

May 10, 2018

The Honorable Mick Mulvaney  
Ms. Monica Jackson  
Consumer Financial Protection Bureau  
1700 G Street, NW  
Washington, DC 20552

Via email: [FederalRegisterComments@cfpb.gov](mailto:FederalRegisterComments@cfpb.gov)

**Re: Docket No. CFPB-2018-0001  
Request for Information Regarding Bureau Civil Investigative  
Demands and Associated Processes**

Dear Acting Director Mulvaney and Executive Secretary Jackson:

We the undersigned conservative leaders submit these comments in response to the above-referenced Request for Information. We also reference the April 25, 2018 [comments](#) submitted to you by 16 Democrat state attorneys general and one other Democrat state official.<sup>1</sup> We appreciate the opportunity to comment on the Bureau's use of civil investigative demands (CIDs).

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<sup>1</sup> The Democrat AGs' submission was accompanied by a news release by now-former New York Attorney General Schneiderman with the ominous warning, "The Trump Administration's move to limit the CFPB's basic investigative authority will only allow bad actors to exploit consumers – and get away free of penalty ... If Washington refuses to stand up for consumers, my fellow Attorneys General and I won't hesitate to enforce consumer protection laws and protect those we serve."  
<https://ag.ny.gov/press-release/ag-schneiderman-trump-administration-dont-weaken-cfpbs-investigative-authority>.

These comments explain (1) that CIDs are incompatible with the Fourth Amendment<sup>2</sup> when original public meaning is applied, (2) that the uses of CIDs have exceeded the scope of the New Deal Supreme Court's authorization of them, and (3) the potential and actual political weaponization of searches using CIDs, making them dangerous to many rights.

CIDs, also known as “administrative subpoenas,” are searches of papers and/or effects using demands issued by government entities to private parties where the searches are relevant to an inquiry under a purpose authorized by the legislature. They may be issued without probable cause. They are issued unilaterally, meaning they are not issued by neutral judicial officers. The nature of CIDs is that they are searches even though the government entity does not physically enter the premises of the target.<sup>3</sup> Compared to when CIDs became institutionalized by the New Deal Court, federal agencies now have more discretion in interpreting the substantive laws they enforce, and such discretion has now been applied in the context of the scope of CIDs.<sup>4</sup> Such discretion has even

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<sup>2</sup> “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST., amend. IV.

<sup>3</sup> “We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the Boyd case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena duces tecum, against which the person, be he individual or corporation, is entitled to protection.” *Hale v. Henkel*, 76 U.S. 43, 76 (1906).

<sup>4</sup> “The scope of the investigation, moreover, is very much dependent on the agency's interpretation and administration of its authorizing substantive legislation concerning which the agency may enjoy

been applied to CIDs issued by state attorneys general.<sup>5</sup> Discretion is disfavored by the Fourth Amendment, and the separation of powers is critical to preservation of rights in the context of searches.<sup>6</sup>

## 1. CIDs Are Incompatible with the Fourth Amendment Viewed through Original Public Meaning.

The genius of the Fourth Amendment is in its dual if not competing purposes of protecting the community from miscreants while protecting the security of our “persons, houses, papers, and effects” from government trespass, which courts have construed to also include a natural law right of an expectation of privacy.

CIDs seem impossible to reconcile with the Fourth Amendment -- certainly its original public meaning -- because they (1) violate the requirement of probable cause under oath or affirmation in advance of issuance of writs to search, (2) are not issued by neutral judicial officers

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interpretative deference. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* . . . “ *Director, Office of Thrift Supervision v. Vinson & Elkins*, 124 F.3d 1304, \_\_\_, (D.C. Cir 1997).

<sup>5</sup> “At this stage, the [Massachusetts] Attorney General is statutorily authorized to investigate whatever conduct she believes may constitute a violation of G. L. 93A.” *Exxon Mobil Corporation v. Attorney General*, Mass. SJC-12376, slip opinion page 6, April 13, 2018,

<https://cases.justia.com/massachusetts/supreme-court/2018-sjc-12376.pdf?ts=1523880377>.

<sup>6</sup> “The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government.” *United States v. United States District Court*, 407 U.S. 297, 316 - 317 (1972). See also, Laura K. Donohue, [The Original Fourth Amendment](#), 83 U. Chi. L. Rev. 1181, 1191 (2016): “[W]hat the Framers objected to was not general warrants per se, but the allocation of the discretionary exercise of power to petty officers.”

(i.e., violate the separation of powers -- indeed, even the dreaded Writs of Assistance were at least issued by judges<sup>7</sup>), and (3) are not reasonable under the historic justifications of search by unilateral, judgeless government trespass -- such as exigent circumstances or plain view -- to protect life, property, and the community. Because they violate the right of security in private papers and effects guaranteed by the Fourth Amendment, CIDs are dangerous to many rights shielded by that security.

## 2. CIDs Now Operate in a Vastly Expanded and More Powerful Administrative State Compared to When They Were Institutionalized.

In his 1946 New Deal Court opinion in *Oklahoma Press Publishing v. Walling* institutionalizing judgeless, probable cause-free administrative searches, Justice Wiley Blount Rutledge wrote, “Officious examination can be expensive, so much so that it eats up men's substance. It can be time-consuming, clogging the processes of business. It can become persecution when carried beyond reason.”<sup>8</sup> Therefore, even without mischievous political or ideological motivations, searches using CIDs can be disruptive of businesses and intrusive on rights, and so from a public policy and constitutional perspective we particularly applaud the Bureau for its request for comments about these judgeless, probable cause-free searches.

In the 72 years since Justice Rutledge’s opinion, there has been a major expansion of the administrative state at the federal and state levels, including the 2011 controversial creation of the Bureau. There was also

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<sup>7</sup> Five years before issuing the opinion upholding the Writs of Assistance in *Paxton’s Case* in his new role as a justice, Lieutenant Governor Thomas “Hutchinson himself pointed out the illegality” of the practice under Governor Shirley of using these Writs to search and seize without obtaining prior authorization of the courts. *Founding Families: Digital Editions of the Papers of the Winthrops and the Adamses*, ed.C. James Taylor. Boston: Massachusetts Historical Society, 2018, at 111, <http://www.masshist.org/apde2/>.

<sup>8</sup> 327 U.S. 186, 213 (1946).

the often-criticized 1984 opinion in which administrative interpretations of law are given greater judicial deference, *Chevron U.S.A. v. Natural Resource Defense Council*.<sup>9</sup>

Justice Frank Murphy's brief dissent in *Oklahoma Press Publishing* was therefore remarkably prescient with regard to the Bureau's request for comments and the April 25 submission of the Democrat attorneys general noting "common authority" of CIDs throughout federal, state, and local government. Justice Murphy wrote:

\*\*\* Administrative law has increased greatly in the past few years, and seems destined to be augmented even further in the future. But attending this growth should be a new and broader sense of responsibility on the part of administrative agencies and officials. Excessive use or abuse of authority can not only destroy man's instinct for liberty, but will eventually undo the administrative processes themselves. Our history is not without a precedent of a successful revolt against a ruler who "sent hither swarms of officers to harass our people."

Perhaps we are too far removed from the experiences of the past to appreciate fully the consequences that may result from an irresponsible though well meaning use of the subpoena power. To allow a nonjudicial officer, unarmed with judicial process, to demand the books and papers of an individual is an open invitation to abuse of that power. It is no answer that the individual may refuse to produce the material demanded. Many persons have yielded solely because of the air of authority with which the demand is made, a demand that cannot be enforced without subsequent judicial aid. Many invasions of private rights thus occur without the restraining hand of the judiciary ever intervening.

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<sup>9</sup> 467 U.S. 837 (1984).

Only by confining the subpoena power exclusively to the judiciary can there be any insurance against this corrosion of liberty. Statutory enforcement would not thereby be made impossible. Indeed, it would be made easier. A people's desire to cooperate with the enforcement of a statute is in direct proportion to the respect for individual rights shown in the enforcement process. Liberty is too priceless to be forfeited through the zeal of an administrative agent.<sup>10</sup>

### 3. Use of CIDs Is Now Too Vulnerable to Political Weaponization.

It should not be lost on anyone that only Democrats signed onto the April 25 state attorneys general comments submitted to your office. This seems to suggest the Democrats' claim at pages 1 and 5 of their letter that CIDs are "an indispensable law enforcement tool" certainly has a political or partisan bent.

The claim on page 1 of the Democrat attorneys general submission that the Bureau's implementation of CID authority "proved non-controversial" seems to be without support and oblivious to facts -- and even disingenuous especially given many challenges to state attorney general CIDs. Indeed, in an April 21, 2017 decision in *CFPB v. Accrediting Council for Independent Colleges & Schools*,<sup>11</sup> the D.C. Circuit Court of Appeals did the correct but rare thing of declaring a CID invalid for failing to adequately state the nature of the violation being investigated. See also, "Three Things Companies Hate About the CFPB's Investigative Demands."<sup>12</sup>

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<sup>10</sup> *Oklahoma Press Publishing v. Walling* (Murphy, J., dissenting), note 4 *supra*, at 218 – 219.

<sup>11</sup> No. 16-5174, <https://www.cadc.uscourts.gov/internet/opinions.nsf/688FF4237DE59CF185258109004E0CCD/%24file/16-5174-1672052.pdf>.

<sup>12</sup> C. Ryan Barber, *The National Law Journal*, January 17, 2018,

While we do not expect the Bureau under the current administration to issue CIDs for political reasons or for purposes of invading and intimidating speech, religious, or other rights, future administrations may not be so principled. Certainly the example set by various Democrat attorneys general in weaponizing CIDs against “climate speech” is ample warning that CIDs are in fact used to intimidate or punish speakers who do not fit the progressive orthodoxy. And, the CID recently upheld by the Massachusetts Supreme Court against Texas corporation Exxon Mobil over climate speech<sup>13</sup> indicates that *post hoc*, probable cause-free judicial review doesn’t necessarily “ensure that [CID] recipients’ rights are protected” by judicial supervision, as claimed at page 4 of the April 25 comments submitted by the Democrat attorneys general.

Therefore, while the Bureau is authorized by statute to issue CIDs, we urge contemplation of our comments at the Bureau and among members of the general public.

Respectfully submitted,  
(Entities shown for identification purposes only)

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<https://www.law.com/nationallawjournal/sites/nationallawjournal/2018/01/17/companies-often-grumbled-about-the-cfpbs-subpoenas-mulvaney-wants-to-hear-more/>

<sup>13</sup> See, *Exxon Mobil Corporation v. Attorney General*, *supra*, note 4.

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