Constitutional and Accountable:
The Consumer Financial Protection Bureau

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Executive Summary

- Notwithstanding persistent challenges to the constitutional validity of the Consumer Financial Protection Bureau ("CFPB" or "Bureau"), the agency is plainly constitutional.

- First, opponents of the CFPB argue that the Bureau's structure violates the Constitution's separation of powers because the President may remove its Director only for "inefficiency, neglect of duty, or malfeasance in office," and not at will. This is wrong.

    - The Constitution's Framers empowered Congress to shape the structure of the executive branch, affording legislators the flexibility to address unforeseen crises that, as Chief Justice John Marshall later observed, "can be best provided for as they occur."

    - Since *Marbury v. Madison*, the Supreme Court has recognized that many executive branch officers may be insulated from presidential removal at will. Moreover, the statutory grounds for removing a CFPB Director are identical to those approved in the Court's seminal 1935 decision *Humphrey's Executor*. The Court has reaffirmed that decision many times, including recently in an opinion by Chief Justice John Roberts.

    - Because of this precedent, and because the CFPB Director's responsibilities so closely resemble those of the officer addressed in *Humphrey's Executor*, the constitutionality of the CFPB removal provision is settled by that decision and later decisions reaffirming it.

    - As the Supreme Court has made clear, the key question is whether a removal restriction impedes the President's ability to perform his duties under Article II of the Constitution, and the Court has repeatedly held that the power to remove an officer for cause enables the President to ensure that the laws are faithfully executed.

    - Bureau opponents suggest that these principles apply only to the heads of multimember commissions, but they offer no coherent explanation why. Indeed, a multimember body in which members serve staggered terms is, if anything, *less* accountable to the President than is a single directorship, which offers a direct line of accountability—and a simple remedy—when an agency strays from its mandate.

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  - Recently a divided panel of the U.S. Court of Appeals for the District of Columbia Circuit diverged from existing precedent and held that the CFPB's removal provision is unconstitutional, essentially on the ground that a single director may be more prone than a multimember commission to make bad decisions that could impinge on individual liberty. This speculative claim, however, has no connection to the constitutional inquiry prescribed by the Supreme Court—whether the President's power has been impaired—and the decision is thus unlikely to survive review by the full D.C. Circuit or the Supreme Court. In any event, the decision does not threaten the Bureau's existence or ongoing work; the panel majority would only strike the CFPB Director's removal provision, leaving the Director in place but removable at will by the President.

- Second, Bureau opponents attack the constitutionality of the CFPB's funding because it comes from the earnings of the Federal Reserve System, rather than from congressional appropriations. This argument too is wrong, and courts have uniformly refused to accept it.

  - Nothing in the Constitution requires agencies to be funded by annual appropriations.

  - Among all the financial regulatory agencies, only two are funded by congressional appropriations, and the chronic under-funding of those two agencies illustrates why Congress chose to protect the CFPB from that fate.

  - Finally, Congress remains free to change the funding of the CFPB at any time.

- Third, Bureau opponents argue that the structural features above might be constitutional in isolation, but not when combined in the CFPB, which they assert has sweeping, unprecedented authority. This also is wrong and has not been accepted by any court.

  - When adjudicating separation-of-powers challenges, courts look to whether the powers of the coordinate branches have been impaired or encroached upon. But as indicated above, the CFPB's funding and leadership structure do not intrude upon the prerogatives of either the President or Congress.

  - Equally important, portrayals of the Bureau as deeply novel are mistaken. Other federal entities wield substantial responsibilities under the leadership of a single individual removable only for cause. And the CFPB is not the first agency to have both a single agency head and independent funding.

  - The CFPB's powers, moreover, resemble those of other financial regulators and are confined by the same restrictions, in addition to special limits unique to the Bureau—including veto power over its rules by a council of prudential regulators, a duty to consult with other agencies during rulemaking, a requirement to make specific cost-benefit findings, procedural obligations regarding small businesses, and significant sharing of enforcement power with other agencies.

I. Introduction and Summary

In 2008, the nation was plunged into the worst financial crisis since the Great Depression. After months of evaluating the roots of this 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 a new and consolidated Consumer Financial Protection Bureau ("CFPB" or "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 the CFPB's creation, opponents of financial regulation have sought to weaken the Bureau's ability to protect the interests of consumers, pursuing their agenda through both legislation and litigation. In particular, financial institutions have challenged the Bureau's constitutionality on the ground that its structure and authorities violate the Constitution's separation of powers. This White Paper provides background on the CFPB and then explains why the arguments against its constitutionality are all without merit.[1]

Challenges to the CFPB based on the constitutional separation of powers have focused on two features of the Bureau: its leadership by a single Director (rather than a multimember commission) who is removable by the President only for cause, and its source of independent funding outside of the congressional appropriations process. Objections to these two features of the CFPB are meritless. The Constitution does not require independent regulatory agencies to be led by multimember bodies, nor does it require that the directors of such agencies be removable by the President at will. Likewise, nothing in the Constitution requires agencies to be funded by annual congressional appropriations. In fact, many agencies (especially financial regulators) have one or both of the features to which opponents of the CFPB object.

Regarding the fact that the CFPB Director is removable only for cause, the Supreme Court established decades ago that limiting the President's removal power in this way does not violate the separation of powers. In doing so, the Court upheld a statutory removal provision that is identical to the one governing the Director of the CFPB. This precedent has been reaffirmed by the Supreme Court many times, including as recently as six years ago.

Bureau opponents insist, however, that this precedent applies only to agencies that are led by multimember commissions. But they offer no basis for this distinction. Neither the Constitution's text and history, nor the Supreme Court's precedents, nor the longstanding

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[1] This Paper focuses on challenges to permanent structural features of the Bureau, and thus does not address certain other challenges, which have heretofore been unsuccessful, to the validity of actions taken by the CFPB before its Director was confirmed to his position by the Senate. *See CFPB v. Gordon*, 819 F.3d 1179 (9th Cir. 2016); *State Nat'l Bank of Big Spring v. Lew*, --- F. Supp. 3d ----, No. 12-1032, 2016 WL 3812637 (D.D.C. July 12, 2016). Likewise, this Paper does not address disputes about the interpretation of the Bureau's statutory authorities. *See, e.g.*, *CFPB v. Accrediting Council for Indep. Colleges & Sch.*, --- F. Supp. 3d ----, No. 15-1838, 2016 WL 1625084 (D.D.C. Apr. 21, 2016).

principles on which those precedents rest lend any support to the notion that removal limits are permissible only for multimember bodies.

The Bureau's detractors also argue that its funding, which comes from the earnings of the Federal Reserve System instead of congressional appropriations, violates the separation of powers. But they fail to offer a credible reason why. Independent funding is the norm, rather than the exception, for financial regulatory agencies, and nothing in the Constitution prohibits it. Moreover, Congress retains full power to alter the Bureau's funding structure at any time.

Finally, Bureau opponents argue that when independent funding and a single Director removable for cause are combined in the CFPB—which they assert has sweeping, unprecedented authority—the result is an entity not subject to any form of political accountability, in violation of the Constitution. This too is wrong. The Bureau's powers are similar to those of other financial regulatory agencies, and the Bureau is fully accountable to the President, Congress, and the courts. Nothing about the CFPB upsets the balance among the three coordinate branches or impairs the ability of any branch to carry out its functions.

In the end, whether the arguments of the Bureau's opponents are considered individually or together, the result is the same: the Consumer Financial Protection Bureau is plainly constitutional.

II. Background

A. Creation of the Consumer Financial Protection Bureau

In 2008, the nation was plunged into "what has become known as the Great Recession," in which, as the Senate Committee on Banking, Housing, and Urban Affairs noted two years later, "millions of Americans have lost jobs; millions of American families have lost trillions of dollars in net worth; millions of Americans have lost their homes; and millions of Americans have lost their retirement, college, and other savings."[2] In the wake of the crisis, the Committee observed, "more than 8 million jobs were lost," "American household wealth fell by more than $13 trillion," "retirement assets dropped by more than 20%," and "[m]ore than 7 million homes in America have entered foreclosure."[3] Moreover, "[b]ehind the statistics are hardworking men and women whose lives have been shattered, small businesses that have been shuttered, retirement funds that have evaporated, and families who have lost their homes. . . . Indeed, the financial crisis has torn at the very fiber of our middle class."[4]

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

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[2] S. REP. NO. 111-176, at 9 (2010).
[3] *Id.* at 39.
[4] *Id.*

keep pace with the changing financial system."[5] More specifically, the financial crisis "was precipitated by the proliferation of poorly underwritten mortgages with abusive terms, followed by a broad fall in housing prices as those mortgages went into default and led to increasing foreclosures."[6] Enabling these dire events was "the spectacular failure of the prudential regulators to protect average American homeowners" from "risky" and "unaffordable" financial products, in favor of protecting the "short-term profitability of banks."[7] And a key explanation for this regulatory failure, Congress found, was the fact that "[c]onsumer protection in the financial arena [was] governed by various agencies with different jurisdictions and regulatory approaches," resulting in a "disparate regulatory system [that] has been blamed in part for the lack of aggressive enforcement against abusive and predatory loan products that contributed to the financial crisis."[8]

In other words, as one scholar notes, the subprime mortgage crisis and the ensuing recession "occurred despite the existence of a plethora of federal and state regulators with jurisdiction to enforce broad consumer financial protection regulation."[9] As the Senate Banking Committee explained:

> The current consumer protection system divides jurisdiction and authority for consumer protection between many federal regulators, whose mission is not focused on consumer protection. The result has been that banks could choose the least restrictive consumer compliance supervisor. The fragmented regulatory structure also resulted in finger pointing among regulators and inaction when problems with consumer products and services arose.[10]

To remedy these failures, "prevent[] a recurrence of the same problems," and create "a new regulatory framework that can respond to the challenges of a 21st century marketplace,"[11] Congress in 2010 enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, a key component of which was the creation of the CFPB.[12]

Having concluded that fragmentation of responsibility for consumer financial protection diminishes its effectiveness and "undermines accountability," Congress "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."[13] The Dodd-Frank

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5 *Id.* at 42.
6 *Id.* at 11.
7 *Id.* at 15.
8 H.R. REP. NO. 111-367, pt. 1, at 91 (2009).
9 Susan Block-Lieb, *Accountability and the Bureau of Consumer Financial Protection*, 7 BROOK. J. CORP. FIN. & COM. L. 25, 33 (2012).
10 S. REP. NO. 111-176, at 168 (2010).
11 *Id.* at 42.
12 Pub. L. No. 111-203, 124 Stat. 1376 (2010). Title X of the Dodd-Frank Act created the CFPB.
13 S. REP. NO. 111-176, at 10-11, 168 (2010).

Act thus "shifted pre-existing regulatory authority that had been scattered among several federal regulators to one federal agency, the CFPB, with exclusive jurisdiction to promulgate regulations regarding the federal consumer financial protection laws and primary jurisdiction to monitor and enforce those laws."[14]

B. Leadership Structure of the Bureau

The CFPB is headed by a Director who is appointed by the President, with the advice and consent of the Senate, to a term of five years.[15] The President may remove a sitting Director "for inefficiency, neglect of duty, or malfeasance in office."[16]

The use of a single Director to lead the Bureau, instead of a multimember board as is common among independent regulatory agencies, was a considered choice by Congress, maintained in the face of vocal opposition during months of debate over the legislation that became Dodd-Frank.[17]

The original idea for the Bureau was to create a financial-products counterpart to the Consumer Product Safety Commission ("CPSC"),[18] but the five-member structure of that Commission had been shown to seriously hamper its effectiveness. The Government Accountability Office concluded that this structure fostered instability, delay, and a lack of independence, along with other "indicators suggesting that CPSC could benefit by changing to a single administrator," the model governing seven of the eight other health and safety regulatory agencies.[19] For these and other reasons, 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."[20]

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,"[21] promised to avert another devastating failure to "keep pace with the changing financial system."[22]

Leadership by a single director is a common feature of agency design, especially for health and safety regulators, and the CFPB "is not the first instance in which Congress has

[14] Block-Lieb, *supra* note 9, at 29.
[15] 12 U.S.C. § 5491(b)(1), (b)(2), (c)(1).
[16] *Id.* § 5491(c)(3).
[17] *See, e.g.*, H.R. REP. NO. 111-367, pt. 1, at 101 (2009) (dissenting views).
[18] *See* Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY J. 8, 16 (Summer 2007).
[19] U.S. GOV'T ACCOUNTABILITY OFFICE, CONSUMER PRODUCT SAFETY COMMISSION: ADMINISTRATIVE STRUCTURE COULD BENEFIT FROM CHANGE, at 3, 6, 9-10 (Apr. 1987).
[20] Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 67, 71 (2010).
[21] 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).
[22] S. REP. NO. 111-176, at 40 (2010).

placed an agency with substantial responsibilities under the leadership of a single individual removable only for cause."[23]

C. Funding of the Bureau

The CFPB is funded by the earnings of the Federal Reserve System instead of by congressional appropriations. 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.[24]

Budgetary independence is standard for financial regulatory agencies. Among the many federal financial regulators,[25] only the Securities and Exchange Commission ("SEC") and Commodity Futures Trading Commission ("CFTC") are funded by congressional appropriations.[26] And those two exceptions illustrate why Congress deliberately chose to insulate the CFPB, like nearly all other financial regulators, from "the opaque horse-trading of the appropriations process."[27]

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."[28] The SEC's former chief accountant explained in congressional testimony, citing GAO reports, that the Commission

> was essentially starved by Congress of necessary resources during much of the 1990s . . . . After this underfunding contributed to and played a role in the corporate scandals of a decade ago, Congress increased the funding of the agency. But during the period from 2005 to 2007, as the subprime market bubble was growing toward an implosion, the SEC staff was again reduced by over 10 percent and its spending reduced by some $75 million as a result of actions by Congress and management of the agency.[29]

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[23] *CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1087 (C.D. Cal. 2014). The Bureau shares this feature with the Social Security Administration and the Federal Housing Finance Agency. *See* 42 U.S.C. § 902(a)(3) (Commissioner of Social Security "may be removed from office only pursuant to a finding by the President of neglect of duty or malfeasance in office"); 12 U.S.C. § 4512(b)(2) (Director of the Federal Housing Finance Agency may be "removed before the end of such term for cause by the President").
[24] 12 U.S.C. § 5497(a)(1).
[25] See pages 22-23, below.
[26] Wilmarth, *supra* note 21, at 951.
[27] Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 341 (2013).
[28] Wilmarth, *supra* note 21, at 951.
[29] *Enhanced Investor Protection After the Financial Crisis: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 112th Cong. 5, 13 (2011) (statement of Lynn Turner) ("Turner testimony").

While Dodd-Frank specified acceptable levels of SEC funding for the next several years, only a year later Congress was "already breaking its promise to investors and the SEC" by providing funding below the specified level.[30]

Nor is this the only example of how the year-to-year appropriations cycle can squeeze financial regulators of the funds needed to perform their duties. The Senate Banking Committee recounted another example, in explaining the importance of the CFPB's funding structure:

> The Committee finds that the assurance of adequate funding, independent of the Congressional appropriations process, is absolutely essential to the independent operations of any financial regulator. This was a hard learned lesson from the difficulties faced by the Office of Federal Housing Enterprise Oversight (OFHEO), which was subject to repeated Congressional pressure because it was forced to go through the annual appropriations process. It is widely acknowledged that this helped limit OFHEO's effectiveness.[31]

Just as Congress corrected this problem in 2008 by funding the OFHEO's successor—the Federal Housing Finance Agency—outside of the appropriations process,[32] so did Congress later apply the same lesson to the CFPB, to "ensure that the Bureau has the funds to perform its mission."[33]

Among financial regulators, moreover, the size of the CFPB's budget is unexceptional—smaller than that of the Office of the Comptroller of the Currency, approximately half that of the SEC and the Federal Deposit Insurance Corporation, and only a fraction of that of the Federal Reserve.[34]

D. Challenges to the Bureau's Structure and Authorities

The creation of the CFPB "was one of the most controversial and hard-fought parts" of the Dodd-Frank legislation, vigorously opposed by the financial services industry.[35] Since the Bureau came into existence, its opponents have sought to weaken its capacity to protect the interests of consumers. They have pursued this agenda on two fronts: legislation and litigation.

In 2011, lawmakers began introducing bills to diminish the CFPB's effectiveness, including proposals to replace its single directorship with a multimember board and subject its

[30] *Id.* at 82; *see* Wilmarth, *supra* note 21, at 951-53.
[31] S. REP. NO. 111-176 (2010), at 163.
[32] *See* 12 U.S.C. § 4516(a).
[33] S. REP. NO. 111-176 (2010), at 163.
[34] *Id.* at 164.
[35] Levitin, *supra* note 27, at 336.

budget to the congressional appropriations process.[36] Those efforts have continued up to the present day.[37]

In tandem with these legislative measures, Bureau opponents unveiled constitutional theories aimed at altering the same elements of the CFPB's structure.[38] Based on those theories, several litigants have challenged the Bureau's constitutionality on separation-of-powers grounds. So far, three of these challenges have led to rulings on the merits. In two cases, federal district courts affirmed the Bureau's constitutionality without hesitation.[39] In the third case, a divided panel of the U.S. Court of Appeals for the District of Columbia Circuit declared the Bureau's leadership structure to be unconstitutional, ruling that the President must be able to remove the CFPB Director at will.[40] A fourth lawsuit, in the U.S. District Court for the District of Columbia, has been on hold pending the D.C. Circuit's decision.[41] A fifth challenge was initiated only recently.[42]

III. Analysis of Constitutional Arguments

Challenges to the CFPB's constitutionality have focused on two aspects of the Bureau's structure that purportedly violate the separation of powers: its leadership by a single Director (rather than a multimember board or commission) who is removable by the President only for cause, and its source of independent funding outside of the congressional appropriations process.[43] Both objections lack merit. The Constitution does not require that single agency

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[36] *See* Wilmarth, *supra* note 21, at 890-92.
[37] *See, e.g.*, H.R. 5485, 114th Cong. (2016) (eliminating independent funding and replacing Director with five-member commission, among other changes); S. 1910, 114th Cong. (2015) (same); *see also* H.R. 50, 114th Cong. (2015); H.R. 1195, 114th Cong. (2015); H.R. 1486, 114th Cong. (2015); H.R. 1737, 114th Cong. (2015); H.R. 3118, 114th Cong. (2016); H.R. 5465, 114th Cong. (2016); H.R. 5490, 114th Cong. (2016); H.R. 5522, 114th Cong. (2016); H.R. 5527, 114th Cong. (2016); H.R. 5569, 114th Cong. (2016); S. 96, 114th Cong. (2015); S. 1383, 114th Cong. (2015); S. 1804, 114th Cong. (2015); S. 2663, 114th Cong. (2016); S. 3196, 114th Cong. (2016).
[38] *See, e.g.*, George Will, *A Government Agency Answerable to No One*, WASH. POST, Nov. 16, 2012 ("Judicial dismantling of the CFPB would affirm the rule of law and Congress's constitutional role." (describing arguments of C. Boyden Gray and Adam J. White)).
[39] *See CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082 (C.D. Cal. 2014); *CFPB v. ITT Educ. Servs., Inc.*, --- F. Supp. 3d ----, No. 14-0292, 2015 WL 1013508 (S.D. Ind. Mar. 6, 2015).
[40] *See PHH Corp. v. CFPB*, No. 15-1177, 2016 WL 5898801 (D.C. Cir. Oct. 11, 2016).
[41] *See State National Bank of Big Spring v. Lew*, No. 12-1032 (D.D.C.).
[42] *See* Mem. of Law in Support of Defendants' Mot. to Dismiss, *CFPB v. Intercept Corp.*, No. 16-0144 (D.N.D. Aug. 8, 2016).
[43] Some Bureau opponents have also claimed that the CFPB's authority to prohibit "abusive" acts or practices is an unconstitutional delegation of legislative power. While it is true that "Congress generally cannot delegate its legislative power to another Branch," *Mistretta v. United States*, 488 U.S. 361, 372 (1989), there is no unconstitutional delegation so long as legislation provides "an intelligible principle to which the person or body authorized to [act] is directed to conform." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 472 (2001) (citation omitted). Significantly, the Supreme Court has "found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Id*. at 474. In contrast, the Dodd-Frank Act supplies the requisite intelligible principle, describing "abusive" acts or practices in depth. *See* 12 U.S.C. § 5531(d). "This standard is at

heads be removable at will. And the Supreme Court has repeatedly approved limits on the removal of agency heads that are identical to those governing the CFPB Director, including for agencies with functions materially indistinguishable from the Bureau's. Likewise, nothing in the Constitution requires agencies to be funded by congressional appropriations.

Bureau opponents argue, however, that when these two features are combined in the CFPB—which they assert has sweeping, unprecedented authority—the result is an entity not subject to any form of political accountability, in violation of the Constitution. This argument is wrong. As explained in detail below, the Bureau's powers are fundamentally similar to those of other consumer and financial regulatory agencies, and the Bureau is fully accountable to the President, Congress, and the courts. Nor do the Bureau's features impair the ability of any branch of government to carry out its constitutional functions.

A. Single Director, Removable for Cause

The CFPB is led by a Director who serves a five-year term and whom the President may remove from office "for inefficiency, neglect of duty, or malfeasance in office."[44] This limit on presidential removal makes the Bureau one of the government's "independent" agencies, "headed by someone who cannot be removed at will by the President but instead can be removed only for good cause."[45] Opponents of the Bureau contend that this arrangement violates the constitutional separation of powers because it deprives the President of the ability to remove the Director based on policy disagreements or a desire to substitute a new appointee of the President's choosing.[46] This argument is wholly without merit.

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. The Constitution does not address the power to remove executive branch officers from their positions, other than by giving impeachment authority to Congress.[47] Removal power was not discussed at the constitutional convention in Philadelphia.[48] Although the Constitution provides for executive officers to assist the President and sets forth a small number of rules regarding their

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least as specific as other provisions held to constitute 'intelligible principles.'" *Morgan Drexen*, 60 F. Supp. 3d at 1090. "Consequently, the CFPB's power to regulate 'abusive' practices does not violate the Constitution's prohibition on the delegation of legislative power." *Id*.

[44] 12 U.S.C. § 5491(b)(1), (c)(1), (c)(3).

[45] Barkow, *supra* note 20, at 16; *see* Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1138 (2000) ("The critical element of independence is the protection . . . against removal except 'for cause.'").

[46] *See, e.g.*, Brief of State National Bank of Big Spring, at 10, *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. Oct. 5, 2015) ("SNB Brief") ("[T]he Director of the CFPB is protected from removal and, as a result, from ultimate accountability to the Chief Executive.").

[47] *See* U.S. CONST. art. II, § 4.

[48] Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 601 n.112 (1984).

appointment and responsibilities,[49] "[t]he text and structure of the Constitution impose few limits on Congress's ability to structure administrative government."[50] Indeed, "[i]n almost all significant respects, . . . the job of creating and altering the shape of the federal government was left to the future."[51]

The Framers ensured, however, that future Congresses would have "the flexibility required for shaping the government to the demands of changing circumstances,"[52] 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."[53] Indeed, 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."[54]

As Chief Justice John Marshall later observed, this 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."[55] 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."[56] Rejecting any such attempt, the Framers instead chose an arrangement under which "Congress has plenary control over the salary, duties, and even existence of executive offices," as the Supreme Court recently noted.[57] 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.

This is not to say that "judges should simply defer to the elected branches' design of the administrative state."[58] The point, rather, is that the Constitution's text and history refute the

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[49] *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").
[50] Strauss, *supra* note 48, at 597; *see Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 500 (2010) ("Congress has plenary control over the salary, duties, and even existence of executive offices.").
[51] Strauss, *supra* note 48, at 597, 598-99.
[52] *Id.* at 601.
[53] U.S. CONST. art. I, § 8, cl. 18.
[54] Strauss, *supra* note 48, 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).
[55] *M'Culloch v. Maryland*, 17 U.S. 316, 415 (1819).
[56] *Id.*
[57] *Free Enter. Fund*, 561 U.S. at 500.
[58] *PHH Corp.*, 2016 WL 5898801, at *25.

idea that "novel agency structure[s]"[59] are constitutionally suspect. Judicial distaste for such innovation flouts "the character of" our founding charter by ossifying the shape of the executive branch, and thus "prescrib[ing] the means by which government should, in all future time, execute its powers."[60] It also can lead judges to substitute their own preferences about agency design for those of the people's elected representatives.

A stark example is the recent opinion by a divided panel of the U.S. Court of Appeals for the District of Columbia Circuit, which declared that the Constitution *requires* a multimember leadership structure for independent agencies—*i.e.*, agencies whose leaders the President may remove for cause but not at will—at least where those agencies wield substantial enforcement powers. With no basis for its conclusion in either the text of the Constitution or Supreme Court precedent, the panel majority chiefly contends that the Bureau's leadership structure is a "departure from historical practice," and details various asserted "benefits of multi-member independent agencies," compared with single-director agencies, in making decisions.[61]

Other courts have properly recognized, however, that a "generalized assault on the 'unprecedented' nature of the Bureau proceeds from the mistaken premise that that which is not specifically approved by precedent is forbidden."[62] The Supreme Court has made the point clearly: "Our constitutional principles of separated powers are not violated . . . by mere anomaly or innovation."[63] The correct approach, therefore, is the opposite of the D.C. Circuit's: when assessing a separation-of-powers challenge to a statute, judges must begin "with the presumption that the challenged statute is valid."[64] In other words, "novelty does not create a presumption of unconstitutionality."[65] On the contrary, a presumption against novelty in executive branch design is at odds with the Constitution's text and history.[66]

Starting with the requisite presumption that the challenged statute is valid, there is no question that the CFPB is lawful. Although, as noted earlier, the Constitution does not address presidential removal of executive officers, this topic "was discussed extensively in Congress

[59] *Id.* at *4.
[60] *M'Culloch*, 17 U.S. at 415.
[61] *PHH Corp.*, 2016 WL 5898801, at *18, *20. As discussed below, even if the panel's dubious critique of single-director agencies were persuasive, this critique has no relationship to the constitutional question, which is whether the CFPB's leadership structure impairs the President's ability to ensure that the laws are faithfully executed. See pages 15-19 and 21, below.
[62] *ITT Educ. Servs.*, 2015 WL 1013508, at *11.
[63] *Mistretta*, 488 U.S. at 385; *see id.* at 412 (affirming constitutionality of the Sentencing Commission, "an unusual hybrid in structure and authority").
[64] *Chadha*, 462 U.S. at 944.
[65] *ITT Educ. Servs.*, 2015 WL 1013508, at *13.
[66] Contrary to the claims of CFPB opponents, the Supreme Court did not suggest in *Free Enterprise Fund v. PCAOB* that novel agency structures are constitutionally problematic. In that decision, the Court noted a "lack of historical precedent" for the entity under consideration only to rebut the dissent's argument "that our conclusion is contradicted by the past practice of Congress." *Free Enter. Fund*, 561 U.S. at 505.

when the first executive departments were created."[67] The resolution of this debate, in the so-called "Decision of 1789," has taken on great significance because in the absence of explicit constitutional text the Supreme Court has drawn on it to discern fundamental rules about the power to remove federal officers. In brief, as the first Congress fashioned legislation establishing the new position of Secretary of Foreign Affairs, a "wide-ranging" debate that was "replete with references to separation of powers" resulted in statutory language that indirectly acknowledged the President's power to remove the Secretary without the Senate's consent.[68] From this decision, the Supreme Court observed in 1839, it became "the settled and well understood construction of the Constitution, that the power of removal was vested in the President alone, in such cases; although the appointment of the officer was by the President and Senate."[69]

The Decision of 1789 did not reflect an understanding that the President has an unlimited constitutional right to remove all federal officers at will. Rather, the Decision focused on a department secretary whose proposed office would help implement the President's inherent constitutional power to conduct foreign affairs by making treaties and dealing with foreign officials.[70] As the Supreme Court would later explain, "the office under consideration by Congress was not only purely executive, but the officer one who was responsible to the President, and to him alone, in a very definite sense. A reading of the debates shows that the President's illimitable power of removal was not considered in respect of other than executive officers."[71]

Nor has it since been understood that the Constitution makes all executive branch officials removable at will by the President. Indeed, in *Marbury v. Madison*, Chief Justice Marshall recognized (albeit in *dictum*) a distinction between those whose roles were so closely bound to the President's constitutional duties that he must be able to remove them at will, and those whose roles were of a different nature—who thus could be insulated from presidential removal by fixed terms of office. As the Court later explained, "Chief Justice Marshall was of opinion that a justice of the peace for the District of Columbia was not removable at the will of the President; and that there was a distinction between such an officer and officers appointed to aid the President in the performance of his constitutional duties. In the latter case, the distinction he saw was that 'their acts are his acts' and his will, therefore, controls."[72]

Not until the twentieth century, however, did the Supreme Court directly confront the constitutionality of statutory limits on the President's ability to remove principal executive

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[67] *Id.* at 492. In the Federalist Papers, Alexander Hamilton assumed that Senate consent would be needed to remove an executive branch officer. *See* THE FEDERALIST No. 77, at 427 (C. Rossiter ed., 1961).
[68] Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practice*, 30 WM. & MARY L. REV. 211, 234-35 (1988).
[69] *In re Hennen*, 38 U.S. 230, 259 (1839).
[70] *See* U.S. CONST. art II, §§ 2, 3.
[71] *Humphrey's Ex'r v. United States*, 295 U.S. 602, 631 (1935).
[72] *Id.* (quoting *Marbury v. Madison*, 5 U.S. 137, 166 (1803)).

officers.[73] In a seminal decision, *Humphrey's Executor v. United States*, the Court unanimously ruled that the heads of independent regulatory agencies may be shielded by legislation from presidential removal at will.[74]

The case began when President Franklin Roosevelt removed a member of the Federal Trade Commission ("FTC") before the end of his seven-year term, citing policy disagreements but not "inefficiency, neglect of duty, or malfeasance in office," as required by statute.[75] Less than a decade earlier, in *Myers v. United States*, the Court for the first time had struck down a congressional limit on presidential removal powers,[76] and so the FTC commissioner's executor sought to have his removal likewise declared invalid, in order to obtain his unpaid salary.

As the Court explained, however, the Constitution does not require all executive branch officers to be removable at will. Instead: "Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the character of the office."[77] *Myers* had concerned a postmaster, who—like the Foreign Affairs Secretary in the Decision of 1789—was "an executive officer restricted to the performance of executive functions" and "charged with no duty at all related to either the legislative or judicial power."[78] By contrast, the FTC could not "in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control."[79] Thus: "We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of th[is] character[.]"[80]

That was not all. 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*—a reason relevant to the constitutionality of the CFPB removal provision. The statute addressed 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."[81] The Court found it a violation of the separation of powers for "Congress to draw to itself, or to either branch of it, the power to remove or the right to

[73] The Supreme Court recognized quite early, however, that "inferior" officers—*i.e.*, those whose appointment Congress may vest in parties other than the President, *see* U.S. Const. art. II, § 2, cl. 2—may be protected by legislation from presidential removal. *See In re Hennen*, 38 U.S. at 259-60; *see also United States v. Perkins*, 116 U.S. 483, 485 (1886) ("We have no doubt that when congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest.").
[74] *Humphrey's Ex'r*, 295 U.S. at 631-32.
[75] *Id.* at 618-19.
[76] *Myers v. United States*, 272 U.S. 52, 176 (1926).
[77] *Humphrey's Ex'r*, 295 U.S. at 631.
[78] *Id.* at 627.
[79] *Id.* at 628.
[80] *Id.* at 629.
[81] *Myers*, 272 U.S. at 107.

participate in the exercise of that power" because this "would make it impossible for the President, in case of political or other difference with the Senate or Congress, to take care that the laws be faithfully executed."[82] Thus, in *Myers*, "the narrow point actually decided was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress."[83]

Neither that decision nor any other, therefore, "recognized the President's inherent constitutional power to remove officials, no matter what the relation of the executive to the discharge of their duties and no matter what restrictions Congress may have imposed regarding the nature of their tenure."[84] Instead, as exemplified in *Humphrey's Executor*, the correct approach is to examine the functions of the officers concerned and their relationship to the President's Article II powers, to determine whether removal limits impair the President's exercise of those powers.[85]

The Court has reaffirmed these principles and the holding of *Humphrey's Executor* many times,[86] including six years ago in an opinion by Chief Justice John Roberts.[87] In the process, 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."[88] 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."[89]

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

[82] *Id.* at 161, 164.
[83] *Humphrey's Ex'r*, 295 U.S. at 626 ("In the course of the opinion of the court [in *Myers*], expressions occur which . . . are beyond the point involved . . . . In so far as they are out of harmony with the views here set forth, these expressions are disapproved."). The Court has consistently rebuffed Congress's efforts to give itself appointment and removal authority over executive officers. *See Buckley v. Valeo*, 424 U.S. 1, 140-41 (1976) (invalidating commission wielding executive authority whose officers were appointed by Congress, rather than the President); *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (invalidating statute under which Congress "reserve[d] for itself the power of removal of an officer charged with the execution of the laws").
[84] *Wiener v. United States*, 357 U.S. 349, 352 (1958).
[85] *See Humphrey's Ex'r*, 295 U.S. at 627-32.
[86] *Wiener*, 357 U.S. at 356 (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 v. Olson*, 487 U.S. 654, 691 (1988) (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*, 488 U.S. at 410-11; *Bowsher*, 478 U.S. at 725-26; *I.N.S. v. Chadha*, 462 U.S. 919, 953 n.16 (1983); and *Buckley*, 424 U.S. at 136, 141.
[87] *See Free Enter. Fund*, 561 U.S. at 483, 509. See pages 18-21, below.
[88] *Morrison*, 487 U.S. at 691.
[89] *Id.* at 689-90.

ability to ensure that the laws are faithfully executed" and therefore is "incompatible with the Constitution's separation of powers."[90] And as suggested in *Myers*, there are "some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role."[91] But the latter do not include the heads of independent regulatory agencies like the FTC.[92]

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."[93] The Act thus "specifies precisely the same grounds for removal as the archetypal 'for cause' provision approved by the Court in *Humphrey's Executor*."[94] Moreover, the Director's functions are not materially different from those of the FTC commissioner discussed in *Humphrey's Executor*. "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."[95]

Because the Bureau is so clearly akin to the FTC and other regulatory agencies, "the question of the constitutionality of the [CFPB]'s removal provision is settled by *Humphrey's Executor* and its progeny."[96] The President's ability to remove the Director only for cause does not "impede the President's ability to perform his constitutional duty."[97] To the contrary, it "provides the Executive with substantial ability to ensure that the laws are 'faithfully executed.'"[98] 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,"[99] 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."[100] The President thus "retains ample authority

[90] *Free Enter. Fund*, 561 U.S. at 496, 498.
[91] *Morrison*, 487 U.S. at 690.
[92] *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.
[93] 12 U.S.C. § 5491(c)(3).
[94] *ITT Educ. Servs.*, 2015 WL 1013508, at *9; *see* 15 U.S.C. § 41.
[95] *Morgan Drexen*, 60 F. Supp. 3d at 1087 (quoting *Humphrey's Ex'r*, 295 U.S. at 620-21).
[96] *ITT Educ. Servs.*, 2015 WL 1013508, at *14; *accord Morgan Drexen*, 60 F. Supp. 3d at 1087-88. 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*.
[97] *Morrison*, 487 U.S. at 691.
[98] *Id*. at 696.
[99] *Free Enter. Fund*, 561 U.S. at 484, 496.
[100] *Id*. at 498.

to assure that the [Director] is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act."[101] The Constitution requires no more.

In short, the legitimacy of the Director's removal provision has been settled by precedent directly on point and reaffirmed many times.

To overcome this clear-cut precedent, opponents of the Bureau emphasize that it is headed by a single Director rather than a multimember commission, and argue that this distinction makes a constitutional difference. But they have never successfully explained why. Some suggest that the Court in *Humphrey's Executor* departed from the result in *Myers* because of the FTC's composition as a multimember body.[102] But that suggestion is demonstrably false. "*Humphrey's Executor* did not distinguish *Myers* on the basis that *Myers* involved an officer, not a commission."[103] 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 a postmaster.[104]

The Bureau's detractors also argue that it has been given an unprecedented breadth of power without a corresponding degree of democratic accountability.[105] An agency this powerful, they say, must be restrained by internal checks such as those that characterize a multimember board.[106]

To start, this critique is simply wrong as a factual matter. As demonstrated at length below, the Bureau's powers are comparable to those of other financial regulatory agencies, and it is bound by an extensive web of requirements that ensure accountability to all three branches of government.[107]

This critique is also incoherent as a constitutional matter. The Supreme Court has explained that "the real question" is whether removal restrictions "impede the President's ability to perform his constitutional duty."[108] 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

[101] *Morrison*, 487 U.S. at 692.
[102] *See, e.g.*, *Morgan Drexen*, 60 F. Supp. 3d at 1087 (quoting defendants' memorandum).
[103] *Id.* at 1088.
[104] *Humphrey's Ex'r*, 295 U.S. at 631. See page 14, above.
[105] *See, e.g.*, SNB Brief at 8 (citing "the unprecedented combination of sweeping executive powers and stripped-away constitutional restraints that is embodied in the CFPB").
[106] *See, e.g.*, *id.* at 15-17.
[107] See pages 27-34, below.
[108] *Morrison*, 487 U.S. at 691.

order to change the leadership of the CFPB."[109] And with a multimember board, even the preliminary step of identifying *which* officers need to be removed can be problematic. As the Department of Justice has noted: "A multimember leadership structure may make it more difficult for the President to attribute a shortcoming in an agency's performance to any particular official."[110] 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. "Much has been written," they aver, "on the benefits of multi-member bodies relative to sole directorships."[111] 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."[112] Whether or not any of this is true,[113] it has nothing to do with the issue, which is whether removal restrictions "impede the President's ability to perform his constitutional duty."[114] 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.

Finally, the Bureau's detractors suggest that the Supreme Court's recent decision in *Free Enterprise Fund v. PCAOB* signals a new approach to removal restrictions that buttresses their case.[115] But the opinion actually confirms that the Bureau's Director, because he may be removed for cause, is "subject . . . to Presidential oversight," thus preserving "the President's ability to ensure that the laws are faithfully executed."[116]

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[109] *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 20, at 38.
[110] Combined Mem. in Support of Defendants' Cross-Mot. for Summary Judgment and Dismissal and in Opp. to Plaintiffs' Mot. for Summary Judgment, at 19-20, *State Nat'l Bank of Big Spring v. Lew*, No. 12-1032 (D.D.C. Jan. 8, 2016) ("DOJ Memorandum").
[111] SNB Brief at 16.
[112] *Morgan Drexen*, 60 F. Supp. 3d at 1092 (quoting defendants' memorandum).
[113] 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 21, 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.").
[114] *Morrison*, 487 U.S. at 691.
[115] *See, e.g.*, Opening Brief for Petitioners, at 47 n.6, *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. Sept. 28, 2015) ("PHH Brief"); SNB Brief at 6.
[116] *Free Enter. Fund*, 561 U.S. at 498, 509.

In *Free Enterprise Fund*, the Justices confronted "the unusual situation, never before addressed by the Court, of two layers of for-cause tenure."[117] That is, the Court examined a statute under which members of the Securities and Exchange Commission—who are removable by the President only for good cause—were empowered to appoint the members of a subsidiary body, the Public Company Accounting Oversight Board, and in turn could remove those Board members only for good cause.[118] The Court held that "such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President" because the President cannot "take Care that the Laws be faithfully executed" if he cannot remove a Board member even when "the officer is neglecting his duties or discharging them improperly."[119] As the Court explained, "[t]he added layer of tenure protection makes a difference," resulting in "a Board that is not accountable to the President."[120]

Fashioning a remedy for this problem, the Court reaffirmed that the Constitution does not require all executive branch officers to be removable at will, and that with respect to independent regulatory agencies (like the CFPB), the power to remove officers for good cause enables the President to ensure that the laws are faithfully executed. The solution to the Oversight Board's problematic dual layer of tenure protection, the Court concluded, was simply to eliminate the second layer protecting the Board members from removal at will. This solution "leaves the Board removable by the Commission at will, and leaves the President separated from Board members by only a single level of good-cause tenure."[121] In other words, the Court's solution in *Free Enterprise Fund* was to impose the very same "single level of good-cause tenure" under which the Director of the CFPB serves.[122] Far from suggesting any cause for doubt, therefore, the opinion reaffirms the legitimacy of the Director's for-cause removal provision.

In sum, the separation of powers does not require the Director of the CFPB to be removable at will or replaced with a multimember commission. And as one federal court noted in rejecting a challenge to the Bureau, "absent some constitutional basis," courts lack the authority to "second guess Congress' policy determination that a single director, rather than a commission, is the best choice to head the CFPB."[123]

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[117] *Id.* at 501.
[118] *See id*. at 486.
[119] *Id*. at 484.
[120] *Id*. at 495. The Court explained that its point was "not to take issue with for-cause limitations in general; we do not do that." *Id.* at 501. Indeed, after reciting the key doctrines on presidential removal power established in *Myers*, *Humphrey's Executor*, and *Morrison*, the Court noted: "The parties do not ask us to reexamine any of these precedents, and we do not do so." *Id.* at 483.
[121] *Id*. at 509.
[122] *Id*.; *see ITT Educ. Servs.*, 2015 WL 1013508, at *9 ("The Director is responsible directly to the President, without the additional layer of screening the Court [in *Free Enterprise Fund*] found problematic in the structure of the Public Company Accounting Oversight Board.").
[123] *Morgan Drexen*, 60 F. Supp. 3d at 1092. See pages 6-7, above, regarding Congress's choice of a single Director.

The recent decision to the contrary by a divided panel of the D.C. Circuit exemplifies this type of judicial second-guessing. The panel majority declared that the CFPB is "unconstitutionally structured because it is an independent agency headed by a single Director."[124] According to the panel, independent agencies "are unchecked by the President" because their leaders may be removed only for good cause. In the absence of such accountability, the panel asserted, "the multi-member structure of [most] independent agencies acts as a critical substitute check on the excesses of any individual independent agency head—a check that helps to prevent arbitrary decisionmaking and thereby to protect individual liberty."[125] The panel thus concluded that the Constitution requires independent agencies with substantial enforcement powers to be led by a multimember board or commission instead of a single director. (To remedy this perceived defect, the panel severed the for-cause removal provision from the Dodd-Frank Act, making the Director removable at will by the President and thus allowing the Bureau to continue as an executive, rather than independent, agency.)[126]

The flaws in this reasoning begin with the panel's misreading of the Supreme Court precedent on which it purported to rely. The panel repeatedly asserted that the CFPB Director is not "checked" by the President or "accountable" to him because the President may not remove a Director based on policy disagreements alone, and therefore cannot force a Director to adopt the President's preferred policies.[127] As the Supreme Court has made clear, however, there is no absence of accountability, or constitutionally significant interference with the President's Article II role, so long as the President can remove the head of a regulatory agency if that person "is neglecting his duties or discharging them improperly."[128] Put differently, the power to remove an official for good cause, such as "inefficiency, neglect of duty, or malfeasance in office,"[129] provides the needed accountability. Significantly, this bedrock constitutional rule is reflected in the structure of a number of key agencies ranging from the Federal Trade Commission to the Federal Reserve Board.

Applying this rule in *Free Enterprise Fund*, the Supreme Court recently concluded that the Oversight Board within the SEC is constitutionally accountable to the President so long as the Board is controlled by SEC officials whom the President may remove for good cause.

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[124] *PHH Corp.*, 2016 WL 5898801, at *26. The panel's third member objected to the majority's constitutional analysis, asserting that it was superfluous given the panel's decision to vacate the challenged CFPB order on statutory grounds. *See id.* at *42 (Henderson, J., concurring in part and dissenting in part) ("As my colleagues ably demonstrate, PHH's statutory arguments are sufficient to accomplish its goal . . . . But my colleagues don't stop there. Instead, they unnecessarily reach PHH's constitutional challenge, thereby rejecting one of the most fundamental tenets of judicial decisionmaking. With respect, I cannot join them in this departure from longstanding precedent.").

[125] *Id*. at *18.

[126] *Id.* at *28.

[127] *See id.* at *11, *18, *23.

[128] *Free Enter. Fund*, 561 U.S. at 484, 496; *see id.* (explaining that in the absence of for-cause removal power, the President would be unable to "ensure that the laws are faithfully executed" or "be held responsible for [an officer]'s breach of faith").

[129] 12 U.S.C. § 5491(c)(3) (governing removal of CFPB Director).

Although the President may remove neither Board members nor SEC commissioners at will, and may not order them to adopt his preferred policies, both "the Board's actions" and "the Commission's own functions" are subject to "Presidential oversight."[130] The President thus can "be held fully accountable for discharging his own responsibilities," and constitutional requirements are satisfied.[131]

The D.C. Circuit's conclusion that the Constitution requires more than good-cause removal power flatly contradicts *Free Enterprise Fund* and the many decisions it reaffirmed, stretching back to *Humphrey's Executor*. Indeed, by refusing to acknowledge that removability for cause makes an official accountable to the President, the panel "dismisses the importance of removal as a tool of supervision," exactly what the Court in *Free Enterprise Fund* warned against.[132]

Of course, even the power to remove for cause may be insufficient with regard to *certain* executive branch officials, whose positions are so closely tied to the President's inherent constitutional duties "that 'their acts are his acts' and his will, therefore, controls."[133] In other words, "there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role."[134] But the heads of independent regulatory agencies like the CFPB are emphatically not among those officials, as the Court has held unvaryingly for 75 years.[135]

While those holdings involved multimember-led agencies, the D.C. Circuit majority acknowledged that "there is no meaningful difference in responsiveness and accountability to the President" between an agency led by a multimember body and one led by a single director.[136] Nevertheless, the panel asserted that "the single-Director independent agency . . . poses a constitutional problem even if it does not occasion any additional diminishment of Presidential power[.]"[137] But why? The panel's only answer is that single-director agencies are apt to make bad decisions that could impinge on personal liberty. Yet that speculative claim has nothing to do with "the real question," which is "the President's ability to perform his constitutional duty."[138] The panel simply failed to connect its criticism of single-director independent agencies to the separation of powers or to Article II.

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[130] *Free Enter. Fund*, 561 U.S. at 509.
[131] *Id*. at 514.
[132] *Id*. at 499.
[133] *Humphrey's Ex'r*, 295 U.S. at 631 (quoting *Marbury*, 5 U.S. at 166).
[134] *Morrison*, 487 U.S. at 690. See pages 13-14, above.
[135] *See Humphrey's Ex'r*, 295 U.S. at 632 (regarding FTC); *Wiener*, 357 U.S. at 356 (regarding War Claims Commission); *Free Enter. Fund*, 561 U.S. at 509 (regarding SEC and Public Company Accounting Oversight Board).
[136] *PHH Corp.*, 2016 WL 5898801, at *23. An agency led by a multimember board is, if anything, *less* accountable to the President than an agency led by a single director. See pages 17-18, above.
[137] *PHH Corp.*, 2016 WL 5898801, at *24 (emphasis removed).
[138] *Morrison*, 487 U.S. at 691; *accord Free Enter. Fund*, 561 U.S. at 498 (striking down provision that "subverts the President's ability to ensure that the laws are faithfully executed").

Ultimately, the flaws in the D.C. Circuit's opinion—its misreading of precedent, its disregard of the question it was supposed to answer, its elevation of judicial policy preferences over the choices of the people's representatives—are the best evidence yet that the Bureau's single-director structure entails no genuine constitutional defect.[139]

B. Independent Funding

The CFPB is funded by the earnings of the Federal Reserve System instead of by regular congressional appropriations. Opponents of the Bureau argue that this arrangement violates the Constitution's separation of powers, but fail to offer a credible reason why. Independent funding is the norm, not the exception, for financial regulatory agencies, and nothing in the Constitution prohibits it. Moreover, Congress can alter the Bureau's funding structure at any time.

Each year, an amount of up to twelve percent of the Federal Reserve System's operating expenses is transferred to the Bureau, upon the Director's determination that the amount is "reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law."[140] Depending on inflation, the real value of this capped funding amount will likely diminish over time.[141]

The Bureau "is required to seek a congressional appropriation if it wishes to increase its budget beyond that amount."[142] Specifically, if the Director concludes that the funds provided for by statute will be insufficient to carry out the Bureau's responsibilities, he or she must submit a report to the President and the congressional appropriations committees.[143] Regardless of whether the Bureau seeks additional appropriations, its finances are audited every year by the Government Accountability Office.[144]

In sum, as long as the Bureau does not spend more than the Federal Reserve is authorized to transfer to it, the Bureau's annual funding does not come from congressional appropriations. The statute further provides that the funds derived from the Federal Reserve are not subject to review by the congressional appropriations committees.[145]

"While the CFPB's budget is not determined by congressional appropriations, neither are the budgets of other federal bank regulators."[146] Except for the Securities and Exchange

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[139] Moreover, the panel opinion's flaws make it unlikely to survive review by the full D.C. Circuit or the Supreme Court.
[140] 12 U.S.C. § 5497(a)(1).
[141] Levitin, *supra* note 27, at 340-41 (explaining that the inflation-adjustment measure set forth in the statute "often lags real inflation").
[142] Wilmarth, *supra* note 21, at 906.
[143] 12 U.S.C. § 5497(e)(1).
[144] *Id.* §§ 5496a(b), 5497(a)(5).
[145] *Id.* § 5497(a)(2)(C).
[146] Levitin, *supra* note 27, at 341.

Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC"), "no federal financial regulator is subject to congressional appropriations."[147] 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 by collecting fees and assessments from the institutions they regulate,"[148] as do the NCUA and PCAOB.[149] The same was true of the former Office of Thrift Supervision ("OTS").[150]

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, as noted, it must seek appropriations for any amounts that exceed twelve percent of the Federal Reserve's operating expenses.[151] 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."[152]

Despite this, opponents of the CFPB argue that the Bureau's independent funding makes it unconstitutional.[153] Yet they never articulate precisely why this is so.[154] Indeed, rather than offer a specific theory of how the CFPB's funding violates the Constitution, Bureau opponents tend to wax eloquent about the value of Congress's "power of the purse" in overseeing the executive branch.[155] These musings rest on a false assumption because Congress has not, in fact, abandoned its power of the purse with respect to the Bureau. Moreover, Bureau opponents make no attempt to explain why an independent funding structure violates the Constitution when applied to the CFPB but not when applied to the FDIC, FHFA, FRB, NCUA, OCC, or PCAOB—all of which, unlike the Bureau, enjoy *complete* exemption from the need for congressional appropriations.

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[147] Wilmarth, *supra* note 21, at 951. The Farm Credit Administration and Farm Credit System Insurance Corporation are also funded without appropriations. While independent funding is less common outside of the financial regulatory sphere, the Bureau of Engraving and Printing and the Federal Prison Industries are also funded this way. *Recent Legislation*, 124 HARV. L. REV. 2123, 2127 n.38 (2010).
[148] Wilmarth, *supra* note 21, at 906.
[149] *See* 12 U.S.C. § 1755(a), (b) (NCUA); 15 U.S.C. § 7219(c)(1), (d)(1) (PCAOB).
[150] *See* Block-Lieb, *supra* note 9, at 33.
[151] Wilmarth, *supra* note 21, at 906.
[152] Levitin, *supra* note 27, at 341; Wilmarth, *supra* note 21, at 911.
[153] *See, e.g.*, PHH Brief at 48-49; SNB Brief at 18-28.
[154] *See ITT Educ. Servs.*, 2015 WL 1013508, at *12 (noting that the litigant "neglects to explain how the Bureau's source of funding implicates constitutional concerns").
[155] *See, e.g.*, SNB Brief at 18-24.

Unsurprisingly, in light of these shortcomings, no court has accepted the argument that the Bureau's funding is constitutionally problematic, including the D.C. Circuit.[156]

The Appropriations Clause of Article I provides: "No 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."[157] This provision is what it appears to be—a limit on withdrawing money from the federal Treasury. "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.'"[158]

Because the Bureau's funding does not involve paying money out of the Treasury, the Appropriations Clause is irrelevant.[159] Neither that Clause, nor any other part of the Constitution, prohibits Congress "from enacting funding structures for agencies that differ from the procedures prescribed by the ordinary appropriations process."[160]

Furthermore, as the Justice Department explains, "when the Framers intended to limit the means by which Congress funds government functions, they did so in precise terms."[161] For instance, the Constitution explicitly prohibits appropriations lasting more than two years to "raise and support Armies."[162] This limit was intended as a check against the permanent maintenance of a standing military.[163] Given the presence of such express, considered limits on Congress's funding powers, there is even less justification for "read[ing] into the Constitution additional, vague limits with no basis in the constitutional text."[164]

Thus, the Constitution does not "prohibit Congress from creating funding mechanisms that enjoy some degree of insulation from its own year-to-year control."[165] This type of partial insulation does not relinquish the power of the purse, because "Congress can always alter the CFPB's funding in any appropriations cycle (or at any other time)."[166] The failure of Bureau

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[156] *See PHH Corp.*, 2016 WL 5898801, at *26 n.16; *ITT Educ. Servs.*, 2015 WL 1013508, at *12; *Morgan Drexen*, 60 F. Supp. 3d at 1092.
[157] U.S. CONST. art I, § 9, cl. 7.
[158] *Morgan Drexen*, 60 F. Supp. 3d at 1092 (quoting *Office of Pers. Mgmt. v. Richmond,* 496 U.S. 414, 424 (1990) (additional internal quotation marks omitted)).
[159] *Id*.
[160] *ITT Educ. Servs.*, 2015 WL 1013508, at *12; *accord Morgan Drexen*, 60 F. Supp. 3d at 1092; *see Am. Fed'n of Gov't Employees, 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.").
[161] DOJ Memorandum at 24.
[162] U.S. CONST. art I, § 8, cl. 12.
[163] *See* THE FEDERALIST NO. 26, at 139-42 (C. Rossiter ed., 1961) (Hamilton).
[164] DOJ Memorandum at 24.
[165] *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.
[166] *PHH Corp.*, 2016 WL 5898801, at *26 n.16.

opponents to achieve this result so far, despite having introduced numerous bills in Congress to that end, reflects a lack of political support for the effort. Nothing in the Constitution demands the result sought by these failed legislative bids or requires Congress to annually revisit an agency's funding.[167]

Moreover, by specifying that the CFPB's annual funding is not subject to appropriations committee review,[168] 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."[169] Thus the Bureau's funding structure is not "shielded from future congressional alteration, nor could it be."[170]

In short, Congress's decision to fund the CFPB outside of the appropriations process is a permissible, routine policy choice, and suggestions that this arrangement threatens "fundamental structural protections of the Constitution" prove to be "more smoke than fire."[171]

C. Both Objections Combined and Political Accountability

As demonstrated above, there is no legitimate objection to the CFPB's leadership structure or funding mechanism. But some Bureau opponents argue that the *combination* of these two otherwise valid features violates the Constitution. As they put it: "Certain features of the CFPB viewed in isolation may or may not be constitutionally permissible, but the combination is not."[172]

Bureau opponents offer no cogent explanation of how combining a single directorship with independent funding violates the Constitution.[173] Instead, they invoke an amorphous "separation of powers" principle unrelated to the divisions of authority in the constitutional text and thus lacking any standards by which to distinguish permissible from impermissible agency structures.

Although it was widely agreed at the time of the Founding that dividing governmental powers was necessary to preserve individual freedom, the Framers did not include a "separation of powers" clause in the Constitution. Instead, they "embedded" the concept in

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[167] Furthermore, 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." DOJ Memorandum at 25 (citing 1794 statute regarding post-office funding).
[168] *See* 12 U.S.C. § 5497(a)(2)(C).
[169] *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[.]").
[170] *PHH Corp.*, 2016 WL 5898801, at *26 n.16 (citing *Manigault v. Springs*, 199 U.S. 473, 487 (1905)).
[171] *Mistretta*, 488 U.S. at 384 (internal quotation marks omitted).
[172] SNB Brief at 3; *see* PHH Brief at 49; *ITT Educ. Servs.*, 2015 WL 1013508, at *11 (citing litigant's memorandum).
[173] *See ITT Educ. Servs.*, 2015 WL 1013508, at *11 (explaining that the litigant "never offers a convincing basis for the conclusion that many of these features of the [Bureau] contribute . . . to the Bureau's unconstitutionality").

specific textual requirements, such as the requirement that the executive power be vested in the President and that it is the President who "shall take Care that the Laws be faithfully executed."[174]

Therefore, in determining whether the separation of powers has been violated, the Supreme Court has generally looked to the specific textual provisions in the Constitution that incorporate this concept. For example, in cases regarding the President's power to remove federal officers, the Supreme Court's 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."[175] More generally, "in determining whether [an] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents [a] Branch from accomplishing its constitutionally assigned functions."[176]

In particular, "separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch."[177] Accordingly, the Court has struck down provisions "that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch," while it has upheld provisions "that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment."[178]

These principles decisively undermine the arguments of CFPB opponents. As already shown, the Bureau's structure and funding do not interfere with the President's exercise of the executive power or duty to faithfully execute the laws.[179] Nor do they encroach upon Congress's legislative power.[180] It is not even seriously contended that they intrude upon the

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[174] U.S. CONST. art. II, § 1, cl. 1; *id.* art. II, § 3; *see Freytag v. C.I.R.*, 501 U.S. 868, 882, 884 (1991) ("[t]he principle of separation of powers is embedded in the Appointments Clause," which "bespeaks a principle of limitation by dividing the power to appoint the principal federal officers . . . between the Executive and Legislative Branches").
[175] *Morrison*, 487 U.S. at 689-90 (quoting U.S. CONST. art. II, § 2, cl. 1 & *id.* art. II, § 3).
[176] *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. at 443.
[177] *Freytag*, 501 U.S. at 878; *see Mistretta*, 488 U.S. at 382 ("It is this concern of encroachment and aggrandizement that has animated [the Court's] separation-of-powers jurisprudence."); *New York*, 505 U.S. at 182 (division of powers is violated "where one branch invades the territory of another").
[178] *Mistretta*, 488 U.S. at 382-83. *Compare Free Enter. Fund*, 561 U.S. at 484 ("This [provision] contravenes the President's 'constitutional obligation to ensure the faithful execution of the laws.'" (citation omitted)), *and Bowsher*, 478 U.S. at 734 ("Congress in effect has retained control over the execution of the Act and has intruded into the executive function."), *with Morrison*, 487 U.S. at 694 ("[T]his case simply does not pose a 'dange[r] of congressional usurpation of Executive Branch functions.'" (citation omitted)), and *Mistretta*, 488 U.S. at 395 ("Congress cannot be said to have aggrandized the authority of [the Judicial] Branch or to have deprived the Executive Branch of a power it once possessed.").
[179] See pages 10-19, above.
[180] See pages 22-25, above.

powers of the judiciary.[181] This leaves no basis for asserting that the Bureau's structure and funding violate the Constitution's separation of powers. Three strikes do not add up to a hit.

Bureau opponents nevertheless insist that "the Dodd-Frank Act vests the CFPB with vast executive authority, exempts it from accountability to the political branches, provides no mitigating internal checks and balances, and allows it to make and execute law on its own indefinitely without further involvement or oversight by Congress or the President."[182] The Bureau's "unprecedented" combination of features, they argue, makes it "entirely unaccountable to the democratic process."[183]

Regarding the supposedly "unprecedented" nature of the Bureau, it is of course true—and hardly surprising—that no other agency has the Bureau's precise combination of structure and authorities. No two agencies are exactly alike, because each is designed to address unique problems. The Constitution does not prevent Congress from creating agencies uniquely equipped to respond to specific challenges. To the contrary, it empowers Congress to do just that. As discussed above, "novelty does not create a presumption of unconstitutionality."[184]

In any event, CFPB opponents wildly exaggerate the Bureau's novelty. As explained above, 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.[185] 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,[186] and the OCC is also highly similar in this regard.[187] 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. Moreover, a variety of accountability measures ensures that the Bureau is answerable to Congress, the President, and the public.

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[181] See pages 33-34, below.
[182] SNB Brief at 7 (italics omitted).
[183] PHH Brief at 45-46.
[184] *ITT Educ. Servs.*, 2015 WL 1013508, at *13. See pages 11-12, above.
[185] See pages 6-7 and 22-23, above.
[186] *See* 12 U.S.C. § 4512(a), (b).
[187] 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.

Limits on CFPB Powers

To start, the Bureau's powers are not, as its opponents would have it, novel and extraordinary.[188] As one court put it, the Bureau "is no venture into uncharted waters; it is a variation on a theme—the independent regulatory agency with enforcement power—that has been a recurring feature of the modern administrative state."[189] More specifically, "CFPB's rulemaking and enforcement authorities resemble those of other federal bank regulators," including the OCC, FDIC, FHFA, and FRB.[190] 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."[191]

To be sure, the CFPB "has rulemaking, supervision, and enforcement authority over an extremely broad swath of the consumer financial services industry."[192] 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."[193] "These powers," moreover, "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."[194] 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.'"[195]

"Because Congress granted the CFPB 'exclusive' rulemaking authority" within its sphere, "the Bureau's independence is greatest when it issues regulations. This ostensibly 'exclusive' regulatory authority is, however, subject to oversight, consultation, and coordination."[196]

"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

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188 *See, e.g.*, SNB Brief at 2.
189 *ITT Educ. Servs.*, 2015 WL 1013508, at *13.
190 Wilmarth, *supra* note 21, at 885, 900.
191 *Id.* at 907-08.
192 Levitin, *supra* note 27, at 343.
193 S. REP. NO. 111-176, at 10-11, 168 (2010). See pages 4-6, above.
194 Levitin, *supra* note 27, at 343-44.
195 Wilmarth, *supra* note 21, at 911 (quoting Kate Davidson, *Four Big Myths About CFPB and Its Powers*, AM. BANKER, June 3, 2011, at 1).
196 Block-Lieb, *supra* note 9, at 55.

on the proposal, and publication of the final rule before its effective date."[197] Once a rule has been finalized and issued, "the CFPB's rulemaking activities are subject to judicial review under standard administrative law jurisprudence."[198]

In addition, the Bureau's rulemaking "is subject to specific burdens of proof set out in the [Dodd-Frank] Act."[199] For example, the Bureau is "required by statute to undertake a cost-benefit analysis of its rulemakings."[200] 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 depositaries and rural consumers."[201] Furthermore, "when regulating unfair, deceptive, or abusive practices, Dodd-Frank overlays a second cost-benefit analysis," which requires meeting various stringent burdens of proof.[202]

The need to conduct cost-benefit analysis in every instance "makes CFPB's rulemakings more vulnerable to judicial challenges and therefore encourages CFPB to adopt incremental rather than far-reaching rules."[203]

Unlike most agencies, moreover, "the CFPB is subject to a set of further restrictions and review on its rulemaking authority."[204] 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."[205] 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."[206]

External restrictions limit the Bureau's rulemaking as well. "Dodd-Frank also creates a sort of 'super prudential regulator,'"[207] the Financial Stability Oversight Council ("FSOC"), which acts as "a 'Justice League' of financial regulators tasked with preventing systemic risk."[208] 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

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[197] Levitin, *supra* note 27, at 348.
[198] *Id*.
[199] Block-Lieb, *supra* note 9, at 44.
[200] Levitin, *supra* note 27, at 352.
[201] *Id.* at 352 (quoting 12 U.S.C. § 5512(b)(2)).
[202] Block-Lieb, *supra* note 9, 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)).
[203] Wilmarth, *supra* note 21, at 909.
[204] Levitin, *supra* note 27, at 348.
[205] *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).
[206] Levitin, *supra* note 27, at 349, 351.
[207] Block-Lieb, *supra* note 9, at 47.
[208] Levitin, *supra* note 27, at 353.

States banking system or the stability of the financial system of the United States at risk."[209] 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,"[210] 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."[211]

Moreover, the mere potential for an FSOC veto "provides enormous opportunity for executive influence on the CFPB's exercise of its rulemaking authority," given that many of the Council's members are presidential appointees, while the "very public nature of the process through which the Council considers whether to set aside a regulation issued by the CFPB also provides each of the members of the Council with another opportunity to lobby the Bureau about its policies and proposed regulations."[212] It "also presents Congress with both a source of information about the CFPB's rulemaking and an opportunity for involvement."[213]

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, CFPB must include in its final rulemaking a description of the regulator's objection and CFPB's response to that objection."[214]

Although these consultation requirements do not allow other agencies to veto proposed rules, as the FSOC may do, "pragmatic consequences would likely follow the requirement that the CFPB record both the competing regulator's written objection and its response in the regulatory record."[215] Notably, "similar purely procedural requirements of consultation have been described as imposing 'a powerful interagency lever' on the grounds that, although the principal agency retains considerable discretion, in practice this sort of provision 'can function as a veto because disregarding recommendations can expose an agency to civil and criminal penalties and because deviation may render a decision arbitrary and capricious on judicial review.'"[216]

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.

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[209] 12 U.S.C. § 5513(a), (c)(3)(A).
[210] Levitin, *supra* note 27, at 354.
[211] Wilmarth, *supra* note 21, at 910.
[212] Block-Lieb, *supra* note 9, at 48-49.
[213] *Id*. at 49.
[214] Wilmarth, *supra* note 21, at 909-10 (quoting 12 U.S.C. § 5512(b)(2)(B), (C)).
[215] Block-Lieb, *supra* note 9, at 46.
[216] *Id*. at 47 (quoting Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1158 (2012)).

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.[217] 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.[218] As one commenter notes:

> While the CFPB holds greater enforcement authority over "large banks, savings associations, and credit unions," its ability to examine even these "large banks" is shared with prudential regulators. With banks and other financial institutions with assets of $10 billion or less, the CFPB must rely on the relevant prudential regulator to enforce consumer financial protection regulation. And as to "covered persons" that are not banks, Dodd-Frank was also clear to retain the FTC as a contiguous regulator.[219]

Because the Bureau's enforcement jurisdiction is shared with other agencies, moreover, "as a practical matter, it will have to take prudential regulators' concerns into account when promulgating regulations."[220]

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.[221]

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.[222]

CFPB Accountability

By the same token, the Bureau is accountable to all three branches of government, notwithstanding its independent funding and the Director's protection from removal at will.

The Bureau and its Director are fully accountable to the President. To begin with, only the President, with the advice and consent of the Senate, may choose whom to appoint as

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[217] *Id.* at 55.
[218] *Id.* at 49-50.
[219] *Id.* at 55.
[220] *Id.*
[221] *See* 12 U.S.C. § 5563(b)(4), (c)(2), (d)(1); *id.* § 5564(a), (f).
[222] Apart from this web of requirements and constraints, the CFPB lacks a host of powers typically exercised by financial regulators, including 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 21, at 907-08.

Director.[223] The President may also remove a Director "for inefficiency, neglect of duty, or malfeasance in office."[224] As discussed above, the Supreme Court has repeatedly held that this removal power provides the accountability required by the Constitution: the Director, as head of an independent regulatory agency, does not serve in a role so "purely executive" that he "must be removable by the President at will if [the President] is to be able to accomplish his constitutional role" under Article II, and so the President's ability to remove the Director for cause provides the necessary accountability.[225] This "single level of good-cause tenure," in other words, keeps Bureau directors squarely within "Presidential oversight," allowing the President to serve as "the judge of the [their] conduct" and "the one who decides whether [they] are abusing their offices or neglecting their duties."[226] The President thereby is able to "ensure that the laws are faithfully executed," and he can "be held responsible for a [director]'s breach of faith."[227]

While this is sufficient under the Constitution, layers of additional requirements further ensure that the Bureau is responsive to policy concerns of the President and other executive branch officials. These measures—detailed above—include the potential for a veto of Bureau rules by the FSOC (a risk that is likely to exert shadow effects on the Bureau, by encouraging efforts to avoid the possibility of a veto), the requirement to consult with banking regulators and other appropriate federal agencies on proposed rules (providing incentives to resolve any objections or else face a greater risk of nullification on judicial review), and the additional procedural requirements demanded by SBREFA.[228] The Director also must submit detailed semiannual reports to the President, as described below.

The Bureau and its Director are also fully accountable to Congress. "The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts."[229] Nevertheless, numerous requirements of the Dodd-Frank Act ensure that Congress is given the information it needs to assess how the Bureau is fulfilling its responsibilities and to decide whether further legislation is warranted.

Twice a year, the Director must appear before House and Senate committees to testify about the Bureau's recent performance and its future plans.[230] In connection with these hearings, the Director must submit semiannual reports to the committees (and the President) covering an array of issues, including a justification of its most recent budget request; a description of recent rules, orders, and enforcement or supervisory actions of the Bureau;

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[223] U.S. CONST. art. II, § 2, cl. 2.
[224] 12 U.S.C. § 5491(c)(3).
[225] *Morrison*, 487 U.S. at 690-91.
[226] *Free Enter. Fund*, 561 U.S. at 496, 509.
[227] *Id.* at 496. See pages 15-19, above.
[228] See pages 27-31, above.
[229] *Bowsher*, 478 U.S. at 722. Generally, "once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation." *Id.* at 733-34 (citing *Chadha,* 462 U.S. at 958).
[230] 12 U.S.C. § 5496(a).

a discussion of planned initiatives for the upcoming six months; and an analysis of the Bureau's efforts to fulfill its fair lending mission.[231] These reports and hearings provide members of Congress with an opportunity to submit additional questions to the Director.

"The informational access that this oversight jurisdiction provides is considerable,"[232] both in theory and in practice. As the Justice Department notes, "the Bureau engages extensively with members of Congress and their staff to satisfy oversight interests through letters, document productions, staff briefings, committee hearings, and periodic reports. For example, Bureau officials have testified before Congress a total of 56 times since the Bureau began operations just four years ago, and the Bureau has submitted more than 40 reports to Congress."[233] Every year, moreover, the GAO audits the Bureau's financial statements and transactions, and submits a report to Congress on the results.[234]

These informational requirements, of course, do not give any individual legislator the right to direct the Bureau's activities, nor do they guarantee that any individual legislator will be satisfied with the Bureau's performance. They do, however, require the Director to supply extensive information about the Bureau's conduct and respond to lawmakers' questions. This is—quite literally—what it means to be "accountable."[235]

In the end, moreover, Congress may revise or eliminate any rule promulgated by the Bureau before it takes effect.[236] Thus, "the [Bureau] is fully accountable to Congress, which can revoke or amend any or all of the [rules] as it sees fit."[237] And Congress remains free to alter the Bureau's powers, organization, or funding structure at any time.

Finally, the Bureau is fully accountable to the judiciary. Its more serious opponents do not even contend otherwise.[238] Any such contention would be frivolous because the Bureau's rulemaking is reviewable by the courts under standard APA jurisprudence, which governs every

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[231] *Id.* § 5496(b), (c).
[232] Block-Lieb, *supra* note 9, at 54.
[233] DOJ Memorandum at 30 n.18 (internal citations omitted).
[234] 12 U.S.C. § 5496a; *id.* § 5497(a)(5)(A), (B).
[235] *See* MERRIAM-WEBSTER ONLINE DICTIONARY (2016) (defining "accountable" as "required to explain actions or decisions to someone"), http://www.merriam-webster.com/dictionary/accountable.

Because opponents argue that the Bureau's funding outside the congressional appropriations process diminishes its accountability, see pages 22-25, above, it bears adding here that appropriations are not necessarily the most effective tool of congressional oversight. After all, "appropriations are not handled by the Congressional committees that actually deal with the substantive oversight of agencies." Levitin, *supra* note 27, at 367-68. "There is a concern, then, that rather than increasing accountability, the appropriations process instead subjects agencies to the risks of Congressional hostage-taking, brinksmanship, and horse-trading, none of which have anything to do with substantive accountability." *Id.* at 368. The experience of the two financial regulators that have been funded by appropriations amply justifies this concern. See pages 7-8, above.
[236] *See* 5 U.S.C. §§ 801-808.
[237] *Mistretta*, 488 U.S. at 393-94.
[238] *See generally* PHH Brief; SNB Brief.

other rulemaking agency.[239] And the Bureau's enforcement efforts are always subject to review by the federal courts.[240]

As demonstrated in this Paper, the CFPB's design "involves a carefully calibrated balancing of interests in tension," making it "both independent *and* accountable."[241] The Bureau's combination of powers and organizational structure clearly passes constitutional muster under a separation-of-powers analysis, and statutory requirements go even further, ensuring that the Bureau is responsive, accountable, and transparent to political representatives and the public.

Conclusion

When one strips away the overheated rhetoric of the CFPB's opponents and examines the Bureau's authorities and limitations, the agency's unquestionable constitutionality becomes clear. The text, structure, and history of the Constitution, together with decades of Supreme Court precedent, demonstrate that the Bureau, even if novel in some respects, does not remotely violate the Constitution's separation of powers.

[239] The only feature of the Bureau that has been criticized in this regard is a provision of Dodd-Frank that accounts for the fact that the Bureau's authority over certain statutes overlaps with that of other agencies. *See* 12 U.S.C. § 5512(b)(4)(B). This provision simply gives the Bureau exclusive authority to interpret those statutes, meaning that its interpretations will receive judicial deference "in accordance with the well-established principles first enunciated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*" *ITT Educ. Servs.*, 2015 WL 1013508, at *12. "[I]t is entirely consistent with Article III for courts to defer to CFPB interpretations in the manner contemplated by *Chevron.*" *Morgan Drexen*, 60 F. Supp. 3d at 1091.

[240] *See* 12 U.S.C. § 5563(b)(4), (c)(2), (d)(1); *id.* § 5564(a), (f).

[241] Block-Lieb, *supra* note 9, at 29.