THE POTENTIAL UNCONSTITUTIONALITY OF THE CONSUMER FINANCIAL PROTECTION BOARD AND ITS RAMIFICATIONS FOR THE ELDERLY

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The Consumer Financial Protection Bureau ("CFPB") is the most powerful, and in many cases the only, governmental entity looking out for elderly victims of financial abuse. However, the CFPB has been organized in a potentially unconstitutional manner. Thus, to comport with the Constitution, it may be necessary to reconfigure or disband the CFPB. Unfortunately, any reconstruction process to the CFPB's command structure may put the programs and enforcement groups responsible for educating and protecting elderly consumers in jeopardy.

This Note analyzes the various solutions to fixing the CFPB's constitutionality that could be implemented by various branches of the government through the lens of their impact on programs and services benefiting elderly consumers. The Note concludes that changing the CFPB into an executive agency by making the director terminable "at-will" will be the smoothest, less disruptive path for elderly safeguards over other options, such as turning the CFPB into a multi-member agency or disbanding it. Transforming the CFPB into an executive agency will ensure the Constitution is properly followed while eliminating the risks elderly Americans would face from a major renovation to the CFPB command structure. Thus, this Note recommends making the CFPB into an executive agency.

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I. Introduction

The Consumer Financial Protection Bureau ("CFPB") was created in 2010 under the Dodd-Frank Act to safeguard "American consumers in the market for consumer financial products and services."[1] That safeguarding role gives the CFPB regulatory, supervisory, and enforcement powers in many fields,[2] and there are many offices within the CFPB designed to handle specific issues.[3] One such office is the Office for Older Americans ("OOA").[4] The OOA is the only office in the federal government specifically dedicated to the financial health of seniors.[5] Moreover, the OOA's mission is to "prevent unfair, deceptive, and abusive practices aimed at seniors" and to "help seniors make sound financial decisions as they age" through education and training.[6] Through the OOA, the CFPB actively manages some seniors' money and provides interagency guidance through a manual for assisted living and nursing facilities.[7] The CFPB has also "taken steps to encourage financial institutions to prevent, detect, and report elder financial exploitation."[8]

Despite the benefits the OOA provides to the elderly, the entire CFPB is currently facing a powerful constitutional challenge in the Circuit Court for the District of Columbia.[9] PHH Corp. (PHH) is challenging a CFPB order against them on the grounds that (among other theories) the CFPB's current construction violates Article II of the

1. *Creating the Consumer Bureau*, CFPB, http://www.consumerfinance.gov/the-bureau/creatingthebureau/ (last visited Aug. 31, 2017) [hereinafter *Creating*].
2. Kristen R. Brown et al., *The CFPB's Mission Continues to Grow in Size and Scope*, LAW 360 (Oct. 2, 2014, 10:40 AM), http://www.law360.com/articles/582441/the-cfpb-s-mission-continues-to-grow-in-size-and-scope.
3. *See CFPB Organization Chart*, ONLINELENDERSALLIANCE.ORG, http://onlinelendersalliance.org/wp-content/uploads/2015/02/CFPB_Organization_Chart.pdf (last visited Oct. 20, 2016).
4. Naomi Karp, *Cognitive Aging and Financial Issues: Engaging Stakeholders to Enhance Financial Security in Later Life*, CONSUMER FINANCIAL PROTECTION BUREAU, OFFICE OF OLDER AMS. (June 9, 2014), http://nationalacademies.org/hmd/~/media/Files/Activity%20Files/Aging/Cognitive%20aging/JUN-09-2014/Naomi%20Karp%20PowerPoint_Institute%20of%20Medicine%20presentation%20Karp_20140609_FINAL.pdf [hereinafter Karp].
5. *Id.*
6. *Id.*
7. *Id.*
8. Amanda M. Kowalski et al., *Elder Financial Exploitation: An Increasing Compliance Concern*, 28 J. OF TAX'N & REG. OF FIN. INSTITUTIONS 31 (Jan/Feb 2015).
9. Lisa Lambert & Nate Raymond, *U.S. Court Rules CFPB Structure Unconstitutional, Bureau Can Still Operate*, REUTERS (Oct. 11, 2016, 9:35 AM), http://www.reuters.com/article/us-usa-court-cfpb-idUSKCN12B1TN [hereinafter Lambert & Raymond].

Constitution[10] The claim is centered on the theory that an independent agency cannot have a lone director if that single director cannot be removed at the president's will.[11] Recently, a three-judge panel on the D.C. Circuit agreed with PHH's contention and declared the CFPB unconstitutional.[12] The D.C. Circuit has granted the CFPB's request to rehear the case *en banc*,[13] although observers expect the case to reach the Supreme Court on appeal regardless of the D.C. Circuit's *en banc* decision.[14]

If the Supreme Court upholds the CFPB's unconstitutionality, tweaks can be expected from a judicial order or congressional action adjusting the Dodd-Frank statute that created the Board. Other governmental agencies have faced challenges centered on unconstitutional structuring before.[15] Rarely do those charges bring about the complete destruction of the agency in question; instead, the Supreme Court is more likely to alter the specific part of the agency that causes constitutional concerns.[16] For the CFPB, that tweak will most likely be granting the president the authority to terminate the CFPB director at-will or establishing a multi-member commission to take the director's place.[17]

Changing the CFPB's leadership structure, although a relatively minor revision, could have an impact on American seniors in a variety of ways. For example, placing the CFPB under direct presidential control could create a whiplash effect regarding regulations as Republican and Democratic administrations trade control of the White House.[18] Another possible outcome may be a multi-member

10. *Id.*
11. PHH Corp. v. Consumer Fin. Protection Bureau, 839 F.3d 1, 36 (D.C. Cir. 2016).
12. Lambert & Raymond, *supra* note 9.
13. Alan S. Kaplinsky, *D.C. Circuit Grants CFPB's Petition for Rehearing en banc in PHH Case*, CONSUMER FINANCE MONITOR (Feb. 16, 2017), https://www.cfpbmonitor.com/2017/02/16/d-c-circuit-grants-cfpbs-petition-for-rehearing-en-banc-in-phh-case/ [hereinafter Kaplinsky].
14. *Id.*
15. *See* Charles N. Steele and Jeffrey H. Bowman, *The Constitutionality of Independent Regulatory Agencies Under the Necessary and Proper Clause: The Case of the Federal Election Commission*, 42 YALE J. ON REG. 363, 365 (1987), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1056&context=yjreg.
16. *See generally id.*
17. PHH Corp. v. Consumer Fin. Protection Bureau, 839 F.3d 1, 22–23 (D.C. Cir. 2016).
18. Kate Berry et. al., *Cheat Sheet: What CFPB Constitutionality Ruling Means for Banks*, AMERICAN BANKER (Oct. 11, 2016), http://www.americanbanker.com/

commission that responds less decisively and quickly to new financial threats, particularly in cyber-security, than a solitary director, thus leaving a variety of seniors unprotected against new schemes.[19]

Part II discusses the CFPB's background and current societal role, starting with an examination of the CFPB's history. Then, it then delves into the CFPB programs that assist and protect elderly Americans. From the OOA to enforcement actions that protects seniors, Part II examines how large a role the CFPB plays in helping America's seniors gain financial stability. From there, it breaks down the recent D.C. Circuit case, *PHH Corp. v. CFPB,* and the constitutional issue the court found with the CFPB. Lastly, it assesses the likelihood that Republicans will eliminate the Dodd-Frank Act, and what that would mean for the CFPB.

Part III assesses possible consequences to elderly Americans by the CFPB's unconstitutionality or elimination, and give an analysis of the final tweaks to the CFPB that Congress and the Supreme Court are likely to implement. Part IV provides recommendations for what the Court or the legislature should do to the CFPB to best benefit America's older citizens. Recommendations are also provided for what Congress ought to do if the CFPB is destroyed along with Dodd-Frank to continue protecting elderly Americans. Finally, Part V concludes by summarizing the issues addressed and solutions presented.

II. Background

a. History of the CFPB

The CFPB was established in 2010 by the Dodd-Frank Act.[20] As the brainchild of former director, now Senator, Elizabeth Warren, the CFPB is designed to protect consumers from deceptive, unfair, and abusive practices and bring enforcement cases against alleged wrongdoers.[21] The supervisory and regulatory reach of the CFPB expands over a variety of financial institutions, such as banks, credit

news/law-regulation/cheat-sheet-what-cfpb-constitutionality-ruling-means-for-banks-1091870-1.html [hereinafter Berry].

19. *See generally* Brenden Soucy, *The Consumer Financial Protection Bureau: The Solution or the Problem?*, 40 FLA. ST. U. L. REV. 691 (2013) [hereinafter Soucy].

20. *Creating*, *supra* note 1.

21. Jon Eisenberg, *An Early History of the CFPB: Part 1*, LAW 360 (Mar. 18, 2014, 5:59 PM), http://www.law360.com/articles/517131/an-early-history-of-the-cfpb-part-1 [hereinafter Eisenberg].

unions, non-consumer financial service providers like mortgage lenders, and participants in debt collection.[22] Its first enforcement action was filed in 2012.[23] Lengthy investigations tend to precede CFPB legal actions, which explains the multiple-year delay between the CFPB's founding and its first legal action.[24] The CFPB's budget keeps growing to allow it to watch over these various fields, increasing to over 80% after its first year in action.[25] The CFPB's largest concentration of funds and labor goes into the Supervision, Enforcement, and Fair Lending Unit.[26]

The CFPB often focuses its enforcement on practices it considers deceptive (especially in the credit card arena), such as violating RESPA (mortgage business referral arena), or discriminatory practices, rather than simply pursuing whatever business methods could be considered unfair and/or abusive.[27] Although many of the CFPB's enforcement powers and methods are based on the SEC, the CFPB has a larger arsenal to execute its legal actions than the SEC.[28] The pace of CFPB legal actions have been increasing in recent years, slowly rising as the CFPB began filing its first actions.[29] With misconduct connected to mortgages, the CFPB will typically target referral fees or kickbacks that service providers receive.[30] But, the CFPB is also concerned with reverse mortgages, which frequently target the elderly.[31] When dealing with credit card misconduct, telemarketers that mislead consumers by not adequately disclosing the costs or limitations of add-on product sales are usually the culprits.[32] Senior citizens are more susceptible to such fraud, making the CFPB protections important.[33]

The CFPB's ability to impose unusually large monetary penalties and its status as an independent agency being led by a single director

22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. Alex Covington & Joshua Davey, *CFPB Targets Practices Impacting the Elderly*, SUBJECT TO INQUIRY (July 30, 2015), http://www.subjecttoinquiry.com/financial-institution-regulation/cfpb-targets-practices-impacting-the-elderly/ [hereinafter Covington & Davey].
32. Eisenberg, *supra* note 21.
33. *Scams and Safety: Common Fraud Schemes*, FBI, https://www.fbi.gov/scams-and-safety/common-fraud-schemes/seniors (last visited Aug. 31, 2017).

are often targets of the CFPB's critics.[34] The status issue has led experts to question the CFPB's constitutionality.[35] The CFPB has, however, characteristics that other agencies would benefit from adopting, such as not publishing a notice of charges until ten days after the respondent has been served.[36] Additionally, the CFPB has been successful when targeting future violations by seeking orders that involve more specific conduct, which closes loopholes future troublemakers could exploit.[37] Bulletins designed to guide industries on how to practice without incurring trouble with the CFPB are also admirable.[38] Most deserving of praise and emulation is the CFPB's willingness to pursue litigation in court rather than in front of administrative law judges.[39] This willingness allows defendants to defend themselves on more even footing, which avoids limited discovery rights, shorter deadlines, and an appeal to the director that originally decided to sue them.[40] In contrast, the SEC has fallen under constitutional scrutiny for its tendency to rely on administrative proceedings rather than courts.[41]

b. Elderly Victimization through Financial Crimes

The elderly are the prime targets of financial crime.[42] CFPB studies have shown "the most common form of elder abuse" is financial exploitation, but only a small fraction of such abuses are reported.[43] The National Center on Elder Abuse conducted studies in 1998 and 2000, uncovering that 12% and 13% of all reported elder abuse was financial abuse.[44] Yet, the CFPB's report that exposed an

34. Eisenberg, *supra* note 21.
35. Lambert & Raymond, *supra* note 9.
36. Eisenberg, *supra* note 21.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *SEC Administrative Proceedings Under Constitutional Scrutiny*, VEDDER PRICE (Aug. 2015), http://www.vedderprice.com/sec-administrative-proceedings-under-constitutional-scrutiny/.
42. Covington & Davey, *supra* note 31.
43. Richard Cordray, *Prepared Remarks of CFPB Director Richard Cordray at the White House Conference on Aging*, CFPB (July 13, 2015), http://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-white-house-conference-on-aging/ [hereinafter Cordray].
44. *Financial Exploitation of the Elderly*, NAT'L INST. OF JUST. (May 12, 2015), http://www.nij.gov/topics/crime/elder-abuse/pages/financial-exploitation.aspx [hereinafter NAT'L INST. OF JUST.].

underreporting of elderly financial abuse matched discoveries by elder abuse experts, who said that "the level of elder exploitation may well exceed what has been reported to authorities and documented by researchers."[45] After all, "unlike physical abuse and neglect, financial abuse is more likely to occur with the tacit acknowledgment and consent of the elder person and can be more difficult to detect and establish."[46] Elderly individuals are less likely than third parties to report elder abuse, which further contributes to the underreporting epidemic because friends and neighbors are the most frequent third-party reporters of elderly financial abuse.[47]

Financial abuse often leads to the infliction of real harm upon seniors, and financial ruin is frequently a real possibility for the victim.[48] Lost assets are often impossible to replace for individuals who are retired or suffer from physical or mental disabilities.[49] The loss of assets will likely cause the victim to rely more heavily on family members for support, often inducing or adding to a relative's financial struggles.[50] Victims often become dependent on social welfare agencies and frequently see a "significant decline in their quality of life" if they cannot rely on their families for help.[51]

Furthermore, there can be psychological as well as practical side effects to financial abuse.[52] In fact, financial abuse is known to achieve the same type of harm to an elderly person as a violent crime or physical abuse.[53] "[L]oss of trust in others has been identified as the most common consequence of financial abuse."[54] Other side effects include a rise in elderly fearfulness, both of crime and their own vulnerability to crimes, which in turn can harm their emotional well-being.[55] Depression, hopelessness, and suicide have all been linked to financial abuse.[56]

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45. *Id.*
46. Thomas L. Hafemeister, *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America*, NAT'L ACAD. PRESS 382 (2003) https://www.ncbi.nlm.nih.
gov/books/NBK98784/ [hereinafter Hafemeister].
47. *Id.* at 389.
48. *Id.* at 391.
49. *Id.* at 392.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*

Financial exploitation of the elderly can happen in a variety of different ways. The most impactful forms financial abuse takes are: (1) taking, misusing, or using money or property without permission; (2) forging or forcing a signature; (3) abusing a joint bank account; (4) cashing checks from an elderly person without authorization or permission; (5) taking pension funds without permission; (6) deceiving or coercing an elderly person to sign a deed, will, contract, or power of attorney document; (7) intentionally misleading an elderly person to use or assign his or her assets; (8) abusing authority in a trust; (9) promising to provide long-term or lifelong care in exchange for money or property, and then failing to fulfill the promise after receiving the money or property; (10) overcharging or simply not delivering caregiving services; and (11) preventing or denying an elderly person from accessing their money or assets.[57] These painful forms of elderly abuse are often perpetrated in "a domestic setting" by "individuals relatively well known to the elder person . . . ."[58]

While relatives are usually responsible for many damaging forms of financial exploitation, the elderly consistently face the dangers of consumer exploitation from strangers over the phone or internet most often.[59] In a National Institute of Justice study, nearly 60% of elderly people were targeted by a fraud attempt.[60] Comparatively, between 15% and 31% of adults between the ages of eighteen and sixty-four are targeted for fraud annually.[61] Furthermore, 14% of the surveyed elderly people became victims of fraud in the last year.[62] Meanwhile, 25% of the seniors that experienced specific targeting by fraud perpetrators were victimized.[63]

In these schemes, the perpetrator's typical goal is to trick the victim into handing over personal financial information.[64] Seniors were victimized through email, telephone, internet, and physical mail schemes.[65] Other kinds of targeting include attempts to get seniors to claim a phony prize or to donate money to a phony charity or

57. *Id.* at 388–89.
58. *Id.* at 388.
59. Kristy Holtfreter & Daniel P. Mears, *Financial Exploitation of the Elderly in a Consumer Context*, NAT'L INST. JUST. 1, 9 (March 2014), https://www.ncjrs.gov/pdffiles1/nij/grants/245388.pdf.
60. *Id.* at 11.
61. *Id.* at 8.
62. *Id.* at 9.
63. *Id.*
64. *Id.*
65. *Id.*

church.[66] The vast majority of seniors interviewed in the study did not report the fraud (successful or not) to law enforcement.[67]

Moreover, a study funded by the National Institute of Justice ("NIJ") found, in an Arizona community of 2,000 seniors, that about 6% of residents reported being victims of financial mistreatment.[68] Commonly, seniors fell prey to someone stealing or spending their money without permission, having someone sell their property without permission, or having their signatures forged.[69] The NIJ also discovered that seniors who were less social had an increased likelihood of becoming victims to financial exploitation.[70] Moreover, the NIJ's researchers discovered an elderly person with both physical and financial independence was "more likely to experience pure financial exploitation."[71]

When compared to other forms of elder abuse, many caseworkers think law enforcement officers and prosecutors are less helpful in financial exploitation situations than with other crimes or other forms of elder abuse.[72] Due to the longer investigation times, greater difficulty in producing evidence, and uncooperative nature of many financial institutions and elderly victims, many caseworkers lament that it is simply more difficult to prosecute financial exploitation cases than other crimes.[73] Thus, it is unsurprising that 72% of caseworkers interviewed in a prior NIJ study believed prosecutors were less helpful and less willing to take up financial exploitation cases compared to physical abuse or neglect cases.[74] Unfortunately, such distrust creates a "vicious cycle" where caseworkers are less inclined to refer cases to prosecutors, increasing the likelihood prosecutors believe the financial exploitation of the elderly is a minor or even non-existent threat in their jurisdiction.[75]

66. *Id.* at 10.
67. *Id.* at 9.
68. NAT'L INST. OF JUST., *supra* note 44.
69. *Id.*
70. *Id.*
71. *Id.*
72. Shelly L. Jackson & Thomas L. Hafemeister, *Financial Abuse of Elderly People vs. Other Forms of Elder Abuse: Assessing Their Dynamics, Risk Factors, and Society's Response*, NAT'L INST. OF JUST. 1, 15 (Aug. 2010), https://www.ncjrs.gov/pdffiles1/nij/grants/233613.pdf.
73. *Id.*
74. *Id.*
75. *Id.* at 16.

Further complicating matters is the alarming frequency of cases where exploitation victims do not want help.[76] Incredibly, 74% of elderly persons reportedly did not want their case prosecuted, only enhancing the difficulty of getting justice for these victims.[77] Apparently, most elderly persons need a relative to spur them to prosecute, and with many relatives perpetrating elder abuse situations, it is no wonder a vigor to pursue justice for themselves often fails to materialize.[78] With the creation of the Dodd-Frank Act, however, the CFPB and its ability to help mitigate some of these lapses in senior protection were born, and the CFPB has stepped up with several programs and strategies to confront elder financial abuse.

C. CFPB's Programs for the Elderly

The CFPB has targeted enforcement actions to protect seniors from abusers.[79] There are several reasons why abusers target seniors.[80] One prime reason is elderly people possess the bulk of the nation's wealth.[81] Since seniors own 70% of funds deposited in financial institutions, scammers naturally and frequently target seniors' deeper pockets.[82] Since seniors often live on fixed incomes, they are typically more susceptible to a "get-rich-quick" scheme as well.[83] Additionally, the greater frequency of cognitive impairments or disabilities among the elderly makes them easier targets for scam artists.[84] Elderly people are also more likely isolated and dependent on others for help, giving abusive culprits less oversight and more access to sensitive financial materials.[85] Finally, the usual lack of ramifications against perpetrators of elder abuse gives such criminals confidence to go after the elderly.[86] Yet, the CFPB's creation and subsequent work has begun to shore up to protect the elderly from abuse through education, further study, and enforcement actions.[87]

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76. *Id.* at 17.
77. *Id.*
78. *Id.*
79. Covington & Davey, *supra* note 31.
80. Hafemeister, *supra* note 46, at 392.
81. *Id.*
82. *Id.*
83. *Id.* at 393.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*

The CFPB explicitly recognized these dangers to elderly citizens, stating "our new agency specifically recognizes the need to protect older Americans against financial exploitation and promote economic security later in life."[88] Primarily, CFPB assistance to seniors comes out of the OOA, but there are circumstances where more enforcement via protective order or public guardian offices get involved as well.[89] Thus, the CFPB stands poised as a watchdog over financial institutions to ensure they use their position to prevent fraud against senior citizens who are often targeted for their large holdings in financial institutions.

One of the primary ways the CFPB helps the elderly is through financial education.[90] The OOA released focus group studies to warn about potential financial problems or predatory schemes facing seniors.[91] For example, there was a recent group study about the potential risks from reverse mortgage advertisements within the elderly community.[92] Reverse mortgages allow older homeowners to borrow against the accrued equity of their homes and defer the payment on that new loan until they sell their home, move out of the home, or die.[93] The CFPB found reverse mortgages often confused seniors citizens.[94] According to the CFPB, seniors tended to believe reverse mortgages were not loans, but a "government program [that] allowed participants to stay in their homes 'as long as they want.'"[95] In response to this common misconception, the CFPB circulated guides and advisories to arm seniors and their caregivers with the full story about reverse mortgages.[96] The CFPB also identified certain advertisements as "problematic" and took steps to eliminate them.[97]

The CFPB has also invested in studies of seniors' "financial performance."[98] They discovered people's decisions regarding credit cards, loans, mortgages, etc. began to decline after the age of fifty-three.[99] These studies also revealed financial performance skills decline

88. Cordray, *supra* note 43.
89. Hafemeister, *supra* note 46, at 418.
90. Covington & Davey, *supra* note 31.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. Karp, *supra* note 4, at 7.
99. *Id.*

early in the clinical disease process.[100] That revelation showed declining money managing skills can be a precursor to an Alzheimer's diagnosis, not only giving families a financial reason to help their more senior relatives handle money, but also giving relatives an early warning sign of a painful disease.[101] The CFPB's tests also revealed how people with early Alzheimer's are financially vulnerable.[102]

The CFPB has begun to help this disadvantaged group by providing education not only for elderly people and their families, but to assisted living and nursing facilities as well.[103] Now caretakers are receiving information on warning signs of diminished financial capacity, such as disorganization, math mistakes, difficulty understanding basic financial terms, an interest in nonsensical investments, and memory lapses.[104] These studies also provide insight into how to assist the elderly through daily money management help, getting seniors advance planning and fiduciary arrangements, and access to "age-friendly" banking.[105]

The CFPB, however, is not merely working with caretakers and family members to prevent elder abuse. Another focus of the CFPB is educating and monitoring financial services providers.[106] Educationally, these providers are taught how to recognize a decline in financial capacity, how to spot and report cases of financial exploitation, and what goes into providing age-friendly banking.[107] Age-friendly banking has six components: it protects older people from financial abuse and fraud, provides customizable financial products and services to fit seniors' needs, expands available and affordable financial management options, guarantees access to critical income supports, facilitates successful aging in the community, and makes banking more accessible for those with restricted mobility or who live alone in remote areas.[108]

100. *Id.* at 8.
101. *Id.*
102. *Id.* at 9.
103. *Id.* at 13.
104. *Id.* at 6.
105. *Id.* at 11.
106. *Id.* at 12.
107. *Id.*
108. *Age-Friendly Banking Definitions*, NCRC, http://www.ncrc.org/fleeced/wp-content/uploads/2016/09/Age_Friendly_Banking_Definitions.pdf (last visited Aug. 31, 2017).

The CFPB also provides guidance to and supervises fiduciaries who are managing seniors' money.[109] "About 22 million people age 60 or older have named someone in [*sic*] a power of attorney to make financial decisions for them—and millions of others have court-appointed guardians or other fiduciaries . . . ."[110] The CFPB created four rules that fiduciaries are required to follow: act in the senior's best interest, manage the senior's money and property carefully, not commingle their money and property with the senior's, and maintain good records.[111] Assistant Director for OOA, Nora Eisenhower, said these guidelines are especially helpful, stating: "[W]ithout the knowledge of what this task actually entails, they may not be able to do a good job. The responsibility can be overwhelming . . . ."[112]

Without the CFPB, elderly victims must rely on state agencies and groups, like the victim services network, for protection.[113] While all states have some kind of protective services law, most states have not given their agencies the power to punish elder abuse perpetrators.[114] Instead, they focus on merely investigating and providing assistance to victims.[115] In contrast, the CFPB can actively initiate enforcement actions.[116] Meanwhile, victim services networks tend to ignore financial exploitation of elderly victims because their guidelines prioritize helping violent crime victims.[117] Before the CFPB expanded federal protection for the elderly, these resources demonstrated to many commentators that the elderly had "second-class status."[118] Clearly, the CFPB provides greater protection from, and fiercer deterrence against, elder abuse through financial exploitation.

109. *See Managing Someone Else's Money: Help for Agents Under a Power of Attorney*, CFPB, http://files.consumerfinance.gov/f/201310_cfpb_lay_fiduciary_guides_agents.pdf (last visited Aug. 31, 2017).
110. Ashlea Ebeling, *Four Rules for Managing Your Aging Parents' Money*, FORBES (Oct. 30, 2013, 9:49 AM), http://www.forbes.com/sites/ashleaebeling/2013/10/30/four-rules-for-managing-your-aging-parents-money/#2e94f339408a.
111. *Id.*
112. *Id.*
113. Hafemeister, *supra* note 46, at 418.
114. *Id.* at 419.
115. *Id.*
116. Maureen Mahoney, *CFPB fights elder abuse & senior scams*, CONSUMERS UNION (July 16, 2014) http://consumersunion.org/2014/07/cfpb-fights-elder-abuse-senior-scams/ [hereinafter Mahoney].
117. Hafemeister, *supra* note 46, at 419.
118. *Id.*

d. Constitutional Challenge

The constitutionality of the CFPB was recently questioned in *PHH Corp. v. Consumer Fin. Prot. Bureau*.[119] PHH is a major mortgage lender in the home mortgage lender industry that suffered a $109 million order against it following CFPB's enforcement action.[120] PHH's mortgage insurance gives lenders a safety net for when a homebuyer defaults on their mortgage, and PHH in turn will purchase "mortgage reinsurance" to cover some of PHH's payments to lenders upon a homebuyer's default.[121] PHH established a subsidiary in 1994, Atrium Insurance Corporation ("Atrium"), that provided reinsurance.[122] PHH and Atrium had a "captive reinsurance" arrangement, a common set-up in the nineties, where Atrium would provide reinsurance to mortgage insurers that insured PHH-generated mortgages and, in return, PHH would refer borrowers to mortgage insurers that used Atrium.[123]

For twenty years, PHH and Atrium continued this arrangement, receiving the blessing of the Department of Housing and Urban Development ("HUD").[124] HUD interpreted the Real Estate Settlement Procedures Act's Section 8(c)—in the section titled "Prohibition against kickbacks and unearned fees"[125]—to "allow captive reinsurance arrangements so long as the mortgage insurer paid no more than reasonable market value for reinsurance."[126] Relying on that interpretation, PHH and Atrium continued their arrangement undisturbed for decades, until the CFPB replaced the HUD's enforcement role in 2010.[127]

In 2014, "the CFPB alleged that PHH's captive reinsurance arrangement with the mortgage insurers violated Section 8."[128] With a "newly minted interpretation" of Section 8, the CFPB said that most referrals made by lenders to mortgage insurers in exchange for the insurer's purchasing reinsurance from an affiliated lender reinsurer are

119. PHH Corp. v. Consumer Fin. Protection Bureau, 839 F.3d 1, 6 (D.C. Cir. 2016).
120. *Id.* at 8, 17.
121. *Id.* at 18.
122. *Id.*
123. *Id.*
124. *Id.* at 20.
125. 12 U.S.C. § 2607 (2018).
126. *PHH Corp.*, 839 F.3d at 20.
127. *Id.*
128. *Id.* at 21.

prohibited, even when the mortgage insurer is paying the reasonable market value for reinsurance.[129] The CFPB then applied this interpretation of Section 8 to PHH, despite PHH's previous reliance on HUD's interpretation.[130] The result: a $109 million order by disgorgement and injunction against PHH, prohibiting them from entering into captive reinsurance arrangements in the future.[131]

In response to the order, PHH claimed "the CFPB's status as an independent agency headed by a single director violates Article II of the Constitution."[132] PHH argued the CFPB's director must be removable by the president at-will or CFPB must be directed by a multi-member commission in order for the its command structure to comply with Article II of the Constitution.[133] According to PHH, if the CFPB were an independent agency under a single director, the agency would be in conflict with the constitutional commandment that "[t]he executive Power shall be vested in a President of the United States"[134] and that "the President alone [has] the authority and responsibility to 'take Care that the Laws be faithfully executed.'"[135]

A panel of three judges on the D.C. Circuit agreed the CFPB is unconstitutionally organized.[136] First, they concurred that Article II of the Constitution requires the CFPB to either have a director that is removable at the President's will or to be run by a multi-member commission.[137] The court was gravely concerned by the CFPB director's authority, stating: "Because the Director alone heads the [CFPB] without Presidential supervision, and in light of the CFPB's broad authority over the U.S. Economy, the Director enjoys significantly more *unilateral* power than any single member of any other independent agency."[138]

The CFPB argues the Consumer Advisory Board and the CFPB Director are required, by the Dodd-Frank Act, to establish and consult with each other, which should alleviate the constitutional concerns.[139] The court rejected this argument, pointing out the Consumer Advisory

129. *Id.*
130. *Id.* at 22.
131. *Id.*
132. *Id.* at 8.
133. *Id.* at 22.
134. U.S. CONST. art. II, § 1.
135. *PHH Corp.*, 839 F.3d at 23 (quoting U.S. CONST. art. II, § 3).
136. *Id.* at 8.
137. *Id.* at 24–30.
138. *Id.* at 33.
139. *Id.* at 34.

Board has no "formal authority to prevent unilateral action by the Director" and thus "the [Consumer] Advisory Board does not come close to equating to the check provided by the multi-member structure of traditional independent commissions."[140] Other potential oversights from the Financial Stability Oversight Council or the Federal Reserve were found to be too limited and would not measure up to a multi-member independent agency's oversight.[141]

The CFPB also attempted to argue that there is a history of allowing independent agencies to operate while headed by a single person.[142] The court dismissed their three examples (the Social Security Administration, the Office of Special Counsel, and the Federal Housing Finance Agency (FHFA)).[143] "We regard these few scattered examples as anomalies,"[144] said the court, while also pointing out the FHFA is less than a decade old and the other two agencies "do not exercise the core Article II executive power of bringing law enforcement actions or imposing fines and penalties against private citizens for violation of statutes or agency rules."[145] The court went on to emphasize the importance of history when assessing whether a novel practice is constitutional[146] and said the CFPB was a "major departure from the settled historical practice requiring multi-member bodies at the helm of independent agencies."[147]

Following this analysis, the court concluded the CFPB is structured unconstitutionally.[148] Yet, it refused to strike down the entire CFPB and instead merely tweaked the agency, severing the "for-cause removal provision" for the CFPB's Director.[149] Consequently, their constitutional ruling "will not halt the CFPB's ongoing operations . . . ."[150] Unsurprisingly, the CFPB requested the D.C. Circuit to rehear the case *en banc*.[151] The D.C. Circuit granted the CFPB's

140. *Id.* at 34–35.
141. *Id.* at 36.
142. *Id.* at 39.
143. *Id.*
144. *Id.* (quoting *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2567 (2014)).
145. *PHH Corp.*, 839 F.3d at 39–40.
146. *Id.* at 25.
147. *Id.*
148. *Id.* at 39.
149. *Id.*
150. *Id.*
151. Evan Weinberger, *CFPB Wins Full DC Circ. Review of Leadership Ruling*, LAW 360 (Feb. 16, 2017, 1:43 PM), https://www.law360.com/banking/articles/893055/cfpb-wins-full-dc-circ-review-of-leadership-ruling.

request,[152] although there's a chance the court could punt on the constitutionality issue due to the CFPB's recent leadership shakeup.[153]

e. Pending Executive and Legislative Action Impacting the CFBP[154]

While the CFPB's unconstitutionality could lead to a reorganization, it is also possible America's forty-fifth president could sweep the program away.[155] "We expect to be cutting a lot out of Dodd-Frank . . . I have so many people, friends of mine, with nice businesses, they can't borrow money, because the banks won't let them borrow because of the rules and regulations and Dodd-Frank," said President Trump. Defenders of Dodd-Frank and the CFPB fear this is just the "opening salvo" in a plan to repeal the act entirely.[156] President Trump made no secret of his disdain for the CFPB.[157] "Dodd-Frank has made it impossible for bankers to function . . . . It makes it very hard for bankers to loan money for people to create jobs, for people with businesses to create jobs. And that has to stop[,]" said, then-candidate, Trump.[158] While fellow Republicans have called for President Trump to dismantle Dodd-Frank and the CFPB, arguing it

152. *Id.*
153. Evan Wienberger, *DC Circ. May Skip CFPB Fight After Cordray's Exit*, LAW 360 (Nov. 30, 2017, 9:31 PM), https://www.law360.com/banking/articles/990041/dc-circ-may-skip-cfpb-fight-after-cordray-s-exit?nl_pk=a96eb5b2-2c59-41da-8839-162f34b84571&utm_source=newsletter&utm_medium=email&utm_campaign=banking [Hereinafter *Skip CFPB Fight*].
154. Previous drafts of this note also included predictions for how the Trump administration would attempt to alter the CFPB. Those predictions centered on President Trump seeking to tweak the command structure rather than follow other Republicans wishes to wipe out the CFPB. The rationale for that prediction was the CFPB's popularity for uncovering the Wells Fargo scandal and the potential for a conservative CFPB director to successfully accomplish some of the President's banking deregulation objectives. With his recent appointment of Mulvaney and the administration's stance that the CFPB director should be terminable-at-will, it appears these predictions have been largely on point.
155. Gillian B. White, *Trump Begins to Chip Away at Banking Regulations*, THE ATLANTIC (Feb. 3, 2017), https://www.theatlantic.com/business/archive/2017/02/trump-dodd-frank/515646/ ("'I think this is the opening salvo in their attack on consumer and investor protection,' says Michael S. Barr, a law professor at the University of Michigan and one of the architects of the Dodd-Frank Act.") [hereinafter White].
156. *Id.* ("'I think this is the opening salvo in their attack on consumer and investor protection,' says Michael S. Barr, a law professor at the University of Michigan and one of the architects of the Dodd-Frank Act.").
157. Reuters, *Donald Trump Says He Would Dismantle Dodd-Frank Wall Street Regulation*, FORTUNE: LEADERSHIP (May 18, 2016), http://fortune.com/2016/05/18/trump-dodd-frank-wall-street/.
158. *Id.*

makes life too difficult on small and medium-sized banks,[159] recent events have almost guaranteed President Trump will be able to appease the banking lobby by making compliance with the CFPB easier[160] through his newly appointed director, Mick Mulvaney.[161]

President Trump's appointment of Mulvaney is not without controversy.[162] The President's appointment came hours after the former director, Richard Cordray, appointed longtime CFPB staffer Leandra English to the position of deputy director and promptly resigned.[163] Cordray intended for English to become the acting director of the CFPB when he resigned, citing Dodd Frank's section 1011(b)(5) in a memo to staffers on the day as his justification for that rationale.[164] 1011(b)(5)(B) states that the CFPB's deputy director shall "serve as acting Director in the absence or unavailability of the Director."[165] English argues that a vacancy in the director position, like the one created by Cordray's resignation, counts under 1011(b)(5) of Dodd-Frank as a situation where the director is absent or unavailable.[166] Thus, English argues that statute demands she be appointed as the acting director of the CFPB.[167]

But the White House disagreed with that interpretation of the Dodd-Frank act and appointed Mulvaney under 1011(b)(2), which states "the Director shall be appointed by the President, with the advice and consent of the Senate."[168] Thus, both Mulvaney and English

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159. *Id.* ("Republicans in Congress have pushed to ease the requirements on small- and medium-sized banks . . . . They have also argued for getting rid of the consumer financial protection agency.").

160. *Id.* ("Bank lobbyists have generally pushed for changes to make complying easier, rather than wholesale rewrite.").

161. Miranda Green, *Federal Judge Won't Block Trump's Pick to Lead Consumer Protection Agency*, CNN (last updated Nov. 29, 2017, 2:24 AM), http://www.cnn.com/2017/11/28/politics/director-cfpb-judge/index.html [hereinafter Green].

162. *See id.* ("A lawsuit (was) filed over the weekend challenging Trump's authority to appoint Mulvaney as the acting director of the bureau.").

163. Evan Weinberger, *Trump, Cordray Throw CFPB Leadership Into Disarray*, LAW 360 (Nov. 24, 2017, 7:02 PM), https://www.law360.com/banking/articles/988213/trump-cordray-throw-cfpb-leadership-into-disarray?nl_pk=a96eb5b2-2c59-41da-8839-162f34b84571&utm_source=newsletter&utm_medium=email&utm_campaign=banking [hereinafter Weinberger].

164. *Id.*

165. 12 U.S.C. § 5491(b)(5)(B) (2018).

166. Green, *supra* note 161 ("[A]ttorney for English argue she is entitled to the position (of director) under the Dodd-Frank Wall Street reform law, which created the agency and says the deputy director becomes acting director when the agency's top spot is vacant.").

167. *Id.*

168. 12 U.S.C. § 5491(b)(2) (2018).

showed up to work at the CFPB on Monday, November 27, 2017.[169] English attempted to stop Mulvaney by filing a temporary restraining order, but it was denied on November 28.[170] But, English's attorneys promise to keep fighting this appointment,[171] and the issue will not be resolved until either the courts sort out the proper statutory interpretation or President Trump appoints a nominee that is subsequently approved by the Senate.[172] Either option will likely take months.[173]

If Mulvaney is given the acting director position, he will almost certainly reshape the way the CFPB enforces regulations.[174] After all, Mulvaney has "described the CFPB as a 'sick, sad joke'" in the past.[175] If Mulvaney is allowed to take the reins, the CFPB's options in the *PHH Corp.* case shift.[176] The CFPB may argue that the constitutional issue is now moot since "the primary issue is no longer an immediate concern–namely, the ability of the president to dismiss Director Cordray[.]"[177] But, due to the advanced stage of the *PHH Corp.* litigation, as well as the director position being called into constitutional question when there was a president who had no desire to fire his appointed director before, that argument seems likely to be unpersuasive.[178]

More likely, the CFPB under Mulvaney's leadership, could settle the case out of court or argue that the agency is unconstitutional to a certain degree.[179] If the case is settled, then the constitutional issue be moot until another entity brings an argument, presumably the next time the CFPB brings a large enforcement action.[180] Although it may seem odd for the CFPB to argue its own unconstitutionality, that route

169. Green, *supra* note 161.
170. *Id.*
171. *Id.*
172. Weinberger, *supra* note 163.
173. *Id.*
174. Preeti Varathan, *Trump says the CFPB has "Devastated" Financial Institutions. The Numbers Tell a Different Story*, QUARTZ (Nov. 28, 2017), https://qz.com/1139254/trump-says-the-cfpb-has-devastated-financial-institutions-the-numbers-tell-a-different-story/.
175. *Id.*
176. *Skip CFPB Fight*, *supra* note 153.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*

may best serve the Trump administration.[181] "If the court rules that the CFPB director can be fired at will–the official position of the administration–then [President] Trump could have the ability to put Mulvaney in place at the CFPB regardless of the succession plan set up by Dodd-Frank."[182] Of course, Mulvaney will have to successfully pry control away from English in order to direct the CFPB legal strategy; but if he can, the outcome of the *PHH Corp.* case and the CFPB's constitutionality could be drastically altered.

Although the new, conservative-appointed leadership of the CFPB will almost certainly quill their criticisms, Republicans in the legislature have worked to disband the CFPB. Senator Ted Cruz proposed a bill to abolish the CFPB.[183] Sen. Cruz's bill is only two pages, featuring only one sentence to describe the bill's purpose: "The Consumer Financial Protection Act of 2010 . . . is repealed, and the provisions of law amended or repealed by that Act are restored or revised as if the Act had not been enacted."[184] Sen. Cruz made a statement elaborating on his contempt for the CFPB, stating that the CFPB does "little to protect consumers" and "grew in power and magnitude without any accountability to Congress and the people . . . ."[185] Sen. Cruz's fellow Texan, Representative John Ratcliffe, introduced "identical legislation in the House of Representatives."[186]

The Texas Republicans' respective bills represented a departure from the less intense approach of Republicans on the House Financial Services Committee.[187] The chairman of the House Financial Services Committee, Representative Job Hensarling (another Texas Republican), recently said it would be impossible for Republicans to overcome a Democratic filibuster if Republicans seriously pushed to completely destroy the CFPB.[188] Rather, Rep. Hensarling pushed for the CFPB to be "functionally terminated" by cutting the agency off from federal

181. *Id.*
182. Weinberger, *supra* note 163.
183. Joseph Lawler, *Ted Cruz Introduces Bill to Abolish CFPB*, WASHINGTON EXAMINER (Feb. 14, 2017, 4:09 PM), http://www.washingtonexaminer.com/ted-cruz-introduces-bill-to-abolish-cfpb/article/2614804 [hereinafter Lawler].
184. Thomas Phippen, *Ted Cruz Introduces Two-Page Bill To Abolish Warren's Consumer Agency*, DAILY CALLER (Feb. 15, 2017, 9:56 AM), http://dailycaller.com/2017/02/15/ted-cruz-introduces-one-line-bill-to-abolish-warrens-consumer-agency/.
185. *Id.*
186. *Id.*
187. Lawler, *supra* note 183.
188. *Id.*

funding.[189] Apparently, a simple majority is all that is necessary to pass a funding bill in the Senate, allowing the Republican majority to disembowel the CFPB's funding without much of a fight.[190] There has now been legislation in the Senate proposed for just that purpose, as Senator Mike Rounds from South Dakota introduced a bill to "dismantle" the CFPB.[191] His bill would deny the CFPB any funding from the Federal Reserve, where it currently gets its funding.[192] The bill would further cripple the CFPB by preventing it from collecting any fines it has assessed.[193]

Republicans in the House of Representatives pushed to turn the CFPB into a multi-member agency.[194] Representative Scott DesJarlais of Tennessee introduced H.R. 1018, which seeks to replace the Director of the CFPB with a five-person commission.[195] Introduced on February 13, 2017, the bill would not only allow for bipartisan control of the CFPB, but would also bring the agency into compliance with the D.C. Circuit Court's ruling in *PHH Corp*.[196]

But, all three of these bills appear to be stuck in committee, so they are more an interesting note on legislative efforts against the CFPB than a real threat.[197] Any of these actions will have lasting consequences on the CFPB if they come to pass, and consequently, lasting consequences on the CFPB's ability to protect the elderly. An analysis on the likelihood of these actions passing and what their impact on the elderly will be is below.

III. Analysis

In *PHH Corp.*, the CFPB was found to be unconstitutional under Article II of the Constitution.[198] The court's prescribed remedy will not

189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. H.R. 1018, 115th Cong. (2017).
196. *Id.*
197. *See* H.R. 1018, 115th Cong.; H.R. 1031, 115th Cong. (2017); S. 370, 115th Cong. (2017). All three bills have been introduced and placed in committee between February 13 and 14 of 2017. After nearly a year of sitting in committee without prompting any news since their introduction, I feel confident saying that it seems unlikely any of these bills will leave committee, let alone become law.
198. PHH Corp. v. Consumer Fin. Protection Bureau, 839 F.3d 1, 8 (D.C. Cir. 2016).

stop the CFPB from operating, but will change the way the CFPB is managed, at least theoretically.[199] Many of the day-to-day operations and investigations of the CFPB will continue unchanged.[200] The question is whether the Supreme Court will uphold the D.C Circuit's ruling and keep the prescribed changes. An additional possibility is that the CFPB's unconstitutionality will be unresolved and allow President Trump to pursue dismantling the agency.[201]

a. Likelihood that the *PHH Corp.* Ruling Stands

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Supreme Court faced a similar Article II challenge to a government agency.[202] In that case, the Public Company Accounting Oversight Board (PCAOB), was under fire because the SEC could only remove its board members "for good cause."[203] The Supreme Court held that provisions outlining the board removal procedures were "inconsistent with the Constitution's separation of powers."[204] Thus, the Supreme Court required that the PCAOB board members be removable at-will by the SEC, rather than only for good cause.[205] Despite technically being an organization with an unconstitutional construction, the Supreme Court left most of the PCAOB alone.[206] "All other aspects of the SEC's oversight, the structure of the PCAOB and its programs are otherwise unaffected by the Court's decision."[207]

The *Free Enterprise Fund* decision is extremely similar, in design and, logic to the D.C. panel in *PHH Corp*. Both decisions feature Article II constitutional violations[208] and both resolved the respective

199. *Id.* at 9.
200. *Id.*
201. S.A. Miller, *Trump Targets CFPB in Plan to Unravel Dodd-Frank Act*, THE WASH. TIMES (Feb. 5, 2017), http://www.washingtontimes.com/news/2017/feb/5/trump-targets-cfpb-in-plan-to-unravel-dodd-frank-a/ [hereinafter Miller].
202. 561 U.S. 477 (2010). The case name is in the sentence, so renaming it is stylistically abhorrent to author.
203. *Decision in Free Enterprise Fund v. PCAOB*, PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD (June 28, 2010), https://pcaobus.org/News/Releases/Pages/06282010_SupremeCourtDecision.aspx [hereinafter *Decision*].
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *See generally id.;* PHH Corp. v. Consumer Fin. Protection Bureau, 839 F.3d 1, 8 (D.C. Cir. 2016).

violations through tweaking the government agency, without shutting down either's day-to-day operations.[209]

Another recent case involving constitutional tweaking was the challenge to the Affordable Care Act.[210] The challenge to the ACA was not about Article II, but a misuse of congressional powers granted in Article I, Section 8.[211] The Court held Congress did not have the power to force people to buy health insurance under the Interstate Commerce Clause, but does have the power to tax people who choose not to buy health insurance.[212] This decision struck down the so-called individual mandate, leaving most of the Affordable Care Act in full effect but changed (slightly) its enforcement.[213] The Supreme Court has also demonstrated its propensity for tweaking rather than overhauling potential unconstitutional issues in Hobby Lobby's recent lawsuit.[214] There, the Supreme Court ruled companies could receive religious exemptions under the Affordable Care Act under limited circumstances.[215]

But, the power struggle between English and Mulvaney may impact the outcome of the case. Some posit the CFPB will argue the constitutional issue is now moot.[216] That argument, however, should be unpersuasive given the case's advanced stage and the lack of constitutional resolution.[217] PHH's contention is as long as the CFPB's director is terminable-for-cause, the CFPB is unconstitutional and cannot enforce the $109 million penalty against PHH, Mulvaney may take it easier on PHH, but it does not change their fundamental argument that any CFPB director's enforcement actions are unconstitutional. Therefore, the D.C. Circuit is unlikely to ignore the

209. *Decision*, *supra* note 203; *PHH Corp.*, 839 F.3d at 39.
210. *See generally* Nat'l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).
211. David M. Cutler & Jonathan Gruber, *The Affordable Care Act is Constitutional*, ANNALS OF INTERNAL MEDICINE 660 (May 1, 2012), http://economics.mit.edu/files/11411.
212. Robert Barnes, *Supreme Court Upholds Obama's Health-Care Law*, WASH. POST (June 28, 2012), https://www.washingtonpost.com/politics/supreme-court-to-rule-thursday-on-health-care-law/2012/06/28/gJQAarRm8V_story.html?tid=a_inl.
213. *Id.*
214. *See generally* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).
215. NCC Staff, *How Obamacare has faced five years of constitutional challenges*, CONST. DAILY (Mar. 23, 2015), http://blog.constitutioncenter.org/2015/03/how-obamacare-survived-five-years-of-constitutional-challenges/.
216. *See Skip CFPB Ruling*, *supra* note 153.
217. *Id.*

constitutional issue based on the current leadership struggle at the CFPB.[218]

Moreover, the idea that the CFPB will argue its own unconstitutionality has been floated too.[219] However, this has been exclusively mentioned as an option if the case proceeds to the Supreme Court after an appeal by PHH,[220] which may be very possible since some commentators forecast the *en banc* D.C. Circuit will rule the CFPB is constitutional.[221] In that case, the CFPB's acceptance of its own unconstitutionality would bolster the odds that the Supreme Court would find the CFPB unconstitutional.[222] If PHH wins in the D.C. Circuit, then the CFPB would be unlikely to appeal since the Trump administration will be satisfied with a terminable-at-will set-up.[223]

Finally, the *PHH Corp.* court explicitly recognized that Congress designed the CFPB's constitutional flaws to be dealt with individually, rather than letting the whole agency be declared unconstitutional for a single legislative misstep.[224] Thus, following court precedents and the legislative intent of the Dodd-Frank Act, the *PHH Corp.* case suggested two solutions to the CFPB's constitutional problems.[225]

b. Correcting the Constitutional Deficiency of a Single-Director Independent Agency

There are two chief solutions the Court could use to remedy the CFPB's constitutional breach: giving the President the power to fire the CFPB Director at-will and creating a multi-member commission to act

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218. *Id.*
219. *See id.* (saying that if PHH appeals on the constitutionality issue, "potentially all parties arguing before the high court could stake out arguments at different levels that the CFPB is unconstitutional, with no one supporting the existing arrangement").
220. *Id.*
221. *Id.* ("Many predicted the D.C. Circuit would go the route of U.S. Circuit Judge Karen L. Henderson, a member of the original panel that ruled in the PHH litigation.").
222. *Id.* See the discussion on both the CFPB and PHH Corp. supporting the existing CFPB structure as constitutional.
223. Weinberger, *supra* note 163 (showing that there should be a terminable-at-will CFPB director is the official position of the Trump administration).
224. PHH Corp. v. Consumer Fin. Protection Bureau, 839 F.3d 1, 38 (D.C. Cir. 2016). ("Indeed, the Dodd-Frank Act itself all but answers the question of presumed congressional intent through its express severability clause, which instructs: 'If any provision' of the Act 'is held to be unconstitutional, the remainder of' the Act 'shall not be affected thereby.' 12 U.S.C. § 5302.").
225. *Id.* at 12.

as the director.[226] Both solutions would have different ramifications, creating a different, new-look CFPB.

The most-likely solution to the CFPB's unconstitutional structure is changing the CFPB from an independent entity to an executive agency. One of the primary appeals of this option is its simplicity: there would not be any actual changes to the CFPB's day-to-day operations and no need to create new CFPB positions.[227] The priority would be making the transition as easy as possible.[228] By changing the CFPB to an executive agency, "the CFPB may still 'regulate the offering and provision of consumer financial products or services under federal consumer financial laws,' much as the Accounting Oversight Board has continued fulfilling its regulatory mission in the wake of the Supreme Court's decision in *Free Enterprise Fund*."[229] The Dodd-Frank Act as a whole would also remain unscathed.[230] Strategically, it is relatively simple to make the CFPB an executive agency, merely cut out the "for cause" firing provision.[231] The Trump administration is on record supporting this solution to the constitutional issue.[232]

The second solution would be transforming the CFPB's Director position into a multi-member board. The CFPB was initially conceived of as a multi-member independent agency.[233] Somewhere during committee discussion, however, Congress decided a sole director would be best.[234] Over a half-decade later, switching the CFPB's command structure to its original design seems to be the less

226. *Id.*
227. *Id.* at 39 ("[O]ur constitutional ruling will not halt the CFP's ongoing operations or the CFPB's ability to uphold the $109 million order against PHH . . . .").
228. "Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact." *Id.* at 37 (quoting *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S 477, 508 (2010)).
229. *PHH Corp.*, 839 F.3d at 38.
230. *Id.*
231. *Id.*
232. Weinberger, *supra* note 163.
233. *PHH Corp.*, 839 F.3d at 15 ("The agency proposed by Professor Warren was to operate as a traditional multi-member independent agency. The subsequent Executive Branch proposal for such a new agency likewise contemplated a multi-member structure. *See* Department of the Treasury, Financial Regulatory Reform: A New Foundation: Rebuilding Financial Supervision and Regulation 58 (2009). The originally passed House bill sponsored by Congressman Barney Frank and supported by Speaker Nancy Pelosi also would have created a traditional multi-member independent agency.").
234. *Id.*

desirable option by the D.C. Circuit.[235] Changing the CFPB into a multi-member independent agency would apparently require the court to make new CFPB offices, to designate one of those offices as the Chairperson of the CFPB, and to redo a variety of administrative procedures and policies for the CFPB.[236] The court was clearly not comfortable taking that much creative control over a legislatively-created entity.[237] Furthermore, the court noted such an overhaul of the CFPB would essentially shut down the agency.[238] The President would have to nominate individuals to fill the newly created CFPB offices and the Senate would have to confirm each nominee.[239] Waiting for such a process to be completed could mean "potentially shutting the agency down for months if not years."[240] But, if Congress wanted to restructure the CFPB as a multi-member independent agency, the court gives them full blessing to enact new legislature to generate those effects.[241]

Overall, it seems more likely the court will alter the CFPB to meet constitutional standards, changing the single director's employment from "for cause" to "at-will."[242] The court in *PHH Corp.* did exactly that, declaring "we remedy the constitutional violation here by severing the for-cause removal provision from the statute."[243] Thus, the CFPB will now have to operate as an executive agency.[244] Obviously, this is subject to change, especially since the CFPB has appealed the ruling.[245] Regardless, despite the probability that day-to-day operations continue normally for the CFPB after changing the accountability

235. *Id.* at 38.
236. *Id.* at 38–39 ("[W]e should rewrite and add to the Dodd-Frank Act by restructuring the CFPB as a *multi-member* independent agency. But doing so would require us to create a variety of new offices, designate one of the offices as Chair, and specify various administrative details of the reconstituted agency.").
237. *Id.* at 39 ("All of that 'editorial freedom' would take us far beyond our judicial capacity.").
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.* ("In similar circumstances, the Supreme Court in *Free Enterprise Fund* severed the unconstitutional for-cause provision but did not otherwise disturb the Sarbanes-Oxley Act or the operation of the new Accounting Oversight Board created by that Act . . . . in a recent case involving the Copyright Royalty Board, we severed the for cause provision that rendered that Board unconstitutional, but did not otherwise disturb the copyright laws or the operation of the Copyright Royalty Board.")
243. *Id.*
244. *Id.*
245. Kaplinsky, *supra* note 13.

standards of the director, these changes will have real impacts on the CFPB's elderly programs.

c. Impact on CFPB Programs Benefiting the Elderly

Considering the D.C. Circuit Court could have declared the CFPB unconstitutional and voided all of its past actions, the proposed changes may seem relatively minor.[246] In fact, the then-Director of the CFPB, Senator Elizabeth Warren, said "the ruling makes a small, technical tweak . . . and does not question the legality of any . . . future actions of the CFPB."[247] The ruling, however, has real implications for elderly Americans who depend on the CFPB, even if the judiciary's only change is eliminating the "for cause" firing clause for the CFPB Director.

i. CFPB becomes an Executive Agency

First and foremost, changing the CFPB from an independent to an executive agency will have real ramifications for banks and other financial institutions.[248] Currently, the CFPB Director can only be removed for "an act of 'inefficiency, neglect of duty or malfeasance,'" leading to the CFPB operating with a high level of self-governance.[249] But, once the director's job becomes terminable at-will, that stability disappears and the director will have to bend to the president's will or face the risk of immediate termination.[250] The president of the Consumer Bankers Association, Richard Hunt, said the *PHH Corp.* ruling was "the worst thing that can happen to the banking industry and consumers."[251] Despite lobbying for years to change the CFPB's structure, Hunt believes the CFPB's transition to an executive agency will lead to unpredictability regarding CFPB's enforcement, regulation, and leadership.[252]

246. Lambert & Raymond, *supra* note 9.
247. *Id.*
248. Berry, *supra* note 18.
249. Phillip Branch, *5 Ways the CFPB Constitutionality Ruling Impacts Banks and Consumers*, HORNE CBA & BUSINESS ADVISORS (Oct. 19, 2016), http://blog.hornellp.com/banking/5-ways-the-cfpb-constitutionality-ruling-impacts-banks-and-consumers [hereinafter Branch].
250. *Id.*
251. Berry, *supra* note 18.
252. *Id.* ("Richard Hunt, president of the Consumer Bankers Association, . . . 'It leads to a whipsaw effect every four years. We need certainty and stability.'").

Banks crave stable oversight, which hypothetically flies out the window when the CFPB Director (and primary policy maker) can be removed at whim.[253] Moreover, the CFPB is now under the purview of executive orders.[254] Since Republicans and Democrats have very different philosophies on how to best regulate banks, the CFPB regulations can potentially ricochet wildly from president to president.[255] Therefore, banks can expect that whenever the White House goes from Democrat-control to Republican-control (and vice versa), the new president will fire the old CFPB Director and implement their own choice, someone more aligned with their parties financial vision.[256] Such uncertainty creates havoc in banks' future planning, often creating shocks in the market.[257] Shocks and other market imbalances can interfere with financial stability, which means banks' investments become less stable.[258] Changes to financial infrastructure (such as changes to the head of the CFPB) are one of the primary ways that market uncertainty and market shocks are created.[259]

253. *Id.*

254. *See* Financial Services Committee, *Hensarling: Court Ruling Means Executive Orders Now Apply to CFPB* (Oct. 19, 2016), http://financialservices.house.gov/news/documentsingle.aspx?DocumentID=401166.

255. *See* Ryan C. Fuhrmann, *What are the Main Differences Between the Republican and Democratic Approaches to Regulating the Economy*, INVESTOPEDIA http://www.investopedia.com/ask/answers/regulating-economy.asp (last visited Aug. 31, 2017) (indicating Republicans are more likely to lower the Federal funds rate and the banking reserve ratios); Dell Markey, *Republicans vs. Democrats Views on Government Size*, SYNONYM http://classroom.synonym.com/republicans-vs-democrats-views-government-size-7737.html (last visited Aug. 31, 2017) (discussing how Democrats favor more federal government regulation over the banking industry while Republicans would rather leave government intervention out of it).

256. *See generally* Berry, *supra* note 18.

257. 2011 FSOC ANNUAL REPORT, *Potential Emerging Threats to U.S. Financial Stability*, U.S. DEPT. OF TREASURY 131 https://www.treasury.gov/initiatives/fsoc/Documents/Potential%20Emerging%20Threats%20to%20U.S.%20Financial%20Stability.pdf (last visited Aug. 31, 2017) ("Financial stability requires a forward-looking assessment of the financial system's propensity to generate imbalances and the system's resilience to a range of potential adverse events. Misaligned incentives and inappropriate compensation can produce imbalances and vulnerabilities. Unanticipated events and the reversal of widely held beliefs create shocks that can be amplified by existing structural vulnerabilities. Threats to financial stability arise from a combination of imbalances, shocks, and vulnerabilities that impair the functioning of the financial system.") [hereinafter POTENTIAL EMERGING THREATS].

258. *Id.*

259. *Id.* ("Shocks and imbalances can interfere with financial stability through three main interconnected channels: . . . 3. Disruptions in financial infrastructure.").

An interference with banks' financial stability will impact banks' investments.[260] "A deterioration in market functioning can force financial institutions and market participants to rapidly reassess their risk profiles."[261] These reassessments can lead to sudden changes in liquidity and pricing for such institutions, which then "can disrupt the ability of financial institutions and market participants to manage their risks, forecast their financial needs, or even fulfill their contractual obligations."[262] Failing to fulfill contracts leads to less confidence in financial institutions and their transactions, making parties reluctant to deal with, for example, banks that need to be able to deal in such investments.[263]

This chain-reaction could be a worst-case economic scenario that scares financial institutions into reducing risk of loss by reeling back services when market stress is evident.[264] For banks, this means withholding loans from potential borrowers (including members of the elderly population) and deciding to conserve capital and liquidity, while simultaneously avoiding situations where borrowers will fail to meet their obligations.[265]

Government organizations attempt to reduce market shocks and imbalances through regulation, hoping to prevent these horrific economic effects from occurring.[266] "Achieving this goal [of financial stability] requires not only fixing structural vulnerabilities but also maintaining confidence in the ability of the financial system to absorb a wide range of shocks."[267] The aforementioned unpredictability of the CFPB's leadership, however, from presidential term to presidential term completely undermines this goal and creates the sort of market uncertainty banks (and their customers should) dread.[268]

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260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.* ("Disruptions in financial infrastructure can undermine confidence in financial transactions; without certainty that a payment will be delivered, or a transaction settled and cleared, financial institutions and market participants will be reluctant to engage in transactions, even with otherwise reliable counterparties.").
264. *Id.* ("Under market stress, financial institutions and market participants may react to fears about the amplification of potential losses by reducing their provision of financial services within the system itself and to the broader economy.").
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*

Still, there are reasons to dismiss such cataclysmic fears. After all, turnover at federal agencies is common during the beginning of a new administration.[269] On average, it takes a new administration nine to ten months to turn a majority of independent agency leaders into individuals affiliated with the new president's party.[270] For an absolute majority of leaders in a multi-member agency, it takes a new president an average of twenty-six months.[271] This includes other financial watchdogs, like the SEC.[272] While the SEC may be differentiated from the CFPB because it is a multi-member rather than single director agency, other watchdog agencies are led by a single at-will director and are still able to oversee financial institutions successfully. One example is the FHFA.[273] While the two can be differentiated based on their scope, as the CFPB is much larger than the FHFA[274] and protects all consumers rather than a subset of the financial markets, the FHFA's existence and operations proves that financial watchdogs can operate under at-will directors without destroying the banking industry.

In the event that Hunt's fears are proven correct, the elderly would suffer. First, elderly individuals tend to be more dependent on the availability of loans.[275] Many seniors live off of fixed incomes and

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269. Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B. U. L. REV. 459, 469 (2008) [hereinafter Devins & Lewis].

270. *Id.*

271. *Id.* at 470.

272. SEC HISTORICAL SUMMARY OF CHAIRMEN AND COMMISSIONERS, U.S. SECURITIES AND EXCHANGE COMMISSION (last modified May 4, 2017), https://www.sec.gov/about/sechistoricalsummary.htm.

273. Jim Puzzanghera, *Senate Confirms Rep. Mel Watt as Fannie Mae, Freddie Mac Regulator*, L.A. TIMES (Dec. 10, 2013, 4:20 P.M.), http://www.latimes.com/business/la-fi-mo-mel-watt-fhfa-fannie-mae-freddie-mac-20131210-story.html.

274. *See* CONSUMER FIN. PROT. BUREAU, THE CFPB STRATEGIC PLAN, BUDGET, AND PERFORMANCE PLAN AND REPORT-9-12, 12 http://files.consumerfinance.gov/f/201502_cfpb_report_strategic-plan-budget-and-performance-plan_FY2014-2016.pdf (last visited on Feb. 14, 2017) ("The FY 2017 Budget estimate of $636.1 million is 54.0% above the FY 2016 budget estimate of $605.9 million."); CONSUMER FINANCIAL PROTECTION BUREAU/NUMBER OF EMPLOYEES, GOOGLE, https://www.google.com/search?client=sa...TF-8&oe=UTF-8#q=fhfa+total+employees (last visited Feb. 14, 2017) (Showing the CFPB has 1,623 employees for 2016 fiscal year); *contra* FISCAL YEAR 2016 FED. HOUSING FIN. AGENCY: PERFORMANCE AND ACCOUNTABILITY REPORT 6, FHFA (2016) https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/FHFA-2016-PAR.pdf ("During FY 2016, the [FHFA] operated with a budget of $199.1 million and ended the fiscal year with 579 employees . . . . For FY 2017, FHFA's budget is $199.5 million, which will be used to support 630 positions.").

275. Gene Rondinaro, *Elderly Homeowners to Get Help With Repairs*, N. Y. TIMES (Feb. 15, 1987), http://www.nytimes.com/1987/02/15/realestate/elderly-homeowners-to-get-help-with-repairs.html [hereinafter Rondinaro].

thus need loans from banks to keep their independence whenever circumstances cause their financial needs to exceed their means.[276] A common circumstance is home maintenance, as defective or faulty appliances can be a great financial strain.[277] Under market stress, however, the greater probability of losses may cause banks to reduce their financial services, particularly lending.[278] Seniors would suffer in the aggregate from a reduced amount of loans, as they would have to turn to less regulated and reputable lenders, or do without loans.[279] Going without the loans, especially for necessities like home repair, leads to a loss in elderly independence.[280]

Moreover, banking struggles would cause a loss of savings and create more difficulty in accessing savings.[281] During financial stress, banks may offer lower interest rates or raise deposit rates to mitigate the impact.[282] This is just one more hurdle for individuals to cross that prevents the elderly from saving money, adding to the existing obstacles like credit card debt, student loan debt, low wages, and the need to save for other family members, which already prevent about a third of Americans from saving for retirement.[283] Of the seniors that have saved for retirement, 57.14% have saved less than $100,000.[284] Consequently, many seniors are poorer than the average household and will have greater difficulty paying higher bank fees.[285] Without social security, nearly half of the 46.2 million senior citizens would be

276. *Id.*
277. *See id.*
278. *See* POTENTIAL EMERGING THREATS, *supra* note 257, at 131 ("For example, if lenders believe that a borrower may fail to honor a contractual obligation, they may restrain lending to other borrowers to conserve capital and liquidity.").
279. *Id.*
280. Rondinaro, *supra* note 259. If the elderly person is unable to keep their home in compliance with basic standards, they will lose their home. Thus, they will have to move in with a relative or into a nursing home, resulting in a loss of independence.
281. *See* POTENTIAL EMERGING THREATS, *supra* note 257, at 146.
282. *Id.* ("Banks that are experiencing deposit outflows might have to raise their deposit rates or find alternative forms of funding, lowering their net interest margins.").
283. Elyssa Kirkham, *1 in 3 Americans Has Saved $0*, TIME (Mar. 14, 2016), http://time.com/money/4258451/retirement-savings-survey/.
284. *Id.* 40% of all seniors have saved either $50k-$99k, $10k-$49k, or less than $10k. I subtracted the 30% without retirement savings, and then divided the 40% from the remaining 70% to find the percentage of those that saved $99k or under from the percentage of Americans who have saved something. *Id.*
285. U.S. CENSUS BUREAU, OLDER AMERICANS MONTH: MAY 2016 1-2 (No. CB16-FF.08 2016), http://www.census.gov/newsroom/facts-for-features/2016/cb16-ff08.html. (indicating the median income of householders 65 and older was $36,895, with 6.6 million senior citizens living in supplemental poverty).

living in poverty.[286] Nearly 80% of the elderly men have left the work force, while nearly 90% of elderly women are retired.[287] In fact, there are more elderly people living in poverty than there are elderly people working.[288] Many are reliant on access to their savings to survive, as well as needing their savings to remain at their current levels to pay their bills.[289]

ii. CFPB becomes a Multi-Member Agency

Another option to bring the CFPB into constitutional compliance is turning it into a multi-member agency. House Republicans are already trying to bring this about, introducing legislature to transform the CFPB directorship into a five-member enterprise.[290] Proponents of a multi-member commission believe the additional voices will promote discourse and create more nuanced, satisfactory decisions for all sides.[291]

Furthermore, a multi-member commission guarantees that all sides are not only heard, but get an actual say in the direction of the CFPB.[292] In the current set-up, the CFPB's director is required to consult with other federal financial regulators before adopting major policies.[293] If a consulted regulator makes a formal, written objection to the CFPB's proposal, the CFPB is required to respond to that objection and give a basis for sticking to its original decision.[294] Thus, the CFPB Director is realistically able to act without regard to the objections of outsiders, as the agency may proceed regardless of the objection's merits as long as they make an excuse for ignoring the objection.[295] Supporters of a multi-member commission believe these accountability issues will be vanquished because dissenting opinions actually get a vote and participate in debates.[296] Rather than begging the director to change his or her policies, the multi-member

286. *Id.* at 1.
287. *Id.* at 2. Labor force participation rate is 21.5% for senior men, 13.7% for senior women.
288. *Id.* 5.2 million working elderly vs 6.6 million million elderly in poverty.
289. *Id.*
290. H.R. 1018, 115th Cong. (2017).
291. Soucy, *supra* note 19, at 712.
292. *Id.* at 714.
293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.* at 714–15.

commissioners in a minority would only have to sway one out of three majority members to their side.[297]

Yet, this view of a multi-member commission providing checks and balances contributing to wiser, sounder decisions every time from the CFPB is so optimistic that it borders on whimsical. The members of the multi-member commission will have political ties, like those of the SEC and FTC.[298] Advocates believe meaningful discourse will take place between board members, regardless of party affiliation.[299] Yet, the threat of institutional paralysis looms large over a potential multi-member commission CFPB. When three (or more) of the five commission members belong to the same party, they can and would have incentive to steamroll their peers while steering the Commission.[300] In fact, the CFPB would almost be more insulated from criticism and alternative viewpoints because the majority could direct the agency in whatever direction it chooses, while insulating itself from criticism by saying their decision was reached by a consensus vote rather than a single decision maker's direction.[301] Democracy in action could be their excuse, when in reality the CFPB could act just like the dictatorship people fear it is under its current regime.

Another problematic aspect of a multi-member commission is its negative effect on the CFPB's efficiency. A single-director agency streamlines the decision-making process and allows swift and decisive action.[302] In support of the single-director set up, Professor Arthur E. Wilmarth at George Washington University School of Law said "the factors of efficiency, stability, decisiveness and accountability argue in favor of retaining CFPB's single-director model of governance."[303]
Wilmarth points out a five-member commission would "likely produce more delay and less consistency in CFPB's decision-making . . . [and] would expose CFPB to the risk of leadership deadlock whenever a commissioner left office."[304]

Wilmarth's critics respond that our government was designed for checks and balances rather than efficiency.[305] After all, they argue, the

297. *Id.* at 715.
298. *Id.* at 712.
299. *Id.* at 713.
300. *Id.* at 712.
301. *Id.*
302. *Id.* at 711.
303. *Id.*
304. *Id.*
305. *Id.* at 712.

United States would run more efficiently on the whole if we were a dictatorship rather than a democracy, especially one with a separation of powers.[306] "If a single individual controlled all aspects of the government, then policies could be created and implemented in much less time and that individual would be able to ensure that the government acts as a unified whole," states a proponent of the multi-member commission.[307] Blessedly, this speaker admits he makes an "extreme analogy,"[308] as it is easy to distinguish the CFPB, having a single director, and the Executive Branch as not being the sole controlling force of our government.[309] After all, the CFPB's single director is still removable and thus a check on the director's authority is clearly in place.[310] Even in the current "for cause" set-up, the director is not an actor who can make wide-sweeping decisions without the fear of consequences. The director would be even more fearful of oversight under a "terminable at-will" set up, since any misstep (no matter how small) could lead to the director's removal.[311]

Multi-member agency proponents still believe a "terminable at-will" arrangement leaves the CFPB vulnerable to the director's dictatorship-like actions. One concern is that the director could still act with little regard for concerns other parties raise.[312] But, the elderly would be much more vulnerable under an indecisive and slow-acting CFPB rather than an expedient, decisive one.[313] New forms of financial crimes are created very quickly,[314] and seniors are often the targets and victims of new scams.[315] Therefore, it is important for seniors' protection that the CFPB is able to respond swiftly to new threats.

The time it would take just to establish a multi-member commission alone would be a danger to the elderly. For example, it took 431 days to get the SEC up and running under its five

306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.*
310. *Id.* at 715 (stating the director can only be removed from office for cause).
311. *See generally id.*
312. *Id.* at 715.
313. *What is Financial Crime*, INTERNATIONAL COMPLIANCE ASSOCIATION, https://www.int-comp.org/careers/a-career-in-financial-crime-prevention/what-is-financial-crime/ (last visited Aug. 31, 2017) [hereinafter *Financial Crime*].
314. *Id.*
315. Kelly Johnson, *Financial Crimes Against the Elderly*, POP CENTER 1 http://www.popcenter.org/problems/crimes_against_elderly (last visited Aug. 31, 2017).

commissioners.[316] With advances in technology, there are more ways to entrap seniors popping up every day.[317] It would be irresponsible to leave our nation's seniors without protection from the CFPB—who can respond to new threats with new regulations and provides supplementary materials to warn people of new schemes—for nearly an entire year.

Even after the commissioners are approved and ready to go, it will not be as quick to respond to new threats as a single director.[318] A multi-member commission will deliberate and debate, spending precious time arguing or deciding how the CFPB will respond to a new issue.[319] Meanwhile, the elderly are being financially taken advantage of at an increasing rate, with a recent study discovering that seniors have lost twelve times more, due to fraud, than previously thought.[320] Financial abuse is a huge issue, and our awareness of the issue keeps growing thanks to the CFPB's efforts to investigate and stop fraud.[321] With a multi-member regime in place, the CFPB will be slower to develop solutions to new threats it learns of than it would as a single-director administration, thus harming the elderly.[322]

Conversely, it is possible a multi-member commission would be able to better investigate fraud and formulate long-lasting solutions to various elderly weaknesses that criminals exploit. The dialogue and discussion a multi-member commission must undergo would allow them to brainstorm opinions a single director would not have thought of by herself.[323] A lone director usually relies on opinions from outside parties, who lack the same knowledge of goals and intentions behind a potential CFPB policy that potential committee members would have.[324] Proponents also hypothesize that committees would better

316. Dr. Kenneth Durr & Dr. Adrian Kinnane, *431 Days: Joseph P. Kennedy and the Creation of the SEC (1934-35)*, SECURITIES AND EXCHANGE COMMISSION HISTORICAL SOCIETY (Dec. 1, 2005), http://www.sechistorical.org/museum/galleries/kennedy/ [hereinafter Durr & Kinnane].
317. *Financial Crime*, *supra* note 313.
318. *See* Soucy, *supra* note 19, at 712.
319. *See generally id.*
320. Ann Brenoff, *Study Finds Elderly Scams Cost 12 TIMES More Than Previously Thought*, HUFFINGTON POST (April 7, 2015, 7:06 AM), http://www.huffington
post.com/ann-brenoff/elderly-scams-cost-study_b_6564288.html.
321. *See generally* Soucy, *supra* note 19.
322. *See generally id.*
323. *See id.* at 714.
324. *Id.*

insulate the agency from "shortsighted or irrational policies."[325] While there is no data presented to indicate decisions would be better under a multi-member commission, there is an intuitive logic to the idea that five people who examine and discuss certain issues of the CFPB exclusively would make better decisions for the CFPB and the people it protects than a group of outsiders that would offer their input once. Thus, perhaps a slower CFPB will be better for the elderly in the long run, although that may be cold comfort for the elderly, who suffer financial abuse from a multi-member commission's slower reaction times.

iii. Concerns about the CFPB's Scope under a New Structure

Additionally, and importantly for the elderly, will fixing the constitutionality of the CFPB result in limitations of the CFPB's scope?[326] Before the *PHH Corp*. decision, the CFPB had the power to "regulate the offering and provision of consumer financial products or services along with the power to define what those financial products actually are."[327] Thus, the CFPB was able to regulate virtually anything finance-related, including savings plans, banks, etc., while also having the ability to inflict warranted penalties and create new laws or standards to protect consumers.[328] Once the CFPB loses its independent status and becomes directly accountable to other leadership, "the CFPB loses much of this control over its scope of influence."[329]

A diminished scope of influence by the CFPB will have direct consequences on elderly victims of financial abuse. The most substantial ways the CFPB protects the elderly is by leaning on financial institutions to provide protections and intervening with sanctions when it sees fit.[330] The loss of these powers would remove one of the only actual preventative measures protecting seniors from potential financial abuse.[331] Moreover, without incentive to watch over senior citizens' financial records more closely, victims with dementia or

325. *Id.*
326. Branch, *supra* note 249.
327. *Id.*
328. *Id.*
329. *Id.*
330. Eisenberg, *supra* note 21 (explaining the protections provided by the CFPB against abusive financial institutions).
331. *Id.*

other mental illness lose one of the best spotters of potential abuse: their banks.[332] With the potential loss of these powers, seniors could be solely relying on relatives (who are often abusers in these situations) or underfunded, underpowered state agencies to get the job done.[333]

There are some scholars, however, who believe consumers will benefit from greater CFPB oversight. The CFPB has been accused of allowing their "lack of oversight" to result in frivolous spending without proper oversight.[334] "Given this extreme lack of democratic accountability, the CFPB has done what all bureaucracies tend to do: constantly expanded its power, promoted its own bureaucratic interests at the expense of the public, and trampled under the feet of other public policies, such as consumer choice and financial innovation."[335] The CFPB's alleged bureaucratic wrongs could potentially be the cause of privacy concerns for individuals and corporations.[336] Allegedly, these intrusions are harming current businesses and continue to dissuade individuals from starting new ones.[337] In sum, the critics point to the CFPB and Dodd-Frank as the cause for limited choices for mortgages, bank accounts, and credit cards, as well as leading generally to higher goods prices and less consumer credit choice.[338] These things harm the elderly especially since many senior citizens are on a fixed income and are unprepared to battle rising costs.[339] If the suggestion that the CFPB is a rogue organization causing many negative effects are true, perhaps the CFPB

332. *Id.*

333. *Id.*

334. Todd Zywicki, *The Dodd-Frank Act Five Years Later: Are We More Stable?*, COMMITTEE ON FINANCIAL SERVICES 1, 2 (July 9, 2015), http://masonlec.org/site/rte_uploads/files/Zywicki_Dodd-Frank_Testimony_v1.pdf.

335. *Id.*

336. *Id.* ("The CFPB has launched a massive data-mining program that collects data on hundreds of millions of consumer credit cards, mortgages, bank accounts, and other products, an appetite for consumer information that far exceeds any reasonable regulatory purpose. Not only do these data-mining operations impose costs on banks and their customers, the operations' scale creates unprecedented threats to privacy and risks to personal information security. Because many small, independent, kitchen-table businesses use products such as personal credit cards, home equity loans, and auto title loans in financing their businesses, the CFPB's powers reach into all of these small businesses as well.").

337. *Id.* at 3 ("Little wonder then for the first time in American history more businesses are being destroyed than new businesses being started.").

338. *Id.* at 8.

339. *See generally id.*

being brought to heel as an executive or multi-member agency will help the elderly.

iv. CFPB is defunded and dismantled

Finally, and most drastically impacting the elderly, what if the CFPB is wiped away along with the rest of Dodd-Frank? There is some suggestion that the Dodd-Frank Act has been nothing but trouble for all Americans, including the elderly.[340] Yet, removing the CFPB entirely would dismantle many of the elderly protections only the CFPB can effectively provide.[341] Despite some overtures from conservative congressmen, any bills to dismantle Dodd-Frank have been stuck in committee for nearly a year,[342] making this outcome highly unlikely.

IV. Recommendations

The *en banc* D.C. Circuit should uphold their unconstitutionality ruling and order the CFPB to be reorganized with a terminable at-will director. The current set-up, where the CFPB director is only terminable for cause, undercuts the authority of the Executive.[343] Catastrophists will say the CFPB could operate as a rogue agency and undermine the elected officials of our government if the "for cause" requirement is not changed.[344] While such fears may normally be dismissed as paranoid, the CFPB has such broad, discretionary power over specific sectors of the United States' economy that it is hard to argue an unelected director should steer the agency without much oversight.[345] Therefore, the entire D.C. Circuit should uphold their previous ruling and implement proposed solution: making the director terminable "at-will."

A director, hired at-will, is a superior option to creating multi-member agency. First, it will be much faster to nominate, confirm, and

340. *Id.* at 3 ("After five years, has Dodd-Frank made American families better off? No. Instead, the overall impact of Dodd-Frank has been to slow our economic recovery, raise prices, reduce choice, and eliminate access to the financial mainstream for American families.").
341. *See generally* Rondinaro, *supra* note 275.
342. *See, e.g.*, H.R. 1031, 105th Cong. (2017).
343. *See generally PHH Corp.*, 839 F.3d at 12.
344. *Id.*
345. *Id.*

put in place a new director.[346] Moreover, it will put a stop to the fight between English and Mulvaney, allowing the President to select the acting director right now, without debate.[347] But, if the D.C. Circuit orders the CFPB to transform into a multi-member agency, there will be a lengthy process in nominating and confirming candidates.[348] Considering how fast new scams and ploys against the elderly come into existence,[349] such a leadership vacuum is unacceptable.

Next, criticisms of an at-will director as unpredictable seem far too dramatic. Critics of the at-will design fret about the potential for unpredictability because each new president could fire and replace the director with someone more in line with his or her political agenda.[350] Yet, many agencies already operate under such give-and-take movements and are effective.[351] Furthermore, the political agenda the new director will implement is predictable, as well as only occurring every four to eight years,[352] so the worry that banks will be unable to anticipate regulations seems theatrical.

Finally, an "at-will" agency will be far more efficient than a multi-member agency.[353] Whereas a multi-member agency will need to have hearings, debate, and vote on any new policies or strategies that will respond to new financial threats, a director-led agency only needs the director to hear the situation and make a decision.[354] This makes the agency more decisive and effective at responding to new threats. That efficiency is especially important for seniors, since they are frequently the prime targets of new financial scams.[355]

Moreover, all Republicans should begin supporting this reconstruction of the CFPB rather than pushing for its all-out abolition. The CFPB is too essential to regulating financial institutions and protecting consumers, especially vulnerable elderly consumers, to be dismantled without a replacement.

346. Durr & Kinnane, *supra* note 316. For reference, it took nearly a year and a half to set up the SEC, whereas the CFPB would be able to continue, uninterrupted, if it became an executive agency.
347. Weinberger, *supra* note 163.
348. *See generally* Durr & Kinnane, *supra* note 316 (Once again, the history of the SEC's establishment for the same comparative reason as endnote 340).
349. *See generally Financial Crime*, *supra* note 313.
350. *See generally* Soucy, *supra* note 19.
351. *See generally* Devins & Lewis, *supra* note 269.
352. *See generally* Soucy, *supra* note 19.
353. Soucy, *supra* note 19, at 712.
354. *Id.*
355. *See generally Financial Crime*, *supra* note 313.

The CFPB should be reconfigured into an at-will executive agency rather than keeping the status quo, disbanding the agency completely, or transforming the CFPB into a multi-member agency. The benefits of efficiency and oversight outweigh any unpredictability concerns ventured by banks and, most importantly, the CFPB should continue to provide its services for the elderly without interruption or delay. Thus, making the director terminable at-will by the president is the best solution for America's senior citizens.

V. Conclusion

The CFPB's constitutional flaws should be remedied. But, this should be done through a method that preserves the protections and benefits the CFPB provides to senior citizens. Dissolving the CFPB would put the elderly in grave need of further financial protections and is an untenable solution.[356] The best solution is to restructure the CFPB's leadership construction, either by making the sole director of the CFPB terminable at-will by the President or making the CFPB a multi-member agency like the SEC. The transitional difficulties and risks of having a terminable at-will director are less severe than creating a multi-member agency. Thus, in terms of protecting the financial interests of senior citizens, the D.C. Circuit Court should order the CFPB to be reorganized as an "at-will" agency.

356. *See generally* Mahoney, *supra* note 116.