

January 9, 2017

The Honorable Mike Pence
1800 F Street NW, Room G117
Washington, DC 20270-0117

Dear Vice President-elect Pence,

We write to request that promptly after his inauguration President Trump remove Richard Cordray from his position as Director of the Consumer Financial Protection Bureau (“CFPB” or “Bureau”).

Given the CFPB’s unconstitutional structure, removing Director Cordray would be consistent with President Trump’s oath to “preserve, protect, and defend the Constitution of the United States”¹ and his duty to serve as an independent guardian of the U.S. Constitution. Removing Director Cordray would also uphold the American idea of limited government, because Director Cordray has vigorously supported the unconstitutional independence of the CFPB and pursued a regulatory agenda that is harmful to the American people.

President Trump Has the Constitutional Authority to Remove Director Cordray

The Framers of the Constitution recognized that unrestrained federal power posed a “grave threat to individual liberty” and therefore divided power both vertically (between the federal government and the States) and horizontally (between the legislative, executive, and judicial branches).² Over the past 80 years, however, the federal government has blurred the lines between the Executive Branch and Congress by delegating lawmaking authority to agencies, including to a “headless fourth branch” of independent agencies unaccountable to the public or the president.³ The CFPB is the single-most egregious example of this practice.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) grants the CFPB vague and sweeping authority to regulate large swaths of the economy, including the ill-defined authority to prohibit “abusive acts or practices,”⁴ and the authority to impose substantial penalties on individuals and businesses, including money damages, civil monetary penalties, and a range of equitable remedies.⁵ Dodd-Frank also provides the CFPB with funding from the Federal Reserve instead of directly from Congress, which limits Congress’ ability to control the Bureau by reducing or eliminating appropriations.⁶ Finally, while other independent agencies vest authority in multi-member panels in order to constrain the authority of any single official, the CFPB vests decision-making authority in one person, removable by the president only for cause.⁷ As the D.C. Circuit explained, this structure “represents a gross

¹ U.S. Const., Art. II, Sec. 1.

² *PHH Corp. v. CFPB*, No. 15-1177, Slip op. at 3 (D.C. Cir. Oct. 11, 2016).

³ *Id.* at 4.

⁴ 12 U.S.C. § 5536(a)(B).

⁵ *Id.* § 5565(a)(2).

⁶ 12 U.S.C. § 5497.

⁷ Specifically, the CFPB director is removable due to “inefficiency, neglect of duty, or malfeasance in office.” *See* 12 U.S.C. § 5491(c)(3).

departure from settled historical practice” because “[n]ever before has an independent agency exercising substantial executive authority been headed by just one person.”⁸ As a result of the broad authority delegated to the CFPB and its novel structure, aside from the president, the CFPB Director is quite possibly the “single most powerful official in the entire United States Government.”⁹

As the D.C. Circuit recently explained in *PHH Corp. v. CFPB*, the Bureau’s novel structure violates Article II of the Constitution. The court explained that the president generally has “Article II authority to supervise, direct, and remove at will subordinate officers in the Executive Branch,”¹⁰ and although the Supreme Court has identified independent agencies as an exception to that rule, such agencies “have historically been headed by *multiple* commissioners, directors, or board members who act as checks on one another.”¹¹ Because the CFPB departs from that established model by vesting authority in a single director instead of a multi-member panel, the D.C. Circuit—in a well-reasoned opinion authored by Judge Kavanaugh—concluded that Dodd-Frank’s restriction on the president’s removal power violated Article II and that the president has the constitutional authority to remove the director at will.¹²

The CFPB has vigorously advocated for the right to operate as an unaccountable fourth branch of government, including by petitioning to rehear *PHH en banc*.¹³ It is expected to continue this posture during President Trump’s Administration, despite the President-elect’s likely disagreement.

Despite this appeal, the president retains constitutional authority to remove the director until a valid court order says otherwise. Like all government officials, the president is sworn to uphold the Constitution and is not duty-bound to respect unconstitutional statutes.¹⁴

Director Cordray’s Regulatory Agenda Is Harmful to the American People

President-elect Trump should remove Director Cordray because he has pursued costly regulatory policies that are radically opposed to the Trump Administration’s pro-growth agenda. Under Director Cordray’s disastrous tenure, the CFPB has repeatedly advanced “unnecessary regulations that kill jobs;” “bloat government;” have an “enormous...impact on our economy, communities and individual Americans from coast to coast;” and have inflicted “profound

⁸ *PHH Corp.*, at 9.

⁹ *Id.* at 27.

¹⁰ U.S. Const., Art. II, Sec. 3.

¹¹ *PHH Corp. v. CFPB*, No. 15-1177, at 4 (D.C. Cir. Oct. 11, 2016) (emphasis in original).

¹² *Id.* at 9-10.

¹³ Dodd-Frank grants the CFPB independent litigation authority unless and until a case reaches the Supreme Court. The D.C. Circuit has nonetheless asked for the views of the Solicitor General in considering whether to grant rehearing *en banc*. If the D.C. Circuit grants rehearing, we urge you to ask the Solicitor General not to defend the CFPB’s structure, either in an amicus brief before the D.C. Circuit or before the Supreme Court.

¹⁴ See, e.g., Walter Dellinger, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, Office of Legal Counsel memorandum (Nov. 1994), available at https://www.justice.gov/sites/default/files/olc/opinions/1994/11/31/op-olc-v018-p0199_0.pdf (“The President has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency.”).

damage [on] our economy and our freedoms.”¹⁵ In particular, the CFPB has issued regulations that have disproportionately burdened credit unions and community banks;¹⁶ proposed a payday lending rule that could reduce access to credit for average consumers; proposed an arbitration rule based on flawed research;¹⁷ and advanced an overreaching regulatory agenda through enforcement actions instead of rulemakings—circumventing a process designed to provide notice and ensure that divergent perspectives are heard on regulatory issues.

Removing Director Cordray Would Uphold American Constitutionalism and the Rule of Law

A new CFPB Director could substantially improve regulatory policy at the CFPB, but working toward a more accountable CFPB is about much more than that. It is about American constitutionalism and the rule of law. Our founders believed that government power is limited and exists to protect the rights of the people. By contrast, the CFPB’s structure is based on the idea that government is unlimited and rights are dependent on the special dispensation of the experts who know better than the American people. President Trump has the power to protect the American idea from this destructive view by removing Director Cordray. Director Cordray’s removal will be the first marker in the long process of rolling-back an agency that combines the powers of the executive, legislative, and judicial branches into the hands of a few unaccountable Washington elites.

Thank you for your consideration.

Sincerely,



Ben Sasse
United States Senator



Mike Lee
United States Senator

¹⁵ Regulatory Reform, GreatAgain.gov, <https://www.greatagain.gov/policy/regulatory-reform.html>.

¹⁶ See, e.g., Testimony of Todd Zywicki before the Senate Banking Committee, April 5, 2016, available at <http://www.banking.senate.gov/public/cache/files/58bb96f4-8268-4ecd-95dd-5e35f8d26e4a/060C9C587736B1F08DD0A117FC3EE8B6.zywicki-testimony-4-5-16.pdf>; see also Tanya Marsh and Joseph Norman, *The Impact of Dodd-Frank on Community Banks*, AEI Policy Paper (May 2013), available at http://images.politico.com/global/2013/05/06/2013-05_marshall-norman.html; Hester Peirce, Ian Robinson, and Thomas Stratmann, *How Are Small Banks Faring Under Dodd-Frank*, Mercatus Working Paper (February 2014), available at https://www.mercatus.org/system/files/Peirce_SmallBankSurvey_v1.pdf.

¹⁷ See Jason Scott Johnston and Todd Zywicki, *The Consumer Financial Protection Bureau’s Arbitration Study: A Summary and Critique*, Mercatus Working Paper (Aug. 2015), available at <https://www.mercatus.org/system/files/Johnston-CFPB-Arbitration.pdf>.