THE BUREAU OF CONSUMER FINANCIAL PROTECTION'S UNCONSTITUTIONAL DESIGN

HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT
AND INVESTIGATIONS

OF THE

COMMITTEE ON FINANCIAL SERVICES

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

MARCH 21, 2017

Printed for the use of the Committee on Financial Services

Serial No. 115–6

U.S. GOVERNMENT PUBLISHING OFFICE

27–247 PDF WASHINGTON : 2018

For sale by the Superintendent of Documents, U.S. Government Publishing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
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THE BUREAU OF CONSUMER FINANCIAL PROTECTION'S UNCONSTITUTIONAL DESIGN

Tuesday, March 21, 2017

U.S. House of Representatives,
Subcommittee on Oversight
and Investigations,
Committee on Financial Services,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:08 a.m., in room 2128, Hon. Ann Wagner [chairwoman of the subcommittee] presiding.

Members present: Representatives Wagner, Tipton, Ross, Messer, Zeldin, Trott, Loudermilk, Kustoff, Tenney, Hollingsworth; Green, Ellison, Cleaver, Beatty, Capuano, Gottheimer, and Gonzalez.

Ex officio present: Representatives Hensarling and Waters.

Chairwoman Wagner. The Subcommittee on Oversight and Investigations will come to order. Welcome. This is my very first time chairing the Subcommittee on Oversight. We are going to have—Ranking Member Green and I have just spoken. Many of our members are still in conferences. The President of the United States is speaking to our conference at the moment, so folks are going to be a little tardy in streaming in, but we want to get started on your testimony. And many have already seen your written testimony as you have submitted it.

So today's hearing is entitled, "The Bureau of Consumer Financial Protection's Unconstitutional Design."

Without objection, the Chair is authorized to declare a recess of the subcommittee at any time.

The Chair now recognizes herself for 4 minutes for an opening statement.

For the past 8 years, the American people, under the Obama Administration, have grown complacent with the unchecked power emanating from Washington and its complete disregard for the Constitution. From health care to energy to financial services, Washington has worked to plan every aspect of your life and decide what is best for you.

Now, more than ever, we have a new obligation to examine the checks and balances of our Federal Government, and ensure that our Constitution is reflected by it. It is time to bring accountability back to Washington for we, the people.

Nothing embodies the Washington-knows-best mindset more than the Consumer Financial Protection Bureau (CFPB), by removing choices and making access to financial products more difficult under the guise of consumer protection. Since the creation of the CFPB, we have seen regulations that make it more difficult for consumers to qualify for a mortgage, obtain an auto loan, and access forms of credit. The superseding independence of the Bureau has demonstrated how a lack of checks and balances can lead to abuse.

In the majority opinion of a case last October, a Federal judge ruled that, "The Director of the CFPB is the single most powerful official in the entire U.S. Government other than the President."

As a result of a lack of safeguards, we have seen examples of widespread discrimination within the CFPB itself under Director Cordray's tenure, to which this committee has held five hearings itself. Additionally, without the ability of Congress and the Executive Branch to carry out proper oversight, the CFPB has become arrogant in its cloak of unaccountability by pursuing policy and regulating entities outside of its authorized scope, to the detriment of consumers.

Without proper checks and balances, the natural tendency of government is always to continue expanding its power and reach, and the CFPB has been a perfect example. The CFPB is unaccountable to Congress in that it does not rely upon Congress for funding; instead, taking its funding stream from the Federal Reserve, to be allotted by the CFPB Director with no review from Congress. As a result, the CFPB has grown comfortable in repeatedly ignoring oversight requests made by this committee, including for subpoenaed records.

Additionally, the CFPB is unaccountable to the President as well as by being headed by a single Director who can only be removed for cause rather than at will. The Constitution vests the executive power in an elected President of the United States of America, and not in various unelected agency and bureau heads.

Lastly, the CFPB is unaccountable to the Judiciary, as the Dodd-Frank Act mandated, that courts give extra deference to the CFPB statutory interpretations, even if they are not granted exclusive interpretive authority. In this way, the CFPB can reinterpret consumer laws that are already on the books with established case law, and have been regulated by other agencies for years.

Today, we will be examining the unconstitutional structure of the CFPB and how it has yielded unaccountability to Congress and the Executive Branch. Additionally, we will look at ways that the CFPB can be restructured in order to make the Bureau constitutional, as well as more accountable to Congress and the executive.

Finally, we will be looking at what authority the President currently has to remove the CFPB Director, even before the resolution of ongoing litigation.

I now recognize the gentleman from Texas, my good friend and colleague, Mr. Green, the ranking member of the subcommittee, for 5 minutes.

Mr. GREEN. Thank you, Madam Chairwoman.

Madam Chair, speaking of power, I would like to, this morning, apologize to the American people for this shameful and disrespectful abuse of power. The Republicans are abusing their power by taking one side in the piece of litigation that is presently pending in a Federal Court right here in Washington, D.C. They are taking one side, the side of a mortgage company that has been accused of ripping off Americans, taking one side today, taking one side by allowing Mr. Olson to testify and present evidence and issues that will benefit his client. One side.

Wouldn't it be great if every lawyer could have his client's case presented to the Congress of the United States of America? I suppose we have to ask ourselves, is this something that we will do in the future for every lawyer who has a case pending? Or is this simply a special congressional fix for Mr. Olson's client?

One side. It is a shameful and disgraceful circumstance that we find ourselves dealing with today. And I am confident that Mr. Olson will indicate in his testimony, because I have a copy of it, that the views he will express will not necessarily be those of his firm or his client. Note the operative words, "not necessarily," meaning maybe, maybe not, the views of his client. However, over on page 10 of his testimony, Mr. Olson cites his client's case and gives commentary about his client's case. One side, the side of a mortgage company accused of ripping off the American people.

Mr. Olson made this argument, or a similar argument, some 39 years ago in *Morrison* v. *Olson,* a case that he is intimately familiar with, because in that case, *Morrison* v. *Olson,* the "Olson" is Mr. Ted Olson, who is testifying before Congress today. In that case, *Morrison* v. *Olson,* a special prosecutor was appointed to investigate Mr. Olson for lying to Congress 39 years ago. Mr. Olson has made this argument before. But now, to be fair to Mr. Olson, he was never proven to have lied to Congress. But 39 years ago, he made similar arguments and lost the case before the United States Supreme Court seven to one.

Mr. Olson cites this case, which is why I bring it to your attention, *Morrison* v. *Olson*. Check page 10 of his testimony for those who desire to, and you will see where he brings the present case that is pending, the *PHH* case, before the Congress. The *Morrison* case he cites multiple times. The first, I believe, is on page 3. That would be in footnote number 2.

This is a disgrace. The Congress of the United States of America should not be in the business of promoting litigation. It is disrespectful to the Judiciary of the United States of America for the Congress to do this. We ought to be about the business of deciding whether or not we are going to go forward with legislation.

It is pretty obvious that Mr. Olson's clients—or client, in this case, the PHH client, the mortgage company—will benefit from this testimony today, because you are going to find one side, my Republican colleagues, in support of that case. They won't say it. They will just support the arguments that are being made and the arguments that will be put forth, similar to the arguments that were brought before the court 39 years ago by Mr. Olson.

I thank you for the time and I yield back.

Chairwoman WAGNER. The Chair now recognizes the Vice Chair of the subcommittee, the gentleman from Colorado, Mr. Tipton, for 1 minute for an opening statement.

Mr. TIPTON. Thank you, Madam Chairwoman. And thank you for holding this hearing today on the CFPB's unconstitutional structure.

After 6 years of the CFPB's existence, we are seeing negative repercussions that have stemmed from the agency's decision-making. Therefore, it is important that we discuss how the Bureau's design allowed it to be wholly unaccountable to Congress. The independence of the CFPB from both the President and Congress has incentivized the Bureau to act with impunity, while it consolidates supervisory and regulatory authority.

According to the unified agenda of its Federal regulations, the CFPB has finalized over 50 rules; and just half of these finalized rules have created $2.8 billion in cost and 17 million hours of paperwork. Surprisingly, these new burdens were created without cost-benefit analysis or a study of the cumulative impact of the new requirements, and the impact that they would have on financial institutions or the businesses that depend on access to capital for survival.

Under the guise of consumer protection, the Bureau has expanded its regulatory net to capture industries that are outside of its jurisdiction. It has favored enforcement actions over rulemaking. It has utilized questionable data collection and analysis to support an agenda driven by ideology instead of fact.

Fundamental changes are needed to steer the CFPB back to its original mandate. The current regulatory regime has created a too-small-to-succeed atmosphere for those most in need of assistance, whether it be a community bank, Main Street business or credit union seeking a family to watch over.

Chairwoman WAGNER. The gentleman's time has expired.

Mr. TIPTON. I appreciate you holding this hearing, and I look forward to the commentary.

Chairwoman WAGNER. I now have the pleasure of welcoming our witnesses. Mr. Ted Olson, the Honorable Ted Olson, is currently a partner at Gibson Dunn serving as lead counsel on the *PHH* v. *CFPB* case. Mr. Olson previously was Solicitor General of the United States as well as Assistant Attorney General in charge of the Office of Legal Counsel at the U.S. Department of Justice.

Mr. Olson, you are recognized for 5 minutes.

STATEMENT OF THE HONORABLE THEODORE B. OLSON, PARTNER, GIBSON, DUNN & CRUTCHER LLP

Mr. OLSON. Thank you, Chairwoman Wagner, Ranking Member Green, and members of the subcommittee.

I am grateful for the opportunity to address the important question of the constitutionality of the CFPB's structure. The views that I express are my own, and not necessarily those of my firm or any client of my firm.

The Framers of the Constitution agreed that the accumulation of legislative, executive, and judicial power in the same hands is, in the words of the Framers, the very definition of tyranny. That principle animated their thoughtful, considered, and thoroughly debated decision to structure a government of carefully separated powers, with elaborate checks and balances. That structure has lasted for 230 years, far longer than any governmental structure in history, and has delivered to the people of this country, the American people, a prosperous, strong, and free society, which is, and has been, the envy of the world. However tempting it might be to invent new and complex government structures in the interest of accomplishing some presumed efficiency or independence, we abandon the carefully calibrated structure of our Constitution at our peril.

My testimony today will explain how the CFPB's structure violates the Constitution's separation of powers, turning to first, bedrock constitutional principles; second, to the CFPB's structure; and third, to the ways in which we might consider, as Americans, approaches to cure that structure.

It bears emphasis that the Constitution's separation-of-powers principles are a constitutional imperative, not a matter of aesthetics. The Constitution expressly divides the government's powers into three separate categories: legislative; executive; and judicial, and it assigns these powers to three branches of government in what are called the vesting clauses, the first three Articles of the Constitution. This structure, carefully explained by James Madison in Federalist Papers 47 and 48, was calculated to divide authority and, thus, protect liberty, but also to focus responsibility, transparency, and accountability.

All executive power is vested in the President of the United States. The Framers of the Constitution openly debated, in June of 1787, whether or not the executive power should be invested in a multiple or an individual unitary President. They voted, after extensive debate, in favor of a unitary presidency, to vest executive power in the President alone and to vest the President with the responsibility to faithfully execute the laws of the United States.

From the founding, the Constitution has been understood to empower and, indeed, require the President to maintain responsibility over Executive Branch subordinates through the power of removal. This removal power enables the President to ensure that the laws are faithfully executed. If the President fails to do that, he loses responsibility over the execution of powers.

Now, to be sure, the Supreme Court has recognized exceptions in certain agencies, multiple-person agencies with limited powers, and in the case that was mentioned by Ranking Member Green, *Morrison* v. *Olson,* which involved a temporary limited allocation of power to a single individual. But those lines of authorities have been criticized by the Supreme Court, and scholars in recent cases have questioned their validity.

The CFPB's structure is the product of aggregating some of the most democratically unaccountable and power-centralizing features of the Federal Government's administrative state. The President is prevented from removing the head of the Bureau, except for very limited circumstances, and therefore, the President was stripped of the power to faithfully execute the laws in these circumstances.

We have identified in our written testimony all of the other ways in which power is concentrated in the CFPB, without accountability to Congress over the budget, or to the President in connection with the removal power. The Director's hiring decisions are unchecked. None of his subordinates need the consent of the Senate to be appointed. The Bureau is striking in its unaccountability to Congress.

Given the CFPB's lack of democratic accountability, it has, not surprisingly, during its brief existence rendered decisions that are sweeping in scope and arbitrary and capricious in substance.

I realize that my time has expired, and I can stop at this point if that is appropriate.

[The prepared statement of Mr. Olson can be found on page 52 of the appendix.]

Chairwoman WAGNER. The witness' time has expired, and I am sure we will be able to proceed during some of the questioning with some of your other points. We thank you for your written testimony, and without objection, all of the witnesses' written statements will be made a part of the hearing record.

Mr. OLSON. Thank you, Chairwoman Wagner.

Chairwoman WAGNER. And I appreciate your testimony.

Our next witness is Professor Saikrishna Prakash, a professor at UVA Law, focusing on separation of powers, particularly executive powers. Mr. Prakash previously has clerked on the U.S. Court of Appeals for the D.C. Circuit and for the U.S. Supreme Court, and has additionally served as Associate General Counsel at OMB.

Mr. Prakash, you are now recognized for 5 minutes.

STATEMENT OF SAIKRISHNA BANGALORE PRAKASH, JAMES MONROE DISTINGUISHED PROFESSOR, UNIVERSITY OF VIRGINIA SCHOOL OF LAW

Mr. PRAKASH. Thank you, Chairwoman Wagner and Ranking Member Green, and thank you, members of the Financial Services Committee, for inviting me here today.

I have been studying questions of separation of power for about 2 decades now, and I have written various articles on removal and a book on the original Presidency.

Let me start off with some basic principles. The Constitution vests the executive power with the President. It requires that he take care that the laws are faithfully executed. These are principles understood by all, but what does that mean? It means that the executive power, which is the power to execute the laws, rests with the President; just like the judicial power, the power to decide cases, rests with judges; and just like the legislative power, the power to make laws, rests with Congress.

From the beginning, this principle was understood. The first Congress created several departments. Each of those departments reflected the principle that the Constitution itself made the President the constitutional executor of the laws, and that others that were created by Congress to help him execute the laws were his subordinates and assistants. And that is why those first three statutes, the statutes that created the Department of Foreign Affairs, the Department of the Treasury, and the Department of War—people were less politically correct back then—the Department of War, those three statutes all assume that the President had a power to remove. And James Madison famously explained why. He said, "If any power is executive, it has to be the power to supervise, direct, and remove executive officers." And from that time on, it has been understood that the removal is an executive power.

President Washington issued hundreds of commissions, each of which noted that the officer served at the pleasure of the President.

He removed dozens of officials. He did all these things without any statutory warrant. There was no statute that ever said that the President could remove; and there was no statute that ever imposed a for-cause restriction until the Civil War.

Things changed during the Civil War, because Congress was deeply unsatisfied with Andrew Johnson's Administration of the South, and Congress put, for the first time, a for-cause restriction in the statutes. And ever since then, questions about limitations on the President's power to remove have occasionally wandered into the courts. The courts haven't exactly shined in this area. There are more zigzags in the court's jurisprudence than on the slalom course. The court has never stuck with one position. *Myers* v. *United States* is a case that suggested the President has an unlimitable power to remove with respect to people appointed with the advice and consent of the Senate. That was decided by Chief Justice Taft, the only member of the court to have been President prior to serving on the court.

But about 9 years later, during the New Deal, at a time when people were quite apprehensive about Presidential power, the court did a 180-degree turn on President Roosevelt (FDR), much to his astonishment, and they decided that the President needed to abide by a statute that said he needed cause to remove a Commissioner of the FTC.

FDR was shocked. His advisors were shocked. And several members of the court that were part of the Myers majority had flipped. And I think it was part of a context where members of the Supreme Court were deeply concerned about the amount of authority being given by Congress to the Executive Branch and by the authority being exercised by the Executive Branch.

Since *Myers* and since *Humphrey's,* the court has just not been very clear about the removal authority. In the most recent case, *Free Enterprise Fund,* decided several years ago, the court went out of its way to strike down the statute. It assumed that the SEC Commissioners in the case had for-cause removal protections, then used that fact to strike down the for-cause protections for the PCAOB. Essentially, the court went out of its way to strike down the statute. And they made it clear that they weren't saying that Humphrey's Executor and *Morrison* v. *Olson* were still good law. They made a point of saying that the litigants haven't asked us to reconsider those statutes or those cases. I think there are four votes on the court right now to overturn *Morrison* and/or *Humphrey's.* There could very well be a fourth, a fifth, depending upon what happens to Mr. Gorsuch.

I will end by saying, if the statute is constitutional, there is nothing that prevents Congress from amalgamating all administrative power across all agencies and giving it to Mr. Cordray, or to Mr. Deregulator, or whomever you want, and telling that person, you now are responsible for all these decisions, because there is no logical stopping point to the statute.

Thank you so much.

[The prepared statement of Mr. Prakash can be found on page 68 of the appendix.]

Chairwoman WAGNER. I thank the witness for his testimony.

Next, we will move on to Mr. Adam White. Mr. White is a research fellow at the Hoover Institution, writing on the courts and the administrative state. Prior to that, he was an adjunct fellow at the Manhattan Institute, and he also practiced law with Boyden Gray & Associates, writing briefs on constitutional and regulatory issues.

Welcome, Mr. White. I look forward to your testimony.

STATEMENT OF ADAM J. WHITE, RESEARCH FELLOW, THE HOOVER INSTITUTION

Mr. WHITE. Thank you.

Chairwoman Wagner, Ranking Member Green, Financial Services Committee Chairman Hensarling, and members of this committee, thank you for the opportunity to testify.

The CFPB's structure is one of the most important constitutional issues facing Congress today. When you debate the CFPB's structure, you are debating the structure of the 21st Century administrative state in general. For nearly a century, our administrative state was defined by the structural decisions made by Congress from 1887 to 1914—that is, from the creation of the Interstate Commerce Commission, to the creation of the Federal Trade Commission. Those legislative precedents, and the judicial precedents that followed, became the benchmark for decades and decades that followed. When Congressmen, Presidents, judges, and lawyers debated the administrative state in the 20th Century, they debated within the lines drawn by Congress decades earlier.

The Dodd-Frank Act radically changed that paradigm by creating new forms of structural unaccountability. If Congress or the courts do not reform the CFPB structure, then that agency's structure will become the benchmark, the paradigm, for decades to come. The next time someone proposes a new independent agency, they won't model it on the Consumer Product Safety Commission; they will model it on the CFPB. In fact, we saw in 2010 and 2013, the Chair of the SEC and the Chair of the CFTC calling for new funding structures to resemble the CFPB's new structure.

The CFPB's unconstitutionality has been self-evident since the moment it was created. Boyden Gray, my old boss, and John Shu, raised these issues in a Federalist Society White Paper soon after Dodd-Frank was enacted. And in 2012, Boyden and his colleagues, including me, filed the first constitutional lawsuit challenging the CFPB. For 6 years, the CFPB's unconstitutionality has been highlighted in Congress, in legal scholarship, and now, by the D.C. Circuit's three-judge panel in the *PHH* case.

But as Justice Holmes once wrote, a page of history is worth a volume of logic. The best evidence of the CFPB's structural unconstitutionality is found in the CFPB's own conduct: its lavish spending; its haphazard approach to lawmaking; its refusal to take seriously the allegations of racial discrimination in personnel decisions; its aggressive collection of personal financial data; and its unapologetic defiance of Congress, especially of this subcommittee. All of those pages of history are symptoms of the CFPB's unprecedented lack of accountability to Congress and to the President.

Given the recent change in Presidential Administrations, it is natural to focus on the CFPB's measure of independence from the

President. But I would urge you to focus, first and foremost, on the CFPB's independence from Congress, especially its independence from your power of the purse. As James Madison observed in Federalist 58, this power of 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. Madison added that the power of the purse would be Congress' best shield against "all the overgrown prerogatives of the other branches of the government." When the 111th Congress gave away your power of the purse, it abdicated your constitutional responsibilities, with all due respect.

So long as the CFPB is able to fund itself by calling up the Federal Reserve and demanding its annual $600 million entitlement, the agency will never take seriously any limits placed upon it by Congress. Please do not wait for the courts to fix Dodd-Frank, especially with respect to your power of the purse. As Justice Jackson warned in the *Steel Seizure* case, in the end, "only Congress itself can prevent power from slipping through its fingers."

Thank you.

[The prepared statement of Mr. White can be found on page 81 of the appendix.]

Chairwoman WAGNER. Thank you for your testimony. Our next witness is Ms. Brianne Gorod. Ms. Gorod is the chief counsel at the Constitution Accountability Center. Ms. Gorod previously served in private practice as counsel for her firm's Supreme Court and appellate practice. Prior to that, she was an attorney adviser in the Office of Legal Counsel at the U.S. Department of Justice, and served as a law clerk on the Supreme Court.

Welcome, Ms. Gorod. We look forward to your testimony.

STATEMENT OF BRIANNE J. GOROD, CHIEF COUNSEL, CONSTITUTION ACCOUNTABILITY CENTER

Ms. GOROD. Thank you, Chairwoman Wagner, Ranking Member Green, and members of the subcommittee.

I would like to thank the subcommittee for inviting me to assist its members and their colleagues in considering the constitutionality of the Consumer Financial Protection Bureau, which Congress created in 2010 in the wake of the devastating financial crisis of 2008.

After months of evaluating the roots of the financial crisis and assessing the types of reforms needed, lawmakers concluded that a major culprit was the failure of a fragmented and unaccountable consumer financial protection regime to safeguard homeowners from reckless financial products. To remedy this failure, Congress established the CFPB, a bureau that would have the independence, the resources, and the mission focus necessary to prevent a recurrence of those problems and respond to the challenges of an evolving financial marketplace. Since its inception, the CFPB has been incredibly successful in achieving its aims of protecting consumers and overseeing the financial sector.

Despite, or perhaps because of the CFPB's incredible successes, it has come under repeated attacks, including claims by its opponents that it is unconstitutional. In my remarks this morning, I am going to explain why these arguments are all wholly without merit.

First, the CFPB's leadership structure, namely, the fact that it is led by a single Director removable only for cause, is consistent with the text and history of the Constitution as well as Supreme Court precedent.

We have already heard a lot this morning about the fact that we have a single President. That is true enough. But that doesn't answer the question of whether the President must have unlimited removal power over all officers, no matter their character and their functions.

In drafting the Constitution, the Framers gave Congress considerable flexibility in determining how to shape the Federal Government. Consistent with that constitutional design, the Supreme Court held over 80 years ago that Congress may choose to shield the heads of independent regulatory agencies from Presidential removal at will. In that case, the Court upheld a removal provision identical to the one governing the CFPB Director.

The Supreme Court has repeatedly reaffirmed that principle in the years since, including as recently as 6 years ago, in an opinion by Chief Justice John Roberts. That precedent should be the end of the discussion. But CFPB opponents argue that this clear-cut precedent doesn't matter, because the CFPB is headed by a single Director rather than a multi-member commission. But that is a distinction without a difference. Indeed, that distinction was not the basis for the Supreme Court decision.

The question under Supreme Court case law is whether the removal provision impedes the President's ability to perform his constitutional duty. And no plausible argument can be made that leadership by a multi-member body would enhance the President's ability to ensure faithful execution of the laws.

Quite the opposite. If the Bureau's leadership structure had any significance to the constitutional question, this factor would weigh in favor of a single Director because a multi-member board serving staggered terms is, if anything, less accountable to the President. The fact is, in the context of the CFPB, the removal provision does not impede the President's ability to faithfully execute the laws, because if he determines the Director is abusing his office or committing a breach of faith, the President may hold the Director accountable by removing him, and that is all the Constitution requires.

Second, there is no constitutional prohibition on the CFPB being funded outside the congressional appropriations process. Indeed, the CFPB is hardly alone in this. All but two of the Federal financial regulatory agencies are funded outside the congressional appropriations process.

Opponents of the Bureau argue that its independent funding is prohibited by the appropriations clause, which provides that no money shall be drawn from the Treasury, but in consequence of appropriations made by law. But that clause is exactly what it seems, simply a limit on withdrawing money from the Federal Treasury. Because the Bureau's funding doesn't come from the Federal Treasury, that clause is simply irrelevant. And there is no other provision of the Constitution which prohibits Congress from enacting funding structures for agencies that defer from the procedures prescribed by the ordinary appropriations process. It also bears emphasis that Congress remains free to alter the CFPB's funding structure at any time.

Finally, Bureau opponents have argued that it is not only unconstitutional, but also unaccountable, because, in their view, its powers are unprecedented and unlimited. This, too, is wrong. Leadership by a single director is a common feature among agencies, and independent funding is the norm for financial regulators. The Bureau is not the first agency to combine those two features. The Bureau's powers are also hardly unchecked. It is subject to an array of requirements and procedural checks, and it shares regulatory enforcement authority with other regulators.

In sum, the CFPB opponents' claims are wrong. The Bureau is clearly constitutional, and it is accountable, and it should be allowed to continue doing the important work of protecting American consumers.

Thank you.

[The prepared statement of Ms. Gorod can be found on page 38 of the appendix.]

Chairwoman WAGNER. I thank our witnesses for their testimony, and without objection, the witnesses' entire written statements will be made a part of the record.

The Chair now recognizes herself for 5 minutes for questioning.

When I took an oath of office for my seat in Congress, I swore to support and uphold the Constitution, alongside the rest of my fellow Members of Congress. Just before Donald Trump assumed the office of the President, he similarly swore to preserve and protect and defend the Constitution. I take that oath very seriously, and I believe the President does as well.

While we are holding a hearing and contemplating legislation to identify and discuss how Congress should remedy and restructure the issues that plague the CFPB, I believe the President can also play a role and has an identical responsibility to protect the Constitution and correct defects.

Mr. Olson, what are some of the things that you think the President can do to fix the Bureau's structure in order to uphold his constitutional obligation?

Mr. OLSON. In my judgment, Chairwoman Wagner, the President has the constitutional authority to remove the Director of the Bureau, notwithstanding the limitations that are imposed in the statute. We believe that those limitations are unconstitutional, and that they strip the President of the power to execute the laws.

If the entire administrative agency that this statute creates can act without direction of the President and completely separated from the President, the execution of those 19 broad-based statutes is out of the hands of the executive created by the Constitution to enforce the law. Therefore, I believe that the President has the power to remove that individual in order to faithfully execute the laws.

Chairwoman WAGNER. Many seem to think that the push for the Director of the CFPB to be able to remove at will is an entirely partisan exercise, but we have seen many bipartisan examples in the past that supported the President's ability to decline to enforce unconstitutional statutes.

The Clinton Administration, for instance, in the Office of Legal Counsel memos, stated that, "There are circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional, particularly to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency."

Mr. Olson, does the President's constitutional duty require him to abide by a statute he views as unconstitutional that encroaches upon the powers of the Presidency, such as being able to remove the CFPB Director?

Mr. OLSON. I believe the President has the responsibility to the Constitution, not to an unconstitutional statute. I served in the Office of Legal Counsel for nearly 4 years, 40-some years ago, and I reviewed the opinions of the Office of Legal Counsel that preceded my tenure there, and I have reviewed opinions of the Office of Legal Counsel under other Presidents in the years after.

The Office of Legal Counsel in the Justice Department repeatedly has opined that the President has the responsibility to protect the Constitution, and that is inclusive of protecting the prerogatives and authority of the Congress and the Executive Branch.

Chairwoman WAGNER. Thank you, Mr. Olson.

Additionally, in 2012, regarding the ability of the President to remove the CFPB Director, Barney Frank said, "No one doubts that if a change in administration comes and the new President disagrees with the existing Director, he or she can be removed. And proving that you were not inefficient, the burden of proof being on you, would be overwhelming."

Mr. Prakash, do you agree with Barney Frank, one of the chief authors of the Dodd-Frank Act which created the CFPB, on the ability of the President to remove the CFPB Director simply with a change in the Administration?

Mr. PRAKASH. Thank you, Chairwoman Wagner. I do agree with Chairman Frank. I see his picture back there. I think the Supreme Court has never been clear about what cause requires. And sometimes, they have read that requirement very broadly, meaning the President has lots of authority to find cause; and other times, they have read it narrowly.

But I also agree with Mr. Olson that, independent of that, the President has a constitutional duty to disregard statutes he believes are unconstitutional. That goes back to Thomas Jefferson and his refusal to enforce the Alien and Sedition Acts.

Chairwoman WAGNER. Thank you, Mr. Prakash.

Quickly, Mr. White, does the President need to wait for the courts to strike down a law as unconstitutional before deciding whether to remove the Director?

Mr. WHITE. No, he doesn't, either under the statutory for-cause requirements, or under his constitutional authority. He has a constitutional power and obligation to apply the Constitution.

Chairwoman WAGNER. Thank you. I see that my time has expired.

And it is my pleasure now to recognize the gentleman from Minnesota, Mr. Ellison, for 5 minutes.

Mr. ELLISON. I would like to thank the Chair, and the ranking member, and all of our witnesses today.

Disrupting realty cartels, taking action against captive reinsurance, stopping illegal kickbacks during home sales, that is what this case is about. *PHH* v. *CFPB* is a $109 million fine, the largest fine CFPB has ever levied against a firm, because of a kickback scheme. And, unfortunately, three witnesses here today are defending a kickbacker, which I think is shameful.

Why does stopping these kickback schemes matter to the American people? Because it makes it harder for people to buy a home. We live in a country where we are proud of our great middle class. Part of that means being able to get a home. The behavior of PHH Corporation is directly oppositional to that effort, in order to try to extract more money.

I am very concerned about the falling home ownership gap. I am also concerned that millennials and African-American home ownership rates are lower than usual. Part of the reason for low home ownership rates is the high cost of housing and the need to assemble enough money for a downpayment and closing costs. When people buy a home, they quickly find out there are many costs in addition to the price of the home. And if you are not paying cash, you will need title insurance for a lender, maybe title insurance for yourself. If you aren't putting down 20 percent, you are going to need private mortgage insurance, maybe a homeowner's warranty.

Of course, buyers are usually unfamiliar with these financial products. Unless you work in the industry, you probably never heard of them before you tried to buy that house. So home buyers rely on their REALTORS® and lenders to refer them to trusted partners. But for too long and too often, some of these affiliations were really kickback schemes. And that is what three of our witnesses here are defending, really.

There is a lot of high-floating rhetoric about the Constitution and so forth. This is because the CFPB is standing up for working people. That is it. This is the money versus the many, plain and simple.

On the screen is a slide from the realty firms charged by the CFPB of illegal kickbacks. They are up there right now. You might ask, aren't kickbacks illegal? The answer is yes. There is a piece of legislation called RESPA, which prohibits a financial benefit for a referral. But for too long, that prohibition has not been enforced.

Talking about things not being enforced, let's start there. So lower desk rents, commissions, event tickets, or cash were all provided to lenders, mortgage brokers, and real estate firms and agents based on how many clients they sent over.

Are there any witnesses who feel that mortgage lenders, REALTORS® and bankers should be allowed to receive a financial benefit for a referral? Raise your hand if you think a mortgage broker, bank, or REALTOR® should be able to receive a financial benefit for a referral?

I see no hands.

Let's be clear. When borrowers are overcharged, it makes it more likely that they will default on their mortgage. As a Member of Congress, as a homeowner, and as a Member of Congress who represents homeowners, I don't want to see people overcharged, not when they buy their home, not when they use a bank, not when they get a prepaid card.

Not only do I not want to see homeowners overcharged, I don't want to see companies, like title insurance companies, private mortgage insurance firms, et cetera, forced into costly controlled affiliations in order to stay in business. Title insurance and PMI companies should have the freedom to run their businesses as they wish without having to give a kickback for their referral base.

That is the market CFPB the is creating, a more fair market, a better market for companies and people. And I know that the hearing today is a very real legal conversation about construction and funding for the CFPB, but I want the people watching this broadcast, if they are, to know that that is not really what this is about. This is about protecting a deeply vested, incredibly profitable industry. That is what is happening here. It is not about the Constitution; that is a subterfuge.

Let's not lose focus about what the CFPB does. When financial firms rip you off, the CFPB gets your money back, and they need independence to do that. And that is what these three men are opposing, and that is what Ms. Gorod is standing up for.

I yield back.

Chairwoman WAGNER. The gentleman yields back.

The Chair now recognizes the Vice Chair of the Oversight and Investigations Subcommittee, the gentleman from Colorado, Mr. Tipton, for 5 minutes.

Mr. TIPTON. Thank you, Madam Chairwoman.

Mr. Olson, I appreciated your comments in regards to separation of powers. Regarding the CFPB and funding decisions, is the Director subject to any review by the Federal Reserve?

Mr. OLSON. No.

Mr. TIPTON. Is the Director subject to any review by either of Congress' Committees on Appropriations?

Mr. OLSON. No, that is not my understanding.

Mr. TIPTON. Is the Director subject to any review by the Office of Management and Budget?

Mr. OLSON. No.

Mr. TIPTON. Is the Director subject to any review by the President?

Mr. OLSON. No.

Mr. TIPTON. Mr. Olson, perhaps you could describe for me, with the importance of separation of powers, where is the check and balance on the CFPB?

Mr. OLSON. That is the important part of what you are discussing here today. When agencies are created, the Framers of our Constitution vested the power to create laws in Congress; to enforce laws in the President; and to adjudicate whether those laws have been violated in the Judiciary.

The Framers of the Constitution felt very strongly that if you accumulated all those powers—the powers to create laws, to enforce laws, and to adjudicate laws—in a single institution, that would be the very definition of tyranny. That is why there must be a check on the CFPB if you have that authority; for executive agencies, the President, is responsible to you and to the people with respect to the enforcement of those laws, and then the Judiciary comes in with respect to enforcement of those laws. If you break down that separation of powers, you lose the very valuable thing that was created in 1789 to protect us and protect our liberties.

Mr. TIPTON. Do you view that really as dangerous, to have an agency that is completely out of control of any authority by Congress, and, apparently, to a degree, even the President?

Mr. OLSON. It is very dangerous, because it is the very definition of tyranny, according to what the Framers of our Constitution describe, because you have to have accountability. And when you don't, when you have an agency that is not accountable to you with respect to appropriations, it is not accountable to the President with respect to the enforcement of policies, and then who can control that agency? No one can control that agency. The way this agency was structured, the President has no control whatsoever, and neither does Congress.

Mr. TIPTON. We had a question that had been raised offering you the opportunity to be able to raise your hand. Does anyone on our panel believe that we shouldn't have separation of powers, checks and balances, throughout our system?

No hands are raised.

We are seeing actually a fundamental agreement here that we need to be able to have checks and balances within our system. But when we are looking at the CFPB, we see an agency that is completely out of control of the Executive and the Legislative Branches.

We focused a lot, actually, on the President's ability to be able to remove the Director with cause, which was never actually defined, but, Mr. Olson, does it raise additional constitutional questions in regards to the funding not being under control by Congress?

Mr. OLSON. It is an additional problem. The power of appropriations is the core of Congress' responsibility in addition to creating laws. And when you lose that power, you lose control over the agency, so you cannot do that.

The statute also gives the CFPB—and it is in my written testimony—additional powers, freedom to hire and fire its employees without responsibility to other Federal laws, hiring subordinates without having them approved by the Senate, which other executive agencies have to do, and I could go on and on. It is in our written testimony. Everything that Congress has ever created to draw power away from the President and from Congress is aggregated in this agency. It has all been put together.

Mr. TIPTON. So would an appropriate response be for Congress to reclaim the power of the purse over the CFPB?

Mr. OLSON. Yes.

Mr. TIPTON. Thank you, Mr. Olson.

I would like to be able to maybe talk to Mr. White for just a moment in regards to your testimony, getting back to some of our community issues as well. You mentioned that the biggest banks fare much better under the heightened compliance burdens created by the CFPB regulations.

My rural district in Colorado is populated with Main Street institutions, community banks, and credit unions. In your experience, how well do these small institutions do under the same compliance obligations as larger institutions?

Mr. WHITE. I would say my experience is limited to my former co-representation of a west Texas community bank that challenged the constitutionality of Dodd-Frank. That litigation is still pending. I am no longer involved in it. I have seen how that bank and other small banks who can't afford armies of lawyers, lobbyists, and compliance officers struggle to shoulder the burdens of those costs.

I do agree with what Governor Romney said in his 2012 Presidential debate, that Dodd-Frank is the biggest kiss that Wall Street ever received from Washington in that respect.

Mr. TIPTON. Thank you.

I yield back, Madam Chairwoman.

Chairwoman WAGNER. The gentleman yields back.

It is now my pleasure to recognize my good friend, the gentleman from Missouri, Mr. Cleaver, for 5 minutes.

Mr. CLEAVER. Thank you, Madam Chairwoman. And thank you, Ranking Member Green.

We hear a lot about government and so forth, what it should do. And sometimes I get the feeling that people are suggesting that civil liberties are better off without government. I am wondering, Mr. Olson, if you agree that the Constitution of the United States defines who counts? Do you agree with that, yes or no? The Constitution?

Mr. OLSON. I am not sure I heard the last part of that question.

Mr. CLEAVER. Who counts? In the Constitution—if you read the Constitution, do you come away with a better understanding that in the United States, based on this document, who counts?

Mr. OLSON. I am not understanding the question. I am not hearing that one word.

Mr. CLEAVER. Who counts?

Mr. OLSON. Ultimately, the people, of course, count. And the people have created a Constitution that separates powers and creates accountability. In Federalist 70, Alexander Hamilton talked about how it was important to focus executive power in an individual, the President—

Mr. CLEAVER. Okay. I am not going there.

Mr. OLSON. —so that the President could be accountable to the people.

Mr. CLEAVER. Thank you very kindly.

Right at the beginning, all men are created equal. It starts telling us who counts. That may be more theology than political. But I think the Constitution—and I was in the Middle East, and a guy was telling me, I don't know why African Americans would be loyal to this country and so forth. I said, look, we have a document, and it defines who counts; and in this document, whether we have achieved it or not, I know that the Framers wanted everyone to count.

So you agree with me, I think.

Mr. OLSON. I think I agree with you. I think that it is essential, and that the reason this Constitution has preserved our liberty in this country for so many years, is that the Framers of the Constitution thought very carefully about how to hold accountable and who counts—

Mr. CLEAVER. Okay.

Mr. OLSON. —and to vest authority in places where they could oversee it.

Mr. CLEAVER. Okay, thank you. On who counts, you agree with me.

Do you agree, Mr. White, that the might of any republic is found in how it treats its vulnerable, yes or no? The might of any republic is found in how it treats its vulnerable?

Mr. WHITE. Yes, sir. And I think—

Mr. CLEAVER. Thank you very kindly. I appreciate it.

Ms. Gorod, thank you for being here. Do you know anything about the Federal Trade Commission?

Ms. GOROD. Just a little bit.

Mr. CLEAVER. Do you know who appoints the—we actually call them ambassadors, but who appoints the trade administrator?

Ms. GOROD. I believe the President does.

Mr. CLEAVER. Yes.

Mr. White, do you know who can remove the Federal Trade Commission?

Mr. WHITE. Yes, sir, the President.

Mr. CLEAVER. Thank you very kindly.

Can you tell me who, Mr. White, can replace the Director of the CFPB?

Mr. WHITE. To the extent that he can be removed, he can be removed by the President.

Mr. CLEAVER. Thank you very kindly.

You all have been so supportive of what I said today. I appreciate it very much.

I yield back.

Chairwoman WAGNER. I thank the gentleman for his questioning. The gentleman yields back.

The Chair now recognizes a new member of our committee, the gentleman from Indiana, Mr. Hollingsworth, for 5 minutes.

Mr. HOLLINGSWORTH. Good morning. And thanks, everybody, for being here.

As she said, I am a new member here, and I come from a business background, manufacturing specifically. And because of that, I think about two different things all the time: results; and processes. And it feels like that is a lot of the debate that we are having here.

What I hear from my colleagues on the other side of the aisle is that the CFPB is getting results, however they define that, and a lot of them. But I think what matters to a lot to us is making sure that we get results by the right process, and making sure that we manage that process, because it has always been my experience in manufacturing that when you focus only on results and driving more through without an adherence to a process, you end up with bad results, and results gotten through misguided processes.

When they measure results, don't you think that we—and this question will be to Mr. Olson specifically to start with, but we can probably get more results if we just suspend the Bill of Rights and make the CFPB power unlimited. They could then get many, many more results, but I am not sure that we would be satisfied or happy with the results. And certainly, I don't think we would feel good about the trampling of our civil liberties in the process.

But don't we think if we are just going to focus on results, as my colleagues frequently talk about, that we might be—that we could get more of them if we just suspended all of the limitations on CFPB power, whatever they may be?

Mr. OLSON. Absolutely. I totally agree with you. If you eliminated elections, if you eliminated all of the structural protections and the Bill of Rights, you could do whatever you wanted to do. You would call that results. Over the long term, the results would not be acceptable to the American people, because our liberties and our freedoms are bedrock to our constitutional system of government.

Mr. HOLLINGSWORTH. Mr. White?

Mr. WHITE. I agree. And as the Framers indicated, the first and foremost safeguard of our liberties is, in fact, the checks and balances, the structural Constitution.

Mr. HOLLINGSWORTH. Absolutely. Again, I talk about misaligned incentives a lot in my prior business career—if you provide people the incentive to deliver in one metric alone, without governing some of the how they get there, people will find a way to do that. And I think in the CFPB's case, that is certainly the case. In the way that they are funded and elsewhere, we provided them incentive to take action, and let that incentive somewhat unchecked. And because of that, we have gotten some poor results.

And so, I guess—I know we have talked a little bit about the constitutionality, but the process for getting back under constitutional governance, walk me through some of the steps that you would see, Mr. Olson, in terms of how we might pursue that and what mechanically we can do to begin to get that process back under control.

Mr. OLSON. We would recommend that Congress restore the President's power to control the subordinates in the Executive Branch, those who enforce the law. Restore congressional control over the budget of the agency, because that gives the agency the responsibility to come to you and say, "Here is what we have done, here is how we are doing it, these are the funds that we need in order to do it." You then ask the questions. You conduct your oversight. That has been completely removed.

We also made other suggestions in our written testimony, but those are the two things that strike me as the most important, because it is this body, the congressional body, that controls and makes the laws and needs to have that oversight. And it is the President, then, who has the responsibility to see that it is done properly in accordance with the laws that you enact.

Mr. HOLLINGSWORTH. Right. When I hear my friends across the aisle talk about what counts, I think accountability counts. And it really matters in setting up a system that reflects the will of the people. And I know in my district, transferring a little bit from my business career to the campaign of the last 18 months, what I heard over and over again from my constituents was a grave concern of the expansion of a bureaucracy, an expansion of a bureaucracy that has more and more power over their lives, the power to shape their futures, to determine the limits of their opportunities.

And they don't get any recourse. There is no means of redress to those individuals. They can't call them up in the same way they call me every single day to tell me they hate what I am doing, they don't like what I am doing, or, alternatively, that they love what I am doing and I should keep going, right? And we need that level of accountability. And I think much of what I heard in the last election was the feeling like the officials they elect no longer have the power to shape their futures, but it is, instead, the unelected bureaucracy that continues to limit their futures.

And I hope that if we took anything away from the last election, it was a feeling that the power needs to go back to the people and their elected representatives that those people are putting in office.

Thank you so much for being here.

Chairwoman WAGNER. The gentleman yields back. The Chair now recognizes the gentlelady from Ohio, my good friend Mrs. Beatty, for 5 minutes.

Mrs. BEATTY. Thank you so much, Madam Chairwoman. How much I like saying that, like history.

And to my colleagues and the ranking member, and all of our scholarly witnesses today, thank you for being here.

I believe in transparency. I believe in having someone oversee or be a free-spirited, maybe you want to call it independent watchdog for the least of these. I have had the opportunity to read all of your testimonies, to read about your background. So for my time, I am going to ask some yes-or-no questions, because you are scholarly, and I know you will take long answers and our time will run down.

So we are just going to go one, two, three, four, yes or no. Okay? So are you aware that the Consumer Financial Protection Bureau—and I am going to say that whole word every time, because my colleagues oftentimes refer to it as "the Bureau." Now, I have a thought behind that. I think if you are talking to America, like we do and you say "bureau," most people don't know what that is.

So maybe there is a reason that we don't say Consumer Financial Protection Bureau. That sends a whole different message to the Nation, that they may feel a little safer, they may feel that there is someone protecting them. So I am going to encourage everybody to have that education awareness and not call it "the bureau" but to call it what it is, the Consumer Financial Protection Bureau.

So with that said, are you aware of the $11.8 billion of relief to consumers by the Consumer Financial Protection Bureau?

Mr. OLSON. I am aware of the statistic.

Mrs. BEATTY. Yes. I take that as a yes. Right down the line.

Mr. PRAKASH. Not until today, madam.

Mr. WHITE. Not until today.

Mrs. BEATTY. But you are aware. It doesn't matter—I don't care if you learned yesterday, today, or 10 minutes ago. Are you aware?

Mr. PRAKASH. As of now, yes.

Mr. WHITE. Yes, I believe you.

Ms. GOROD. Yes.

Mrs. BEATTY. Okay. How about $3.7 billion in monetary compensation to consumers as a result of enforcement activity?

Mr. OLSON. I am aware of those statistics.

Mr. PRAKASH. Yes.

Mr. WHITE. Yes.

Ms. GOROD. Yes.

Mrs. BEATTY. $7.7 billion in principal reductions, canceled debt, and other consumer reliefs as a result of enforcement activity?

Mr. OLSON. Yes.

Mr. PRAKASH. Yes.

Mr. WHITE. Yes.

Ms. GOROD. Yes.

Mrs. BEATTY. $371 million in consumer relief as the result of supervisory activity?

Mr. OLSON. Yes.

Mr. PRAKASH. Yes.

Mr. WHITE. Yes.

Ms. GOROD. Yes.

Mrs. BEATTY. Did all of these yeses sound like great things?

Mr. OLSON. It depends upon how you get there.

Mrs. BEATTY. Yes or no?

Mr. OLSON. Not necessarily.

Mr. PRAKASH. I can't say.

Mr. WHITE. I am happy to agree with you on these.

Ms. GOROD. Yes. And I hope I have the opportunity to explain why—

Mrs. BEATTY. Fifty percent of the people get it right. You just agreed to four major things to disagree with yourself. Welcome to the world of what I am in.

So here is the thing: We have these hearings—so let's go now, move quickly to the whole issue of the Constitution.

So I will start with you, Mr. Olson. Do you think that the constitutionality of a law passed by Congress is for a Federal judge to decide? Yes or no?

Mr. OLSON. It is not just for Federal judges to decide.

Mrs. BEATTY. But is it for the Federal judges?

Mr. OLSON. That is a part of the judicial—

Mrs. BEATTY. So, that is a yes. Okay. Next?

Mr. PRAKASH. Yes.

Mrs. BEATTY. Okay. Yes?

Mr. WHITE. Yes, all three branches do, yes.

Mrs. BEATTY. Okay. So to me, I agree. I would be a yes as well. But yet we are in the middle of deciding the very question with regard to the structure of the Consumer Financial Protection Bureau. So that would mean, to me, by the scholars and your responses, that that makes absolutely no sense.

So let me move quickly to a story that I read about you, Mr. Olson, and I just want to say it publicly. I am in a house of all lawyers. My husband told me a wonderful story about you traveling and a young man was discriminated against. And while he was a scholar and brilliant, he was African American. And you stood up for him because you said we need to protect one another, and we need people to be responsible for the least of us and our brothers and sisters.

Is that a true story?

Mr. OLSON. Yes, it is a true story. And thank you.

Mrs. BEATTY. So I relate that kind of to what we believe that the Director or the independent watchdog is protecting those folks. And so that is one of the reasons I am a supporter of the Consumer Financial Protection Bureau. And my time is up. Thank you so much.

Mr. OLSON. Thank you.

Chairwoman WAGNER. I am very sorry that the gentlelady has to yield back.

The Chair now recognizes another new member of the Oversight and Investigations Subcommittee, the gentleman from Tennessee, Mr. Kustoff, for 5 minutes.

Mr. KUSTOFF. Thank you, Madam Chairwoman.

Mr. Olson, first of all, thank you for being here, and thank you for your public service to our country.

I have listened to everybody's statements about the constitutionality and the structure of the CFPB, and without a doubt, to me, it does seem that the structure, the way it is composed is unconstitutional. Now, we can also debate the need for the CFPB, but for our purposes today, if the President were to come to you and say, Mr. Olson, I think there is some need for the CFPB, but I want it to be structurally sound, I want it to be constitutionally sound, can you paint a framework of what you think the bureau would look like, how it would be composed? Would there be one director? Would there be a panel of directors? To whom would they ultimately be accountable? Could you paint a general structure of what that would look like and how it would be constitutionally sound?

Mr. OLSON. Yes. I would suggest that the CFPB be a part of the Executive Branch, created like an Executive Branch agency, such as the Energy Department, such as the Justice Department, such as the Treasury Department. Whether it be managed by one individual or a panel of individuals, that it be responsible to the President; that it be responsible to Congress in enforcing the laws; that that agency, along with the White House and the administrative branch and the OMB, would have to come to Congress and justify its budget. And then you would pass its budget, conduct oversight hearings over what it was going to do, and supervise that agency, but hold the President responsible for what that agency does.

And if that agency does—is abusive, then he is responsible, not only to you in Congress, but also to the electorate. But if he doesn't have the authority to make sure that that agency is conducting itself in a way that is consistent with the laws, he must be accountable. And the only way he can be accountable, if he has the power to remove an individual who is not following his policies.

Mr. KUSTOFF. To remove for any reason? To remove for a reason or—

Mr. OLSON. No. The President is elected to faithfully execute the laws of the United States. He or she has to determine the policies pursuant to which those laws are going to be enforced. And the President must exercise that authority. He doesn't have to have a reason to remove the Secretary of the Treasury. And he shouldn't have to have a reason to remove a member of the Executive Branch who has a responsibility to him under the Constitution.

Mr. KUSTOFF. In other words, that director or that board of directors would serve at the pleasure of the President?

Mr. OLSON. That is correct.

Mr. KUSTOFF. Thank you, Mr. Olson.

I yield back.

Chairwoman WAGNER. The gentleman yields back.

The Chair now recognizes the gentleman from Massachusetts, Mr. Capuano, for 5 minutes.

Mr. CAPUANO. Thank you, Madam Chairwoman.

I want to thank the panel. I apologize for running in and out, but, as you know, that is what we do here.

I guess—I would like to state, first of all, I guess it is great to be here at another hearing. This is, to my knowledge, the 63rd hearing we have had on the CFPB, and not one hearing—actually, I take it back. One hearing. One hearing we had on the impact of the CFPB that was related to Wells Fargo. Other than that, we have never had any consumers here who have kind of gotten it in the neck that the CFPB has protected, but we will just keep doing hearings on it until we get tired of it.

I guess I would like to follow up on a couple of things. First of all, Mr. Olson, look, you are a world-class lawyer, you are a world-known lawyer. Is this a normal situation you have heard of where the full court of a D.C. Court of Appeals takes an en banc decision from a three-judge panel? Is that normal? I know it happens.

Mr. OLSON. It happens. It happens a few times a year.

Mr. CAPUANO. So it happens, but it is a little unusual?

Mr. OLSON. It is unusual for any appeals court to hear a case en banc, you are correct.

Mr. CAPUANO. Okay. That is what I expected, and that is what I believe to be true.

I guess—I don't have to ask because I think you all know that we have many people in the Federal Government who are appointed for a term of years and can't be replaced without cause. For instance, we just had a gentleman here—not in this committee but another committee yesterday—saying that the FBI Director is appointed for 10 years. Nobody complained about that.

What about the Federal Reserve Board? They are appointed, can't be removed. Should we be able to remove the FBI Director like that? Should we be able to remove the Chair of the Federal Reserve Board like that for political reasons? And I understand the arguments for anything. But I am just curious, are those two that you would also have us remove, Mr. Olson?

Mr. OLSON. The FBI Director is removable and has been removed by the President. Within the last 10 or so years, an FBI Director was removed.

Mr. CAPUANO. For a cause. Mr. Comey just said he is going to serve out the rest of his term.

Mr. OLSON. We have heard a little bit about what cause means under what circumstances, but the—

Mr. CAPUANO. I understand that. So you think the FBI Director should be able to be withdrawn, be able to be fired for political purposes? And that is okay. It is a good opinion. I just want to—I'm curious about your opinion.

Mr. OLSON. It is a good reason, if you hold the President responsible.

Mr. CAPUANO. So you think he should. I get it.

Mr. Prakash, do you think that we should be able to fire the FBI Director or the Federal Reserve Chair?

Mr. PRAKASH. Representative Capuano, I think you are mistaken. The FBI Director serves at pleasure. President Clinton removed the—

Mr. CAPUANO. I think you are mistaken. He serves for a term of 10 years. He just said on TV the other day that he is staying for another 6 years. I don't think he can say that without some confidence.

Mr. PRAKASH. The term of office does not preclude removal at pleasure. President Clinton removed the FBI Director without cause.

Mr. CAPUANO. For a reason.

Mr. White, do you think we should be able to do it for political reasons as well?

Mr. WHITE. For policy reasons, disagreement over policy?

Mr. CAPUANO. Yes, the Federal Reserve Chair.

Mr. WHITE. In my testimony, I point out that the Supreme Court said in *Bowsher* v. *Synar,* they indicated that policy—the policy—

Mr. CAPUANO. I guess—look, guys, simple questions. I understand the argument that we should be able to do it. The question is, should we be able to do it with everybody? And if the answer is yes, that is a fair answer; it just happens to not be the case.

And then there being—the point that I am trying to make is there are clearly some people in the Federal Government that Congress and the President have decided over the years should not be removable for political purposes.

Now, I understand if you disagree with them. That is fine. You come to Congress and you ask us to pass a law to change that. That is fine. Thus far, my colleagues on the other side haven't done that. And that is what you are here for today.

If I am not going to get clear answers, I guess I will just finish off with Ms. Gorod. Do you think we should be able to remove every Federal employee just for political reasons?

Ms. GOROD. Obviously not, and I think that underscores an important point. The opponents of the CFPB like to pretend that it is somehow anomalous or novel. And the fact is, there are a number of other agencies that are headed by a single director, there are a number of other agencies that have officers who are removable only for cause, and it is not even the first agency to combine those two features.

Mr. CAPUANO. Fair enough. I appreciate that. My time is running out, so I have two more points to make.

First of all, for the people who are listening who don't know this, what PHH was alleged to have done, was proven twice now to have done—actually, three times, but that is a different issue—is that they brought people in to give them mortgages and then required them, for all intents and purposes, to buy mortgage insurance from their company for kickback purposes. They were caught at that charging people more, charging people more for their mortgage if they didn't do it and basically ordered to disgorge $109 million of inappropriately gotten gains. Now, I understand that those are facts that may be disputed in court, but at the moment that is where we are.

So I want people at home to understand what we are talking about. That is the case where consumers of—homeowners are getting stuck to that you are defending.

Mr. Olson, last question, do you or your firm represent PHH?

Mr. OLSON. Yes, we do. And I came here to discuss the constitutional question, not the issues involved in that case.

Mr. CAPUANO. I appreciate that. This doesn't strike you as a conflict of interest that you are in court with a client that is paying you—

Chairwoman WAGNER. The gentleman's time has expired.

Mr. CAPUANO. —and you are here to talk about the issue that they are in court about? I think that is a massive conflict of interest.

Chairwoman WAGNER. The gentleman's time has expired.

The Chair now recognizes a new member of our committee, the gentleman from Michigan, Mr. Trott, for 5 minutes.

Mr. TROTT. Thank you, Madam Chairwoman.

And thank you to the panel for being here.

And as an aside, what I just heard is a complete misunderstanding of the conflict-of-interest rules as they relate to the legal profession, but we will save that argument for another time.

Ms. Gorod, I want to start with you. And in your testimony, you wrote—and before I get into the constitutionality issues, I want to talk about kind of the underlying reason for the financial crisis. And in your testimony, you wrote: "After months of evaluating the roots of the financial crisis and assessing different types of reforms needed, lawmakers concluded that the major culprit was the failure of a fragmented and unaccountable consumer financial protection regime to safeguard homeowners from reckless financial products."

You wrote it. I assume you believe that. A lot of times when we write regulations in Washington, we justify them by saying we need to write these regulations because the private sector has run amuck.

And I want to read an editorial from the Journal from 2011: "Beginning in 1992, the government required Fannie Mae and Freddie Mac to direct a substantial portion of their mortgage financing to borrowers who were at or below the median income in their communities. The original legislative quota was 30 percent, but HUD gives authority to adjust it. And through Bill Clinton and George Bush, HUD raised the quota to 50 percent in 2000, 55 percent in 2007."

So was the cause the mortgage-backed security in the financial products that weren't well understood or was the cause of these regulations that came to pass under Dodd-Frank created by government action which created the crisis in the first place?

Ms. GOROD. Congress spent a considerable amount of time studying the causes of the financial crisis and concluded that one of the major problems was the failure of existing regulatory authorities to act because regulatory authority was dispersed over a number of different regulatory agencies. They decided that a new Consumer Financial Protection Bureau that was headed by a single director, removable only for cause, would be the best way for—

Mr. TROTT. We will talk about that in a minute, but—so you are saying that nothing happened in Washington that precipitated the crisis. The idea that every American should own a home when they shouldn't, that wasn't a major cause of the crisis?

Ms. GOROD. I am saying that what Congress concluded was that there was an absence of comprehensive and effective regulation and that a way to address that would be to create the CFPB.

Mr. TROTT. Okay. Let's talk about the CFPB then. You wrote in your testimony that, "The court has explained that assessing the constitutionality of a removal restriction is whether the restriction impedes the President's ability to perform his constitutional duty."

And you are not bothered that the current regulation impedes that because Dodd-Frank provides that the President may remove the Director for inefficiency, neglect of duty, or malfeasance in office. So you believe there are no constitutional issues. Right?

Ms. GOROD. I believe there are no constitutional issues, and the Supreme Court has repeatedly recognized that there are no constitutional issues.

Mr. TROTT. Right. And you talked about other agencies that have directors who have to be removed for cause, right? And we will talk about that in a minute.

So let me ask you, how would we go about making a case for removing Mr. Cordray? We couldn't argue, if I was the President, that he has been inefficient. The CFPB has been very busy. We couldn't argue there has been a neglect of duty. Every day, they come out with new charges against some financial product or institution, so there is no neglect of duty.

So we would have to argue that there is some kind of malfeasance, which is defined as the failure to discharge public obligations existing by law, custom, or statute. So how would we make a case if we wanted to remove Mr. Cordray that he is somehow guilty of malfeasance? Could the President do that?

Ms. GOROD. I think I would perhaps agree with you that there is no case to be made against Director Cordray. There is no basis for removing him for cause. But the fact is that if he did violate the for-cause provisions, then the President would be able to remove him. And I think this is a moment to underscore that the President has no authority to violate the Dodd-Frank statute in contrast to what the other folks up here have said.

Mr. TROTT. Reclaiming my time, let's go to Mr. Olson's testimony and have you explain how we would argue—let's take Mr. Cordray out of it, because obviously you like him. Let's just say there is someone there that you didn't like. And here is their job description as defined by Mr. Olson: It is headed by a single director who has broad discretion to enforce 19 Federal consumer protection laws, promulgate regulations, litigate in the name of the Federal Government, punish private citizens, all without any accountability to the President in whom the Constitution vests executive power.

So with that broad authority, how could you ever argue someone—you might disagree with what they are doing, but you couldn't make an argument that they are guilty of malfeasance, could you?

Ms. GOROD. I think there very well could be circumstances in which one was guilty of malfeasance. I think there is no evidence of that with respect to Mr. Cordray.

Mr. TROTT. We are done talking about Mr. Cordray.

I want to ask Mr. Olson a question in my last 30 seconds. So let's talk about due process for a minute. From my perspective, what happened to PHH—and I know you are not here to talk about that case, but it was a $6 million or $9 million fine for Section 8 issues, and then all of a sudden the CFPB swept in and said, no, really the fine is going to be $109 million.

How easy is it to fight the government? The government has no budget in terms of its litigation expenses. The government has no accountability in terms of when they decide not to pursue a case or defend a case. So in your experience, sir—forget PHH—isn't it a pretty unevenly balanced scale when you have to litigate against the United States Government on a fine that they are trying to assess against your organization?

Mr. OLSON. I have been on both sides, in the private sector and in the government. It is very, very difficult to fight against the government because the government, essentially, has unlimited resources and an unlimited budget. It is very hard for a private citizen to—

Mr. TROTT. My time has expired, but it is best if you just pay the fine and move on because you are probably going to end up losing even if you have to pay your own litigation expenses.

Chairwoman WAGNER. The gentleman's time has expired.

Mr. TROTT. Thank you.

Chairwoman WAGNER. The Chair now recognizes the ranking member of the full Financial Services Committee, the gentlewoman from California, Ranking Member Waters.

Ms. WATERS. Thank you very much, Madam Chair.

First, let me just say something to the Honorable Theodore Olson, partner, Gibson, Dunn, & Crutcher. You don't know me. I basically know you from the press. And despite the fact that we don't know each other, I have absolutely lived with your pain, based on the telephone call from your wife that was given wide publicity. And so I want you to know that I would really like to beat up on you badly today, but I am not going to do it because of, not only what you have experienced, but because of the *Hollingsworth* v. *Perry* case, the LGBT case that you were involved in.

And so, basically, I think you are a superb attorney, a fine lawyer, and you don't deserve to be in this position that you are in today. It is beneath you.

Now, having said that, I am going to leave you alone and tell you this: Dodd-Frank is extremely important and valuable to this country. But the centerpiece of it is the Consumer Financial Protection Bureau.

For us all to know and understand that the consumers of this country literally had no protection, nobody speaking up for them, nobody looking out for them prior to Dodd-Frank, is for us to say, well, they deserve to have someone speaking up for them and doing this job that was created in Dodd-Frank so that they would never be in the position again where they were being ignored, dropped off of America's agenda.

I don't know how anybody, my friends on the opposite side of the aisle, could be against representation for consumers. You know and understand what payday lenders have done to them. You know and understand what debt collectors have done to them. You know about student loans. You know about the automobile industry and how it targeted communities and overcharged interest rates on the people who could least afford them. You know all of this.

And so for those who come in here supporting getting rid of the Consumer Financial Protection Bureau and going along with this argument about it is unconstitutional, et cetera, et cetera, what are you doing, and why are you doing this? Are you simply the tools of those who would exploit and those who would commit fraud, those who would steal from the people who are the most vulnerable in our country?

And so I take this time to admonish all of you who are doing it. And I take this time to thank Ms. Brianne Gorod, the chief counsel, Constitution Accountability Center, for being able to be in a position to really talk about what our Constitution is, what it is all about.

This three-judge panel, I ignore. I don't pay any attention to that. And I am glad that that decision was vacated, because I think in the final analysis, some of the right questions are being raised.

And this PHH that you are representing, Mr. Olson, in my estimation, does not have a leg to stand on.

And so all that I want to say is this: I am committed to fighting as hard as I can for the Consumer Financial Protection Bureau, and I consider that one of the most important fights of my career. Starting out in the California legislature, it was all about consumers and poor people and people who were being ripped off in our society.

And I finally, here in the Congress of the United States, got a chance to work on Dodd-Frank, served on the conference committee, worked through some of the problems, worked through getting consensus on some of the issues of Dodd-Frank. And I and others are not about to allow it to be destroyed. And I just want to continue my advocacy and my disappointment with those who have shown less care and concern for consumers.

So with that, my time is up.

Mr. Olson, go do some of that fabulous work that you know how to do. Get rid of this case. You are better than this.

Chairwoman WAGNER. The gentlelady's time has expired.

Ms. WATERS. Thank you. I yield back the balance of my time.

Chairwoman WAGNER. The gentlelady yields back the balance of her time.

It is now my pleasure to introduce another new member of our O&I Subcommittee, the gentleman from Georgia, Mr. Loudermilk, for 5 minutes.

Mr. LOUDERMILK. Thank you, Madam Chairwoman, and thank you for holding this hearing.

It has been very interesting, as I sit here and I listen to a lot of the discussion that is going on. And I think, as we started off, this is a constitutional discussion, at least from those of us on this side of the dais here.

A quick question for Ms. Gorod: How did we get Dodd-Frank? That was an act of the legislature. Right?

Ms. GOROD. That is correct.

Mr. LOUDERMILK. Which was in the purview of the Legislative Branch to set public policy?

Ms. GOROD. That is right. The Constitution gives Congress great flexibility to determine—

Mr. LOUDERMILK. So it was a law that was passed, and that was our responsibility.

Mr. White, what is the responsibility of the Executive Branch when Congress passes a law such as this?

Mr. WHITE. To execute it insofar as it is constitutional.

Mr. LOUDERMILK. Okay. If there is a difference in the opinion of what a law does between the Executive Branch who is executing it and the Legislative Branch's original meaning, who determines that?

Mr. WHITE. Each branch has to determine for itself in light of—

Mr. LOUDERMILK. But if there is a difference between the interpretation of what was intended?

Mr. WHITE. Oftentimes, these issues end up in court.

Mr. LOUDERMILK. And the Judicial Branch a lot of times determines that.

Mr. Prakash, could you, really quickly, for the people watching out here, tell us in layman's terms, what is Chevron deference?

Mr. PRAKASH. Chevron deference is a doctrine from the courts that says that courts should defer to the reasonable constructions of statutes issued by agencies.

Mr. LOUDERMILK. So, basically, it says that if there is a misinterpretation, then the agency determines what the interpretation of the law is?

Mr. PRAKASH. And the way to put it is, if there is wiggle room in the statute, the agency wins.

Mr. LOUDERMILK. Okay. And that is what I want to focus on, Mr. Olson, is the Chevron deference here, because—and we know that there is no single agency entitled to full Chevron deference in the courts when there is multiple agencies that have the ability to enforce that law, with the exception of the CFPB.

And in your testimony, you stated that if the Director and the President disagree on the interpretation of Federal consumer finance law, the CFPB Director's view is accepted, basically that the courts are told you have to listen to the CFPB. Does that not give the CFPB Director more power than the President over consumer financial protection law?

Mr. OLSON. The way this statute and this agency is structured, you are absolutely right. It is not just the deference that courts will accord where a statute is ambiguous, but the scale and the breadth of authority given to the Director of this agency to decide what is fair, what is reasonable, what is an abuse, and so forth. It is you who have delegated to that agency an inordinately broad power of legislative activity to decide what is right and what is wrong.

Mr. LOUDERMILK. Has any other agency, department head or agency head, ever had that level of power?

Mr. OLSON. I believe that the worst delegations of authority to agencies is all wrapped up in this agency. So some of the worst things that have happened in other agencies, there are problems in other places, but the breadth of the authority here and the lack of oversight and responsibility to Congress and to the executive, I have never seen it in any other agency.

Mr. LOUDERMILK. So basically, what we are seeing with the CFPB, as Ms. Gorod stated, that we have legislative power to set policy. Mr. White stated the executive has a responsibility to execute that, but there is a Chevron deference. So if there is a difference, then the courts have to lean toward what the agency says.

But in this case, basically the CFPB is given power above the Judicial Branch because the Judicial Branch is told how you must interpret, and the Legislative Branch because they can interpret any way they want to. Is that a fair assessment?

Mr. OLSON. It is not complete, because the courts can come in and say, "You have just gone too far, you have gone beyond the statutes, you have interpreted things in the wrong way." That has happened. And this agency is subject to the judicial oversight as well. But there is an awful lot of wiggle room, as my colleague has put it, a tremendous breadth of authority given to this agency and very little supervision.

Mr. LOUDERMILK. And in closing—I am running out of time—at risk of sending a lot of people into a tizzy, which is okay, I don't care, we have heard a lot of discussion about corruption and all this.

Our Founders were very clear that separation of powers was to prevent corruption. In fact, many times they cited a verse of scripture, Jeremiah 17:9, that says men's hearts are deceitfully wicked. Basically saying, left unchecked, regardless of how good their intentions are, if you give power, greed and ambition will override good judgment every time. That is why we have brought the separation of powers in, and we have totally run over that in the case of the CFPB. Would you agree?

Mr. OLSON. I do. I agree.

Mr. LOUDERMILK. Thank you, Madam Chairwoman. I yield back.

Chairwoman WAGNER. The gentleman yields back.

It is now my pleasure to recognize the gentlelady from New York, Ms. Tenney, for 5 minutes.

Ms. TENNEY. Thank you, Chairwoman Wagner.

And I thank the panel for being here today. It is an extremely important hearing.

Like Mr. Hollingsworth, I too am a business owner and am uniquely aware of the difficult access to credit for small businesses, as I come from one of the poorest and highest taxed districts in the Nation, in central New York. And I see the CFPB as more of an obstacle. I respectfully disagree with my colleagues.

I understand that Dodd-Frank has just given this—I deem it unconstitutional, as someone who is also an attorney and who has done a little work before the Federal courts in fighting what Chevron has become.

And I know that you have answered many of the questions, but I would just like to direct this to Mr. Olson, since I commend you on your fine service and also I have had the pleasure of actually reading some of your briefs before the Supreme Court.

And I just wanted to know—we obviously know the structure is a legislative delegation of power unchecked; you have discussed all that. Can you just comment, if you can, about where you think the future of the Chevron deference is going to be? As you say, this unaccountable legislative delegation, the courts can actually draw this back. But are the courts actually doing that? Is that something we can—in your opinion, what does the Supreme Court look like in the future where we can actually start rolling back some of these overbloated bureaucratic schemes and some of the overreach of power with the CFPB?

Mr. OLSON. It is very hard to predict, of course, what the Supreme Court might do in a particular case. But I think there is a widespread consensus that the Chevron doctrine, the deference to decisions by administrative agencies interpreting their own authority, has gone pretty far, maybe too far.

And when Congress gives broad discretion to administrative or Executive Branch agencies, and then they decide to interpret that authority in ways that are very, very expansive, the courts perhaps should exercise a more scrupulous role in disciplining that process.

Ms. TENNEY. Don't you think that it would be, in your opinion, a good thing for this to be rolled back into the Executive Branch—I know you have sort of touched on this—so that we can have oversight, the jurisdiction of the Oversight Committee in addition to the Office of Management and Budget?

It just seems to me that this is just an out-of-control agency, as a new member and someone who has seen what happens in a State with a very large bureaucracy and a very large Executive Branch that is somewhat out of control, and might I add, sadly considered one of the most dysfunctional and most corrupt legislatures in the Nation. But something I see happening on the Federal level is this enormous bureaucracy unchecked. So—

Mr. OLSON. I agree with that. I think that it needs to be brought into check—into the constitutional system.

Ms. TENNEY. Right.

Mr. OLSON. I think that Congress went way too far with this agency, and it could be a model, as one of my colleagues said, for legislation in the future. Why not roll the Justice Department, why not roll the Treasury Department, why not roll the EPA all into one agency and then give that individual running that agency complete power to do what basically whatever he or she wants to do? That is a very, very bad model. It is a very unconstitutional model. As I said at the end of my testimony, it is a constitutional nightmare.

Ms. TENNEY. I agree wholeheartedly. Thank you so much for your comments and for the panel today. I appreciate it. Thank you.

And I yield back.

Chairwoman WAGNER. The gentlelady yields back.

It is now my honor to recognize the chairman of the full Financial Services Committee, Chairman Jeb Hensarling from Texas, to testify and to ask questions for 5 minutes.

Mr. Chairman, you are now recognized.

Chairman HENSARLING. Thank you, Madam Chairwoman. And thank you for holding an incredibly important hearing.

The first thing that any Member does after they are elected and they come onto the House Floor is they raise their right hand and swear an oath to uphold and defend the Constitution. Every Member has that personal responsibility. And they do it under oath.

And so I want to thank you, Madam Chair, for having this hearing so that Members can be enlightened as to this critical debate on the constitutionality of this agency.

And it should not go unheeded that a three-judge panel of the second highest court in the land has ruled it unconstitutional. I don't know what is going to happen once the entire court meets en banc. I don't know what will happen if this is appealed to the Supreme Court. But very learned jurists have found this to be an unconstitutional agency, and it is one that we should take very, very seriously.

And unfortunately, as I listen to many arguments of my friends on the other side of the aisle, what comes ringing through is that somehow the ends justify the means, and that as long as there is some noble purpose here, we should be indifferent to the means by which we get there. But I don't believe so.

So to some extent, I want to follow up on a line of questioning, I think it was from the gentleman from Indiana, Mr. Hollingsworth. But I will ask you, Ms. Gorod, if we repealed Miranda rights, do you think that our criminal justice system would receive more convictions?

Ms. GOROD. I don't think anyone is saying that the ends justify the means. The position of—

Chairman HENSARLING. That is not the question. The question is, if we repealed Miranda rights, would we have more convictions? Do you have an opinion on the matter? If you don't, I will ask another witness.

Ms. GOROD. We might. But the point is—

Chairman HENSARLING. Okay. We might. What if we repealed the Fourth Amendment? Do you think we would have more criminal convictions if we repealed the Fourth Amendment to the Constitution? Do you have an opinion on that, Ms. Gorod?

Ms. GOROD. Again, we might. It is an empirical question.

Chairman HENSARLING. Okay. Thank you.

So what we know is that we have numerous individuals, companies, agencies that perhaps have been accused of misdeeds. And what we have is our friends on the other side of the aisle saying, don't you see all these fines? Don't you understand that they must be guilty because they have been accused of something?

I suppose if we started beating accused criminals with rubber hoses, we might also have more convictions as well, but that is not the point. The point is, what has happened to due process? What has happened to due process under the law? Where are our constitutional foundations?

And so the first question I have to ask—and we haven't even gotten into the point of, is this agency on a net basis actually helping consumers, when I see that all of a sudden after its advent, free checking has been cut in half at banks, bank fees are up, the ranks of the unbanked have increased, and many of those who are pursuing auto loans are now paying more. Under the qualified mortgage rule, fully implemented, one-third of all Blacks and Hispanics will no longer qualify for a mortgage, yet I hear no outcry from my friends on the other side of the aisle. That is not me saying it. That is the Federal Reserve.

So let's set aside for the moment the injury that this agency has done to consumers, and let's just focus as Americans who take an oath to the Constitution, let's look at due process questions.

First, starting with you, Mr. Olson, as we erode checks and balances, do you have an opinion on how due process is being upheld currently at the CFPB?

Mr. OLSON. One of your colleagues said that power corrupts, and that is an aphorism that we have to live with. And the reason that we have the checks and balances and the separation of powers is to prevent that corruption from taking root and abusing the rights of our citizens and taking away due process.

Chairman HENSARLING. Mr. Prakash, do you have an opinion on the matter? Have you observed how due process is being practiced at the CFPB?

Mr. PRAKASH. Mr. Chairman, I am not here to testify about the policy of having a CFPB. And I am not here to—I don't know anything about the fines that were levied. I am making a purely constitutional claim that I think should appeal to Republicans and Democrats. If President Trump appoints Joe Deregulator and decides to totally gut the CFPB, I would still be making the claim I am making today.

Chairman HENSARLING. Mr. White, do you have an opinion on the due process issue?

Mr. WHITE. I do think that the way the CFPB went about asserting jurisdiction over auto dealers, auto loans through informal guidance documents without the real rigorous work of notice and comment rulemaking was troublesome.

Chairman HENSARLING. Thank you. I appreciate your testimony.

Chairwoman WAGNER. The gentleman yields back.

The Chair now recognizes the distinguished ranking member of the subcommittee, Mr. Green, for 5 minutes.

Mr. GREEN. I thank the Chair.

Mr. Prakash, you would have *Morrison* overturned. Is that correct?

Mr. PRAKASH. Yes, sir.

Mr. GREEN. And *Morrison,* for edification purposes, is styled *Morrison* v. *Olson,* is that correct?

Mr. PRAKASH. Yes, sir.

Mr. GREEN. And the "Olson" of whom we speak is the "Olson" who is seated next to you. Is this correct?

Mr. PRAKASH. Yes, sir.

Mr. GREEN. You decided that you would come to this hearing today and give your testimony, understanding that the lawyer who represents PHH, a case pending in Federal court, would be here today giving his client's cause a hearing before Congress?

Mr. PRAKASH. I knew that Mr. Olson would be here today, yes.

Mr. GREEN. Okay. And you agree that this is something that is acceptable, to have the lawyer who represents a client with a case pending to bring his cause before the Congress of the United States of America?

Mr. PRAKASH. With all due respect, Representative Green, I didn't think it was a problem. I assumed—

Mr. GREEN. But now that you are hearing it expressed, a lawyer—do you think every lawyer ought to be able to bring his client's case before the Congress of the United States of America? Can you answer that, please, quickly?

Mr. PRAKASH. Honestly, I think it is up to Members of Congress to decide who they want—

Mr. GREEN. I understand. So your opinion is that it is okay for lawyers to bring their cases before Congress?

Mr. PRAKASH. I don't have any objection to it, and I don't feel that I am doing something wrong.

Mr. GREEN. These records are forever, so that will be a part of your legacy.

Let's go on to Mr. White. Mr. White, do you think it is okay for lawyers to bring their cases before the Congress of the United States of America?

Mr. WHITE. I think all people should plead their cases to Congress. Congress is the first branch.

Mr. GREEN. So you are of the opinion that every lawyer should bring his client's case before Congress?

Mr. WHITE. I think Congress stands to defend the rights of all Americans, yes.

Mr. GREEN. All right. That takes care of your legacy.

Let's now go on to Ms. Gorod. Ma'am, do you find some concern with bringing a case that is pending in Federal court before the Congress of the United States of America?

Ms. GOROD. What I find most troubling are the assertions that have been made. The assertion, for example, that the President can violate the law which provides that the Director can't be removed except for cause. I find troubling Mr. Olson and the other witnesses' consistent ignoring of the numerous checks and constraints that apply to the CFPB that help demonstrate how accountable it is. So those are the things that I find most troubling that have happened this morning.

Mr. GREEN. I understand they are most troubling. But don't you find it troubling that a lawyer who is seated on this panel with you has a client whose case is being discussed today?

Ms. GOROD. I am going to focus on the substantive remarks, and I think they are deeply troubling because they are in tension with our Constitution's text and history and with 80 years of Supreme Court precedent.

Mr. GREEN. Mr. Olson, I must tell you, I objected to the hearing at the genesis of the hearing. I still object to the hearing. I think it is entirely inappropriate that you would be here, notwithstanding your storied history, notwithstanding all of the good that you have done, that you would be here representing a client who has litigation that is pending before a Federal court.

The Congress of the United States should not be in the business of providing oversight to courts. We shouldn't take up these causes before they have been litigated. I think that what you are doing is a disservice. It is really a disservice to this country in the sense that we are creating this precedent. And if it has been done before, it shouldn't have been done then. I don't agree with this.

And if your client, Mr. Olson, is 100 percent right, what we are doing today is 100 percent wrong. We ought not have lawyers bring their cases, unless we are going to now have every lawyer, every lawyer can petition Congress, has a case pending in Federal court, let's have my case heard before some subcommittee in Congress. I think it is entirely inappropriate for this to occur.

And my hope is, Mr. Olson, that when this case is finalized, that at some point you and I can have an additional discussion about this, because I believe that this is an appropriate thing for us to do, to talk about how we can prevent this from happening again.

With that said, I know that there may be a second round, so I will reserve my time for the second round. I yield back.

Mr. OLSON. May I respond briefly?

Mr. GREEN. I will yield time to you.

Mr. OLSON. I understand your point of view entirely. I want to emphasize that I am here representing my own opinions, not representing a client. These are my own views on separation of powers, issues that I have spoken and written about for 50 years.

Mr. GREEN. Let me ask you this, Mr. Olson, so if you were representing your client's views today—

Chairwoman WAGNER. The gentleman's time has expired.

Mr. GREEN. —you would find that unacceptable, if you were representing your client's views?

Mr. OLSON. I am not here representing the client.

Mr. GREEN. I understand you are not, but if you were—

Chairwoman WAGNER. The gentleman's time has expired.

Mr. GREEN. —would you find that unacceptable? Mr. Olson finds unacceptable for what—

Chairwoman WAGNER. The gentleman's time has expired.

It is now my pleasure to recognize a new member of our Oversight and Investigations Subcommittee, the gentleman from New York, Mr. Zeldin, for 5 minutes.

Mr. ZELDIN. Thank you, Madam Chairwoman.

The ranking member is criticizing Mr. Olson's appearance here because he says it would give his client an unfair advantage, however, Ms. Gorod is also representing individuals in the *PHH* case.

Ms. Gorod, I have some yes-or-no questions for you. First off, you represented the ranking member and other Members of Congress in proceedings before the D.C. Circuit in the *PHH* case. Correct?

Ms. GOROD. That is right. I am here representing my own views.

Mr. ZELDIN. And in those proceedings, you argued on behalf of the ranking member and other clients that the structure of the CFPB was constitutional. Correct?

Ms. GOROD. Yes.

Mr. ZELDIN. In fact, the essential premise of your legal argument for why your clients should be allowed to intervene in the *PHH* litigation was a fear that with the inauguration of President Trump, only they would be positioned to adequately defend the constitutionality of the structure of the CFPB. Correct?

Ms. GOROD. Yes. I think it is important that this issue get full review by the courts.

Mr. ZELDIN. And you also are the counsel for an amicus brief defending the constitutionality of the CFPB submitted by 21 former and current Members of Congress, some of whom are here with us today, correct?

Ms. GOROD. That is correct.

Mr. ZELDIN. So to be clear, you are here today testifying that the CFPB structure is constitutional at the express invitation of some of the very same Members for whom you are defending the constitutionality of the CFPB structure before the D.C. Circuit. Correct?

Ms. GOROD. That is right. That is an amicus brief, not a party in the litigation.

Mr. ZELDIN. Ms. Gorod, I am concerned that in this narrow, and I would say fairly unique setting, your duty to zealously represent your clients could be seen to conflict with your ability to offer truthful testimony. Can you provide truthful testimony?

Ms. GOROD. Yes.

Mr. ZELDIN. It certainly appears that you are being paid to represent Members' interests in court. Are you not representing their interests before the committee today?

Ms. GOROD. I am not being paid by anyone to represent their interest in court. We represent Members pro bono.

Mr. ZELDIN. Okay. Are you being paid by your clients at all? How are you being compensated for your time?

Ms. GOROD. I am part of a 501(c)(3) organization that is funded.

Mr. ZELDIN. Did you consult with the ranking member or other members who are your clients or any of their staff regarding your testimony today?

Ms. GOROD. Not in any specifics, no.

Mr. ZELDIN. What was the conversation in generalities then with regards to your testimony today?

Ms. GOROD. I am not sure I understand the question.

Mr. ZELDIN. Okay. My question is, did you consult with the ranking member, or other Members who are your clients, or any of their staff regarding your testimony today?

Ms. GOROD. They knew that I was giving testimony.

Mr. ZELDIN. Okay. But did you have—what were those consultations with regards to today's testimony?

Ms. GOROD. I don't think there were any specifically about the testimony.

Chairwoman WAGNER. Will the gentleman yield?

Mr. ZELDIN. Yes, Madam Chairwoman.

Chairwoman WAGNER. I thank the gentleman for yielding.

Ms. Gorod, what is the role of government?

Ms. GOROD. The role of government?

Chairwoman WAGNER. Yes. A simple question. What is the role of government?

Ms. GOROD. There are many roles of government. They include enacting laws to protect people and their individual liberties. It includes passing laws to prevent crime and to enforce those laws. I think it is not quite a simple question.

Chairwoman WAGNER. The role of government, Ms. Gorod, is to protect and preserve the individual rights and freedoms of the people, as laid out in our Constitution, liberties that are endowed by our Creator.

I yield back to the gentleman.

Mr. ZELDIN. Thank you, Madam Chairwoman.

Ms. Gorod, what are your thoughts on listening to the ranking member giving Mr. Olson a difficult time, saying that there is an unfair advantage for his client, given the fact that you are also representing individuals in the *PHH* case?

Ms. GOROD. I think there is a significant difference between a party in litigation and amici, and I understand the ranking member's concerns. I said my significant concern is with the substance of the testimony that has been given because I think it is inconsistent with the Constitution and with Supreme Court precedent.

Mr. ZELDIN. Yes. I think it is incredibly hypocritical on the part of the ranking member to be giving Mr. Olson a hard time and alleging that his client is going to be given an unfair advantage while you are also representing individuals in the *PHH* case. You are invited here to testify at this particular hearing. You appear on behalf of current and former ranking members in the *PHH* case, including Members who were here at this committee.

I yield back.

Chairwoman WAGNER. The gentleman yields back.

This concludes our—

Mr. GREEN. May I submit something for the record, with unanimous consent, Madam Chair?

Chairwoman WAGNER. Yes, without objection, it is so ordered.

Mr. GREEN. All right. I would like to place in the record an amicus brief that is in support of the rehearing en banc; a statement from Americans for Financial Reform; a letter that is addressed to the Chair from the Center for American Progress. And indicate that the ranking member didn't ask for the hearing. The ranking member responded to those who asked for the hearing. The ranking member still disagrees with it.

I yield back.

Chairwoman WAGNER. Without objection, those items will be placed in the record.

Again, I would like to thank our witnesses for their testimony today.

And, Mr. Olson, I want to thank you, since your former wife was referred to today by the ranking member for her sacrifice on September 11th and her untimely death, sir. It pains me greatly as a friend of hers and as an American citizen.

I thank you all for your testimony today.

The Chair notes that some Members may have additional questions for this panel, which they may wish to submit in writing. Without objection, the hearing record will remain open for 5 legislative days for Members to submit written questions to these witnesses and to place their responses in the record. Also, without objection, Members will have 5 legislative days to submit extraneous materials to the Chair for inclusion in the record.

This hearing is now adjourned.

[Whereupon, at 11:59 a.m., the hearing was adjourned.]

A P P E N D I X

March 21, 2017

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THE CONSTITUTIONALITY AND ACCOUNTABILITY OF THE CONSUMER FINANCIAL PROTECTION BUREAU

Testimony of Brianne J. Gorod
Chief Counsel, Constitutional Accountability Center
Before the Subcommittee on Oversight and Investigations
Financial Services Committee
United States House of Representatives

Tuesday, March 21, 2017, 10:00 AM
2128 Rayburn House Office Building

I would like to thank the Subcommittee for inviting me to assist its members and their colleagues in considering the constitutionality of the Consumer Financial Protection Bureau (CFPB). The CFPB was created in 2010 by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress' response to the devastating financial crisis of 2008. After months of evaluating the roots of the financial crisis and assessing the types of reforms needed, lawmakers concluded that a major culprit was the failure of a fragmented and unaccountable consumer financial protection regime to safeguard homeowners from reckless financial products. To remedy this failure, Congress established the CFPB, a bureau that would have the independence, resources, and mission focus needed to prevent a recurrence of those problems and respond to the challenges of an evolving financial marketplace. Since its creation, the CFPB has been incredibly successful in achieving its aims of protecting consumers and overseeing the financial sector. Among many other things, it has recovered billions of dollars for consumers who were defrauded by their credit card companies; it has promulgated new rules to end abusive mortgage practices; it has gone to bat for victims of for-profit schools; and it has documented widespread abuses in the payday lending market.

Despite (or perhaps because of) its many successes, the CFPB has been the subject of numerous attacks, including claims by its opponents that it is unconstitutional. This issue is particularly important now because the constitutionality of the CFPB's leadership structure is at issue in a case currently pending in the D.C. Circuit called *PHH Corp. v. Consumer Financial Protection Bureau*. Last October in that case, two judges of a three-judge panel held that the CFPB's leadership structure is unconstitutional.[1] Earlier this year, the full D.C. Circuit vacated that judgment and agreed that the whole court should rehear the case. The full D.C. Circuit will be hearing oral argument in the case on May 24, 2017.

I am currently Chief Counsel of the Constitutional Accountability Center, a public interest law firm, think tank, and action center, dedicated to realizing the progressive

[1] *PHH Corp. v. Consumer Financial Protection Bureau*, 839 F.3d 1 (D.C. Cir. 2016).

promise of our Constitution. I serve as counsel in *PHH Corp. v. CFPB* to current and former members of Congress, who were sponsors of Dodd-Frank, participated in drafting it, serve or served on committees with jurisdiction over the federal financial regulatory agencies and the banking industry, or served in the leadership when Dodd-Frank was passed. The Constitutional Accountability Center filed an *amicus* brief on behalf of these members in the D.C. Circuit arguing that the full court should rehear the case and hold that the CFPB's structure is, in fact, constitutional.[2] My colleagues and I also drafted a white paper, which explains at length why challenges to the constitutionality of the CFPB, including the one at issue in *PHH*, are without merit.[3] I also regularly speak on issues related to the Supreme Court, the lower federal courts, and the Constitution in public debates, on academic panels, and in the media.

Introduction and Summary

In 2008, the nation was plunged into "what has become known as the Great Recession."[4] Millions of Americans lost their jobs and their homes, and millions of American families lost trillions of dollars in net worth.[5] After more than fifty hearings devoted to "prob[ing] and evaluat[ing] the causes of the economic downfall" and "assess[ing] the types of reforms needed," lawmakers concluded that "[t]his devastation was made possible by a long-standing failure of our regulatory structure to keep pace with the changing financial system."[6] A key explanation for this regulatory failure, Congress concluded, was the fact that "[c]onsumer protection in the financial arena [was] governed by various agencies with different jurisdictions and regulatory approaches."[7]

To remedy these failures, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act,[8] which "end[ed] the fragmentation of the current system by combining the authority of the seven federal agencies involved in consumer financial protection in the CFPB, thereby ensuring accountability" and "leaving regulatory arbitrage and inter-agency finger pointing in the past."[9] The Dodd-Frank Act gave the CFPB "exclusive jurisdiction to promulgate regulations regarding the federal consumer

[2] Brief *Amici Curiae* of Current and Former Members of Congress in Support of Respondent's Petition for Rehearing En Banc, *PHH Corp. v. Consumer Financial Protection Bureau*, No. 15-1177, *available at* http://theusconstitution.org/sites/default/files/briefs/PHH-En-Banc-Amicus-CAC.pdf.
[3] Brianne J. Gorod, Brian R. Frazelle, & Simon Lazarus, *Constitutional and Accountable: The Consumer Financial Protection Bureau* (Oct. 2016), http://theusconstitution.org/sites/default/files/20161020_White_Paper_CFPB.pdf.
[4] S. REP. NO. 111-176, at 9 (2010).
[5] *Id.*
[6] *Id.* at 42.
[7] H.R. REP. NO. 111-367, pt. 1, at 91 (2009).
[8] Pub. L. No. 111-203, 124 Stat. 1376 (2010).
[9] S. REP. NO. 111-176, at 10-11, 168 (2010).

financial protection laws and primary jurisdiction to monitor and enforce those laws."[10]

As I noted earlier, there is currently a case pending in the D.C. Circuit that raises the question whether the CFPB's leadership structure is unconstitutional. Opponents of the CFPB have also argued that the CFPB's independent funding outside the congressional appropriations process is unconstitutional and, more generally, that the CFPB is unaccountable because it enjoys unlimited and unprecedented power. All of these arguments are wholly without merit.

To start, the CFPB's leadership structure—namely, the fact that it is led by a single Director removable only for cause—is consistent with the text and history of the Constitution, as well as Supreme Court precedent. In drafting the Constitution, the Framers gave Congress considerable flexibility in determining how to shape the federal government.[11] Consistent with that constitutional design, the Supreme Court held over 80 years ago that Congress may choose to shield the heads of independent regulatory agencies from presidential removal at will.[12] The Supreme Court has repeatedly reaffirmed that principle in the years since, including as recently as six years ago in an opinion by Chief Justice John Roberts.[13] In the process, the Court has explained that the question in assessing the constitutionality of a removal restriction is whether that restriction "impede[s] the President's ability to perform his constitutional duty."[14] Here, it plainly does not because if the President determines, for instance, that the Director is "abusing [his] offic[e]," committing a "breach of faith," or "neglecting his duties or discharging them improperly," the President may hold the Director accountable by removing him.[15]

Nor is there any constitutional prohibition on the CFPB being funded outside the congressional appropriations process. Indeed, it is common practice for federal financial regulatory agencies to be funded outside the congressional appropriations process, and all but two are funded in that way.[16] Opponents of the CFPB sometimes argue that its independent funding is prohibited by the Constitution's Appropriations Clause,[17] but that Clause is a limit on withdrawing money from the federal Treasury. Because the Bureau's funding does not involve paying money out of the Treasury, that Clause is irrelevant. And no other part of the Constitution prohibits Congress "from enacting funding structures for agencies that differ from the procedures prescribed by

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[10] Susan Block-Lieb, Accountability and the Bureau of Consumer Financial Protection, 7 BROOK. J. CORP. FIN. & COM. L. 25, 29 (2012).
[11] *See infra* notes 26-33 & accompanying text.
[12] *Humphrey's Ex'r v. United States*, 295 U.S. 602, 631 (1935).
[13] *See infra* notes 36-37.
[14] *Morrison v. Olson*, 487 U.S. 654, 691 (1988).
[15] *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 496, 484 (2010).
[16] *See infra* notes 69-73 & accompanying text.
[17] U.S. Const. art. I, § 9, cl. 7.

the ordinary appropriations process."[18]

Finally, CFPB opponents argue that the CFPB's power is both unprecedented and unlimited. This, too, is clearly wrong. In fact, the CFPB's powers resemble those of comparable financial regulatory agencies and are subject to the same restrictions, along with additional limits unique to the Bureau.[19]

The CFPB's Leadership Structure Is Consistent with the Text and History of the Constitution, as Well as Supreme Court Precedent

In setting up the CFPB, Congress made the considered choice to have the CFPB headed by a Director who is appointed by the President, with the advice and consent of the Senate, to a term of five years.[20] The President may remove a sitting Director "for inefficiency, neglect of duty, or malfeasance in office."[21]

Although the original idea for the Bureau was to create a financial-products counterpart to the Consumer Product Safety Commission ("CPSC"),[22] the five-member structure of that Commission had been shown to seriously hamper its effectiveness. The Government Accountability Office, for example, concluded that this structure fostered instability, delay, and a lack of independence.[23] The financial crisis, however, showed the need for a regulator that could respond promptly and decisively to protect consumers from emerging threats. A single-director model, which scholars generally associate with greater "efficiency and accountability,"[24] promised to avert another devastating failure to "keep pace with the changing financial system."[25]

Congress' decision to structure the CFPB in this way is plainly constitutional. To start, there is no support in the Constitution's text or history for the proposition that an officer like the Director of the CFPB must be removable at will. Significantly, although

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[18] *CFPB v. ITT Educ. Servs., Inc.*, --- F. Supp. 3d ---, No. 14-0292, 2015 WL 1013508, at *12; *accord CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1092 (C.D. Cal. 2014); *see Am. Fed'n of Gov't Emps., AFL-CIO, Local 1647 v. FLRA*, 388 F.3d 405, 409 (3d Cir. 2004) ("Congress may . . . decide not to finance a federal entity with appropriations.").
[19] *See infra* notes 76-102 & accompanying text.
[20] 12 U.S.C. § 5491(b)(1), (b)(2), (c)(1).
[21] *Id.* § 5491(c)(3).
[22] *See* Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY J. 8, 16 (Summer 2007).
[23] U.S. GOV'T ACCOUNTABILITY OFFICE, CONSUMER PRODUCT SAFETY COMMISSION: ADMINISTRATIVE STRUCTURE COULD BENEFIT FROM CHANGE, at 3, 6, 9-10 (Apr. 1987); *see* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 67, 71 (2010) (concluding that by 2008 the CPSC had "fallen far short of its statutory mandate" and was "widely regarded as one of the least politically independent and influential agencies in government").
[24] Arthur E. Wilmarth, *The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 REV. BANKING & FIN. L. 881, 919 (2012).
[25] S. REP. NO. 111-176, at 40 (2010).

the Constitution provides for executive officers to assist the President and sets forth a small number of rules regarding their appointment and responsibilities,[26] "[t]he text and structure of the Constitution impose few limits on Congress's ability to structure administrative government."[27] Indeed, "[i]n almost all significant respects, . . . the job of creating and altering the shape of the federal government was left to the future."[28]

The Framers ensured that future Congresses would have "the flexibility required for shaping the government to the demands of changing circumstances,"[29] by granting Congress the authority to "make all Laws which shall be necessary and proper for carrying into Execution . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[30] Notably, participants at Philadelphia rejected a plan that would have enumerated specific executive departments and prescribed their duties in the Constitution itself, partly out of a desire "to leave to successive Congresses, through the medium of the necessary and proper clause, the flexibility required for shaping the government to the demands of changing circumstances."[31] As Chief Justice John Marshall later observed, the Necessary and Proper Clause, like the Constitution itself, was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."[32] By contrast, "[t]o have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument," resulting in "an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur."[33] In other words, the Constitution gives Congress the means to structure the executive branch so as to respond effectively to pressing challenges of the day, including the need to ensure that consumer finance abuses do not again cause a cataclysmic economic collapse.

Consistent with this history, the Supreme Court has long recognized that

[26] *See* U.S. CONST. art. II, § 2, cl. 2 (regarding appointment of "Officers of the United States" and "inferior Officers"); *id.* art. II, § 2, cl. 1 (authorizing the President to "require the Opinion, in writing, of the principal Officers in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices").
[27] Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 597 (1984); *see Free Enter. Fund*, 561 U.S. at 500 ("Congress has plenary control over the salary, duties, and even existence of executive offices.").
[28] Strauss, *supra* note 27, at 597, 598-99.
[29] *Id.* at 601.
[30] U.S. CONST. art. I, § 8, cl. 18.
[31] Strauss, *supra* note 27, at 601; *see* 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 250-51 (Jonathan Elliot ed., 1836) (proposal specifying duties of six department secretaries, all serving at the pleasure of the President).
[32] *M'Culloch v. Maryland*, 17 U.S. 316, 415 (1819).
[33] *Id.*

Congress may choose to shield the heads of independent regulatory agencies from presidential removal at will. In *Humphrey's Executor v. United States*, the Court upheld a removal provision identical to the one governing the CFPB Director in a case involving an FTC Commissioner, an officer whose functions were not materially different from those of the CFPB Director.[34] "Then as now, the FTC was empowered to prevent 'unfair methods of competition in commerce,'" and "to carry out this responsibility, the FTC had the power to investigate, adjudicate, and enforce the prohibition on unfair competition."[35] In the years since, the Supreme Court has repeatedly reaffirmed *Humphrey's Executor*,[36] including just six years ago.[37]

In deciding these cases, the Court has explained that "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light."[38] Such analysis is designed "to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II."[39] For instance, where a statute prevents the President from removing executive officials even if they "are abusing their offices or neglecting their duties," this "subverts the President's ability to ensure that the laws are faithfully executed" and therefore is "incompatible with the Constitution's separation of powers."[40]

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[34] 295 U.S. at 629.

[35] *Morgan Drexen*, 60 F. Supp. 3d at 1087 (quoting *Humphrey's Ex'r*, 295 U.S. at 620-21). Although *Humphrey's Executor* described the FTC as a "quasi-legislative" or "quasi-judicial" agency, the Court since has acknowledged that "it is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." *Morrison*, 487 U.S. at 689 n.28. In any event, the investigation and enforcement powers of the CFBP are, however described, no more closely tied to the President's inherent constitutional powers than were the powers of the FTC at the time of *Humphrey's Executor*.

[36] *Wiener v. United States*, 357 U.S. 349, 356 (1958) (unanimously rejecting "the claim that the President could remove a member of an adjudicatory body like the War Claims Commission merely because he wanted his own appointees on such a Commission" and holding instead "that no such power is given to the President directly by the Constitution"); *Morrison*, 487 U.S. at 691 (upholding removal limits for the independent counsel established by the Ethics in Government Act because "we cannot say that the imposition of a 'good cause' standard for removal by itself unduly trammels on executive authority"). Other decisions in which the Court has reaffirmed the validity of *Humphrey's Executor* include *Mistretta v. United States*, 488 U.S. 361, 410-11 (1989); *Bowsher v. Synar*, 478 U.S. 714, 725-26 (1986); *I.N.S. v. Chadha*, 462 U.S. 919, 953 n.16 (1983); and *Buckley v. Valeo*, 424 U.S. 1, 136, 141 (1976).

[37] *Free Enter. Fund*, 561 U.S. at 483, 509.

[38] *Morrison*, 487 U.S. at 691; *see Humphrey's Ex'r*, 295 U.S. at 627-32.

[39] *Morrison*, 487 U.S. at 689-90.

[40] *Free Enter. Fund*, 561 U.S. at 496, 498. And the Court has suggested that there are "some 'purely executive' officials who must be removable by the President at will if he is

Under these established standards, the CFPB Director's removal protections are constitutional. Dodd-Frank provides that the President may remove the Director "for inefficiency, neglect of duty, or malfeasance in office."[41] Thus, the President's ability to remove the Director only for cause does not "impede the President's ability to perform his constitutional duty."[42] To the contrary, it "provides the Executive with substantial ability to ensure that the laws are 'faithfully executed.'"[43] If the President determines, for instance, that the Director is "abusing [his] offic[e]," committing a "breach of faith," or "neglecting his duties or discharging them improperly,"[44] the President may hold the Director accountable by removing him. This option preserves "the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts."[45] The Constitution requires no more.

To overcome this clear-cut precedent, opponents of the Bureau emphasize that the CFPB is headed by a single Director rather than a multimember commission, and they argue that this distinction makes a constitutional difference. But they have never successfully explained why. CFPB opponents often rely heavily on an earlier case, *Myers v. United States*, in which the Court struck down a congressional limit on presidential removal powers,[46] and they argue that the Court in *Humphrey's Executor* departed from its result in *Myers* because of the FTC's composition as a multimember body.[47] But that suggestion is demonstrably false. "*Humphrey's Executor* did not distinguish *Myers* on the basis that *Myers* involved an officer, not a commission."[48] Rather, the Court stated that the validity of removal limitations "will depend upon the character of the office," and it differentiated the role of an FTC commissioner from the "purely executive" role of the postmaster at issue in *Myers*.[49] The Court also identified another reason why the removal limit at issue in *Humphrey's Executor* was constitutionally distinct from the removal limit in *Myers*: the statute in *Myers* not only limited the President's removal of the postmaster but also gave an entirely different branch of government the right to approve or deny that removal—by conditioning it on "the advice and consent of the Senate."[50]

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to be able to accomplish his constitutional role." *Morrison*, 487 U.S. at 690. But the latter do not include the heads of independent regulatory agencies like the FTC. *See Free Enter. Fund*, 561 U.S. at 483, 509; *Wiener*, 357 U.S. at 356; *Humphrey's Ex'r*, 295 U.S. at 628-29.

[41] 12 U.S.C. § 5491(c)(3).

[42] *Morrison*, 487 U.S. at 691.

[43] *Id.* at 696.

[44] *Free Enter. Fund*, 561 U.S. at 484, 496.

[45] *Id.* at 498.

[46] 272 U.S. 52 (1926).

[47] *See, e.g.*, *Morgan Drexen*, 60 F. Supp. 3d at 1087 (quoting defendants' memorandum).

[48] *Id.* at 1088.

[49] *Humphrey's Ex'r*, 295 U.S. at 631.

[50] *Myers*, 272 U.S. at 107.

The Bureau's detractors also argue that it has been given an unprecedented breadth of power without a corresponding degree of democratic accountability. An agency this powerful, they say, must be restrained by internal checks such as those that characterize a multimember board. To start, this critique is simply wrong as a factual matter. The Bureau's powers are comparable to those of other financial regulatory agencies, and it is bound by an extensive web of requirements and checks on its power.[51]

This critique is also incoherent as a constitutional matter. As just noted, "the real question" is whether removal restrictions "impede the President's ability to perform his constitutional duty."[52] No plausible argument can be made that leadership by a multimember body would enhance the President's ability to ensure faithful execution of the laws. Quite the opposite: if the Bureau's leadership structure had any significance under Article II, this factor would weigh *in favor* of a single director, because a multimember board serving staggered terms is, if anything, *less* accountable to the President. To alter the direction of such a board, the President would have to remove several members and replace them with new Senate-confirmed nominees, "while only one [change] is required in order to change the leadership of the CFPB."[53] And with a multimember board, even the preliminary step of identifying *which* officers need to be removed can be problematic. A single director, by contrast, offers a clear and direct line of accountability when an agency has strayed from its statutory mandate.

In place of an argument grounded in the Constitution's text and history or Supreme Court precedent, Bureau opponents tout the alleged virtues of multimember agencies. They argue that "multi-member commissions allow for 'collegial decisionmaking,' open public meetings, and 'expert' decisions, and are therefore better equipped to head agencies with substantial responsibilities such as the CFPB."[54] Whether or not any of this is true,[55] it has nothing to do with the issue, which is whether

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[51] *See infra* notes 76-102 & accompanying text.
[52] *Morrison*, 487 U.S. at 691.
[53] *Morgan Drexen*, 60 F. Supp. 3d at 1088. "Presidents may have relatively less direct influence over multimember agencies, if only because these agencies have members who serve staggered terms." Barkow, *supra* note 23, at 38.
[54] *Morgan Drexen*, 60 F. Supp. 3d at 1092 (quoting defendants' memorandum).
[55] Although "[t]he scholarly literature on agency design has not achieved any consensus as to the superior form of organization," Congress concluded that "[i]n the case of the CFPB there are particularly salient reasons *not* to adopt a multi-member commission structure. For consumer protection, we should want a structural bias toward action rather than inaction. We have seen the result of financial regulators asleep at the switch." *Enhanced Consumer Protection After the Financial Crisis: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 112th Cong. 112-13 (2011) (prepared statement of Adam J. Levitin); *see* Wilmarth, *supra* note 24, at 921 ("Creating a five-member commission would likely produce more delay and less consistency in CFPB's decisionmaking [and] would expose CFPB to the risk of leadership deadlock whenever a commissioner left office.").

removal restrictions "impede the President's ability to perform his constitutional duty."[56] Using a single director instead of a multimember commission to lead an agency does not reduce the President's control over that agency—if anything, it *increases* control. It is irrelevant to the constitutional analysis, therefore, whether multimember bodies are better at making wise decisions. That question is within the province of the people's representatives in Congress.

There Is No Constitutional Bar to the CFPB's Funding Structure, Which Is Consistent with that of Other Financial Regulatory Agencies

In setting up the CFPB, Congress determined that it should be funded by the earnings of the Federal Reserve System instead of by congressional appropriations. Thus, the Federal Reserve annually transfers an amount of up to twelve percent of its operating expenses to the Bureau, upon the Director's determination that the amount is reasonably necessary to carry out the Bureau's mission.[57]

The CFPB's funding structure is completely constitutional. In arguing otherwise, opponents of the CFPB often point to the Appropriations Clause of Article I, which provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."[58] But this provision is simply what it appears to be—a limit on withdrawing money from the federal Treasury.[59] Because the Bureau's funding does not involve paying money out of the federal Treasury, the Appropriations Clause is irrelevant. Moreover, no other part of the Constitution prohibits Congress "from enacting funding structures for agencies that differ from the procedures prescribed by the ordinary appropriations process."[60]

Notably, "when the Framers intended to limit the means by which Congress funds government functions, they did so in precise terms."[61] For instance, the Constitution explicitly prohibits appropriations lasting more than two years to "raise and support Armies."[62] This limit was intended as a check against the permanent

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[56] *Morrison*, 487 U.S. at 691.
[57] 12 U.S.C. § 5497(a)(1).
[58] U.S. CONST. art I, § 9, cl. 7.
[59] *Morgan Drexen*, 60 F. Supp. 3d at 1092 (""The Supreme Court has 'underscore[d] the straightforward and explicit command of the Appropriations Clause. It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" (quoting *Office of Pers. Mgmt. v. Richmond,* 496 U.S. 414, 424 (1990)) (additional internal quotation marks omitted)).
[60] *ITT Educ. Servs.*, 2015 WL 1013508, at *12; *accord Morgan Drexen*, 60 F. Supp. 3d at 1092; *see Am. Fed'n of Gov't Emps., AFL-CIO, Local 1647,* 388 F.3d at 409 ("Congress may . . . decide not to finance a federal entity with appropriations.").
[61] Combined Mem. in Support of Defendants' Cross-Mot. for Summary Judgment and Dismissal and in Opp. to Plaintiffs' Mot. for Summary Judgment, at 24, *State Nat'l Bank of Big Spring v. Lew*, No. 12-1032 (D.D.C. Jan. 8, 2016) ("DOJ Memorandum").
[62] U.S. CONST. art I, § 8, cl. 12.

maintenance of a standing military.[63] No provision in the Constitution "prohibit[s] Congress from creating funding mechanisms that enjoy some degree of insulation from its own year-to-year control."[64]

Moreover, by specifying that the CFPB's annual funding is not subject to appropriations committee review,[65] the Dodd-Frank Act does not unconstitutionally deprive future Congresses of any power. While the Act "does indeed restrict the House and Senate Appropriations Committees from reviewing the Bureau's primary funding source . . . it does not strip Congress *as a whole* of its power to modify appropriations as it sees fit."[66] "Congress can always alter the CFPB's funding in any appropriations cycle (or at any other time)."[67] Thus the Bureau's funding structure is not "shielded from future congressional alteration, nor could it be."[68]

It bears emphasis that independent funding "is no recent innovation. As early as the 1790s, Congress authorized certain agencies to fund their activities through permanent revolving funds rather than withdrawals from the Treasury."[69] Moreover, budgetary independence is now standard for financial regulatory agencies. Except for the Securities and Exchange Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC"), "no federal financial regulator is subject to congressional appropriations."[70] Thus, the Federal Deposit Insurance Corporation ("FDIC"), Federal Housing Finance Agency ("FHFA"), Federal Reserve Board ("FRB"), National Credit Union Administration ("NCUA"), Office of the Comptroller of the Currency ("OCC"), and Public Company Accounting Oversight Board ("PCAOB") all receive their funding from independent sources rather than congressional appropriations. The FRB "finances its operations from the earnings generated by its large portfolio of government securities and other investments," while the OCC, FDIC, and FHFA "fund their operations primarily

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[63] *See* THE FEDERALIST NO. 26, at 139-42 (C. Rossiter ed., 1961) (Hamilton).
[64] *ITT Educ. Servs.*, 2015 WL 1013508, at *12. If the Constitution did prohibit such insulation, then permanent or indefinite appropriations presumably would be unconstitutional as well. But that clearly is not so, given the Constitution's explicit prohibition on only one form of permanent or indefinite appropriation (to raise and support armies), *see* U.S. CONST. art I, § 8, cl. 12, and Congress has long provided for such appropriations.
[65] *See* 12 U.S.C. § 5497(a)(2)(C).
[66] *ITT Educ. Servs.*, 2015 WL 1013508, at *12; *see Dorsey v. United States*, 132 S. Ct. 2321, 2331 (2012) ("[S]tatutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute[.]").
[67] *PHH Corp.*, 839 F.3d at 36 n.16.
[68] *Id.* (citing *Manigault v. Springs*, 199 U.S. 473, 487 (1905)).
[69] DOJ Memorandum, *supra* note 61, at 25 (citing 1794 statute regarding post-office funding).
[70] Wilmarth, *supra* note 24, at 951. Those two exceptions illustrate why Congress deliberately chose to insulate the CFPB, like nearly all other financial regulators, from the annual appropriations process. As one commentator has noted, "Congress has undermined the effectiveness of CFTC and SEC over the past two decades by frequently failing to provide those agencies with adequate funds." *Id.*

by collecting fees and assessments from the institutions they regulate,"[71] as do the NCUA and PCAOB.[72] The same was true of the former Office of Thrift Supervision ("OTS").[73]

Moreover, unlike the Bureau, these other regulatory entities are all *completely* independent of congressional appropriations. "In contrast, CFPB has substantial but not complete budgetary autonomy," because it must seek appropriations for any amounts that exceed twelve percent of the Federal Reserve's operating expenses.[74] Among the numerous financial regulators with independent funding, the CFPB's budget "is the only one subject to a cap or to an annual audit by the Government Accounting Office."[75]

The CFPB Is Not Only Constitutional, But Politically Accountable, Because Its Authorities Are Limited by Restrictions That in Many Ways Exceed Those Governing Comparable Institutions

In addition to arguing that the CFPB is unconstitutional, CFPB opponents also argue that it is unaccountable on the ground that its powers are both unprecedented and unlimited. Both assertions are false. To start, leadership by a single director is a common feature among agencies, particularly health and safety regulators, while independent funding is the norm for financial regulators. The Bureau is not the first agency to combine those two features, having been preceded in this regard by the OCC, OTS, and FHFA. Nor is it the first such agency whose director is removable only for cause: this is true of the FHFA,[76] and the OCC is also highly similar in this regard.[77] While the Bureau has different rulemaking and enforcement responsibilities than other agencies (something that is true of every regulator), its authorities are in no way novel, and they are limited by restrictions, both internal and external, that in many ways exceed those governing comparable institutions.

For example, the "CFPB's rulemaking and enforcement authorities resemble

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[71] Wilmarth, *supra* note 24, at 906.

[72] *See* 12 U.S.C. § 1755(a), (b) (NCUA); 15 U.S.C. § 7219(c)(1), (d)(1) (PCAOB).

[73] *See* Block-Lieb, *supra* note 10, at 33.

[74] Wilmarth, *supra* note 24, at 906.

[75] Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 341 (2013); Wilmarth, *supra* note 24, at 911.

[76] *See* 12 U.S.C. § 4512(a), (b).

[77] The Comptroller of the Currency serves a five-year term unless removed by the President "upon reasons to be communicated by him to the Senate." 12 U.S.C. § 2. While it is unclear whether this requirement of "reasons"—contained in language that dates to 1864—is any different from a typical good-cause removal restriction, Comptrollers in recent decades have frequently served their full terms, spanning intervening changes in presidential administration and political party. *See* Past Comptrollers of the Currency, http://www.occ.gov/about/who-we-are/leadership/past-comptrollers/index-past-comptrollers.html.

those of other federal bank regulators," including the OCC, FDIC, FHFA, and FRB.[78] Like the CFPB, those entities "all have authority to examine financial service providers subject to their respective jurisdictions in order to ensure compliance with applicable laws and regulations. All five regulators also have comprehensive enforcement powers, including the authority to issue administrative cease-and-desist orders and civil money penalty orders."[79]

To be sure, the CFPB "has rulemaking, supervision, and enforcement authority over an extremely broad swath of the consumer financial services industry."[80] That was the point of creating the agency. After it became evident that the fragmented state of consumer financial regulation helped bring the nation to the brink of economic ruin, Congress resolved to "end[] the fragmentation of the current system by combining the authority of the seven federal agencies involved in consumer financial protection in the CFPB, thereby ensuring accountability."[81] But "[t]hese powers are all subject to a variety of limitations, not only in the scope of the entities subject thereto, but also in the procedures the CFPB must use when exercising the powers."[82] Where the Bureau's authority is greatest, in rulemaking, it is restricted by a greater number of checks than where its power is more narrow, such as in enforcement. Thus, "while CFPB's powers are undeniably broad, the agency is constrained by significant statutory limitations, 'includ[ing] some unique requirements that other banking regulators do not face.'"[83]

"Like all federal agencies," for instance, "the CFPB's rulemaking is subject to the Administrative Procedure Act," which requires that the Bureau's rulemaking "proceed with public notice of proposed rulemakings, provision of an opportunity for the public to comment on the proposal, and publication of the final rule before its effective date."[84] Once a rule has been finalized and issued, "the CFPB's rulemaking activities are subject to judicial review under standard administrative law jurisprudence."[85]

In addition, the Bureau's rulemaking "is subject to specific burdens of proof set out in the [Dodd-Frank] Act."[86] For example, the Bureau is "required by statute to undertake a cost-benefit analysis of its rulemakings."[87] Before issuing any rule, "the CFPB must 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' as well as the impact on small

[78] Wilmarth, *supra* note 24, at 885, 900.
[79] *Id.* at 907-08.
[80] Levitin, *supra* note 75, at 343.
[81] S. REP. NO. 111-176, at 10-11, 168 (2010).
[82] Levitin, *supra* note 75, at 343-44.
[83] Wilmarth, *supra* note 24, at 911 (quoting Kate Davidson, *Four Big Myths About CFPB and Its Powers*, AM. BANKER, June 3, 2011, at 1).
[84] Levitin, *supra* note 75, at 348.
[85] *Id.*
[86] Block-Lieb, *supra* note 10, at 44.
[87] Levitin, *supra* note 75, at 352.

depositaries and rural consumers."[88] Furthermore, "when regulating unfair, deceptive, or abusive practices, Dodd-Frank overlays a second cost-benefit analysis," which requires meeting various stringent burdens of proof.[89]

Unlike most agencies, moreover, "the CFPB is subject to a set of further restrictions and review on its rulemaking authority."[90] One of these is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), which "requires agencies to undertake certain procedural steps to encourage them to minimize the cost of rules on small entities."[91] The CFPB is the only independent agency subject to this Act, and "[a]dditional SBREFA provisions were added in 2010 that apply solely to the CFPB."[92]

External restrictions limit the Bureau's rulemaking as well. "Dodd-Frank also creates a sort of 'super prudential regulator,'"[93] the Financial Stability Oversight Council ("FSOC"), which acts as "a 'Justice League' of financial regulators tasked with preventing systemic risk."[94] The FSOC is empowered to veto or stay the implementation of any rules promulgated by the Bureau. Members of the Council may petition for review of a CFPB rulemaking, and may, by a two-thirds majority, set aside a rule that "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."[95] While the CFPB is unlikely to propose such a rule, this structure nonetheless reflects the supervision to which the CFPB is subject. Notably, this structure "is unique in federal legislation,"[96] and the Bureau "is the only federal financial regulator whose regulations are subject to override by an appellate body composed of heads of other agencies."[97]

In addition, before adopting any rule, the CFPB is required to engage in consultations with other agencies. The Bureau must consult "with federal banking regulators and other appropriate federal agencies about the 'consistency' of the proposed rule with 'prudential, market, or systemic objectives administered by such agencies.' If any prudential regulator objects in writing to a proposed CFPB regulation,

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[88] *Id.* at 352 (quoting 12 U.S.C. § 5512(b)(2)).
[89] Block-Lieb, *supra* note 10, at 45. For example, the Act "defines 'unfair' to require the Bureau to conclude that the questionable practice 'is likely to cause substantial injury to consumers' that is not 'reasonably avoidable by consumers' and 'is not outweighed by countervailing benefits.'" *Id.* (quoting 12 U.S.C. § 5531(c)).
[90] Levitin, *supra* note 75, at 348.
[91] *Id.* at 349; *see* Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. §§ 601-612).
[92] Levitin, *supra* note 75, at 349, 351.
[93] Block-Lieb, *supra* note 10, at 47.
[94] Levitin, *supra* note 75, at 353.
[95] 12 U.S.C. § 5513(a), (c)(3)(A).
[96] Levitin, *supra* note 75, at 354.
[97] Wilmarth, *supra* note 24, at 910.

CFPB must include in its final rulemaking a description of the regulator's objection and CFPB's response to that objection."[98]

In sum, an array of requirements and procedural checks—including APA constraints, cost-benefit analysis requirements, SBREFA requirements, consultation obligations, and the possibility of an FSOC veto—limit the Bureau's rulemaking powers, imposing restrictions as well as avenues for outside influence.

Although these requirements apply only to rulemaking and not to enforcement actions, the CFPB "is less independent when viewed as an enforcement agent" because its authority there is not exclusive.[99] Unlike rulemaking, "enforcement and supervisory authority remains divided under the statute depending on the type of consumer lender at issue," meaning that the Bureau "must share enforcement jurisdiction with a complex assortment of federal and state regulators," on whom it may need to rely to enforce its regulations.[100]

Furthermore, in the enforcement realm, there is no plausible argument to be made that the Bureau wields unchecked authority. To remedy any alleged violation of consumer financial law, the Bureau must go to federal court—either in the first instance or to enforce orders obtained in an administrative hearing.[101]

As this review of the Bureau's jurisdiction and authorities demonstrates, there is nothing extraordinary or unprecedented about the powers it exercises. These powers resemble those of comparable financial regulatory agencies and are subject to the same restrictions, along with additional limits unique to the Bureau.[102]

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In sum, the text, structure, and history of the Constitution, together with decades of Supreme Court precedent, demonstrate that the CFPB is constitutional. A close examination of its powers, and the checks on those powers, make clear that it is also politically accountable.

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[98] *Id.* at 909-10 (quoting 12 U.S.C. § 5512(b)(2)(B), (C)).
[99] Block-Lieb, *supra* note 10, at 55.
[100] *Id.* at 49-50.
[101] *See* 12 U.S.C. § 5563(b)(4), (c)(2), (d)(1); *id.* § 5564(a), (f).
[102] Apart from this web of requirements and constraints, the CFPB lacks a host of powers typically exercised by financial regulators, including the power to remove or suspend officers and directors, the ability to act as conservator or receiver of a regulated institution, prudential authority to regulate banks for safety and soundness, and supervisory power over institutional decisions. *See* Wilmarth, *supra* note 24, at 907-08.

Written Testimony of Theodore B. Olson

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

The Consumer Financial Protection Bureau's Unconstitutional Design

March 21, 2017
Washington, D.C.

I. Introduction

Thank you, Chairman Wagner and Ranking Member Green, for the opportunity to address the constitutionality of the structure of the Consumer Financial Protection Bureau, or "CFPB." The views I express are my own and not necessarily those of my Firm or any client.

The Framers of our Constitution agreed above everything else that "[n]o political truth is certainly of greater intrinsic value … [than that the] accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many … may justly be pronounced the very definition of tyranny."[1] That principle animated their thoughtful, considered, and thoroughly debated decision to structure a government of carefully separated powers with elaborate checks and balances. And that structure has endured for 230 years, far longer than any governmental structure in history, and has delivered to the American people a prosperous, strong, and free society, which is and has been the envy of the world. However tempting it may be to invent new and complex structures in the interest of accomplishing some perceived efficiency or "independence," we abandon the carefully wrought structure of our Constitution at risk of eroding the vital structural safeguards that were designed to preserve our strength and our liberties.

The Dodd-Frank Wall Street Reform and Consumer Protection Act, commonly known as the Dodd-Frank Act, violated this principle of separated

[1] *The Federalist No. 47*, at 301 (Madison) (Clinton Rossiter ed., 1961).

powers when it created the CFPB. The CFPB is an executive agency possessing far-reaching legislative, executive, and judicial powers that impact vast sectors of our economy. It is headed by a single Director who has broad discretion to enforce 19 federal consumer protection laws, promulgate regulations, litigate in the name of the federal government, and punish private citizens—all without any accountability to the President, in whom the Constitution vests the executive power to "take Care that the Laws be faithfully executed." The Director's immense powers are perpetually funded outside the auspices of congressional oversight and appropriation. The Director also has expansive authority to hire, fire, and compensate CFPB employees, including discretion to waive the normal competitive-service requirements. Alone among agencies with the authority to enforce our laws, the CFPB is unusual in that none of the Director's senior subordinates is subject to the power of the Senate to advise and consent to his or her appointment. More than any other administrative agency ever created by Congress, the CFPB is far outside of our constitutional structure, holds the potential for tyrannical governance, and obscures the lines of governmental accountability.

My testimony will proceed in three parts. First, I will outline the constitutional separation-of-powers principles that should inform the Subcommittee's deliberations. In doing so, I will address the text and history of the relevant constitutional provisions, and also the Supreme Court's jurisprudence in this area. Second, I will explain why the CFPB's unique structure and significant powers cannot be reconciled with our constitutional tradition. Third, I will comment on ways in which the CFPB's constitutional infirmities may be addressed.

My testimony will focus on the constitutionality of the CFPB, not on the policy justifications for its creation. Regardless of disparate views on these policy matters, I am certain that all of us share a keen desire to uphold the Constitution's separation-of-powers principles. My goal is to summarize those principles and apply them to the structure of the CFPB.

II. Constitutional Separation-Of-Powers Principles Require Accountability In The Executive Branch.

Our Constitution's separation of powers is the genius of our republic, and must be zealously defended against encroachment in order to secure our liberties. As the late Justice Scalia explained, "[w]ithout a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours."[2] Adhering to separation-of-powers principles is not just a matter of good housekeeping. It is a constitutional imperative.

The Constitution's "vesting" clauses divide the government's powers into "three defined categories, Legislative, Executive, and Judicial."[3] These powers, in turn, are assigned to three "separate and distinct" Branches of government.[4] "All legislative Powers" that the federal government possesses are "vested in" Congress, including the power to make appropriations.[5] "The executive Power" is "vested in a President," who must "take Care that the Laws be faithfully executed."[6] And "[t]he judicial Power" to decide cases and controversies is "vested in" the Supreme Court and the lower federal courts.[7] This is not to say that the Constitution "requires that the three branches of Government 'operate with absolute independence.'"[8] But the Supreme Court has "not hesitated to invalidate provisions of law which violate this principle," reaffirming "the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches."[9]

A critical aspect of this structure is the Framers' "conspicuous[]" refusal to "sap the Executive's strength" by "dividing the executive power."[10] During a series of debates in June 1787, "[p]roposals to have multiple executives, or a council of advisers with separate authority were rejected" in the Framers' efforts to establish a "just Government" accountable to the people.[11] Edmund Randolph, for example, opposed a unitary executive "with great earnestness" and argued that a "plurality" was "equally competent to all the objects of the department" of the

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2 *Morrison* v. *Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

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

4 *The Federalist No. 51*, *supra* note 1, at 355 (Madison).

5 U.S. Const. art. I, § 1; *id.* § 9, cl. 7.

6 *Id.* art. II, §§ 1, 3.

7 *Id.* art. III, § 1.

8 *Morrison*, 487 U.S. at 693–94 (majority op.) (quoting *United States* v. *Nixon*, 418 U.S. 683, 707 (1974)).

9 *Id.* at 693.

10 *Id.* at 698–99 (Scalia, J., dissenting).

11 *Id.* at 697, 699 (Scalia, J., dissenting).

executive.[12] But others argued that a "single person" would "feel the greatest responsibility, and administer the public affairs best,"[13] and that multiple executives could produce "animosities" that would "interrupt the public administration."[14] Recognizing that "[e]nergy in the Executive is a leading character in the definition of good government," and that "unity" is first among the "ingredients which constitute energy in the Executive,"[15] the Framers explicitly and categorically rejected the concept of a plural executive and squarely determined that "[t]he executive Power shall be vested in *a President of the United States of America*."[16]

The Framers emphasized the advantages of a unitary executive in urging the States to ratify the Constitution. Alexander Hamilton explained that "[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number."[17] By contrast, "[w]henever two or more persons are engaged in any common enterprise or pursuit, there is always danger of difference of opinion," which is liable to produce "bitter dissensions" that "lessen the respectability, weaken the authority, and distract the plans and operations of those whom they divide."[18] Moreover, plurality in the executive can make it "impossible ... to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall," because blame can be "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."[19] In short, "the plurality of the Executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power, *first*, the restraints of public opinion, ... and, *second*, the opportunity of discovering with facility and

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[12] 1 Max Farrand, *The Records of the Federal Convention of 1787*, at 88 (1911) (Edmund Randolph).

[13] *Id.* at 65 (John Rutledge).

[14] *Id.* at 96 (James Wilson).

[15] *Federalist No. 70*, *supra* note 1, at 423–24 (Hamilton).

[16] U.S. Const. art. II, § 1 (emphasis added).

[17] *Federalist No. 70*, *supra* note 1, at 424 (Hamilton).

[18] *Id.* at 425–26.

[19] *Id.* at 428.

clearness the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment."[20]

Ever since that unequivocal founding, "the Constitution has been understood to empower the President to keep [executive] officers accountable—by removing them from office, if necessary."[21] This removal power enables the President to discharge his duty to "take Care that the Laws be faithfully executed" by "oversee[ing] the faithfulness of the officers who execute them," including by removal.[22] It also vindicates the Constitution's separation-of-powers principles: If the President were powerless to remove a faithless subordinate executive officer, that officer—and the executive agency headed by the officer—would effectively be operating outside the executive department, unaccountable to the President or the people.[23] Because the President must be able to "supervise and guide" the actions of the officers who execute federal laws, he "must have the power to remove [those officers] without delay."[24] "Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey."[25]

The Constitution therefore requires that the President be able to hold executive officers accountable by holding the power of removing them from office in his or her discretion. And the Supreme Court has largely recognized that "the traditional default rule" is that the power of "removal is incident to the power of appointment."[26] It is true that in *Humphrey's Executor* v. *United States*, the Supreme Court permitted Congress to depart from the Constitution's design in order to establish an independent agency headed by a multi-member "body of experts" appointed by the President but removable only for cause, which the Court

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[20] *Id.* at 428–29.

[21] *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010); *see also Myers* v. *United States*, 272 U.S. 52 (1926).

[22] *Free Enter. Fund*, 561 U.S. at 484.

[23] *See Morrison*, 487 U.S. at 715 (Scalia, J., dissenting) (recognizing that separation-of-powers principles "give life and content to ... the President's power to appoint and remove officers").

[24] *Myers*, 272 U.S. at 134–35.

[25] *Bowsher* v. *Synar*, 478 U.S. 714, 726 (1986) (quotation marks omitted).

[26] *Free Enter. Fund*, 561 U.S. at 509.

perceived would act, not as the executive, but in a quasi-legislative and quasi-judicial capacity.[27] And, in *Morrison* v. *Olson* and similar cases,[28] the Supreme Court has validated this limited departure from constitutional design by allowing for-cause removal for certain inferior officers with limited tenure and a relatively narrow scope of powers.

These are the only two sets of circumstances in which the Supreme Court has authorized limiting the President's removal power, and both lines of cases have been criticized or questioned by commentators,[29] and by judges,[30] particularly after the Supreme Court's 2010 decision invalidating a removal restriction in *Free Enterprise Fund*.[31] Indeed, in *Free Enterprise Fund* the Supreme Court pointedly noted that the parties in that case did "not ask [the Court] to reexamine" its precedents allowing limitations on the President's removal authority, suggesting that the Supreme Court might be willing to reconsider those precedents in a future

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[27] 295 U.S. 602, 624 (1935). Specifically, the statute in *Humphrey's Executor* provided that the President could remove a commissioner only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 620 (quotation marks omitted).

[28] *Morrison* v. *Olson*, 487 U.S. 654 (1988); *see also United States* v. *Perkins*, 116 U.S. 483 (1886).

[29] *See, e.g.*, Aziz Z. Huq, *Removal as a Political Question*, 65 Stan. L. Rev. 1, 9–20 (2013); Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 Am. U. L. Rev. 313 (1989); Geoffrey P. Miller, *Independent Agencies*, 1986 Sup. Ct. Rev. 41, 93; Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1208 (2014); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 611–12 (1984).

[30] *See, e.g.*, *Mistretta* v. *United States*, 488 U.S. 361, 423–24 (1989) (Scalia, J., dissenting) (stating that *Humphrey's Executor* "has come in general contemplation to stand for something quite different" than the apparent assumption underlying the opinion itself); *Morrison*, 487 U.S. at 726 (Scalia, J., dissenting) (describing *Humphrey's Executor* as "*ipse dixit*" that was "devoid of textual or historical precedent"); *In re Aiken Cty.*, 645 F.3d 428, 444, 446 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

[31] *Free Enter. Fund*, 561 U.S. 477.

case.[32] The validity of *Humphrey's Executor*, *Morrison*, and similar precedents is thus uncertain. Ultimately, though, neither line of cases supports the CFPB's structure.

III. The CFPB's Structure Insulates It From Accountability And Violates The Constitution.

In 2010, Congress passed the Dodd-Frank Act.[33] Title X of that statute, known as the Consumer Financial Protection Act of 2010, created a new "[e]xecutive agency," the CFPB.[34]

The CFPB is the product of cherry-picking some the most democratically unaccountable and power-centralizing features of the federal government's administrative agencies, and aggregating them into one massive and all-powerful body. The CFPB is headed by a single, autonomous Director appointed by the President and confirmed by the Senate who serves a lengthy five-year term that may extend indefinitely "until a successor has been appointed and qualified,"[35] thus allowing the Senate to prevent the President, for an indeterminate period, from appointing a new Director. The President, moreover, is barred from removing the Director except "for cause."[36] No other CFPB official is appointed by the President or confirmed by the Senate; even the Deputy Director and the members of the Consumer Advisory Board are appointed unilaterally by the Director.[37] And although the CFPB is located "in the Federal Reserve System,"[38] the Dodd-Frank Act gives the CFPB "[a]utonomy" from the Federal Reserve's Board of Governors.[39] There is therefore no official in the Executive Branch or anywhere in the government to supervise the discretion and activities of the CFPB's all-powerful Director.

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[32] *Id.* at 483.

[33] Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[34] 12 U.S.C. § 5491(a).

[35] *Id.* § 5491(b)(1)–(2), (c)(1)–(2).

[36] *Id.* § 5491(c)(3).

[37] *Id.* §§ 5491(b)(5)(A), 5494.

[38] *Id.* § 5491(a).

[39] *Id.* § 5492(c).

The application of a for-cause removal provision to a *single* director differentiates the CFPB from almost every other independent agency, including the Federal Trade Commission ("FTC"), which was the agency at issue in *Humphrey's Executor*. A President will always be able to nominate some FTC commissioners in one term due to their staggered tenures, and can unilaterally designate the FTC's chair.[40] By contrast, a President could serve an entire four-year term powerless to remove the CFPB's leader or name a successor.

Moreover, the multi-member structure of the FTC and similar commissions—such as the Federal Communications Commission, the National Labor Relations Board, the Federal Energy Regulatory Commission, and the Nuclear Regulatory Commission—serves as an internal check on arbitrary decisionmaking, as these entities are "called upon to exercise the trained judgment of [what, in theory at least, is] *a body of experts* 'appointed by law and informed by experience.'"[41] The CFPB, by contrast, is headed by an unelected overseer whose discretionary policy decisions can neither be outvoted nor used to remove him from office. Indeed, courts typically understand the for-cause removal limitation to prevent the President from removing an officer based on policy disagreements, and the broad scope of the Director's unilateral, discretionary authority could be viewed as further limiting the circumstances under which he can be removed "for inefficiency, neglect of duty, or malfeasance in office."[42] The Director therefore has virtually unchecked power over a vast range of laws touching on consumer finance.

In that regard, the Dodd-Frank Act transfers to the Director broad authority to enforce 18 preexisting consumer-protection laws previously administered by seven different agencies, covering widely varying topics including home financing, student loans, credit cards, and banking practices.[43] It also gives the CFPB new authority, including broad powers to regulate and prosecute acts it considers "unfair, deceptive, or abusive."[44] The Director's jurisdiction thus touches nearly

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[40] 15 U.S.C. § 41.

[41] *Humphrey's Ex'r*, 295 U.S. at 624 (citation omitted; emphasis added).

[42] 12 U.S.C. § 5491(c)(3); *see also Free Enter. Fund*, 561 U.S. at 484, 496 (noting that mere "disagree[ment]" between the President and the officer is generally an insufficient basis for removing the officer).

[43] 12 U.S.C. § 5481(12), (14).

[44] *Id.* § 5531(a).

every person who offers financial products or service to consumers, and everyone who uses such services.[45]

Within his vast realm, the Director wields unchecked legislative, executive, and judicial powers—including the power to issue far-reaching regulations, bring actions to enforce those rules, punish businesses and individuals by adjudicating enforcement actions in the CFPB's in-house court, and independently litigate in the government's name.[46] And if the Director and the President, acting through an executive agency, disagree on the interpretation of federal consumer finance law, the Director's view controls.[47] Thus, the CFPB's organic statute even purports to give the Director *greater* power than the President in the execution of federal consumer finance law. Never before has so much federal power been concentrated in the hands of one individual so thoroughly shielded from constitutional accountability.

The Director also has broad discretion to hire, fire, and compensate CFPB employees,[48] to whom he may unilaterally delegate his immense powers.[49] There are few meaningful checks on that discretion: the Dodd-Frank Act even gives the Director discretion to "waive the requirements" of federal law that govern the examination, selection, and placement of employees "to the extent necessary" to appoint employees on terms and conditions "consistent with" the Federal Reserve's hiring practices.[50] And in setting pay rates and benefits for employees of the CFPB, the Director selects levels that are "at a minimum" "comparable to" the corresponding class of employees for the Federal Reserve, and to provide "terms and conditions" that are "consistent with" the Federal Reserve's practices—

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[45] *Id.* § 5481(6), (26); *id.* § 5536(a).

[46] *See* 12 U.S.C. § 5512 (rulemaking authority for consumer finance law); *id.* § 5531(b) (rulemaking authority for "unfair, deceptive, or abusive acts or practices"); *id.* § 5562 (investigative authority); *id.* § 5563 (adjudicative authority); *id.* § 5564 (independent litigation and enforcement authority); *id.* § 5565 (power to impose legal and equitable relief and penalties).

[47] 12 U.S.C. § 5512(b)(4).

[48] *Id.* § 5493(a)(1)–(2).

[49] *Id.* § 5492(b).

[50] *Id.* § 5493(a)(1)(C).

"[n]otwithstanding any otherwise applicable provision of Title 5" of the U.S. Code "concerning compensation."[51]

The Director's sweeping authority and lengthy tenure differentiates him from the independent counsel in *Morrison*. The Director likely qualifies as a principal officer, not an "inferior officer," and does not have "limited jurisdiction and tenure" or "lac[k] policymaking or significant administrative authority."[52] These features also differentiate the CFPB from the few anomalous agencies that are headed by a single individual removable only for cause.[53] And the CFPB possess other characteristics that further remove it from presidential oversight. For example, the Dodd-Frank Act prohibits the President from exercising *any* authority to control the CFPB's communication with Congress, with respect to legislation or testimony.[54]

Not only is the Director unaccountable to the President, he is also unaccountable to Congress. The Constitution grants Congress the exclusive power of the purse, including by providing that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[55] This measure was included "in large part because the British experience taught that the appropriations power was a tool with which the legislature could resist" executive power.[56] The ability to determine how money is spent is an important check on federal agencies and on "executive aggrandizement" more generally.[57]

In the Dodd-Frank Act, however, Congress effectively abdicated this responsibility by allowing the CFPB to fund itself entirely outside the

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[51] *Id.* § 5493(a)(2).

[52] *Morrison*, 487 U.S. at 691.

[53] *See PHH Corp.* v. *CFPB*, 839 F.3d 1, 18–20 (D.C. Cir. 2016), *reh'g en banc granted* (Feb. 16, 2017) (distinguishing the Social Security Administration, Office of Special Counsel, and Federal Housing Finance Agency).

[54] 12 U.S.C. § 5492(c)(4).

[55] U.S. Const. art. I, § 9, cl. 7 (emphasis added); *see also id.* art. I, § 7, cl. 1 (Origination Clause); *id.* § 8, cl. 1 (Taxing and Spending Clause).

[56] *Noel Canning* v. *NLRB*, 705 F.3d 490, 510 (D.C. Cir. 2013), *aff'd*, 134 S. Ct. 2550 (2014).

[57] *Id.*

appropriations process. The Director is authorized to claim as much as 12% of the Federal Reserve System's assessed fees,[58] a percentage which amounted to $632 million in fiscal year 2016.[59] By comparison, the FTC requested a $309 million appropriation for fiscal year 2016,[60] and received $306.9 million.[61] Moreover, the Federal Reserve System is itself funded outside the appropriations process, meaning that Congress cannot even reduce the CFPB's funding by reducing an appropriation for the Federal Reserve System's funding.[62] The CFPB therefore has an unprecedented two layers of insulation from the appropriations process

In making these self-funding decisions, the Director is not subject to review by either of Congress's committees on appropriations,[63] and is not required to "obtain the consent or approval of the Director of the Office of Management and Budget" ("OMB"), which along with the Board of Governors lacks "any jurisdiction or oversight over the affairs or operations of the Bureau."[64] This process also spares the Director from the need to coordinate with the President for assistance in negotiating appropriations from Congress.[65] These added layers of insulation further shield the CFPB from any public accountability.

This unprecedented and unacceptable level of unaccountability makes the CFPB a law unto itself, and predictably leads to overreaching assertions of power. The CFPB has, for example, attempted to circumvent an express limit on its authority over auto dealers by bringing disparate-impact actions against lenders

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[58] 12 U.S.C. § 5497(a)(2)(A)(iii); *see id.* § 243 (funding the Federal Reserve by fees assessed on banks).

[59] Financial Report of the CFPB, Fiscal Year 2016, at 61 (Nov. 15, 2016), https://tinyurl.com/z2s7m28.

[60] FTC, *Fiscal Year 2016 Congressional Budget Justification*, at 3 (Feb. 2, 2015), https://www.ftc.gov/system/files/documents/reports/fy-2016-congressional-budget-justification/2016-cbj.pdf.

[61] Pub. L. No. 114-113, 129 Stat. 2242, 2450 (2015).

[62] *See* 12 U.S.C. §§ 243–244.

[63] *See id.* § 5497(a)(2)(C).

[64] *Id.* § 5497(a)(4)(E).

[65] *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 42–43 (2010).

that purchase installment agreements from dealers.[66] The CFPB has similarly claimed authority under a catch-all provision to fine companies for alleged failures to protect customer data, even though the CFPB is expressly foreclosed from enforcing the data security requirements of the Gramm-Leach-Bliley Act.[67] And the CFPB has used its investigative powers to probe an academic accreditation body, even though accreditation bodies do not offer consumer financial products or services.[68] The CFPB has also attempted to regulate arbitration agreements,[69] telephone bills,[70] and the practice of law,[71] among many other activities. While in theory judicial review may be available, many targets of the CFPB's enforcement power will opt to settle instead of engaging in costly litigation and potentially facing million-dollar-per-day civil money penalties, thus insulating the CFPB's assertions of authority from external review.

In considering the constitutionality of the CFPB's structural features, it would be a mistake to focus on each of them in isolation. To be sure, many of the features of the CFPB individually render the agency arguably unconstitutional, such as the Director's for-cause removal restriction, the CFPB's independent litigating authority, and the agency's immunity from the appropriations process, among others. In combination, however, these and other features create a "novel structure" that goes far beyond any structure ever approved by the Supreme Court.[72] While the Supreme Court has "previously upheld limited restrictions" on particular checks and balances,[73] the CFPB's unprecedented insulation from *all*

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[66] *See* 12 U.S.C. § 5519(a); *see also, e.g.*, Republican Staff of H. Comm. on Fin. Servs., 115th Cong., *Unsafe at Any Bureaucracy, Part III: The CFPB's Vitiated Legal Case Against Auto-Lenders* (2017).

[67] *See* 12 U.S.C. § 5481(12)(J); 15 U.S.C. §§ 6801, 6805; *see also* Consent Order, *Dwolla, Inc.*, CFPB No. 2016-CFPB-0007 (Mar. 2, 2016).

[68] *See CFPB* v. *Accrediting Council for Indep. Colls. and Schs.*, 183 F. Supp. 3d 79 (D.D.C. 2016), *appeal pending*, No. 16-5174 (D.C. Cir.).

[69] *See* Proposed Rule, 81 Fed. Reg. 32,830 (May 3, 2016).

[70] *See* Stipulated Final Judgment and Order, *CFPB v. Sprint Corp.*, No. 14-cv-9931 (S.D.N.Y. June 30, 2015).

[71] *See* Consent Order, *Pressler & Pressler LLP*, CFPB No. 2016-CFPB-0009 (Apr. 25, 2016).

[72] *Free Enter. Fund*, 561 U.S. at 496.

[73] *Id.* at 495.

democratic checks and accountability puts it far beyond any concept that would have been tolerated by the Framers. In summary, among the CFPB's many unconstitutional features:

- The CFPB Director has a five-year term and cannot be removed except for cause.
- The CFPB Director has an indefinite term if the Senate does not confirm a successor.
- The CFPB Director has sweeping authority to hire, fire, and compensate employees.
- The CFPB makes its own rules, which are elevated above those of other agencies.
- The CFPB enforces its own rules.
- The CFPB adjudges violations of its own rules.
- The CFPB penalizes violations of its own rules.
- The CFPB funds itself.
- The CFPB is immune from OMB budgetary oversight.
- The CFPB is immune from executive oversight of congressional communications.
- The CFPB is immune from the Federal Reserve's oversight.
- The CFPB has authority to litigate in the government's name without requiring Executive Branch approval (except in the Supreme Court).[74]

The CFPB's structure also insulates *the President* from political accountability. In the constitutional system envisioned by the Framers, the President is "directly dependent on the people, and since there is only *one* President, *he* is responsible."[75] The people therefore "know whom to

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[74] 12 U.S.C. § 5564(e).

[75] *Morrison*, 487 U.S. at 729 (Scalia, J, dissenting).

blame" when the laws are not being executed properly.[76] A "plurality in the executive," by contrast, "tends to conceal faults and destroy responsibility."[77] For this reason, a vote to correct the CFPB's structural defects need not be a vote of distrust against the CFPB or a particular Director; it is a vote in favor of "facilitating accountability" in the Executive Branch.[78]

IV. Repairing The CFPB's Structural Defects Requires Implementing Constitutional Separation-Of-Powers Principles.

If Congress is to remedy the constitutional problems of the CFPB, it must fundamentally change the structure of the agency so that it respects the separation-of-powers principles reflected in the Constitution.

One of the most glaring flaws of the CFPB's structure is that it is led by a single principal officer who is not removable at will by the President. The only remedial step that respects our constitutional structure is to make the Director removable at will by the President, and also to eliminate other provisions limiting the President's oversight authority. This would align with the Framers' conviction that "unity in the Executive ... would be the best safeguard against tyranny."[79] When executive officers are accountable to the President, the voters know that the President is ultimately responsible for that officer's actions.[80] Allowing the President faithfully use his supervisory authority as a democratic check on the otherwise unfettered discretion of a bureaucrat produces structural accountability that will better secure the substantive rights and liberties afforded by the Constitution.

While the Supreme Court has, as noted earlier, approved multi-member "independent agencies" with restrictions on the President's removal power, the Framers did not envision government by a multiplicity of "experts" removable only for cause. The Constitution instead vested the *entire* executive power in the President, who alone is charged with ensuring that the laws are faithfully executed. This flowed from a recognition that the "diffusion of power carries with it a

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[76] *Id.*

[77] *Federalist No. 70*, *supra* note 1, at 427 (Hamilton).

[78] *Clinton* v. *Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring).

[79] 1 Farrand, *supra* note 12, at 66 (James Wilson).

[80] *See Morrison*, 487 U.S. at 729 (Scalia, J., dissenting).

diffusion of accountability."[81] And the continuing validity of *Humphrey's Executor*, it must be remembered, is an open question. The FTC, and other agencies like it, have gone far beyond panels of "experts" exercising quasi-judicial and quasi-legislative powers. Their legitimacy in their current evolved status is open to serious questions.

In addition to increasing executive accountability over the CFPB, Congress should reassert its own oversight. The Dodd-Frank Act all but eliminates the CFPB's accountability to Congress by granting the CFPB independence from the power of the purse. This oversight is an important democratic check, particularly if Congress eliminates the existing for-cause removal provision. Removing the disabilities placed on the President without shoring up Congress's authority could significantly "alte[r] the balance of powers between the Legislative and Executive Branches,"[82] because Congress will have granted the President increased power over 19 federal consumer-protection statutes—several of which were previously administered by "independent" agencies—while at the same time abdicating its own appropriations and oversight powers. Congress should therefore subject the CFPB to the ordinary appropriations and budgetary process for Executive Branch agencies.

More generally, Congress should scale back the CFPB's powers. The Dodd-Frank Act grants the CFPB a broad mix of regulatory, enforcement, adjudicatory, and remedial authority that is largely unchecked by Congress and the President. The curative steps above would subject these powers to increased oversight, but that does not change the basic fact that the CFPB has sweeping, undifferentiated power to interpret and enforce 19 federal consumer-protection laws, including by prosecuting cases in the agency's in-house court and meting out arbitrary penalties.

V. Conclusion

"The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in 1787."[83] "The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were

[81] *Free Enter. Fund*, 561 U.S. at 497.

[82] *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685 (1987).

[83] *Buckley* v. *Valeo*, 424 U.S. 1, 124 (1976).

consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. … [W]e have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution."[84]

The CFPB's structure is an affront to these principles. The CFPB is headed by a single Director. He serves a five-year term that cannot be cut short if the President disagrees with the Director's policy judgments and that can be extended indefinitely if the Senate does not confirm a replacement. This structure potentially relegates the Chief Executive to the role of a spectator as the CFPB Director executes a vast body of federal law according to his own notions. The CFPB's perpetual self-funding authority, moreover, removes the external check that Congress ordinarily exercises through the power of the purse. These and other features of the CFPB violate the Constitution and should be remedied expeditiously by Congress.

[84] *Chadha*, 462 U.S. at 959.

Statement of
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House Committee on Financial Services
Subcommittee on Oversight and Investigations

March 21, 2017

Good Morning Chairman Wagner, Ranking Member Green, and members of the subcommittee. Thank you for the opportunity to discuss the constitutional infirmities of the Consumer Financial Protection Bureau (CFPB). I have spent my academic career studying the Constitution's separation of powers, with a particular emphasis on presidential power over law execution, war powers, and foreign affairs. I have authored a book on the creation of the presidency and several articles on law execution and removal. In my view, the CFPB is ripe for oversight and investigation, because its unusual configuration raises constitutional questions of the first order.

Though I am a Professor of Law and Miller Center Senior Fellow at the University of Virginia, I want to make clear that my testimony reflects no one's views, save for my own. I also want to underscore that my misgivings about the CFPB's structure are not grounded in policy objections to regulation of financial products or opposition to decisions made by Director Richard Cordray. Rather, I believe that once one steps back from policy disputes and politics, something admittedly difficult to do, there are reasons for Republicans *and Democrats* to be chary of the CFPB's structure. If Congress may create an office, vest it with truly vast amounts of authority over lawmaking and law execution, make it independent of the President, and make the office virtually impervious to legislative alteration and influence, then Congress has a ready blueprint that both parties will employ to fashion unassailable bureaucratic redoubts from which unelected officials will reign over the people of America.

I have three points. First, I'll argue that "for cause" removal restrictions are unconstitutional under the Constitution. Second, I'll contend that the restriction on the removal of the CFPB Director is deeply problematic under Supreme Court precedent, especially in a context where the Court seems increasingly to look askance at the so-called Fourth Branch of Government. Third, I'll address how Congress might resolve the constitutionality difficulties.

Removal is an Executive Power under the Constitution's Text, Structure, and Early History

Article II specifies how officers are to be appointed. The President appoints officers, but only after first securing the Senate's advice and consent. The Founders believed that a check on presidential appointment was necessary to ensure that qualified, competent, and wise individuals could occupy offices, both judicial and executive. The Constitution contains two exceptions to this general rule of Senate participation. Congress can vest the appointment of inferior officers in the hands of certain high officers. And the President may appoint to fill vacancies that may arise during a Senate recess.

In contrast, there is nothing about removal in Article II, save for a lone reference to impeachment in Article II, section 4. Nonetheless, early discussants assumed that the chief executive would superintend and direct officers, other than Article III judges. The general tenor of the Philadelphia Convention was that the President would "prevent[] and correct[] errors [and] detect[] and punish[] mal-practices" of officers. 3 The Records of the Federal Convention of 1787, at 111 (Max Farrand rev. ed., 1966). After the proposed Constitution went to the states, both Federalists and Anti-federalists recognized that the vesting of executive power granted the President the power to control and remove officers. One American noted that the President would "superintend[] the execution of the laws of the Union." 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 106 (Jonathan Elliot ed., 2nd ed. 1836). Another observed that a single executive was "peculiarly well circumstanced to superintend the execution of laws with discernment and decision, with promptitude and uniformity." The Federal Farmer No. 14 in 20 The Documentary History of the Ratification of the Constitution 1035, 1038 (John P. Kaminski et al. eds. 2004).

In the wake of protracted debate on this very question, the first Congress concluded that the President had a constitutional power to remove. They carefully crafted three statutes–the laws creating the Departments of Treasury, War, and Foreign Affairs–each of which discussed what would happen to departmental papers should the President remove the relevant Secretary. Saikrishna Bangalore Prakash, New Light on the Decision of 1789, 91 Cornell L. Rev. 1021, 1023 (2006). The three statutes were drafted in this way to make clear that Congress was not granting a power to remove. Rather each statute was grounded on the assumption that the President might do so because of a preexisting *constitutional* power to remove.

The dominant view, expressed in debates in the House, was that the grant of "executive power" included authority to remove officers of the United States, other than Article III judges. As James Madison put it, "[t]he constitution affirms, that the executive power shall be vested in the president . . . . Is the power of displacing an executive power? I conceive that if any power whatsoever is in its nature executive it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Congress 481 (1789). Regarding the Take Care Clause of Article II, Madison noted that "[i]f the duty to see the laws faithfully executed be required at the hands of the executive magistrate, it would seem that it was generally intended he should have that species of power which is necessary to accomplish that end." Id. at 516. Madison meant that the Take Care Clause presupposes that the President may remove officers as a means of fulfilling his faithful execution duty, save for when the Constitution itself establishes a more durable tenure (good behavior tenure).

The Father of the Constitution was not alone in this view. As noted, the House and the Senate passed three acts, each of which were premised on the view that the President had constitutional power, arising from the Vesting Clause, to remove officers. Moreover, no early congressional statute purported to deny the President's power to remove or limit it in any way. There were no "for cause" restrictions in the early republic.

The consensus that removal is an executive power goes well beyond the first several Congresses. The Father of the Country, George Washington, also took this position. Without any statutory warrant and relying upon his constitutional authority alone, he repeatedly noted in the commissions that he issued that all officers (other than Article III judges) served at his "pleasure", meaning he could remove them at any time and for any reason. He issued such commissions to ambassadors, district attorneys, marshals, tax collectors and many, many others. *See* Saikrishna Bangalore Prakash, Imperial from the Beginning: The Constitution of the Original Executive 196-97 (2015). Consistent with the Decision of 1789 and the commissions he issued, Washington removed some two-dozen officers, including ambassadors, consuls, and tax collectors. Id. at 197. To my knowledge, no one voiced constitutional objections to these commissions or removals. No one in Congress, none of the appointed officials, and none of those whom Washington fired, lodged a protest.

Washington articulated a constitutional basis for his authority to direct officers and remove them at pleasure. "The impossibility that one man should be able to perform all the great business of the State, I take to have been the reason for instituting the great Departments, and appointing officers therein, to assist the supreme Magistrate in discharging the duties of his trust." 30 The Writings of George Washington 334 (John C. Fitzpatrick ed. 1939). And Washington remained true to this conception of the office through his two terms. The executive power was his and officers charged with executing the law, conducting diplomacy, or protecting the nation, were his subordinates and subject to his direction.

Others said much the same thing about removal. Alexander Hamilton, one of co-author of *The Federalist Papers* and the first Treasury Secretary, explained the structure of Article II in a way that precisely captures its essence. The second Article

> establishes this general Proposition, That "The EXECUTIVE POWER shall be vested in a President of the United States of America . . . . The same article in a succeeding Section proceeds to designate particular cases of Executive Power . . . . It would not consist with the rules of sound construction to consider this enumeration of particular authorities as derogating from the more comprehensive grant contained in the general clause, further than as it may be coupled with

> express restrictions or qualifications . . . . The enumeration ought rather therefore to be considered as intended by way of greater caution, to specify and regulate the principal articles implied in the definition of Executive Power; leaving the rest to flow from the general grant of that power, interpreted in conformity to other parts [of] the constitution and to the principles of free government . . . . The general doctrine then of our constitution is, that the EXECUTIVE POWER of the Nation is vested in the President; subject only to the *exceptions* and *qu[a]lifications* which are expressed in the instrument.

Pacificus No. 1 in The Pacificus-Helvidius Debates of 1793-94, at 12-13 (2007). Hamilton then went on to note that the first Congress had adopted this construction in the statutes creating the first three executive departments and in assuming that the Article II Vesting Clause had conveyed a power to remove officers. Id. at 13.

Only in unusual instances does the Constitution authorize Congress to abridge or restrain presidential powers. One such exception: the Constitution expressly authorizes Congress to vest the appointment of inferior officers with someone other than the President, thereby limiting the President's power to appoint. In contrast, Congress cannot decree that the President shall not pardon treason, murder, or immigration violations. Nor can Congress bar the President from proposing treaties to the Senate. In both of these instances, Congress lacks constitutional authority to withdraw or curtail the relevant presidential power. The same can be said of removal. Though the Constitution grants the President the power to remove, it nowhere grants Congress power to retract or limit that authority. Neither the Necessary and Proper Clause nor any other provision authorizes Congress to regulate the president's power to remove. Another way of putting the point is that the Constitution does not generally treat presidential powers as if they were modifiable by congressional decree. Rather the Constitution's grants to the Presidents are not defeasible by statute.

The Supreme Court's Recent Unease with the Fourth Branch of Government

Of course, subsequent Congresses have not always agreed with the first Congress or with Madison, Washington, or Hamilton. Over time, Congresses started to enact statutes that required the Senate's consent to remove officers or that limited presidential removals to instances where there was "cause"—incapacity, neglect, inefficiency, malfeasance, *etc.* The attempt by Congress to limit presidential removal set the stage for a series of momentous political showdowns, with the judiciary sometimes serving as arbiters. Unfortunately, the Supreme Court's periodic interventions have more zigzags than a slalom ski course.

Though there were previous Supreme Court removal cases, *Myers v. United States*, 272 U.S. 52 (1926), might be said to usher in the modern line of cases. In *Myers*, the Supreme Court struck down a statutory requirement that the President secure the Senate's consent prior to removing postmasters. Indeed, *Myers* declared that Congress could not constrain the President's power to remove officers appointed with the Senate's consent.

But several years later, at the height of fears of unchecked presidential power and unchecked congressional delegations, the Court upheld a for-cause restriction on the President's ability to remove commissioners of the Federal Trade Commission. Humphrey's Executor v. United States, 295 U.S 602 (1935). The *Humphrey's* Court distinguished *Myers* saying that the commissioners were not executive officers, that Congress wanted the commissioners to be independent of the President, and that commissioners were meant to be apolitical experts. Id. at 624. Much later, *Morrison v. Olson*, 487 U.S. 654 (1988), upheld removal restrictions even as applied to an executive officer, albeit one with an extremely limited jurisdiction and tenure. While *Humphrey's* and *Morrison* sanctioned the for-cause restrictions at issue in those cases, neither granted Congress *carte blanche* to impose such constraints.

The most recent removal case, *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), evinced a decidedly more jaundiced perspective on removal restrictions. The Court did not limit or overturn either *Humphrey's* or *Morrison*. Yet in striking down a for-cause restriction, the Court said much that suggested a newfound solicitude for the president's power to remove.

In the Sarbanes-Oxley Act, Congress created the Public Company Accounting Oversight Board (PCAOB), with authority over accounting firms. Id. at 484. Under the Act, the members of the PCAOB would be appointed by the Securities and Exchange Commission (SEC) and could be removed only by the SEC for cause. Id. at 484-85. For purposes of the case, the Court assumed that the President could remove SEC commissioners only for cause. Id. at 487. Faced with this "novel structure" of double for-cause protections (the President could remove SEC commissioners only for cause and those commissioners could remove PCAOB members only for cause), the Court concluded that the Act unduly constrained the President's ability to ensure a faithful execution of federal law. "Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. The President['s] ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired." Id. at 496. This impairment proved to be the Act's fatal constitutional defect.

In the course of so holding, the Court evinced newfound respect for principles of accountability and presidential removal. The President, under our constitutional system, is to be responsible for administration, that is the implementation and execution of federal law. Id. at 496-97. *He* is to take care that the laws be faithfully executed. But when statutes unduly restrict his power to remove officers, the President cannot be justly accountable for the choices of such officers, decisions over which the President has no say. Id. at 497. In other words, even if some removal restrictions might be constitutional as to some agency heads, restrictions are unconstitutional when they unduly impinge upon the President's constitutional duties and principles of constitutional accountability. Id. at 498.

Drawing from *Humphrey's Executor*, *Morrison* and *Free Enterprise Fund*, one can see much in the CFPB that is problematic under existing doctrine. Unlike the commissioners of *Humphrey's Executor*, the Director has vast amounts of power that he may wield unilaterally. Rather than having to act in a consensual way, the Director is not answerable to anyone else. He is not answerable to the President or to Congress, and need not work in concert with other commissioners. Unlike the independent prosecutor in *Morrison*, the Director of the CFPB is not an inferior officer and enjoys vast amounts of delegated authority related to policy and prosecutions. As Judge Brett Kavanaugh noted in the D.C. Circuit, the Director is the second most powerful officer in the government for he serves under no one's supervision, enjoys a vast budget not subject to the appropriations process, and exerts enormous influence over several prominent aspects of the economy. Unlike the PCAOB members in *Free Enterprise Fund*, neither the SEC nor any other officers may withdraw the Director's jurisdiction. Nor does the Director have to face the organizational constraints that come from working in a collegial body; the Director need not convince colleagues in the way that SEC commissioners or PCAOB members must. To paraphrase *Free Enterprise Fund*, "[t]his novel structure does not merely add to the [Director's] independence, but transforms it." Id. at 496.

In sum, the Director occupies a unique office in the federal government, one that rivals the office of the President. Thought experiments help illustrate the difficulty of the novel scheme. Suppose Congress decided to eliminate the various independent agencies and grant their authority to the CFPB Director (restyled as the "Chief Director"), thereby drawing into one person's hands the power to regulate securities, federal elections, communications, accounting companies, financial products, monetary policy, *etc.*? I think there would be little doubt that the Court would strike down the statute, either by making the "Chief Director" removable at will or by concluding that the entire statute must fall because the unconstitutional portion was non-severable.

Of course, one can take the illustration further. Suppose Congress ceded *all agency authority* to a single office, this time styled the "President-Director". This person would wield power over the Department of Justice, the Environmental Protection Agency, the Department of Interior, etc., along with authority over the independent agencies (SEC, FTC, CFPB, *etc.*). And suppose further that President Trump resigned in the waning days of his term and that Vice President Michael Pence, as acting president, appointed Trump to serve as "President-Director", with the Senate's consent. It should be obvious that "President-Director" Trump would be serving as the functional equivalent of the President. In fact, he would have an office that is, in some ways, more powerful than the one he now occupies. But if Congress can strip away authorities from seven agencies and vest vast amounts of authority in a single director protected by for-cause protections, it can vest even more such authority in a single person. The problem with the CFPB is that if it is constitutional, it is "open season" on the Constitution's chief executive, for Congress may create an even more powerful ersatz one. For all intents and purposes, Dodd-Frank creates a statutory chief executive, a mini-President over consumer financial products.

Congressional Fixes

First, Congress can make the Director removable for cause. This would satisfy my constitutional concerns, as the President would be able to ensure that the laws are faithfully executed and could be properly held accountable for the Bureau's decisions. As Madison put it, a proper "chain of dependence" would be maintained when it comes to law execution, with the Chief Magistrate serving as a responsible executive. 1 Annals of Congress 499 (1789). In 2018, President Trump should not be able to appoint someone who may serve as an independent executive officer into the administration of a President Sanders or a President Warren.

Second, Congress can make the CFPB subject to the annual appropriation process. This would tend to ameliorate constitutional difficulties and also satisfy policy concerns that arise with governmental agencies that improperly regard themselves as beyond congressional supervision. The power of the purse is a potent source of authority, one that Congress should be loath to delegate or cede.

Third, Congress could create a commission to serve as the apex of the agency. Under my reading of the Constitution, it requires that such commissioners would have to be removable by the President at will. But under judicial doctrine, at least, dispersing the CFPB's considerable power amongst a collegial body would tend to weaken claims that the structure of the CFPB is unconstitutional. The CFPB would look more like the SEC and the FEC, rather than like the anomaly it is today. The Court might still hold the reformulated CFPB unconstitutional, but only if it were willing to overturn cases like *Humphrey's Executor*.

"THE CFPB'S UNCONSTITUTIONAL DESIGN"

Testimony of
Adam J. White
The Hoover Institution[1]

Before the United States House of Representatives,
Committee on Financial Services,
Subcommittee on Oversight and Investigations

MARCH 21, 2017

Chairman Wagner, Ranking Member Green, and other members of the Subcommittee, thank you for inviting me to testify on "the Bureau of Consumer Financial Protection's Unconstitutional Design." As my testimony here makes clear, I agree unequivocally with this hearing's premise: the CFPB's structure is unconstitutional, for reasons identified recently by a panel of the U.S. Court of Appeals for the D.C. Circuit,[2] and for other equally important reasons that the panel did not reach.

These issues are profoundly important, and not just because of any particular policies that the CFPB might formulate now or in the future. If Congress and the courts allow the CFPB's original structure to remain intact, then it will become the new benchmark for the next generation of "independent agencies." The current benchmark—the multi-member commission model pioneered in the late 19th century and entrenched during the Progressive Era and the New Deal—is not without faults of its own, but it has come to serve a reliable and worthy purpose in modern administration, while remaining accountable to Congress.

I urge you not to allow that history to be discarded in favor of a new form of "independent" agency that enjoys not only a measure independence from the President, but also "*full independence*" from Congress, as the CFPB has repeatedly

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2 *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016). The panel's decision was vacated when the Court granted the CFPB's petition for rehearing *en banc*, on Feb. 16, 2017. The case awaits *en banc* re-argument.

boasted.[3] No matter what the courts ultimately do on these issues, Congress itself ought to reform the CFPB in order to restore constitutional accountability to this unprecedented, unconstitutional agency.[4]

I. The CFPB is unprecedented and unconstitutional.

Administrative agencies are, in a sense, as old as our Republic itself. The Constitution expressly assumed that our government would have "Departments" accountable to the President.[5] The First Congress legislated the first Departments into being, after significant debate over their nature and powers.[6]

And we have had "independent" agencies since at least the mid-19th century, with the creation of the Steamboat Inspection Service in 1852 and the Interstate Commerce Commission in 1887.[7] By FDR's time, the basic structure of independent regulatory agencies was well-established,[8] as were the problems inherent in vesting government power in "independent" agencies.[9] But in that same period, beginning with the seminal case of *Humphrey's Executor*, we have seen the Supreme Court settle into a well-established framework that allows for some measure of agency "independence,"[10] within limits.[11] And the Court recently made clear that this body

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3 *See* Part II, below, for examples of the CFPB boasting of its "full independence" from Congress.

4 Some of the arguments presented in this testimony reflect arguments that I previously made as co-counsel for private parties challenging the CFPB's constitutionality in a pending federal case. *See State National Bank v. Lew*, 795 F.3d 48 (D.C. Cir. 2015), *on remand*, 197 F. Supp. 3d 177 (D.D.C. 2016); *see also PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016) (amicus brief); *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (amicus brief). I am no longer counsel in that case.

5 U.S. Const., art. II, § 2 (providing for the appointment of "Officers" and empowering the President to require "the principal Officer in each of the executive Departments" to report to him "upon any subject relating to the Duties of their respective Offices").

6 *See, e.g.*, Fergus M. Bordewich, *The First Congress* (2016), pp. 58–64, 95–98.

7 10 Stat. 61 (Aug. 30, 1852) (establishing the Steamboat Inspection Service); 24 Stat. 379 (Feb. 4, 1887) (establishing the Interstate Commerce Commission). *See also* Adam J. White, "The Administrative State and the Imperial Presidency," in Gary J. Schmitt *et al.*, *The Imperial Presidency and the Constitution* (2017) (summarizing the history of early administration).

8 *See* Robert E. Cushman, *The Independent Regulatory Commissions* (1941).

9 *See, e.g.*, *Report of the President's Committee on Administrative Management* (1937) ("They constitute a headless 'fourth branch' of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers. They do violence to the basic theory of the American Constitution that there should be three major branches of the Government and only three.")

10 *Humphrey's Ex'r v U.S.*, 295 U.S. 602 (1935).

11 *Wiener v. U.S.*, 357 U.S. 349 (1958); *Morrison v. Olson*, 487 U.S. 654 (1988).

of precedent marks the *outermost boundary* of what the Constitution can abide in terms of "independent" agencies.[12]

As the Supreme Court repeatedly has observed on matters of constitutional structure, this long history is crucially important, for it helps to illuminate and delineate the principles and prudential judgments undergirding modern government's balance between republican first-principles and administrative accommodations. As the Court explained in *Mistretta*, "traditional ways of conducting government give meaning to the Constitution."[13] Where constitutional lines are fuzzy, the Court often has "treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era."[14]

To borrow Justice Oliver Wendell Holmes's famous observation, such "experience" is "[t]he life of the law."[15] Or, to put it in the words of James Madison the substantive meaning of our Constitution's implicit limits on agency independence has been "liquidated and ascertained" by nearly a century of judicial and legislative precedents.[16]

But when President Obama and the 111th Congress created the CFPB, they cast aside this entire body of accumulated experience and legal doctrine, and instead created something unprecedented: an agency with not just a measure of independence from the President, but also complete independence from Congress, headed by a single man with effectively open-ended regulatory powers. This wholly unprecedented combination of structural independence and immense power goes beyond anything the Court has previously allowed; indeed, under existing precedent it is palpably unconstitutional.

A. The CFPB is unconstitutional under *Morrison* and *Free Enterprise Fund.*

First, and most simply, the Dodd-Frank Act violated the Constitution by making the CFPB Director independent from the President despite the CFPB's

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12 *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 514 (2010) ("While we have sustained in certain cases limits on the President's removal power, the Act before us imposes a new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power. Congress cannot limit the President's authority in this way.").

13 *Mistretta v. U.S.*, 488 U.S. 361, 401 (1989) (quoting the *Steel Seizure Case*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)).

14 *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014).

15 Oliver Wendell Holmes Jr., *The Common Law* (1881), p. 1.

16 *Federalist 37* (James Madison).

immense powers. Under *Morrison v. Olson*, an officer can enjoy statutory "independence" from the President if and only if the officer enjoys only "limited jurisdiction and tenure and lack[s] policymaking or significant administrative authority."[17]

Here, by contrast, the Dodd-Frank Act gave the CFPB Director statutory independence from the President,[18] yet also vested the Director with an immense delegation of power to regulate and prosecute whatever he deems to be an "unfair, deceptive, or abusive act or practice."[19] The D.C. Circuit panel aptly summarized the practical meaning of that power in its recent decision *PHH Corp. v. CFPB*: "In short, when measured in terms of unilateral power, the Director of the CFPB is the single most powerful official in the entire U.S. Government, other than the President. Indeed, within his jurisdiction, the Director of the CFPB can be considered even more powerful than the President. It is the Director's view of consumer protection law that prevails over all others. In essence, the Director is the President of Consumer Finance."[20]

This grant of independent power goes far beyond the lines that the Court drew around the independent counsel statute in *Morrison*,[21] and thus should be struck down by the courts—or, better still, reformed by Congress.[22] As the D.C.

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17 *Morrison*, 487 U.S. at 691.

18 Specifically, during the CFPB Director's five-year term the President cannot fire him at will; the President can fire him only for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3).

19 12 U.S.C. § 5531(a).

20 *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016) (panel decision), *order vacated and en banc reh'g granted*, Feb. 16, 2017.

21 487 U.S. at 691.

22 At the same time, we must take care not to *overstate* the CFPB Director's independence from the President. While his independence is significant, it is not unlimited. The Director can be removed for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). The Supreme Court has recognized that this standard is capacious enough to allow an officer to be fired based on his policy positions. *Bowsher v. Synar*, 478 U.S. 714, 729 (1986) In that case, involving a statute empowering Congress, not the President, to fire an officer for "inefficiency," "neglect of duty," or "malfeasance," the Court noted that "[t]hese terms are very broad and, as interpreted by Congress, could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will."

Prominent scholars of all ideological stripes have endorsed this interpretation of for-cause removal statutes. *See, e.g.*, Richard J. Pierce, Jr., *Morrison v. Olson, Separation of Powers, and the Structure of Government*, 1988 Sup. Ct. Rev. 1, 25 (1988) ("officers whose responsibilities include both policymaking and some significant role in adjudicatory proceedings can be the subject of 'for cause' limits on the President's removal power, but 'cause' must include failure to comply with any valid policy decision made by the President or his agent"); Lawrence Lessig & Cass Sunstein, *The*

Circuit panel observed, there is no precedent supporting the CFPB's radical new form of independence.[23]

B. As the D.C. Circuit recognized in its recent panel decision, the CFPB's lack of a multi-member commission structure exacerbates the CFPB's constitutional flaws.

When the D.C. Circuit's three-judge panel declared the CFPB's structure unconstitutional, it focused not just on the independent CFPB's immense powers, but also on the fact that those powers are vested in a single man—the CFPB Director—instead of a multi-member commission.[24] In that part of its analysis, the D.C. Circuit panel intuited and vindicated a fundamental principle of "independent" agencies: namely, that such independence should be reserved only for "quasi judicial and quasi legislative" bodies that exercise power through multi-member deliberation rather than through unilateral action.[25]

While that principle had been occluded by the Supreme Court in *Morrison*,[26] it was self-evident to the Congress and Supreme Court that first created and endorsed independent agencies.

1. The Court's recognition of this principle is well known: it was the bedrock distinction upon which the Court based its seminal decision of *Humphrey's Executor*, where the Justices upheld as constitutional the FTC Act provision granting FTC Commissioners a limited measure of independence from presidential control.[27] Just years after famously declaring (in *Myers*) that purely executive

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President and the Administration, 94 Colum. L. Rev. 1, 110–111 (1994); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive* (2008), p. 423.

I believe this to be a better construction of the statute than that provided in other dicta by the Supreme Court and D.C. Circuit, assuming a much more aggressive construction. *Free Enter. Fund*, 561 U.S. at 502; *PHH*, 839 F.3d at 15. While the for-cause removal standard prohibits a President for firing an independent officer without actually identifying *any* specific policy disagreement or other cause for removal, the Court has never made a holding as constrictive as the courts' dicta in *Free Enterprise Fund* or *PHH*. *See Humphrey's Ex'r*, 295 U.S. at 619; *Wiener*, 357 U.S. at 350.

[23] *PHH*, 839 F.3d at 18–20 (rejecting the CFPB's attempts to find precedent in the Social Security Administration, the Office of Special Counsel, and the Federal Housing Finance Agency); *see also* C. Boyden Gray & John Shu, "The Dodd-Frank Wall Street Reform & Consumer Protection Act of 2010: Is It Constitutional?," *Engage* (Nov. 16, 2010) (examining the CFPB's unprecedented degrees of independence), *at* http://www.fed-soc.org/publications/detail/the-dodd-frank-wall-street-reform-consumer-protection-act-of-2010-is-it-constitutional.

[24] *PHH*, 839 F.3d at 17–30.

[25] *Humphrey's Ex'r*, 295 U.S. at 624.

[26] *See Morrison*, 487 U.S. at 689.

[27] *Id.*

officers cannot be given independence from the President because they serve as his "alter ego,"[28] the Court in *Humphrey's Executor* distinguished the FTC, the Interstate Commerce Commission, and other multi-member commissions whose "members are called upon to exercise the trained judgment of a *body of experts* 'appointed by law and informed by experience.'"[29]

Those multi-member commissions can be made independent precisely because they are intended "to be nonpartisan" and to "act with entire impartiality."[30] By focusing on the structure and nature of independent commissions, the Court in *Humphrey's Executor* "drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers, and those who are *members of a body* 'to exercise its judgment without the leave or hindrance of any other official or any department of the government.'"[31]

2. The Court's approach reflected common-sense insight into the nature of single-headed bodies versus multi-member bodies. When a multi-member commission exercises its judgment, it is exercising *collective* judgment, in a process that differs starkly from single-leader agencies. Single-leader agencies, like the President himself, do not exemplify deliberation—they exemplify *energy*. As Alexander Hamilton observed in *Federalist* 70, the fact that "unity" in leadership "is conducive to energy will not be disputed. *Decision, activity, secrecy, and despatch will generally characterize the proceedings of one man* in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished."[32]

Multi-member commissions present precisely the opposite qualities: decision and activity are replaced by deliberation; secrecy is replaced by transparency; despatch is replaced by friction. Like congressmen or appellate judges, the members

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28 *Myers v. U.S.*, 272 U.S. 52, 133 (1926).

29 *Humphrey's Ex'r*, 295 U.S. at 624 (emphasis added); *cf. Standard Oil Co. v. U.S.*, 283 U.S. 235, 239 (1931) (cited in *Humphrey's Ex'r*) (observing that the Interstate Commerce Commission's order reflected a determination that "is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable, and such acquaintance is commonly to be found only in *a body of experts*") (emphasis added).

30 *Humphrey's Ex'r*, 295 U.S. at 624.

31 *Wiener v. U.S.*, 357 U.S. 353 (1958) (emphasis added). The Court also alluded to such distinctions in its seminal "nondelegation" case, where it suggested that Congress can more safely delegate broad powers to expert multimember commissions like the Interstate Commerce Commission and the Federal Communication Commission's predecessor. *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 539–540 (1935).

32 *Federalist 70* (Alexander Hamilton).

of a commission debate one another, challenging each other's positions and ultimately producing a collective judgment and perhaps dissenting opinions.

As former FTC Commissioner Joshua Wright has explained, placing a single director in control of an agency prevents "the agency from enjoying the benefits of deliberation which produces more informed judgments about the direction of regulatory policy."[33] "[M]ultimember structures," on the other hand, foster collegiality and thereby increase "the potential for exposure to a variety of views and improved decisionmaking."[34]

Or, as Professor Todd Zywicki observes, "collective governance can constrain overconfidence or cognitive errors by providing critical assessments and viewpoints of proposals," and "can also constrain shirking, self-dealing, and capture by providing multilateral monitoring and raising the number of people who need to be corrupted for improper action to occur."[35]

3. The Supreme Court and scholars are not alone in recognizing the character of multi-member commissions. Congress has recognized it for more than one and a quarter centuries, as evidenced by the fact that the bipartisan multimember commission structure has been the benchmark and premise for independent agencies since the 1880s.[36] Congress's consistent use of this structure reflects "a desired focus on expertise above partisanship; an effort to form a bipartisan solution to difficult policy issues; and a desire to foster a sense of legitimacy in the agency's actions in the public's eye," as well as Congress's desire to have "significant input" on the appointment of the commissions' members.[37]

Indeed, Congress's recognition of the special nature of independent commissions can be traced to the very creation of the Interstate Commerce Commission: Congress created that independent, multi-member commission just weeks before it ended the infamous Tenure of Office Act, the post-Civil-War act by which Congress had attempted to limit presidents' ability to fire executive branch officers.[38] The Congress that removed those limitations on the President's power to fire executive officers took care to place those very same limitations on the

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33 Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: The Two Policies at War With Each Other*, 121 Yale L.J. 2216, 2260 (2012).

34 *Id.*

35 Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 Geo. Wash L. Rev. 856, 897–98 (2013).

36 Ronald J. Krotoszynski, Jr. *et al.*, *Partisan Balance Requirements in the Age of New Formalism*, 90 N.D. L. Rev. 941, 962 *et seq.* (2015).

37 *Id.* at 982–983.

38 *See* Act of March 3, 1887, 24 Stat. 500 (repealing the Tenure of Office Act).

President's control over the quasi-legislative, quasi-judicial Interstate Commerce Commission. In so doing, it signaled its understanding that those two types of agencies were of significantly different character.

Given that history, it is no surprise that then-Professor Warren originally envisioned the CFPB as a multi-member "Financial Product Safety Commission" modeled upon the Consumer Product Safety Commission.[39] So did the original House legislation that gave rise to Dodd-Frank.[40] So did the Senate bill originally proposed by Senators Schumer, Kennedy, and Durbin, titled the "Financial Product Safety Commission Act of 2009."[41]

So, for that matter, did the Obama Administration's original blueprint for financial regulation reform, which urged that the new consumer financial regulatory agency "should be structured to promote its independence and accountability," and thus should "have a Director and a Board"—and the "Board should represent *a diverse set of viewpoints and experiences*."[42]

All of those proposals reflected the basic presumptions of more than a century's experience of independent agencies in our constitutional system. But in the end, President Obama and Congress created the radically different CFPB, an agency lacking all the internal expertise-producing checks and balances normally provided by an independent regulatory commission. When the D.C. Circuit panel declared the CFPB's independence unconstitutional because the CFPB is not a multi-member commission, it was simply recognizing the principles and pragmatic judgments of more than a century of legislative and judicial precedent.

II. The CFPB's "full independence" from Congress is a profoundly dangerous departure from constitutional government.

The CFPB's independence from the President is not its only constitutional problem. Indeed, its independence from the President may not even be the CFPB's most *dangerous* constitutional problem. The CFPB's independence from the President is matched—perhaps exceeded—by its independence from *Congress*.

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39 Elizabeth Warren, "Unsafe at Any Rate," *Democracy: A Journal of Ideas*, Summer 2007, p. 8; *see also* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. Penn. L. Rev. 1, 98 (2008) (urging the creation of a Financial Product Safety Commission but warning that it should make policy through quasi-legislative rulemaking, not through after-the-fact litigation that is "too blunt to provide a comprehensive regulatory response to unsafe consumer credit products").

40 H.R. 4173, 111th Cong., § 4103 (passed Dec. 11, 2009).

41 S. 566, 111th Cong., § 4(a)(2) (introduced Mar. 10, 2009).

42 U.S. Dep't of the Treas., *Financial Regulatory Reform: A New Foundation: Financial Supervision and Regulation* (2009), p. 58 (emphasis added).

The CFPB is not funded by appropriations. The Dodd-Frank Act preemptively severed that tie between Congress and the CFPB, by allowing the CFPB to fund itself through a statutory entitlement to *hundreds of millions of dollars* annually from the Federal Reserve.[43] According to the CFPB, that entitlement will amount to **$646.2 million** in fiscal year 2017 alone.[44] Under Dodd-Frank, the House's and Senate's appropriations committees are *prohibited* from even "review[ing]" the CFPB's self-funded budget.[45]

That is a profoundly dangerous provision. When President Obama and the 111th Congress enacted it as part of Dodd-Frank, they gave the CFPB "full independence" from Congress. That is not my characterization—that is the CFPB's *own* characterization, repeated in the agency's early annual reports.[46]

When the CFPB used to boast about its "full independence" from Congress's appropriations process, it seemed to think that this was a virtuous arrangement. But men much wiser—the Founding Fathers—recognized that it actually is a *vicious* one. As James Madison stressed in *Federalist 58*, Congress's "power of the purse" is "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."[47] Alexander Hamilton agreed: while the President "holds the sword," Congress "commands the purse."[48]

The courts repeatedly have recognized the crucial importance of Congress's power of the purse—most recently the district court hearing the House of Representatives' lawsuit challenging the Obama Administration's unconstitutional expenditure of unappropriated funds: "appropriations are an integral part of our constitutional checks and balances, insofar as they tie the Executive Branch to the Legislative Branch via purse string"[49] and thus "maintain constitutional

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43 12 U.S.C. § 5497(a). Dodd-Frank defines that entitlement as a percentage of the Federal Reserve's operating costs.

44 CFPB, *The CFPB Strategic Plan, Budget, and Performance Plan and Report* (Feb. 2016), p. 9, *at* http://files.consumerfinance.gov/f/201602_cfpb_report_strategic-plan-budget-and-performance-plan_FY2016.pdf.

45 12 U.S.C. § 5497(a)(2)(C).

46 *See, e.g.*, CFPB, *The CFPB Strategic Plan, Budget, and Performance Plan and Report* (Mar. 2014), p. 89, *at* http://files.consumerfinance.gov/f/strategic-plan-budget-and-performance-plan-and-report-FY2013-15.pdf; CFPB, *Consumer Financial Protection Bureau Strategic Plan, FY2013–FY2017* (Apr. 2013), p. 36, *at* http://files.consumerfinance.gov/f/strategic-plan.pdf.

47 *Federalist 58* (James Madison).

48 *Federalist 78* (Alexander Hamilton).

49 *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 59 (D.D.C. 2015).

equilibrium between the Executive and the Legislature."[50] *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 57–58 (D.D.C. 2015). "[W]hen the appropriations process is itself circumvented, Congress finds itself deprived of its constitutional role."[51]

The district court was elaborating a principle long held by the Supreme Court and D.C. Circuit. "The Framers placed the power of the purse in the Congress in large part because the British experience taught that the appropriations power was a tool with which the legislature could resist 'the overgrown prerogatives of the other branches of government.'"[52] It is "a bulwark of the Constitution's separation of powers among the three branches of the National Government," and "particularly important as a restraint on Executive Branch officers."[53] It enables Congress to maintain oversight of "the wisdom and soundness of Executive action," especially where judicial review of executive action is unavailable.[54]

This, too, is a point that scholars have long emphasized. Robert Cushman's authoritative mid-century study of independent agencies placed Congress's "control over commission finances" first and foremost among the tools for oversight of independent agencies: "The most constant and effective control which Congress can exercise over an independent regulatory commission is financial control. . . . Viewed broadly, the financial control exercised by Congress over the [independent] commissions is a necessary and desirable form of supervision."[55] Myriad other scholars have echoed this insight, then and now.[56] So does the Government

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50 *Id.* at 57–58.

51 *Id.* at 75.

52 *Noel Canning v. NLRB*, 705 F.3d 490, 510 (D.C. Cir. 2013) (quoting *Federalist 58*).

53 *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1347 (D.C. Cir. 2012).

54 *Laird v. Tatum*, 408 U.S. 1, 15 (1972); *see also Public Citizen v. NHTSA*, 489 F.3d 1279, 1295 (D.C. Cir. 2007) ("To the extent Congress is concerned about Executive under-regulation or under-enforcement of statutes, it also may exercise its oversight role and power of the purse.") (citing *Laird*).

55 Cushman, *The Independent Regulatory Commissions*, pp. 674–675.

56 *See, e.g.*, Arthur W. Macmahon, *Congressional Oversight of Administration: The Power of the Purse [Part I]*, 58 Pol. Sci. Q. 161, 173 (1943) ("Through [appropriations] is accomplished most of the oversight that Congress exercises over administration."); Kate Sith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1360 (1988) ("Appropriations limitations constrain every government action and activity and, assuming general compliance with legislative prescriptions, constitute a low-cost vehicle for effective legislative control over executive activity."); Jack M. Beermann, *Congressional Administration*, 43 San Diego L. Rev. 61, 84 (2006) ("One way in which Congress has supervised agencies with great particularity, both formally and informally, is through the appropriations process"); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 816 (2013) ("Congress primarily exerts influence over agency heads . . . through the power of the purse. Thus 'an agency has an incentive to shade its policy choice toward the legislature's ideal point to take advantage of that inducement.'" (alteration omitted)

Accountability Office, which begins its *Principles of Federal Appropriations Law* by reiterating that, "[t]hrough the Constitution, the framers provided that the legislative branch—the Congress—has power to control the government's purse strings," which "ensured that the government remained directly accountable to the will of the people," and preserved for Congress "a key check on the power of the other branches."[57] It is nothing less than "the most important single curb in the Constitution on Presidential power."[58]

But most importantly, *Congress* has recognized this fundamental constitutional truth: "The appropriations process is the most potent form of congressional oversight, particularly with regard to the federal regulatory agencies."[59] And to that end, Congress today must take care to *reclaim* the power that it forfeited seven years ago.

The 111th Congress gave its power of the purse away for reasons of its own. But while an individual Congress, like an individual President, "might find advantages in tying [its] own hands," subsequent Congresses must fight to reclaim that power, because "the separation of powers does not depend on the views of individual [Congresses]."[60] As counsel to plaintiffs filing the original constitutional lawsuit against the CFPB, I spent years urging the courts to correct Congress's mistake. Even now that I am no longer involved in that litigation, I still hope that the courts will correct that mistake—but I hope all the more that *Congress* will correct it.[61] As Justice Jackson urged in the *Steel Seizure Case*, in the end "only *Congress itself* can prevent power from slipping through its fingers."[62]

(quoting Randall L. Calvert *et al.*, *A Theory of Political Control and Agency Discretion*, 33 Am. J. Pol. Sci. 588, 602 (1989)); Joseph Cooper & Ann Cooper, *The Legislative Veto & the Constitution*, 30 Geo. Wash. L. Rev. 467, 491 (1961) ("Congress constantly uses the appropriations bills to control and supervise executive decision-making with regard to both policy and operations."); *cf.* Edward S. Corwin, *The War & the Constitution: President & Congress*, 37 Am. Pol. Sci. Rev. 18, 24 (1943) ("[I]n its control of the purse-strings Congress possesses its most effective check on Presidential power.").

57 GAO, *Principles of Federal Appropriations Law* (4th ed. 2016), vol. 1, pp. 1-4 to 1-5.

58 *Id.* at p. 1-5.

59 S. Comm. on Gov't Operations, 95th Cong. 1st Sess., *Study on Federal Regulatory Agencies* (1977), vol. 2, p. 42.

60 *Free Enter. Fund*, 561 U.S. at 497.

61 The D.C. Circuit panel that originally ruled against the CFPB in the *PHH* case declined to reach the appropriations issue, concluding that "[t]he CFPB's exemption from the ordinary appropriations process is at most just 'extra icing on' an unconstitutional 'cake already frosted.'" *PHH*, 839 F.3d at 36 n.16. I respectfully but strongly disagree with the panel's minimization of the appropriations issue.

62 *Steel Seizure Case*, 343 U.S. 654 (Jackson, J., concurring) (emphasis added).

III. Director Cordray's record exemplifies the very dangers inherent the CFPB's unconstitutional structure.

As I noted earlier, Holmes famously observed that the "life of the law" is "experience."[63] And in this case, the last seven years' experience confirms over and over again the Framers' wisdom that Congress must maintain its power of the purse over the other branches of government. Director Cordray's record as director of the CFPB exemplifies the dangers inherent in making a single-member agency independent of the President, and in freeing it from Congress's appropriations.

Most startlingly, Director Cordray demonstrated astonishing contempt for this Committee generally, and Chairman Wagner specifically, when he bluntly refused to answer her straightforward and good-faith question as to the CFPB's lavish spending on its building, in a March 2015 hearing:

> *Rep. Wagner*: Someone made a decision to spend upwards . . . of $215.8 million dollars, and you're telling me there's no record, no one responsible—
>
> *Director Cordray*: I didn't say that.
>
> *Rep. Wagner*: Then who is it? What individual—
>
> *Director Cordray*: No, I mean, there's lots of records on this, including my reaffirmation of the decision . . .
>
> *Rep. Wagner*: Who signed off? Who gave the authorization for such an incredible—
>
> *Director Cordray*: *And why does that matter to you?*
>
> *Rep. Wagner:* Because it's $215 million in taxpayers' money. That's why it matters to me.[64]

Such basic questions remain unanswered—not simply as to who Director Cordray authorized to undertake such lavish renovations, but also as to *why* such opulence was actually *necessary* for the CFPB's efficient execution of its statutory responsibilities.[65] The same could be said of the CFPB's millions of dollars in

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63 Oliver Wendell Holmes Jr., *The Common Law* (1881), p. 1.

64 Video of this exchange is available at https://youtu.be/5IxSfJ638cs.

65 *See also* Richard Pollock, "CFPB's renovation costs skyrocket to $216 million; IG sees 'no sound basis' for it," *Washington Examiner* (July 2, 2014); Richard Pollock, "No space in CFPB's $139m renovated headquarters for a third of its employees," *Washington Examiner* (Mar. 20, 2014).

spending on advertising,[66] or any of the other matters on which Director Cordray has long resisted answering this Committee's inquiries.[67]

Meanwhile, Director Cordray's tenure has been marked by other major failings, such as widespread complaints of racial discrimination within his agency.[68]

And his failings are not merely acts of omission. There are also acts of commission, such as his decision to take the ALJ's $6.4 million fine against PHH Corporation and increase it to a staggering final sum of **$109 million**, an act interpreted by some observers as a preemptive warning to any other defendants who might consider filing an administrative appeal of an ALJ decision in an CFPB enforcement case.[69] These are precisely the sorts of excessive, aggressive actions that one might expect an independent agency to undertake when it is freed from Congress's appropriations-backed oversight—the "overgrown prerogatives" against which James Madison and the other Framers hoped that Congress would protect us against, using its power of the purse.[70]

IV. The CFPB's Excesses Hurt Small Banks Most of All.

When I was co-counsel in CFPB litigation, I represented the State National Bank of Big Spring, Texas. I saw how that the CFPB's excesses fall most heavily on community banks and other small companies. Unlike the biggest banks, community banks cannot afford armies of lawyers, lobbyists, and compliance officers to challenge, change, or comply with CFPB regulations. Indeed, the biggest banks know this: JPMorgan Chase's CEO told analysts in 2013 that new regulations could

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66 Yuka Hayashi & Brody Mullins, "Consumer-Finance Agency, Under Fire, Accelerates Ad Spending," *Wall St. Journal* (June 12, 2016).

67 *See, e.g.*, Rep. Randy Neugebauer, "A $447 Million Consumer Alert," *Wall St. J.*, Sept. 19, 2012 ("My House Subcommittee on Oversight and Investigations has tried unsuccessfully to gain greater visibility into the bureau's budgetary planning process. I have repeatedly asked to review the bureau's statutorily required financial operating plans and forecasts. These requests were denied. I have repeatedly requested that the bureau expand its Fiscal Year 2013 budget justification for $447,688,000 to more than a scanty 25 pages. These requests were denied.")

68 Rachel Witkowski, "CFPB Staff Evaluations Show Sharp Racial Disparities," *Am. Banker* (Mar. 6, 2014); GAO, *CFPB: Additional Actions Needed to Support a Fair and Inclusive Workplace*, GAO-16-61 (May 2016) at p. 23; Kelly Riddell, "Bureaucrats gone wild: Feds describe racial hostility, discrimination inside new Obama agency," *Washington Times* (Aug. 27, 2014); Testimony of Angela Martin, House Fin. Servs. Comm., Oversight & Investigations Subcomm. (Apr. 2, 2014) (emphasis added), *at* http://financialservices.house.gov/uploadedfiles/hhrg-113-ba09-wstate-amartin-20140402.pdf.

69 *See, e.g.*, Evan Weinberger, "Cordray Hikes PHH Penalty to $109M in 1st Appeal Decision," *Law360.com* (June 4, 2015) ("the decision provides a useful, if painful, lesson for other firms considering CFPB administrative appeals").

70 *Federalist 58.*

be the "moat" that makes the industry (in the analysts' words) "more expensive and tend to make it tougher for smaller players to enter the market."[71]

Goldman Sachs's CEO made the same point two years later, in 2015: "More intense regulatory and technology requirements have raised the barriers to entry higher than at any other time in modern history," he told an investor conference. "This is an expensive business to be in, if you don't have the market share in scale. Consider the numerous business exits that have been announced by our peers as they reassessed their competitive positioning and relative returns."[72]

And the facts suggest that the Jamie Dimon's and Lloyd Blankfein's predictions were well founded. As the Mercatus Center, AEI, and others have reported, the years since Dodd-Frank have witnessed significant consolidation in the banking industry, as community banks give up and merge.[73] While too many in Congress and elsewhere simply assume that all regulation necessarily hurts Wall Street, the fact remains that Dodd-Frank truly was "the biggest kiss" that Washington could have given to Wall Street, at least in terms of increasing the biggest banks' advantages over smaller competitors.[74]

Restoring the Constitution's fundamental principles of separated powers, and its checks and balances, will benefit all Americans. But it will first and foremost benefit small banks and the communities and people who depend on them.

Thank you for the opportunity to testify today.

[71] Citi Research, *JP Morgan Chase & Co. (JPM): Meeting Notes w/CEO Jamie Dimon; Reiterate Buy and $53 Target as Solid Execution Drives Double-Digit Returns in 2013* (Feb. 3, 2013); *quoted in* John Carney, "Surprise! Dodd-Frank Helps JPMorgan Chase," *CNBC* (Feb. 4, 2013), http://www.cnbc.com/id/100431660; *see also* Hugh Son, "Dimon Says Banks to Gain as Crisis-Era Rules Sting Poor," *Bloomberg* (Apr. 10, 2014) (quoting 2014 annual letter).

[72] Editorial, "Regulation Is Good for Goldman," *Wall St. Journal* (Feb. 11, 2015).

[73] Hester Peirce et al., *How Are Small Banks Faring Under Dodd-Frank?*, Mercatus Working Paper No. 14-05 (Feb. 2014); Tanya D. Marsh & Joseph W. Norman, AEI, *The Impact of Dodd-Frank on Community Banks* (May 2013).

[74] C. Boyden Gray & Adam J. White, "The Biggest Kiss," *Weekly Standard* (Oct. 29, 2012).

LETTER

AFSA
Protecting Credit Since 1916
American Financial Services Association

March 20, 2017

The Honorable Ann Wagner	The Honorable Al Green
Chairman	Ranking Member
Subcommittee on Oversight and Investigations	Subcommittee on Oversight and Investigations
Committee on Financial Services	Committee on Financial Services
Washington, DC 20515	Washington, DC 20515

Dear Chairman Wagner and Ranking Member Green:

On behalf of the American Financial Services Association (AFSA)[1], I am writing regarding your hearing, "the Bureau of Consumer Financial Protection's Unconstitutional Design." Thank you for conducting this hearing, and I respectfully request that this letter be included in the record.

The unprecedented and extraordinary degree of autonomy that the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) granted to the Consumer Financial Protection Bureau (CFPB), particularly the single director's ability to unilaterally determine the Bureau's budget, priorities, and policies, has not been optimal. Six years after the CFPB's establishment, the Bureau is not accountable to Congress, to industry stakeholders, or to the American public.

The CFPB should be subject to traditional government checks and balances. Rather than the CFPB director dictating his own budget, Congress should exercise its constitutional power of the purse to determine the Bureau's budget. The CFPB should be placed under the appropriations process to ensure that the agency is not self-regulated and that Congress has proper oversight and funding authority over the Bureau as it does other federal agencies.

Furthermore, the financial services industry is too vital to the health and welfare of the nation's economy to be led by a solitary CFPB director with unilateral decision-making power and virtually no oversight. Therefore, the CFPB should be reconstituted as a bipartisan "Consumer Financial Opportunity Commission" to ensure certainty, fairness, and transparency. A bipartisan commission structure would provide a diversity of perspectives, leading to more balanced and effective regulation.

We look forward to working with you on these and other reforms to the Dodd Frank Act. Thank you for conducting this important hearing on the constitutionality of the CFPB. Please do not hesitate to contact me at (202) 466-8616 or bhimpler@afsamail.org with any questions.

Sincerely,

Bill Himpler

Bill Himpler
Executive Vice President
American Financial Services Association

[1] *Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, direct and indirect vehicle financing, mortgages, payment cards, and retail sales finance.*

CBA | CONSUMER BANKERS ASSOCIATION

March 21, 2016

The Honorable Ann Wagner
Chairman
Subcommittee on Oversight and Investigations
Committee on Financial Services
U.S. House of Representatives
2129 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Al Green
Ranking Member
Subcommittee on Oversight and Investigations
Committee on Financial Services
U.S. House of Representatives
4340 O'Neill House Office Building
Washington, D.C. 20151

Dear Chairman Wagner and Ranking Member Green:

The Consumer Bankers Association (CBA)[1] appreciates the Financial Services Subcommittee on Oversight and Investigations' oversight of the Consumer Financial Protection Bureau ("Bureau" or "CFPB") and its activities. We would like to take this opportunity to submit the following comments and ask that they be submitted in to the record for the hearing entitled, "The Bureau of Consumer Financial Protection's Unconstitutional Design."

The Consumer Financial Protection Bureau

In 2010, following the worst recession since the Great Depression, Congress passed the Dodd-Frank Act, which created the Consumer Financial Protection Bureau (CFPB). The CFPB has unprecedented rulemaking, supervisory, and enforcement authority over the entire consumer financial services industry, and was created with a mission "to make markets for consumer financial products and services work for Americans."[2]

By concentrating all of the consumer protection powers in one place, the CFPB has supervisory authority over more entities than all other Federal bank supervisors combined,[3] totaling 15,000 institutions altogether. By contrast, the Office of the Comptroller of the Currency has supervisory authority over approximately 1,600 institutions.[4] In addition to authority over each depository institution with assets over $10 billion, the CFPB has supervisory authority over all those in the business of origination, brokerage, or servicing of consumer loans secured by real estate, and related mortgage loan modification or foreclosure relief services; private education loans; and short term liquidity products. Additionally, the agency has the ability to define, by rulemaking, its

[1] Founded in 1919, the Consumer Bankers Association is the trade association for today's leaders in retail banking - banking services geared toward consumers and small businesses. The nation's largest financial institutions, as well as many regional banks, are CBA corporate members, collectively holding well over half of the industry's total assets. CBA's mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business.

[2] Consumer Financial Protection Bureau, *About Us*, http://www.consumerfinance.gov/the-bureau/.

[3] Financial Report of the Consumer Financial Protection Bureau, FY 2014.

[4] The CFPB supervises compliance with consumer protection laws; the OCC's supervisory authority includes prudential supervision and CRA for all national banks and federal thrifts, and consumer protection for national banks and federal thrifts with assets of $10 billion or less.

own scope of supervisory authority, which it has so far defined to include authority over larger consumer reporting agencies, debt collectors, nonbank student loan servicers, international money transmitters and nonbank auto finance companies. Overall, the Bureau's vast jurisdiction includes an entire sector of American finance from banks and credit unions, to innumerable financial services companies of all sizes, including larger participants in the American financial system, ultimately touching all Americans.

Since its inception, the CFPB was granted power by Congress to protect consumers, reduce discriminatory and predatory lending, and return dollars back to consumers by way of fines collected from enforcement actions. Unlike a majority of the financial service regulators, a single individual was tasked with the duties of directing such a vast and important endeavor. With so much power vested in one person, it is prudent for Congress to reexamine the structure of the agency to ensure the Bureau's design properly regulates the financial services industry, safeguards consumers, while permitting growth and innovation within our financial markets.

As we know, the CFPB's actions can have incredible ramifications on the financial industry and our economy. This hearing serves the important purpose of examining the constitutionality of the agency and remedies to its structure which will ensure the longevity of the CFPB and its ability to protect consumers. It is imperative the CFPB's structure is stable, deliberative, and bipartisan – for the sake of the American consumer and the U.S. economy.

The *PHH v. CFPB* Case Has Created Greater Uncertainty

A recent U.S. Court of Appeals Case, *PHH Corp. v. CFPB*, examined the question of the CFPB's constitutionality. The opinion held that having a single director at the CFPB—an independent agency—who can only be removed by the President "for cause" puts too much power in the hands of a single individual, is a "gross departure from settled historical practice," and is unconstitutional. The court's solution was to permit the President to remove the Bureau's director "at will."

The court, however, noted that establishing a commission to lead the agency would be an alternative that would resolve the agency's constitutional infirmities. Judge Kavanaugh, the author of the opinion, stated, "The CFPB's concentration of enormous executive power in a single, unaccountable, unchecked Director not only departs from settled historical practice, but also poses a far greater risk of arbitrary decision making and abuse of power, and a far greater threat to individual liberty, than does a multi-member independent agency."[5]

The U.S. Circuit Court for the District of Columbia has decided to rehear the case with the entire panel of judges (known as an *en banc* review) with oral arguments scheduled for May 24th. It will take months more for the court to reach a decision.

Need For a Bipartisan Commission

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[5] *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Circuit 2016).

To preserve the CFPB as an effective regulator, with a mission to protect consumers regardless of which political party is in the White House, Congress should return the CFPB to its originally intended and planned structure, from a sole director to a bipartisan commission. The *PHH Corp. v. CFPB* decision only exacerbates the need for a commission to eliminate the ongoing uncertainty posed by having a sole director.

A bipartisan commission would provide a balanced and deliberative approach to supervision, regulation, and enforcement for the long-term as well as offer a stable form of leadership. Certainty is not only good for industry, it is also good for consumers and the economy. No matter the action or rule the Bureau considers, having multiple viewpoints that must be heard though a commission structure is more likely to strengthen consumer choice and increase consumer's access to credit instead of one person's opinion who may only solicit advice from a few select sources.

Another factor that calls into question the single director model, is the ever-changing political landscape. Understanding that stability and certainty are two components of a healthy regulatory environment, a single director structure jeopardizes industry certainty, subjecting the financial services industry and consumers to the various and unpredictable political viewpoints that make it difficult for banks and credit unions to develop long-term plans so they can better serve consumers and small business.

In addition, a commission is the traditional and customary structure for independent federal agencies, helping to ensure thorough deliberation, bipartisanship, and impartiality. Examples in the financial services space include the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, the Commodity Futures Trading Commission, and the National Credit Union Administration.

Bipartisan Support for Commission Structure

The idea of a five-person commission has had bipartisan support and even originated in a Democrat-led Congress. In 2009, then-Speaker Nancy Pelosi (D-CA) and then-House Financial Services Chairman Barney Frank (D-MA) led passage of legislation in the House, with strong Democratic support, which would have created a five-member commission to oversee the CFPB. In addition, then-professor Elizabeth Warren, whose ideas led to the creation of the CFPB, also called for a Financial Product Safety Commission (FPSC) during public debate over the Agency's creation – a proposal that was supported by President Obama.

In addition to Democratic support during the creation of the Dodd-Frank Act, a number of Republican led legislative efforts have attempted to replace the sole director model with a five-person commission. In the 114th Congress, House Financial Services Committee Financial Institutions and Consumer Credit Subcommittee Chairman Randy Neugebauer (R-TX) introduced H.R. 1266, the Financial Product Safety Commission Act, modeled after the language that was originally included in the House-passed version of Dodd-Frank in 2009. The House Financial Services Committee approved H.R. 1266 with bipartisan support in late September 2015. Most recently, in September 2016, House Financial Services Committee Chairman Jeb

Hensarling (R-TX) introduced H.R. 5983, the Financial CHOICE Act, which included the Neugebauer language, creating a commission at the CFPB. In late September 2016, the Financial Services Committee passed the Financial CHOICE Act.

Conclusion

Improving the financial lives of consumers and the strength of small businesses is a goal we all share. The best way to ensure this outcome is to establish a governance structure at the CFPB that promotes debate and deliberation among leaders with diverse experiences and expertise so rules and regulations are written for the financial betterment of consumers and small businesses. A bipartisan commission of five, Senate-confirmed commissioners would provide a balanced and deliberative approach to supervision, regulation, and enforcement of rules and regulations that oversee the financial services sector. Transitioning the CFPB's governance structure to a bipartisan commission would ensure greater regulatory collaboration from all stakeholders culminating in the development of financial products that are safe, affordable and meet consumer demand.

CBA stands ready to work with Congress to craft a regulatory framework that safeguards the American consumer, ensures access to credit and promotes competition in the financial marketplace. On behalf of the members of CBA, we appreciate the opportunity to submit this statement for the record.

Sincerely,

Richard Hunt
President and CEO
Consumer Bankers Association

CFPB Actions to Enforce the Real Estate Settlement Procedures Act

The CFPB is responsible for enforcing the Real Estate Settlement Procedures Act, which was enacted in 1974 as a response to abuses in the real estate settlement process. A primary purpose of the law is to eliminate kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services.

- PHH, NJ: fined $109 million (in litigation) for illegal kickbacks
- RealtySouth, AL: $500,000 fine for inadequate disclosures
- Stonebridge Title Services Inc., NJ: $30,000 fine for illegal kickbacks
- Borders & Borders, KY: Charged with paying commissions for referrals, fine pending
- Lighthouse Title, MI: $200,000 fine for illegal quid pro quo referral agreements
- Prospect Mortgage, CA: $3.5 million fine for illegal kickbacks
- ReMax Gold Coast, CA: $50,000 fine for accepting kickbacks
- Keller Williams Mid-Willamette, OR: $190,000 fine for accepting kickbacks
- Planet Home Lending, CT: $265,000 fine for payment of illegal referral fees.

Rep. Keith Ellison Slide

Americans for Financial Reform

United States House of Representatives
Financial Services Committee
Oversight and Investigations Subcommittee
March 21, 2017

Americans for Financial Reform (AFR)[1] appreciates the opportunity to provide this statement for the record of the Oversight and Investigations Subcommittee hearing on the constitutionality of the structure of the Consumer Financial Protection Bureau (CFPB).

The first five-and-a-half years of the CFPB's history has vindicated the decisions that Congress made in 2010 to create a strong, independent agency to protect consumers from fraud and abuse in the financial marketplace. When Congress created the CFPB, it gave it "the authority and accountability to ensure that existing consumer protection laws and regulations are comprehensive, fair, and vigorously enforced."[2] Through its rulemaking, supervision, enforcement, consumer education, and consumer complaint system, the CFPB has made major strides in making the financial marketplace fairer to consumers. Its actions have begun to reform the industry by making banks and other financial services companies more attentive to consumers' rights.

A few examples of the CFPB's enforcement efforts illustrate the tangible importance of its work:

- Securing $1.8 billion in refunds for the credit card customers of Citibank,[3] Bank of America,[4] and JP Morgan Chase[5] for worthless add-on products like fraud monitoring services and deceptively-marketed insurance.
- Entering into a $2.1 billion settlement with Ocwen for systematically overcharging homeowners by misapplying their payments and adding unauthorized fees, and by misleading homeowners and courts in the foreclosure process.[6]

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1 AFR is a coalition of more than 200 national, state, and local groups who have come together to reform the financial industry. Members of our coalition include consumer, civil rights, investor, retiree, community, labor, faith based, and business groups. A list of AFR member groups is available at http://ourfinancialsecurity.org/about/our-coalition/.

2 Joint Explanatory Statement of the [Dodd-Frank] Committee of Conference at 874 (June 29, 2010), http://www.llsdc.org/assets/DoddFrankdocs/dodd-frank-act-jt-expl-statement.pdf

3 http://www.consumerfinance.gov/newsroom/cfpb-orders-citibank-to-pay-700-million-in-consumer-relief-for-illegal-credit-card-practices/

4 http://www.consumerfinance.gov/newsroom/cfpb-orders-bank-of-america-to-pay-727-million-in-consumer-relief-for-illegal-credit-card-practices/

5 http://www.consumerfinance.gov/newsroom/cfpb-orders-chase-and-jpmorgan-chase-to-pay-309-million-refund-for-illegal-credit-card-practices/

6 http://www.consumerfinance.gov/newsroom/cfpb-state-authorities-order-ocwen-to-provide-2-billion-in-relief-to-homeowners-for-servicing-wrongs/

- Securing a $530 million default judgment against Corinthian,[7] a for-profit school that swindled students into paying for worthless degrees and then engaged in illegal debt collection in its private student loan program, along with $480 million in debt relief for affected students.[8]
- Stopping Wells Fargo's practice of routinely opening fraudulent accounts without customer authorization.[9]
- Putting an end to the unfair practices of dozens of other companies. For example, in December 2015, the CFPB stopped CarHop from continuing to convey inaccurate information to credit reporting agencies; CarHop also agreed to pay a $6,465,000 civil penalty in recognition of the 84,000 customers already been harmed by its false reports.[10]

The CFPB has successfully resolved more than 100 cases and secured $11.8 billion in relief for consumers - more than four times what the agency has spent on all functions over the course of its existence. This relief is often mislabeled by the agency's detractors as "fines"; in fact, the $11.8 billion only includes funds directly returned to 29 million consumers who suffered a financial loss due to a defendant's lawbreaking.[11] The agency has also issued more than $589 million in civil money penalties to deter future lawbreaking, money which is available to remedy consumer losses in instances when the wrongdoer is insolvent.[12]

These successes vindicate the structure that Congress put in place to give the CFPB and its director the independence and authority needed to take on powerful industry interests.

Agency Independence Under A Single Director

Congress vested the CFPB's leadership in a single director.[13] Making a single director responsible for the agency's functioning facilitates effective decision-making and ensures a clear point of responsibility for the CFPB's actions and performance. Perhaps for that reason, the vast majority of federal agencies are headed by single individuals.

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7 http://www.consumerfinance.gov/newsroom/cfpb-wins-default-judgment-against-corinthian-colleges-for-engaging-in-a-predatory-lending-scheme/

8 http://www.consumerfinance.gov/newsroom/cfpb-secures-480-million-in-debt-relief-for-current-and-former-corinthian-students/

9 https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/

10 http://www.consumerfinance.gov/newsroom/cfpb-orders-carhop-to-pay-6-4-million-penalty-for-jeopardizing-consumers-credit/

11 http://files.consumerfinance.gov/f/documents/201701_cfpb_CFPB-By-the-Numbers-Factsheet.pdf

12 12 U.S.C. § 5497(d).

13 12 U.S.C. § 5491(b)(1).

Congress also made the CFPB an independent agency, just like all other federal financial regulators.[14] By statute, the president may remove the CFPB Director only for "inefficiency, neglect of duty, or malfeasance in office."[15] This statutory language is identical to the statute the Supreme Court blessed when it decided *Humphrey's Executor* more than 80 years ago, holding that those statutory restrictions on the removal of Federal Trade Commission (FTC) commissioners, and by extension the heads of other administrative agencies, were constitutional.[16] That decision has been upheld repeatedly by the Supreme Court,[17] and applied by two federal district courts to uphold the constitutionality of the CFPB's structure.[18]

Nevertheless, a divided panel of the D.C. Circuit recently issued a novel opinion, authored by the federal judiciary's most outspoken critic of *Humphrey's Executor*,[19] holding that Congress could not protect the head of a single-director agency from arbitrary removal.[20] The D.C. Circuit has since vacated that unprecedented decision, and it will be reargued before the court sitting *en banc* in May.

Contrary to the panel opinion, the Supreme Court has held that whether the Constitution requires the president to enjoy unfettered authority to remove the head of an agency "depend[s] upon the character of the office."[21] The CFPB is characteristic of the administrative agencies for which the Supreme Court has upheld for-cause removal. In upholding such removal protections restrictions for the FTC, the Supreme Court explained that "[i]n administering the [prohibition] of 'unfair methods of competition' — that is to say in filling in and administering the details embodied by that general standard — the [FTC] acts in part quasi-legislatively and in part quasi-judicially." The CFPB has the same quasi-legislative and quasi-judicial responsibilities to define and enforce the prohibition of "unfair, deceptive, or abusive act[s] or practice[s]" in consumer finance, as well as to make rules and enforce for the consumer finance statutes.[22]

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14 Congressional Research Service, *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues* (Feb. 28, 2017), available at https://fas.org/sgp/crs/misc/R43391.pdf.

15 12 U.S.C. § 549(c)(3).

16 *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

17 *Wiener v. United States*, 357 U.S. 349 (1958); *Morrison v. Olson*, 487 U.S. 654 (1988).

18 *CFPB v. Morgan Drexen*, 60 F. Supp. 3d 1082 (C.D. Cal. 2014); *CFPB v. ITT Educational Servs., Inc.*, No. 1:14-cv-00292-SEB-TAB (S.D. Ind. Mar. 6, 2015).

19 *See In re Aiken County*, 645 F. 3d 428, 438 (D.C. Cir. 2011) (Kavanaugh, J., concurring) ; *Securities & Exchange Comm'n v. Federal Labor Relations Authority*, 568 F. 3d 990, 996-98 (D.C. Cir. 2009) (Kavanaugh, J., concurring); *Free Enterprise Fund v. PCAOB*, 537 F.3d 667, 685 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

20 *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. Oct. 11, 2016).

21 *Humphrey's Executor*, 295 U.S. at 631; *accord Wiener*, 357 U.S. at 353 ("the most reliable factor for drawing an inference regarding the president's power of removal . . . is the nature of the function that Congress vested").

22 12 U.S.C. §§ 5481(12), 5531.

Thus, because the CFPB's functions permit it to be an independent agency, whether it is headed by a single director or otherwise. And a single-director structure for an independent financial regulator is nothing new: the Office of the Comptroller of the Currency (OCC), the regulator of national banks, has been headed by a single official since it was established in 1863.[23] By statute, the Comptroller is independent,[24] and the President has recognized that independence by excluding the OCC from coverage in its regulatory executive orders.[25] Furthermore, there is a strong argument that – like other financial regulators without clear statutory protections against removal[26] – the Comptroller is removable only for cause.[27] And since Congress established the Federal Housing Finance Agency in 2008 that agency has also been headed by a single director who can be removed only for cause.[28]

Despite the CFPB's independence, it nevertheless faces many structural checks on its authority. Its rulemakings are subject to notice-and-comment procedures that provide opportunity for input by the affected industries, the public, and elected officials, and its rules may be challenged in court under the Administrative Procedures Act. Similarly, enforcement actions may be appealed to the courts. Unlike other bank regulators, the CFPB's decisions are also subject to veto by the members of the Financial Stability Oversight Council,[29] and CFPB rulemakings that impact small businesses are initially reviewed by a panel of affected small businesses. The CFPB is also subject to extensive oversight through semi-annual testimony before each house of Congress's committee of jurisdiction, annual Government Accountability Office audits, and frequent reports by the Inspector General.

In summary, independent agencies are the well-established norm for consumer and financial regulation, and there is no constitutional prohibition on an independent agency being led by a single director. These issues are addressed in greater depth by the attached amicus brief that we, with nine other organizations, submitted to the D.C. Circuit in *PHH Corporation v. CFPB.*

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[23] 12 U.S.C. § 1(b)(1).

[24] *E.g.*, 12 U.S.C. §§ 1, 250.

[25] *E.g.*, Executive Order 12866 (incorporating the definition of "independent regulatory agency" in 44 U.S.C. § 3502(5), which lists the Federal Housing Finance Agency, the Bureau of Consumer Financial Protection, and the Office of the Comptroller of the Currency by name).

[26] *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3148-49 (2010) (SEC Commissioners enjoy removal protections despite statutory silence); *Swan v. Clinton*, 100 F.3d 973, 981-88 (D.C. Cir. 1986) (assuming same for NCUA). *See also Wiener v. United States*, 357 U.S. 349, 356 (1958) (same for defunct War Claims Commission); *Federal Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 826 (D.C. Cir. 1993) (same for FEC).

[27] Brief of Americans for Financial Reform, et al., *PHH Corporation v. CFPB*, No. 15-1177 (D.C. Cir. Nov. 29, 2016), at 12, *available at* http://ourfinancialsecurity.org/wp-content/uploads/2016/11/PHH-DC-Cir-amicus-final.pdf.

[28] 12 U.S.C. § 5491(b).

[29] 12 U.S.C. § 5513(a).

Independent Funding

All federal regulators of banks and credit unions are funded outside the Congressional appropriations process. In fact, those agencies – other than the CFPB – effectively set their own funding levels.[30] The OCC sets its own fee schedule, while the Federal Deposit Insurance Corporation and National Credit Union Administration fund their operations through deposit insurance assessments that they each set.[31] Similarly, the Federal Reserve Board (FRB) is funded by investment returns, with the FRB retaining discretion regarding the amount of its operating expenses.[32] By contrast, the CFPB's independent funding is capped by statute.[33]

Given this well-established practice of funding regulatory agencies without appropriations, it is no surprise that the courts have summarily rejected arguments that the CFPB's funding is unconstitutional.[34] There is simply no constitutional requirement that any agency be funded from the U.S. Treasury through the appropriations process rather than other means.[35]

* * *

Thank you for the opportunity to express AFR's views on the constitutionality of the CFPB's governance and funding structure. If you have additional questions on these issues, please contact Brian Simmonds Marshall, AFR's Policy Counsel, at brian@ourfinancialsecurity.org or 202-684-2974.

Sincerely,

Americans for Financial Reform

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[30] *See* Arthur E. Wilmarth Jr., *The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 Rev. Banking & Fin. L. 881, 906 (2012), available at http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2171&context=faculty_publications.

[31] Congressional Research Service, *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues* (Feb. 28, 2017), at 27, available at https://fas.org/sgp/crs/misc/R43391.pdf.

[32] *Id.*

[33] 12 U.S.C. § 5497(d).

[34] *CFPB v. Morgan Drexen*, 60 F. Supp. 3d 1082, 1089 (C.D. Cal. 2014); *CFPB v. ITT Educational Servs., Inc.*, No. 1:14-cv-00292-SEB-TAB (S.D. Ind. Mar. 6, 2015).

[35] *See AINS, Inc. v. United* States, 56 Fed. Cl. 522, 539 (Fed. Cl. 2003), *aff'd*, 365 F.3d 1333 (Fed. Cir. 2004); *Am. Fed'n of Gov't Employees, AFL-CIO, Local 1647 v. Fed. Labor Relations Auth.*, 388 F.3d 405, 409 (3d Cir. 2004)

ARGUED APRIL 12, 2016; DECIDED OCTOBER 11, 2016

No. 15-1177

In the United States Court of Appeals for the District of Columbia Circuit

PHH CORPORATION, et al., *Petitioners*,

v.

CONSUMER FINANCIAL PROTECTION BUREAU, *Respondent.*

On Petition for Review of an Order of the
Consumer Financial Protection Bureau (CFPB File 2014-CFPB-0002)

BRIEF OF AMERICANS FOR FINANCIAL REFORM, CALIFORNIA REINVESTMENT COALITION, THE CENTER FOR RESPONSIBLE LENDING, CONSUMER FEDERATION OF AMERICA, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, THE NATIONAL COMMUNITY REINVESTMENT COALITION, THE NATIONAL CONSUMER LAW CENTER, THE NATIONAL COUNCIL OF LA RAZA, UNITED STATES PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND, INC., AND WOODSTOCK INSTITUTE AS AMICI CURIAE IN SUPPORT OF REHEARING EN BANC

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COMBINED CERTIFICATES

Certificate as to Parties, Rulings, and Related Cases

A. *Parties and Amici.* Except for the organizations that are signatories to this brief and any other *amici* who had not yet entered an appearance as of the filing of the petition for rehearing en banc, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the petition for rehearing en banc.

B. *Rulings under Review.* References to the rulings under review appear in the brief for Respondent.

C. *Related Cases.* References to the rulings under review appear in the brief for Respondent.

Rule 29(c)(5) Statement

No party's counsel authored this brief, in whole or in part. No party or a party's counsel contributed money that was intended to fund the preparation or submission of this brief. No person (other than *amici curiae*, their members, or their counsel) contributed money that was intended to fund the preparation of the brief.

Certificate of *Amici Curiae* Under Circuit Rule 29(d)

Amici curiae are ten non-profit organizations that advocate for consumer protection and civil rights. Each organization advocated for the CFPB's creation and frequently appears before the Bureau to advocate for consumer interests. *Amici* and their members therefore have a strong interest in ensuring that the CFPB remains free from undue political and industry influence, and are uniquely well positioned to explain to the Court why the panel opinion, if left standing, will threaten the Bureau's ability to protect consumers and imperil Congress's goal of creating a regulatory environment free of undue industry influence.

Corporate Disclosure Statement

No party to this filing has a parent corporation, and no publicly held corporation owns 10% or more of the stock of any party to this filing.

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TABLE OF AUTHORITIES*

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* Authorities upon which we chiefly rely are marked with asterisks.

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GLOSSARY

CFPB	Consumer Financial Protection Bureau
FCIC	Financial Crisis Inquiry Commission
OCC	Office of the Comptroller of the Currency
SEC	Securities and Exchange Commission

INTRODUCTION

Spurred by toxic mortgages, the 2008 financial crisis caused millions of American families to lose their homes and brought the economy to the brink. A key cause, Congress found, was regulatory failure. Consumer protection was orphaned across many federal agencies and took a backseat to concern for banks' safety and soundness. And, all too often, regulators were captured by industry influence. The result was a vacuum in which reckless predatory lending flourished.

Congress responded by creating a new Consumer Financial Protection Bureau (CFPB)—an independent single-director agency charged with protecting consumers from the unchecked financial practices that fueled the crisis. To prevent history from repeating itself, Congress deliberately designed this new agency to withstand partisan politics and the powerful influence of the financial industry.

The panel's sweeping and unprecedented opinion in this case reaches out to declare Congress's design unconstitutional. If left standing, the panel's opinion will threaten the CFPB's ability to protect consumers and imperil Congress's goal of creating a regulator free of undue industry influence. And the opinion's reach does not stop at the CFPB; it threatens other federal agencies with single directors insulated by for-cause removal protection—including the Federal Housing Finance Agency—as well as other bodies those officials oversee, such as the Federal Stability Oversight Council (12 U.S.C. § 5321) and the Federal Deposit Insurance

Corporation (12 U.S.C. § 1812(a)(1)). Because the decision comes on the eve of a presidential transition, it will also sow uncertainty about whether the new administration may replace the leadership of the CFPB and other single-director agencies, and possibly even uncertainty over who will control this litigation. *Cf.* 12 U.S.C. § 5564(e) (partially limiting CPFB's independent litigation authority in the Supreme Court). Such a momentous decision should not be made in this way—by a split panel, without precedent, where a constitutional ruling may not have been "absolutely necessary to a decision of the case." *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

Beyond its practical implications, the panel's opinion is also manifestly wrong. It cannot be reconciled with *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), or *Morrison v. Olson*, 487 U.S. 654 (1988), both of which endorsed for-cause removal protection for independent-agency heads. And nothing in the Constitution's text, or any previous decision by *any* court, supports the policy preference that drove the panel's opinion: its view that, "notwithstanding some failings and downsides, multi-member independent agencies are superior to single-Director independent agencies." Op. at 52. That is a debatable judgment for the political branches—not a rule for judges to divine based on their special insight into "the deep values of the Constitution." Op. at 49. This Court should rehear this case en banc and uphold the agency's structure.

INTEREST OF *AMICI CURIAE*

Amici curiae are ten non-profit organizations that advocate for consumer protection and civil rights. Each organization advocated for the CFPB's creation and frequently appears before the Bureau to advocate for consumer interests. *Amici* and their members therefore have a strong interest in ensuring that the CFPB remains free from undue political and industry influence. The identity and interest of each *amicus curiae* is stated individually in an appendix to this brief.

ARGUMENT

I. The panel's decision undermines Congress's goal of structuring the CFPB to effectively protect consumers, free of undue political influence and industry capture.

By invalidating the CFPB director's for-cause removal protection, the panel decision topples Congress's design for this critical new agency and imperils its ability to function as intended. Worse still, the panel's one-hundred-page opinion reaches this result without even once addressing *why* Congress took such care to structure the CFPB as it did or *how* the CFPB's design is so critical to its proper functioning.

A. Had the panel properly examined those questions, it would have had to acknowledge that the CFPB's structure was a direct response to what Congress identified as "the spectacular failure of the prudential regulators to protect average American homeowners from risky, unaffordable" mortgages before the crisis. S.

Rep. No. 111-176, at 15 (2010). Before the CFPB's creation, authority for consumer financial protection was scattered across many federal agencies—most of them focused on the safety and soundness of the banking system, with consumer protection as a secondary or tertiary concern. 12 U.S.C. § 5581(b) (transferring authority to CFPB from seven agencies).

But the problem wasn't just that these federal regulators had divided missions. They were also too susceptible to capture by the powerful influence of the financial industry, which led them to overlook predatory consumer lending practices that should have been seen as alarming. As the Senate report put it, federal banking agencies "routinely sacrificed consumer protection" while adopting policies that promoted the "short-term profitability" of large banks, nonbank mortgage lenders, and Wall Street securities firms. S. Rep. No. 111-176, at 15 (quoting testimony of Patricia McCoy). Congress's verdict was harsh: "[I]t was the failure by the [federal] prudential regulators to give sufficient consideration to consumer protection that helped bring the financial system down." *Id.* at 166; *see* KATHLEEN ENGEL AND PATRICIA MCCOY, THE SUBPRIME VIRUS 157-205 (2011).

Perhaps the "prime example" was "the Federal Reserve's pivotal failure to stem the flow of toxic mortgages, which it could have done by setting prudent mortgage-lending standards." FINANCIAL CRISIS INQUIRY COMMISSION REPORT xvii (2011). Not far behind were the Office of the Comptroller of the Currency

(OCC) and the now-abolished Office of Thrift Supervision, both of which were "under pressure to cater to their regulated institutions' interests because of the ability of banks to shop their charter"—*i.e.*, to choose their regulator. Adam J. Levitin, *The Politics of Financial Regulation and The Regulation of Financial Politics*, 127 HARV. L. REV. 1991, 2043 (2014). "This structure set up a competition for laxity in regulation." *Id.* Before the crisis, the Comptroller pointed to "national banks' immunity from many state laws" on predatory lending as "a significant benefit of the national charter—a benefit that the OCC [had] fought hard over the years to preserve." FCIC REPORT at 112. In addition, "there is a problem of legislative capture that is particularly pronounced in financial services and which can, in turn, shape agency capture." Levitin, *Politics of Financial Regulation*, 127 HARV. L. REV. at 2044. The financial-services industry has been "far and away the largest source of campaign contributions to federal candidates and parties and has ranked among the top of all industries in terms of lobbying expenditures since 1998." *Id.* As the Financial Crisis Inquiry Commission found, financial industry lobbying "played a key role in weakening regulatory constraints on institutions, markets, and products. It did not surprise the Commission that an industry of such wealth and power would exert pressure on policy makers and regulators." FCIC REPORT at xviii.

Congress thus recognized the need to redouble its efforts to insulate banking regulation from political and industry influence. As a result, "[t]he institutional framework for the CFPB was a hotly contested issue from the beginning. And because capture was an obvious concern, many [agency design issues] were expressly debated as industry groups fought to avoid powerful equalizing measures." Rachel Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 71 (2010); *see* Levitin, *Politics of Financial Regulation*, 127 HARV. L. REV. at 2056 (CFPB "was specifically intended to free consumer protection from the particular capture problems that plagued prudential bank regulators"). Congress structured the CFPB to be headed by a single director, appointed by the president for a term of five years. It also employed other safeguards common among banking agencies, including insulation from the ordinary appropriations process and a limitation on the director's removal to cases of "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491. This structure allows the Bureau to make decisions that protect consumers, including decisions strongly opposed by industry.

B. Because the panel's opinion paid insufficient attention to Congress's *reasons* for adopting this structure, it also failed to recognize that Congress's concerns are neither unprecedented nor lacking a grounding in empirical reality.

As this Court has previously recognized, "[i]ndependence from presidential control is arguably important if agencies charged with regulating financial institutions . . . are to successfully fulfill their responsibilities; people will likely have greater confidence in financial institutions if they believe that the regulation of these institutions is immune from political influence." *Swan v. Clinton*, 100 F.3d 973, 983 (D.C. Cir. 1986). And the importance of removal protection goes well beyond instances in which a director might actually be fired. Instead, the practical impact of the panel's decision will be to greatly increase political influence on the CFPB's day-to-day decisionmaking. *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2303-09 (2001). To avoid just such influence, Congress has ensured that "[t]he vast majority of financial regulators enjoy protection from removal from office, often coupled with budgetary autonomy from Congress and other indicia of independence, such as exemption from White House regulatory oversight." Gillian E. Metzger, *Through the Looking Glass to A Shared Reflection: The Evolving Relationship Between Administrative Law and Financial Regulation*, 78 LAW & CONTEMP. PROBS. 129, 130 (2015).

The panel opinion concludes that the CFPB must be treated differently merely because it has a single director. But there is no solid foundation—and certainly no constitutional basis—for the panel's categorical decree that "multi-member independent agencies are superior to single-Director independent agencies." Op. at 52. To the contrary, "[t]he scholarly literature on agency design has not achieved any consensus as to whether single agency heads are superior or inferior to multimember commissions." Arthur E. Wilmarth, Jr., *The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31

REV. BANKING & FIN. L. 881, 919 (2012). Scholars see the two structures as "offering relatively equal 'trade-offs' between (1) greater 'efficiency and accountability' within agencies administered by single officials and (2) increased 'deliberation and debate' and 'compromise' within multimember commissions." *Id.* at 919-920. Notably, a 1987 evaluation of the Consumer Product Safety Commission by the General Accounting Office concluded that the superior effectiveness of a single-director structure would outweigh any benefits of collegial decision-making by the multimember agency. *See* U.S. GAO, *Administrative Structure of the Consumer Product Safety Commission* 2-6 (1987).

The panel also overlooked the ways in which "a single Director structure makes the CFPB *more* electorally responsive than a commission structure." Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 369 (2013) (emphasis added). Given the financial industry's powerful influence on Congress, "a five-member commission structure would likely change the political direction of the CFPB, as the choice of commissioners would be the result of Congressional bargaining." *Id.* at 368. In this way, "[a] commission structure would effectively shift the power of appointment for the CFPB from the Presidency to the Senate, which, given staggered elections and incumbent entrenchment because of lack of term limits, is arguably the less democratically responsive branch of government." *Id.*

C. Finally, the panel's decision ignores the fact that the CFPB's design is working: the agency has stayed true to its mission and "has taken pains" to avoid capture. Rob Blackwell, *How Specter of Regulatory Capture Shaped CFPB's First Year*, Am. Banker, Jul. 9, 2012. Among other things, it has "sought to limit its hiring of existing federal bank regulators"—part of a "a conscious effort . . . to avoid the criticism that has long dogged traditional bank regulators—that they sometimes go soft on the banks they oversee because they become too close to them." *Id.*

Since the CFPB began operating in July 2011, it has proven to be highly effective in identifying violations of consumer-protection law and remedying problems with precision and agility. "The bureau has overhauled mortgage lending rules, reined in abusive debt collectors, prosecuted hundreds of companies, and extracted nearly $12 billion from businesses in the form of canceled debts and consumer refunds." Stacy Cowley, *Consumer Protection Bureau Chief Braces for a Reckoning*, N.Y. Times, Nov. 24, 2016; *see also* Christopher Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 TULANE L. REV. 1057 (2016) (in an examination of all publicly announced CFPB enforcement actions between 2012 and 2015, finding that the agency did not lose a single case; that no bank had contested any CFPB enforcement action; and that 90% of all CFPB cases in which consumer relief was awarded involved evidence that defendants had illegally deceived consumers). The CFPB's effectiveness, and its ability to respond to unlawful practices quickly, is attributable in part to its leadership by a single director and its insulation from political influence and industry capture.

II. The panel's decision is wrong.

Even setting aside the profound practical implications, rehearing should be granted because the panel decision is manifestly incorrect. *First*, although amici agree with the CFPB that the panel incorrectly interpreted the Real Estate Settlement Procedures Act, the panel was doubly wrong to decide the constitutional question because PHH (on the panel's mistaken view of the statute) could have obtained all the relief it sought on statutory grounds. As Judge Henderson pointed out, the panel thus "unnecessarily reach[ed] PHH's constitutional challenge, thereby rejecting one of the most fundamental tenets of judicial decisionmaking." Dissent at 1. That failure to show "judicial restraint" warrants rehearing en banc. *Id.* at 2.

Second, as the Bureau's petition ably demonstrates, the panel decision cannot be reconciled with the Supreme Court's consistent endorsement of for-cause removal protections for independent agency heads in both *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *Morrison v. Olson*, 487 U.S. 654 (1988). In this regard, it is telling how much weight the panel opinion places on the *dissent* in *Morrison*. Nothing in the Constitution's text—or in any previous decision by any court—supports transforming the panel's policy preference for multi-member bodies into a constitutional rule.

Third, the panel's dubious historical analysis not only gives short shrift to the parallel structures of the Social Security Administration, Office of Special Counsel, and Federal Housing Finance Agency, but also rests on the unsubstantiated claim that "[t]he Comptroller [of the Currency] is removable at will by the President." Op. at 33-34 n.6. Since 1863, the OCC has been headed by one Comptroller appointed by the President, with the Senate's advice and consent, for a five-year term. 12 U.S.C. § 2. The panel's interpretation of the requirement that "reasons" for removing the Comptroller be "communicated [by the President] to the Senate," *id.*, as authorizing removal-at-will (Op. at 33-34 n.6) is incompatible with *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010). *Free Enterprise* assumed that SEC commissioners are removable only for cause, *id.*, despite the statute's silence, 15 U.S.C. § 78d(a). That conclusion was essential to the Court's holding that accounting board members' "two levels of protection from removal" are unconstitutional. 561 U.S. at 514. Given that *Free Enterprise* inferred "for cause" removal for SEC commissioners without any textual basis, the Comptroller cannot fairly be assumed to be removable without cause. *See also Wiener v. United States*, 357 U.S. 349, 356 (1958); *Federal Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 826 (D.C. Cir. 1993); *Swan*, 100 F.3d at 981-88.

There are thus strong reasons to doubt the panel's conclusion that the CFPB is "a gross departure from settled historical practice." Op. at 8.

CONCLUSION

For the foregoing reasons, respondent's petition for rehearing *en banc* should be granted.

Respectfully submitted,

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November 29, 2016

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APPENDIX

Americans for Financial Reform (AFR) is a nonpartisan, nonprofit coalition of more than 200 consumer, investor, labor, civil rights, business, faith-based, and community groups. *See* AFR Membership List, available at http://ourfinancialsecurity.org/about/our-coalition/. AFR works to lay the foundation for a strong, stable, and ethical financial system—one that serves the economy and the nation as a whole. Through policy analysis, education, and outreach to our members and others, AFR seeks to build public will for substantial reform of the American financial system. AFR engages actively in policy issues relating to securities regulation and investor protections.

California Reinvestment Coalition (CRC) is a nonprofit organization that has been advocating for consumer protection and fair and equal access to credit for all California communities since 1986. CRC builds an inclusive and fair economy that meets the needs of communities of color and low-income communities by ensuring that banks and other corporations invest and conduct business in our communities in a just and equitable manner. Over its 30 years, the CRC has grown into the largest state community reinvestment coalition in the country with a membership of 300 nonprofit organizations working for the economic vitality of low-income communities and communities of color.

The Center for Responsible Lending (CRL) is a nonprofit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, one of the nation's largest nonprofit community development financial institutions. Over 30 years, Self-Help has provided $6 billion in financing to 70,000 homebuyers, small businesses, and nonprofits. It serves more than 140,000 mostly low-income families through 43 retail credit union branches in North Carolina, California, Florida, and Chicago.

Consumer Federation of America (CFA) is a nonprofit association of more than 250 state, local, and national pro-consumer organizations, founded in 1968 to represent the consumer interest through research, advocacy, and education. More information about CFA's membership is available at http://consumerfed.org/membership/. For decades, CFA has been a leading voice advocating for consumers, especially low-wealth consumers, who need safe, affordable transaction accounts to get paid, pay bills, and save. CFA supports consumer protections designed to make sure that banking fees are predictable, proportional, and fair, to encourage and preserve access to financial services that help consumers achieve financial security. CFA works to ensure that the CFPB remains at the center of the national effort to prevent abusive financial practices and has the information, independent funding and leadership structure it needs to ensure that consumers have every chance to safely borrow, save, and build assets.

The Leadership Conference on Civil and Human Rights (The Leadership Conference) is a coalition of more than 200 organizations committed to the protection of civil and human rights in the United States. It is the nation's oldest, largest, and most diverse civil and human rights coalition advocating for federal legislation and policy. It has worked to secure passage of every major civil rights statute since the Civil Rights Act of 1957, including the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The Leadership Conference works to address the continuing problem of housing and financial discrimination in the United States, with a particular focus on the nature and extent of housing discrimination, including the impact of subprime lending and the resulting foreclosure crisis.

The National Community Reinvestment Coalition (NCRC) is a nonpartisan, nonprofit coalition of 600 community-based organizations that promote access to basic banking services including credit and savings, to create and sustain affordable housing, job development, and vibrant communities for America's working families. Its members include community reinvestment organizations, community development corporations, local and state government agencies, faith-based institutions, community organizing and civil rights groups, minority- and women-owned business associations, and social service providers from across the nation.

The National Consumer Law Center (NCLC) is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low income and elderly consumers. Since its founding as a nonprofit corporation in 1969, NCLC has been a resource center addressing numerous consumer finance issues affecting equal access to fair credit in the marketplace. NCLC publishes a 20-volume Consumer Credit and Sales Legal Practice Series and has served on the Federal Reserve System Consumer-Industry Advisory Committee and committees of the National Conference of Commissioners on Uniform State Laws. NCLC has also acted as the Federal Trade Commission's designated consumer representative in promulgating important consumer protection regulations. NCLC staff actively engage with the CFPB on a broad range of consumer-oriented topics and the organization currently is represented by a staff member serving on the CFPB's Consumer Advisory Board.

The National Council of La Raza (NCLR)—the largest national Hispanic civil rights and advocacy organization in the United States—works to improve opportunities for Hispanic Americans. Through its network of nearly 300 affiliated community-based organizations, NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. To achieve its mission, NCLR conducts applied research, policy analysis, and advocacy, providing a Latino perspective. Its Wealth-Building Initiative develops and promotes a policy agenda that creates economic opportunities for Latino families, including consumer finance regulation. Founded in 1968, NCLR is a private, nonprofit, nonpartisan, tax-exempt organization serving all Hispanic subgroups in all regions of the country.

United States Public Interest Research Group Education Fund, Inc. (U.S. PIRG Education Fund) is a 501(c)(3) independent, non-partisan organization that works on behalf of consumers and the public interest. Through research, public education, and outreach, it serves as a counterweight to the influence of powerful special interests that threaten the public's health, safety, or well-being. U.S. PIRG Education Fund participates as amicus curiae in cases that will have a substantial impact on consumers and the public interest, such as this one. U.S. PIRG Education Fund was one of the leading advocates for the creation of the CFPB and continues to work to ensure that the CFPB remains a strong and independent regulator that protects consumers.

Woodstock Institute is a nonprofit research and policy organization in the areas of equitable lending and investments; wealth creation and preservation; and safe and affordable financial products, services, and systems. Through applied research, policy development, coalition building, and technical assistance, Woodstock Institute works locally and nationally to create a financial system in which lower-wealth persons and communities of color can safely borrow, save, and build wealth so that they can achieve economic security and community prosperity. Woodstock Institute was founded in 1973 near Woodstock, Illinois.

CERTIFICATE OF COMPLIANCE

In the absence of a specific rule that sets a maximum length for *amicus* briefs in support of petitions for rehearing, *amici curiae* have limited their brief to no more than 2,600 words—the limit under the soon-to-be-implemented Federal Rule of Appellate Procedure 29(b) (excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(e)(1)). The body of the brief contains 2,577 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in a proportionally spaced 14-point typeface, including serifs. The typeface is Baskerville.

I certify that this information is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

DATED: November 29, 2016

/s/ *Deepak Gupta*
Deepak Gupta

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2016, I electronically filed the foregoing Brief of *Amici Curiae* Americans for Financial Reform, et al. in Support of Respondent with the Clerk of the Court of the U.S. Court of Appeals for the D.C. Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

/s/ *Deepak Gupta*
Deepak Gupta

Statement for the Record
Hearing of the House Committee on Financial Services
Subcommittee on Oversight and Investigations on
"The Bureau of Consumer Financial Protection's Unconstitutional Design"

Chairman Ann Wagner
Ranking Member Al Green
House Financial Services Committee
Subcommittee on Oversight and Investigations
2129 Rayburn House Office Building
Washington, DC 20515

March 21, 2017

Dear Chairman Wagner and Ranking Member Green:

In the nearly six years since the Consumer Financial Protection Bureau, or CFPB, first opened its doors, it has proven to be an efficient and effective independent agency restoring trust in the financial marketplace. During this time, it has returned nearly $12 billion to 29 million victims of financial wrongdoing[1] across the country—approximately five dollars to wronged consumers for every dollar of its funding.[2] Its enforcement actions have rooted out unfair and deceptive practices, such as the opening of as many as two million unauthorized bank and credit card accounts by Wells Fargo in an effort to meet sales quotas.[3] Its enforcement staff have returned, on average, nearly $10 million in relief to consumers per employee.[4] And its rulemaking activity to date, from mortgages to prepaid cards, reflects a movement toward consumer financial markets that are competitive, transparent, and fair. The agency has been a breath of fresh air in the wake of a financial crisis caused by misaligned financial incentives that allowed financial institutions to profit from failing borrowers, rather than from helping them succeed in reaching their financial goals.[5]

In an era where both banks and Congress are often held in low esteem—only about one in four Americans express "a great deal" or "quite a lot" of confidence in banks, while Congressional approval

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[1] Consumer Financial Protection Bureau, "Consumer Financial Protection Bureau: By the numbers," December 2016, available at http://files.consumerfinance.gov/f/documents/201701_cfpb_CFPB-By-the-Numbers-Factsheet.pdf.
[2] Joe Valenti, "Many Happy Returns for Consumers: The CFPB at 5 Years" (Washington: Center for American Progress, 2016), available at https://www.americanprogress.org/issues/economy/news/2016/07/21/141664/many-happy-returns-for-consumers-the-cfpb-at-5-years/.
[3] Consumer Financial Protection Bureau, "Consumer Financial Protection Bureau Fines Wells Fargo $100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts," Press release, September 8, 2016, available at http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/.
[4] Peterson, Christopher Lewis, "Consumer Financial Protection Bureau Law Enforcement: An Empirical Review" (May 17, 2016). *Tulane Law Review*, Vol. 90, No. 5, June 2016, available at https://ssrn.com/abstract=2780791.
[5] Joe Valenti, Sarah Edelman, and Julia Gordon, "Lending for Success" (Washington: Center for American Progress, 2015), available at https://www.americanprogress.org/issues/economy/reports/2015/07/13/117020/lending-for-success/.

remains in single digits[6]—the CFPB remains immensely popular with the public. Seven out of ten voters overall support the agency, with 81 percent of Democrats and 59 percent of Republicans in favor of it.[7] Similarly, a poll of self-identified Trump voters last December found that 55 percent would like to either leave the CFPB alone or expand its power.[8]

In short, the agency has a track record for the American people that speaks for itself. And yet, baseless accusations about the CFPB's questionable constitutionality continue. The CFPB was designed to be an independent agency with a single director removable by the President solely for cause--inefficiency, neglect of duty, or malfeasance in office--and a budget supplied through transfers from the Federal Reserve.

The October 2016 D.C. Circuit opinion finding the CFPB's structure unconstitutional was vacated when that court agreed to hear CFPB's appeal en banc. And CFPB has every likelihood of prevailing upon rehearing. The CFPB's for-cause removal provision in the Dodd-Frank Act is identical to the one that the Supreme Court upheld in 1935 in *Humphrey's Executor*, which involved the firing of a Federal Trade Commission member on political grounds.[9] Notably, no for-cause removal has taken place in the decades since, and any attempt to remove the Director on such grounds would be an uphill battle.[10]

The single-director structure, too, is neither unique to the CFPB nor without precedent among independent agencies. In 1994, Congress established the Social Security Administration as an independent agency with a single commissioner removable from office "only pursuant to a finding by the President of neglect of duty or malfeasance in office."[11] In 2008, Congress passed the Housing and Economic Recovery Act, establishing the Federal Housing Finance Agency as an agency with a single director removable only for cause.[12] If the House were truly concerned about the constitutionality of such congressionally created agencies over the past two decades, the focus of its investigation would need to go beyond the CFPB to encompass these independent bodies as well.

An independent source of agency funding outside of congressional appropriations is also not unique to the CFPB. Congress has long supported independent funding of banking regulators in recognition of the harms posed by political pressure on agencies.[13] If Congress seeks to disregard the importance of an independent funding source, it remains free to change the CFPB's funding structure at any time through legislation. By doing so, it would likely result in less vigorous defense of consumer interests because of

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[6] For example, see Gallup, "Confidence in Institutions," June 1-5, 2016, available at http://www.gallup.com/poll/1597/confidence-institutions.aspx.
[7] Americans for Financial Reform, "Bipartisan Poll: Americans Express Broad Support for Financial Regulation and the Work of the CFPB," July 15, 2016, available at http://ourfinancialsecurity.org/2016/07/new-bipartisan-poll-americans-express-broad-support-financial-regulation-cfpb/.
[8] Glover Park Group, "GPG Survey of Trump Voters, December 2016," available at http://gpg.com/gpg-survey-trump-voters-december-2016/.
[9] *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).
[10] Brian Simmonds Marshall and Veronica Meffe, "No One Has Been Fired by the President For Cause. Richard Cordray Should Not Be the First," December 21, 2016, available at https://medium.com/@RealBankReform/no-one-has-been-fired-by-the-president-for-cause-e2ff2b283ca3#.
[11] P.L. 103-296, "Social Security Independence and Program Improvements Act of 1994."
[12] P.L. 110-289, "Housing and Economic Recovery Act of 2008."
[13] For example, Justin Schardin, "Truly Independent Financial Regulators" (Washington: Bipartisan Policy Center, 2013), available at https://bipartisanpolicy.org/blog/truly-independent-financial-regulators/.

political pressure from self-interested financial institutions. But the hands of Congress are clearly not tied merely by virtue of the CFPB's funding structure.

Much criticism of the CFPB suggests that it is omnipotent while ignoring the particular mandates that make it highly accountable. In addition to regular appearances before Congress—62 appearances by senior officials to date[14]—the CFPB is subject to an annual audit by the Government Accountability Office as well as supervision by the Inspector General of the Federal Reserve. Its rulemakings are subject to the Administrative Procedures Act and, unlike other financial regulators, it must also undertake a Small Business Advocacy Review panel before proposing a rule.[15] Other financial regulators also have the power to overturn CFPB rules that would threaten a bank's safety or soundness through a supermajority on the Financial Stability Oversight Council.[16]

Thank you for providing me with the opportunity to discuss this matter. Please do not hesitate to contact me if you have any questions or would like any additional information.

Sincerely,

Joe Valenti
Director of Consumer Finance
Center for American Progress
jvalenti@americanprogress.org

[14] Consumer Financial Protection Bureau, "Consumer Financial Protection Bureau: By the numbers."
[15] U.S. Small Business Administration, "CFPB SBREFA Panels," available at https://www.sba.gov/category/advocacy-navigation-structure/cfpb-sbrefa-panels (last accessed March 2017).
[16] 12 U.S.C. §5513(a).

Consumers Union®

March 21, 2017

Honorable Jeb Hensarling
Chairman
House Financial Services Committee
2119 Rayburn HOB
Washington, D.C. 20510

Honorable Maxine Waters
Ranking Member
House Financial Services Committee
4340 O'Neill FOB
Washington, D.C. 20510

Dear Chairman Hensarling and Ranking Member Waters,

Consumers Union, the policy and mobilization arm of Consumer Reports, is a strong supporter of the Consumer Financial Protection Bureau (CFPB) and is concerned about proposals being considered in Congress that would undermine its ability to safeguard consumers from unfair financial products and services. Consumers Union believes that the current structure of the CFPB is constitutional and that a single director, removable only for cause, best preserves the bureau's independence and ability to protect consumers. We are also opposed to efforts to politicize CFPB's budget by subjecting it to the congressional appropriations process.

Under some proposals being considered by Congress, the CFPB director could be fired, at will, by the President and the agency's budget would be subject to the annual congressional appropriations process, opening it up to further attack by financial industry lobbyists and other opponents determined to undermine the agency and shrink its budget. These structural and funding changes are unwarranted.

Congress created the CFPB with a presidentially-appointed and Senate-confirmed single director to head the bureau for a five-year term. The President may remove the Director for "inefficiency, neglect of duty, or malfeasance in office." [i] The single director structure was carefully crafted to safeguard the bureau's ability to protect consumers from predatory lending practices, abusive products, bogus fees and confusing contracts. With a single director, accountability and responsibility for the CFPB is clear and streamlined. [ii] A single director ensures consistency in decision making and regulatory oversight, and helps ensure that the CFPB is appropriately free of undue political influence and industry capture. Having a single director enables the CFPB to respond more quickly and decisively to new and emerging threats to consumers. By contrast, multi-member boards like the Securities and Exchange Commission are prone to excessive delay that can hamper their effectiveness.[iii]

The U.S. Supreme Court has upheld the constitutionality of independent agencies like the CFPB headed by directors who can only be removed for cause. In Humphrey's Executor v. United States, 295 U.S. 602, 630 (1935), the court unanimously held that the heads of independent regulatory agencies may be shielded by legislation from presidential removal at will.[iv] The Humphrey's decision was later reaffirmed in Morrison v. Olson 487 U.S. 641, 691 (1988), where the court held the removal restriction is a presumptively constitutional exercise of Congress's legislative power, subject to invalidation only if they unduly impair the president's ability to control the execution of the laws.[v] The statutory framework of the CFPB does not impair the president's ability to execute laws. As previously noted, Congress gave the president explicit power to remove the Director for neglect of duty or malfeasance in office.

Like other federal financial industry regulators, such as the Office of the Comptroller of the Currency (OCC), Federal Deposit Insurance Commission (FDIC), National Credit Union Administration (NCUA) and the Federal Reserve, the CFPB receives its funding independently from the congressional appropriations process. In the case of the CFPB, it receives a small percentage, subject to a statutory cap, of the Federal Reserve's annual budget. When compared with other financial regulators, the size of the CFPB's budget is smaller than that of the OCC, approximately half that of the SEC and the FDIC, and only a fraction of that of the Federal Reserve. [vi]

Congress deliberately set up the CFPB with independent funding to protect it from banking industry lobbyists determined to muzzle the watchdog. Subjecting the CFPB to the annual budget process would threaten the stability of its funding and its ability to police the marketplace and protect consumers. Of the financial regulators, only the Securities and Exchange Commission and the Commodity Futures Trading Commission are funded annually by Congress. Some have questioned the effectiveness of these agencies because of their dependency on year-to-year funding.[vii]

We also are concerned about proposals you are considering that would eliminate the CFPB's authority to supervise banks, credit reporting agencies, and payday lenders. According to news reports about your draft proposal, the watchdog would lose its ability to stop unfair, deceptive, and abusive practices, and would be stripped of the power to fine companies for breaking the law or to order them to provide refunds to consumers cheated out of their money. The draft proposal even blocks the CFPB's authority to conduct education campaigns to help consumers make smarter financial decisions and would eliminate the public's ability to file complaints with the agency and get help resolving them when they've been mistreated.

Congress is already in a position to maintain vigilant oversight of the bureau. CFPB officials regularly testify before Congress, submit reports and respond to congressional inquiries. In addition, CFPB rules are subject to the Administrative Procedures Act and can be challenged in court; GAO performs annual CFPB audits; and the Office of Inspector General provides independent oversight of the CFPB to improve its programs and operations, and to prevent and detect fraud, waste and abuse. Unlike other regulators, the CFPB rules are subject to special review by the small business panel, the Bureau must make specific cost benefit findings and other financial regulators can veto its rules. Moreover, while the CFPB does not receive appropriated funds, its budget is capped by Congress while other federal bank regulators' budgets are not.

The CFPB design is working and raises no constitutional concerns. Under its current structure and Director Cordray's leadership, the CFPB has a proven track record of being a strong and effective financial watchdog. Its thorough, thoughtful approach to oversight has resulted in greater transparency and safer products. Its rulemaking is fair, balanced and inclusive. The record shows that consumers are better equipped to make financial decisions because of the CFPB's financial literacy campaigns, and can get help resolving problems they've encountered in the marketplace. Since opening its doors in 2011, the CFPB has helped resolve over 1 million consumer complaints. The CFPB's enforcement actions have returned approximately $12 billion to nearly 30 million consumers who have been harmed by illegal practices. [viii] Given the CFPB's stellar leadership and many accomplishments, there is no basis to restructure the agency, eliminate its independent funding or remove Director Richard Cordray for cause.

We respectfully urge you to support the CFPB and Director Cordray.

Sincerely,

Pamela Banks
Senior Policy Counsel

cc: House Financial Services Committee

[i] 12 U.S.C. Section 5491(b)(1), (b)(2), (c)(1).
[ii] See, Arthur E. Wilmarth, the Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau, 31, Rev. Banking & Finance L. 881, 919 (2012), in Constitutional Accountability Center, "Constitutional and Accountable: the Consumer Financial Protection Bureau", by Gorod, Frazelle and Lazarus. October 2016.
[iii] Also see, U.S. Government Accounting Office, GAO/HRD-84-47, Consumer Product Safety Commission: Administrative Structure Could Benefit from Change (1987) (CPSC could benefit by changing to a single administrator).
[iv] Humphrey's Ex'r, 295 U.S. at 631-32, cited in "Constitutional and Accountable", at 14-17.
[v] Chris Walker, blog from Yale Journal on Regulations and the ABA Section of Administrative Law and Regulatory Practice, "DC Circuit Holds Single Member Independent CFPB," Jack Beerman, October 2016.
[vi] S. Rep, No.111-176 (2011) at 164.
[vii] See, Wilmarth at 951. (Congress has undermined the effectiveness of the CFTC and SEC over the past two decades by frequently failing to provide those agencies with adequate funds.)
[viii] See, Christopher Peterson, "Consumer Financial Protection Bureau Law Enforcement: An Empirical Review", 90 Tulane L. Rev. 1057 (2016) (a review of the CFPB's publicly announced enforcement actions between 2012-2015, found that the Bureau did not lose a single case; that no bank had contested any CFPB enforcement action; and 90% of all CFPB cases in which consumer relief was awarded involved evidence that defendants had legally deceived consumers.