

THE ADMINISTRATIVE STATE V. THE
CONSTITUTION: DODD-FRANK AT FIVE YEARS

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THE ADMINISTRATIVE STATE V. THE CONSTITUTION: DODD-FRANK AT FIVE YEARS

THURSDAY, JULY 23, 2015

UNITED STATES SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2 p.m., in Room 226, Dirksen Senate Office Building, Hon. John Cornyn, Chairman of the Subcommittee, presiding.

Present: Senators Cornyn [presiding], Tillis, Durbin, and Franken.

Also present: Senator Lee.

OPENING STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Chairman CORNYN. This hearing of the Constitution Subcommittee of the Senate Judiciary Committee is called to order, and I thank all of our witnesses for being here with us today. I look forward to an interesting exchange.

This week marks the 5th anniversary of the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Eight hundred fifty pages long, 16 titles, vague standards on critical issues, and requiring nearly 400 different rulemakings and an alphabet soup of new bureaucracies, this law is too big not to fail. Fail it has. When President Obama signed Dodd-Frank into law, he said it would end “too big to fail.” But it did not. The big banks are bigger, and the small banks are saddled with regulations that make it hard to compete.

This perverse result should surprise no one. From the start, Dodd-Frank was a wish list of new administrative authority, much aimed at problems that did not cause the financial crisis. As I tell the community bankers in Texas, “Wall Street may have been the target, but you are the collateral damage.”

Today’s hearing is intended to explore many of the constitutional issues raised by Dodd-Frank. In its conception and implementation, Dodd-Frank would be unrecognizable to our Founding Fathers. Take the Consumer Financial Protection Bureau: vague and vast authority, Congress has no power of the purse, the President cannot remove the Director at will, and courts must defer broadly to the Bureau, even though and even when it lacks expertise. These are serious constitutional flaws, and the results are an affront: a President that violated the Constitution to appoint the Director; a Bureau collecting sensitive financial data on millions of Americans

without adequate protections or legally required approval; employees reportedly being told to redo examinations because they did not find violations; and a Director who upsets long-standing precedent and overrules his subordinates to increase the liability of targeted businesses.

However much this should shock us, it should not surprise us. This is what happens when you give incredible power to unaccountable bureaucrats.

James Madison, of course, wrote in “Federalist 47”, “The accumulation of all power, legislative, executive, and judicial, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”

Our Constitution clearly separates powers and for good reason. Dodd-Frank does not. The Financial Stability Oversight Council is another example. Based on vague standards and no real check, the FSOC decides which companies the Government can subject to additional regulation and liquidate under Title II’s Orderly Liquidation Authority, a process itself involving frightening violations of due process.

For that, we have a solution. Senators Toomey, Lee, Crapo, and I have introduced the Taxpayer Protection and Responsible Resolution Act which would replace Title 2 with a bankruptcy process that announces the rules in advance, gives parties due process, and protects the rule of law.

Let us now turn to today’s witnesses:

Ambassador C. Boyden Gray is a founding partner of Boyden Gray & Associates. A graduate of Harvard University and the University of North Carolina Law School, he served in the Marine Corps and then clerked for Chief Justice Earl Warren. He has had a distinguished career as a regulatory lawyer and served as, among many other positions, Counsel to President George Herbert Walker Bush. In litigation regarding the constitutionality of Dodd-Frank, Ambassador Gray represents the State National Bank of Big Spring, one of our wonderful community banks in Texas.

Mr. Deepak Gupta is founding principal of Gupta Wessler. He graduated from Fordham University and Georgetown University Law Center and directed the Consumer Justice Project at Public Citizen. From 2011 to 2012, Mr. Gupta served as senior litigation counsel and senior counsel for enforcement strategy at the CFPB.

Professor Neomi Rao teaches at George Mason University School of Law. She graduated from Yale University and the University of Chicago Law School. She clerked for Judge Harvie Wilkinson on the Fourth Circuit and later for Justice Clarence Thomas at the U.S. Supreme Court. Professor Rao has served this Committee as Counsel for Nominations and Constitutional Law and as Associate Counsel in the Office of Counsel to the President.

Professor Adam Levitin teaches at Georgetown University Law Center. He graduated from Harvard, both undergraduate and law school, and received a graduate degree from Columbia University as well. Professor Levitin clerked for Judge Jane Roth on the U.S. Court of Appeals for the Third Circuit and served as Special Counsel to the Congressional Oversight Panel that supervised the Trou-

bled Asset Relief Program, known as TARP, and currently serves on the CFPB's Consumer Advisory Board.

Dr. Mark Calabria is the director of financial regulation studies at the Cato Institute. He holds a Ph.D. in economics from George Mason University and served as Deputy Assistant Secretary for Regulatory Affairs at the U.S. Department of Housing and Urban Development and after that as a member of the professional staff of the Committee on Banking, Housing, and Urban Affairs.

I welcome all of you again, and I appreciate your being here and for sharing your expertise and testimony with the Committee.

Let me turn to the Ranking Member, Senator Durbin, for any comments he would care to make.

**OPENING STATEMENT OF HON. RICHARD J. DURBIN,
A U.S. SENATOR FROM THE STATE OF ILLINOIS**

Senator DURBIN. Thanks, Mr. Chairman. The title of this hearing, "The Administrative State v. The Constitution: Dodd-Frank at Five Years," sounds like a prize fight. But the truth is the main event we are watching these days is the Republican Party versus Wall Street reform.

It is no secret that since the Dodd-Frank Wall Street Reform and Consumer Protection Act was enacted 5 years ago, Republicans have been obsessed with ending it and really turning Wall Street loose again.

The Republican Party platform specifically calls for the repeal of this law. The top three members of the Senate Republican Leadership were all at one point cosponsors of a bill entitled "The Dodd-Frank Repeal Act." Just a few days ago, in the GOP weekly address, House Financial Services Committee Chair, Jeb Hensarling, said, quote, "It is time we commit to making sure this anniversary is Dodd-Frank's last anniversary."

It seems the GOP is committed to gutting Dodd-Frank any way they can, either in Congress, in the courts, or they hope under a Republican President who will have the ability to appoint or remove the heads of regulatory agencies. I do not understand this hostility to Wall Street reform. Some people have a very short memory.

What do they have against the Consumer Financial Protection Bureau, the only Federal agency that puts the interests of consumers first? This agency has taken on credit card companies, payday lenders, for-profit colleges, and others who have tried to trick and trap consumers with rotten financial products. Holly Petraeus has made her work at the Consumer Financial Protection Bureau a focus on military—men and women in the military and their families being exploited. What is wrong with having an agency that really is trying to protect our military families?

The CFPB so far has achieved over \$10 billion in relief for 17 million consumers through its enforcement actions. Is that bad news or good news? I think it is good news.

Have the Republicans forgotten why Dodd-Frank was created? In 2008, we were standing on the precipice of the greatest economic meltdown in the United States of America since the Great Depression. How did we get there? It started years earlier with the

growth of subprime mortgages, which were often fueled by predatory lending practices.

I remember many years ago debating a previous Senator from Texas, Phil Gramm, on the floor of the U.S. Senate in 2001, over an amendment I offered to curb predatory subprime lending. He fought my amendment, and it failed by one vote. Senator Gramm said, and I quote, “Some people look at subprime lending and see evil. I look at subprime lending, and I see the American dream in action.”

Senator Gramm’s view prevailed. Subprime lending continued, and it did not take long for mortgage companies to start securitizing these shaky mortgages and for Wall Street to create unregulated derivatives based on them. It was a huge, fast-growing house of cards that the financial industry put together, and our regulatory system was unprepared. The financial regulators were either co-opted or behind the curve. It all fell apart a few years later in 2008, when one financial giant after another collapsed: Bear Stearns, Lehman Brothers, Merrill Lynch, AIG, Washington Mutual, Wachovia, and a host of smaller entities. It was a time of panic. Credit markets froze; the stock market swung wildly. We went into a recession. We were losing 800,000 jobs a month in the United States. Millions saw their home values diminish or lost their homes in foreclosure. They also lost a substantial part of their savings.

Who suffered the most from Wall Street’s misbehavior? Main Street Americans. Unemployment rose above 10 percent, 8 million jobs lost. GDP, home values, and household wealth dropped significantly. Foreclosures in the millions.

It was clear we had to get out of the recession, and we did. Our economy has stabilized since those dark days, thank goodness. It was also clear we needed to reform our financial regulatory system and curb risky, predatory financial practices. Congress embarked on a deliberate effort to pass Wall Street reform. We spent 7 months on Dodd-Frank between the introduction of the House bill and its enactment in July 2010. The legislation was thoroughly debated in Committee, on the floor, and in conference. Much thought went into crafting reforms that comply with the Constitution. Dodd-Frank does not place unrestrained power in the hands of regulatory agencies. While the law includes commonsense mechanisms to keep Wall Street and its allies from co-opting regulators, there are meaningful checks and balances.

With respect to this Committee, the Constitution Subcommittee, constitutional challenges have been brought against Dodd-Frank. I am happy to debate their merits again today. I note that in at least four separate cases—one in California; one in Indiana; two in my home State of Illinois—Federal district courts have already rejected constitutional challenges to the Consumer Financial Protection Bureau, and none of the other constitutional challenges to Dodd-Frank’s core provisions have yet to gain any traction in court.

I will also note the irony of this effort to overturn Dodd-Frank. The other party has long complained about judicial activism, but it has now become the standard operating procedure for the Grand Old Party. When they lose in the court of public opinion, they ask judges to overturn the law, and that is what happened with the Af-

fordable Care Act. That effort was doomed to failure, and so is this one.

In closing, I would say this: When the banking industry comes to Capitol Hill and asks Congress to undo Wall Street reform and rewrite the rules their way, I hope my colleagues will remember those grim and ghastly days of 2008. We almost went over the edge of the cliff because of Wall Street's tricks and rigged games and the inability of our regulators to stop them. We do not need to go back to those days. We ought to move forward.

Chairman CORNYN. As you can see, Senator Durbin and I are of one mind on the issues that are raised here. We look forward to hearing from the witnesses, but first will you stand and be sworn? Raise your hand. Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Ambassador GRAY. I do.

Mr. GUPTA. I do.

Professor RAO. I do.

Professor LEVITIN. I do.

Dr. CALABRIA. I do.

[Witnesses are sworn in.]

Chairman CORNYN. Thank you very much. Mr. Gray, we will hear from you first, please.

**STATEMENT OF HON. C. BOYDEN GRAY, FOUNDING
PARTNER, BOYDEN GRAY & ASSOCIATES, PLLC,
WASHINGTON, DC**

Ambassador GRAY. Thank you very much for the opportunity to talk about these issues, which I think are very, very important. My written testimony goes through the details, which I think are fairly well known as to why I and others, some on this panel, think that there are portions of Dodd-Frank that are unconstitutional. I just want to make some preliminary comments about the result of this.

The result of the lack of oversight that is so much part of this legislation is a regulatory flood which is very hard to challenge, here, in the courts, in the executive branch. This leads to a bias for large institutions which can afford the regulations and which in turn leads to larger Government to monitor what these large institutions do, and this is a bad spiral. The biggest banks have grown, doubled in size since the crisis, and the smaller banks—as you say, the collateral damage—have been disappearing. With them the consumer financing or small business financing that is so necessary for job growth in this country; 80 percent of new jobs are small business. The community banks have really suffered.

The biggest banks, Wall Street, you might say, does complain loudly about this legislation, but they do benefit. The chairman of one of the largest banks has referred to Dodd-Frank as his “moat”—that is, his protection against competition. Another chairman of one of the largest banks has said, “Never have regulatory barriers to entry been so high as they are now.” I do not think either of those banks is anxious to get rid of their protection against competition.

The Fed has reacted, I think, well in recent months to raise the capital requirements for these very large institutions, but that, un-

fortunately, does not help the community banks at all. They never were at fault for any of these loans. These loans were the result of the insatiable hunger by Fannie Mae and Freddie Mac, which were not addressed in this legislation, for subprime loans. The community banks now really cannot make a lot of loans like they used to or issue a lot of mortgages as they used to because character loans, which were the basis for the community banking system in the United States, are basically off limits. I think that is a great loss. There are studies that show that character loans have far greater reliability than cookie-cutter, check-the-box loans, and that loss is very, very serious.

The problems with the Consumer Bureau are illustrative of other sections of Dodd-Frank, including Sections 1 and 2, Titles I and II. There is no executive branch oversight. There is no removal authority on the part of the President. You here, in Congress, are handcuffed because the money comes from the Fed, not from you. The courts are required to give deference to whatever the consumer agency wants to do, even at a time when the courts are raising serious, serious questions about the propriety of the doctrine of deference.

Some say, "Well, there is congressional oversight," but congressional overseers get answers to questions like, "Well, what does that matter to you?" I think Cordray was heard to say to one question about the size of the cost of their new offices.

We see the results, of course, with the data gathering, which is detailed in my testimony and in others', and I think that is a dangerous thing. We know about the disappearance of the smaller banks. I was gratified to read that Barney Frank suggested that maybe designating an ordinary insurance company as a SIFI may have been overreach. I think there is a lot more than just that one instance.

Thank you very much. I would be happy to answer whatever questions you have.

[The prepared statement of Ambassador Gray appears as a submission for the record.]

Chairman CORNYN. Thank you, Mr. Gray.

All of your written statements will be made part of the record, without objection. Mr. Gupta.

**STATEMENT OF DEEPAK GUPTA, FOUNDING
PRINCIPAL, GUPTA WESSLER PLLC, WASHINGTON, DC**

Mr. GUPTA. Chairman Cornyn, Ranking Member Durbin, Members of the Committee, thank you for the opportunity to testify here today on the constitutionality of Dodd-Frank, and, in particular, Dodd-Frank's crown jewel, the CFPB, where I was senior counsel 3 years ago. My testimony makes three basic points.

The first thing I want to address is the subject of this hearing, the constitutionality, the constitutional challenges to Dodd-Frank. In my view, these challenges are extreme and utterly lacking in legal merit, and the cases, the four cases that Senator Durbin mentioned, I think bear that out. The courts had no difficulty dispatching these challenges.

In the 5 years since the enactment of Dodd-Frank, its political opponents have invoked every conceivable constitutional prin-

ciple—from the separation of powers, to procedural due process, to the void-for-vagueness doctrine—in an effort to turn back the clock on financial reform and consumer protection. These efforts, as I mentioned, have failed, and they have not got the buy-in of major financial institutions or trade groups. In fact, in the D.C. Circuit case, the *Big Spring* case, the most high profile of these cases in which Ambassador Gray represents the plaintiffs, there are no amicus briefs from any of those organizations or institutions. The legal challenges we are talking about today are truly at the fringe.

Unfortunately, I think they are emblematic of the moment that we live in. As Senator Durbin mentioned, we live in a moment in which every major political disagreement, it seems, gets constitutionalized, from health care to immigration, and now financial reform and even consumer protection are no exception.

In this hearing I hope we can keep two things separate from each other. We can have a legitimate policy debate about the Dodd-Frank Act and about consumer protection. Let us not confuse those debates with constitutional debates. It is very important that we keep them separate lest we make the courts the only branch that has the final answer on these kinds of topics. I think conservatives should appreciate that as well as people on the other side of the aisle.

The principal constitutional argument that is made is really a kind of disguised nondelegation argument. The argument is basically that we are handing power to these administrative agencies and the grant of power is too vague or too broad. That kind of argument, that nondelegation theory, has not been successfully invoked since 1935 at the height of judicial skepticism to the New Deal. That shows you how extreme it is. Even Justice Scalia has explained in a 2001 opinion that the Court has never felt qualified to second-guess Congress regarding the degree of policy judgments that can be left to agencies.

The next batch of challenges concerns Presidential removal. The complaint here is that the President does not have enough control over the CFPB because the Director can only be removed for cause. This argument, too, seeks to turn the clock back to the same year, 1935. That is the year in which the Supreme Court in a case called *Humphrey's Executor* held that the exact same language, limiting removal of Federal Trade Commissioners, met constitutional scrutiny.

At the end of the day, these constitutional arguments on Dodd-Frank and on the CFPB are not so much attacks on those particular pieces of legislation or agencies, but on the very foundations of the modern administrative State.

The second point I want to make, turning now away from the constitutional precedent, is that the basic accountability critiques about the CFPB are groundless, and we should all care about whether our institutions of Government are accountable and transparent. The CFPB was specifically designed to resist capture by special interests. It is at least as accountable to the public as were the existing banking regulators that were captured before the crisis, and in several respects, the Bureau is far more accountable. Its budget is capped. Its rules can be vetoed by a committee of other regulators, something that is not true of any other agency in Wash-

ington. It is subject to special small business reviews that no other financial regulator faces.

The last point I want to make is something that is more immediate to what is going on in this building, and that is, you know, the CFPB has already proven that it is working for consumers. There are efforts to gut the agency outside the normal kind of legislative process. Again, just as with the constitutional challenges, those that do not have the votes to overturn the law are trying to challenge it in the courts. They are also trying to use the back door of the appropriations process to gut the agency.

I just want to flag one issue because I think it has not gotten the attention it deserves, and that is, the hard work that the CFPB is doing to fulfill its statutory mandate to look at the fine print of consumer contracts where there are arbitration clauses—and issue, I know, Senator Franken, you have worked on. There is an effort now in the House to use appropriations language to kill that effort by the CFPB. It should be stopped.

Thank you for the opportunity to testify today, and I look forward to answering your questions.

[The prepared statement of Mr. Gupta appears as a submission for the record.]

Chairman CORNYN. Thank you. Professor Rao.

**STATEMENT OF NEOMI RAO, ASSOCIATE
PROFESSOR, GEORGE MASON SCHOOL OF LAW**

Professor RAO. Thank you very much. Chairman Cornyn, Ranking Member Durbin, distinguished Members of this Committee, thank you for inviting me to testify on the constitutionality of Dodd-Frank Wall Street reform.

Dodd-Frank has raised serious constitutional questions since its inception, but today I will focus on the problems with the Consumer Financial Protection Bureau. This Bureau's structure and power provides an unfortunate case study of this hearing's topic: the Administrative State v. the Constitution.

Five years of regulation and enforcement demonstrate how the lack of constitutional accountability encourages the Bureau to exceed its legal authority and undermine the predictability and stability of the rule of law. Let me just begin with a few first principles.

Our Constitution is, of course, the supreme law of the land. All three branches of the Federal Government have a duty to ensure the constitutionality of administration as they exercise their respective powers. Importantly, this means the Supreme Court has no monopoly on constitutional interpretation, and judicial doctrine does not exhaust the meaning of the Constitution.

Thus, in determining whether the CFPB is constitutional and whether it should be reformed or abolished, Congress may be informed by Supreme Court precedent, yet it need not be limited by it.

Let me turn now to some of the problems with the CFPB, which have already been mentioned.

First, the Bureau enjoys an unprecedented degree of independence from Presidential control and congressional oversight. Such independence, however, finds no place in the Constitution. The

Constitution creates three distinct branches of Government, but no fourth branch for independent administrative expertise.

The CFPB is an agency that implements the law and, therefore, it exercises executive power within the executive branch. Yet the President cannot remove at will the Director of the CFPB. In addition, the agency lacks meaningful accountability to Congress because the Bureau sets its own budget and, therefore, is not responsive to the appropriations process.

What can be done about this super independence? Judicial challenges, such as the one brought by Ambassador Gray, are one possibility. The Court could restore the CFPB's accountability by invalidating the Director's removal protections. This remedy finds significant support in the Supreme Court's recent decision in *Free Enterprise Fund v. PCAOB*. Striking down the removal limits would be a limited judicial remedy that would not invalidate the agency or its regulatory mandate. It would restore a kind of constitutional accountability to the President.

Supporters of the CFPB have defended its constitutionality by emphasizing that the Court is unlikely to fix these problems of independence. They cite jurisdictional limits like standing and cases like *Humphrey's Executor* that uphold removal restrictions.

While I have argued that courts should address these constitutional problems, I agree that these lawsuits face an uphill battle. This, however, only suggests the urgency of congressional action. Congress can unravel the dangerous regulatory independence created by Dodd-Frank, and, indeed, there are many bills proposing to do just that.

Another serious flaw with the CFPB concerns the breadth of its delegated authority, and I am not disguising my nondelegation arguments. I am bringing them right out in front. For example, the Bureau can regulate "abusive practices," a term the Bureau has almost complete discretion to define.

Mr. Gupta and Professor Levitin express a commonly held view that the nondelegation doctrine is dead, yet the Supreme Court has steadfastly maintained the importance and centrality of the principle that Congress cannot delegate its exclusively legislative power.

Admittedly, the Court's nondelegation doctrine has permitted many expansive delegations under the toothless intelligible principle standard, but this is only a rule for courts. It reflects the limits of the judiciary, and it also reflects deference to Congress' judgment about structuring agency discretion. These institutional limitations simply do not apply to Congress.

Congress can withdraw delegated authority or else provide more specific guidance about its enforcement. This would promote rule of law values by providing more notice to regulated entities. Defining core statutory terms would also eliminate the Bureau's "I know it when I see it" approach to enforcing the abusive standard.

Supporters of the CFPB have suggested that nondelegation arguments are on the fringe. Of course, they are only on the fringe if one believes that the full meaning of the Constitution is reflected in Supreme Court caselaw. It never has been. Moreover, judicial doctrine can and does change. The *Free Enterprise Fund* case, decided in 2010, suggests a willingness to reconsider *Humphrey's Ex-*

ecutor and agency independence. Just this past term, Justices Thomas and Alito stressed the importance of the nondelegation principle to individual liberty.

May I have another moment?

The constitutional problems here have real-world urgency because an agency lacking accountability will predictably expand its powers beyond its legal authority. The CFPB's massive data collection, its circumvention of statutory limits, its Orwellian enforcement tactics—all reflect an agency that answers to no one.

Let me just be clear that today my arguments are not simply about the particular policies of the CFPB. The CFPB's policies may be destroying various markets, as critics contend, or it might be defending the underdog consumer, as its supporters say. It is precisely the function of our accountable lawmaking process to reflect these diverse interests. By contrast, an independent agency cuts off this debate and compromise.

Moreover, the agency's expertise is not a substitute for representative Government. Expertise does not answer the hard questions about what the agency should do and at what cost. These are questions that are invariably laden with economic, legal, social, political, and even moral judgments. There is no independent standpoint with the CFPB, just raw authority of the bureaucrats.

Fixing these constitutional infirmities does not require tearing down the administrative state. It only requires that administration occur with proper deliberation and accountability.

Thank you for this opportunity to testify. I look forward to your questions.

[The prepared statement of Professor Rao appears as a submission for the record.]

Chairman CORNYN. Thank you. Professor Levitin.

**STATEMENT OF ADAM J. LEVITIN,
PROFESSOR OF LAW, GEORGETOWN UNIVERSITY
LAW CENTER, WASHINGTON, DC**

Professor LEVITIN. Chairman Cornyn, Ranking Member Durbin, Members of the Committee: Today's hearing is on the constitutionality of the Dodd-Frank Act. Simply put, there is no credible constitutional problem with Dodd-Frank.

While the Act does create some novel administrative structures, the financial regulatory world is full of agencies that do not conform to hornbook administrative law paradigms. None of these agencies have previously caused constitutional consternation. The Office of the Comptroller of the Currency, for example, has been around for over 150 years without a constitutional challenge despite being equivalently sheltered from Presidential and congressional control as today's bugbear, the Consumer Financial Protection Bureau.

The CFPB was deliberately designed to be somewhat politically insulated, with a single Director and independent funding. A point that was made repeatedly in the debates leading up to the enactment of the Dodd-Frank Act was that the existing Federal financial regulators were totally ineffective at consumer protection, in part, because of internal deadlock, regulatory capture, and political pressures.

Congress recognized that consumer interests versus banking interests were inevitably a David-versus-Goliath mismatch. Therefore, if the CFPB were left subject to the horse trading, log rolling, and hostage taking of the appropriations process, the Bureau would never be effective.

As it happens, the CFPB is one of the most dynamic, innovative, and effective agencies in the entire Federal Government. To illustrate, consumer financial protection enforcement actions in the decade before the CFPB was created totaled far less than \$1 billion. In 4 years, the CFPB has already obtained over \$11 billion in consumer relief, and the Bureau is the only financial regulator to finish its Dodd-Frank rulemakings on schedule. Clearly, a motivated and politically insulated agency produces better results, and nothing in the Constitution provides that regulatory agencies must be designed to be as ineffective as possible.

While the CFPB is politically insulated, that does not mean it is not subject to oversight. The CFPB is subject to congressional budget controls, just not through the appropriations process. If Congress wants to change the budget, it has to take affirmative legislative action. That would also be what is required were Congress to appropriate funds for the Bureau. Nothing in the Constitution requires that an agency be subject to appropriations, and, indeed, none of the Federal bank regulators are subject to appropriations.

The CFPB has a single Director, but the Constitution does not require a multi-member commission. The Comptroller of the Currency is not a commission, for example.

The CFPB's Director is removable only for cause, but, again, that is a standard that the Supreme Court upheld in *Humphrey's Executor*. The CFPB is subject not only to the usual checks and balances on administrative agencies, but also to special ones. The usual Administrative Procedures Act requirements and judicial review apply to CFPB rulemakings and adjudications.

The CFPB is the only Federal financial regulator required to go through the SBREFA rulemaking process or subject to an FSOC veto on its rulemakings or subject to an annual GAO audit. The CFPB is also, of course, subject to the usual oversight exercised by Congressional Committees such as this one. Most importantly, Congress is always free to amend Title X of the Dodd-Frank Act. Just get the votes.

There really is not much to say about the constitutionality of the CFPB or any of the other parts of Dodd-Frank, and, you know, it is not surprising that there has been little noise on these issues aside from Ambassador Gray's lawsuit. If the Dodd-Frank Act were so patently unconstitutional, do you not think that the American Bankers Association or the Consumer Bankers Association or the ICBA or CUNA or some of the major banks themselves would have brought litigation? None of them have. Surely a lawsuit would have been a lot cheaper for Citibank, for example, than the \$700 million settlement that it entered into with the CFPB this week. Not one of these entities has even filed an amicus brief in support of Ambassador Gray's suit.

Let us be clear about what the real issue is behind the trumped-up constitutional challenges to the Dodd-Frank Act. The issue is

not principled concerns about the CFPB's constitutionality. Instead, the issue is that certain businesses want to be able to continue profiting from illegal practices against their customers. The Constitution is not being invoked in any sort of principled way to protect fundamental liberties. Instead, it is being cited as part of a campaign to preserve ill-gotten corporate profits.

You do not need to take my word for it. Just read the published scholarship of Professor Rao. She has actually written that the motivation for Ambassador Gray's litigation against the CFPB is to eliminate the CFPB rather than to correct any alleged constitutional defects.

Reasonable minds can differ about the policy choices embodied in the Dodd-Frank Act, and if the detractors of the Act can get enough votes, they can change those policies. The constitutionality of the Act is not seriously in question.

I look forward to your questions and, in particular, to have the chance to address the uproar over CFPB data collection. Thank you.

[The prepared statement of Professor Levitin appears as a submission for the record.]

Chairman CORNYN. Thank you. Dr. Calabria.

**STATEMENT OF MARK A. CALABRIA, PH.D.,
DIRECTOR OF FINANCIAL REGULATION
STUDIES, CATO INSTITUTE, WASHINGTON, DC**

Dr. CALABRIA. Chairman Cornyn, Ranking Member Durbin, and distinguished Members of the Subcommittee, I thank you for the invitation to appear at today's important hearing. I also want to thank the Subcommittee for its interest in hearing from a non-lawyer. I like to think the Constitution is important to all of us, not just lawyers. Just in case there are any tough constitutional questions, I brought my Cato pocket Constitution.

Over the many years I have worked on financial policy, one of the most striking elements continues to be the vast delegation of actual decision-making to executive branch and so-called independent agencies. I would actually agree with some of my colleagues that the CFPB is not new because we have been doing this with a lot of other agencies for a long time, and that is part of the problem.

While I share some of the concerns raised, I want to focus my time on the CFPB, particularly two aspects, but I do want to emphasize in no way should this be interpreted that I do not think there are other flaws in the Act or that there are other flaws of the CFPB. I am going to quickly talk about the funding structure and the bulk collection of consumer data.

As the Committee has heard, the CFPB sets up a very unusual process for funding where it is outside of the budget control, it is outside of the appropriations process. As we have heard, this is argued to be protective of the CFPB from Wall Street. I will set aside the fact that Wall Street is actually not under the jurisdiction of the CFPB. It remains at the SEC and the CFTC. More importantly, the last time I checked, I could not find a single Wall Street lobbyist sitting on the Senate Appropriations Committee. Looked a couple times. Could not find any.

What I did see, however, was earnest, hardworking Members on both sides of the aisle trying to do the difficult and sometimes thankless job of allocating our Federal resources. Let me say I have the full confidence in the Chair, Ranking Member, and other Members of the Financial Services Subcommittee of the Appropriations Committee to competently carry out the job of allocating resources to the CFPB. I have no doubt they will be able to do that job effectively, whoever is in the majority.

Turning to the data collection, many Members will well remember 9/11. I remember it. I was in this building. One of the things that came out of 9/11, the PATRIOT Act, was a vast expansion of data collection by the Federal Government. We were told that only if we had had more information and more data, those attacks could have been avoided. Yet as the 9/11 Commission revealed, it was not a lack of data. It was a lack of connecting the dots, the unwillingness to connect the dots.

Similarly, the financial crisis was met with the same demand for more data as if the overheated housing markets and mortgage markets were not obvious enough from the generally available aggregate data that problems were coming. I will certainly emphasize, as a critic of Dodd-Frank, and as someone who spent his years up here trying to stop the crisis from happening, in no way do critics of Dodd-Frank, certainly myself, want to relive it. What we want to do is avoid another crisis.

Unfortunately, the CFPB has become the lead prophet for this false idol of more data. As GAO has reported, the CFPB has engaged in at least 12 large-scale data collection efforts. At least three of these directly identify individual consumers. The remainder you can combine outside information and identify individual consumers. In my opinion, I do not believe these collections comply fully with the Right to Financial Privacy Act.

Let me also say as a former Federal employee and one subject to the recent OPM data breach, let me clearly say I do not trust the CFPB with my personal data either. In fact, I do not want any of the Government to have my personal data.

Unfortunately, in consolidating all this financial data in one place, the CFPB has basically created one-stop shopping for hackers and leaves consumers at the risk of identity theft and even extortion from hackers.

Of course, that is just the risk from outside the CFPB. Unfortunately, the CFPB's data collection efforts, particularly in the area of credit cards, in my opinion poses significant threats to our Fourth Amendment protections. As Justice Douglas observed in his dissent to *California Bankers*, "A checking account—may well record a citizen's activities, opinions, and beliefs as fully as transcripts of his telephone records." Of course, credit cards are today's checks.

Such concerns are not simply the reflections of the Watergate-era. As recently as 2012, Justice Sotomayor in her concurrence to *United States v. Antoine Jones* correctly observed that, quote, "Awareness that the Government may be watching chills associational and expressive freedoms. The Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse." I think that Justice Sotomayor

was underexaggerating the threat there. She also, in her concurrence, gave the example of identifying medications purchased by online retailers. Of course, such a purchase could potentially be identified within the CFPB's data base of credit card accounts.

For a variety of reasons, the CFPB has become a highly partisan issue. Were it to use the financial records of its critics in an attempt to silence or intimidate these critics, it would not be the first agency to do so.

As Justice Thurgood Marshall sadly observed, "The technique of examining bank accounts to investigate political organizations is, unfortunately, not a rare one."

The CFPB should end these sweeping data collections. I do not think they are needed for—they could actually try to respond to the consumer complaints more often. Plenty of consumer complaints out there.

Let me also end with saying, you know, if I thought that the benefits of Dodd-Frank outweighed the costs, I would be the first to stand up and applaud it. If I thought it would stop future financial crises from happening, I would be the first to stand up and applaud it. In my opinion, if we continue along the path that we are going on today, we are certain to have another financial crisis in the next 10 years that will be worse than the last one. Thank you.

[The prepared statement of Dr. Calabria appears as a submission for the record.]

Chairman CORNYN. I thank all the witnesses for their testimony. We will go with 5-minute rounds, and I will start.

All of us who serve in the Congress have taken an oath to uphold and defend the Constitution of the United States of America, and I find it odd that some of the witnesses would say that only the courts can decide or consider questions of constitutionality, particularly given the fact that courts by the limitation of their jurisdiction to people with standing, ripe cases, can adjudicate cases or controversies. Clearly, Congress' authority is much more broad, is plenary, and so I think it is entirely appropriate for us to consider the constitutionality of these laws, even in the absence of any litigated case that would raise those issues.

Ambassador Gray, perhaps you can start. We have heard from some of the witnesses the purposes for which Dodd-Frank was passed, and most of the concerns, like those raised by the Ranking Member, had to do with the subprime crisis, the credit agencies on Wall Street that graded the paper that was then bought by investors, and the house of cards that was created that eventually collapsed.

Can you tell me what part of that that the State National Bank of Big Spring played?

Ambassador GRAY. It played no part whatsoever. None. I do not think any community bank contributed to the crisis at all, but they are the ones who have suffered—have suffered the most. The answer is nothing at all.

Chairman CORNYN. I believe, Ambassador Gray, you alluded to the number of community banks that are simply disappearing. In States like mine, in rural areas in particular, where the costs of compliance with this new regulatory scheme have simply been so

burdensome, many community banks have simply ceased to exist or have been bought by other institutions.

Professor Rao, Mr. Gupta, and Mr. Levitin said this Committee does not have really any business raising constitutional questions. It strikes me that, especially given the nature of the regulatory state, with all of the protections given to litigants in a court of law, questions of due process, notice, and a right to be heard, the right to be heard by an impartial adjudicator, not just at the first instance but also on appeal, we have seen many instances here of late, for example, like the Securities and Exchange Commission that has been criticized for basically being the judge and jury and executioner without any sort of independent view of the case and an opportunity for people to be afforded some of the basic elements of what we would consider to be due process.

Would you comment on that, please?

Professor RAO. Sure. Thank you. Thank you, Chairman Cornyn. Your comments raise one of the other very significant problems with the CFPB, which, as you say, combines all the three functions of the Federal Government into one. It can make the rules, which is a type of legislative function. It gets to execute and enforce those rules, which is an executive function. It, of course, gets to adjudicate.

You know, our Framers separated powers precisely so that there would be checks and balances in the exercise of Federal power. An agency that combines all the powers of the Federal Government into one does not have those checks and balances. That often leads to abuse, as some of the filed lawsuits have indicated.

Chairman CORNYN. Mr. Gupta, I appreciated your testimony. I would just like to ask, given the challenges that someone in a bank, a financial institution, let us say a community bank like the one that Ambassador Gray represents, given the challenges that they have of getting essentially a fair trial in the administrative process, number one, the people writing the rule are not elected, unlike Members of this panel that can be unelected if people do not like what we are doing, along with the deference that the courts give under the Administrative Procedures Act to the fact finding, and even under the *Chevron* case, a deference in terms of interpreting the law where the law might otherwise be considered ambiguous, along with no opportunity for an appeal before an impartial third party, much as you would, let us say, in a court of law. Isn't the deck stacked against small financial institutions like the one that Ambassador Gray represents such that you understand why they may feel like they cannot get a fair shake?

Mr. GUPTA. Thank you for the question, Senator Cornyn. I do not think the deck is stacked at all, and I think part of the point—this is in the DNA of the CFPB—part of the point of the agency is to level the playing field between big banks and small banks. Before the crisis, you had ten different regulators with partially overlapping and distinct authority. You had different rules for different players in the system.

The idea of the CFPB is if you have one set of rules for, say, nonbanks and banks that are doing the same thing or for big banks and small banks, that levels the playing field. It is one of the rea-

sons that the community bankers were so supportive of this agency throughout the legislative process and in its early years.

Big Spring Bank, by the way, is not actually subject to CFPB enforcement at all, which is one of the reasons its challenge ran aground on standing issues.

Let me get to what I think is the heart of your question, which is the concern about due process. Of course, we should be very concerned about due process, whether it is in the administrative process or in the court system. It is just not true that there is no right to appeal. In fact, you know, the CFPB—

Chairman CORNYN. My question had to do with an impartial third party, not to the agency itself.

Mr. GUPTA. Right, but you can. You can appeal to the D.C. Circuit from any adjudication through the agency, and that is standard within administrative agencies. I think we have not seen that happen yet simply because a lot of the action has been happening in the courts. The CFPB can either go to court, or it can do enforcement in its own process. But either way you have a right, as a small bank or a large bank, to an Article III Judge to ultimately decide that question.

Chairman CORNYN. Senator Durbin.

Senator DURBIN. Thanks, Mr. Chairman.

I would like to address for a moment this question of removal of the Commissioner—pardon me, removal of those who are in charge at the CFPB. There has been reference to the *Free Enterprise* case, and I did a quick read here. I would not want to have to stand and address the class on it, but the quick read I made suggests that the Court found that it violated separation of powers to have a second layer of insulation in this case so that the Public Company Accounting Oversight Board members were removable—removable only for cause by the Commissioners of the SEC, and the SEC Commissioners were likewise only removable for cause by the President.

As I understand it, the President under the CFPB has the power to directly remove the Director. Is that correct, Mr. Gupta?

Mr. GUPTA. That is exactly right. The President's ability to remove the Director is unobstructed. The only way in which it is obstructed is that there is a for-cause requirement, but that has been true of the FTC for 100 years. It is true of lots of agencies, and it entirely distinguishes this case from the *Free Enterprise* case.

Senator DURBIN. Professor Rao, am I pronouncing your name correctly?

Professor RAO. Yes, you are.

Senator DURBIN. Do you take exception to that, that the distinction made in the *Free Enterprise* case was a dual layer of removal, and in this case with the CFPB, it is only a single layer?

Professor RAO. Yes, Senator Durbin, that is correct. That is a correct factual statement of the difference between the CFPB and the PCAOB.

Senator DURBIN. That will help me in my grade.

[Laughter.]

Professor RAO. My argument is that the reasoning of the *Free Enterprise Fund* case goes beyond the double layer of removal protection. If you read that case, it seems quite clear that Chief Jus-

tice Roberts is talking about the importance of removal generally for Presidential control. He suggests that the removal power is an essential part of Article II and of the President's control as the Chief Administrator.

While that case does not address the first layer of removal, I think its reasoning and its logic strongly casts doubt on *Humphrey's Executor* and agency independence more generally.

Senator DURBIN. The FTC decision of many decades ago about removal for cause being sufficient?

Professor RAO. Sure, that case, *Humphrey's Executor*, from, you know, the 1930s, that case said that the FTC Commissioners could be insulated for cause removal because they exercised quasi-legislative and quasi-judicial powers and, therefore, the FTC was not part of the executive branch.

An interesting thing, *Humphrey's Executor* is still considered to be good law by the Supreme Court. However, its reasoning has been strongly undermined. Even Justices who recognize that agencies can have a certain amount of independence and that for-cause removal restrictions are valid, they all recognize that these independent agencies are part of the executive branch. That is a very interesting shift in the way of thinking about these agencies, and I think that also casts doubt on the holding of *Humphrey's Executor*, because if these agencies are part of the executive branch, they should be accountable to the President.

Senator DURBIN. My staff just informed me the district courts have ruled that the *Humphrey's Executor* case does apply to the CFPB.

Professor RAO. They need to hold that because they are not the Supreme Court. We will see maybe perhaps in another case.

Senator DURBIN. You are hoping your former boss gets his hands on this.

[Laughter]

Dr. Calabria, you talked about the legal system, a basic characteristic of a good legal system is one where private parties can read the law and have a strong sense of whether they are in compliance. I am dealing with for-profit colleges and universities, the most subsidized industry in America. Ninety—

Dr. CALABRIA. Let us cutoff those subsidies.

Senator DURBIN. Ninety percent—90 percent of their revenue comes from the Federal Government. I am dealing with students, deep, head over heels in debt to these for-profit schools, which account for 10 percent of the graduates from high school and 44 percent of student loan defaults. Many of them are forced to sign these arbitration clauses which keep them out of court so that when they try to resolve their problems, they really do not have access to due process. They have access to whatever the schools decide will be the rules to play by. Is that fair?

Dr. CALABRIA. There are at least three or four things in there that probably are not fair, so where to start? Certainly, I would encourage Congress to rethink the subsidy system that encourages this behavior.

I think the point about arbitration is whether it is properly disclosed or not ahead of time. I do not have a problem with arbitration if you know what you are getting into—

Senator DURBIN. Excuse me. Would you have had a problem when you were 19 years old on your first day at college deciding whether an arbitration clause in your student loan was the right thing for you?

Dr. CALABRIA. That is a good question. What I would say is I still think if it is clearly disclosed, then to me what more do we want? If we are going to say that it is unfair, it is not clear to me that it is unfair, if that is your basic question.

Senator DURBIN. I thought I was pretty smart in those days, but I am not sure I would have been able to explain an arbitration clause as I was signing up for school.

Dr. CALABRIA. I am not sure I would have understood interest deferment and how the interest rate was going to reset and all the subsidies, either. Of course, the whole structure of it is unfair.

Senator DURBIN. If the structure is unfair, that is what the CFPB is all about, is to get to the question of fairness, not whether it is spelled out in that loan agreement, but whether it is a fair relationship.

Dr. CALABRIA. Let's pull some of this apart. I think we probably all agree that it is fine, not just fine but needed, to have an agency go out there and get rid of fraud. That is agreed with. And then, you know, fairness is fairly subjective. If the question is about that I think this party has more bargaining power than that party, well, then, I generally do not think that the role of the Federal Government is to decide what the balance between bargaining is. I think the role of the Federal Government is to make sure that you have got the deal that you bargained for and that you were not defrauded. I think we all agree on that. I certainly am not saying that there should be no protections against fraud.

Senator DURBIN. Thank you.

Chairman CORNYN. Senator Lee.

Senator LEE. Thank you, Mr. Chairman. I want to thank all of our panelists for their very careful attention to detail in this.

Professor Rao, I would like to talk to you about some of your testimony and some of the constitutional implications that we have here. Would it be fair to say that when the Supreme Court articulates a constitutional principle, it is not always articulating the extent to which it is willing to enforce that principle? Would that be accurate?

Professor RAO. Yes, I think that is correct.

Senator LEE. You refer to this in connection with the nondelegation doctrine. The Court has been pretty consistent in how it has articulated the principle of nondelegation. Much of this goes all the way back to Charles de Montesquieu, who influenced the Founding Fathers and who understood that there is a difference between the power to make law and the act of delegating to someone else the power to make a law.

This principle exists in the nondelegation principle itself as articulated in a number of Supreme Court opinions, even though it is not necessarily enforced in those opinions. I think there is an important point that I believe you make reference to in page 7 of your written testimony and the text accompanying footnote 33 wherein you make the argument that there is also support for this in the Presentment Clause. Do you think this represents what could be

an independent basis upon which some of this authority could be challenged?

Professor RAO. Under the Presentment Clause.

Senator LEE. Yes.

Professor RAO. Because delegations allow the agencies to make law without presentment.

Senator LEE. Yes.

Professor RAO. Right, it is without either bicameralism or presentment, right? Agencies, you know, one of the problems with the way agencies exercise power is if they are actually setting the rule of conduct and if they are making the significant and important questions that the legislature should be making, then they are essentially exercising a kind of legislative function. As you say, they are doing so outside of the requirements of bicameralism and presentment.

Senator LEE. Right, and so, in the case of *Chadha*, you had a legislative veto that was being challenged both on the grounds that there was a lack of bicameralism and because there was a departure from the principle of presentment. The Supreme Court concluded that, regardless of the bicameralism problem, it was enough to say that there was an absence of presentment. You did not have bicameral action by Congress followed by presentment and signature of acquiescence by the President.

That was enough for the Court to say, okay, the final bell here, the final action being taken is Congress, and it is not acting in the manner prescribed by Article I, Section 7, so that is a problem.

It seems to me that there is a corollary to that that says that when the final legislative act, as you might say, is undertaken by an executive branch agency, they are issuing a new rule carrying implications, a new rule of general applicability, imposing legally binding restrictions on members of the public, could that not also be characterized as a legislative act undertaken in the absence of bicameralism and presentment as prescribed by Article I, Section 7.

Professor RAO. I think in some instances it certainly could be characterized that way. Of course, the difficulty is that the executive branch does have the authority to fill in the gaps, right? You know, where they are implementing the laws, there are certainly certain rules and regulations that the executive branch can properly enact.

Senator LEE. Sure.

Professor RAO. The difficulty is separating those legitimate rule-making functions that are part of the executive power from the power that is vested exclusively with Congress—right?—the law-making power. That is a tough line to draw, which is one of the reasons why courts, as you say, have not wanted to draw that line very often.

Senator LEE. Correct. It is not always possible perhaps to state with mathematical precision in a single mathematical formula exactly where that line is crossed. Yet you can know when it has been crossed in many instances.

I would imagine, for example, you would agree that we would probably have—in addition to perhaps a nondelegation problem, you might well have a presentment problem. If Congress went to

such a degree of abstraction as to say we shall have good law—this is in an act of Congress—and we hereby delegate to the herewith created U.S. Commission on the Creation of Good Laws the power to create good law, the power to promulgate rules carrying the force of generally applicable law that are good, and they will also have the authority to implement those laws, would that not create a Presentment Clause problem?

Professor RAO. Yes, that would seem to, even under current supreme doctrine, violate the nondelegation—

Senator LEE. At the time *Chadha* was decided, in the mid-1980s, the practice of using legislative veto provisions, not just of adopting a legislative veto provision, but also of allowing Congress to exercise either a bicameral or in some cases a unicameral legislative veto had become rampant for more than 50 years, had it not?

Professor RAO. Yes.

Senator LEE. In fact, we had not just dozens, not just scores, but literally hundreds of legislative veto provisions on the books. Few doubted the lack of constitutionality in these provisions. No court had ever held that this violated the Constitution. Yet was it any less violative of the Constitution?

Professor RAO. No.

Senator LEE. It was not. I see my time has expired. Thank you, Professor.

Professor RAO. Thank you.

Senator LEE. Thank you, Mr. Chairman.

Chairman CORNYN. We have statements for the record from Americans for Financial Reform and 14 other consumer, community, and civil rights groups, also from Public Citizen and from Ranking Member Leahy. All of them will be made part of the record, without objection.

[The information appears as submissions for the record.]

Chairman CORNYN. Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman.

Mr. Gupta, thank you for your testimony. You mentioned mandatory arbitration in your spoken testimony, and also you highlighted the release of the CFPB's study on mandatory arbitration clauses as well in your written testimony.

I have led a coalition of more than 50 Members of Congress in urging the CFPB to use its authority under the law to ban forced arbitration in consumer contracts, and I was very pleased when Director Cordray announced last week that the Bureau would be moving forward with a rulemaking on this matter.

However, one of the challenges in this area is that a lot of people do not really understand why arbitration is such an important issue. It is not always easy to see how it affects people's day-to-day lives.

Based on your experience, can you discuss how mandatory arbitration clauses in consumer contracts, financial services contracts, how they impact people's everyday lives?

Mr. GUPTA. Thank you so much, Senator Franken, for the question and for your work, really important work on this issue. I think you are exactly right that the problem here is this issue is so important and yet underappreciated because every time we get a credit card or we get a cell phone, a student loan, chances are that

tucked into the fine print somewhere is a mandatory binding arbitration clause. You say those words, and people sort of tune out. They do not understand what it means, and they do not think it is going to affect them.

What it really means is that, you know, when Congress passes laws, we think it enshrines some important right, and we assume that right is going to be enforceable somewhere. If the right just sort of vanishes, then all of the other things that you do around consumer protection can become meaningless. That is the threat of mandatory arbitration. It means that you are giving up, without knowing it, you are giving up the right to court, you are giving up the right to a jury, you are giving up the right to have the dispute be public, you are giving up the right to precedent, you are giving up the right to an appeal. If you are talking about consumer claims that are, you know, small-dollar claims, which they often are against banks, it means that you are giving up any economically feasible way of enforcing those claims because they are either going to be enforced by people banding together and bringing those claims in court, or it is just not going to happen.

You know, we were debating about this for years. The CFPB's study I think completely pulls the rug out of so many of the arguments that are made by the financial industry, because it is 780-page document, it is the most comprehensive look at what consumer arbitration means. It shows that over 2011 and 2012, the period that they looked at, the biggest arbitration provider, the American Arbitration Association, the CFPB looked at how many claims were there under \$1,000 that went to the Arbitration Association, were actually decided, and what did consumers get? The number is not 4,000 consumers or 400 consumers. It is four consumers. There were four consumers that actually got some relief in claims under \$1,000 in the American Arbitration Association.

That shows that arbitration is not a better, cheaper, or faster way of resolving disputes. It just means the claims are going away. It is an exit clause from the civil justice system. It is entirely appropriate that the CFPB exercise its authority under the law to study this issue and to right the rules as you have suggested. I am not surprised that there are efforts now in the House Financial Services appropriations bill to kill the CFPB's study by paralysis.

Senator FRANKEN. They want to get rid of their rulemaking authority on things like mandatory arbitration.

Mr. GUPTA. Yes, but they are not saying it. They are not actually coming out and saying that that is what they are doing. Instead, they have come up with this list of, you know, 100 hurdles that the Bureau would have to jump through to do the study and just sort of kill it quietly. I hope that does not happen.

Senator FRANKEN. Let me move on to Mr. Levitin. For 5 years, Wall Street banks and their allies in Washington have gone after the Wall Street reform bill and the Consumer Financial Protection Bureau. I think what they are saying is very disconnected from what average people think about Wall Street and about the need for a consumer watchdog.

Can you—I know I am running out of time, so I will just—can you explain how an agency such as the CFPB is accountable and responsive to Congress as well as to the general public? Because

I have gone to CFPB on mortgages—rules on mortgages in rural areas and gotten them to change their rules. I go to them all the time and get changes.

Is that okay, Mr. Chairman? I am sorry.

Professor LEVITIN. Thank you for the question, Senator Franken. There are some formal ways the CFPB is accountable and I think a bunch of very important informal ways that need to be considered.

Formally, it starts with the Senate advice and consent for the appointment of the Director. The CFPB is subject to the Administrative Procedures Act for rulemakings and adjudications. It is subject to judicial review. For major rulemakings that are going to affect small businesses, there is a special rulemaking process that the CFPB is one of three agencies in the entire Government that has to comply with what is called the SBREFA process.

There is an FSOC veto over CFPB rulemakings. It is the only agency in the entire Federal Government whose rulemakings can be vetoed by other agencies.

There is an annual audit by the GAO. There are congressional hearings. There have been some 55 appearances on the Hill in the past 4 years by senior CFPB officials. As you note, Members of Congress exercise significant moral suasion over the CFPB.

Beyond that, there are things like—there is just direct public input. The CFPB has a consumer complaint data base. Over 650,000 complaints have been filed. That is a level of consumer participation unparalleled by any Federal rulemaking in history, I believe. I do not think any rulemaking has gotten 650,000 comments. This is an important intelligence source for the Bureau. It lets the Bureau know what real Americans are concerned about.

The CFPB has a number of specially constituted advisory boards. I have the honor of serving on one, which is statutorily required, but there is also a Small Bank Advisory Board and a Credit Union Advisory Board, which the CFPB was not required to create, but it wanted to hear from those smaller community financial institutions. Lest you think that these yes-men advisory boards, let me point out that the Consumer Advisory Board includes the CEO of Advance America, one of the largest payday lenders in the U.S.; a senior American Express executive; a vice president of the Bank of Hawaii; and a debt collection attorney. The CFPB wants to hear not just from consumers but from all segments of the industry that it regulates, and it is trying to put out really good rules. It is not just trying to squash banks. It is trying to find the right balance between consumer protection and access to credit, which is also part of its statutory mission.

Senator FRANKEN. I am sorry to have asked a question at negative 35 seconds.

Chairman CORNYN. Senator Tillis.

Senator TILLIS. Thank you, Mr. Chair. Mr. Gray, would you like to opine on your view of CFPB's accountability?

Ambassador GRAY. Yes, sir. The point that I think I would like to make is that the defects of oversight by the various branches of Government are cumulative, and it is the totality and the combination of this lack of oversight which I think creates the problem.

There was previous discussion about whether, from Senator Durbin with Professor Rao, about whether one or two levels of insulation from removability was a problem, and there is only one level with the Consumer Bureau, so what is the problem? The problem is that “peek-a-boo” case, the *PCAOB* case, the *Free Enterprise* case, what it really stands for, I think, is that these problems compound, and when you have two levels of separation, it is much worse than just one. When you have at the Consumer Bureau not only executive branch formal insulation and insulation by you, because you have no oversight financial—I mean, taxpayer oversight, and when the courts are required to defer to this one agency which may not know anything about the subject matter, above all the other agencies that may share jurisdiction and do know about the subject matter, what you have is a combination which means the agency has no limits.

I think a point I would like to add to that is that I sort of welcome the notion that the CFPB is going to engage in rulemaking, because at least the public gets a chance to provide comment and has some notice as to what the violation is. What the Consumer Bureau is more likely to do as a matter of practice is—and Cordray has so said publicly—he is not going to define “abusive.” He is just going to know it when he sees it. You are not going to know whether you have violated the abusive standard until after you have been charged with it. That is—talk about delegations of authority. That is a totally wide open delegation of authority and runs counter to the development of the law in this country for—well, since the Second World War with the Administrative Procedure Act. That is—you add that to the other problems, and you have an agency that can do anything it wants.

This data collection exercise makes the Office of Personnel Management problems seem to me to be trivial because the data breach that—God knows whether the Chinese have already looked at my credit card accounts. I do not know. The data breach possibilities are enormous, and there has been no rulemaking by the Bureau to say the benefits exceed the costs or that they balance out. There has been none of that. It has just been this big data grab, and what they are going to do with it, nobody knows and nobody has any way to find out.

Senator TILLIS. Mr. Gupta, you had mentioned—and, Mr. Gray, I may come back to you, because when we were talking about the executive branch’s authority over the CFPB, you seemed to react to at least something that Mr. Gupta said. One thing I was curious about, the CFPB, we had a lot of discussions about information security and surveillance here a few weeks back and were worried about the process—the national security priorities over personal security. We dealt with that about a month ago.

The CFPB has access to some of the most detailed information about the citizens, and they say, well, we have some, but we redact it or we do not use it.

If the CFPB had a data breach and all of this information was exposed, would that be a terminate-for-cause event?

Mr. GUPTA. I think the question assumes—

Senator TILLIS. Could the President fire the head of the CFPB if we had that sort of a data breach?

Mr. GUPTA. If the CFPB Director exercised negligence or malfeasance, yes; under the terms of the statute, yes. But——

Senator TILLIS. That would seem to suggest that they would have had to have been directly involved in the execution of the policies or information security. It would seem like they would be one level removed. Even though it would be a disastrous consequence, it would be difficult for me to determine how they could be terminated for cause if that is the standard that the President would be held to.

Mr. GUPTA. Negligence is included within that, so I think it would meet the standard. Let me be clear because I think the premise of the question is, with due respect, its incorrect. I know that there has been a lot of talk about the data collection at the CFPB. Director Cordray testified about it last week. The Bureau simply is not collecting personal information about consumers. It is instead aggregating information looking for market trends. I want to, if I may—you know, I know that Professor Levitin has looked into this far more than I have, and I think it would make sense for him to address the question.

Chairman CORNYN. The witnesses will answer. He will ask the questions.

Senator TILLIS. Actually, I was trying to get more to breakdowns within the CFPB that could be bad management that are not necessarily for-cause events that the President could not actually make a change in the leadership. That to me is a limit to the executive branch's control over the person running the show. That was the point I was making. Maybe I used a bad example.

Mr. Gray, you—and I am going over time. One thing I have learned with attorneys, if you do not have a lot of questions, you do not really need to worry because you are not going to be able to ask many of them. I did want to come back. Mr. Gray, you seemed to—you did not get a chance to answer this question when Senator Cornyn asked Mr. Gupta about executive oversight. Did you have any opinion in terms of the limits of the executive branch over the CFPB with respect to constitutionality?

Ambassador GRAY. With respect to constitutional reality—again, I would repeat what I said before. It is the aggregation of all of these difficulties that creates the central problem. I can see that, yes, removal authority would make the CFPB more responsive, but you have to have a President who is in a mood to remove. I am not sure our current President would be in a mood to remove, so I am not sure that in the current circumstances that matters so much.

You go two steps over. What about you guys? What about the Senate of the United States? What about the House? Then what about the courts? They are all cut out; you are all cut out. That gives Cordray the opportunity to say, as I said in my—I do not think you were here, maybe, but during my prepared testimony, when he was asked the question about the cost of their new building, he said, "What does it matter to you?" That is the kind of insubordinate kind of response that you are going to get from an agency that——

Senator TILLIS. That is not accountable.

Ambassador GRAY [continuing]. Does not have any accountability to anybody.

Senator TILLIS. My last—I just have one question, Chairman, and this is a clarification for either Mr. Levitin or Mr. Gupta. It was my understanding that the transactional data that we are gathering from financial services industry, I understand it is being used for aggregating purposes. It was my understanding that at the point of entry there is indicative data that is being captured. Is that not correct?

Professor LEVITIN. It depends on the data set, but basically there are three data sets that the CFPB gets that have some personally identifiable data. Two of them get anonymized, and, frankly, one of them is about auto sales. The CFPB might know that someone bought a car. That is not particularly useful for a cyber criminal to know that. That is data that comes from public records actually, from State and DMV records.

What is important to know is that the CFPB does not have your credit card number. If a cyber criminal were to get all of the data the CFPB—if there was to be a hacking of the CFPB, it is not useful information for a cyber criminal. No one can make a purchase using the data that they get from the CFPB. The CFPB does not know—

Senator TILLIS. I do not want to go much further, but—so, in your view, the data that is captured either at least initially before it is redacted or the party is made anonymous, there is no point in time that the CFPB receives information that could in any way be triangulated to compromise the identities of those financial transactions that are being captured?

Professor LEVITIN. I do not want to say absolutely never. I cannot say that there is no possibility. It would be very difficult. Most of this is aggregate-level data, so the CFPB will not know what your transactions are. They will not know if you have an account with Ashley Madison or if you are buying firearms or bongs. They do not know that. They do not have transaction-level data. They have aggregate account balance data. They will know how much a particular individual has on a credit card balance, but not what the individual has been buying. The concerns that Dr. Calabria raised, those really just do not exist here. I understand concerns about, you know, Big Brother Government having too much data. That is not what is going on here. The CFPB needs this data, among other things, to do fair lending enforcement. If you want to look for disparate impacts, you have to have data. The attack on CFPB data collection is really an attack on fair lending laws.

Chairman CORNYN. Professor Levitin, let me just follow up on that. You are saying at the time that the CFPB receives the information from banks, from credit agencies, from motor vehicle transactions, none of that has the identity of the consumer?

Professor LEVITIN. There is one data set—I am sorry. There are three data sets that have some consumer identity. One of them is a very small data set of about 11,000 arbitration cases. It is not an ongoing data collection. It is a one-time thing used in support of the report that the CFPB was required to author, to undertake as part of the Dodd-Frank Act.

Two other data sets are rather small, and they do have some personally identifiable information. The CFPB anonymizes that data, and then the staff works with the anonymized data.

Chairman CORNYN. It is not anonymous in the hands of the financial institution that the CFPB collects it from. It is identified by the consumer, I presume. It would be a mortgage, it would be a car purchase and the like. Are you saying that CFPB anonymizes it?

Professor LEVITIN. Some of it, I believe, is anonymized directly by the CFPB, but it is important to know the data, most of it is not coming directly from financial institutions. It is coming from other Federal bank regulators which collect the same, if not more data. The OCC has long collected much more credit card data than the CFPB does, and we have not heard anything about that.

Chairman CORNYN. I think all of us find it ironic, to say the least, that we were debating the National Security Agency's meta data collection program where there were three data points: There was a phone number, presumably from a foreign source that could be matched up perhaps with a domestic phone number, which would reveal the time and duration of the call, that is it. To go back, then it would be required to go to the FISA Court and show cause to get additional information. Yet, according to the GAO, the CFPB collects data on 700,000 vehicle transactions per month, 10.7 million consumer credit reports a month, 173 million mortgages a month, 5.5 million student loans, and up to 75 million individual consumer credit card accounts monthly.

I think all of us realize that the more data you collect and the more you compare that data with these different sources, you pretty well can build a profile of an individual, and I strikes me as a lot more intrusive than what—without the similar protections that were given under Section 215 of the Foreign Intelligence Surveillance Act, because there is not any court overseeing the CFPB, and, of course, we have already talked a little bit about the hacking concerns in the hands of the Chinese or Russian hacker or anybody else, or just a common criminal. It strikes me that there is a lot of risk.

Dr. Calabria, can you talk a little bit about how your concerns about the intrusive nature of this data collection?

Dr. CALABRIA. Certainly, and let me clarify. You know, it is not just a concern about CFPB. I am concerned about the data and have long been concerned about the data that other bank regulators collect. I feel like a common theme that I sometimes hear is, well, other bank regulators do this, therefore it is okay.

For instance, I think Mr. Gupta mentions in his testimony that the Federal Reserve performed really badly before the crisis. Let me say something. I 100 percent agree with is a generality. Therefore, we must make the CFPB more like the Federal Reserve.

No, the Federal Reserve is unaccountable. I testified in the other body last week about how unaccountable the Federal Reserve is. This is a common theme. To me, if your standard for accountability is the Federal Reserve, then I would submit you do not actually believe in accountability.

Let us get to the actual data question. I think Adam downplayed this. Reading from the GAO report right now, for instance, on the storefront payday lending loans, GAO says as many as 40 million total loans are being collected. I do not think 40 million is a small number myself. Some of the aspects even collected by other bank

regulators, such as the HMDA data on mortgages, we have long known that you can identify, link into courthouse records who HMDA individuals are in those records.

Of course, we hear this every time. What I would emphasize, the agency does not actually need this to do its job. It can respond and collect consumer complaints. It could actually follow up on those consumer complaints. It can investigate those consumer complaints. As I talk about in my testimony, this is one of the things that the Framers were very concerned about with the Fourth Amendment, that you would just see these fishing expeditions where you do these wide-sweeping—and so in all due respect to my friend Adam, I feel like I read his testimony, and there is a presumption of guilt on the part of anybody in the financial services industry in his testimony there. I think that is the approach of the CFPB.

To me, let us respond to actual complaints. Let us investigate those actual complaints. These broad, sweeping data collections where you are just looking for things rather than actually responding to things that are illegal is very troublesome to me.

Chairman CORNYN. Professor Rao, I would like to follow up on the question that Senator Lee asked. If Congress delegated to an agency, “Write a good law for us,” and so the agency passed a rule or set up—there is an agency to administer or to write those rules and to pass those good rules, and then when they found a violation, they could adjudicate that and force a taxpayer to come before them and have the authority to penalize it and the like, you get the idea. Is there any limit to the extent to which Congress can simply delegate its responsibilities? I understand that the courts have not since, what, 1935, I think Mr. Gupta said, actually found a violation of the nondelegation doctrine. It strikes me as we have gotten on a very slippery slope, and now Congress delegates far too much responsibility to people who are simply unaccountable to the voters.

Would you describe where you think that line—where that crosses the line?

Professor RAO. I certainly think that there is a line that can be crossed, and the “Agency”—for, you know—“Goodness and Niceness” or the “Commission for Goodness and Niceness” almost is certainly on the wrong side of that line, and I think it would be on the wrong side of that line even under current judicial doctrine.

I think one way that it has been characterized is that Congress has to make all of the important decisions that are important enough for Congress to make them. It is a bit circular, but, you know, it really reflects something that Chief Justice John Marshall said many, many years ago about what Congress has to decide for itself.

Chairman CORNYN. As I vaguely recall my legal training, the whole purpose of the administrative state was they provided expertise and detailed rulemaking that would allow the implementation of the basic legal framework that was passed in a law by Congress. Dodd-Frank is 850 pages long, and it calls for 390 new rules, and many of them include vague standards, which I assume under current legal doctrine the courts, rather than intrude in that, they would simply defer to the agency.

Does this massive delegation of authority to Federal bureaucrats concern you? What, if anything, would you suggest that Congress do about it?

Professor RAO. I think it is a tremendous concern precisely because the idea that Congress cannot legislate is at the foundation of our republican form of Government. We have laws, and the laws need to be made by people who are accountable to the people and not made by agencies that are unaccountable.

I think it is a tremendous problem, and the solution to it is really in Congress' hands to write more—as you mentioned, Dodd-Frank is already incredibly long. If it is going to confer authority on agencies, that authority perhaps should be more specified, right? It should cabin them more.

One of the problems—I mentioned this in my written testimony—is that because the CFPB, for instance, has such sweeping authority, it can circumvent even the specific limitations that Congress does put on its authority. There is a problem with delegations, and even where Congress tries to be specific, broad delegated authority allows them to evade those limits.

Chairman CORNYN. Ambassador Gray, in your view, does Dodd-Frank's Title II Orderly Liquidation Authority scheme afford companies facing resolution due process?

Ambassador GRAY. I mean, no, sir, I do not think it does because most of the parties or the counterparties to an institution that is undergoing resolution are not supposed to be told about it. It is supposed to be done in secret. A court is given 24 hours to respond, and if they do not respond, whatever the Government says should be the plan will go into effect. There is a real gag order in the form of criminal penalties if anyone leaks the pendency of the proceeding.

Most of the people involved are not told until after the fact or will not find out until after the fact what has happened. I do not know of any precedent anytime in American history—maybe the Alien and Sedition Acts going back a couple hundred years. I do not know of any recent, modern precedent where you have such secret court proceedings.

I can understand, for example, for a FISA Court involving national security, that has to be secret. This is a purely domestic matter, and the courts are instructed that they cannot review major portions of the basis for the intervention. Congress cannot do anything about it until later.

There is a fiction out there—not fiction, but a narrative that the OLA is good because it does not involve any taxpayer funds. That also means it does not involve any oversight by the Senate or the House. How can this be done without taxpayer funds? There is an internal tax that the OLA has. They can get unlimited funding by the Treasury to do whatever they want to do, and then they can get it paid back by taxing or levying fees on the financial community.

You know, I do not—that is a tax. I do not think it is—I am not even sure that is constitutional. It certainly deprives everybody of any kind of review over what happens. I am told by people on Wall Street and elsewhere that the purpose of the law was to codify the kind of occurrence that happened with the AIG where certain

creditors were paid off 100 cents on the dollar, when the regulators could have gotten a hair cut along with what they got from other creditors.

I think your bill addresses these problems in a very systematic and fair way and reintroduces, you know, the 100-year tradition of bankruptcy law in this country where you treat people fairly and with notice and people understand what is going to go on, and there is full court review, including a resort to the Tucker Act if at the end of the day you feel you have been mistreated.

I certainly wish you luck with your legislation, and I hope it gets enacted.

Chairman CORNYN. The purpose, of course, for our legislation is to try to restore the resolution process to a legal framework that already exists with rules everybody knows about ahead of time which are impartially applied, which is to me the opposite of sort of an ad hoc resolution process done in secret. We have seen through the GM bankruptcy, where favoritism is displayed toward different creditors and some are left out in the cold and others are favored, the dangers of a politicized process, and including one that does not have sort of transparency and preordained rules.

I would just like to ask two last questions, and then any other questions that Senator Tillis has. The President has said that Dodd-Frank would end "too big to fail." I would like to see a show of hands of everybody who believes that Dodd-Frank ended too big to fail.

The record will reflect no hands were raised other than mine, which was not because I think it did but because I was trying to be an example for anyone who did.

Professor Levitin, you wrote Dodd-Frank Act's Orderly Liquidation Authority are not and never can be credible guarantees against bailouts. Is that still your position?

Professor LEVITIN. Very much so. I am skeptical that we will ever see Title II actually deployed. No one wants to find out how well it is going to work, and because of that, I think that if we have a major financial institution that is on the verge of failure, there will be a bailout, whether it is legal or not, and afterwards we will all wag our fingers and say, you know, "How did possibly happen?" We will be right back where we started.

Chairman CORNYN. Senator Tillis, do you have anything else?

[No response.]

Let me say to each of the witnesses, thank you very much for answering our questions and sharing your expertise and advice for the Committee.

This hearing is now adjourned—or I should say, before I do that, that there could well be other written questions that might be sent, or statements that will be made part of the record. We will leave the record open for a while in order for that to be accomplished, so just for your information.

Now, we are adjourned.

[Whereupon, at 3:32 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

APPENDIX

Submitted by Chair Durbin:

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Hearing before the
United States Senate,
Committee on the Judiciary,
Subcommittee on the Constitution

THE ADMINISTRATIVE STATE V. THE CONSTITUTION:
DODD-FRANK AT FIVE YEARS

July 23, 2015

Statement of Amb. C. Boyden Gray

I am grateful for the opportunity to testify before this Subcommittee, on the constitutional flaws inherent in the creation and operation of the Consumer Financial Protection Bureau, under Title X of the Dodd-Frank Act.¹ The CFPB's structural unconstitutionality is a matter of fundamental importance—as important today as it was on the day that President Obama signed it into law, or the day that he unconstitutionally appointed Director Cordray to lead it without the Senate's advice and consent. Indeed, the CFPB's unconstitutionality is all the *more* important today, because the passage of five years has only illustrated all the more clearly, in concrete terms, the harmful consequences of vesting a regulatory agency with effectively unchecked power.

I have had the honor of testifying previously on these issues. In 2012, I addressed the CFPB's unconstitutionality, and Cordray's unconstitutional “recess” appointment, before the House Oversight Committee²; and in 2013 I addressed the

¹ Pub. L. No. 111-203, 124 Stat. 1376 (2010).

² *Uncharted Territory: What Are The Consequences of President Obama's Unprecedented "Recess" Appointments?*, 112th Cong. (Feb. 1, 2012), available at

similar structural constitutional flaws of Dodd-Frank's Title I (Financial Stability Oversight Council) and Title II (Orderly Liquidation), before a subcommittee of the House Financial Services Committee.³ I attach my testimony on Titles I and II as Appendix A.

But most importantly, I am co-counsel to several parties litigating a constitutional challenge to the CFPB, to Director Cordray's recess appointment, and to FSOC in federal court.⁴ It is no accident that a community bank is the lead plaintiff in that case: community banks have been hit very hard by the CFPB's unchecked powers, and unlike Wall Street banks they cannot simply hire an army of lawyers and lobbyists in perpetuity. Just as big government and bureaucratic discretion inherently favor the biggest businesses over small upstarts, so community banks—and the communities and Main Streets they serve—bear the brunt of the CFPB's regulatory onslaught.

<http://www.boydengrayassociates.com/uncharted-territory-what-are-the-consequences-of-president-obamas-unprecedented-recess-appointments/>.

³ *Examining Constitutional Deficiencies and Legal Uncertainties in the Dodd-Frank Act*, 113th Cong. (July 9, 2013), available at <http://www.boydengrayassociates.com/examining-constitutional-deficiencies-and-legal-uncertainties-in-the-dodd-frank-act/>.

⁴ And State plaintiffs are challenging Orderly Liquidation. *State Nat'l Bank of Big Spring v. Lew*, No. 1:12-cv-01032 (D.D.C. filed June 21, 2012), *appeal pending*, No. 13-5247 (D.C. Cir. filed Aug. 7, 2013). The president of State National Bank of Big Spring, my client in the lawsuit, testified before a subcommittee of the House Financial Services Committee. *The Adverse Consequences of the Dodd-Frank Act on Community Bank Customers and Borrowers: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Financial Servs.*, 112th Cong. (July 19, 2012) (statement for the record of Jim Purcell, CEO, State National Bank), available at <http://financialservices.house.gov/uploadedfiles/hhrg-112-ba09-wstate-jpurcell-20120719.pdf>.

In my prepared statement today, I would like to briefly reiterate the constitutional arguments that we are pressing in our litigation, and which I have written and spoken on elsewhere,⁵ and to respond to the assertion that alternative forms of “oversight” somehow mitigate Dodd-Frank’s nullification of constitutional checks and balances. Then I will examine two specific points highlighting the fruits of the CFPB’s unconstitutional structure: its astonishingly aggressive efforts to sweep up Americans’ personal financial information; and the trend toward further consolidation in the banking industry, which exacerbates the “too big to fail” (or “TBTF”) problem.

As the Dallas Federal Reserve Bank has succinctly stated, “[f]or all its bluster, Dodd-Frank leaves TBTF *entrenched*.”⁶ Ironically, two days ago the *Wall Street Journal*’s front page reported: “Fed Tells Big Banks to Shrink or Else.” I say that this is ironic because, as will be discussed at the end of my testimony, Dodd-Frank itself has helped to perpetuate and exacerbate Too Big to Fail, meaning the Federal Reserve is trying to fix a problem of the government’s own making. If the Federal Reserve does impose stricter capital requirements on big banks, then there

⁵ See, e.g., C. Boyden Gray & Jim R. Purcell, *Why Dodd-Frank is Unconstitutional*, WALL. ST. J., June 21, 2012; C. Boyden Gray & John Shu, *The Dodd-Frank Wall Street Reform & Consumer Protection Act of 2010: Is It Constitutional?*, 11 ENGAGE: THE JOURNAL OF THE FEDERALIST SOCIETY’S PRACTICE GROUPS (Nov. 2010), at <http://www.fed-soc.org/publications/detail/the-dodd-frank-wall-street-reform-consumer-protection-act-of-2010-is-it-constitutional>; C. Boyden Gray, *Congressional Abdication: Delegation Without Detail and Without Waiver*, 36 HARV. J. L. & PUB. POL’Y 41 (2013).

⁶ FEDERAL RESERVE BANK OF DALLAS, CHOOSING THE ROAD TO PROSPERITY: WHY WE MUST END TOO BIG TO FAIL—NOW, 2011 ANNUAL REPORT 21 (emphasis added), available at <http://www.dallasfed.org/assets/documents/fed/annual/2011/ar11.pdf>.

would be all the less need for heavy-handed regulation of banks, especially community banks.

I. The CFPB Is Unconstitutional

Our Constitution separates the legislative, executive, and judicial powers precisely in order to limit government and preserve liberty. As Alexander Hamilton wrote in Federalist No. 9, the “regular distribution of power into distinct departments” and “the introduction of legislative balances and checks” were the first of several “means, and powerful means, by which the excellences of republican government may be retained and its imperfections lessened or avoided.” By contrast, as James Madison (quoting Montesquieu) warned in Federalist No. 47, “[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.” Thus, the Framers separated the powers in order “to divide and arrange the several offices in such a manner as that each may be a check on the other.”⁷

Independent agencies pose a well-recognized challenge to the separation of powers, by vesting in the agencies not just executive but also “quasi-legislative” and “quasi-judicial” powers, while purporting also to remove them from full executive control. The Supreme Court famously endorsed such an agency structure in *Humphrey’s Executor v. United States*.⁸ Even if that case was rightly decided within the four corners of the issues before the Court in 1935, the subsequent eight decades have seen the proliferation of even more forms of agency “independence” or

⁷ Federalist No. 51 (Madison).

⁸ 295 U.S. 602 (1935).

“insulation,”⁹ posing ever greater threats to the Constitution’s limited, tripartite form of government.

Fortunately, the Supreme Court drew a line in the sand five years ago, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.¹⁰ The Court held that although *Humphrey’s Executor* and other cases allow Congress to place one layer of independence between the President and an agency, the Court has never allowed an agency to enjoy *more* independence than that. And thus the Court struck down the Sarbanes-Oxley Act’s second layer of independence between the President and the Public Company Accounting Oversight Board.

“The added layer of tenure protection makes a difference,” the Court explained.¹¹ “This novel structure does not merely add to the Board’s independence, but transforms it.”¹² “Indeed, if allowed to stand, this dispersion of responsibility could be multiplied. If Congress can shelter the bureaucracy behind two layers of good-cause tenure, why not a third?”¹³ Ultimately, the Court recognized that we can preserve the Framers’ republican government only by ensuring that the agencies remain meaningfully accountable to the people: we “can have a government that functions without being ruled by functionaries, and a government that benefits from

⁹ See, e.g., Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15 (2010).

¹⁰ 561 U.S. 477 (2010).

¹¹ *Id.* at 495.

¹² *Id.* at 496.

¹³ *Id.* at 497.

expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders.”¹⁴

The CFPB’s structure runs afoul of the same basic constitutional principles. True, Dodd-Frank does not stack multiple forms of insulation between the President and the CFPB, as Sarbanes-Oxley did for the PCAOB. Instead of combining multiple forms of independence vertically, it does so *horizontally*—i.e., by combining the CFPB’s independence from the President¹⁵ with the CFPB’s additional independence from *Congress*, by nullifying Congress’s power of the purse over the CFPB and funding it instead through automatic payments from the Federal Reserve—more than \$600 *million* annually.¹⁶ Furthermore, Dodd-Frank expressly decreases the judicial branch’s power over the agency by mandating that courts give extra deference to the CFPB’s statutory interpretations.¹⁷ And in all of

¹⁴ *Id.* at 499.

¹⁵ Dodd-Frank § 1011.

¹⁶ *Id.* § 1017(a).

¹⁷ See *id.* § 1022(b)(4)(B) (“DEFERENCE—Notwithstanding any power granted to any Federal agency or to the Council under this title, and subject to section 1061(b)(5)(E), the deference that a court affords to the Bureau with respect to a determination by the Bureau regarding the meaning or interpretation of any provision of a Federal consumer financial law shall be applied as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law.”). If the CFPB already were entitled to *Chevron* deference for its interpretation of the Federal consumer financial laws, then this provision would be superfluous. Rather, Dodd-Frank’s framers evidently recognized that the CFPB is *not* entitled to such deference in interpreting these statutes, because the CFPB is not the only agency that administers these statutes. (Indeed, the CFPB’s own proponents often urge that FSOC, too, is charged in part with administering them. See Part II, below.) If a statute is not committed to the CFPB’s *exclusive* interpretive authority by Congress, then the CFPB is not entitled to *Chevron* deference. See, e.g., *Dodge v. Comptroller of the Currency*, 744 F.3d 148,

this, the extraordinarily independent agency is delegated effectively unlimited regulatory powers.¹⁸ Taken together, those features violate the Constitution’s separation of powers by creating a regulatory agency far more “independent” and powerful than anything ever approved by the Supreme Court.

Dodd-Frank’s nullification of Congress’s appropriations power over the CFPB is particularly dangerous. As James Madison stressed in Federalist No. 58, the “power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.” But Congress’s purse is powerless over the CFPB, because the CFPB does not rely on appropriations. Instead, Dodd-Frank entitles the CFPB to more than **\$600 million every year**, payable out of the Federal Reserve on the CFPB’s demand.¹⁹ Dodd-Frank goes so far as to order the relevant congressional committees not even to “review” the CFPB’s automatic funds.²⁰

156 (D.C. Cir. 2014) (“the court owes no [*Chevron*] deference to” an agency’s interpretation of a statute that “several agencies administer”).

¹⁸ Dodd-Frank § 1031 (empowering the CFPB to regulate and litigate “unfair,” “deceptive,” or “abusive” lending practices).

¹⁹ Specifically, the CFPB is entitled to up to 12 percent of the Federal Reserve’s operating expenses. Dodd-Frank § 1017(a). According to the CFPB, this equals \$618.7 million in FY2015, and \$631.7 million in FY2016. CFPB, *The CFPB Strategic Plan, Budget, and Performance Plan and Report* 11 (Feb. 2015), available at http://files.consumerfinance.gov/f/201502_cfpb_report_strategic-plan-budget-and-performance-plan_FY2014-2016.pdf.

²⁰ Dodd-Frank § 1017(a)(2)(c). A related provision further states that the Office of Management and Budget does not have “any jurisdiction or oversight over the affairs or operations of the Bureau.” *Id.* § 1017(a)(4)(E).

Moreover, the CFPB can keep funds that it collects via “civil penalties.” Specifically, if “victims cannot be located or such payments [to victims] are otherwise not practicable, the Bureau may use such funds for the purpose of consumer education and financial literacy programs.”²¹ To date, the CFPB claims to have collected \$286 million in civil penalties, but of that amount nearly \$40 million has not been returned to victims,²² an apparent windfall to the CFPB.

And the CFPB is not afraid to boast its independence from Congress (at least not when such boasts suit its purposes). The agency has crowed that its statutory entitlement to “funding outside the congressional appropriations process” ensures its “*full independence*” from Congress.²³ The Framers would be stunned, to say the least, to hear that a regulatory agency enjoys “full independence” from Congress.

The Supreme Court correctly (and unanimously) held that President Obama’s original attempt to appoint CFPB Director Cordray without the Senate’s advice and consent was unconstitutional.²⁴ Director Cordray’s eventual reappointment, with Senate confirmation, means that he is no longer unconstitutionally appointed—but

²¹ *Id.* § 1017(d)(2); see also *Consumer Financial Civil Penalty Fund*, 78 Fed. Reg. 26489 (May 7, 2013).

²² “Consumer Financial Protection Bureau: By The Numbers” (July 15, 2015), available at http://files.consumerfinance.gov/f/201507_cfpb_factsheet-by-the-numbers.pdf.

²³ CFPB, *The CFPB Strategic Plan, Budget, and Performance Plan and Report* 81 (Apr. 2013) (emphasis added), available at <http://files.consumerfinance.gov/f/strategic-plan-budget-and-performance-plan-and-report-FY2012-14.pdf>.

²⁴ *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (striking down the NLRB members appointed with Director Cordray).

he still directs an unconstitutional agency.²⁵ Congress must not wait for the Supreme Court to act again; it must undertake the work of restructuring the agency according to constitutional limits.

II. The CFPB's Structural Unconstitutionality Cannot Be Cured By Other Forms of "Oversight" That Its Proponents Inaccurately Invoke

Despite the CFPB's unprecedented status as a regulatory agency independent from both the President and Congress, insulated from judicial review and wielding open-ended powers, its proponents have attempted to confuse the issue by asserting that the agency's unconstitutionality is mitigated by other forms of "oversight." This is epitomized by a chart published²⁶ on the "Credit Slips" blog:

Comparison of Oversight of Selected Federal Regulatory Agencies									
	CFPB	EPA	FDIC	FRB	FTC	OCC	OTS	SEC	SSA
APA Rulemaking	X	X	X	X	X	X	X	X	X
APA Adjudication	X	X	X	X	X	X	X	X	X
Budget Subject to Appropriations		X			X			X	X
Budget Capped	X								
OIRA Review of Economically Significant Regs		X			X	X	X		X
OIRA SBREFA Review	X	X							
FSOC Veto	X								
Annual GAO Audit	X								
Term in Office <5 Years		X							
5-member Commission			X	X	X			X	
Bipartisan Representation Requirement			X		X				
Presidential Removal without Cause		X				?	?		
Congressional Oversight	X	X	X	X	X	X	X	X	X

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²⁵ After Cordray received Senate confirmation, he published a one-paragraph announcement purporting to "affirm and ratify" the CFPB's pre-confirmation actions. 78 Fed. Reg. 53734 (Aug. 30, 2013). But neither the "de facto officer doctrine" nor other doctrines empower Cordray to singlehandedly cure the unconstitutionality of his own past actions by simply waving that *pro forma* wand. To cure the unconstitutionality of rulemakings that the CFPB issued under its then-unconstitutionally-appointed director, it must rescind and re-promulgate those regulations with a full opportunity for public comment and judicial review.

²⁶ <http://www.creditslips.org/creditslips/2011/05/cfpb-oversight.html>

As you can see, Prof. Levitin’s chart attempts to show that the CFPB is actually subject to *more* oversight than other federal agencies. But his chart is deeply flawed. Its significant inaccuracies include the following:

“Budget Capped”: The chart says that the CFPB’s budget is “capped.” But that is not true. The CFPB receives its aforementioned, automatic payments from the Federal Reserve—in FY2016 that will be \$631 million, as noted above, in addition to the civil penalties that the CFPB keeps. And the CFPB can ask Congress for even *more* money, if it finds itself unable to make ends meet on more than \$600 million per year. But if an automatic grant of \$631 million is a “capped” budget, then “capped” has lost any real meaning.

“FSOC Veto”: The CFPB’s proponents often note that the Financial Stability Oversight Council, an inter-agency council, has veto authority over the CFPB. But they rarely admit that this is a “veto” only nominally:

First, the “veto” applies only to the CFPB’s *“final regulations”*—not to enforcement or supervisory actions, not to investigations, not to agency “guidance,” and not to any other means by which the CFPB governs the regulated community.²⁸

Second, even in the narrow context of final regulations, the FSOC cannot veto the CFPB unless its regulation “would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk”—a criterion so extreme that it likely will never be triggered.²⁹ (If the

²⁸ Dodd-Frank § 1023(a).

²⁹ *Id.*

CFPB’s proponents have ever identified a CFPB regulation—either actual or hypothetical—that would meet that standard, then I have never heard of it.)

Last, but not least, even if the FSOC were confronted with a CFPB regulation that actually meets that extreme statutory standard, it still cannot veto the rule unless the FSOC members endorse the veto by a two-thirds supermajority.³⁰ With FSOC’s ten voting members, that would require a 70% supermajority. But more importantly, *the CFPB is one of the FSOC’s ten voting members*, which means that the FSOC cannot veto the rule unless *seven of the other nine members vote for a veto*—a 78% supermajority of non-CFPB members.

In short, the FSOC has a nominal “veto” that will never actually be used.

“Congressional Oversight”: Finally, the aforementioned chart asserts that the CFPB is subject to “Congressional Oversight.” That, too, is truer in theory than in reality. As noted above, Congress does not actually have any power of the purse over the agency, which means that the agency is largely free to disregard Congress.

And that is precisely what the CFPB has done and continues to do, rebuffing Congress’s good-faith questions in almost comical fashion—as Rep. Neugebauer, former chairman of the House Financial Services Committee’s Oversight Subcommittee noted in 2012.³¹ The CFPB’s defiance of congressional oversight—or, as mentioned above, what the CFPB calls its “full independence” from Congress—is epitomized by Director Cordray’s refusal to answer Congress’s questions on the

³⁰ *Id.* § 1023(c)(3).

³¹ Rep. Randy Neugebauer, *A \$447 Million Consumer Alert*, WALL ST. J. (Sept. 19, 2012), *available at* <http://www.wsj.com/articles/SB10000872396390444620104578006182400443070>.

CFPB's overspending of hundreds of millions of dollars on its new headquarters—or, as he told Congress, “*why does that matter to you?*”³²

Similarly, Director Cordray has told Congress that he does not find it “useful” to define “abusive” lending practices in advance, and instead he will define it on a case-by-case basis.³³ He also claims that the agency has power (“exception authority”) to nullify statutes that conflicted with the CFPB’s own priorities.³⁴

Those are not the statements of an agency that sees itself as subject to meaningful “oversight” by Congress.

III. The CFPB’s Lack of Constitutional Checks and Balances Is Exemplified By Its Massive, Secret Collection of Americans’ Financial Information

As noted above, the Framers believed that constitutional checks and balances would protect individual liberty and promote good government. Especially Congress’s power of the purse, which Madison believed was “the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people.” The absence of such tools of accountability leaves the

³² <http://www.youtube.com/watch?v=5IxSfJ638cs>; Michael Leahy, *CFPB Director Swats Down Congressional Question About \$215 Million Spent On New HQ: ‘Why Does That Matter to You?’*, BREITBART.COM (Mar. 5, 2015), at <http://www.breitbart.com/big-government/2015/03/05/cfpb-director-swats-down-congressional-question-about-215-million-spent-on-new-hq-why-does-that-matter-to-you/>.

³³ *How Will The CFPB Function Under Richard Cordray*, Hrg. before the House Oversight Committee, Subcomm. on TARP, Financial Servs., and Bailouts of Public and Private Programs, 112th Cong. 69 (Jan. 24, 2012).

³⁴ *Holding the CFPB Accountable: Review of Semi-Annual Report to Congress*, Hrg. before the Senate Committee on Banking, Housing, and Urban Affairs, 112th Cong. 8 (Sept. 13, 2012).

CFPB free to undertake reckless policies. This is especially evident in the CFPB's collection of scandalous amounts of personal financial information.

A. Consumer Credit Cards, Mortgages, and Credit Reports Data

On March 13, 2012, the CFPB signed a contract with Argus Information and Advisory Services LLC for the "collection, transmission, validation, aggregation, reporting, storage, and analysis of credit card data."³⁵

For a year, the CFPB operated this program under the public radar. But on April 17, 2013, Bloomberg reported that the CFPB was "gearing up to monitor how millions of Americans use credit cards, take out mortgages and overdraw their checking accounts."³⁶ It reported that the CFPB's contract with Argus, worth \$15 million, involved credit-card information from nine unnamed banks.³⁷ It further reported that the CFPB had promised to pay Experian, a Dublin-based credit-monitoring company, \$8.4 million "to provide data on 5 million to 10 million consumers."³⁸ The CFPB's own assistant director for research was quoted as saying,

³⁵ *Argus Information and Advisory Services LLC CFP12C00001*, USASPENDING.GOV, available at <https://www.usaspending.gov/transparency/Pages/TransactionDetails.aspx?RecordID=B614ECF5-E6B8-3C2A-5A42-F922A0DB3571&AwardID=16177347&AwardType=C>.

The contract was a fixed-priced contract for one year with four, one-year options. *Credit Card Data Analysis Services*, FEDERAL BUSINESS OPPORTUNITIES (Mar. 14, 2012), available at <https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=64043f84f1b0fa0ccb4d3fc819d0712d>.

³⁶ Carter Dougherty, *U.S. Amasses Data on 10 Million Consumers as Banks Object*, BLOOMBERG BUSINESS (April 17, 2013), available at <http://www.bloomberg.com/news/articles/2013-04-17/u-s-amasses-data-on-10-million-consumers-as-banks-object>.

³⁷ *Id.*

³⁸ *Id.*

“I understand that people don’t want firms [accumulating massive data repositories], so why would you want the government doing it?’ . . . ‘It seems invasive.’”³⁹

A few days after the Bloomberg article, CFPB Director Richard Cordray appeared before the Senate Banking Committee, where several Senators pressed him on the CFPB’s data grab. Under questioning from Senator Crapo, Director Cordray attempted to justify the data-gathering by stating that high-quality data would enable the CFPB to do high quality cost benefit analysis of its regulations.⁴⁰ Further, he argued, “big data” is already extensively used in the private sector, and the CFPB is merely trying to “keep up” with the private sector by purchasing already available information.⁴¹ Finally, he attempted to assure the committee members that all of the data that the CFPB received was anonymous.⁴² But when Sen. Crapo pressed him to answer whether the CFPB could dig into the data to get personal information, Director Cordray could not answer that personal information cannot be identified—instead, he said only that the CFPB had no interest in personal information.⁴³

³⁹ *Id.*

⁴⁰ *The Consumer Financial Protection Bureau’s Semi-Annual Report to Congress Before the S. Comm. On Banking, Housing, and Urban Affairs, 113th Cong. 7 (Apr. 2013).*

⁴¹ *Id.*

⁴² *Id.* at 8.

⁴³ *Id.*

In answer to questioning from Senator Johanns, Director Cordray explained that the CFPB was collecting three types of data: credit card data, national mortgage data, and credit record data.⁴⁴ The credit card data was purchased from Argus, which was already used by other institutions for similar data.⁴⁵ The national mortgage data was obtained from the Federal Housing Finance Agency (FHFA), which in turn collected the data in real time.⁴⁶ Lastly, the credit record data was purchased from the same source from which the Federal Reserve Board of New York purchased its data.⁴⁷ Senator Johanns noted that the CFPB's data collection seemed "downright creepy."⁴⁸

As a result of the committee hearing, many became concerned with the nature and the extent of the CFPB's data collection.⁴⁹ Judicial Watch submitted a FOIA request and received documents listing contracts with Argus, Experian, and Deloitte Consulting for gathering, storing, and sharing credit card data, as well as

⁴⁴ *Id.* at 10.

⁴⁵ *Id.*

⁴⁶ *Id.* at 10–11.

⁴⁷ *Id.* at 11.

⁴⁸ *Id.* at 11.

⁴⁹ See, e.g., Steven Nelson, *CFPB Accused of Targeting 5 Million Americans for 'Warrantless' Financial Surveillance*, U.S. NEWS (June 27, 2013), available at <http://www.usnews.com/news/blogs/washington-whispers/2013/06/27/government-targets-5-million-americans-for-warrantless-financial-surveillance-watchdog-says>; Tom Fitton, *Obama Admin's Consumer Financial Protection Bureau Collecting Credit Card Data*, BREITBART.COM (July 8, 2013), available at <http://www.breitbart.com/big-government/2013/07/08/is-the-obama-administration-collecting-your-confidential-credit-card-data/>.

an “indefinite delivery, indefinite quantity” (IDIQ) contract with Experian.⁵⁰ The documents also revealed that the contract with Argus contained a provision acknowledging that the contractor “may obtain access to non-public, confidential information, Personally Identifiable Information (PII), or proprietary information.”⁵¹ The contract also stated that Argus may be required by the CFPB “to share credit card data collected from the Banks with additional government entities as directed by the Contracting Officer’s Representative (COR).”⁵²

The CFPB’s collection and storage of personal data raises grave privacy concerns. Documents describe the original plan: “The [accounts analyzed] shall include 5 million consumers, and joint borrowers, co-signers, and authorized users. The initial panel shall contain 10 years of historical data on a quarterly basis.”⁵³ While “names, addresses and full account numbers of the 5 million study subjects will be ‘masked to preserve confidentiality,’ . . . ZIP codes, Census block numbers, birth dates and ages of subjects will be recorded.”⁵⁴ The “anonymized” study subjects will also have “a persistent consumer identifier making it possible to follow consumers over time.”⁵⁵

⁵⁰ Fitton, *supra* note 49.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Nelson, *supra* note 49.

⁵⁴ *Id.*

⁵⁵ *Id.*

In the next semi-annual Senate committee hearing, Senator Crapo again raised concerns about the depth and extent of the CFPB's data collection.⁵⁶

SENATOR CRAPO: The bureau, as I understand it, has set a goal of monitoring 80 percent of the U.S. credit card market. Just extrapolating from that, using the U.S. Census Bureau data, that goal would represent about **900 million credit card accounts**. Is that an accurate reflection of the Bureau's goals and their activities in terms of reviewing credit card activity?

DIRECTOR CORDRAY: Again, the bureau is not about reviewing any number . . . of individual consumer accounts. What we are doing instead is illustrated by what we just did a month ago. Congress required us to do a report on the credit card industry and the credit card market to examine how the CARD Act has affected that market and to be able to report to you, you as a member of Congress . . . on how you can make policy around this and how you did with the CARD Act. we cannot do that without data.

. . .

SENATOR CRAPO: And would the number of accounts be approximately 900 million credit card accounts?

DIRECTOR CORDRAY: I do not know what the number of the accounts is, and, again, that is not our focus. It is to oversee the number of credit card issuers, not . . . monitor the behavior of individual—

SENATOR CRAPO: I understand your stated purpose, but the point is that in order to achieve the purpose you describe, you are collecting individualized information on, as we calculate it, about 900 million accounts. I just want you to acknowledge whether that is correct.

DIRECTOR CORDRAY: What I want to say to you is we are not doing anything new. The notion . . . that we are coming up with some brand new database or some brand-new data or it is somehow different in kind—it is not.

. . .

⁵⁶ *The Consumer Financial Protection Bureau's Semi-Annual Report to Congress Before the S. Comm. On Banking, Housing, and Urban Affairs*, 113th Cong. (Nov. 2013) (emphasis added).

SENATOR CRAPO: I take your answer to be that is accurate and that other institutions and private sector entities are doing the same thing. Is that your answer?

DIRECTOR CORDRAY: I do not dispute—I do not dispute what you are saying, but I think it is important to understand, again, this is not about monitoring individual consumer behavior. I do not care about any individual, and we are not tracking anybody’s credit card spending of any sort. What we are trying to do is, if I am going to oversee the largest financial institutions in this country and be able to take enforcement actions as we have done against a number of credit card issuers we have to know what they are doing; we have to know what the effect is on the market; we have to know whether laws are being complied with.

I make no apologies. We need the data to do that, and we cannot do it without the data, nor could we report to you what is happening in the credit card market so that you could consider whether you want to make adjustments on the CARD Act or not.⁵⁷

Privacy concerns are compounded by fears of potential security breaches.

Some have voiced concern that information compiled in these extensive databases could be “reverse engineered” by hackers to identify individual records.⁵⁸ The CFPB has done nothing to assuage these fears. In testimony before the House Financial Services Committee, CFPB Director Cordray was unable to guarantee that consumer information could be kept safe.⁵⁹

The CFPB’s refusal to guarantee the security of consumers’ personal financial information is a major red flag, given the Office of Personnel Management’s

⁵⁷ *Id.* at 8–9.

⁵⁸ Richard Pollock, *Federal Consumer Bureau Data-Mining Hundreds of Millions of Consumer Credit Card Accounts, Mortgages*, WASHINGTON EXAMINER (Jan. 29, 2014), available at <http://www.washingtonexaminer.com/federal-consumer-bureau-data-mining-hundreds-of-millions-of-consumer-credit-card-accounts-mortgages/article/2543039>.

⁵⁹ *Id.*

disastrous failure to secure government employees' personal information. Hackers targeted OPM because it had collected vast quantities of personal information and stored them in a single place—the perfect target. The CFPB's immense collection of personal financial information is just as lucrative of a target.

In addition to worries over credit information, there are concerns about the CFPB's joint effort with FHFA to “collect data on 53 million residential mortgages originated between 1998 and 2014.”⁶⁰ Even the FHFA's own project manager for its national mortgage database acknowledges, “[i]t is easy to reverse engineer and identify the people in our data base.”⁶¹

As a result of these concerns, Senator Crapo requested that the U.S. Government Accountability Office (GAO) launch an investigation into the CFPB, and GAO compiled a report to Congress in September of 2014.⁶² The report compiled a list of the major CFPB data collections, which included 10.7 million individual consumer credit reports collected on a monthly and quarterly basis, more than 500 million credit card accounts collected on a monthly basis, and 29 million active mortgages and 173 million total mortgages collected on a monthly basis.⁶³

⁶⁰ Matt Doffing, *Banks in a Bind on CFPB Tracking of Customer Data*, CFPB JOURNAL (Feb. 4, 2014), available at <http://cfpbjournal.com/issue/cfpb-journal/article/banks-in-a-bind-on-cfpb-tracking-of-customer-data>.

⁶¹ *Id.*

⁶² GOVERNMENT ACCOUNTABILITY OFFICE, CONSUMER FINANCIAL PROTECTION BUREAU: SOME PRIVACY AND SECURITY PROCEDURES FOR DATA COLLECTIONS SHOULD CONTINUE BEING ENHANCED 3 & n.6 (2014).

⁶³ *Id.* at Highlights 2.

While finding that other regulatory agencies gather similar data,⁶⁴ the report stated that because it did not initiate the data collections through notice-and-comment rulemaking, the CFPB has not shown any cost-benefit analysis for collecting the data from either the agency's or the regulated institutions' perspective,⁶⁵ and that the CFPB's data collection may impose greater costs on banking institutions than other regulators.⁶⁶ In the end, the GAO reported several ways that the CFPB needs to improve its security and privacy protection.⁶⁷

The CFPB recently said that it would crack down on banks that amass "big data," because the collection of such data can harm consumers.⁶⁸ How ironic.

B. FIS, Fiserv, and Jack Henry Overdraft Data

In November of 2014, the CFPB ordered several data processing institutions, primarily Fiserv, FIS, and Jack Henry, to submit data in regards to their overdraft services.⁶⁹ Fiserv and FIS responded to the order in May.⁷⁰ Fiserv stated that it relied on the CFPB's assurance that it was only using the data for research

⁶⁴ *Id.* at Highlights 1.

⁶⁵ *Id.* at 33.

⁶⁶ *Id.* at 35.

⁶⁷ *Id.* at Highlights 1–2.

⁶⁸ Allison Grande, *FTC, CFPB Setting Sights on 'Big Data' Enforcement*, LAW360 (May 11, 2015), available at <http://www.law360.com/articles/654132/ftc-cfpb-setting-sights-on-big-data-enforcement>.

⁶⁹ Roy Urrico, *CUNA, ABA Dispute CFPB Overdraft Order*, CREDIT UNION TIMES (June 8, 2015), available at <http://www.cutimes.com/2015/06/08/cuna-aba-dispute-cfpb-overdraft-order>.

⁷⁰ *Id.*

purposes in turning over the information.⁷¹ According to Fiserv, the information, which covered 60 data points, does not include “institution name, location or other identifying information,” and “[t]here was no personally identifiable consumer information involved in the order’s data request.”⁷² FIS likewise claims to have removed all identifying information from the data they sent to the CFPB.⁷³ But Fiserv warns that the cost of providing the overdraft data to the CFPB will “require thousands of hours of effort across its organization.”⁷⁴ Fiserv, therefore, warned its customers of potential price increases resulting from the additional burden on the company.⁷⁵

The CFPB’s assertion of authority over banks’ overdraft protections is yet another example of the agency increasing its jurisdiction well beyond even the broad powers granted to it by Dodd-Frank. As the Independent Community Bankers of America (ICBA) recognizes, the overdraft protections that banks offer their customers are “services to their customers as a convenience to them because it

⁷¹ Roy Urrico, *Fiserv Responds to CFPB Overdraft Order*, CREDIT UNION TIMES (May 26, 2015), available at <http://www.cutimes.com/2015/05/26/fiserv-responds-to-cfpb-overdraft-order>.

⁷² Roy Urrico, *CFPB to Fiserv: Hand Over Overdraft Data*, CREDIT UNION TIMES (May 17, 2015), available at <http://www.cutimes.com/2015/05/17/cfpb-to-fiserv-hand-over-overdraft-data?page=1..>

⁷³ Roy Urrico, *CFPB Orders Overdraft Data From FIS*, CREDIT UNION TIMES (May 18, 2015), available at <http://www.cutimes.com/2015/05/18/cfpb-orders-overdraft-data-from-fis>.

⁷⁴ Roy Urrico, *supra* note 72.

⁷⁵ *Id.*

is a service they request and use.”⁷⁶ But for the CFPB to have jurisdiction over overdraft protections, the agency had to recharacterize overdraft protections as actually loans in disguise.⁷⁷ This was (as the ICBA put it) an “extreme example of government overreach under the guise of market monitoring authority,”⁷⁸ and one that may ultimately cost bank customers money due to the additional burdens imposed on the banks by the CFPB through the data processors.⁷⁹

The American Bankers Association (ABA) joined the ICBA in criticizing the CFPB’s order. In a memo dated June 2, 2015, the ABA argued that the order demonstrates problems with the CFPB’s overly broad powers.⁸⁰ The memo contended that the order shows that the CFPB’s powers under Dodd-Frank violate due process because financial institutions have no means to challenge the order, unlike subpoenas.⁸¹ The ABA also expressed frustration that the CFPB was placing expensive burdens on financial institutions by ordering them to perform work that it was fully capable of performing itself.⁸²

⁷⁶ Evan Weinberger, *Community Banks Bash CFPB Overdraft Info Request*, LAW360 (June 1, 2015), available at <http://www.law360.com/articles/662391/community-banks-bash-cfpb-overdraft-info-request>.

⁷⁷ PYMNTS, *Fiserv Responds to CFPB Overdraft Order*, PYMNTS.COM (May 27, 2015), available at <http://www.pymnts.com/news/2015/fiserv-responds-to-cfpb-overdraft-order/#.VaOxjvIVhHx>.

⁷⁸ Evan Weinberger, *supra* note 76.

⁷⁹ *Id.*

⁸⁰ Memorandum from Virginia O’Neill and Jonathan Thessin, American Bankers Association, to State Associations (June 2, 2015), available at <http://www.cfpbmonitor.com/files/2015/06/OverdraftMemo2015.pdf>.

⁸¹ *Id.*

⁸² *Id.*

Simply put, the CFPB's actions raise grave questions of privacy and agency overreach. The CFPB would not take such actions against American people and businesses if the agency were actually accountable to the people's representatives.

IV. The CFPB Exacerbates The "Too Big to Fail" Problem

When President Obama and the Democratic-controlled Congress created Dodd-Frank in 2010, they asserted that it would help eliminate the problem of "Too Big to Fail." In fact, the opposite is true. As the Dallas Federal Reserve concluded in 2011, "[f]or all its bluster, Dodd-Frank leaves TBTF *entrenched*."⁸³ Indeed, that may be too kind to the CFPB—if anything, the CFPB *exacerbates* Too Big to Fail.

Since 2007 the five biggest banks have only become bigger, controlling ever-greater shares of the financial industry's assets.⁸⁴ A team of Harvard scholars finds that "since the second quarter of 2010—around the time of the passage of the Dodd-Frank Act—[community banks'] share of U.S. commercial banking assets has declined at a rate almost double that between the second quarters of 2006 and 2010."⁸⁵ They trace the problem, at least in part, to the new regulatory environment.

⁸³ FEDERAL RESERVE BANK OF DALLAS, CHOOSING THE ROAD TO PROSPERITY: WHY WE MUST END TOO BIG TO FAIL—NOW, 2011 ANNUAL REPORT 21 (emphasis added), available at <http://www.dallasfed.org/assets/documents/fed/annual/2011/ar11.pdf>.

⁸⁴ See, e.g., Shayndi Raice, *Biggest Lenders Keep On Growing*, WALL ST. J. (Jan. 3, 2014), available at <http://www.wsj.com/articles/SB10001424052702303640604579298830697671324>.

⁸⁵ Marshall Lux & Robert Greene, *The State and Fate of Community Banking*, Harvard Kennedy School, M-RCBG Associate Working Paper Series No. 37, at http://www.hks.harvard.edu/content/download/74695/1687293/version/1/file/Final_State_and_Fate_Lux_Greene.pdf.

The cause of this worrisome trend should not be difficult to ascertain. The CFPB is imposing immensely burdensome new regulatory requirements on banks, and the biggest banks can more easily shoulder those regulatory burdens because they can disperse those burdens over a larger customer base. This hits small banks much harder than big banks.

For that very reason, JPMorgan Chase’s CEO recently said that federal regulations create a “moat” around big banks, protecting them from competition by smaller aspiring rivals.⁸⁶ More recently, Goldman Sachs’s CEO said that “[m]ore intense regulatory and technology requirements have raised the barriers to entry higher than at any other time in modern history.” He added, “[t]his is an expensive business to be in, if you don’t have the market share in scale.”⁸⁷

But the bias also owes to the fact that bureaucracy tends to expand its own control by dealing primarily, if not exclusively, with an industry’s biggest players. No less than Justice Louis Brandeis stressed this, when he joined the Court’s decision to strike down the National Industrial Recovery Act, the New Deal’s central program for coordinating big government, big labor, and big business.⁸⁸

⁸⁶ John Carney, *Surprise! Dodd-Frank Helps JPMorgan Chase*, CNBC.com (Feb. 4, 2013), available at <http://www.cnbc.com/id/100431660>.

⁸⁷ *Regulation Is Good For Goldman*, WALL ST. J. (Feb. 11, 2015), available at <http://www.wsj.com/articles/regulation-is-good-for-goldman-1423700859>.

⁸⁸ “It was Brandeis’s old distaste for bigness—in government no less than in industry—summoned back into the open by his concern that the government had gone out of control.” MICHAEL HILTZIK, *THE NEW DEAL* 282 (2011); see also MELVIN I. UROFSKY, *LOUIS D. BRANDEIS* 698 (2009) (“No part of the New Deal went so much against Louis Brandeis’s beliefs as did the NIRA . . . The heart of the NIRA revolved around Roosevelt’s belief that the crisis of the Depression could revive the spirit of

The biggest banks will continue to benefit from the Dodd-Frank regulatory environment—and community banks and their communities will suffer—if the CFPB is not subjected to significant reforms. First and foremost, it needs to be reconstituted in a manner that actually complies with the Constitution’s system of checks and balances.

Again, all of these constitutional problems and regulatory overreaches are unnecessary. The Too Big To Fail problem can be solved through capital requirements and market mechanisms. With those solutions in place, there is no need for heavy-handed regulations that disproportionately hurt community banks.

* * *

Thank you, again, for the opportunity to testify on these crucially important issues, as well as the similar constitutional problems inherent in Title I (Financial Stability Oversight Council) and Title II (Orderly Liquidation). I welcome your questions.

cooperation that he believed marked business-government relations during the Great War.”).

Appendix A

**Hearing before the
U.S. House of Representatives
Committee on Financial Services,
Subcommittee on Oversight and Investigations**

**“EXAMINING CONSTITUTIONAL DEFICIENCIES AND
LEGAL UNCERTAINTIES IN THE DODD-FRANK ACT”**

July 9, 2013

Statement of Amb. C. Boyden Gray

I am grateful for the opportunity to testify before the Subcommittee on the constitutional flaws inherent in Titles I and II of the Dodd-Frank Act.¹ I am counsel to several parties in a constitutional challenge to Titles I and II, as well as Title X and the “recess” appointment of Richard Cordray to direct the Consumer Financial Protection Bureau;² the president of State National Bank of Big Spring, my client in the lawsuit, testified before this Subcommittee last year.³

But my position on Dodd-Frank’s unconstitutional provisions long predates the filing of that lawsuit. I have been writing and speaking about Dodd-Frank since its very

¹ Pub. L. No. 111-203, 124 Stat. 1376 (2010).

² *State Nat’l Bank of Big Spring v. Lew*, No. 1:12-cv-01032 (D.D.C. filed June 21, 2012).

³ The hearing, held on July 19, 2012, was titled *Who’s In Your Wallet? Dodd-Frank’s Impact on Families, Communities and Small Businesses: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Financial Servs.*, 112th Cong. 10 (2012) (statement for the record of Jim Purcell, CEO, State National Bank), available at <http://financialservices.house.gov/uploadedfiles/hhrg-112-ba09-wstate-jpurcell-20120719.pdf>.

inception, beginning with a “white paper” published shortly after the bill was signed into law,⁴ followed by many articles, speeches, and debates since then.⁵

When President Obama signed Dodd-Frank into law, he said that the law was based on “clear rules and basic safeguards,” and that those rules would “make clear that no firm is somehow protected because it is ‘too big to fail,’ so we don’t have another AIG.”⁶ I wish that that his assurances were true but, regrettably, they are false. As the Dallas Federal Reserve Bank succinctly stated in its 2011 annual report, “[f]or all its bluster, Dodd-Frank leaves” the problem of Too Big to Fail “*entrenched*.”⁷

It is no mere coincidence that Dodd-Frank both entrenches the Too Big To Fail problem and violates the Constitution’s system of checks and balances. Rather, those two problems are deeply intertwined: by giving regulators effectively unlimited power, and by removing the checks and balances that ordinarily prevent the abuse of power, Dodd-Frank fosters the very conditions that give rise to Too Big To Fail.

⁴ C. Boyden Gray & John Shu, *The Dodd-Frank Wall Street Reform & Consumer Protection Act of 2010: Is It Constitutional?*, 11 ENGAGE: THE JOURNAL OF THE FEDERALIST SOCIETY’S PRACTICE GROUPS Dec. 2010, at 1, available at http://www.fed-soc.org/docLib/20101209_BoydenShuDoddFrankWP.pdf.

⁵ See, e.g., C. Boyden Gray, *Congressional Abdication: Delegation Without Detail and Without Waiver*, 36 HARV. J. L. & PUB. POL’Y 41 (2013); C. Boyden Gray & Jim R. Purcell, *Why Dodd-Frank is Unconstitutional*, WALL. ST. J., June 22, 2012, available at <http://online.wsj.com/article/SB10001424052702304765304577480451892603234.html>; C. Boyden Gray, *‘Too Big To Fail’ Casts a Long Shadow*, WASH. TIMES, Apr. 18, 2012, available at <http://www.washingtontimes.com/news/2012/apr/17/gray-too-big-to-fail-casts-a-long-shadow/>.

⁶ President Barack Obama, Remarks by the President at Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act (July 21, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act>.

⁷ FEDERAL RESERVE BANK OF DALLAS, CHOOSING THE ROAD TO PROSPERITY: WHY WE MUST END TOO BIG TO FAIL—NOW, 2011 ANNUAL REPORT 21, available at <http://www.dallasfed.org/assets/documents/fed/annual/2011/ar11.pdf> (emphasis added).

In that respect, Dodd-Frank is just the latest example of a trend that the nation has experienced many times: when we collapse the separation of powers and commit great authority to regulatory bureaucracies, it inherently favors big businesses over smaller ones. This bias against small business owes in part to the fact that bigger businesses are better able to shoulder large regulatory burdens—or, as JPMorgan Chase’s CEO recently characterized Dodd-Frank, the regulatory burden creates a “moat” around big businesses, protecting them from competition by smaller aspiring rivals.⁸ But the bias also owes to the fact that bureaucracy tends to expand its own control by dealing primarily, if not exclusively, with an industry’s biggest players. No less than Justice Louis Brandeis stressed this, when he joined the Supreme Court’s decision to strike down the National Industrial Recovery Act, the New Deal’s central program for coordinating big government, big labor, and big business.⁹

The government’s natural bias toward big businesses over small competitors can be restrained only by reinvigoration of the Constitution’s separation of powers, its checks and balances. In the discussion that follows, I will lay out both the problem of “Too Big To Fail,” which Dodd-Frank was supposed to correct, and Dodd-Frank’s core constitutional flaws, which have only exacerbated and entrenched Too Big To Fail.

⁸ John Carney, *Surprise! Dodd-Frank Helps JPMorgan Chase*, CNBC.com (Feb. 4, 2013), available at <http://www.cnbc.com/id/100431660>.

⁹ “It was Brandeis’s old distaste for bigness—in government no less than in industry—summoned back into the open by his concern that the government had gone out of control.” MICHAEL HILTZIK, *THE NEW DEAL* 282 (2011); see also MELVIN I. UROFSKY, LOUIS D. BRANDEIS 698 (2009) (“No part of the New Deal went so much against Louis Brandeis’s beliefs as did the NIRA . . . The heart of the NIRA revolved around Roosevelt’s belief that the crisis of the Depression could revive the spirit of cooperation that he believed marked business-government relations during the Great War. . . . Everyone had realized that the normal rules, such as antitrust laws, made no sense in wartime”).

I. Dodd-Frank Entrenches “Too Big To Fail,” Conferring Upon Big Banks a Subsidy Worth Billions of Dollars.

It is well established that several large financial institutions were seen as “too big to fail” prior to Dodd-Frank’s enactment, and that their “TBTF” status bestowed upon them substantial advantages over their smaller competitors. Simply put, the market believed that certain banks were so big and interconnected that the federal government would intervene to keep them afloat in times of financial crisis. In other words, these “too big to fail” banks were seen as less risky, and their perceived safety enabled these banks to attract investment capital more cheaply than their competitors could.

To be clear, “too big to fail” status was not merely a figment of market imagination; rather, it was firmly rooted in national experience, as federal officials repeatedly intervened in recent decades to prevent the collapse of particular financial firms. In 1998, the Federal Reserve coordinated a rescue of Long Term Capital Management, a prominent hedge fund, in order to prevent shock waves from damaging Wall Street.¹⁰ In 2008, the Federal Reserve bailed out AIG, once again in order to prevent large banks from being injured by the company’s collapse.¹¹

Indeed, the federal government’s implicit protection of “too big to fail” banks was so well known that, during the financial crisis of 2007-2008, bank presidents actively urged the Treasury Secretary to protect them, particularly as Bear Stearns lunged towards collapse. As Secretary Paulson later recalled in his memoir:

¹⁰ See, e.g., ROGER LOWENSTEIN, WHEN GENIUS FAILED: THE RISE AND FALL OF LONG-TERM CAPITAL MANAGEMENT 185-218 (2001); Roger Lowenstein, *Long-Term Capital: It’s a Short-Term Memory*, N.Y. TIMES, Sept. 7, 2008, at BU1, available at <http://www.nytimes.com/2008/09/07/business/07ltcm.html>.

¹¹ See, e.g., NEIL BAROFSKY, BAILOUT: AN INSIDE ACCOUNT OF HOW WASHINGTON ABANDONED MAIN STREET WHILE RESCUING WALL STREET 179-81 (2012).

The first call I received was from Lloyd Blankfein, my successor as Goldman Sachs CEO. . . . Lloyd went over the market situation with me, providing a typically analytical and extraordinarily comprehensive overview, but I could hear the fear in his voice. His conclusion was apocalyptic.

The market expected a Bear rescue. If there wasn't one, all hell would break loose, starting in Asia Sunday night and racing through London and New York Monday.¹²

In short, the “too big to fail” banks received immense government financial and regulatory assistance in times of crisis.¹³ But even in times of relative peace, big banks enjoyed direct benefits from their “too big to fail” status, in the form of a cost-of-capital advantage. That was an immense subsidy in and of itself, as documented by several economic studies.¹⁴ In 2011, Moody's estimated that in the U.S. the “too big to fail” subsidy amounted to a 50-basis-point cost-of-capital advantage, worth \$102 billion.¹⁵ The International Monetary Fund, too, found that banks larger than \$100 billion (*i.e.*, the pre-Dodd-Frank standard for implicit “too big to fail” status) enjoyed a 50-basis-point advantage.¹⁶ Economists at the Philadelphia Federal Reserve Bank found that banks paid “at least \$15 billion in added premiums” in merger deals to grow their banks above the \$100

¹² HENRY M. PAULSON, JR., *ON THE BRINK* 106 (2010).

¹³ In addition to the aforementioned examples, the banks also lobbied for regulatory intervention—*e.g.*, to prevent “short sellers” from decreasing the price of their shares. *See* ROGER LOWENSTEIN, *THE END OF WALL STREET* 220 (2010).

¹⁴ In addition to the subsequently mentioned studies, the Bank of England summarized several other studies evaluating this trend. JOSEPH NOSS & RHIANNON SOWERBUTTS, *THE IMPLICIT SUBSIDY OF BANKS*, BANK OF ENGLAND FINANCIAL STABILITY PAPER NO. 15, at 6 (2012), *available at* http://www.bankofengland.co.uk/publications/Documents/fsr/fs_paper15.pdf.

¹⁵ ZAN LI, ET AL., *MOODY'S ANALYTICS, QUANTIFYING THE VALUE OF IMPLICIT GOVERNMENT GUARANTEES FOR LARGE FINANCIAL INSTITUTIONS* 14 (2011).

¹⁶ İNCİ ÖTKER-ROBE, ET AL., *INTERNATIONAL MONETARY FUND, THE TOO-IMPORTANT-TO-FAIL CONUNDRUM: IMPOSSIBLE TO IGNORE AND DIFFICULT TO RESOLVE* 6 (2011), *available at* <http://www.imf.org/external/pubs/ft/sdn/2011/sdn1112.pdf>.

billion mark.¹⁷ More recently, Bloomberg News calculated that the cost-of-capital advantage is worth \$83 billion to the too-big-to-fail banks.¹⁸ Such studies spurred Senators Vitter and Brown to ask the GAO to study the economic benefits that large banks “receive as a result of actual or perceived government support.”¹⁹

Again, these were the very subsidies that Dodd-Frank supposedly ended. But, as the Dallas Fed stressed, Dodd-Frank did not end them—it *entrenched* them, in multiple ways:

First, Title I’s creation of the Financial Stability Oversight Council (FSOC) turns “too big to fail” status—or, in Dodd-Frank’s terms, “systemically important” status—from mere implication to actual, explicit government designation. We need not guess which financial companies are seen by the government as systemically important, because FSOC will tell us. The Connecticut Insurance Commissioner noted this in a recent speech to International Insurance Conference’s annual seminar:

Particularly on the life side, where people are buying a product for a 30- or 40-year promise, you want that financial stability; and if you say as a consumer this designation means the company has more supervision, that’s a good thing. It has more capital. That’s really good

¹⁷ Elijah Brewer III & Julapa Jagtiani, *How Much Did Banks Pay To Become Too-Big-To-Fail and To Become Systemically Important?*, 43 J FIN. SERVS. RESEARCH 1, 8 (2013), available at <http://link.springer.com/content/pdf/10.1007%2Fs10693-011-0119-6.pdf>.

¹⁸ See, e.g., *Why Should Taxpayers Give Big Banks \$83 Billion a Year?*, BLOOMBERG VIEW, Feb. 20, 2013, <http://www.bloomberg.com/news/2013-02-20/why-should-taxpayers-give-big-banks-83-billion-a-year.html>; *Remember That \$83 Billion Bank Subsidy? We Weren’t Kidding*, BLOOMBERG VIEW, Feb. 24, 2013, <http://www.bloomberg.com/news/2013-02-24/remember-that-83-billion-bank-subsidy-we-weren-t-kidding.html>.

¹⁹ Letter from Senators Vitter & Brown to Gene Dodaro, Comptroller General of the United States (Jan. 1, 2013), available at http://www.fsround.org/fsr/dodd_frank/pdfs/Vitter-Brown-GAO-Study-Request-on-Megabanks.pdf.

and, as it's potentially too big to fail, so the government is not going to let this company go.²⁰

The Commissioner is right, and the proof is in the pudding: When news broke a few weeks ago that GE Capital, AIG, and Prudential had received preliminary “systemic importance” designations from the FSOC, their stock prices immediately *jumped*.²¹

The second way that Dodd-Frank entrenches “too big to fail” also pertains to Title I. The statute further expands the pre-Dodd-Frank universe of “too big to fail” companies by setting the statutory threshold at \$50 billion in assets,²² rather than the \$100 billion threshold that previously was seen as the benchmark for implicit too-big-to-fail status.

Third, Title I also expands too-big-to-fail to include not merely big banks, but also “nonbank financial companies” such as insurance companies, hedge funds, and other companies not previously assumed to have government backing.²³

Fourth, Title II’s “Orderly Liquidation Authority” allows the federal government to conduct “back-door bailouts” of too-big-to-fail banks that have invested in troubled financial companies. This is effectively a codification of the AIG episode: if a financial company faces the possibility of default, and that company’s failure threatens big banks that have invested in it or are its counterparties, then Title II gives the Treasury

²⁰ Commissioner Thomas Leonardi’s comments were quoted by Gavin Souter, *Stability, Higher Costs Seen in Systemic Designation for Insurers*, BUSINESS INS., June 19, 2013, <http://www.businessinsurance.com/article/20130619/NEWS04/130619774>.

²¹ Ian Katz & Zachary Tracer, *AIG, Prudential Named Systemically Important by Panel*, BLOOMBERG, June 4, 2013, <http://www.bloomberg.com/news/2013-06-03/u-s-regulators-vote-to-label-some-non-banks-systemically-risky.html>.

²² See Dodd-Frank Act, Pub. L. No. 111-203, § 165(a)(1), 124 Stat. 1376, 1423 (2010) (codified at 12 U.S.C. § 5365(a)(1)) (setting \$50 billion benchmark for bank holding companies); see also FSOC, *Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies*, 77 Fed. Reg. 21637, 21643 (Apr. 11, 2012) (setting \$50 billion benchmark for nonbank financial companies, under Dodd-Frank § 113).

²³ Dodd-Frank Act § 113.

Secretary and FDIC effectively unlimited power to liquidate (*i.e.*, wind-down or reorganize) the company in a way that favors certain stakeholders over others—even treating some creditors better than other similarly situated creditors, an abrogation of one of the fundamental rules of bankruptcy law²⁴—and to do so behind closed doors, completely hidden from public view.

II. Dodd-Frank Violates the Constitution’s Separation of Powers by Giving Effectively Open-Ended Power to Unchecked Regulators.

It is no great surprise that big banks would seek to leverage their size, interconnectedness, and other qualities in order to obtain favor from the government. Indeed, that was one of the many great insights that Adam Smith offered in *The Wealth of Nations*: “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”²⁵ Perhaps the law cannot prevent them from meeting and conspiring, but at the very least, Smith urged, “it ought to do nothing to facilitate such assemblies, much less to render them necessary.”²⁶

The solution is simple. The Constitution’s separation of powers, its system of checks and balances, was intended to foster a rule of law that would limit government officials’ discretion to bestow unlimited favor upon particular classes of businessmen or other interest groups.

²⁴ See, *e.g.*, Dodd-Frank Act § 210(b)(4).

²⁵ ADAM SMITH, 1 AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, ch. 10, part II (1776). The modern school of “Public Choice Theory,” too, offers great insight into government officials’ incentives in bailing out big banks. See generally J.W. Verret, *The Bailout Through a Public Choice Lens: Government-Controlled Corporations as a Mechanism for Rent Transfer*, 40 SETON HALL L. REV. 1521 (2010).

²⁶ SMITH, *supra* note 25, at ch. 10, part II.

Moreover, the separation of powers was intended to ensure that the government would remain fully accountable to the people, as Publius explained in Federalist 70:

It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author. The circumstances which may have led to any national miscarriage or misfortune are sometimes so complicated that, where there are a number of actors who may have had different degrees and kinds of agency, though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.²⁷

The Supreme Court reminded us of this most recently in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, in which the Court struck down the Sarbanes-Oxley Act's attempt to shelter a new independent agency (*i.e.*, the Public Company Accounting Oversight Board, or "PCAOB") within another independent agency (*i.e.*, the Securities and Exchange Commission).²⁸ As the Court explained, precedents dating back to the New Deal Era had long ago established that Congress could create agencies enjoying some independence from the President, by providing that members of independent commissions could only be removed "for good cause."²⁹ But those precedents, the Court stressed, marked the outer limits of "independence" that the Constitution allows. Sarbanes-

²⁷ Federalist No. 70 (A. Hamilton).

²⁸ 130 S. Ct. 3138 (2010). To be clear, the Court did not specifically hold that the SEC itself is an "independent agency"; the SEC's organic statute does not expressly insulate the Commissioners from the President's control. Nevertheless, the parties to that case all agreed that the SEC Commissioners do enjoy that degree of independence, and the Court therefore "decide[d] the case with that understanding." *Id.* at 3149.

²⁹ *Id.* at 3146-47 (citing *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), *United States v. Perkins*, 116 U.S. 483 (1886); *Morrison v. Olson*, 487 U.S. 654 (1988)).

Oxley’s double layer of independence, by contrast, required the Court to consider “whether these separate layers of protection may be combined.”³⁰ The answer to that question was, emphatically, “no”:

As explained, we have previously upheld limited restrictions on the President’s removal power. . . . The Act before us does something quite different. It not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists. That decision is vested instead in other tenured officers—the Commissioners—none of whom is subject to the President’s direct control. The result is a Board that is not accountable to the President, and a President who is not responsible for the Board.

The added layer of tenure protection makes a difference. . . . *This novel structure does not merely add to the Board’s independence, but transforms it.* Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board.³¹

“The added layer of tenure protection makes a difference”; the PCAOB’s “novel structure”—its double layer of independence—“does not merely add to the Board’s independence, but transforms it.” This analysis, which led the Court to strike down Sarbanes-Oxley’s unprecedented independent-agency-within-an-independent-agency (and which last week led the D.C. Circuit to strike down a statute delegating legislative power to a private corporation³²), also counsels in favor of striking down the parts of Dodd-Frank that combine multiple forms of independence to create new agency structures insulated from oversight by *multiple* branches of government. As the plaintiffs urge in *State National Bank of Big Spring v. Lew*, that includes the FSOC and the Orderly Liquidation Authority (OLA), as well as the Consumer Financial Protection Bureau (CFPB). These agencies do not enjoy

³⁰ *Id.* at 3147.

³¹ *Id.* at 3153-54 (emphasis added).

³² *Ass’n of Am. Railroads v. U.S. Dep’t of Transp.*, No. 12-5204, at pp. 11-14 (D.C. Cir. July 2, 2013).

multiple layers of independence from a single branch of government, as PCAOB did, but they do enjoy layers of independence from multiple branches of government, in a manner that far outpaces anything that the Supreme Court has previously approved.

I have written in detail on the multiple forms of independence that the FSOC, OLA, and CFPB respectively enjoy.³³ But let me briefly summarize the OLA's and FSOC's multiple layers of independence:

A. OLA

The OLA is an inter-agency framework administered primarily by the Treasury Secretary, who commences an “orderly liquidation,” and by the FDIC, which carries it out. The Treasury Secretary serves at the pleasure of the president, of course. Of the FDIC's board, one member certainly enjoys the traditional hallmark of independence from the President: the CFPB Director, who enjoys an *ex officio* seat on the FDIC board, may only be removed “for inefficiency, neglect of duty, or malfeasance in office.”³⁴ The remaining four members—three appointed by the President with the Senate's advice and consent, and the *ex officio* Comptroller of the Currency—are not expressly made independent from the President, although they are all appointed for fixed terms and elsewhere in the Code are identified collectively as an “independent regulatory agency.”³⁵

³³ Gray & Shu, *supra* note 4; *see also* Second Amended Complaint at ¶¶ 67-255, *State Nat'l Bank of Big Spring v. Lew*, No. 12-1032 (D.D.C. filed Feb. 13, 2013).

³⁴ 12 U.S.C. § 1812(a)(1)(B) (placing the CFPB director on the FDIC); Dodd-Frank Act, Pub. L. No. 111-203, § 1011(c)(3), 124 Stat. 1376, 1964 (2010) (codified at 12 U.S.C. § 5491) (removal).

³⁵ 44 U.S.C. § 3502(5) (defining “independent regulatory agency” to include the FDIC); *see also* 12 U.S.C. § 2 (making the Comptroller of the Currency removable by the President “upon reasons to be communicated by him to the Senate”); 12 U.S.C. § 1812 (identifying FDIC board members to include the Comptroller of the Currency and the Director of the CFPB).

The OLA's multiple layers of independence pertain, instead, to its independence from Congress and the courts. Congress exercises no "power of the purse" over the OLA process, which is funded instead either by the assets of the liquidated financial company or by assessments on the financial sector.³⁶

And most importantly, Title II imposes truly draconian limitations on judicial oversight. The Treasury Secretary's initial decision to liquidate a company is effectively immune from judicial review in the district courts: a court has only 24 hours to hear the initial appeal of his liquidation decision, and if the court does not issue a final decision on the merits before that time limit expires, then the government wins by default.³⁷ The public, including the liquidated company's bondholders and shareholders, are categorically prohibited from even knowing that the liquidation process has commenced, until after the case leaves the district court.³⁸ Once the case leaves the district court, the liquidation process cannot be stayed; the FDIC can liquidate the company while subsequent appeals are still being litigated,³⁹ which may in practice mean that any appeal will be rendered moot before the Supreme Court gets to consider the case, as happened in the Chrysler reorganization.⁴⁰ And throughout all of this, judicial review is truncated not merely in time, but also in scope: the courts may only consider whether the Treasury Secretary was arbitrary and capricious in determining that the liquidated company was "a financial company" and that it was "in

³⁶ Dodd-Frank Act § 214(b).

³⁷ *Id.* § 202(a)(1)(A)(v).

³⁸ *Id.* § 202(a)(1)(A)(iii).

³⁹ *Id.* § 202(a)(1)(B).

⁴⁰ *Indiana State Police Pension Trust v. Chrysler LLC*, 130 S. Ct. 1015, 1015 (2009).

default or in danger of default.”⁴¹ The courts are thus denied even their fundamental power to decide whether the Treasury Secretary’s decision was unlawful or unconstitutional.

Finally, creditors are deprived even of their ultimate constitutional backstop, the Tucker Act, which traditionally protects the right to just compensation for the government’s taking of private property.⁴² They must instead plead their cause to the FDIC as receiver, which in turn can limit their recovery to the amount that they theoretically would have received had the company been liquidated under Chapter 7 of the Bankruptcy Code, an utterly hypothetical, alternative-universe framework that offers no meaningful right to financial compensation.⁴³ Similarly, if the creditor appeals the FDIC’s decisions in federal court, then the creditor’s recovery is limited to the same artificially capped amount.⁴⁴

In addition to this truly unprecedented combination of independence from Congress and the courts, the OLA also incorporates an effectively open-ended grant of statutory power. The Treasury Secretary administers statutory provisions that are either supremely vague (*e.g.*, the determination whether a company is “in default or in danger of default”) or altogether lacking in an intelligible principle (*e.g.*, the determination whether a company’s failure would “have serious adverse effects on financial stability”).⁴⁵ Similarly, the FDIC enjoys unfettered discretion to discriminate among similarly situated creditors,⁴⁶ and to repudiate any contracts that it deems “burdensome.”⁴⁷

⁴¹ Dodd-Frank Act § 202(a)(1)(A)(iv).

⁴² *See generally Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125-36 (1974).

⁴³ Dodd-Frank Act § 210(d)-(e).

⁴⁴ *Id.* § 210(d)(2), (e).

⁴⁵ *Id.* § 203(b).

⁴⁶ *Id.* § 210(b)(4).

⁴⁷ *Id.* § 210(c)(1).

Any one of these features, taken in isolation, might be held constitutional under the Supreme Court’s precedents. But taken together they are unprecedented and unconstitutional. And, as the constitutional challenge to Title II further argues, the OLA process’s combination of draconian restrictions on judicial review and its lack of any binding uniformity violates both the Fifth Amendment’s Due Process Clause and the Constitution’s Bankruptcy Clause.

B. FSOC

The FSOC’s independence, like the OLA’s, is less a matter of presidential oversight than of congressional and judicial oversight. Of the FSOC’s ten voting members,⁴⁸ one expressly cannot be removed by the President at will (*i.e.*, the CFPB Director), others certainly can be removed at will (*e.g.*, the SEC Chairman, who can be removed from the chairmanship at will), and others fall somewhere in between (*e.g.*, the aforementioned Comptroller of the Currency).⁴⁹ Nevertheless, the FSOC also has five nonvoting members, including three selected by *state* authorities,⁵⁰ which raises substantial questions under the Constitution’s Appointments Clause.

In any event, the FSOC’s primary layers of independence pertain to the courts, and to the breadth of its statutory mandate. As with the OLA, the FSOC is not subject to meaningful judicial review. Companies designated as “systemically important” cannot challenge the legality of the FSOC’s determination; rather, they may only question whether the FSOC’s determination is “arbitrary and capricious.”⁵¹ Even more importantly, third

⁴⁸ *Id.* § 111(b)(1).

⁴⁹ *See supra* note 35.

⁵⁰ Dodd-Frank Act § 111(b)(1).

⁵¹ *Id.* § 113(h).

parties—*e.g.*, competitors who want to prevent a company from being deemed “too big to fail”—have *no* right of judicial review under Title I.

And as with the OLA, the FSOC’s statutory mandate is effectively unlimited. While Title I specifies some vague factors that FSOC may consider in deciding whether a particular nonbank financial company is “systemically important,”⁵² the statutory provision concludes by stressing that its list is non-exhaustive: the FSOC may designate a nonbank financial company as systemically important based on “any other risk-related factors that the Council deems appropriate.”⁵³

As with the OLA, any one of these features, taken in isolation, might be held constitutional under the Supreme Court’s precedents. But taken together they are unprecedented and unconstitutional.

* * *

We can be thankful that circumstances have not yet given the Treasury Secretary and FDIC an opportunity to fully enforce the OLA,⁵⁴ and the FSOC is only now completing its initial round of systemic-importance designations⁵⁵ Nevertheless, evidence of

⁵² *Id.* § 113(a)(2).

⁵³ *Id.* § 113(a)(2)(K).

⁵⁴ This is not to say that Title II does not already impart injuries. As the States explain in their constitutional lawsuit, Title II’s express abrogation of their previous rights as creditors is an actual injury that gives them standing to challenge Title II in court.

⁵⁵ According to news reports, the FSOC has internally designated GE Capital, AIG, and Prudential as the first systemically important nonbank financial companies. Although those designations have yet to be finalized, GE Capital and AIG announced last week that they will not contest their designations; Prudential will request that FSOC internally reconsider its designation. See Kate Linebaugh & Erik Holm, *AIG, GE Capital Won’t Appeal ‘Systemically Important’ Label*, WALL ST. J., July 2, 2013, <http://online.wsj.com/article/BT-CO-20130702-710096.html>.

what problems can arise from their unprecedented independence can be found in the conduct of the other independent agency created by Dodd-Frank: the CFPB.

First, the CFPB, like the OLA, enjoys complete immunity from Congress's power of the purse. (It funds itself by taking hundreds of millions of dollars from the Federal Reserve Board of Governors; Congress is prohibited by statute from even reviewing its budget.⁵⁶) And as this subcommittee knows from experience, the CFPB has not hesitated to wield its independence, refusing to comply with the previous Chairman's justified and reasonable requests for the CFPB's financial statements and forecasts.⁵⁷

Second, without meaningful oversight by either Congress or the courts, the CFPB has had much incentive to interpret its own powers expansively. In a January 24, 2012 hearing before the House Oversight Committee, Director Cordray announced that the CFPB will not attempt to define one of its core statutory terms—"abusive" lending practices—through notice-and-comment rulemaking, and instead will define the term on a case-by-case, *ex post facto* basis.⁵⁸ More recently, it was revealed that the CFPB has undertaken a massive "data grab," either spending millions of dollars on consumer financial data purchased from third parties, or by simply demanding that banks to turn data over for

⁵⁶ Dodd-Frank Act § 1017(a)(2).

⁵⁷ See Rep. Randy Neugebauer, *A \$447 Million Consumer Alert*, WALL ST. J., Sept. 20, 2012, <http://online.wsj.com/article/SB10000872396390444620104578006182400443070.html>.

⁵⁸ *How Will the CFPB Function Under Richard Cordray: Hearing Before the Subcomm. on TARP, Financial Services, and Bailouts of Public and Private Programs of the H. Comm. on Oversight and Government Reform*, 112th Cong. (2012) (statement of Richard Cordray) ("[W]e have determined that [the definition of 'abusive'] is going to have to be a fact and circumstances issue; it is not something we are likely to be able to define in the abstract. Probably not useful to try to define a term like that in the abstract.").

free.⁵⁹ The Chamber of Commerce's recent letter to the CFPB describes the substantial legal questions raised by the data grab.⁶⁰

Finally, the CFPB has taken steps to expand its authority still further beyond its statutory limits, attempting to regulate aspects of auto loans that Title X expressly excluded from the CFPB's reach. Despite Title X's prohibition against the CFPB "exercis[ing] any rulemaking, supervisory, enforcement or any other authority, including any authority to order assessments, over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both,"⁶¹ the CFPB recently issued a "bulletin" detailing how it will regulate "indirect auto lenders."⁶²

The CFPB's attempt to regulate auto dealers engaged in indirect financing is troubling for several reasons. First and foremost, this appears to be a plain attempt to nullify Congress's express protection for auto dealers, who certainly will be affected by this "exercise" of the CFPB's "authority." Second, the CFPB's decision to implement this new policy through a "bulletin," rather than through notice-and-comment rulemaking, subverts the regulatory process itself, by purporting to make new law without an opportunity for the

⁵⁹ See, e.g., Carter Dougherty, *U.S. Amasses Data on 10 Million Consumers as Banks Object*, BLOOMBERG, Apr. 17, 2013, <http://www.bloomberg.com/news/2013-04-17/u-s-amasses-data-on-10-million-consumers-as-banks-object.html>; Carter Dougherty, *Richard Cordray and the CFPB Are Monitoring Your Banking Habits*, BLOOMBERG BUSINESSWEEK, Apr. 25, 2013, <http://www.businessweek.com/articles/2013-04-25/richard-cordray-and-the-cfpb-are-monitoring-your-banking-habits>.

⁶⁰ Letter from David T. Hirschmann, President and CEO, U.S. Chamber of Commerce, to Richard Cordray, Director, Consumer Financial Protection Bureau (June 19, 2013), available at <http://www.cfpbmonitor.com/files/2013/06/chamber-cfpb-data-letter.pdf>.

⁶¹ Dodd-Frank Act § 1029(a).

⁶² CFPB Bulletin 2013-02 (Mar. 21, 2013), available at http://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf.

public to express its views, and by attempting to prevent regulated parties from directly appealing the policy in court. Third, by failing to undertake a public notice-and-comment rulemaking, the CFPB offers the public no indication of what its own data and models are; consumers and auto dealers are left instead to conduct their business under the shadow of the CFPB's black box. Finally, the CFPB's unilateral action offers no evidence that the agency is coordinating with the Federal Trade Commissioner and the Federal Reserve Board of Governors, as required by Section 1029 of Dodd-Frank.⁶³

I am aware that Members of this Committee recently wrote to Mr. Cordray, expressing their concern over the CFPB's actions, and asking Mr. Cordray for answers to specific questions regarding the CFPB's data and methodology.⁶⁴ I am also aware, unfortunately, that Mr. Cordray's response to that letter failed to answer their specific questions.⁶⁵ And I am aware of other Members' June 20, 2013 letter to the CFPB's Assistant Director in the Office of Fair Lending and Equal Opportunity, raising questions regarding the CFPB's auto loan guidance, and I look forward to the CFPB's response (if any) with great interest.

But in all of this, I hope that this Subcommittee, and the Committee on Financial Services as a whole, will take the CFPB's conduct as an example of what we may expect from Dodd-Frank's other creations, the FSOC and the OLA. When agencies are

⁶³ Dodd-Frank Act § 1029(e) (requiring FTC and the Federal Reserve to coordinate with CFPB's Office of Service Member Affairs to educate service members and their family about financial products offered by motor vehicle dealers).

⁶⁴ Letter from Rep. Terri A. Sewell, et al., to Director Richard Cordray (May 28, 2013), *available at* http://www.cfpbmonitor.com/files/2013/05/130530_cfpb_auto_dealer_letter.pdf.

⁶⁵ *See* Letter from Director Richard Cordray to Rep. Terri A. Sewell, et al. (June 20, 2013), *available at* http://www.cfpbmonitor.com/files/2013/06/06-21-13_CFPB-Letter-on-Auto-Lending1.pdf.

freed from the Constitution's system of checks and balances, when they are not directly and fully accountable to the Executive, Legislative, and Judicial Branches, those agencies will almost certainly attempt to expand their powers, evade judicial review, and produce regulatory actions that simply lack the quality of regulations promulgated through the rigors of notice-and-comment rulemaking under the watchful eye of congressional and judicial oversight.

Thank you, again, for the opportunity to testify on these critically important issues. I welcome your questions.

**Testimony of Deepak Gupta
Founding Principal, Gupta Wessler PLLC, Washington, DC**

**Before the United States Senate,
Committee on the Judiciary,
Subcommittee on the Constitution**

**“The Administrative State v. The Constitution:
Dodd-Frank At Five Years”**

July 23, 2015

Chairman Cornyn, Ranking Member Durbin, and distinguished members of the Committee, thank you for inviting me to testify on the constitutionality of the Dodd-Frank Wall Street Reform and Consumer Protection Act and the important watchdog agency created by that legislation: the Consumer Financial Protection Bureau (CFPB). My name is Deepak Gupta. I am the founding principal of Gupta Wessler PLLC, a law firm focusing on appellate and constitutional litigation. I previously served as Senior Counsel at the CFPB, where my duties included defending the new agency and its programs in court and advising its leadership on constitutional issues. My testimony today makes three basic points:

First, the constitutional challenges to Dodd-Frank lack merit. It has been five full years since Dodd-Frank’s enactment. In that time, the Act’s opponents have invoked every conceivable constitutional principle—from the separation of powers, to the void-for-vagueness doctrine, to procedural due process—in an effort to turn back the clock on financial reform and consumer protection. These efforts have failed before every court to consider them. Tellingly, no reputable financial institution or major trade group has lent its name to the

constitutional challenges to the CFPB. Indeed, not a single amicus brief was filed before the D.C. Circuit in *State National Bank of Big Spring v. Lew*, the most high-profile of the cases. These legal challenges are truly at the fringe. Unfortunately, however, they are emblematic of the unique historical moment in which we live, in which seemingly every major political disagreement—from health care to immigration—is constitutionalized and litigated. Consumer protection, apparently, is no exception.

The principal constitutional arguments against Dodd-Frank, based on the separation of powers, are at odds with at least eighty years of settled precedent. Most are really disguised “non-delegation” arguments—that is, arguments that Congress’s delegation of power to an agency (such as the CFPB’s authority to regulate unfair lending practices, or the Financial Stability Oversight Council’s authority to designate entities as systemically risky) is too vague or broad. But that doctrine hasn’t been successfully invoked since 1935—at the height of judicial resistance to the New Deal—and Dodd-Frank’s standards are actually more specific than those that have been upheld. As the Supreme Court explained in a 2001 opinion by Justice Scalia, “even in sweeping regulatory schemes [the Court] ha[s] never demanded ... a ‘determinate criterion’” or “felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”¹

¹ *Whitman v. American Trucking Ass’n*, 531 U.S. 457, 474-75 (2001).

The challengers also argue that the President lacks sufficient control over the CFPB because its Director may be removed only for cause.² This argument likewise seeks to turn the clock back to before 1935—the year the Supreme Court approved identical for-cause removal protections for FTC commissioners.³ That precedent applies with full force to CFPB.⁴ As the age of the precedents reveal, these arguments are not really attacks on Dodd-Frank or the CFPB so much as attacks on the very foundations of the modern administrative state. In that sense, the title of today’s hearing is apt.

Second, even setting aside constitutional precedent, the basic accountability critiques of the CFPB and Dodd-Frank are misplaced. To be sure, democratic legitimacy is perhaps the central problem of administrative law, and we should always ask whether the administrative state has become unmoored from our democracy.⁵ But the CFPB—which was specifically designed to resist capture by narrow industry interests—is at least as accountable to the public as were the existing prudential banking regulators, from which the CFPB inherited much of its authority over consumer protection. And in several respects, the Bureau is far *more* accountable: Its budget is capped; its rules can be vetoed by a

² 12 U.S.C. § 5491(c)(3) (“The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.”).

³ *Humphrey’s Executor v. United States*, 295 U.S. 602, 619, 628, 632 (1935).

⁴ See *Morrison v. Olson*, 487 U.S. 654, 692-93 (1988) (approving provision authorizing removal of independent counsel only for “good cause”); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161 (2010) (concluding that “a single level of good-cause tenure” preserved sufficient presidential oversight).

⁵ See generally Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1678–80 (1975).

committee of other regulators; and it is subject to a special small-business review process by which only EPA and OSHA are similarly constrained. Finally, the CFPB has also gone beyond legal requirements and conventions, using technology and public participation to make itself more directly responsive to the American consumer.

Third, the CFPB, Dodd-Frank’s crown jewel, has already proven that it is working for American consumers; Congress should resist efforts to gut the agency outside the normal political process. The CFPB is protecting American consumers. The agency has already returned \$10.8 billion dollars for more than 25 million consumers harmed by illegal practices, and has reined in some of the worst abuses in the payday and installment-lending, credit-card, and mortgage industries. Yet the Bureau’s opponents are trying to hamstring its efforts and alter its structure to make it less effective—not through the ordinary legislative process but through back-door appropriations riders, absent any debate.

I particularly want to focus the Committee’s attention on one area in which the CFPB is working hard to fulfill its statutory mandate to protect consumers, and in which some opponents are trying to use the appropriations process to put up roadblocks: the agency’s mandate to study and write rules on the forced arbitration of consumer disputes. As mandated by Congress, the Bureau has produced a 726-page report—the most comprehensive study of consumer arbitration to date—and it shows that forced arbitration clauses embedded in the fine print of consumer contracts grossly favor the financial services industry at the expense of consumers.

Allowing CFBP to continue its important work on arbitration is vital for restoring a fair playing field for consumers and rectifying the extreme imbalance of power between corporate interests and the public.

I. Constitutional Challenges to Dodd-Frank and the CFPB.

The constitutional challenges to the Dodd-Frank Act and the CFPB thus far have recited a similar series of unsuccessful legal arguments. At least four federal courts have rejected these arguments on the merits⁶ and at least three others have rejected them on standing grounds.⁷

Rather than fully articulating a specific constitutional violation, these litigants partially construct several constitutional claims in the hopes that a “mosaic” will prevail.⁸ These theories, which courts have uniformly rejected, allege that the structure and authority of CFPB or the Financial Stability Oversight Council (FSOC), as well as the Treasury’s Orderly Liquidation Authority (OLA), are unconstitutional on separation-of-powers or due-process grounds. To adopt these arguments would be to overturn eighty years of settled precedent and, indeed, the foundations of the New Deal and the modern administrative state.

A. Standing and the Lack of Mainstream Support. Before turning to the merits, however, it is worth saying a brief word about who’s behind these

⁶ *Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc.*, No. 1:14-CV-00292-SEB, 2015 WL 1013508, *11, *13-14, *18, *20 (S.D. Ind. Mar. 6, 2015); *Consumer Fin. Prot. Bureau v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1089-92 (C.D. Cal. 2014); *Illinois v. Alta Colleges, Inc.*, 2014 U.S. Dist. LEXIS 123053, *8-13 (N.D. Ill. Sept. 4, 2014); *Illinois v. CMK Investments, Inc.*, 2015 U.S. Dist. LEXIS 84277, *8 (N.D. Ill. June 30, 2015).

⁷ *State Nat’l Bank of Big Spring v. Lew*, 958 F. Supp. 2d 127, 136-39, 145 (D.D.C. Aug. 1, 2013); *Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau*, 979 F. Supp. 2d 104, 121 (D.D.C. 2013), *aff’d*, 785 F.3d 684, 690 (D.C. Cir. 2015).

⁸ *ITT Educ. Servs., Inc.* at *11.

challenges. Reputable financial institutions and mainstream trade associations have largely stayed clear of the fray. The highest profile challenge, *State National Bank of Big Spring v. Lew*—filed with great press fanfare in 2012 and billed as “a high-noon showdown between the Obama Administration ... and the banking industry”—was brought by a group of transparently politically-oriented plaintiffs, organized through the Competitive Enterprise Institute and represented by one of today’s majority witnesses, Ambassador C. Boyden Gray.⁹ At a debate about the case, Ambassador Gray publicly admitted that he found it difficult to find any financial institution willing to join the challenge.¹⁰ And, despite D.C.’s booming cottage industry of lawyers representing financial institutions on Dodd-Frank matters, not a single amicus brief was filed in the D.C. Circuit appeal in *Big Spring*.

As I observed on the day the case was filed, one consequence of this lack of mainstream industry support is that the plaintiffs—including the lead plaintiff, the State National Bank of Big Spring, Texas—face serious standing problems.¹¹ Among other things, Big Spring’s total assets are far less than the \$10 billion

⁹ Keith Goldberg, *Banking Cases to Watch in 2013*, LAW360, Jan. 1, 2013, <http://www.law360.com/articles/397603/banking-cases-to-watch-in-2013>.

¹⁰ “The Constitutional Challenge to the Consumer Financial Protection Bureau: A Debate,” Georgetown University Law Center, Washington, DC (March 21, 2013) (debate between Deepak Gupta and C. Boyden Gray, sponsored by the Georgetown Center on the Constitution, the Federalist Society, and Consumer Law Society). See also C. Boyden Gray, *Congressional Abdication: Delegation Without Detail and Without Waiver*, 36 HARV. J.L. & PUB. POL’Y 41, 47 (2013) (“Finding private plaintiffs has not been easy.”).

¹¹ Carter Dougherty, *U.S. Consumer Bureau Violates Constitution, Lawsuit to Claim*, BLOOMBERG BUSINESS, June 21, 2012, <http://www.bloomberg.com/news/articles/2012-06-21/u-s-consumer-bureau-challenged-as-unconstitutional-in-lawsuit>.

needed for a bank to be subject to the Bureau's direct enforcement authority.¹² As a result, the Bureau's only power over Big Spring is the power to *recommend* an enforcement action to the bank's actual regulator, the Office of the Comptroller of the Currency (OCC)—a recommendation that the OCC would then be free to reject.¹³ Therefore, Big Spring's standing theory either rests upon a sequence of interlinked hypotheticals—the Bureau *might* promulgate a regulation, and further *might* recommend that the OCC bring an enforcement action relating to this regulation, a recommendation the OCC *might* follow—or upon the self-inflicted harm that resulted when Big Spring chose to exit the mortgage market, purportedly based on fear of being subject to an enforcement action.¹⁴ As the district court correctly held, neither of these theories provides a basis for standing.¹⁵

Nonetheless, the constitutional challenges asserted by Big Spring against the CFPB mirror the claims pursued by the challengers in *Morgan Drexen* and *ITT*, who raised their challenges defensively, in the context of CFPB enforcement actions against them. The CFPB sued ITT for predatory lending to college students who were coerced into taking out private loans to pay for their tuition;¹⁶ it sued Morgan Drexen for tricking consumers into paying thousands of dollars in

¹² First Am. Compl. at 8, *State Nat'l Bank of Big Spring v. Geithner*, No. 1:12-cv-01032 (D.D.C. Sept. 20, 2012); 12 U.S.C. § 5515.

¹³ 12 U.S.C. § 5516.

¹⁴ See First Am. Compl. at 17-18, *Nat'l Bank of Big Spring*, No 1:12-cv-01032.

¹⁵ *Nat'l Bank of Big Spring*, 958 F. Supp. 2d at 165.

¹⁶ See *ITT Educ. Servs., Inc.* at *1-5.

illegal fees and misrepresenting its questionable debt-relief and bankruptcy services.¹⁷ In both cases, the courts were therefore able to reject the constitutional arguments on the merits.¹⁸

In addition, in a pending case before the U.S. District Court in Washington D.C., MetLife, Inc. has brought a constitutional challenge to the FSOC's process for designating financial institutions "systemically important" under Dodd-Frank.¹⁹ In relation to *Big Spring*, what's striking about MetLife's complaint is that it bases standing on the alleged harm incurred by the FSOC's designation.²⁰ Big Spring, in contrast, asserts that its *lack* of FSOC designation places it at a competitive disadvantage with financial institutions that are designated "systematically important."²¹ At the very least, this disagreement among the two sets of plaintiffs regarding whether FSOC-designation is a benefit or a burden cautions against a finding that the lack of designation confers standing.²²

B. Challenges to the CFPB's Structure and Authority. Although Big Spring also aims to discredit the constitutionality of the OLA and the FSOC, its most extensive criticism is reserved for the CFPB. Weaving together a patchwork of disjointed allegations, Big Spring seeks to establish that, when taken together,

¹⁷ *Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau*, 979 F. Supp. 2d 104, 110 (D.D.C. 2013), *aff'd*, 785 F.3d 684 (D.C. Cir. 2015).

¹⁸ *See Id.* at 1089-92; *ITT Educ. Servs., Inc.* at *11, 14, 18, 20.

¹⁹ *See* Compl. at 2, *MetLife, Inc. v. Fin. Stability Oversight Council*, No. 1:15-cv-00045 (Jan. 13, 2015).

²⁰ *Id.* at 9.

²¹ Compl. at 31-33, *Nat'l Bank of Big Spring*, No 1:12-cv-01032.

²² *See Nat'l Bank of Big Spring*, 958 F. Supp. 2d at 137-138 (noting the "ambiguous consequences of SIFI designation" before rejecting the plaintiff's standing argument).

“the overwhelming uncertainty inherent in the Title X’s open-ended grant of power to the CFPB and the lack of checks and balances limiting the CFPB’s exercise of that power” render it unconstitutional.²³

1. Disguised Nondelegation Arguments. Big Spring first argues that the Dodd-Frank Act’s failure to place meaningful restrictions on CFPB’s authority to define and enforce “unfair, deceptive, or abusive actions or practices” contravenes the separation of powers.²⁴ Morgan Drexen and ITT made similar arguments, and both district courts rejected them. Noting that the Dodd-Frank Act explicitly restricts “abusive” practices to four circumstances,²⁵ the *Drexen* court found that the legislative guidance provided by the Act satisfies constitutional requirements because it is “at least as specific as other provisions held to constitute ‘intelligible principles.’”²⁶ The *ITT* court applied a similar line of reasoning when it held that, in the context of the statute, the terms “abusive” and “unfair” are not unconstitutionally vague in violation of the Fifth Amendment’s Due Process Clause.²⁷ Given that the Dodd-Frank Act’s use of “unfair” reflects

²³ Second Am. Compl. at 24, *State Nat’l Bank of Big Spring v. Geithner*, No. 1:12-cv-01032 (D.D.C. Feb. 19, 2013).

²⁴ First Am. Compl. at 15-22, *Nat’l Bank of Big Spring*, No 1:12-cv-01032.

²⁵ “The Dodd-Frank Act defines ‘abusive’ as either ‘materially interfer[ing] with the ability of a consumer to understand a term or condition of a consumer financial product or service’ or ‘tak[ing] unreasonable advantage of—(A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.’” *Morgan Drexen, Inc.*, 60 F. Supp. 3d at 1090 (quoting 12 U.S.C. § 5531(d)).

²⁶ *Morgan Drexen, Inc.*, 60 F. Supp. 3d at 1090 (citing *Yakus v. United States*, 31 U.S. 414, 414, 420, 426-27 (1944); *Am. Power & Light Co. v. S.E.C.*, 329 U.S. 90, 90, 104-06 (1946)).

²⁷ *ITT Educ. Servs., Inc.* at *18, *20. The Dodd-Frank Act provides detailed definitions for both “unfair” and “abusive” acts or practices, thus constraining the Bureau’s power far more than the

language used in the Federal Trade Commission Act (FTCA), regulated entities are sufficiently apprised of what practices are permitted and forbidden under the Act. As used in the FTCA, the phrase “unfair or deceptive acts or practices” has survived constitutional challenges and been subject to refinement and elaboration since the statute’s enactment in 1914. Based on this history, a reasonable business entity should be able to infer the types of actions to which the CFPB might object.²⁸

These arguments against the constitutionality of the CFPB are a thinly veiled attempt to breathe life into the non-delegation doctrine, which has not formed the basis for a successful constitutional challenge since 1935.²⁹ The Dodd-Frank Act’s delegation of power to CFPB, moreover, is far narrower than other delegations that have been upheld. In 2001, for instance, in an opinion by Justice Scalia, the Supreme Court upheld a provision of the Clean Air Act granting the EPA authority to “set ambient air quality standards ... requisite to protect the public health.”³⁰ In so doing, the Court in *Whitman v. American Trucking*

Clean Air Act in *Whitman* constrained the EPA’s. See 12 U.S.C. § 5531. These statutory definitions, moreover, are expressly couched in terms of limitations on the Bureau’s powers, providing “[t]he Bureau shall have no authority” to declare acts unfair or unlawful except in conformity with the Act’s standards. *Id.* And the Bureau, drawing on the Dodd-Frank Act and established principles of consumer-protection law, has provided clear guidance on its own definitions of “unfair,” “abusive,” and “deceptive” practices. See CFPB, *Supervision and Examination Manual, Version 2*, at UDAAP 1-UDAAP 10 (2012).

²⁸ *ITT Educ. Servs., Inc.* at *18

²⁹ A non-delegation challenge to a federal statute has succeeded only twice in the Nation’s history—both times in 1935, at the height of judicial hostility to the New Deal. See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

³⁰ *Whitman*, 531 U.S. at 465 (2001) (citing 42 U.S.C. § 7409(b)(1)). The Court said “requisite” meant “not lower or higher than is necessary” – hardly a precise definition. *Id.*

Associations remarked that “even in sweeping regulatory schemes [it] ha[s] never demanded ... a ‘determinate criterion’” for the standards set by statutes.³¹ Thus, to hold that the CFPB is unconstitutional on non-delegation grounds would not just contradict settled precedent; it would open the door to inestimable constitutional challenges to agency delegations and, in turn, compromise the post-New Deal institutions on which our government and its citizens have come to rely.

2. ***Presidential Removal Power.*** Big Spring next contends that the CFPB’s insulation from political control also constitutes a violation of the separation of powers. This argument revolves around the Dodd-Frank Act’s alleged contravention of the President’s removal power. Although the Dodd-Frank Act only permits the President to remove the Director of the CFPB for cause, courts that have addressed this issue in depth have held that *Humphrey’s Executor v. United States*,³² a 1935 case in which the Supreme Court upheld for-cause removal of Federal Trade Commissioners, controls.³³

Under this standard, the relevant inquiry is whether limitations on the President’s removal power “impede the President’s ability to perform his constitutional dut[ies].”³⁴ The for-cause removal provided for by the Dodd-Frank Act satisfies this standard because the President retains “ample authority to

³¹ *Id.* at 475. The Court further explained that it has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.” *Id.* at 474-75 (citing *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

³² 295 U.S. 602, 626-31 (1935).

³³ *Morgan Drexen, Inc.*, 60 F. Supp. 3d at 1087; see also *ITT Educ. Servs., Inc.* at *8-9.

³⁴ *Id.* at * 9-11, 13-14 (quoting *Morrison v. Olson*, 487 U.S. 654, 691 (1988)).

assure that the Director is competently leading the CFPB,” just as the President’s for-cause removal power gives him ample authority to oversee the SEC and FTC—agencies that perform very similar functions.³⁵ As the district court in *ITT* summarized, “the structure and powers of the Bureau are sufficiently analogous to those of the FTC, SEC, and other regulatory agencies that the question of the constitutionality of CFPB’s removal provision is settled by *Humphrey’s Executor* and its progeny.”³⁶

Nor does the Dodd-Frank Act present the same “second layer of insulation” issue presented by the Public Company Accounting Oversight Board. Under the Sarbanes-Oxley Act, the Securities and Exchange Commission (SEC), whose members are removable by the President only for cause, appointed the public accounting board, whose members were likewise removable *by the Commissioners* only for cause.³⁷ In the 2010 case in which it held that this structure violates the separation of powers, *Free Enterprise v. Public Company Accounting Oversight Board*, the Supreme Court made clear that its holding rested on this “second layer of insulation,” which did “not merely add to the Board’s independence, but transform[ed] it” into an unconstitutional component of an otherwise constitutional independent agency.³⁸ Because the Dodd-Frank Act authorizes for-cause removal of the Director of the CFPB, it lacks the second layer of insulation that *Free*

³⁵ *Morgan Drexen, Inc.*, 60 F. Supp. 3d at 1087.

³⁶ *ITT Educ. Servs., Inc.* at *14.

³⁷ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3154 (2010).

³⁸ *Id.* at 3154.

Enterprise Fund concluded differentiated the accounting board from constitutionally permissible independent agencies.

Professor Neomi Rao—a majority witness at today’s hearing and a vehement defender of the presidential removal power—has argued in her scholarship that any limitations placed on the President’s removal power are unconstitutional.³⁹ In the wake of *Free Enterprise Fund*, Rao asserts, there is a consensus in legal scholarship that “every federal entity must be accountable to one of three branches.”⁴⁰ The CFPB is nominally within the Federal Reserve System, but its Director is directly accountable to the President, and, with the exception of the Act’s for-cause provision, the President is entirely unobstructed in exercising his or her authority over the CFPB. Despite advocating for courts to overturn the CFPB’s for-cause removal provision as unconstitutional, Rao concedes that her approach marks a dramatic departure from existing precedent and would require courts to overturn *Humphrey’s Executor*.⁴¹

Rao’s scholarship also reveals that those who challenge Dodd-Frank’s constitutionality do not agree even among themselves. Indeed, the majority’s witnesses today advance constitutional theories that are fundamentally incompatible. Although she maintains that the Dodd-Frank Act’s removal provision is unconstitutional, Professor Rao acknowledges that the CFPB would be

³⁹ Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1208 (2014).

⁴⁰ *Id.* at 1230-31.

⁴¹ Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB*, 79 FORD. L. REV. 2541, 2573-75 (2011).

constitutional without it. She thus concedes that the CFPB's basic structure and functions are otherwise constitutionally sufficient. Professor Rao's interpretation, in other words, forecloses Big Spring's and Ambassador Gray's grab-bag (or "mosaic") approach to establishing the constitutional infirmity of Dodd-Frank and the CFPB. As Professor Rao has noted, "there is no all-things-considered functional test to protect separation of powers," nor is there "any decision in which the Court has invalidated government action on functional separation of powers grounds."⁴² Thus, Rao recognizes that the dissatisfaction that both proponents and opponents of the CFPB may find with her views "perhaps highlights the political aspects of the disagreement over how to regulate consumer finance, a disagreement that belongs in the political, not judicial arena."⁴³ On this last point, at least, Professor Rao and I agree.

Finally, it is worth noting that although some opponents of the Dodd-Frank Act's for-cause removal provision call for replacement of the CFPB's Director with a multi-member commission,⁴⁴ that structure might actually dilute the President's removal power. With a single agency head, the President is able to expediently remove incompetent leadership. A commission, on the other hand, presents the President with the issue of first identifying which members are responsible for issues that arise.

⁴² See Rao, *Removal*, at 1272.

⁴³ *Id.* at 1275.

⁴⁴ See, e.g., *Morgan Drexen, Inc.*, 60 F. Supp. 3d at 1086.

3. **Remaining Constitutional Objections to the CFPB.** Courts easily dispose of the hodgepodge of remaining constitutional complaints lodged against the CFPB, which include challenges to the deference afforded to CFPB’s interpretations of federal consumer financial laws,⁴⁵ its funding through the Federal Reserve System, and the appointment of its Deputy Director. In connection with the first challenge, the *Morgan Drexen* and *ITT* courts held that the Dodd-Frank Act “merely prescribes that the Bureau’s constructions of organic law in its subject area are to be given deference, in accordance with the well-established principles first enunciated in *Chevron*.”⁴⁶ Both courts also summarily dismissed objections to the CFPB’s exemption from congressional appropriations on the grounds that Congress is permitted to establish agencies with alternative funding structures.⁴⁷ Settled doctrine affirms that the Appropriations Clause only prevents the Executive Branch from spending public money without Congress’s permission—it doesn’t prevent Congress from providing funding in any manner it sees fit.⁴⁸ Although no court has decided whether the Director’s authority to appoint the Deputy Director is constitutional, the court in *ITT* opined that the CFPB may be considered a “department” under the Court’s definition in *Free*

⁴⁵ Under the Dodd-Frank Act, the CFPB’s interpretations of federal consumer financial law receive the same deference that they would “if the Bureau were the only agency authorized to apply, enforce, and interpret, or administer the provisions of such Federal consumer financial law.” 12 U.S.C. § 5512(b)(4)(B).

⁴⁶ *ITT Educ. Servs., Inc.* at *12; see *Morgan Drexen, Inc.*, 60 F. Supp. 3d at 1091.

⁴⁷ See *Morgan Drexen, Inc.*, 60 F. Supp. 3d at 1091; *ITT Educ. Servs., Inc.* at *12.

⁴⁸ *Morgan Drexen, Inc.*, 60 F. Supp. 3d at 1089.

Enterprise Fund, which would allow Congress to bestow the Bureau's Director with the power to appoint inferior officers.⁴⁹

C. The FSOC and the Treasury's Orderly Liquidation. Authority.

Big Spring's complaint is comprehensive in its condemnation of the Dodd-Frank Act and incorporates challenges to the Treasury's OLA and the FSOC. With respect to the Orderly Liquidation provision, the complaint alleges that it violates separation of powers principles by providing the Treasury with unbridled discretion to identify companies for liquidation "without either useful statutory guidance or meaningful legislative, executive, or judicial oversight."⁵⁰ Moreover, according to Big Spring, the Treasury's procedures infringe companies' Fifth Amendment Rights and the uniformity requirement of Article I, Section 8, Clause 4 by precluding "notice and meaningful opportunity to be heard" and permitting the Treasury to "choose favorites among similarly situated creditors in implementing liquidation."⁵¹

Big Spring's criticism of the FSOC sounds in a similar register: by offering the FSOC unlimited discretion to designate institutions as "systemically important" and insulating this process from judicial review, the Dodd-Frank Act contravenes the separation of powers.⁵² MetLife presents a parallel separation of powers argument in its complaint against the FSOC, which alleges that the Council

⁴⁹ *ITT Educ. Servs., Inc.* at *11. The Constitution provides that Congress may vest the heads of Executive Departments with authority to appoint inferior officers. U.S. Const. Art. II, § 2, cl. 2.

⁵⁰ Compl. at 7, *Nat'l Bank of Big Spring*, No 1:12-cv-01032.

⁵¹ *Id.* at 7-8.

⁵² *Id.* at 6-7.

“conflat[es] the roles of advocate and adjudicator” by having the same individuals investigate and issue a final decision on eligibility.⁵³ It then proceeds to assert that the thresholds applied by the FSOC to determine eligibility are unconstitutionally vague in violation of the Fifth Amendment.⁵⁴

These claims, which recall the separation of powers and Fifth Amendment challenges to the CFPB, are also largely disguised non-delegation arguments, and fail for much the same reasons. Furthermore, they are representative of an overarching theme embodied by the plethora of ill-conceived constitutional challenges levied against the CFPB and the Dodd-Frank Act, generally: wariness of the regulatory scheme’s novelty. The court in *ITT* emphasized that the Bureau is “no venture into uncharted waters,” but a “variation on a theme—the independent regulatory agency with enforcement power—that has been a recurring theme of the modern administrative state.”⁵⁵ But the Dodd-Frank Act is, in many ways, undeniably innovative. In passing the Act, Congress aimed to prevent another Great Recession by overhauling financial regulation in the United States. By instituting the CFPB, it intended to establish the first agency designed to address regulatory capture. Achievement of these ambitious objectives required Congress to consider agency arrangements that deviated from traditional structures.

⁵³ Cross-Motion for Summ J. at 67-68, *MetLife v. Fed. Stability Oversight Council*, No. 1:15-cv-45 (RMC) (D.D.C. June 16, 2015).

⁵⁴ *Id.* at 67.

⁵⁵ *ITT Educ. Servs., Inc.* at *13.

Novelty, however, is not in and of itself an indicator of unconstitutionality. As the *Mistretta* Court noted in upholding the structure of the Sentencing Commission, “constitutional principles of separated powers are not violated ... by mere anomaly or innovation.”⁵⁶ Although it may signal that a court should exercise caution, “generalized assault[s] on the unprecedented nature of the Bureau proceed from the mistaken premise that that which is not specifically approved by precedent is forbidden.”⁵⁷ By treating the Dodd-Frank Act’s originality as a mark against its legality, its opponents compromise the presumption in favor of constitutionality and disincentivize innovation designed to make the government both more effective and responsive. We should be celebrating such innovation, not stifling it.

II. Accountability Critiques of CFPB.

Constitutional challenges aside, the primary attack against CFPB is that it is unaccountable to the public and democratically illegitimate. Critics target the fact that the agency is headed by a single Director rather than by a five-member commission, and that its funding is not subject to the appropriations process overseen by Congress. Alarmist appraisals by opponents such as Todd Zywicki—who describes the agency as combining “vast power and lack of public accountability” in unprecedented ways—are routine.⁵⁸

These criticisms are not new: they echo the same attacks that opponents

⁵⁶ *Mistretta v. United States*, 488 U.S. 361, 385 (1989).

⁵⁷ *ITT Educ. Servs., Inc.* at *11.

⁵⁸ Todd Zywicki, *Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEORGE WASH. L. REV 856 (2013).

launched five years ago, after Congress created the agency.⁵⁰ Several facts show that these criticisms are also flatly unfounded. First, agency accountability was a central goal throughout both the conception and formation of the Bureau, and its structure today reflects fidelity to that priority. Second, the CFPB is accountable in all the ways that the Federal Reserve, the OCC, and the Federal Deposit Insurance Corporation (FDIC) are. Third, in important ways the Bureau's power is more constrained than those of these other regulators. And fourth, over its short existence CFPB has pioneered ways to involve citizens in its decision-making, to ensure its work reflects the challenges and needs of actual consumers, and to keep itself accountable to the public.

A. Accountable to the Public, Resistant to Industry Capture. I agree that the democratic legitimacy of independent agencies is of paramount importance and a central challenge of the administrative state. Ensuring that agencies stay accountable to the public isn't just an academic concern; we saw all-too-recently what can happen when regulators become unmoored from serving the public. As is now widely acknowledged, the 2007 financial crash was the result of gross oversight and neglect on the part of the independent agencies charged with overseeing the financial system. The Federal Reserve failed to stem the flow of toxic mortgages and neglected to read the myriad warning signs that

⁵⁰ Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010) 72-75; David Hirschmann, *Consumer Financial Protection Bureau needs more accountability*, POLITICO, Dec. 7, 2011, at <http://www.politico.com/news/stories/1211/69992.html>

foreshadowed the crisis.⁶⁰ The OCC and the Office of Thrift Supervision (OTS), caught up in turf wars, preempted state regulators from reining in abuses and created incentives for a regulatory “race-to-the-bottom.”⁶¹ In many ways the failings of these agencies can be traced to a lack of democratic accountability, and to ideological and cultural capture by industry.⁶²

The Consumer Financial Protection Bureau was created with these failures in mind. Observing that the existing regulatory framework left consumers entirely exposed to risky and predatory financial products, then-Professor Elizabeth Warren proposed the new agency to fill-in the gap.⁶³ Critically, the idea was to design an entity with both the authority and the incentives to police the safety of consumer credit products. Acutely aware of how vulnerable regulators remain to industry capture, the agency’s supporters drew from scholarship on agency accountability, as well as from the practical lessons of agencies like the Consumer Products Safety Commission, whose structure provided a cautionary tale for how

⁶⁰ As the Financial Crisis Inquiry Commission noted in its final report, “Despite the expressed view of many on Wall Street and in Washington that the crisis could not have been foreseen or avoided, there were warning signs. The tragedy was that they were ignored or discounted.” The red flags included “an explosion in risky subprime lending and securitization, an unsustainable rise in housing prices, widespread reports of egregious and predatory lending practices, dramatic increases in household mortgage debt, and exponential growth in financial firms’ trading activities, unregulated derivatives, and short-term “repo” lending markets, among many other red flags. Yet there was pervasive permissiveness; little meaningful action was taken to quell the threats in a timely manner.” THE FINANCIAL CRISIS INQUIRY COMMISSION REPORT, JAN. 2011, xvii.

⁶¹ *Id.* at xiii.

⁶² James Kwak, *Cultural Capture and the Financial Crisis*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT, eds. Daniel Carpenter and David A. Moss, The Tobin Project, 2014.

⁶³ Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY (Summer 2007); Oren Bar Gill and Elizabeth Warren, *Making Credit Safer*, 157 U. PENN. L. REV. 101 (2008).

traditional markers of independence can fall short.⁶⁴

The institutional framework of the CFPB was the focus of intense political debate.⁶⁵ Initially proposed as a free-standing cabinet-level agency, CFPB's ultimate form was shaped by extensive negotiations in Congress. Tennessee Senator Bob Corker, a conservative Republican, proposed that the agency be housed within the Federal Reserve, insulating it from the appropriations process.⁶⁶ Compromises on both sides yielded the final result.

B. Just as Accountable as Other Financial Regulators. As numerous experts have noted, CFPB is accountable to a host of government processes and bodies. Like other agencies, it is bound by the Administrative Procedures Act (APA), which means that it must inform the public of its proposed rules, offer citizens the opportunity to comment on proposals, and then consider public input when finalizing its rules. It is also subject to the Regulatory Flexibility Act, the Paperwork Reduction Act, and the Congressional Review Act.

Additionally, CFPB's authority is uniquely bound by other regulators. When proposing rules to prohibit unfair, deceptive, or abusive practices, the CFPB is required to consult with federal banking agencies or other regulators to ensure that the rules are in line with "prudential, market, or systemic objectives

⁶⁴ Barkow, *Insulating Agencies*, at 65-71 (identifying various structural features of the CPSC that made it "one of the least politically independent and influential agencies in government").

⁶⁵ Sewell Chan, *Dodd Proposes Giving Fed the Task of Consumer Protection*, N.Y. TIMES, Mar. 2, 2010, at B2 ("[A]dvocates, mindful of fierce Republican opposition to a stand-alone agency, have said that they are less concerned about where the entity is housed than the scope of its authority and the independence of its leadership and budget.").

⁶⁶ Rich Danker, *Corker stiff's anti-Fed Republicans again*, THE HILL, Mar. 6, 2012.

administered by such agencies.”⁶⁷ The CFPB is also obligated to consult prudential regulators and other agencies when proposing rules administering federal consumer financial laws.⁶⁸ Not only are regulators permitted to object to the rules, their written objections must be included in the rule-making record, along with the Bureau’s response to their concerns.⁶⁹ No other financial regulator faces these requirements.

An agency head who can only be removed by the president for-cause and an independent funding stream are features that the Bureau shares with the Federal Reserve, the FDIC, and the OCC.⁷⁰ Congress gave financial regulators this structure because it recognized that the safety and stability of the financial industry—a sector on which all other businesses depend—was too vital to subject to the vagaries of the political process. That the CFPB, a financial regulator, shares the basic design of other financial regulators is not anomalous.

C. More Accountable Than Other Financial Regulators. In important ways, Congress has placed additional limits on CFPB’s authority. Unlike any other financial regulator, the Bureau is subject to the Small Business Regulatory Enforcement Fairness Act (SBREFA), which requires it to give small businesses a preview of new proposals and receive extensive feedback before giving notice to the broader public. The CFPB is also the only financial regulator whose books are

⁶⁷ Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. 5301, §1031(e).

⁶⁸ *Id.* at §1022(b)(2)(B).

⁶⁹ *Id.* at, §1022(b)(2)(C).

⁷⁰ Restraints on the President’s ability to remove the Comptroller of the Currency is unclear and the OCC’s organic statute does not address the issue.

annually audited by the Government Accountability Office (GAO).⁷¹ Furthermore, the Bureau is subject to significant oversight by Congress: the CFPB Director must submit reports to and appear in committees in front of both houses of Congress twice a year.⁷² Senior CFPB officials have already testified to Congress fifty-five times since the agency's birth four years ago, an average of more than one appearance per month. That must be some kind of record.

Uniquely, CFPB's funding is capped. Unlike other financial regulators, CFPB cannot simply hike fees, increase revenue, and boost its activity levels. Its budget is capped at 12 percent of the Federal Reserve's 2009 operating expenses, with slight adjustment for inflation.⁷³ No other financial regulator has a budget ceiling written into law.

Lastly, all of the Bureau's regulations are subject to review by the FSOC, a body of cabinet-level and executive-appointed officials. The FSOC can veto any proposed rule on safety and soundness concerns with a two-thirds vote. The voting members of the FSOC consist of the Secretary of the Treasury, the Fed Chairman, the Comptroller of the Currency, the Director of the CFPB, the Chairman of the SEC, the Chairperson of the FDIC, the Chairperson of the Commodities Futures Trading Commission (CFTC), the Director of the Federal Housing Finance Agency (FHFA), the Chairman of the National Credit Union Administration (NCUA), and an independent member who has insurance expertise and who is

⁷¹ *Id.* at § 1017(a)(5)(B).

⁷² *Id.* at § 1016(a).

⁷³ *Id.* at § 1017(a)(2).

appointed by the President and confirmed by the Senate. I am aware of no other independent agency whose regulations are subject to the veto power of regulators from other agencies.

D. Enhancing Public Participation. Not only is the Bureau as accountable as—and in key regards, even more constrained than—other financial regulators, but it has pioneered new ways to solicit public participation in its decision-making and ensure that its work reflects the actual needs of citizens. Since 2011 it has held over thirty public town halls and field hearings in cities across the country, from Itta Bena, Mississippi to Sioux Falls, South Dakota.⁷⁴ Even before its official launch, CFPB initiated an online campaign to seek public input through popular venues like Twitter, Facebook, and YouTube. Through these online channels, the Bureau has collected reams of information about the kinds of difficulties consumers face with various financial products, data that it uses to inform its priorities and policymaking.⁷⁵

The Bureau’s “Know Before You Owe” mortgage initiative exemplifies the agency’s emphasis on public participation. Charged with the task of simplifying the convoluted information consumers receive under the Truth In Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA), CFPB redesigned the forms and conducted in-depth, one-on-one interviews with borrowers, lenders, and

⁷⁴ Consumer Financial Protection Bureau, Consumer Financial Protection Bureau: By the Numbers Fact Sheet, July 15, 2015.

⁷⁵ Leonard J. Kennedy, Patricia A. McCoy, and Ethan Bernstein, *The Consumer Financial Protection Bureau: Financial Regulation for the Twenty-First Century*, 94 CORN. L. REV. 1140, 1159 (2012).

brokers to understand how well consumers and lenders were able to use various iterations. At the same time that the Bureau was testing each set of forms, it also posted them online with an interactive tool to gather public input about the designs. By recording where users clicked as they reviewed the draft disclosures, this tool allowed the Bureau to compile “heat-maps” showing the areas of the disclosures that attracted the most and least attention. In addition, as a useful supplement to the traditional public notice-and-comment process, the CFPB’s interactive tool permitted targeted input on the portions of the design that were under investigation in that cycle. That input allowed Bureau staff to process the feedback quickly, iterate the forms, and then test again in four weeks.⁷⁶

The process fostered extensive public participation. The Bureau received over 220,000 unique page-views for KBYO, resulting in 27,000 comments over the first seven iterative cycles.⁷⁷ Seeking wide public input as it conducted consumer testing, rather than having a single public comment period on a formal proposal, has been central to the development and success of the Bureau’s proposed form. Initial testing shows that the new disclosures have successfully reduced consumer confusion and are enabling comparison-shopping.⁷⁸ Drawing on this experience, the Bureau has expanded its KBYO initiative to cover student loans and credit cards—efforts that will make the costs and risks of these products easier for the public to understand.

⁷⁶ *Id.* at 1166.

⁷⁷ CONSUMER FIN. PROT. BUREAU, SEMI-ANNUAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU: JULY 21-DECEMBER 31, 2011, at 13-14 (2012).

⁷⁸ Kennedy et al., *The Consumer Financial Protection Bureau*, at 1161.

The Bureau has also sought out extensive feedback from servicemembers. Under the leadership of Holly Petraeus, the Bureau has hosted numerous town hall meetings and roundtable discussions with military families and their advocates. These meetings have educated the Bureau about the financial products and services most affecting servicemembers, information CFPB is now using to shape financial education programs for servicemembers.⁷⁹

These efforts showcase just some of the ways that CFPB is using its mandate to ensure it stays accountable to the public. Not only are attacks on its accountability unfounded, but the Bureau's efforts to enhance its democratic responsiveness serve as a model that we should encourage other regulators to follow.

* * *

Numerous proposals from Congress now threaten the independence and accountability of the Bureau. The most recent House appropriations bill includes several riders that would, among other things, replace its single director with a five-member commission, subject agency rulemaking to additional compliance requirements, and change its funding source from Federal Reserve transfers to annual appropriations.⁸⁰ Most alarmingly, the House appropriations bill would introduce fresh obstacles to the Bureau's ability to review and reform pre-dispute mandatory arbitration—a task Congress charged it with in Dodd-Frank.

⁷⁹ *Id.*, at 1168.

⁸⁰ Financial Services and General Government Appropriations Bill, 2016, 114th Cong., 1st sess., 47-51.

Each of these proposals would critically undermine the agency's structure and powers and should be fought off. The Bureau's efficacy and force as a public champion stems from its independence, and the fact that it can carry out its work insulated from the threat of industry retaliation and the partisan vagaries of the appropriations process. Undoing these key protections would be disastrous for American consumers.

III. Progress of CFPB & Arbitration Study.

In its short five years, the Bureau already has had tremendous success championing the rights of the American public. The agency has returned \$10.8 billion dollars to more than 25 million consumers harmed by illegal practices—including \$14 million that the Bureau won back from the payday lender Cash America for targeting and illegally overcharging members of the military.

The Bureau's victories go beyond numbers: it has also made financial products more transparent and provided consumers with key resources to navigate among different financial options. Most importantly, its mere existence as a public watchdog serves as a powerful deterrent against predatory and exploitative industry practices.

One area in which the CFPB is working hard to protect consumers is forced arbitration. Swaths of consumer contracts today contain mandatory arbitration clauses. These clauses rob consumers of the right to take a company to court, and instead force individuals to settle claims through private arbitrators, usually chosen by the company. Originally sanctioned by Congress as a mechanism for

businesses of equal bargaining power to resolve contractual disputes, arbitration today has morphed into a routine device that companies can use against consumers and workers, parties with vastly unequal bargaining power.⁸¹

For years public advocates and corporate lawyers debated the effects of mandatory arbitration clauses, with each side issuing competing studies documenting how these clauses either harm or benefit the public. Congress gave the Bureau statutory authority to study the prevalence and effects of these clauses as a way to gather credible data and create a public record on the understudied yet rising use of forced arbitration.⁸²

The CFPB undertook the process with methodological rigor and transparency. As a preliminary step, it published a Request for Information that sought comments on the appropriate scope, methods, and data sources for the study, and met with commentators to discuss their concerns. It then published preliminary results from the study in December 2013, and again met with various stakeholders—including industry actors—to hear their feedback.

In March of this year, the Bureau issued its final report.⁸³ The results were unambiguous: the financial industry uses arbitration clauses widely, these clauses notably suppress consumer complaints, and the tiny fraction of consumers who *do* bring claims fare far worse in arbitration than they would in class actions. Strikingly, *four* consumers with small claims received cash compensation through

⁸¹ Lina Khan, *Thrown Out of Court*, WASH. MONTHLY, June/July/August 2014.

⁸² 12 U.S.C. § 5301(a).

⁸³ Consumer Financial Protection Bureau, Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a), March 2015.

arbitration, whereas thirty-four million received compensation through class actions.⁸⁴ A case study comparing outcomes for consumers who had been swindled by banks through overdraft fees found that those without arbitration clauses were able collectively to recover hundreds of millions of dollars that were deposited straight to their bank accounts, while those facing enforceable arbitration clauses won back nothing.⁸⁵

The Bureau also found that 50 percent of outstanding credit card loans contain forced arbitration clauses. (Were it not for a 2009 antitrust settlement that required some banks to eliminate temporarily these clauses, this number would be around 94 percent.) Between 85 and 100 percent of contracts with forced arbitration clauses additionally contain class action bans. Consumers, meanwhile, overwhelmingly have no idea: over 90 percent of consumers whose contracts for financial products include forced arbitration clauses were unaware that they could no longer sue. Between 2010 and 2012, only about 410 individual consumers brought arbitration claims against financial services companies.

The study also found that consumers generally fare much worse than companies do a significant percentage of the time: in cases initiated by consumers, arbitrators provided them some relief in around 20 percent of cases; by contrast, arbitrators awarded companies relief in 93 percent of cases that they filed.

⁸⁴ The arbitration claims were counted over a two-year period, while the class action claims over a five-year period. Needless to say, this discrepancy does not undermine the force of the disparity between four consumers and thirty-four million consumers.

⁸⁵ Consumer Financial Protection Bureau, Arbitration Study, at 39.

Moreover, consumers on average won 12 cents for every dollar that they claimed, whereas corporations on average won 91 cents for every dollar that they claimed.

In sum, the study shows that arbitration is starkly inferior to class actions as a vehicle for consumer relief. The next step for the Bureau is to consider rulemaking informed by this study.

Alarming, it's become clear that opponents are now trying to use the appropriations process to obstruct the agency's work. The 2016 House Appropriations Bill contains provisions that would tie the Bureau's authority to continue working on arbitration to a litany of additional requirements—instituting a form of paralysis by analysis.

Allowing CFBP to continue its arbitration work is vital for restoring a fair playing field for consumers and rectifying the gross imbalance of power between corporate interests and the public. Members of Congress should pay special attention to this attack—and fight it.

Thank you again for the opportunity to testify. I am happy to answer any of the Committee's questions.

**Hearing before the United States Senate Committee on the Judiciary,
Subcommittee on the Constitution**

“The Administrative State v. The Constitution:

Dodd-Frank at Five Years”

July 23, 2015

Prepared Statement of

Neomi Rao

Associate Professor

George Mason School of Law

Chairman Cornyn, Ranking Member Durbin, and members of the Committee, thank you for this opportunity to testify on the constitutionality of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank” or “the Act”).¹

The Dodd-Frank Act has raised serious constitutional questions since its inception five years ago. The Act creates new agencies insulated from political accountability and new procedures that strain due process. Both in law and practice, these structures have transgressed the boundaries of the Constitution. My testimony will focus on the Consumer Financial Protection Bureau (“CFPB” or “Bureau”) created by the Act. The super independence of this Bureau demonstrates many of the problems of administration without meaningful presidential control or congressional oversight.² Moreover, it provides an especially stark example of the types of abuse that can result from overbroad delegations of authority to agencies.³ These concerns with the Bureau existed at enactment, but the passage of time has demonstrated how the constitutional infirmities

¹ Pub. L. 111-203, 124 Stat. 1376 (2010).

² See Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205 (2014) (developing the constitutional requirement of presidential control over all agencies, even those denominated “independent”).

³ See Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. (forthcoming 2015) (arguing that delegations not only expand the power of executive branch agencies, but also allow members of Congress to influence administration outside of their collective lawmaking power).

encourage actions by the Bureau that exceed its legal authority and undermine the predictability and stability of the rule of law.

Regulated entities have raised constitutional challenges to the Bureau and courts should give them serious consideration. Some of these issues may be difficult to redress in the courts because of jurisdictional limits and existing precedent. The Constitution, however, is not the exclusive domain of the courts and judicial doctrine does not exhaust the full meaning of the Constitution. As this hearing before the Subcommittee on the Constitution recognizes, Congress has a duty to evaluate constitutional infirmities in statutes and to provide corrections. No mere academic exercise, the constitutional problems are the foundation for the Act's weaknesses and for its problematic implementation by agencies unencumbered by the mechanisms of democratic accountability.

I SUPER INDEPENDENCE

The Constitution divides the federal government into three branches—the legislature, the executive, and the judiciary—and it gives each branch distinct powers and mechanisms of accountability. The separation of powers “diffused power the better to secure liberty.”⁴ Administrative agencies, however, often combine the three functions of the federal government—they make the rules, enforce the rules, and adjudicate the rules.⁵ In keeping with the progressive ideal of independent expertise, many of these agencies are insulated from political control by the President. The Constitution, however, does not recognize any “independent” entities. Although the Supreme Court continues to recognize some forms of agency independence, in all of the recent cases concerning “independent” agencies, the Court has recognized that such agencies are part of the executive branch.⁶ At least for now, the Supreme Court has maintained the

⁴ *Bowsher v. Synar*, 478 U.S. 714, 721 (1986).

⁵ See generally Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

⁶ See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010) (noting that the Securities and Exchange Commission is a “freestanding component of the Executive Branch” and constitutes a Department for the purposes of Appointments Clause); *Freytag v. Comm’r*, 501 U.S. 868, 912 (1991) (Scalia, J., concurring in part and concurring in the judgment) (“It seems to me entirely obvious that the Tax Court, like the Internal Revenue Service, the FCC, and the NLRB, exercises executive power);

constitutionality of removal limits for independent agencies, but has rejected the reasoning that such agencies form a headless Fourth Branch of government.⁷ Instead, the Supreme Court relies on a more formalist framework in which even independent agencies are squarely within the Executive Branch. For instance, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*,⁸ the justices disagreed on the constitutionality of the PCAOB's structure and double-layer of removal protections, but they all agreed that this "independent" agency exercised executive power as part of the executive branch.⁹

Agencies that implement the laws, such as the CFPB, undoubtedly exercise the executive power and therefore must be within the control of the President, as I argue in greater detail elsewhere.¹⁰ The Court's reasoning in the *Free Enterprise Fund* case strongly suggests that agency independence is unconstitutional because it limits the President's ability to control administration.¹¹ Agencies administering the law must be under the control of the President. While agencies have other forms of accountability, including to congressional oversight and judicial review, they are part of the Executive Branch.

Despite exercising significant executive power, the Bureau enjoys an unprecedented degree of political independence.¹² The Act combines multiple features that insulate the CFPB from political pressures. Other "independent" agencies often have mechanisms by which the President can assert some control and supervision¹³ and most of them remain amenable to congressional oversight through the necessity of securing

Buckley v. Valeo, 424 U.S. 1, 132-33 (1976) (explaining that the Appointments Clause applies to the members of the Federal Election Commission). *See also* Rao, *supra* note 2, at 1231 (discussing the Supreme Court's precedents that consistently recognize that "independent" agencies exercise executive power and that the heads of such agencies are executive officers subject to the requirements of the Appointments Clause).

⁷ The central case upholding removal restrictions, *Humphrey's Executor v. United States*, relied on the reasoning that commissioners of the Federal Trade Commission exercised quasi-judicial and quasi-legislative powers and therefore were not part of the executive branch. 295 U.S. 602, 628 (1935).

⁸ 130 S. Ct. 3138 (2010).

⁹ *See id.* at 3155 (discussing the Board's "executive power without the Executive's oversight"); *id.* at 3165-68 (Breyer, J., dissenting) (discussing members of the PCAOB as "executive Officers" and examining whether for-cause restrictions limit "the President's exercise of executive authority").

¹⁰ *See* Rao, *supra* note 2.

¹¹ *See* Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB*, 79 *FORDHAM L. REV.* 2541 (2011) (arguing that the implications of the *Free Enterprise Fund* decision call into question the constitutionality of all restrictions on the President's removal power).

¹² Rao, *supra* note 2, at 1270-71 (discussing the forms of independence of the CFPB).

¹³ *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 *CORNELL L. REV.* 769 (2013) (cataloguing features of independent agencies).

appropriations. By contrast, the structure of the CFPB creates independence from both presidential control and congressional appropriations, resulting in a rare form of super independence.

Dodd-Frank establishes the CFPB as an “independent bureau... which shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws.”¹⁴ The Director of the Bureau serves for a five-year term and can be removed by the President only “for inefficiency, neglect of duty, or malfeasance in office.”¹⁵ This standard formulation for “independent” agencies is conventionally understood to restrict the President’s ability to remove and therefore to control the actions of the agency. In addition, the CFPB is headed by a single director, rather than a multi-member board or commission, and therefore lacks the bi-partisan deliberation and compromise that can result from such a structure. Moreover, the Act reinforces the Bureau’s independence from the White House by providing that the Director has no “obligation” to consult with the Office of Management and Budget (“OMB”).¹⁶ The Director has discretion to determine whether he will submit to presidential supervision, although as discussed below, nothing prohibits OMB review of the Bureau’s regulations.

The Bureau also combines other features of independence, in particular an unusual degree of budgeting independence. The Director determines the Bureau’s budget and the Federal Reserve must pay this amount from a designated fund.¹⁷ This independence from Congress is further reinforced by a statutory restriction that *prohibits* the Appropriations Committees of the Senate and the House of Representatives from reviewing the budget set by the Director.¹⁸ The Bureau thus operates entirely outside of

¹⁴ 12 U.S.C. § 5491(a).

¹⁵ 12 U.S.C. § 5491(c)(3).

¹⁶ 12 U.S.C. § 5497(a)(4) (E) (providing a “rule of construction” that the statute “may not be construed as implying any obligation on the part of the Director to consult with or obtain the consent or approval of the Director of the Office of Management and Budget with respect to any report, plan, forecast, or other information ... or any jurisdiction or oversight over the affairs or operations of the Bureau”).

¹⁷ 12 U.S.C. § 5497(a)(1) (stating that the Federal Reserve “shall transfer to the Bureau... the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law”). The CFPB’s budget is limited only by a very generous cap. See 12 U.S.C. § 5497(a)(2).

¹⁸ 12 U.S.C. § 5497 (c) (“the funds derived from the Federal Reserve System pursuant to this subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate.”).

the congressional appropriations process, which gives members of Congress less leverage over the Bureau's operations and further diminishes political accountability.

Moreover, events after the CFPB's creation further insulated the Bureau from accountability to Congress. Congress maintains various constitutional checks on administration, including the Senate's role in confirming the appointment of principal executive officers such as the Director of the CFPB.¹⁹ At the outset, the President circumvented this important check by appointing Richard Cordray in between the Senate's *pro forma* sessions, invoking his authority under the Recess Appointment Clause.²⁰ Director Cordray's recess appointment was invalid, however, under the reasoning of the Supreme Court's decision in *National Labor Relations Board v. Noel Canning*,²¹ which invalidated appointments to the National Labor Relations Board made during the same time as Cordray's appointment. Although Director Cordray was eventually confirmed by the Senate and has "ratified" actions he took during his "recess" appointment, questions remain about the status of the actions taken during that time. The initial recess appointment sidestepped the Senate's advice and consent power and denied whatever control the Senate could exercise through the confirmation process over the leadership and direction of the CFPB. Similarly, although the President could assert some control over the CFPB as discussed below, the Administration steadfastly refers to the Bureau as "independent," as an entity apart from the President and distinct from other Administration efforts,²² and presumably therefore outside of the President's responsibility.

In addition, Dodd-Frank creates other independent entities, such as the Financial Stability Oversight Council ("FSOC" or "Council"). The FSOC is a kind of "agency of

¹⁹ U.S. Const. art. II, § 2, cl. 2 (the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint... all other Officers of the United States").

²⁰ U.S. Const. art. II, § 2, cl. 3 (giving the President the power "to fill up all Vacancies that may happen during the Recess of the Senate").

²¹ 134 S. Ct. 2550 (2014) (holding that the President lacked authority to make recess appointments to the National Labor Relations Board in a three-day period between two *pro forma* sessions of the Senate).

²² See, e.g., White House Fact Sheet, Progress Toward Building a Safer, Stronger Financial System and Protecting Consumers from Unfair and Abusive Practices (Mar. 26, 2015), available at <https://www.whitehouse.gov/the-press-office/2015/03/26/fact-sheet-progress-toward-building-safer-stronger-financial-system-and-> (referring to the CFPB as "a dedicated, independent cop on the beat" and discussing the CFPB's work separately from the "President" and the "Obama Administration").

agencies”²³—chaired by the Secretary of the Treasury with voting members including the heads of other federal agencies and commissions dealing with financial markets.²⁴ Like the CFPB, the Council’s structure reinforces its political independence and its insulation from presidential control and congressional oversight even as it exercises significant administrative authority to identify risks to the financial stability of the United States and to coordinate with agencies to avoid such risks.²⁵

II SWEEPING DELEGATED AUTHORITY

The lack of political accountability raises particular concerns, because the CFPB has especially sweeping powers to regulate consumer finance. Expansive delegated authority, political independence, and plenary budget control combine to give the Bureau significant discretion to define the rules of consumer finance and then to enforce and to adjudicate those same rules.

Dodd-Frank entrusts substantial and open-ended authority to the CFPB. For example, the CFPB can exercise its authority under federal consumer financial law to ensure that “consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination.”²⁶ Such delegations raise constitutional concerns, because they provide the CFPB with capacious authority to enforce the law with only minimal guidance from Congress. In a Constitution of limited and enumerated powers, Congress cannot delegate its “exclusively legislative”²⁷ powers to the Executive (or to the courts)

²³ See Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689, 696-98 (2013) (discussing the Financial Stability Oversight Council as an agency of agencies, which is “an administrative structure composed of the heads of other agencies that is built of grounds of information, expertise, and (intentionally or not) a fair measure of structural political insulation”).

²⁴ The voting members include: the Chairman of the Board of Governors of the Federal Reserve, the Comptroller of the Currency, the Director of the CFP, the Chairman of the Securities and Exchange Commission, the Chairperson of the Federal Deposit Insurance Commission, the Chairperson of the Commodity Futures Trading Commission, the Director of the Federal Housing Finance Agency, the Chairman of the National Credit Union Administration, and a presidential appointee with insurance expertise. See 12 U.S.C. § 5321(b).

²⁵ See Gersen, *supra* note 23, at 693-94 (providing an overview of the FSOC’s structure and duties).

²⁶ 12 U.S.C. § 5511(b)(2).

²⁷ *Wayman v. Southard*, 23 U.S. 1, 42 (10 Wheat) (1823) (Marshall, C.J.) (“It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.”).

because the Constitution vests “All legislative power herein granted...” in Congress.²⁸ This ensures that laws that bind the people are made by the people’s representatives through a legislative process designed to promote deliberation and compromise for the public good. The limitation on delegation is “a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.”²⁹

In practice, however, the modern administrative state relies on open-ended delegations—giving agencies authority to formulate rules of conduct that would be difficult to enact through bicameralism and presentment. Delegations are frequently justified on functional, not constitutional, grounds of expediency, emphasizing agency expertise, flexibility, and responsiveness to changed circumstances. The Supreme Court has tolerated broad delegations to agencies so long as the statute contains an “intelligible principle.”³⁰ Although the Court has maintained the importance of the principle of non-delegation, the Court has repeatedly declined to enforce a more robust non-delegation doctrine.³¹

Concerns about non-delegation, however, persist precisely because of its fundamental importance to a republican form of government and to the constitutional limits on government power. In a recent decision, Justice Samuel Alito explained, “The principle that Congress cannot delegate away its vested powers exists to protect liberty.”³² This individual liberty exists before government action. Under our Constitution the legislature cannot interfere with this liberty unless it follows the “single, finely wrought and exhaustively considered procedure” of Article I, section 7.³³ And the executive branch has no general lawmaking power, independent of a statutory or constitutional grant of authority.³⁴

²⁸ U.S. Const. art. I, § 1, cl. 1.

²⁹ *Field v. Clark*, 143 U.S. 649, 692 (1892).

³⁰ *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 395, 409 (1928).

³¹ See *Whitman v. Am. Trucking Ass’n*, 581 U.S. 457 (2001).

³² *Dep’t of Trans. v. Ass’n of Am. R.R.*, 135 S.Ct. 1225, 1237 (2015) (Alito, J., concurring). See also *id.* at 1254-55 (Thomas, J., concurring in the judgment) (explaining that the judiciary’s failure to enforce the non-delegation doctrine come at the “cost [of] our Constitution and the individual liberty it protects”).

³³ *INS v. Chadha*, 462 U.S. 919, 951 (1983).

³⁴ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (“[T]he President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. ... And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.”).

Excessive delegations undermine separation of powers in several ways. First, delegations have significantly expanded the power of the executive branch. In the course of administering open-ended statutes, executive agencies have to fill in the blanks. While some gap filling and interpretation is an essential part of the executive power, many agencies, including the CFPB have such broad delegated authority that functionally they make binding rules that all but resemble legislation, but without the constitutional checks of bicameralism and presentment.³⁵

Second, and often less visible, delegations to agencies allow individual members of Congress to participate in administration.³⁶ Once an agency possesses significant discretionary authority, members of Congress can try to influence the exercise of that agency's authority. Delegations to agencies favor individual members of Congress over Congress as a lawmaking institution. Reporting about the CFPB, for instance, reflects the understanding that the CFPB responds to Senator Elizabeth Warren, who developed and helped to establish the Bureau.³⁷ Open-ended delegations diminish the constitutional Congress, what I call the "collective Congress," in favor of its individual members.³⁸ Some legislators may find greater short-term benefits in influencing administration, rather than pursuing the difficult task of legislating. This further undermines democratic accountability and can work to serve special interests. "By allowing legislators to satisfy individual interests, delegations disconnect the interests of congressmen from the interests of Congress. Delegations fracture the collective Congress, undermine the institutional power of Congress, and weaken the Madisonian checks and balances between Congress and the President."³⁹

³⁵ Justice Clarence Thomas explained the fundamental problem: "The function at issue here is the formulation of generally applicable rules of private conduct. Under the original understanding of the Constitution, that function requires the exercise of legislative power. By corollary, the discretion inherent in executive power does not comprehend the discretion to formulate generally applicable rules of private conduct." *Dep't of Trans. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1237 (2015) (Thomas, J., concurring in the judgment).

³⁶ See Rao, *Administrative Collusion*, *supra* note 3.

³⁷ See, e.g., Joseph Lawler, *Incoming GOP majority would target Elizabeth Warren's CFPB*, WASHINGTON EXAMINER, Oct. 21, 2014, <http://www.washingtonexaminer.com/incoming-gop-majority-would-target-elizabeth-warrens-cfpb/article/2555055>; Erika Eichelberger, *10 Things Elizabeth Warren's Consumer Protection Agency Has Done for You*, MOTHER JONES, Mar. 14, 2014, <http://www.motherjones.com/politics/2014/02/elizabeth-warren-consumer-financial-protection-bureau>.

³⁸ See Rao, *Administrative Collusion*, *supra* note 3.

³⁹ *Id.*

It is a fundamental principle of our constitutional government that the difficulty of lawmaking serves the public good by requiring lawmakers to account for the diverse interests of society.⁴⁰ Matters regarding consumer finance may benefit from the CFPB's expertise, but expertise will rarely, if ever, definitively settle the Bureau's appropriate course of action. Decisions about what to do and at what cost are invariably laden with economic, social, political, and even moral judgments. Without the constitutional mechanisms of control by the President and oversight by Congress, expansive delegated authority will be defined and exercised by bureaucrats. This hardly guarantees expert "independence." Instead it simply insures that important decisions about consumer finance will be made under influences and interests less visible and less accountable to the public.

III BUREAUCRATS UNBOUND

These constitutional problems of super-independence and delegated authority are linked to problems with agency overreach. When insulated from ordinary political debate and mechanisms of influence, an agency with significant discretion to pursue its broad purposes will predictably attempt to expand its jurisdiction. Proponents of the CFPB tout its super independence as one of the primary advantages to the CFPB's structure—it can continue with its "mission" without political interference.⁴¹ Yet independence is not part of the constitutional design. Agencies, like other parts of the federal government, must answer to the people through their elected officials. As the examples below demonstrate, the CFPB exercises significant discretion through its supervisory, rulemaking, and enforcement powers. While Congress may allow agencies some discretion in administering the law, the legitimacy of executive branch discretion depends on having proper statutory authority and exercising it with accountability. Actions undertaken in a bureaucratic bubble will predictably differ from what comes out of a more accountable

⁴⁰ See The Federalist No. 10 (James Madison) (commending a republican form of government as most conducive to "secur[ing] the public good, and private rights, against the danger of [faction], and at the same time [preserving] the spirit and form of popular government").

⁴¹ See, e.g., Eric Garcia, *Elizabeth Warren Strikes Back Against New GOP Efforts to Weaken Dodd-Frank*, THE NATIONAL JOURNAL, Mar. 18, 2015 (noting Senator Warren's defense of the CFPB that the "big banks don't like [CFPB rules]—and that's the number one reason the CFPB should remain free of political influence.").

process. Insulated from the pull and push of politics, the CFPB can pursue its own approach to consumer finance, disconnected from the specific provisions of Dodd-Frank and not directly sanctioned by the President through control or supervision of the Bureau.

A. “Abusive” enforcement

In the past five years, the CFPB’s actions have undermined Congress’ lawmaking power by using general grants of authority to undermine specific statutory limits and to exercise enforcement power in a way that frustrates the rule of law. For example, the CFPB has authority to regulate “abusive” acts and practices. The statute provides some general guidance as to the standard for “abusive,”⁴² but the term remains largely undefined and under specified. Rather than follow a process of rulemaking to define how the “abusive” standard will be enforced, Director Cordray has taken an “I-know-it-when-I-see-it” approach, choosing to define the term through case-by-case enforcement.⁴³ While this maintains enforcement flexibility for the Bureau, it comes at the cost of predictability and notice for regulated industries.

Defining core statutory violations through enforcement poses particular problems, because open-ended terms like “abusive” have a broad range of meaning and application, leaving substantial discretion with the CFPB. The Director has made clear that “abusive” is a discrete factor from “unfair” and “deceptive,” terms which have more developed meaning in existing law. What makes a practice abusive when it is neither unfair nor deceptive? Various political and economic judgments must inform the meaning of “abusive,” making it precisely the type of issue that, absent legislative clarification, would benefit from public input in the process of administrative rulemaking.

⁴² See 12 U.S.C. § 5531(d) (a practice or act may not be declared abusive unless it “(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) takes unreasonable advantage of-- (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.”)

⁴³ *How Will the CFPB Function Under Richard Cordray: Hearing Before the Subcomm. on TARP, Financial Services, and Bailouts of Public and Private Programs of the H. Comm. on Oversight and Government Reform*, 112th Cong. (2012) (statement of Richard Cordray) (explaining that the definition of “abusive” is “going to have to be a fact and circumstances issue; it is not something we are likely to be able to define in the abstract”).

Even after five years, individual proceedings have not shed much light on the “abusive” standard. In a recent case, PayPal is paying \$25 million to settle charges for practices the CFPB alleges are unfair, deceptive, and abusive.⁴⁴ This is the largest civil penalty sought under a case including the abusive standard.⁴⁵ Yet uncertainty remains about what might constitute an abusive practice. Fleshing out a vague and open-ended law through enforcement rather than notice-and-comment rulemaking undermines predictability, stability, and clarity in the law and imposes massive regulatory conditions and fines at the determination of a single agency.

Moreover, despite conferring such broad authority, the Act tries to cabin the Bureau’s discretion with some specific requirements. Dodd-Frank requires that when prescribing *rules*, the CFPB “*shall* consider ...the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule.”⁴⁶ Enforcement actions against a single company, however, do not require considering these costs and benefits. Dodd-Frank reflects Congress’ awareness that regulations protecting consumers could have adverse consequences, such as limiting access to financial products or services, and the Act specifically requires the CFPB to take such consequences into account for rulemaking. Yet when proceeding through enforcement, the Bureau can avoid or minimize these considerations, taking a blinkered view of its actions. Much like administrative rules, enforcement proceedings can set industry standards that businesses will feel compelled to follow, imposing new liabilities with less certainty and less accountability.

B. Data collection

The CFPB has been collecting massive amounts of consumer credit data over the past four years. According to the General Accounting Office (GAO), the CFPB has gathered information on 173 million mortgage loans, 20 million private-label mortgages,

⁴⁴ Complaint, CFPB v. PayPal, Inc., Civ. Act. No. 1-15-cv-01426 (D. Md. May 19, 2015).

⁴⁵ See Jenna Greene, “Why the CFPB Found PayPal’s Conduct ‘Abusive,’” *The National Law Journal* (May 19, 2015), available at <http://www.nationallawjournal.com/id=1202726875917/Why-the-CFPB-Found-PayPals-Conduct-Abusive?slreturn=20150610152308>.

⁴⁶ 12 U.S.C. § 5512(b)(2)(A)(ii) (emphasis added).

and 15-40 million payday loans.⁴⁷ Much of this data has been collected at the consumer level, including 25-75 million individual consumer credit card accounts.⁴⁸

According to the GAO Report, the CFPB began data collections without appropriate consultation with OMB, including with respect to compliance with the Paperwork Reduction Act (PRA). For collections subject to PRA, “agencies must seek comments from the public on the necessity of proposed collections, the accuracy of agencies’ estimates of burden, ways to enhance the quality, utility, and clarity of the information collected, and ways to minimize the burden of the collection.”⁴⁹ The Paperwork Reduction Act requires that data collections directed to ten or more entities require an agency to seek and obtain OMB approval. As the GAO Report explains, CFPB staff determined that they did not need to seek OMB approval for their collections because “the agency did not ask exactly the same questions of more than nine financial institutions, which would have necessitated OMB approval.”⁵⁰ The reasoning offered by CFPB staff suggests awareness of not triggering the statutory requirement of OMB approval.

OMB approval, however, would have provided at least some accountability and a mechanism for ensuring that CFPB processes complied with applicable laws, which require a balance between an agency’s need for the information and the burdens placed on entities that must provide the information. Not only did the CFPB not submit to OMB approval, the GAO Report found that the Bureau failed to implement adequate internal safeguards for data collection. The CFPB also lacked written procedures and documentation for addressing privacy risks of data collection and ensuring ongoing and consistent compliance with the web of legal requirements that apply to such collections of information.⁵¹

Agency independence allowed the CFPB to avoid accountability before the data collection, but also discourages presidential accountability of ongoing and expanding collections. Even after the GAO Report documented the scope of the data collection and

⁴⁷ Government Accountability Office Report, *Consumer Financial Protection Bureau: Some Privacy and Security Procedures for Data Collections Should Continue Being Enhanced* 16 (Sept. 2014) [hereinafter GAO Report].

⁴⁸ *Id.*

⁴⁹ *Id.* at 44.

⁵⁰ *Id.* at 45.

⁵¹ *Id.* at 37-50.

infirmities in the CFPB's legal processes for the collection, the White House does not appear to have publicly addressed these issues. I could not locate any White House statements, releases, or discussions about the CFPB's data collection. By contrast, after the public revelations about the bulk phone data collection by the National Security Administration (NSA), the President faced significant pressure to answer difficult questions, implement review of the programs, and take various executive actions and work with Congress on legislative reforms.⁵² The CFPB's data collection occurs on a massive scale, relates to sensitive financial information, and is apparently easily matched to individual consumers. Yet these actions have received relatively little attention, "independence" in part insulating the agency from public outcry and political accountability. Congressional committees have held hearings on the issue and drawn attention to the data collection,⁵³ but their options for disciplining the CFPB are limited because the CFPB is not subject to congressional appropriations and President Obama has repeatedly said he will veto bills proposing reforms to the structure and mandate of the CFPB.⁵⁴

C. Circumventing statutory limits

Overbroad delegations and political independence can encourage an agency to circumvent even specific statutory requirements. For example, Dodd-Frank clearly

⁵² See, e.g., Press Conference, President Barack Obama (Aug. 9, 2013), available at <https://www.whitehouse.gov/the-press-office/2013/08/09/remarks-president-press-conference> ("[I]t's not enough for me, as President, to have confidence in these programs. The American people need to have confidence in them as well. And that's why, over the last few weeks, I've consulted members of Congress who come at this issue from many different perspectives. I've asked the Privacy and Civil Liberties Oversight Board to review where our counterterrorism efforts and our values come into tension, and I directed my national security team to be more transparent and to pursue reforms of our laws and practices.").

⁵³ See, e.g., *The Consumer Financial Protection Bureau's Semi-Annual Report to Congress: Hearings Before the Senate Comm. On Banking, Housing & Urban Affairs*, 114th Cong. (June 10, 2014) (raising concerns with Director Cordray about the extent of the CFPB's data collection and criticizing the security of the information gathered). Chairman Jeb Hensarling of the House Committee on Financial Services has held dozens of hearings about the activities of the CFPB. See Jeb Hensarling, *After Five Years, Dodd-Frank Is a Failure*, WALL STREET JOURNAL, July 19, 2015 (discussing the CFPB and noting "[w]hat is most disturbing about Dodd-Frank is the authority it gives bureaucrats to control huge swaths of the economy.")

⁵⁴ See Jordan Fablan, *Obama looks to defend CFPB from Republican attacks*, THE HILL, Mar. 26, 2015 (noting President Obama's statement, "If Republicans in Congress send me a bill to unravel Wall Street reform, I will veto it.").

exempts financing by auto dealers from CFPB authority.⁵⁵ Nonetheless, the CFPB recently enacted a rule to cover nonbank auto finance companies, which are the financial institutions that back the financing initiated and overseen by auto dealers.⁵⁶ The Bureau relied on its general authority to supervise nonbank “larger participant[s] of a market for other consumer financial products or services,” as the Bureau defines by rule.⁵⁷ These rules do not regulate auto lenders directly, but still significantly impact the lending of auto dealers because they originate the loans that go to auto lenders. The general and open-ended authority of the CFPB trumped specific limitations against the regulation of auto lenders.

Similarly, with regard to data collection, Dodd-Frank allows the CFPB to collect information, but includes a specific prohibition: “The Bureau may not use its authorities...to obtain records from covered persons and service providers...for purposes of gathering or analyzing the personally identifiable financial information of consumers.”⁵⁸ The CFPB, however, has gathered precisely this type of information, providing as justification its broad supervisory powers to enforce consumer financial law.⁵⁹

The CFPB’s actions demonstrate how *statutory* limits will often impose little restraint on an agency with otherwise expansive delegated authority.⁶⁰ Dodd-Frank passed, like all laws, with a series of political compromises, including the exemption for auto dealers. Our Constitution makes it difficult to enact laws, precisely so that Congress

⁵⁵ 12 U.S.C. § 5519(a) (“[T]he Bureau may not exercise any rulemaking, supervisory, enforcement or any other authority, including any authority to order assessments, over a motor vehicle dealer that is predominantly engaged in the sale and serving of motor vehicles, the leasing and serving of motor vehicles, or both.”).

⁵⁶ See Defining Larger Participants of the Automobile Financing Market and Defining Certain Automobile Leasing Activity as a Financial Product or Service, 12 C.F.R. Parts 1001 and 1090 (2015). The CFPB explained that through this rule it would “supervise about 34 of the largest nonbank auto finance companies and their affiliated companies... [that] together originate around 90 percent of nonbank auto loans and leases.” Press Release, CFPB to Oversee Nonbank Auto Finance Companies (June 10, 2015), available at <http://www.consumerfinance.gov/newsroom/cfpb-to-oversee-nonbank-auto-finance-companies/>.

⁵⁷ See 12 U.S.C. § 5514(a)(1)(B).

⁵⁸ 12 U.S.C. § 5512(c)(4)(C).

⁵⁹ See GAO Report, *supra* note 47, at 77 (comments from Richard Cordray regarding the GAO’s Report on data collection).

⁶⁰ See Reforming CFPB Indirect Auto Financing Guidance Act of 2015, H.R. 1737, 114th Cong. (2015) (nullifying “certain guidance of the Bureau of Consumer Financial Protection and to provide requirements for guidance issued by the Bureau with respect to indirect auto lending). As of July 11, 2015, this bi-partisan bill has 117 cosponsors, including 65 Republicans and 52 Democrats.

can balance competing public interests and concerns. Yet broad delegations allow agencies to unravel the work of Congress and replace it with the interests and concerns of the agency.

IV POTENTIAL REMEDIES

As explained above, the CFPB provides a case study of the problems of administrative overreach by agencies that combine significant delegated authority with a high degree of independence from political accountability. These constitutional infirmities have predictably resulted in agency overreach on matters of fundamental importance to the consumer financial marketplace. All three branches of the government have a responsibility to ensure constitutional government. Within their respective spheres, each branch can provide distinct remedies to the constitutional problems with the CFPB.

A. Judicial review

Although serious constitutional challenges have been raised against provisions of Dodd-Frank and continue to be litigated, judicial review may provide only limited relief for a number of reasons. First, it will often be difficult to satisfy jurisdictional requirements. In the most comprehensive challenge to the constitutionality of the CFPB's structure, the district court dismissed the case for lack of standing.⁶¹ That lawsuit also challenged the constitutionality of Dodd-Frank's orderly liquidation authority, but the district court held that such claims were not ripe since no one had been subject to that authority. As of this testimony, appeal is still pending with the D.C. Circuit, which heard oral argument on November 19, 2014.

Second, existing judicial doctrine makes it difficult to resolve certain constitutional infirmities in the courts. Expansive delegated authority provides the foundation for the CFPB's actions. Yet, as discussed above, the Supreme Court has

⁶¹ See *State Nat'l Bank of Big Spring v. Lew*, 958 F. Supp. 2d 127 (D. D.C. 2013) (holding that the plaintiffs had failed to demonstrate an injury-in-fact caused by the CFPB).

repeatedly declined opportunities to invalidate legislation on non-delegation grounds. The delegations at issue in Dodd-Frank, like nearly all other delegated authority, easily satisfy the Supreme Court's minimal "intelligible principle" standard. Therefore, invalidation on non-delegation grounds would require the Court to break with its recent precedent, something only Justices Thomas and Alito have indicated a willingness to consider.⁶²

Third, although the CFPB strains any reasonable understanding of separation of powers, the courts are unlikely to invalidate the agency for violating a general separation of powers requirement. In previous cases the Court has upheld principles of separation of powers by ensuring that government action follows the Constitution's specific allocation of powers.⁶³ One potential and more specific constitutional violation would focus on protecting the President's removal power. As I have argued elsewhere, the text and structure of the Constitution require that the President have an unfettered removal power over the heads of executive agencies.⁶⁴ In addition, the Supreme Court has suggested in *Free Enterprise Fund v. PCAOB*⁶⁵ that restrictions on the President's removal power pose serious constitutional concerns, because agencies that execute the laws must be within the control of the Chief Executive. As Chief Justice John Roberts explained, the power to ensure faithful execution of the laws "includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else."⁶⁶ Although the holding of *Free Enterprise Fund* applied to two levels of removal protections, the reasoning of the decision supports invalidating all removal restrictions, including those that insulate the Director of the CFPB.⁶⁷

In an appropriate case, the Court could thus hold that restrictions on the President's removal power are invalid.⁶⁸ Removal also provides a justiciable standard for

⁶² See *supra* notes 32-35 and accompanying text.

⁶³ See Rao, *supra* note 2, at 1272-73.

⁶⁴ *Id.*

⁶⁵ 130 S. Ct. 3138 (2010).

⁶⁶ See *id.* at 3164.

⁶⁷ See Rao, *A Modest Proposal*, *supra* note 11.

⁶⁸ I provide a detailed explanation of this conclusion that invalidating the removal restriction remedies the constitutional infirmities with the CFPB. See Rao, *supra* note 2, at 1271-73.

courts, because in reviewing the constitutionality of the CFPB, a court could invalidate the agency's "independence" from the President by severing the restrictions that protect the Director from removal by the President. The agency would remain, but with clear accountability to the President. If the President could remove the Director at will, the President would have to answer for the actions of the Bureau, restoring democratic accountability for execution of the laws. Invalidating the removal protections could provide a judicially administrable remedy to the constitutional problems.

Constitutional challenges continue to percolate through the federal courts. As the Bureau continues to expand its domain, further pushing at the boundaries of its delegated power, new cases may present justiciable claims. A recently filed lawsuit alleges that the CFPB violated due process when it changed longstanding interpretations of the Real Estate Settlement Procedures Act (RESPA), imposed a new liability standard for RESPA violations, and ordered a disgorgement remedy of \$110 million.⁶⁹ Perhaps claims relating to specific agency enforcement will provide a vehicle for judicial consideration of the constitutional problems with the structure of the Bureau. The difficulty of securing a judicial decision on constitutional questions, however, does not undermine their seriousness. Instead, it suggests the imperative of political remedies—Congress and the President working together to reform the Act to improve democratic accountability and to bring Dodd-Frank into line with constitutional principles.

B. Presidential control and responsibility

Even if the Court does not invalidate the removal protections, the President can nonetheless exert greater control and supervision over the CFPB. The Act designates the CFPB as an "independent Bureau," but also states that it "shall be considered an "Executive agency."⁷⁰ Indeed, nothing *prohibits* the President from exerting control over

⁶⁹ Motion of Petitioners for Stay Pending Judicial Review, PHH Corp. v. CFPB, No. 15-1177 (D.C. Cir. June 26, 2015).

⁷⁰ 12 U.S.C. § 5491(a). Dodd-Frank uses the definition of "Executive agency" found in 5 U.S.C. § 105, which states, "'Executive agency' means an Executive department, a Government corporation, and an independent establishment."

the CFPB through OMB and OIRA.⁷¹ Admittedly, conventions of agency independence suggest that the President cannot require the Director of the CFPB to take a particular action, precisely because of the restrictions on removing the Director. Nonetheless, such restrictions run against Article II, and therefore the President remains free to direct the Bureau to take particular actions and thereby to take responsibility for the actions of the Bureau.

The President has an independent duty to uphold the Constitution and to take care of faithful execution of the laws⁷² and abdication of executive discretion to an “independent” agency is not part of the constitutional structure. Although current executive orders do not require independent agencies to consult with OMB,⁷³ many “independent” agencies do submit to such supervision and the Office of Legal Counsel has concluded that such supervision would be lawful.⁷⁴

Thus, the President can supervise and direct the activities of the CFPB and therefore should be held responsible for its actions. Labeling the Bureau “independent” should not allow the Chief Executive to evade responsibility for execution of the laws. Congress and members of the public should ask not just the Director, but the politically accountable President, for answers about the CFPB’s policies. For example, just as the Administration had to answer for the NSA’s bulk data collection, it should explain data collection by the CFPB. Why is the Bureau’s massive data collection necessary? What is being done to safeguard sensitive consumer information? Data collection and security, like other matters pursued by the CFPB, involve significant political discretion and have real-life consequences. When the Bureau exercises discretion over matters that affect the

⁷¹ See Gersen, *supra* note 23, at 708 (“[W]hile all or at least most parties seem to agree that the CFPB need not submit rules to OIRA for review, the Statute nowhere expressly exempts the Bureau and need not be read to implicitly exempt the Bureau.”).

⁷² See U.S. Const. art. II, § 3 (providing that the President “shall take Care that the Laws be faithfully executed”).

⁷³ President Barack Obama issued an executive order that provided independent agencies “should” comply with executive orders government executive agencies with respect to cost-benefit analysis and improving regulatory review. Exec. Order No. 13,579, 3 C.F.R. 256-57 (2011). By contrast, executive agencies “shall” take steps to improve regulation and regulatory review. See Exec. Order No. 13,563, 3 C.F.R. 215-17 (2011).

⁷⁴ See Memorandum for the Hon. David Stockman, Dir., Office of Mgmt. & Budget, from Larry L. Simms, Acting Ass’t Atty. Gen., Office of Legal Counsel (Feb. 12, 1981) (concluding that the President could legally subject independent agencies to regulatory review).

privacy of millions of Americans, politically accountable officials should answer for these choices.

C. Legislative reforms

Judicial and executive remedies exist for some of the constitutional infirmities with the CFPB. Comprehensive reform of the Bureau, however, will require legislative action. Many bills have been introduced to modify the structure of the CFPB and to improve its accountability.⁷⁵ Some bills have addressed particular issues to restrain the Bureau's expansive authority, for example relating to financial privacy of consumer information.⁷⁶ Other solutions would improve the Bureau's accountability to Congress by subjecting it to the regular appropriations process.⁷⁷ These proposals have received hearings and serious consideration in both the Senate and the House of Representatives.⁷⁸ The constitutional infirmities are closely linked to bureaucratic overreach and to the difficulty of addressing problems with the Bureau's regulation and enforcement. The CFPB flies in the face of basic constitutional principles and Congress need not wait for a judicial declaration to set them straight. In a government of limited and enumerated powers, the CFPB poses a dangerous combination of legislative, executive, and judicial authority without control by the President and without accountability to Congress.

In addition to the CFPB, Dodd-Frank raises constitutional problems in a number of areas not addressed in this testimony, such as with the orderly liquidation authority and the FSOC. Because of the difficulty of obtaining judicial review, the limited nature of judicial remedies, and the possibility that judicial review will be ripe only in the midst of

⁷⁵ See, e.g., The Financial Product Safety Commission Act of 2015, H.R. 1266, 114th Cong. (2015) (replacing the CFPB's single Director with a bi-partisan five-member commission).

⁷⁶ See The Consumer Right to Financial Privacy Act of 2015, H.R. 1262, 114th Cong. (2015) (requiring that the CRPB may not obtain personally identifiable financial records unless it provides clear notification to the consumer and the consumer provides consent).

⁷⁷ See, e.g., The Bureau of Consumer Financial Protection Accountability Act of 2015, H.R. 1261, 114th Cong. (2015) (subjecting the CFPB to the congressional appropriations process).

⁷⁸ In 2013, the House of Representatives passed by a 232-182 vote a bill that would make a series of changes to the CFPB, including creating a five-member commission, subjecting the CFPB to the congressional appropriations process, and requiring the commission to consider the impact to consider the impact of all regulations on the ability of individuals and small businesses to access credit. Consumer Financial Freedom and Washington Accountability Act, H.R. 3193, 113th Cong. (2013).

a financial crisis,⁷⁹ Congress is the institution best positioned to reform these agencies and authorities to bring them into line with constitutional administration.

V CONCLUSION

Constitutional restrictions on administrative power are more than formal abstractions. The constraints of the Constitution ensure that the federal government will exercise power, if not always wisely, at least with due accountability to the people. With super independence and expansive delegated authority, the CFPB's structure undermines the Constitution's checks and balances. The insulation of such agencies reflects a fundamental administrative hubris that bureaucrats know what is best for Americans, a belief that unelected "experts" can chart the proper course for financial markets. Such reasoning stands at odds with our Constitution, which creates a republican form of government and carefully circumscribes its powers. Administration outside of the Constitution will invariably lead to administration outside of the law, threatening individual liberty through the unchecked expansion of government power.

⁷⁹ See Thomas W. Merrill & Margaret L. Merrill, *Dodd-Frank Orderly Liquidation Authority: Too Big for the Constitution?*, 163 U. PENN. L. REV. 165, 171 (2014) (noting that if the lawsuit challenging the orderly liquidation authority is dismissed on jurisdictional grounds "the constitutional arguments are likely to reemerge at the worst possible time—if and when another financial crisis hits and one or more systemically significant financial firms are slated for orderly liquidation. Sorting out these constitutional questions in the midst of a financial crisis could disrupt, or at least delay, the resolution process envisioned by Congress.").



GEORGETOWN UNIVERSITY LAW CENTER

Adam J. Levitin
Professor of Law

Written Testimony of

Adam J. Levitin
Professor of Law
Georgetown University Law Center

Before the United States Senate
Committee on the Judiciary
Subcommittee on The Constitution

“The Administrative State v. The Constitution: Dodd-Frank at Five Years”

July 23, 2015
2:00 pm
Dirksen Senate Office Building 226

Witness Background Statement

Adam J. Levitin is a Professor of Law at the Georgetown University Law Center, in Washington, D.C., where he teaches courses in financial regulation, structured finance, contracts, bankruptcy, and commercial law. Among his publications is *Financial Restructuring: Business Bankruptcy in the Modern Commercial World* (Wolters Kluwer 2015).

Professor Levitin has previously served as the Bruce W. Nichols Visiting Professor of Law at Harvard Law School, as the Robert Zinman Scholar in Residence at the American Bankruptcy Institute, and as Special Counsel to the Congressional Oversight Panel supervising the Troubled Asset Relief Program (TARP). Professor Levitin currently serves on Consumer Financial Protection Bureau's Consumer Advisory Board.

Before joining the Georgetown faculty, Professor Levitin practiced in the Business Finance & Restructuring Department of Weil, Gotshal & Manges, LLP in New York, and served as law clerk to the Honorable Jane R. Roth on the United States Court of Appeals for the Third Circuit.

Professor Levitin holds a J.D. from Harvard Law School, an M.Phil and an A.M. from Columbia University, and an A.B. from Harvard College. In 2013 he was awarded the American Law Institute's Young Scholar's Medal.

Professor Levitin has not received any federal grants or any compensation in connection with his testimony, and he is not testifying on behalf of any organization. The views expressed in his testimony are solely his own.

Chairman Cornyn, Ranking Member Durbin, Members of the Committee:

Good afternoon. Thank you for inviting me to testify at this hearing. My name is Adam Levitin. I am a Professor of Law at the Georgetown University, where I teach courses in financial regulation and bankruptcy, among other topics. I also serve on the Consumer Financial Protection Bureau's statutory Consumer Advisory Board. I am here today solely as an academic who studies financial regulation and insolvency and am not testifying on behalf of the CFPB or its Consumer Advisory Board.

This hearing is on the constitutionality of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Simply put, there is no credible constitutional problem with the Dodd-Frank Act. Not surprisingly, none of the litigation challenges to the core provisions of Dodd-Frank have even gotten to first base within the legal system.¹ While the Dodd-Frank Act does create some novel administrative structures, the financial regulatory world already has a unique bestiary of regulatory agencies that do not neatly conform to hornbook administrative law paradigms. Somehow none of these agencies have previously caused constitutional consternation—the Office of the Comptroller of the Currency, for example, has been around for over 150 years without a constitutional challenge despite being equivalently sheltered from Presidential and Congressional control as today's bugbear, the Consumer Financial Protection Bureau (CFPB).

So let's be clear what the real issue is behind constitutional challenges to the Dodd-Frank Act. The issue is not principled concerns about the constitutionality of the CFPB's particular structure or Financial Stability Oversight Council (FSOC) authority. The issue is that certain businesses do not want to be subject to regulatory oversight and are opposed to a CFPB of any shape or form. These businesses want to be able to continue profiting from sharp practices against their customers or being too-big-to-fail without being answerable to anyone. The Constitution is not being invoked in any sort of principled way to protect fundamental liberties, but is instead, being cited as part of a campaign to preserve corporate profits.

Professor Rao—one of the witnesses called by the Majority—herself recognizes this broader goal of constitutional challenges to the Dodd-Frank Act in her scholarship. Professor Rao argues that any constitutional problems with the CFPB's structure can be remedied by interpreting the removal provision for the CFPB Director as being “at will.”² At will removal is a remedy that keeps the basic structure and function of the Bureau intact. In contrast, the remedy sought in the litigation brought by Ambassador Gray—another Majority witness—is an injunction against the CFPB's operations altogether. Professor Rao rightly notes that the remedy sought by Ambassador Gray indicates that the real goal of his litigation is the elimination of the CFPB: “No doubt eliminating the

¹ An SEC rulemaking implementing the Dodd-Frank Act's conflicts minerals disclosure requirement was struck down by the D.C. Circuit as violating the First Amendment, *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014), but a subsequent en banc ruling by the D.C. Circuit expressly overturned the basis for that opinion, *Am. Meat Inst. v. United States Dept. of Agric.*, 760 F.3d 18, 22-23 (D.C. Cir. 2014), and has granted a rehearing on the conflicts minerals rule.

² Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1272-73 (2014). I disagree with Professor Rao's analysis that there are constitutional problems, but that is beside the point.

CFPB and its functions is at least partly at issue for many politicians and for some of the parties initiating this lawsuit.”³

I. THE CONSTITUTIONALITY OF THE DODD-FRANK ACT

To date there have been several lawsuits challenging the constitutionality of core parts of the Dodd-Frank Act.⁴ None of these suits have received favorable rulings from the courts. While they have generally been dismissed on procedural grounds like standing and ripeness, courts have given no indication that there is ultimately merit to the suits, and few scholars (all of whom happen to have impeccable conservative movement credentials) have even suggested that there might be constitutional problems with the statute. Moreover, even those who do see constitutional problems in the Dodd-Frank Act find them to be narrow and capable of being remedied by targeted judicial interpretation, rather than requiring the wholesale demolition of the financial regulatory system.⁵

Those constitutional challenges to the Dodd-Frank Act have largely focused on three issues: the status of the Consumer Financial Protection Bureau, the status of the Financial Stability Oversight Council, and the Title II Orderly Liquidation Authority given to the FDIC. I will review these issues briefly before turning to the benefits of the Dodd-Frank Act, which should not be overlooked when considering its merits.

A. The Consumer Financial Protection Bureau

The CFPB is an independent bureau within the Board of Governors of the Federal Reserve System. While the CFPB is technically part of the Federal Reserve, the CFPB has complete regulatory independence from the Board of Governors of the Federal Reserve.⁶ The CFPB is headed by a single Director appointed by the President with the advice and consent of the Senate.⁷ The CFPB Director is appointed for a five-year term and is removable only for cause,⁸ a status long-held to be acceptable for independent agencies.⁹

³ *Id.* at 1273.

⁴ See, e.g., *State Nat. Bank of Big Spring v. Lew*, 958 F. Supp. 2d 127 (D.D.C. 2013) (dismissing constitutional challenges to Dodd-Frank Titles I, II and X on standing/ripeness grounds; currently on appeal to D.C. Circuit); *CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082 (C.D. Cal. 2014) (rejecting arguments about unconstitutionality of CFPB); *Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau*, 979 F. Supp. 104 (D.D.C. 2013) (memo.op.), *affirmed* *Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau*, 785 F.3d 684 (D.C. Cir. 2015) (affirming dismissal of constitutional challenge to the CFPB based on lack of standing); *Illinois v. Alta Colleges, Inc.* 2014 U.S. Dist. LEXIS 123053 (N.D. Ill. Sept. 4, 2014) (rejecting arguments about unconstitutionality of CFPB); *Illinois v. CMK Investments, Inc.*, 2015 U.S. Dist. LEXIS 84277 (N.D. Ill. June 30, 2015) (rejecting arguments about unconstitutionality of CFPB); *CFPB v. ITT Educ. Servs., Inc.*, 2015 WL 1013508 (S.D. Ind. Mar. 6, 2015) (rejecting arguments about unconstitutionality of CFPB); *TCF Nat. Bank v. Bernanke*, 643 F.3d 1158 (8th Cir. 2011) (affirming dismissal of suit seeking preliminary injunction of Fed rule imposing debit card fee regulations because of takings, due process and equal protection concerns).

⁵ Rao, *supra* note 2, at 1272-73.

⁶ 12 U.S.C. §§ 1012(c)(2), 5491(a).

⁷ *Id.* § 5491(b)(2).

⁸ *Id.* § 5491(c)(1)–(3) (“Removal for cause. The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.”).

⁹ See *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629 (1935) (holding that removal of officers of independent agencies may be restricted to “for cause” removal).

The CFPB is not funded through the congressional appropriations process.¹⁰ Instead, the CFPB is funded by the Fed, which must transfer to the CFPB an inflation-adjusted sum equal to 12% of the Federal Reserve's 2009 annual operating expenses.¹¹ By exempting the CFPB's budget from appropriations, Congress ensured that the CFPB's ability to protect the financial security of American families is not subject to the opaque horse-trading and hostage-taking of the appropriations process.

While the CFPB's budget is not determined by congressional appropriations, neither are the budgets of other federal bank regulators. There are no appropriations for the OCC, the FDIC, the Federal Reserve Board, and the NCUA. These agencies set their budgets based on the fees they charge regulated institutions, which means they can increase their budgets on their own. In contrast, the CFPB's budget is subject to a cap.¹² The CFPB is also the only federal financial regulatory subject to an annual audit by the Government Accounting Office.¹³

Although Congress does not possess the usual power of the purse over the CFPB, the Constitution does not mandate such control, and, in any event, important restrictions exist on the CFPB's actions. First and foremost, general administrative law rules apply. The CFPB is bound by both its statutory authorities and the Administrative Procedure Act. The CFPB is also required to submit significant rulemakings to the White House's Office of Information and Regulatory Affairs (OIRA) for pre-proposal review as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA). This is a privilege the CFPB shares with only two other agencies, the EPA and OSHA. No other financial regulator is required to submit rulemakings to SBREFA review panels. Additionally, all CFPB rulemakings are potentially subject to a veto by the Financial Stability Oversight Counsel (FSOC).¹⁴ No other federal agency has its rulemakings subject to such an FSOC veto.

There are also restrictions on specific CFPB authorities. The CFPB is required to make particular findings in order to exercise its authority to restrict or prohibit acts and practices as unfair, deceptive, or abusive.¹⁵ The CFPB is also prohibited from imposing

¹⁰ *Id.* § 5497(a)(2)(C).

¹¹ *Id.* § 5497(a)(1)–(2). The CFPB may also receive an additional appropriation of up to \$200 million annually for its first five years of operations. *Id.* § 5497(e)(2). Additionally, civil penalties obtained by the CFPB that are not used for compensation of victims of consumer financial protection law violations may be used to fund consumer education and financial literacy programs. *Id.* § 5497(d). The Federal Reserve's 2009 operating expenses were \$3.649 billion. BD. OF GOVERNORS OF THE FED. RESERVE SYS., 96TH ANNUAL REPORT 186–87 (2009) available at <http://www.federalreserve.gov/boarddocs/rptcongress/annual09/pdf/ar09.pdf>. Therefore, the CFPB's annual budget is \$437.88 million, adjusted for inflation annually according to the Bureau of Labor Statistics' employment cost index for total compensation for State and local government workers. 12 U.S.C. § 5497(a)(2)(B). To the extent that this inflation adjustment measure often lags real inflation, the CFPB's real spending power will decline over time. On the other hand, unused excess funds transferred from the Federal Reserve are not returned to the Treasury, but are instead invested for the CFPB, which may draw on the funds in the future. *Id.* §§ 5497(b)(3), (c)(2).

¹² *Id.* § 5497(a)(2).

¹³ *Id.* § 5497(a)(5)(A).

¹⁴ 12 U.S.C. § 5513.

¹⁵ 12 U.S.C. §§ 5531, 5536. Contrary to claims that the “abusive” power, 12 U.S.C. § 5531(d) is an unfettered grant of discretion, it is actually fairly detailed in terms of providing four situations in which the CFPB can prohibit or restrict an act or practice as “abusive.” Indeed, the “abusive” standard seems quite similar to the Federal Trade Commission's pre-1980 interpretation of “unfair” under section 5 of the FTC Act. See Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of

usury caps¹⁶ and from regulating non-financial businesses.¹⁷

Second, despite its freedom from the congressional appropriations process, the CFPB is subject to considerable oversight from Congress. The CFPB Director must make periodic reports to Congress and appear before congressional committees, which can exercise considerable moral suasion.¹⁸ In the four years that the CFPB has been in existence, its senior officials have testified before Congress fifty-five times.¹⁹ The Congressional Review Act enables Congress to override specific CFPB rulemakings on a simple majority basis.²⁰ And Congress is always free to amend title X of the Dodd-Frank Act and change the powers and structures of the CFPB.

The CFPB is also subject to moral suasion from the executive branch. Although the President may only dismiss the Director for cause, such limitations are not unique among financial regulatory agencies, and history suggests there are few individuals that would refuse a Presidential request to resign even if they were within their legal rights to do so.

Table 1 shows in succinct form a comparison between the structural restrictions on the CFPB and that of certain other federal regulatory agencies. What should be apparent is that there is far greater oversight for the CFPB than there is for the other federal bank regulators—OCC, the Fed, and the FDIC—or for the SEC.

Smoking, 29 Fed. Reg. 8355 (1964). This interpretation withstood Supreme Court review. *See* *FTC v. Sperry & Hutchinson*, 405 U.S. 233 (1972).

¹⁶ 12 U.S.C. § 5517(o).

¹⁷ *Id.* § 5517(a).

¹⁸ *Id.* § 5496(a)–(b).

¹⁹ CFPB, Consumer Financial Protection Bureau by the Numbers, July 15, 2015, at http://files.consumerfinance.gov/f/201507_cfpb_factsheet-by-the-numbers.pdf.

²⁰ 5 U.S.C. §§ 801–808 (2006).

TABLE 1. COMPARISON OF OVERSIGHT OF CFPB AND OTHER AGENCIES²¹

	EPA	FDIC	FRB	FTC	OCC	SEC	SSA	CFPB
APA Rulemaking	YES	YES	YES	YES	YES	YES	YES	YES
APA Adjudication	YES	YES	YES	YES	YES	YES	YES	YES
Budget Subject to Appropriations	YES			YES		YES	YES	
Budget Capped								YES
OIRA Review of Economically Significant Regulations	YES						YES	
OIRA SBREFA Review	YES							YES
Statutory Cost-Benefit Analysis for Certain Regulations				YES		YES		YES
FSOC Veto								YES
Annual GAO Audit								YES
Term in Office <5 Years	YES							
5-member Commission		YES	YES	YES		YES		
Bipartisan Representation Requirement		YES		YES				
Presidential Removal without Cause	YES				?			
Congressional Oversight	YES	YES	YES	YES	YES	YES	YES	YES
Congressional Review Act Override of Rulemakings	YES	YES	YES	YES	YES	YES	YES	YES
Moral Suasion by Administration	YES	YES	?	YES	YES	YES	YES	YES

All told, the CFPB was deliberately designed to have a degree of political insulation in order to protect it from the financial regulatory industry's concentrated interest in deregulation, but it is not totally insulated from political control. While its particular form is novel, it does not raise any acute constitutional issues. Nothing in the Constitution prohibits some degree of political insulation so long as either a regulatory agency is ultimately subject to a meaningful check from one of the branches of government.

If there are constitutional issues with the CFPB, they are not the ones raised so far in litigation. Instead, they relate to the constitutionality of the OIRA SBREFA review for the CFPB, and the FSOC veto over the CFPB. Both the SBREFA review and FSOC veto raise separation of powers issues because they involve an executive agency or a council that includes executive agency officers having the ability to impede or actually veto a rulemaking by an independent agency. Notably, critics of the CFPB's constitutionality have not raised these concerns, which, if addressed, would unbind, rather than muzzle the CFPB. The CFPB has long been politically unpopular with the less reputable part of the financial services industry, but that does not mean there is a constitutional issue with the agency.

B. The Financial Stability Oversight Council

Title I of the Dodd-Frank Act created the Financial Stability Oversight Council (FSOC).²² The FSOC is charged with identifying systemic financial stability risks and taking appropriate action to address the risks. The FSOC consists of ten voting members—the heads of the various federal financial regulatory agencies as well as an

²¹ A memorandum opinion from the Department of Justice's Office of Legal Counsel assumes as a passing point that the OTS Director (and presumably the Comptroller of the Currency) serves at the pleasure of the President, but the United States Code is silent on the matter. See Memorandum Opinion from the Gen. Counsel, Dep't of the Treasury, and Chief Counsel, Office of Thrift Supervision on Post Employment Restriction of 12 U.S.C. § 1812(e) (Sept. 4, 2001), available at <http://www.justice.gov/olc/2001/otspost2.pdf>. The OCC was subject to OIRA review of economically significant regulations prior to 2011.

²² 12 U.S.C. § 5321.

independent insurance expert appointed by the President with advice and consent of the sent—and five non-voting members, and is chaired by the Treasury Secretary.²³ The FSOC is authorized to designate certain “nonbank financial companies” as “systemically important financial institutions” (SIFIs) upon a two-thirds vote, including the affirmative vote of the Treasury Secretary.²⁴ SIFI designation is based on an analysis of eleven enumerated factors that contribute to a determination that “material financial distress at the U.S. nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the U.S. nonbank financial company, could pose a threat to the financial stability of the United States.”²⁵

If a firm is designated as a SIFI, it “will be subject to supervision by the Federal Reserve Board and more stringent government regulation in the form of prudential standards and early remediation requirements established by the Board.”²⁶ SIFI designation is based on notice and a hearing, and is subject to judicial review on an arbitrary and capricious standard.²⁷

The FSOC’s authority has been challenged in *State National Bank v. Lew* (for which Majority witness Ambassador Grey is plaintiffs’ counsel) arguing that the FSOC raises separation of powers problems because it “has sweeping and unprecedented discretion to choose which nonbank financial companies to designate as ‘systematically important,’ which is not limited by any meaningful statutory directives.”

The FSOC’s structure as an inter-regulatory council that combines both executive and independent agencies (as well as a non-agency member) is certainly novel. But that structure does not raise meaningful concerns about unfettered discretion or separation of powers issues in regard to SIFI designation. SIFI designation is not an unfettered exercise of discretion. Instead, it requires consideration of no less than eleven detailed factors, as well as an ultimate finding about the nature of risks posed by a firm to the economy.

Moreover, contrary to the claims of the FSOC’s critics, there are several layers of oversight over the FSOC. First, the executive exercises a meaningful check on the FSOC by virtue of the President’s ability to remove the Treasury Secretary at will. Because the Treasury Secretary’s vote is required for a SIFI designation, this is a critical check on the FSOC. Moreover, the FSOC’s budget comes from the Office of Financial Research within the Treasury Department. While the Office of Financial Research is funded by assessments on SIFIs, release of the funds to the FSOC is dependent upon the consent of Director of the Office of Financial Research, who is removable at will by the President.

Second, Congress exercises meaningful checks on all voting members of the FSOC (except arguably the independent insurance representative), through its appointment power and oversight power for all of the FSOC’s members, and also its appropriations power vis-à-vis the Treasury.

²³ See 12 U.S.C. § 5321(b)(1), (3).

²⁴ 12 U.S.C. §§ 5323(a)(1), (b)(1). The term SIFI does not itself appear in the Dodd-Frank Act, but is used as short-hand for an FSOC-designated firm.

²⁵ 12 U.S.C. § 5323(a)(1).

²⁶ See *id.*

²⁷ 12 U.S.C. § 5323(e)(1)-(2), (h).

Third, the FSOC's determinations are subject to judicial review. It is hard, then, to see how the FSOC has unconstrained power. In fact, the FSOC is subject to meaningful checks from all three branches of government.

To the extent that the FSOC's structure raises a true separate of powers problem it is in the form of the FSOC's veto power over CFPB rulemakings. The FSOC's veto power gives executive agencies the ability to veto the action of an independent agency, effectively depriving the independent agency of its independence. Not surprisingly, anti-regulatory litigants have not complained about the appropriateness of the FSOC veto, as it does not serve their political ends.

The FSOC, like the CFPB, represents another permutation of the administrative state. But there is nothing that requires cookie-cutter administrative agency structures, and indeed, I would encourage Congress to continue experimenting with agency structures. Some structures may be more appropriate for certain regulated industries than others. In some cases it may make sense to create agencies that are more insulated from political pressure than in other cases. For example, if an agency regulates an industry that deals with consumers, there will be an inherent imbalance of political power in terms of lobbying the agency. Congress might well want to insulate such an agency from political pressure. On the other hand, if an agency regulates multiple competing parts of an industry, it might make sense to lean into politics and let there be a "fair fight" between equally matched interest groups (which might well cancel each other out).

In any event, novel administrative agency structures are not inherently unconstitutional, any more than the administrative state itself (as the title of this hearing provocatively suggests). More critically, I suspect that the complaints about the Dodd-Frank Act are not about the structure of administrative agencies, but about the fact of regulation itself. Would the plaintiffs in *State National Bank* be satisfied if all of the substantive powers of the CFPB and FSOC were exercised by an executive agency? I doubt it. Their beef is with regulation itself, not with the structure of the administrative state.

C. Orderly Liquidation Authority

Title II of the Dodd-Frank Act authorizes the appointment of the FDIC as receiver of a failing "financial company." This is known as "Orderly Liquidation Authority" (OLA)—the authority to place a systemically significant non-bank financial institution into receivership.

To invoke OLA, two-thirds of the Federal Reserve Board and two-thirds of the FDIC Board must provide a written recommendation to the Treasury Secretary based on an evaluation of eight statutory factors.²⁸ The Treasury Secretary must then make seven findings regarding the need for invoking OLA prior to appointing the FDIC as receiver.²⁹ If the firm does not acquiesce to the receivership, the Treasury Secretary can petition the courts for an order appointing a receiver.³⁰ The Treasury Secretary's appointment of a receiver is subject to only limited and expedited judicial review, and the petition is required to be kept under seal, so creditors are not notified, lest the petition trigger a run

²⁸ See 12 U.S.C. § 5383(a).

²⁹ 12 U.S.C. § 5383(b).

³⁰ 12 U.S.C. § 5832(a)(1).

on the firm.³¹ As receiver under OLA, the FDIC has the same broad range of tools available to it as it does for bank receiverships.³² There has yet to be a regulatory implementation of OLA, much less the actual use of OLA.

It is hard to see how OLA is possibly unconstitutional. Congress clearly had the power to enact it under either the Bankruptcy Clause or the Commerce Clause. The Bankruptcy Clause gives Congress the broad power to enact “uniform laws on the subject of Bankruptcies through the United States”.³³ That is precisely what OLA is—it is a statute that applies uniformly throughout the nation. Moreover, given that Orderly Liquidation Authority applies to a regulated industry, it effectively puts everyone on notice of special rules, which include judicial review, so there is no due process argument.

The arguments that have been raised against OLA’s constitutionality are baseless and reflect complete unfamiliarity with bankruptcy law. First, the plaintiffs in *State National Bank v. Lew* argue that OLA violates the Bankruptcy Clause because it lets the FDIC both choose which companies will be subject to liquidation and what the treatment of creditors will be. This, the *State National Bank* plaintiffs, argue, is inconsistent with “uniform laws.”³⁴

This argument should make any self-identified Originalist cringe. The *State National Bank* plaintiffs appear unaware that “uniform laws” is an established term of art with a well-documented historical context. It does not mean uniform treatment of debtors or uniform treatment of creditors. Instead, it refers to having uniform laws among the states, as opposed to state-specific bankruptcy laws, which presented a major federalism problem at the time of the Constitution’s ratification because of states refusing to recognize each others’ discharges of their citizens’ debts. There is *no* debate whatsoever on this question within the scholarly community, and the entire Supreme Court has agreed on this reading.³⁵ Some basic legal research should have kept this specious argument out of the *State National Bank* plaintiffs’ pleadings.

The *State National Bank* plaintiffs are particularly concerned with alleged arbitrary favoritism of certain creditors by the FDIC in an OLA receivership. Specifically, the plaintiffs allege that “as investors in the unsecured debt of financial companies, they were protected by the federal bankruptcy laws’ guarantee of equal treatment of similarly situated creditors, and that OLA abridged that guarantee.”³⁶

The District Court dismissed this claim for lack of standing, as “holding of certain statutory rights does not amount to an inalienable property right under the Bankruptcy Code.”³⁷ The District Court was correct in holding that a statutory right is not a property right. Were it otherwise, any amendment of the bankruptcy laws would be a taking. The

³¹ 12 U.S.C. § 5382(a).

³² 12 U.S.C. § 5390.

³³ U.S. Const. Art. I, sec. 8, cl. 4.

³⁴ *State National Bank of Big Spring v. Wolin*, Second Amended Complaint, No. 1:12-cv-01032-ESH (D. D.C. Feb. 19, 2013), ¶ 11.

³⁵ See *Central Va. Community College v. Katz*, 546 U.S. 356 (2006).

³⁶ *State National Bank of Big Spring v. Wolin*, States’ Memorandum in Opposition to Motion to Dismiss, No. 1:12-cv-01032-ESH (D. D.C. Feb. 19, 2013), at 14.

³⁷ *State Nat’l Bank of Big Spring v. Lew*, 958 F. Supp. 2d 127, 142 (D.D.C. 2013).

Supreme Court has made clear that amendments to bankruptcy laws may be applied retroactively, at least as to unsecured creditors.³⁸

But even if statutory rights could through some wishful alchemy be transformed into property rights, the *State National Bank* plaintiffs mischaracterize federal bankruptcy law. Federal bankruptcy laws do not guarantee equal treatment of similarly situated creditors. To suggest otherwise is an argument only someone with very superficial knowledge of bankruptcy law could concoct.

As an initial matter, to the extent that OLA represents a non-uniform bankruptcy law, then all of federal bankruptcy law is non-uniform and unconstitutional. There are multiple chapters of federal bankruptcy law, not all of which are available to all debtors. Chapter 7, Chapter 9, Chapter 11, Chapter 12, Chapter 13. These chapters have significant differences in their treatment of debtors and creditors. OLA represents just one more flavor of bankruptcy law, and the fact that it has not been codified by the National Archivist in Title 11 of the U.S. Code is constitutionally irrelevant.

Second, federal bankruptcy law guarantees the equal treatment of similar creditors only in a Chapter 7 liquidation.³⁹ There is no such requirement in Chapter 11. While Chapter 7 bankruptcy is usually thought of as the liquidation chapter of the Bankruptcy Code, Chapter 11 is also frequently used for liquidation. Thus, Lehman Brothers, Inc. and the holding companies of Washington Mutual and IndyMac were all Chapter 11 bankruptcies, even though there was no meaningful reorganization of any of those firms. Critically, a voluntary bankruptcy filing gets to choose the applicable Chapter of the Bankruptcy Code, and because of issues like retention of control of the firm and of attorney-client privilege, as well as attorney compensation, Chapter 11 is often the preferred Chapter for liquidations.

Chapter 11 requires that a plan provide at least as much for a creditor as in a hypothetical Chapter 7 liquidation.⁴⁰ But that is not the same as requiring equal treatment. It just sets a floor for recoveries. For Chapter 11, the Bankruptcy Code requires that creditors' claims be classified⁴¹ and that each class contain only substantially similar claims,⁴² which must receive identical treatment.⁴³ The Code does not itself require that all similar claims be placed in the same class, although some Circuits have interpreted the Code to so require.⁴⁴ But this requirement has never been interpreted as requiring all unsecured creditors to be in the same class. At most, the Bankruptcy Code prohibits "unfair discrimination" in the context of a Chapter 11 "cramdown" plan.⁴⁵

For both Chapter 7 and Chapter 11 bankruptcies, the Bankruptcy Code are filled with provisions that effectively shift the priority of similarly situated creditors, be they exceptions to the automatic stay for certain creditors, or cure requirements for assuming executory contracts, as well as non-Code practices like critical vendors motions, cross-

³⁸ U.S. v. Sec. Indus. Bank, 459 U.S. 70 (1982).

³⁹ 11 U.S.C. § 726(b).

⁴⁰ 11 U.S.C. § 1129(a)(7).

⁴¹ 11 U.S.C. § 1123(a)(1).

⁴² 11 U.S.C. § 1122(a).

⁴³ 11 U.S.C. § 1123(a)(4).

⁴⁴ See 7-1122 COLLIER ON BANKRUPTCY (16TH ED.), ¶ 1122.03 (describing nuances in classification jurisprudence).

⁴⁵ 11 U.S.C. § 1129(b).

collateralized financing, and roll-up financing that effectively prioritize certain creditor's claims. Additionally, trustees in bankruptcy exercise considerable discretion about whether to file claims objections or pursue avoidance actions, all of which affect distributions. In short, the idea that bankruptcy guarantees equal treatment of creditors is a fantasy world vision of bankruptcy that could only be concocted by attorneys not well-versed in bankruptcy law.

The best case against the constitutionality of the OLA relates to the limited and expedited judicial review, but there is undeniably judicial review of the appointment of the FDIC as a receiver. It is review under a very forgiving standard,⁴⁶ but it is within Congress's power to set the standard for judicial review; were it otherwise the entire Administrative Procedures Act and other acts would not stand.⁴⁷ Title II also provides for a default judgment for the Treasury Secretary if a ruling is not issued within 24 hours.⁴⁸ While this is a tight time-frame, it is appropriate for the urgency of the issue, and again within the scope of Congressional power to set deadlines for default judgments, as Congress does for the Federal Rules of Civil Procedure. OLA provides for due process, even if it is not as much process as some might like.

Moreover, but for OLA, such distressed financial firms would likely file for bankruptcy. But bankruptcy law hardly helps the concerns of the *State National Bank* plaintiffs. Bankruptcy law rarely allows for interlocutory judicial review, rendering many issues moot, and bankruptcy law specifically provides that certain key transactions, such as financing agreements and asset sales cannot be reversed even if successfully appealed.⁴⁹ Moreover, bankruptcy law does not even require that creditors be notified about motions, and emergency motions are often granted ex parte. While many Bankruptcy Code provisions reference "after notice and a hearing," the Code defines "notice and a hearing" as requiring only whatever notice and an opportunity for a hearing "as is appropriate in the particular circumstances" and "authorizes an act without an actual hearing if such notice is given properly and if ... there is insufficient time for a hearing".⁵⁰

There is good reason to be concerned about what the regulatory implementation of OLA will look like.⁵¹ But the problems with OLA are policy problems, not constitutional ones.

II. THE BENEFITS OF THE DODD-FRANK ACT

The Dodd-Frank Act, like all legislation, creates winners and losers. The winners are American families, the real economy, and small financial institutions. American families are protected from predatory financial practices. The real economy is protected from being pulled down by excessive risk-taking from the financial sector. And small financial institutions gain a competitive leg up on larger ones because of the Dodd-Frank Act. This is not to say that the Dodd-Frank Act is perfect. There are places where the

⁴⁶ 12 U.S.C. § 5382(a).

⁴⁷ See 5 U.S.C. § 706. See also Veterans Judicial Review Act, 38 U.S.C. § 7261(a)(4).

⁴⁸ 12 U.S.C. § 5382(a)(1)(A)(v).

⁴⁹ 11 U.S.C. §§ 363(m), 364(e).

⁵⁰ 11 U.S.C. § 102(1).

⁵¹ See, e.g., Arthur Wilmarth, 'Single Point of Entry' Plan Ensures More Megabank Bailouts, AM. BANKER, July 16, 2015.

Dodd-Frank Act should have gone farther, places where it might have erred in particular policy judgments, and most critically, sectors of the financial economy it did not address at all, like repo markets.

The American economy has benefitted tremendously from the Dodd-Frank Act through enhanced financial stability. While there work remains to be done, provisions like the Title XIV ability-to-repay mortgage rules, the creation of the FSOC, and the promulgation of Orderly Liquidation Authority are all important steps toward protecting the real economy against the spillover effects from a financial sector collapse like in 2008-2009. It is easy to overlook these benefits—nobody notices when there isn't a crisis—but part of the reason we are not repeating 2008-2009 is because of the Dodd-Frank Act.

American families have also benefitted from the creation of the CFPB. The CFPB's actions have resulted in safer and more sustainable consumer financial products and practices in the mortgage and credit card space, and other financial products are soon to be addressed. The CFPB has also taken enforcement actions that have cracked down on illegal marketing, billing, and debt collection practices. The results have been remarkable. In the CFPB's first four years it has obtained over \$11 billion in consumer relief through enforcement and supervisory actions, including \$2.6 billion in restitution and \$7.5 billion in principal reductions, cancelled debts, and other relief.⁵² These actions have benefitted over 18.8 million consumers.⁵³ These recoveries are even more remarkable given that they include a period of time when the CFPB was still ramping up its staffing and finding its sea legs, and do not include pending actions.

In contrast, all of the federal bank regulators combined—the Federal Reserve, FDIC, OCC, OTS, and NCUA—plus the Federal Trade Commission achieved less than a billion in consumer relief over the decade prior to the operation of the CFPB despite these agencies having the very same power as the CFPB to prohibit unsafe and deceptive acts and practices.

The CFPB's activities, however, are not confined to enforcement actions. The CFPB is the only federal financial regulator to finish all of its Dodd-Frank Act rulemakings on time. The CFPB has launched the first-ever program of supervision over non-banks in the consumer financial services marketplace, including credit reporting agencies, debt collectors, money transmitters, student loan servicers, and nonbank auto lenders.

The CFPB has also developed innovative informational tools to help consumers with the financial shopping process. Its Know-Before-You-Owe homeownership website, its Paying for College website, and its AskCFPB compendium of common financial questions are free, clear, and unbiased sources of information for consumers. Moreover, because of the complexity of American financial terminology, the CFPB has taken care to ensure that its resources are available to Spanish speakers through its CFPB en Español website that carefully translates complicated financial idioms (e.g., “balloon mortgage”) into Spanish.

⁵² CFPB, Consumer Financial Protection Bureau by the Numbers, July 21, 2015, at http://files.consumerfinance.gov/f/201507_cfpb_factsheet-by-the-numbers.pdf.

⁵³ *Id.*

The CFPB has also worked to improve financial disclosures both through voluntary initiatives and through regulation. Better disclosures help consumers make better financial decisions for themselves and are key to an efficient market. The CFPB's Financial Aid Shopping Sheet has been voluntarily adopted by thousands of colleges and universities, enabling students to get apples-to-apples comparisons of financial aid offers. And the pending TILA-RESPA integrated mortgage disclosures are so good that they have been called "a home run" by one commentator with long mortgage industry experience.⁵⁴ When was the last time another financial regulator's work product was called a "home run"? When the FTC and Federal Reserve Board attempted to reconcile the TILA and RESPA disclosures, the result was so unsatisfactory that Congress tasked the CFPB with redoing the work.

Additionally, the CFPB has launched a consumer complaint database that serves as an important market intelligence for the Bureau. Since launched, the Bureau has received over 650,000 complaints,⁵⁵ an indication that work remains to be done in the consumer financial marketplace.

The impetus behind the creation of the CFPB was the recognition that meaningful consumer financial protection requires a motivated and unconflicted regulator with authority over the entire consumer financial space. That is what the CFPB is, and it is already paying dividends in terms of better financial security for consumers. The CFPB is still an incredibly young agency, but it has already shown energy, initiative, and results that surpass all of the other federal financial regulators.

Benefits for Community Financial Institutions

Finally, one of the biggest beneficiaries of the Dodd-Frank Act have been community banks. Community banks are generally defined as depositories with less than \$10 billion in assets.⁵⁶ By this measure, almost all depositories in the United States are considered community banks. Of the 6,509 depositories in the United States only 109 have over \$10 billion assets, so there are 6,400 community banks in the United States.

Community banks play an important role in the American financial system: they are key sources of credit in small business and commercial real estate lending, they tend to pride themselves on more personalized customer service and products, and they are often deeply engaged with the civic fabric of their communities. The health of community banks is also important for preserving choices for consumers in the financial products market place.

Community banks have been ailing for some time. The number of community banks in the United States has fallen nearly in half over the last decade. As Figure 1

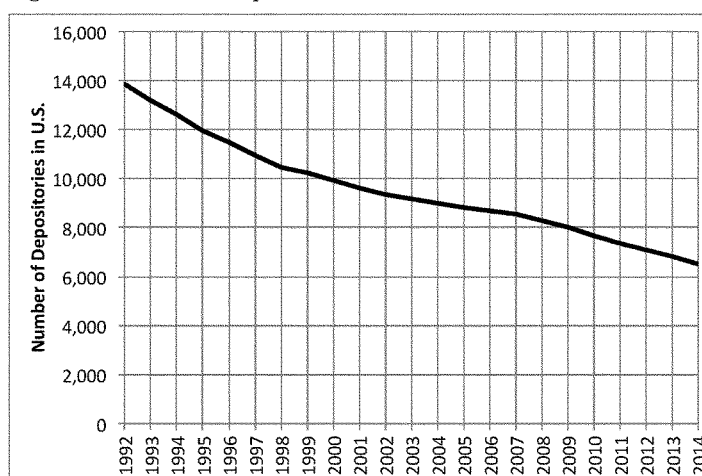
⁵⁴ Mark Greene, "Know Before You Owe" Has One Major Flaw, *Forbes.com*, July 19, 2015, at <http://www.forbes.com/sites/markgreene/2015/07/19/know-before-you-owe-has-one-major-flaw/>.

⁵⁵ CFPB, Consumer Financial Protection Bureau: Helping Consumers Help Themselves, July 15, 2015, at http://files.consumerfinance.gov/f/201507_cfpb_factsheet-helping-consumers-help-themselves.pdf.

⁵⁶ While \$10 billion in assets is the commonly used threshold, it is unreasonably high and includes institutions that cannot reasonably be considered community banks. To give a sense of perspective, \$10 billion in assets is more than the entire endowment of the University of California system or University of Michigan. It is also greater than the annual revenue of the entire National Football League. A more reasonable threshold for what constitutes a community bank would be under \$1 billion (or perhaps \$2 billion) in assets. As of the end of 2014, there were 580 U.S. depositories with between \$1 billion and \$10 billion in assets.

(below) shows, this is the continuation of a long-term trend. In 1992 there were nearly 14,000 depositories in the United States, virtually all of which were community banks. Many small financial institutions failed during the savings and loan crisis, and the removal of interstate branch banking restrictions in 1994 encouraged bank mergers and the emergence of megabanks. Community banks continue to fail, be gobbled up by larger banks, or more rarely grow out of being community banks.⁵⁷ For the past twenty-two years nearly 300 community banks have disappeared annually at a remarkably steady rate.

Figure 1. Number of Depositories in United States, 1992-2014⁵⁸



None of the problems of community banks has anything to do with the Dodd-Frank Act, the CFPB or the post-financial crisis consumer financial protection reforms. Community banks' problems are structural and long-standing; they pre-dated the CFPB's existence (much less the key CFPB regulations, which only became effective in January 2014) by decades. There is zero evidence that the CFPB's regulations have been harming community banks. The CFPB and post-financial crisis reforms have actually given community banks a leg up by putting a friendly thumb on the regulatory scale.

Community banks already receive significant relief from consumer finance regulation. Indeed, as an initial matter, it is important to recognize that absent regulatory intervention community banks would not exist in the first place.

The existence of community banks in the United States is a legacy of historic interstate branch banking restrictions, which were repealed in 1994. The United States has nearly 6,000 depository institutions. Only around 100 of those institutions have more

⁵⁷ While community banks' share of total banking system assets is shrinking, their total size is actually growing. This is consistent with a more optimistic view that community banks are reasonably healthy, but that large banks continue to enjoy economies of scale and too-big-to-fail benefits.

⁵⁸ FDIC Statistics on Depository Institutions (year end figures). The slope of the line has a coefficient of -295, with a r^2 of over 95%, meaning it is very close to a straight line.

than \$10 billion in assets, which is the cut-off typically used for defining “community” banks. In other words, virtually all U.S. depositories are community banks, and most of those depositories have under \$1 billion in assets. No other country in the world has as many depositories as the United States by a couple of orders of magnitude. What we are witnessing now in the consolidation of the banking industry is the mean reversion one would expect absent restrictions on interstate branch banking.

Even today, regulation helps support the community banking industry. Absent FDIC insurance, depositors would never use small institutions instead of large ones—banks like the State National Bank of Big Springs—simply would not exist but for regulation. And merger approval requirements and entry restrictions help protect the community banking business.

The Dodd-Frank Act codifies special solicitude for community banks through several provisions:

- Community banks are exempt from the Durbin Interchange Amendment’s debit card fee regulation.⁵⁹ This gives community banks a significant competitive advantage over megabanks, by allowing them to receive higher interchange fees than the megabanks.
- All financial institutions with less than \$10 billion in assets are exempt from examination and enforcement actions by the CFPB.⁶⁰ There are only 147 banks and credit unions that are subject to CFPB examination and enforcement.⁶¹ Instead, smaller banks and credit unions are examined and subject to enforcement by their regular prudential regulators. This means that community banks have to deal with fewer examinations and are not subject to the scrutiny of a dedicated consumer protection agency.
- In addition to the regular notice and comment requirements of the Administrative Procedures Act, the CFPB is required to go through a special rulemaking process under the Small Business Regulatory Enforcement Fairness Act when it promulgates rules that will affect small businesses, including community banks.⁶² The SBREFA process lets small businesses comment on proposed rules when they are in an early stage, before the “train has left the station.”

The CFPB has also codified special provisions for community banks in its regulatory implementations of the Dodd-Frank Act, even though it is not required to do so. The CFPB has built in numerous exceptions for smaller financial institutions to its rule:

⁵⁹ 15 U.S.C. § 1693o-2(a)(6).

⁶⁰ 12 U.S.C. §§ 5515, 5516(d).

⁶¹ CFPB, Consumer Financial Protection Bureau by the Numbers, July 15, 2015, at http://files.consumerfinance.gov/f/201507_cfpb_factsheet-by-the-numbers.pdf.

⁶² 5 U.S.C. §§ 603(d), 609(d)(2).

- Small creditors (with less than \$2 billion in assets) can make mortgage loans at APRs 200 basis points (2%) higher than larger creditors and still qualify for the absolute safe harbor to the Ability to Repay Rule.⁶³
- Small creditors (with less than \$2 billion in assets) that originate less than 500 mortgage loans per year can qualify for the absolute safe harbor to the Ability to Repay Rule for the loans they retain on portfolio even if those loans have debt-to-income ratios above 43%.⁶⁴ If these loans are held in portfolio for three years, they retain their safe harbor even if subsequently sold to another small creditor.⁶⁵
- Small creditors (with less than \$2 billion in assets) that operate predominantly in rural and underserved areas are exempt from the requirement of maintaining escrow accounts for high-cost mortgages.⁶⁶
- Small creditors (with less than \$2 billion in assets) in rural and underserved areas are exempt from the prohibition on high-cost balloon loans.⁶⁷
- Small creditors in rural and underserved areas may until 2016 make balloon mortgages that qualify for the safe harbor from the ability-to-repay rule.⁶⁸
- Implementation of balloon payment limitations is delayed for two-years (until 2016) for all small creditors (with less than \$2 billion in assets) irrespective of whether they operate predominantly in rural or underserved areas.⁶⁹
- Loans made against rural properties are not subject to the same rules regarding appraisals for high-cost mortgage loans.⁷⁰
- Small mortgage servicers are exempted from the Truth in Lending Act requirement of periodic statements.⁷¹
- Small servicers are exempted from most of the Real Estate Settlement Procedures Act loss mitigation requirements (other than prohibition on commencing foreclosure until 120 days delinquency)
- Entities that handle 100 or fewer remittances per year are exempt from the Remittance Rulemaking under Regulation E under the Electronic Fund Transfers Act.⁷²

CFPB has also proposed rules that would expand the definition of “rural” creditor and as well as increase the small creditor debt-to-income exemption from 500 loan originations to 2,000 loans sold annually (and unlimited originations).⁷³

⁶³ 12 C.F.R. § 1026.43(b)(4), (e)(5).

⁶⁴ 12 C.F.R. § 1026.43(e)(5)(i); 1026.35(b)(2)(iii)(B)-(C).

⁶⁵ 12 C.F.R. § 1026.43(e)(5)(ii)(A).

⁶⁶ 12 C.F.R. § 1026.35(b)(2)(iii).

⁶⁷ 12 C.F.R. § 1026.43(e)(6).

⁶⁸ 12 C.F.R. § 1026.43(f)(1)(vi).

⁶⁹ 12 C.F.R. § 1026.43(e)(6).

⁷⁰ 12 C.F.R. § 1026.35(b)(4)(vii)(H).

⁷¹ 12 C.F.R. § 1026.41(e)(4).

⁷² 12 C.F.R. § 1005.30(f)(2).

⁷³ 80 FED. REG. 7769 (Feb. 11, 2015).

Beyond this, the CFPB has voluntarily taken actions to ensure that the voices of small institutions are heard in the regulatory process:

- The CFPB has voluntarily created a Community Bank Advisory Board and a Credit Union Advisory Board, in addition to its statutorily required Consumer Advisory Board.
- The CFPB has included representatives of small financial institutions on its Consumer Advisory Board, which is currently chaired by the chairman of rural community development credit union.

All of this is to say that the CFPB has shown particular solicitude for small financial institutions, attempting to balance their particular concerns and cost structures with the need for uniform consumer protection laws.

Community banks are ailing, but their problems are not because of the CFPB. The central problem for community banks is that size matters in consumer finance. Community banks lack the economies of scale necessary to compete in mortgages and credit cards. Increasingly, they will have trouble competing for deposits as they lose locational advantages to mobile banking platforms and find themselves unable to keep up in the technological cybersecurity arms race. It is unclear whether commercial and agriculture lending alone will be enough to support many community banks. Although the CFPB has actually put a friendly thumb on the regulatory scale to ease regulatory burdens for community banks, no amount of regulatory relief will offset the structural problem faced by community banks. There is really no way to avoid the fact that size matters in consumer finance.

CONCLUSION

Reasonable minds can differ about the policy choices embodied in the Dodd-Frank Act. But the constitutionality of the Dodd-Frank Act is not seriously in question, and the Constitution should not be abused as a tool to achieve policy goals lest its principles begin to be seen as nothing more than what is politically convenient. As we celebrate the fifth anniversary of the Dodd-Frank Act, let us look for ways to improve and extend that legislation rather than attempt to return to the Dark Ages of a poorly regulated financial marketplace.

Testimony of Mark A. Calabria, Ph.D.
Director, Financial Regulation Studies, Cato Institute
Before the
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Hearing entitled “The Administrative State v. The Constitution: Dodd-Frank
at Five Years”
July 23, 2015

Mark A. Calabria, Ph.D. is Director of Financial Regulation Studies at the Cato Institute. Before joining Cato in 2009, he spent seven years as a member of the senior professional staff of the U.S. Senate Committee on Banking, Housing and Urban Affairs. In that position, he handled issues related to housing, mortgage finance, monetary policy, economics, banking and insurance. Prior to his service on Capitol Hill, Calabria served as Deputy Assistant Secretary for Regulatory Affairs at the U.S. Department of Housing and Urban Development, and also held a variety of positions at Harvard University's Joint Center for Housing Studies, the National Association of Home Builders and the National Association of Realtors. He has also been a Research Associate with the U.S. Census Bureau's Center for Economic Studies. He holds a doctorate in economics from George Mason University.

<http://www.cato.org/people/mark-calabria>

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Chairman Cornyn, Ranking Member Durbin, and distinguished members of the Subcommittee, I thank you for the invitation to appear at today's important hearing. I am Mark Calabria, Director of Financial Regulation Studies at the Cato Institute, a non-profit, non-partisan public policy research institute located here in Washington, D.C. Before I begin my testimony, I would like to make clear that my comments are solely my own and do not represent any official positions of the Cato Institute. In addition, outside of my interest as a citizen and taxpayer, I have no direct financial interest in the subject matter before the Committee today, nor do I represent any entities that do.

I also thank the Subcommittee for its interest in hearing from a non-lawyer. I believe the Constitution should be of great interest to all Americans, and not just lawyers. My primary interest is that of an economist and policy analyst.

Dodd-Frank and the Administrative State

"Formulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people." Justice Brennan, *NAACP v. Button*, 371 U.S., at 432 .

Over the many years I have worked on financial policy, one of the most striking elements continues to be the vast delegation of actual decision-making to executive branch and so-called "independent" agencies. The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") doubles down on that approach. The law firm Davis Polk estimates that Dodd-Frank will require almost 400 separate rule-makings.

Not only is Dodd-Frank's coverage extensive, but most of its decisions are left to unelected bureaucrats. I believe a basic characteristic of a good legal system is one where private parties can read the law and have a strong sense of whether they are in compliance or not. In such important areas as bank capital, which derivatives are subject to mandated clearing, what trades are "proprietary" under the Volcker rule, what consumer products are "abusive", and countless other areas, private parties are left guessing. Dodd-Frank is largely one massive delegation after another. Such is bad enough, and of questionable constitutionality, but regulators themselves have also failed in many instances to give Dodd-Frank specificity.

After the financial crisis, Congress had a duty to the American public to reform our financial system. Instead Congress largely kicked the can to the regulators. Setting aside the constitutional issues, without significant structural changes to our financial regulatory system, and monetary system, from Congress, another financial crisis is only a matter of "when" and not

“if”. Given the intense partisan nature and inability to deal with actual drivers of the recent crisis, Congress would be wise to fully repeal Dodd-Frank and start over again.

While I share the concerns raised by others on this panel, I will focus on the remainder of my testimony on Dodd-Frank’s Consumer Financial Protection Bureau (CFPB). In no way should this emphasis be interpreted to mean that CFPB is the only problematic section of Dodd-Frank. The Act’s flaws are many. I will also focus on two aspects of the CFPB. The unusual funding structure and its bulk collection of consumer finance data. Its problems extend far beyond these two areas.

CFPB – Funding issues

Dodd-Frank creates an unusual, dangerous and unconstitutional funding structure for the CFPB. Essentially the CFPB is allowed to set its own budget and have it covered by the Federal Reserve. Dodd-Frank has placed the CFPB outside the appropriations process. As this Subcommittee is aware Article I Section 9 of the Constitution requires that “no money shall be drawn from the Treasury, but in consequence of appropriations made by law”. The “earnings” of the Federal Reserve are generally derived from its holdings of Treasury (and now agency) securities. “Excess” earnings are returned to Treasury and are used by Congress in the appropriations process. Every dollar allocated to the CFPB is a dollar taken away from Congress’ appropriation’s process. So while one might argue that the CFPB’s funding mechanism does not run afoul of Article I Section 9, it has the same effect as if such funds were appropriated, but without the oversight and rigors of the appropriations process.

Moving beyond whether the CFPB's funding mechanism is "loop-hole" to Article I Section 9 is the fact that it so clearly subverts the spirit and intent of Article I Section 9. The Constitution rests "the power of the purse" with Congress. With great power comes great responsibility; a responsibility to make the hard choices about allocating federal dollars. A dollar that goes to the CFPB is a dollar that does not go to health care, education, fighting homelessness or to tax relief. Members of Congress were elected to make those hard choices. Not to dodge that responsibility by delegating funding decisions to agency heads.

Some might respond that such is simply keeping with the structure of other financial regulators. Such would at best be half right. Agencies such as the Securities and Exchange Commission and the Commodity Futures Trading Commission, despite being funded by industry fees, are still in the appropriations process. Those currently outside that process, such as the Federal Reserve, should have their operating budgets included in the appropriations process. No federal agency should be outside the appropriations process.

One might argue that the CFPB needs to be outside of the appropriations process in order to insulate it from Wall Street lobbyists. Setting aside the fact that the CFPB does not even have jurisdiction over Wall Street firms, the last time I checked, I couldn't find a single "Wall Street lobbyist" sitting on the Senate Appropriations Committee. What I did see, however, was earnest, hard working, members trying to do the difficult, and sometimes thankless, job of budgeting work. I have full confidence in the Chair, Ranking Member and other members of the Financial Services Subcommittee of the Senate Appropriations Committee to competently carry out the allocating of federal resources to the CFPB.

It bears remembering that industry interests attempt to influence the functioning of all federal agencies via the appropriations process. It is no surprise that defense lobbyists try to influence the allocation of defense dollars. And of course protecting the lives of our troops is of utmost importance. Yet any suggestion that the Department of Defense should be removed from the appropriations process would be absurd. There is nothing special about the CFPB that requires it to be treated differently than other federal agencies. Every agency is “special” to someone or some group.

Perhaps more troubling is the precedent of funding agency operations from the “earnings” of the Federal Reserve. What is to stop Congress in the future from having the Federal Reserve fund covert operations for the CIA, or peanut subsidies, or any other program?

While the CFPB is in need of a variety of reforms, Congress would do a better job meeting its constitutional responsibilities by bringing the CFPB into the appropriations process.

CFPB – Data protection, privacy and the Fourth Amendment

Passed in the aftermath of the terrorist attacks of 9/11, the Patriot Act vastly expanded the data collection efforts of the U.S. government. The public was told that only if we had had more data, the attacks could have been avoided. Yet the intelligence failures were not from lack of data, but from an inability (or unwillingness) to “connect the dots”. Similarly the financial crisis was met with demands for “more data” as if the overheated housing and mortgage markets were not obvious enough from the generally available aggregate data.

The CFPB has become the lead prophet for the false idol of “more data”. As GAO has reported, the CFPB has engaged in at least 12 large scale data collection efforts.¹ At least 3 include information that directly identifies individual consumers. Combining this information with other sources allows most of the remaining data collections to also identify individual consumers.²

While some of these collections are relatively small, such as the 11,204 arbitration case records, the Bureau’s collection of mortgages, credit report and credit card data is quite extensive. Combined with the CFPB’s information sharing agreement with the Office of the Comptroller of the Currency, the CFPB has access to almost 90 percent of outstanding credit card balances.

As a former federal employee and one subject to the recent Office of Personnel Management breach, let me clearly say I do not trust the CFPB with protecting my personal financial data from hackers. In consolidating all this financial information in one place, the CFPB has left consumers extremely vulnerable to identity theft and even extortion from hackers.

The risk of hacking is a threat from outside the Bureau. Unfortunately the CFPB’s data collection, particularly in the area of credit cards, poses significant threats to our fourth amendment protections. As Justice Douglas observed in his dissent to *California Bankers Assn v. Shultz*, “A checking account...may well record a citizen’s activities, opinions, and beliefs as fully as transcripts of his telephone records.” Credit cards are today’s checks. As GAO noted,

¹ Government Accountability Office. 2014. *Consumer Financial Protection Bureau: Some Privacy and Security Procedures for Data Collection Should Continue Being Enhanced*. Report to Congressional Addresses GAO-14-758

² See Yves-Alexandre de Montjoye, Laura Radaelli, Vivek Kumar Singh and Alex Pentland. 2015. “Unique in the Shopping Mall: On the Reidentifiability of Credit Card Metadata,” *Science* #6221.

the CFPB is not simply collecting account information, which would be bad enough, but also transaction level information. In its brief to *California Bankers Assn*, the American Civil Liberties Union (ACLU) noted that accessing financial records could allow its membership to be identified, eroding the protections recognized in *NAACP v. Alabama*. As an employee of an institute that also receives donations transmitted via checks and credit cards, I too fear that allowing government access to such records poses a significant threat to our political freedoms. As Justice Marshall observed in his dissent to *California Bankers Assn*, “The technique of examining bank accounts to investigate political organizations is, unfortunately, not rare.”

Such concerns are not simply reflections of the Watergate era. As recently as 2012, Justice Sotomayor in her concurrence to *United States, Petitioner v. Antoine Jones*, correctly observed that “Awareness that the Government may be watching chills associational and expressive freedoms. And the Government’s unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse.” Justice Sotomayor offers the example of medications purchased by online retailers as an example. Such a purchase could potentially be identified within the CFPB’s database of credit card accounts.

For a variety of reasons, the CFPB has become a highly partisan issue. Were it to use the financial records of its critics in an attempt to silence or intimidate these critics, it would not be the first agency to do so.

Unlike many other law enforcement agencies, the CFPB lacks some basic safeguards. For instance no subpoena or warrant has been issued for its massive data collection efforts. As Justice Douglas has explained, a neutral third party, such as magistrate, is needed to balance the pressures of law enforcement with protection of our constitutional freedoms. In *McDonald v.*

United States, Justice Douglas expressed this view of the Founders' intent: "The right of privacy was too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted." The CFPB has repeatedly characterized itself as a "cop on the beat". It is long past time that it is subjected to the same constraints and oversight as a "cop on the beat".

While other financial regulators also collect large amounts of data, and we should be concerned about those efforts as well, GAO has observed the efforts of other financial regulators are "less extensive than CFPB's data collections." For instance neither the Securities and Exchange Commission nor the Commodity Futures Trading Commission engage in the collection of massive amounts of individual investor data.

The Federal Trade Commission (FTC) and the Consumer Product Safety Commission (CPSC), to which the CFPB is often compared, also lack the extensive data collection efforts of the CFPB. The FTC and CPSC do build databases of complaints they receive from consumers, as does the CFPB. Such databases are more than sufficient for regulators to identify trends in misconduct. Would the CFPB have us believe that there are so few consumer complaints that it needs to actively monitor consumers and companies where there have not been any problems found?

As Law Professor Daniel Solove has noted, the "Framers included the warrant clause" of the fourth amendment, "because of their experience with general warrants and writs of assistance."³ One objective of the fourth amendment is to limit the government's ability to

³ Daniel Solove. 2002. "Digital Dossiers and the Dissipation of Fourth Amendment Privacy," *Southern California Law Review* 75:1083.

engage in “fishing expeditions”. Yet such is the very nature of the CFPB’s data collection. Is the CFPB’s data collection limited to following up on suspected violations of the law? No, it covers the extensive surveillance of consumers and companies that have neither been convicted of a crime nor suspected of such.

In reflecting on the Bank Secrecy Act of 1970, from which the third party doctrine flows, Justice Douglas expressed in dissenting from *California Bankers Assn* that he was “not yet ready to agree that America is so possessed with evil that we must level all constitutional barriers to give our civil authorities the tools to catch criminals.” I am not yet ready to agree that our financial markets are so possessed with evil as to merit the CFPB’s broad presumption of guilt on the part of all financial market participants.

Nor is this level of data collection even needed to monitor our financial markets. The CFPB, like the general public, has access to a variety of public reports that detail, in an aggregate manner, trends in consumer finance. Again I would submit that the aggregate trends in housing and mortgage data before the crisis, while incomplete, were more than sufficient to arouse concern. Such trends certainly concerned me. But even if the CFPB continues to believe that micro data is needed, it is collecting amounts far in excess of required sample sizes. As George Mason University Economics Professor Thomas Stratman has noted, the CFPB plans to collect data samples that are 70,000 times the size needed.⁴ Such an expansive collection of data reveals that the CFPB is indeed engaged in “fishing expeditions” rather than simply market monitoring.

Setting aside that I believe both *California Bankers Assn v Shultz* and *United States v. Miller* to be wrongly decided, it should be noted that Miller, in finding no “expectation of

⁴ See <http://mercatus.org/sites/default/files/StratmannCFPBStatisticMethods.pdf>

privacy”, relies upon an analysis that “checks are not confidential communications but negotiable instruments to be used in commercial transactions.” True enough. Checks are negotiable and can be widely circulated. Yet what the CFPB collects is not limited to checks. Credit card transactions, for example, are not negotiable. There is no expectation that such will be passed along like currency. Consumers may well prefer credit (and debit) cards due to their relative anonymity. The data collection efforts of the CFPB (under sections 1022, 1024 and 1025 of Dodd-Frank) go far beyond those envisioned or approved in either *California Bankers Assn* or *Miller*.

Conclusions

Chairman Cornyn, Ranking Member Durbin, the Dodd-Frank Act represents a massive expansion of legislative delegation to administrative agencies. Its constitutional flaws do not end there. As I have focused upon, the Consumer Financial Protection Bureau is characterized by a funding mechanism designed to specifically subvert Article I Section 9 of the Constitution. Additionally its data collection activities run afoul of our Fourth Amendment protections. These extensive data collections are in no way necessary for the CFPB to achieve its statutory mission. Such could be accomplished in a manner that does not offend the Fourth Amendment. As Courts have too often been slow to protect our Fourth Amendment rights, it did take almost 30 years for *Olmstead* to be reversed, Congress should move quickly to protect American consumers from harm of CFPB’s data collection efforts.

**Statement Of Senator Patrick Leahy (D-Vt.),
Ranking Member, Senate Judiciary Committee
Subcommittee Hearing On “The Administrative State v. The Constitution: Dodd-Frank at
Five Years”
July 23, 2015**

Today the Judiciary Committee’s Subcommittee on the Constitution meets to discuss the Dodd-Frank Wall Street Reform and Consumer Protection Act, five years after its enactment. This bipartisan legislation was passed in the wake of one of the Nation’s worst financial crises. The law that came to be referred as “Dodd-Frank” was a major victory for hardworking Americans, many of whom lost their homes and life savings as a result of the 2008 financial meltdown.

Instead of convening to commemorate the five-year anniversary of Dodd-Frank and the impact it has had to improve our banking system and protect consumers, or to discuss how the law can be improved and strengthened, this hearing is merely a platform to promote partisan and meritless constitutional challenges aimed at dismantling the law and returning us to the old policies and weak regulations that led to the financial crisis in the first place. We cannot let this happen.

For too many years Wall Street banks and insurance companies hid their shaky finances from stockholders, government regulators, and the American public. Financial institutions made risky bets in the dark, corporate executives saw their salaries rise to extreme heights, and the Federal agencies tasked with overseeing these institutions failed to rein in their reckless actions. Then, when their bets went sour, Wall Street turned to the American taxpayer to bail them out. Our economy was brought to its knees and Main Street, not Wall Street, paid the price. The need for reform was clear and the response from Congress and President Obama included passage of Dodd-Frank.

To curtail future Wall Street abuses, Dodd-Frank strengthened oversight of our financial institutions, increased transparency and accountability of big banks, and for the first time created a consumer watchdog dedicated to protecting Americans from fraudulent and predatory business practices. As a Senate conferee on Dodd-Frank, I worked hard to ensure that the legislation was not watered down and had the enforcement and oversight mechanisms necessary to affect real reform. The law was not perfect, but no one can doubt that today our financial system is more stable and better regulated, and the American consumer is better protected, because of this law. We now have a government entity dedicated solely to ensuring that no bank is too-big-to-fail, and since its inception the Consumer Financial Protection Bureau has secured over \$10 billion in relief for consumers harmed by illegal practices in the financial marketplace. This is what reform should look like.

Despite this proven track record, the attacks on Dodd-Frank have been persistent. Constitutional challenges to Dodd-Frank are part of a series of attacks levied against the law since its enactment five years ago. Yet the constitutional challenges have been rejected repeatedly in several courts. I welcome the courts’ findings, but do not doubt that the baseless attempts to undermine this important law will continue. I believe it is time we focus on how Dodd-Frank and its reforms have helped the American people and what more needs to be done, rather than devoting endless time and energy on partisan attacks trying to undo this impactful law.

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Senator Dick Durbin
Written Questions for the Record
Hearing on “The Administrative State v. The Constitution: Dodd-Frank at Five Years”

Questions for Mr. Gupta

1. In *CFPB v. ITT Educational Services*, the district court in the Southern District of Indiana responded to the argument made by a for-profit college that the CFPB’s structure and range of powers are somehow a gross departure from precedent. The *ITT* court said “The Bureau, however, is no venture into uncharted waters; it is a variation on a theme – the independent regulatory agency with enforcement power – that has been a recurring feature of the modern administrative state.” The *ITT* court went on to uphold the CFPB’s constitutionality.

Can you please discuss how the CFPB’s structure and powers are within the administrative agency mainstream? Are critics of the CFPB really just criticizing the modern administrative state?

2. Professor Rao says in her testimony that constitutional challenges raised against the CFPB “may be difficult to redress in the courts because of jurisdictional limits and existing precedent.” Do you believe that courts should adhere to jurisdictional limits and follow existing precedent?
3. In his testimony Ambassador Gray says that the CFPB’s structure runs afoul of “the same basic constitutional principles” articulated by the Supreme Court in *Free Enterprise Fund v. Public Company Accounting Oversight Board*. But that case was about having two vertical layers of removal protection between an executive officer and the President – the Court found that it violated separation of powers to have a “second layer of insulation” whereby the PCAOB members were removable only for cause by the Commissioners of the SEC, and the SEC Commissioners were likewise only removable for cause by the President. In contrast, the President can directly remove the CFPB Director.

As Ambassador Gray concedes in his testimony “True, Dodd-Frank does not stack multiple forms of insulation between the President and the CFPB.” So Ambassador Gray instead comes up with the theory that the CFPB combines multiple forms of independence horizontally, and that this makes it unconstitutional. Are you aware of any court that has adopted this theory of multiple horizontal independences? Isn’t Ambassador Gray asking the courts to go beyond Supreme Court precedent? What would be the practical impact if Ambassador Gray’s theory were adopted?

4. As Professor Rao notes in her testimony, “the Supreme Court has tolerated broad delegations to agencies so long as the statute contains an ‘intelligible principle.’” Critics of the CFPB argue that there is no sufficient “intelligible principle” governing the CFPB’s authority to prescribe rules and take enforcement actions against “unfair, deceptive or abusive” financial practices.

But courts have disagreed. In the *Morgan Drexen* case in the Central District of California, the *ITT* case in the Southern District of Indiana, and the *Alta* case in the Northern District of Illinois, courts held that the Dodd-Frank Act contains intelligible principles to guide this authority. The courts noted that the terms “unfair and deceptive” are well-understood from their use in the Federal Trade Commission Act, and the term “abusive” is carefully defined in the Dodd-Frank Act to apply to four circumstances, each of which specifies the type of harm to be prevented. The courts found that the CFPB’s guiding principles are at least as specific as other intelligible principles upheld by the Supreme Court.

Every court that has looked at the question seems to think there is an intelligible principle guiding the CFPB’s authority to crack down on unfair, deceptive or abusive practices. What do you think? Has the CFPB been given an unconstitutional open-ended delegation of boundless authority?

5. Republicans in Congress have placed riders in appropriations bills to try to change the leadership structure of the CFPB from a director to a five-person commission. Does the Constitution compel the CFPB to be headed by a multi-member commission instead of a single director?
6. Several witnesses at this hearing have criticized the CFPB’s funding structure, under which the CFPB receives funding from the earnings of the Federal Reserve System instead of through money appropriated by Congress from the Treasury. But the critique of the CFPB’s funding structure appears to be a policy critique, not an allegation of constitutional infirmity. The *Morgan Drexen* court in California specifically reviewed a challenge to CFPB’s funding structure and said it does not violate the Constitution’s Appropriations Clause. The court noted that the law is clear that Congress can decide to finance a federal entity with appropriations or through other means. Is there any constitutional problem here, or is this just another policy objection to the CFPB?
7. Can you respond to Mr. Calabria’s statement in his testimony that Congress would be wise to fully repeal Dodd-Frank and start over? Who would be the winners and the losers in that scenario?

Questions for Professor Levitin

1. Please describe what it would mean for American consumers if the courts were to make the CFPB disappear and if we were to go back to the patchwork of consumer protection laws and agencies that we had before Dodd-Frank was enacted.
2. Several witnesses at this hearing have expressed concerns over data collection that the CFPB has conducted. Is this type of data collection unique among financial regulators? Does it implicate constitutional concerns? Should consumers feel threatened by it?
3. In your testimony you discuss how the checks and balances that constrain the CFPB are in many respects similar or even more restrictive than the checks and balances that apply to other financial regulators, like the Office of the Comptroller of the Currency. Why do you

Senator Dick Durbin
Written Questions for the Record
Hearing on “The Administrative State v. The Constitution: Dodd-Frank at Five Years”

Questions for Professor Levitin

- 1. Please describe what it would mean for American consumers if the courts were to make the CFPB disappear and if we were to go back to the patchwork of consumer protection laws and agencies that we had before Dodd-Frank was enacted.**

If the CFPB were to disappear, it would mark a return to the Dark Ages of consumer finance, where virtually anything was acceptable. We would have lenders making mortgage loans to consumers who had no ability to repay. Abusive subprime lending would be rampant. Mortgage brokers would be compensated more for steering consumers to higher-cost loans. Mortgage servicers would routinely overcharge consumers and fail to consider their attempts to obtain loan modifications. Kickbacks to lenders in the form of cessation of insurance to captive affiliate reinsurers would continue to be a standard procedure in the private mortgage insurance market. Cellphone bills from Sprint and Verizon would be “crammed” with unauthorized third-party charges. Debt settlement agencies like Morgan Drexen that promised relief that they knew they could not provide would still prey freely upon consumers. Credit card companies would charge for unauthorized add-on services. Predatory for-profit colleges like Corinthian would still be bilking students. And there’d be little consumers could do about this because of arbitration clauses in their contracts that prevent effective private vindication of their rights. Eliminating the CFPB would effectively transfer billions of dollars every year from the pockets of American families to the pockets of the most rapacious players in the financial services industry as consumer protection would once more become an “orphan mission” splintered among over a dozen agencies, none with market-wide jurisdiction or with consumer protection as their primary mission.

- 2. Several witnesses at this hearing have expressed concerns over data collection that the CFPB has conducted. Is this type of data collection unique among financial regulators? Does it implicate constitutional concerns? Should consumers feel threatened by it?**

Unfortunately, the witnesses at this hearing testified about the CFPB’s data collection without knowing the first thing about the CFPB’s data collection programs. In over two dozen appearances before Congress, I have never seen such blatant “shoot first and ask questions later” behavior. It is grossly irresponsible for witnesses to engage in black helicopter paranoia and speculation without having first looked into the facts of CFPB data collection.

As an initial matter, there is of course good reason to be chary of government data collection. Data can allow the government to abuse citizen’s privacy and civil rights. Moreover, as we have seen recently with the Office of Personnel Management data breach, data held by the government is also vulnerable to theft by cybercriminals. It does not follow, however, that all government data collection is problematic. Some is actually beneficial, and the facts about particular government data collection programs matter.

Unfortunately, the witnesses at this hearing who criticized the CFPB's data collection haven't bothered to learn the basic facts about the data the agency collects before impugning it as Big Brother. And this shows the criticism of the CFPB's data collection for what it really is: a politically motivated attack on the CFPB.

A quick look at the facts of the CFPB's data collection shows that there's really nothing to fear, and the idea that there are constitutional issues implicated in the data collection programs is laughable. Much of the data gathered by the Bureau is already public: mortgages are recorded in county land records and auto sales with state DMVs. Most of the data that is not publicly available is commercially available and routinely used by businesses and academics. This just isn't secret or sensitive data.

Very little of the data is publicly identifiable when the CFPB obtains it, and the Bureau de-identifies that data, so Bureau personnel are never working with personally identifiable data. Even if the data were personally identifiable, the nature of the data is that it doesn't reveal anything especially personal. The CFPB collects aggregate account-level data, showing account balances, interest rates, and fees. The data collected by the CFPB does not contain transaction-level data, so the CFPB has no idea what someone has purchased or even where the purchase took place. Consumers can rest easy that the CFPB does not know about their subscriptions to the Ashley Madison adult-dating site or donations to the People's Liberation Front of Judea or the National Rifle Association. The CFPB knows less about consumers' purchases than the banks it regulates know. All of this means that there are no legitimate Big Brother concerns about the CFPB's data collection.

The concerns about data security are similarly misplaced. Data breaches are a fact of modern commercial life. Consumers have to assume that any data they give to merchants, financial institutions, or the government may be compromised. Data breaches don't matter very much, however, unless the data is sensitive, meaning that it is readily monetizeable. Hackers target credit card data for the same reason Willie Sutton robbed banks: "That's where the money is."

As it turns out, the credit card data collected by the CFPB is useless to cybercriminals. It does not include account numbers, expiration dates, or security codes. It doesn't even include consumer names and addresses. In short, the CFPB has nothing that a cybercriminal would want. The data the CFPB possesses simply isn't useful for a fraudster. But you wouldn't know that from the rantings of the witnesses called by the Majority.

You also wouldn't know from the complaints of CFPB data critics that government collection of consumer financial data is nothing new—the OCC, FDIC, and Federal Reserve have been doing it for years (often with larger data sets). Indeed, much of the data the CFPB gets is through Memoranda of Understanding with other regulatory agencies. The CFPB's critics have never previously a word to say about the collection of the same data by other agencies. Apparently, data collection is a problem only when done by the CFPB.

The CFPB's data collection is something that should be applauded rather than criticized. Most of the CFPB's data collection is one-time collections in support of specific rulemakings. Indeed, Isn't evidence-based policy something we want? A responsible rulemaking on overdraft or payday or arbitration requires knowing something about the state of the market, and that requires data. Of course, the Bureau's critics would simply prefer that there be no rulemakings, or that the rulemakings be unsupported by evidence and thus vulnerable to litigation challenges.

Likewise, the CFPB's ongoing data collection is critical to ensuring that the Bureau does not end up behind the ball with market developments, as federal regulators were during the housing bubble. And enforcement of the fair lending laws is not possible without data collection and analysis. Attacks on CFPB data collection are effectively assaults on the fair lending laws.

Evidence-based policymaking is the essence of the CFPB's approach to consumer finance regulation. Unfortunately, the Bureau's implacable ideological opponents are so quick to find fault with the Bureau that they won't let facts get in the way of leveling unfounded and irresponsible charges about abusive data collection.

3. In your testimony you discuss how the checks and balances that constrain the CFPB are in many respects similar or even more restrictive than the checks and balances that apply to other financial regulators, like the Office of the Comptroller of the Currency. Why do you think it is that those other financial regulators are not routinely subject to lawsuits challenging their constitutionality on separation of powers grounds?

The constitutionality of other financial regulators is not regularly challenged because those regulators do not threaten to put bad actors out of business. Instead, other financial regulators have historically coddled even some of the worst actors in the financial services marketplace, doing little beyond applying milquetoast fines for egregious behavior. No one in the financial services industry has no incentive to challenge such a cozy clique of regulators. In contrast, the bad actors in the industry have a strong incentive to challenge the CFPB's constitutionality.

4. In your view, why does the financial industry want so badly for the CFPB to be headed by a commission instead of a single director like the Office of the Comptroller of the Currency?

The financial services industry's push for the CFPB to be structured as a commission rather than as a single director surely isn't out of some principled constitutional concern. The only reason that the financial services industry wants a commission is because it believes that a commission will make the CFPB a less vigorous regulator. The commission structure necessitates some degree of compromise on rulemakings and enforcement. Moreover, because no more than three commissioners would be from any one party, it is unlikely that a majority of commissioners would ever be associated with the more Progressive wing of the Democratic Party, thereby making it unlikely that the CFPB would ever have an aggressive reform agenda, irrespective of who won the Presidential election. The result would ultimately be a less democratically accountable agency, which is exactly what the financial services industry wants.

5. One of the premises of the *Big Spring* lawsuit is that the provisions of Dodd-Frank left small financial institutions - community banks and credit unions - at a competitive disadvantage compared to the big financial institutions that are subject to FSOC oversight and CFPB regulation. This is a strange argument, because as you note in your testimony, Dodd-Frank goes out of its way to exempt small banks and credit unions from the regulations that it applies to giant institutions.

In fact, there are several parts of Dodd-Frank that have created a distinct competitive advantage for small financial institutions. For example, I added an amendment to Dodd-Frank on debit interchange fee reform, which restricted the amount of interchange that Visa and MasterCard could fix on behalf of big banks but did not regulate the amount of interchange that small banks could receive. As a result, small debit card issuers now receive significantly higher interchange than their big bank competitors.

Isn't it accurate that with this provision and others, Dodd-Frank has gone out of its way to benefit small financial institutions as compared to the industry giants?

It is accurate. The Dodd-Frank Act helps level the playing field for small banks through provisions like the exemption for banks with under \$10 billion in net assets under the Durbin Interchange Amendment. Likewise, small banks are exempted from the CFPB supervision and enforcement; only 147 of the roughly 15,000 banks and credit unions in the United States are subject to CFPB examinations or enforcement. And small financial institutions are not subject to additional regulation by the Federal Reserve as systemically important entities. This sort of small bank carve-out is, to my knowledge, unprecedented in prior federal financial laws. There's no question that small banks have lots of problems, but Dodd-Frank really isn't one of them.

6. As Professor Rao notes in her testimony, "the Supreme Court has tolerated broad delegations to agencies so long as the statute contains an 'intelligible principle.'" Critics of the CFPB argue that there is no sufficient "intelligible principle" governing the CFPB's authority to prescribe rules and take enforcement actions against "unfair, deceptive or abusive" financial practices.

But courts have disagreed. In the *Morgan Drexen* case in the Central District of California, the *ITT* case in the Southern District of Indiana, and the *Alta* case in the Northern District of Illinois, courts held that the Dodd-Frank Act contains intelligible principles to guide this authority. The courts noted that the terms "unfair and deceptive" are well-understood from their use in the Federal Trade Commission Act, and the term "abusive" is carefully defined in the Dodd-Frank Act to apply to four circumstances, each of which specifies the type of harm to be prevented. The courts found that the CFPB's guiding principles are at least as specific as other intelligible principles upheld by the Supreme Court.

Every court that has looked at the question seems to think there is an intelligible principle guiding the CFPB's authority to crack down on unfair, deceptive or abusive practices. What do you think? Has the CFPB been given an unconstitutional open-ended delegation of boundless authority?

Absolutely not. The CFPB's "abusive" authority is hardly an open-ended delegation of authority. As you note, every court to consider the issue has noted, the term "abusive" is carefully defined in the Dodd-Frank Act to apply to four specific circumstances: (1) acts or practices that materially interfere with the ability of a consumer to understand terms or conditions of the product or service; (2) acts or practices that take unreasonable advantage of the consumer's lack of understanding of the product or service's risks, costs, or conditions; (3) acts and practices that take unreasonable advantage of the consumer's inability to protect his or her own interests when choosing or using a product or service; and (4) acts and practices that take

unreasonable advantage of the consumer's reliance on a covered person to act in the consumer's interests. These are fairly specific delegations to the agencies.

Moreover, the term "abusive" is not a new one to federal consumer financial law, yet it has never caused consternation as an overly vague term previously. The term "abusive" appears in the 1977 Fair Debt Collection Practices Act (prohibiting "abusive debt collection practices"), 15 U.S.C. § 1692(e), and the 1994 Home Ownership and Equity Protection Act (directing the Federal Reserve Board to prohibit "abusive lending practices" in loan refinancings), 15 U.S.C. § 1639(2)(B). Only now, however, with the CFPB, has "abusive" suddenly become an excessively vague term, at least according to the CFPB's critics. (I will note that during the hearing Dr. Calabria heartily embraced fraud prevention as an appropriate mission for the CFPB. Dr. Calabria may not be acquainted with the limitations on legal doctrines of fraud that necessitate broader standards if the policy goal is to protect consumers from overreaching by sophisticated business entities.)

Most significantly, however, the Supreme Court has previously upheld an even more open-ended term, namely "unfair" as used in the Federal Trade Commission Act. The FTC Act prohibits "unfair and deceptive acts and practices," but does not define "unfair" or "deceptive". The Federal Trade Commission defined "unfair" in a 1964 rulemaking that was upheld by the Supreme Court in an unanimous decision. *Federal Trade Commission v. Sperry & Hutchinson Co.* 405 U.S. 233 (1972). The FTC's definition of "unfair" (reputedly drafted by Judge Richard Posner, then an FTC attorney-advisor) was "(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise — whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking. 29 Fed. Reg. 8355 (1964). This definition of "unfair" is incredibly broad and ill-defined, yet Supreme Court upheld it, noting that "legislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws." 405 U.S. 244. If the FTC's 1964 "unfair" standard passes constitutional muster, it is hard to see how the CFPB's "abusive" authority is in any way constitutionally suspect except in the eyes of those who are ideologically or financially pre-disposed to dislike the CFPB.

7. In his testimony Ambassador Gray says that the CFPB's structure runs afoul of "the same basic constitutional principles" articulated by the Supreme Court in *Free Enterprise Fund v. Public Company Accounting Oversight Board*. But that case was about having two vertical layers of removal protection between an executive officer and the President — the Court found that it violated separation of powers to have a "second layer of insulation" whereby the PCAOB members were removable only for cause by the Commissioners of the SEC, and the SEC Commissioners were likewise only removable for cause by the President. In contrast, the President can directly remove the CFPB Director.

As Ambassador Gray concedes in his testimony, “True, Dodd-Frank does not stack multiple forms of insulation between the President and the CFPB.” So Ambassador Gray instead comes up with the theory that the CFPB combines multiple forms of independence horizontally, and that this makes it unconstitutional. Are you aware of any court that has adopted this theory of multiple horizontal independences? Isn’t Ambassador Gray asking the courts to go beyond Supreme Court precedent? What would be the practical impact if Ambassador Gray’s theory were adopted?

Ambassador Gray has concocted a novel theory of constitutional law. No court has yet embraced his theory, and, given existing precedents, no lower court can embrace his theory. Instead, Ambassador Gray’s litigation challenge to the CFPB depends entirely upon convincing the Supreme Court to grant certiorari and then convincing five Justices to adopt a constitutional theory that would put the constitutionality of not just the CFPB, but many other regulatory agencies in question. As a practical matter, if Ambassador Gray were successful, he would throw the financial services sector of the United States economy (and likely other sectors) into complete disarray because of uncertainty about the constitutionality of the myriad rules and regulations governing financial services. The cost to the American economy from this uncertainty would be enormous.

8. If a data breach involving consumer information occurs at a public or private corporation, does the occurrence of such a breach mean that there has been malfeasance or neglect of duty on the part of the corporation’s CEO and Board of Directors? Should the CEO and Board of Directors be automatically removed because of such a breach?

Data breaches are a fact of modern commercial life. A company that is subject to a data breach is the victim of a crime. A data breach alone does not indicate malfeasance or neglect of duty on the part of a business’s CEO or directors, any more than the mere fact that a robbery victim was carrying money makes the victim negligent or culpable for the robbery. The idea of automatic removal of corporate officers or directors because of a data breach is bizarre—if such a strict liability regime were in place the officers and directors of most major US firms would have been removed several times over. It would be strange, therefore, as suggested at the hearing, to apply such a strict liability standard to the CFPB Director (or to any other officer of the United States).



Americans for Financial Reform
 1629 K St NW, 10th Floor, Washington, DC, 20006
 202.466.1885

July 23, 2015

The Honorable John Cornyn, Chairman
 The Honorable Dick Durbin, Ranking Member
 Subcommittee on the Constitution
 Senate Judiciary Committee
 US Senate
 Washington, DC 20515

Re: Hearing on “The Administrative State v. The Constitution: Dodd-Frank at Five Years”

Chairman Cornyn, Senator Durbin and members of the Committee,

On behalf of Americans for Financial Reform, the leading public interest coalition that supported enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) and its members, including the undersigned, we write both to explain the importance of the Act and to point out that, while numerous opponents of financial reform have challenged the act’s constitutionality, none have prevailed, in any court. In fact, several cases have been firmly rejected.

The bottom line is this: Following two years of investigations and hearings in response to the financial collapse, the Dodd-Frank Act was carefully constructed to reduce the risk of another financial crisis through reforms and new regulatory structures that have built in numerous checks and balances and that pass constitutional muster.

Just this week the act turned 5 and the Consumer Financial Protection Bureau turned 4. The CFPB is a singular achievement of the Congress – perhaps the most important consumer financial reform since deposit insurance over 75 years ago, which was enacted into law the last time that Wall Street predatory practices collapsed the economy. The CFPB is aligning interests of financial firms with those of their customers and making markets work for all Americans. The opponents of Dodd-Frank are expected to also challenge the establishment of the Financial Stability Oversight Council and its powers as well as the act’s establishment of Orderly Liquidation Authority to wind down failing banks.

An important element of all claims regarding the constitutionality of Dodd-Frank is that it is somehow illegitimate or unconstitutional for Congress to grant significant discretionary authority

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to financial regulators in determining how to address issues of financial risk or consumer exploitation. Yet there is a long tradition of granting such broad discretion to financial regulators. The authority of prudential banking regulators to examine banks for safety and soundness dates back to the 1860s. The ability of Federal regulators to regulate markets for unfair and deceptive practices dates back to the Federal Trade Commission Act of 1914. The Securities and Exchange Commission has issued many hundreds of rules under broad mandates to protect investors and facilitate capital formation. Dodd-Frank lies squarely within this long tradition.

One of the witnesses today is chief counsel to the plaintiffs in the case *State National Bank of Big Spring v. Lew*. The case has already been rejected due to a lack of standing of some of the plaintiffs (including Big Spring, which is a small bank not fully subject to the CFPB) and a lack of ripeness for review. Further, most experts believe that a decision in its appeal is not even expected to reach any of the constitutional questions presented.¹

***Big Spring* asserted a pastiche or mosaic of constitutional claims against the CFPB.**

Primarily, plaintiffs assert that Title X of Dodd-Frank allegedly violates the Constitution's separation of powers by giving effectively unbounded power and discretion to the Consumer Financial Protection Bureau (CFPB) and its Director and by insulating the CFPB against meaningful checks by the other branches of government.

Allegations that its structure is somehow "rogue" are meritless; the CFPB's structure, funding, and authorities are very similar to those of the Office of the Comptroller of Currency, an agency enacted in 1863 which regulates the safety and soundness of national banks. One difference in their authorities is telling: The OCC's powers extend to shutting banks down; the CFPB's do not. A difference in their funding is also telling: CFPB's independent funding is capped, after which it must come to Congress for additional funds; OCC can simply raise the regulatory fees it imposes on banks to increase its budget. The CFPB's structure, funding and authorities are also similar to those of another much more recently created agency, the Federal Housing Finance Agency, established under the Housing and Economic Recovery Act (HERA) in 2008. Like the CFPB, FHFA has a single director and dedicated funding.

Of course, like these and other agencies, the CFPB's rulemaking process must follow APA procedures, including Congressional review, and is subject to judicial review. In addition, in a variety of ways the CFPB is subject to review and oversight that is more stringent than that of the OCC, FHFA, or other financial regulators. First, it must engage in an additional separate small business consultation process, SBREFA, before it can begin the regular APA rulemaking process

¹ See, e.g., an industry-side analysis in the frequently-cited blog *CFPB Monitor*: "I do not believe they have a good chance of prevailing on appeal in the D.C. Circuit, particularly in view of the number of that court's opinions cited by Judge Huvelle's opinion," Keith Fisher, "The District Court's ruling in *State National Bank of Big Spring v. Lew*", 7 August 2013, available at <http://www.cfpbmonitor.com/2013/08/07/the-district-courts-ruling-in-state-national-bank-of-big-spring-v-lew/>.

for most rules. Its rules are also subject to veto by the Financial Stability Oversight Committee (FSOC). No other financial regulators have these checks or requirements.

A number of other plaintiffs have also challenged various aspects of the CFPB's structure and authorities on constitutional grounds. Courts have rejected them all:

CFPB v. Morgan Drexen, Inc.:² The court ruled in favor of the CFPB on all statutory and constitutional grounds. Among the court's holdings:

- the Dodd-Frank Act did not impermissibly restrict the President's executive power;
- the delegation of authority to the CFPB did not violate the Constitution's prohibition on the delegation of legislative power outside of Congress;

CFPB v. ITT Educational Servs., Inc.:³ Among the court's holdings in favor of the CFPB:

- the CFPA's restriction on the President's ability to remove the CFPB's Director did not violate the President's constitutional removal powers;
- a provision of the CFPA which stated that the CFPB's determinations were subject to *Chevron* deference did not impermissibly limit judicial oversight;

Illinois v. Alta Colleges:⁴ In this case, the court rejected a variety of constitutionality claims by a for-profit college challenging the Illinois Attorney General's enforcement of the Consumer Financial Protection Act (Title X of the Dodd-Frank Act, establishing the CFPB).

Illinois v. CMK Investments, Inc.:⁵ Similarly, in this case, the court rejected a variety of constitutionality claims by a lender challenging the Illinois Attorney General's enforcement of the Consumer Financial Protection Act:

"In affirmative defenses 12-14, defendant alleges that Dodd-Frank is unconstitutional because it is vague, violates separation-of-powers principles, and vests excessive power in a single official. These allegations have been thoroughly analyzed and rejected by two other district courts. The Court agrees with the reasoning of these decisions, and thus strikes defenses 12-14 as insufficient as a matter of law. (citations omitted)."

Several other claims against the Dodd-Frank Act's constitutionality are made in *Big Spring* and a case brought by the insurance company Met Life:

The first argument, as made in *Big Spring*, is generally that Title I of Dodd-Frank allegedly violates the Constitution's separation of powers by establishing the Financial Stability Oversight

² 60 F. Supp. 3d 1082 (C.D. Cal. 2014)

³ 2015 WL 1013508 (S.D. Ind., 2015)

⁴ 2014 U.S. Dist. LEXIS 123053 (N.D. Ill. 2014)

⁵ 2015 U.S. Dist. LEXIS 84277 (N.D. Ill. 2015)

Council (FSOC), which, in particular, has the power to designate which nonbank financial companies are “systemically important financial institutions,” and not limiting these powers with any meaningful statutory directives or judicial review. *Big Spring* argues that its lack of designation (it is very small) is a constitutional infirmity; conversely, in *MetLife v. Financial Stability Oversight Council*, MetLife argues it is harmed by its SIFI designation. While witnesses including Professor Levitin and Deepak Gupta will discuss the constitutional implications of the various arguments both plaintiffs make, we would like to point out the importance of the FSOC and the SIFI designation process.

The capacity to designate non-banks critical to the U.S. financial system for appropriate regulatory oversight is a central element of FSOC’s powers. After the Gramm Leach Bliley Act repealed the last vestiges of the Glass-Steagall divisions between banking, insurance, and trading market activities, the financial system became more highly interconnected. This allowed for the rapid transfer of risk between insurance companies, commercial banks, broker-dealers, and large hedge funds. During the 2008 financial crisis the impact of these interrelationships became clear, as the failure of investment banks such as Lehman Brothers and insurance companies such as AIG threatened to bring down the entire financial system. While these non-bank entities were regulated for some specific activities, they faced no effective prudential regulation to ensure their overall solvency at the holding company level.

The question of exactly which non-banks should be designated as systemically significant and how such institutions should be regulated is a complex and institution-specific question. This is precisely why Congress has delegated the designation power to a body made up of experts from the full range of financial regulatory agencies. However, given the central role of non-banks in both the financial crisis and in the modern financial system, the general need for a mechanism to ensure proper oversight of systemically critical institutions is clear.

The other primary constitutional problem alleged by opponents concerns Orderly Liquidation Authority. Title II of Dodd-Frank created an “Orderly Liquidation Authority” (OLA) to enable the Treasury Secretary to unwind failing financial companies by appointing the FDIC as a receiver. Opponents claim this provision allegedly violates the separation of powers and also violates the Due Process Clause and the constitutional requirement that bankruptcy laws must be uniform. *Big Spring* makes these claims but we similarly believe they are doomed to fail. The Dodd-Frank liquidation authority for holding companies and systemically important non-banks is clearly modeled after the FDIC’s receivership authority for banks. Congress has long granted FDIC receivership powers over failed banks. These powers grant the FDIC exclusive executive authority to resolve a failed bank, including through repudiation of contracts. FDIC receivership powers have been well established since the 1930s, and we believe that Dodd-Frank Title II powers will clearly be recognized as a logical extension of these long-standing practices.

The public policy justification for Title II is also clear and pressing. The lack of resolution authority for systemically important non-banks and bank holding companies became a major issue during the financial crisis of 2008, and placed unprecedented strains on our financial regulatory system. Eventually the risk of systemic collapse due to the failure of key non-bank financial entities was addressed through large-scale, ad-hoc taxpayer bailouts. Title II of Dodd-Frank was motivated by the desire of Congress and the public to avoid this outcome in the future.

We also expect opponents to raise the recent mortgage case involving PHH Corporation, a mortgage lender, where CFPB Director Cordray overruled an administrative law judge.⁶ We believe that the Director carefully considered his statutory authorities in making this decision and that there are no extant constitutional issues, although we would not be surprised if they are raised in either the hearing or the PHH appeal.

Thank you for your consideration of our views. We believe that two of the witnesses, Professor Levitin and Deepak Gupta, can answer any questions that the committee may have but we are happy to engage further with you or your staff.

Sincerely,

Alabama Appleseed
Americans for Financial Reform
Consumer Action
Consumers Union
Empire Justice Center
MA Communities Action Network
NAACP
National Association of Consumer Advocates
National Community Reinvestment Coalition
National Consumer Law Center
National Fair Housing Alliance
Philadelphia Unemployment Project
Public Citizen
U. S. PIRG
Woodstock Institute

⁶ See "CFPB Director Cordray Issues Decision in PHH Administrative Enforcement Action," 4 June 2015, available at <http://www.consumerfinance.gov/newsroom/cfpb-director-cordray-issues-decision-in-phh-administrative-enforcement-action/>

Following are the partners of Americans for Financial Reform.

All the organizations support the overall principles of AFR and are working for an accountable, fair and secure financial system. Not all of these organizations work on all of the issues covered by the coalition or have signed on to every statement.

- AARP
- A New Way Forward
- AFL-CIO
- AFSCME
- Alliance For Justice
- American Income Life Insurance
- American Sustainable Business Council
- Americans for Democratic Action, Inc
- Americans United for Change
- Campaign for America's Future
- Campaign Money
- Center for Digital Democracy
- Center for Economic and Policy Research
- Center for Economic Progress
- Center for Media and Democracy
- Center for Responsible Lending
- Center for Justice and Democracy
- Center of Concern
- Center for Effective Government
- Change to Win
- Clean Yield Asset Management
- Coastal Enterprises Inc.
- Color of Change
- Common Cause
- Communications Workers of America
- Community Development Transportation Lending Services
- Consumer Action
- Consumer Association Council
- Consumers for Auto Safety and Reliability
- Consumer Federation of America
- Consumer Watchdog
- Consumers Union
- Corporation for Enterprise Development
- CREDO Mobile
- CTW Investment Group
- Demos
- Economic Policy Institute
- Essential Action
- Green America
- Greenlining Institute
- Good Business International

- Government Accountability Project
- HNMA Funding Company
- Home Actions
- Housing Counseling Services
- Home Defenders League
- Information Press
- Institute for Agriculture and Trade Policy
- Institute for Global Communications
- Institute for Policy Studies: Global Economy Project
- International Brotherhood of Teamsters
- Institute of Women's Policy Research
- Krull & Company
- Laborers' International Union of North America
- Lawyers' Committee for Civil Rights Under Law
- Main Street Alliance
- Move On
- NAACP
- NASCAT
- National Association of Consumer Advocates
- National Association of Neighborhoods
- National Community Reinvestment Coalition
- National Consumer Law Center (on behalf of its low-income clients)
- National Consumers League
- National Council of La Raza
- National Council of Women's Organizations
- National Fair Housing Alliance
- National Federation of Community Development Credit Unions
- National Housing Resource Center
- National Housing Trust
- National Housing Trust Community Development Fund
- National NeighborWorks Association
- National Nurses United
- National People's Action
- National Urban League
- Next Step
- OpenTheGovernment.org
- Opportunity Finance Network
- Partners for the Common Good
- PICO National Network
- Progress Now Action
- Progressive States Network
- Poverty and Race Research Action Council
- Public Citizen
- Sargent Shriver Center on Poverty Law
- SEIU
- State Voices
- Taxpayer's for Common Sense
- The Association for Housing and Neighborhood Development

- The Fuel Savers Club
- The Leadership Conference on Civil and Human Rights
- The Seminal
- TICAS
- U.S. Public Interest Research Group
- UNITE HERE
- United Food and Commercial Workers
- United States Student Association
- USAction
- Veris Wealth Partners
- Western States Center
- We the People Now
- Woodstock Institute
- World Privacy Forum
- UNET
- Union Plus
- Unitarian Universalist for a Just Economic Community

List of State and Local Partners

- Alaska PIRG
- Arizona PIRG
- Arizona Advocacy Network
- Arizonans For Responsible Lending
- Association for Neighborhood and Housing Development NY
- Audubon Partnership for Economic Development LDC, New York NY
- BAC Funding Consortium Inc., Miami FL
- Beech Capital Venture Corporation, Philadelphia PA
- California PIRG
- California Reinvestment Coalition
- Century Housing Corporation, Culver City CA
- CHANGER NY
- Chautauqua Home Rehabilitation and Improvement Corporation (NY)
- Chicago Community Loan Fund, Chicago IL
- Chicago Community Ventures, Chicago IL
- Chicago Consumer Coalition
- Citizen Potawatomi CDC, Shawnee OK
- Colorado PIRG
- Coalition on Homeless Housing in Ohio
- Community Capital Fund, Bridgeport CT
- Community Capital of Maryland, Baltimore MD
- Community Development Financial Institution of the Tohono O'odham Nation, Sells AZ
- Community Redevelopment Loan and Investment Fund, Atlanta GA
- Community Reinvestment Association of North Carolina
- Community Resource Group, Fayetteville A
- Connecticut PIRG
- Consumer Assistance Council
- Cooper Square Committee (NYC)

- Cooperative Fund of New England, Wilmington NC
- Corporacion de Desarrollo Economico de Ceiba, Ceiba PR
- Delta Foundation, Inc., Greenville MS
- Economic Opportunity Fund (EOF), Philadelphia PA
- Empire Justice Center NY
- Empowering and Strengthening Ohio's People (ESOP), Cleveland OH
- Enterprises, Inc., Berea KY
- Fair Housing Contact Service OH
- Federation of Appalachian Housing
- Fitness and Praise Youth Development, Inc., Baton Rouge LA
- Florida Consumer Action Network
- Florida PIRG
- Funding Partners for Housing Solutions, Ft. Collins CO
- Georgia PIRG
- Grow Iowa Foundation, Greenfield IA
- Homewise, Inc., Santa Fe NM
- Idaho Nevada CDFI, Pocatello ID
- Idaho Chapter, National Association of Social Workers
- Illinois PIRG
- Impact Capital, Seattle WA
- Indiana PIRG
- Iowa PIRG
- Iowa Citizens for Community Improvement
- JobStart Chautauqua, Inc., Mayville NY
- La Casa Federal Credit Union, Newark NJ
- Low Income Investment Fund, San Francisco CA
- Long Island Housing Services NY
- MaineStream Finance, Bangor ME
- Maryland PIRG
- Massachusetts Consumers' Coalition
- MASSPIRG
- Massachusetts Fair Housing Center
- Michigan PIRG
- Midland Community Development Corporation, Midland TX
- Midwest Minnesota Community Development Corporation, Detroit Lakes MN
- Mile High Community Loan Fund, Denver CO
- Missouri PIRG
- Mortgage Recovery Service Center of L.A.
- Montana Community Development Corporation, Missoula MT
- Montana PIRG
- New Economy Project
- New Hampshire PIRG
- New Jersey Community Capital, Trenton NJ
- New Jersey Citizen Action
- New Jersey PIRG
- New Mexico PIRG
- New York PIRG
- New York City Aids Housing Network

- New Yorkers for Responsible Lending
- NOAH Community Development Fund, Inc., Boston MA
- Nonprofit Finance Fund, New York NY
- Nonprofits Assistance Fund, Minneapolis M
- North Carolina PIRG
- Northside Community Development Fund, Pittsburgh PA
- Ohio Capital Corporation for Housing, Columbus OH
- Ohio PIRG
- OligarchyUSA
- Oregon State PIRG
- Our Oregon
- PennPIRG
- Piedmont Housing Alliance, Charlottesville VA
- Michigan PIRG
- Rocky Mountain Peace and Justice Center, CO
- Rhode Island PIRG
- Rural Community Assistance Corporation, West Sacramento CA
- Rural Organizing Project OR
- San Francisco Municipal Transportation Authority
- Seattle Economic Development Fund
- Community Capital Development
- TexPIRG
- The Fair Housing Council of Central New York
- The Loan Fund, Albuquerque NM
- Third Reconstruction Institute NC
- Vermont PIRG
- Village Capital Corporation, Cleveland OH
- Virginia Citizens Consumer Council
- Virginia Poverty Law Center
- War on Poverty - Florida
- WashPIRG
- Westchester Residential Opportunities Inc.
- Wigamig Owners Loan Fund, Inc., Lac du Flambeau WI
- WISPIRG

Small Businesses

- Blu
- Bowden-Gill Environmental
- Community MedPAC
- Diversified Environmental Planning
- Hayden & Craig, PLLC
- Mid City Animal Hospital, Pheonix AZ
- UNET



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July 23, 2015

The Honorable John Cornyn
Chairman, Subcommittee on the Constitution
U.S. Senate Committee on the Judiciary
Washington, D.C. 20510

The Honorable Dick Durbin
Ranking Member, Subcommittee on the Constitution
U.S. Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Chairman Cornyn and Ranking Member Durbin:

We submit the following comments for the hearing record coinciding with the fifth anniversary of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). The hearing title, *"The Administrative State v. The Constitution: Dodd-Frank at Five Years,"* alludes to challenges to the legitimacy of certain aspects of the statute. Questions of constitutionality of federal authority and policy are a grave matter. However, the arguments that the Dodd-Frank Act and the Consumer Financial Protection Bureau, the federal agency that the law created, somehow violate the U.S. Constitution is an unsupported distraction from the important purpose of financial reform, which is to protect consumers and the financial markets, and most importantly, to prevent another financial crisis similar to the one that crippled the U.S. economy in 2008.

The policies under the Dodd-Frank Act reflect the clear will of Congress. During the financial crisis and after the swift billion-dollar bailouts of failing financial institutions, Congress engaged in careful deliberations that resulted in a comprehensive package of financial policies that sought to restore accountability in the consumer credit, securities and housing markets. These policies were designed to prevent further incidences of systemically risky banking industry practices. Title X in particular, the provision creating the CFPB, brings basic standards of fairness and transparency to the consumer financial marketplace, a responsibility which spread through other agencies when it was considered a low priority.

In its four years of existence, millions of consumers across the country already have benefited from the CFPB's work. The agency reported that it has returned \$10.8 billion to millions of consumers harmed by bad financial industry practices, in the form of restitution, principal reductions, cancelled debts and other relief. It has issued effective rules providing servicing and other standards for residential mortgages, created a consumer complaint database that empowers and helps consumers, and continues to examine lending and servicing practices in the student loan sector, to name a few noteworthy accomplishments. The CFPB's efforts to restore accountability and fairness in the financial markets also have helped to level the playing field for industry participants that aim to follow the rules and conduct their businesses with integrity.

We continue to look forward to additional important actions at the CFPB, including its moves to instill fairness in small-dollar, short-term lending, and to restore consumer choice in the marketplace by regulating the pernicious, nonnegotiable fine print of financial services that restricts consumer access to remedies and the civil justice system.

Meanwhile, it is clear that some industry players would prefer to roll back the Dodd-Frank Act completely and return to the weakly regulated era that existed before the financial crisis. In fact, some industry lobbyists have heightened their opposition to the CFPB's existence and authority, such as alleging that the CFPB structure violates separation of powers and other constitutional safeguards. The fact is that the agency was carefully constructed and funded to ensure fulfillment of its mission to protect consumers from an unrestrained financial marketplace driven by a powerful industry's insatiable appetite for profit.

CFPB's Structure Facilitates Independence, Effectiveness and Accountability

Industry opponents protest the fact that the agency is led by a single, presidentially-appointed director confirmed by the Senate. On several occasions, opponents in Congress have introduced legislation to replace the CFPB director position with a five-member commission. As recently as this week, opponents have tried again to make this change to the agency's structure by including the policy in a Senate appropriations bill. It has been demonstrated that an agency commission can create gridlock and prevent an agency from effectively carrying out its mission. Particularly for quickly evolving financial services and products that can immediately impact consumer lives and livelihood, unnecessary delays and logjams within the agency would impede proper oversight of the market.

Director Richard Cordray's leadership at the CFPB illustrates that the agency can operate effectively while still accounting for its activities before Congress, the president and the general public. As of mid-July 2015, CFPB officials have testified 55 times before Congress. Moreover, in the worst of circumstances, a president is authorized to remove the CFPB director for cause.

Industry and congressional foes also protest the CFPB's current funding stream under the Federal Reserve System. They would prefer that the CFPB's budget fall under the congressional appropriations process, where it would undoubtedly become a target of political ploys, negating its independence and possibly rendering it relatively ineffective. The other banking agencies, including the Federal Reserve, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corp., are also self-funded. Still, the CFPB's funding status does not immunize it from similar tactics in current negotiations. The CFPB's structure and policymaking authority have all been improperly attacked in riders to a number of congressional appropriations bills. The agency must maintain the natural independence stemming from its funding mechanism to lessen the likelihood of it succumbing to industry and partisan capture.

Finally, the Dodd-Frank Act clearly sets forth the CFPB's rights and responsibilities in its policymaking and enforcement actions. For example, the agency has certain authority to curtail unfair, deceptive and abusive acts or practices in the financial market. The statute clearly sets forth these terms and authorizes the agency to enforce and interpret them. As a last resort, the Financial Stability Oversight Council has oversight powers over the CFPB, in that it can override CFPB rules if they threaten the financial system. In addition, the CFPB is obligated to adhere to certain small business consultation requirements before issuing rules that would affect small business.

The "constitutional" protests over the Dodd-Frank Act and the CFPB, in particular, seem disingenuous. They are consistent with efforts to weaken the statute and to incapacitate the agency. Along with the express intent of Congress, clear checks and balances are in place that support the CFPB's current structure and authority.

Meanwhile, in this recovering economy, financial consumers need more protections from risky financial practices. Instead of engaging in discussions transparently aimed at shielding unscrupulous financial institutions from effective oversight, a more worthwhile approach is determining whether the agency is using its enforcement and rulemaking authority sufficiently enough to deter and block harmful financial practices.

Sincerely,

Christine Hines
Consumer and Civil Justice Counsel

Bartlett Naylor
Financial Policy Advocate

Public Citizen, Congress Watch division