Clinton* v. *Jones*, 520 U. S. 681, 712–713 (1997) (BREYER, J., concurring in judgment).

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