Testimony of Timothy R. McTaggart

Good afternoon. My name is Timothy R. McTaggart. I thank you for the invitation to appear before this subcommittee to present testimony on this important topic. I am a partner in the Washington, D.C. office of the law firm, Pepper Hamilton LLP where I head the firm's bank regulatory and consumer finance group. I note that my testimony reflects my views alone, and not those of Pepper Hamilton LLP or its clients. Of course, any errors are to be attributable solely to me.

By way of background, I served as the Bank Commissioner for the state of Delaware from 1994-1999. I served under then-Governor Tom Carper who became the governor in Delaware after serving in the U.S. House of Representatives, including on the then House Banking Committee. Additionally, I served as counsel to the U.S. Senate Banking Committee prior to my service in Delaware. Earlier in my career, after graduating from Harvard

College and Harvard Law School, I joined the legal division at the Board of Governors of the Federal Reserve System in Washington, D.C. The balance of my career has been in private practice in D.C. based law firm offices.

I have attached materials that I have prepared with the assistance of Matthew Silver on many of the topics at issue today. I ask that the summary be included in the record as part of my remarks.

I would offer a few overarching comments pertinent to today's topic concerning the constitutionality of Dodd-Frank Act provisions related to the Financial Services Oversight Council ("FSOC") and the Orderly Liquidation Authority ("OLA"). My written summary also contains references to similar issues regarding the Consumer Financial Protection Bureau ("CFPB"), but I will not focus on the CFPB.

First, the courts have routinely exercised judicial restraint in connection with determining whether Congressionally enacted legislation is unconstitutional. In the summary provided today, the most recent statistics that we are aware of show fewer than 170 actions being held to be unconstitutional from 1789 through 2002. It is possible that total undercounts more recent activity from the end of the Rehnquist court, and during the Roberts court, but as a matter of historical record starting with Marbury v. Madison, it shows the relatively rare overturning of Congressional action through the nation's history. Moreover, the record shows an absence of economic regulation statutory frameworks being declared unconstitutional.

Second, there undoubtedly are major policy choices embedded and omitted in the Dodd-Frank Act. Of course, a difference in policy choice as reflected in enacted legislation does not make the legislation unconstitutional. There may be lingering important questions about the effectiveness of the Dodd-Frank Act to address major policy challenges such as the "too big to fail" issue, but the debate over the effectiveness of the Dodd-Frank Act does not go to the constitutionality of the Act.

Third, the genius in our American system of government is the separation of powers among the three branches and the checks and balances among the branches. While we often focus on the Executive's power to veto Congressional legislation, or the ability of Congress to check Executive power through oversight, we less frequently focus on the ability of the Congress to check the judiciary by enacting legislation which limits the jurisdiction of the courts and sets standards of review to be followed by the courts. So, Congress has the inherent authority to limit the time period available for judicial review and to set other requirements concerning the standard of review to be applied by the courts in reviewing administrative actions.

It seems to me that the crux of the question being considered by the subcommittee is whether the prior Congress which enacted the Dodd-Frank Act overstepped its bounds to do so. With respect to the Dodd-Frank Act limits on judicial review related to timing and the scope of review in the OLA, I would conclude that Congress sought to ensure that "due process" was afforded to the affected financial institutions. With respect to the structural choices made by Congress to create the FSOC, I would conclude that Congress did not impermissibly delegate away its authority.

There are a great many topics, including whether the Dodd-Frank Act ended too big to fail and whether the OLA will be a viable alternative to existing Chapter 11 bankruptcy processes for bank holding companies which previously were not included in the FDIC's resolution authority, that the bank regulatory agencies would be the experts to provide testimony.

I am prepared to answer questions, and thank you for the opportunity to testify at this hearing.

# Constitutionality Analysis of Certain of the Dodd-Frank Wall Street Reform and Consumer Protection Act's Most Significant Grants of Regulatory Power

Pepper Hamilton LLP
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Pepper partner Timothy R. McTaggart, a highly experienced financial services regulatory lawyer and former Delaware State Bank Commissioner, argued for the case that Dodd-Frank is constitutional at a February 15, 2011 policy forum at the Cato Institute, appearing with the Hon. C. Boyden Gray, Former White House Counsel, who took the position the law is unconstitutional. Below is an outline of Mr. McTaggart's presentation.

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## I. OVERVIEW

1. Dodd-Frank Act Purposes and Declaration

- The Dodd-Frank Act (the Act or Dodd-Frank) is guided by several broad concepts:

  a. Wall Street must be strictly regulated to prevent systemic risk and to promote financial stability.

  b. Large interconnected financial companies are inherently risky.

  c. Excessive leverage leads to systemic risk.

  d. A lack of transactional transparency impeded necessary regulatory control.

  e. Investors lacked information to properly understand the nature of complex risky securities.

  f. Regulators are capable of carrying out the intent of the Act.

2. Constitutional Issues Under Dodd-Frank

- Several constitutional objections concerning the Act made since its passage[1] include those related to:

  a. The Financial Stability Oversight Council (FSOC) and its powers and board composition, as set forth in Title I of the Act.

  -The FSOC's three main stated goals are to (1) act as a "systemic regulator," (2) prevent "Too Big To Fail," and (3) prevent future "bank bailouts." (See Section 112 of the Act).

  b. The Bureau of Consumer Financial Protection (BCFP) and its powers, as set forth in Title X of the Act.

  -The BCFP is tasked with regulating the offering and provisions of consumer financial products or services under the Federal consumer financial laws. The BCFP is considered an Executive agency, as defined in section 105 of title 5, United States Code (See Section 1011 of the Act). One of the BCFP's stated objectives is to protect consumers "from unfair, deceptive, or abusive acts[2] and practices and from discrimination." The BCFP may halt a company or service provider from "committing or engaging in an unfair, deceptive, or abusive act or practice" with respect to offering or transacting in a consumer financial product or service.

  c. The resolution authority over "covered"[3] "financial companies."

  -Title II of the Act is entitled "Orderly Liquidation Authority", which empowers the FDIC to unwind, for example, a failing investment bank or insurance company (i.e. a company designated a "covered" financial company) without forcing it into bankruptcy and effectively replacing the bankruptcy process. In making use of the resolution authority provided under Title II, the FDIC is to determine that such action is necessary for purposes of the financial stability of the United States, and not for the purpose of preserving the covered financial company, ensure that management and the members of the board of directors (or body performing similar functions) responsible for the failed condition of the covered financial company is removed, not take an equity interest in the entity, not pay shareholders until all other claims are paid and "ensure that unsecured creditors bear losses in accordance with priority of claim provisions stated in [the Act]."

3. Judicial Restraint

- There has always been a strong legal presumption that the actions of Congress, and in particular those reduced to written law, are constitutional on their face. As of 2002 (the last year of statistics formally compiled by the Federal Government and made publically available)[4] only about 160 federal laws have ever been found by the US Supreme Court to be unconstitutional, in whole or in part – the first such law being the Act of Sept. 24, 1789 (1 Stat. 81, § 13) in the famous case of *Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803). A majority of such decisions since then have involved issues of individual rights, civil rights, subversion,[5] state sovereignty, criminal procedure and/or free speech. Some date from the "New Deal" era.[6] Few laws ever declared unconstitutional have dealt with general business regulatory matters.[7]

  a. Courts have often dealt with broad and vague statutes by construing them narrowly so as to avoid constitutional difficulties where possible.[8]

## II. CONSTITUTIONAL ARGUMENTS[9]

1. Vagueness and Non-Delegation[10] Arguments:

***Unconstitutional arguments:***

- FSOC: The Act assigns the FSOC the duty of regulating companies whose activities threaten "financial stability" – a term that is used dozens of times but left undefined in the Act. The Act provides that the FSOC will conduct studies present findings and recommendations to the Board of Governors of the Federal Reserve system so that new rules and regulations establishing "prudential standards" for regulated companies may be promulgated. Other undefined terms and phrases include what might constitute a "grave threat to the financial stability of the United States," what might constitute a company "in danger of default" and what might rise to the level of an event that "could create or increase the risk of significant liquidity, credit, or other problems spreading among bank holding companies and nonbank financial companies, financial markets of the United States, or low-income, minority, or underserved communities." Somewhat vague or undefined "catch-all" terms are seen as granting relatively unchecked authority to the FSOC.
- BCFP: The power and authority of the BCFP similarly revolves around vague terms such as "unfair," "deceptive,"[11] "abusive," and "discrimination." The BCFP may define such terms and decide how they are applied to financial products and services.
- Non-delegation: The non-delegation doctrine is derived, in part, from Article I of the US Constitution, which states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States". According to various estimates, the Act requires at least 243 new formal rule-makings by 11 different federal agencies, with at least 95 by the SEC, 24 by the BCFP and 56 by the FSOC, rules which will likely total many thousands of pages.[12]

***Constitutionality arguments:***

- On a practical basis, the likelihood of finding significant provisions of the Act unconstitutional because of general vagueness considerations is highly unlikely, especially with regard to the actions of the FSOC. FSOC takeovers of companies that are claimed to be "threats to financial stability" would likely occur and be challenged during a financial crisis.[13] The existence of a crisis would likely place substantial pressure on judges who, by and large, are not economists and must rely substantially on evidence as presented to them.[14] The FSOC likely has or will make contact with numerous mainstream economists and financiers who believe that the powers of the FSOC are necessary to stabilize the economy in time of crisis and likely has or will engage such individuals to develop persuasive position papers and evidence.

- Many regulatory mandates enacted (such as found in existing securities laws) contain vague or expansive terms that are later defined by bodies such as the SEC. Such mandates are rarely found to have constitutionality problems, particularly if the interpretations of the regulatory body are, on their face, reasonable or at least consistent with the enacting law(s).
- Agencies have made thousands of rules and regulations based on underlying Congressional statutes which contain "open ended" terms. The SEC has well over 100 rules promulgated under the Investment Company Act of 1940 (as amended) alone.[15]
- As noted by Duke Law Professor Kim Krawiec,[16] the political conditions leading to Dodd-Frank were ripe for what could be termed responsibility-shifting delegation. Effectively, what Congress may have been trying to do is not delegate power so much as to try to "harness the expertise of courts and agencies, provide the flexibility to adapt the statute to changing circumstances, or reduce the transaction costs associated with lawmaking" while at the same time avoiding blame for unforeseen errors. As noted, in the article:

  Statutes, like contracts, can be more or less complete, but will inevitably have some gaps and ambiguities, which courts or agencies must fill. A purposely-incomplete statute is not necessarily bad. Statutory incompleteness may allow lawmakers to harness the expertise of courts and agencies, provide the flexibility to adapt the statute to changing circumstances, or reduce the transaction costs associated with lawmaking. For this reason, one tends to observe relatively more congressional delegations in highly technical areas that require much expertise and information and in which technology may change quickly. Financial regulation fits this description on many fronts.

  But lawmakers may also leave statutes incomplete for strategic reasons. When a statute is particularly salient to organized interest groups, the voting public, or both, lawmakers may find it politically advantageous to delegate to another branch of government the authority to fill statutory gaps and ambiguities in an attempt to shift responsibility for the negative impacts of law to other governmental branches. For example, empirical study has shown that Congress delegates more frequently in issue areas where it may be hard to claim credit for any benefits of regulation (because they are widely dispersed or barely noticed), but mistakes can be salient and catastrophic, such as drug and product safety, workplace safety, and nuclear weapons. Alternatively, delegation through an incomplete statute may benefit Congress when powerful interest groups are at odds over legislative language, or when the general public's preferences diverge from those of powerful interest groups on a matter of high public salience.

**2.** Arguments Concerning Limited Ability For Court Interpretation And Review / Separation of Powers Arguments:

Article 1 Section I of the Constitution gives Congress only those "legislative powers herein granted" and lists those permissible actions in Article I Section 8. The vesting clause in Article II places no limits on the Executive branch, simply stating that, "The Executive Power shall be vested in a President of the United States of America." The Supreme Court holds the "judicial Power" under Article III of the Constitution and has, by tradition and precedent, the ability (often seen as Constitutional) to review the decisions of the other branches of government (since *Marbury v. Madison*). Thus, the roles and abilities of each branch of government, as set forth by the Constitution in broad terms, are separate and distinct. Further, some have argued that by substantially curtailing court review of Orderly Liquidation Authority (OLA) proceedings under the Act, the judicial branch is being largely eliminated as a constitutional check on the other branches of government.

*Unconstitutional arguments:*

- Under Title II of the Act, the FDIC and the Federal Reserve Board, upon two-thirds vote of each respective board, "shall consider whether to make a written recommendation" as to whether the Secretary of the Treasury should appoint the FDIC as receiver for a financial company under the OLA authority established by the Act. The Act prohibits courts from taking "any action, including any action pursuant to the Securities Investor Protection Act of 1970 or the Bankruptcy Code, to restrain or affect the [receiver's] exercise of powers or functions. . . ." The Act additionally limits any claim against the FDIC as receiver to money damages, and the FDIC has the power to allow, disallow and determine claims. A claimant may sue in U.S. District Court within sixty days, but if the claimant misses the deadline, "the claim shall be deemed to be disallowed. . . such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim." Title II of the Act states that "no court shall have jurisdiction over" any claim or action for payment from, or any action seeking a determination of rights with respect to the assets of the seized entity or any claim relating to any act or omission of the seized entity or the FDIC. Shareholders and creditors of a seized company may have no explicit right to contest a proceeding.[17]

- The FSOC, a body with an "executive" role but also with a statutory ability to promulgate its own internal rules and regulations and arguably the ability to propose and implement a wide range of rules impacting financial companies,[18] is composed of 10 voting and five nonvoting members (the voting members are the Treasury Secretary, who serves as the FSOC chair, and the heads of the Federal Reserve Board, OCC, Bureau of Consumer Financial Protection, SEC, FDIC, CFTC, FHFA, NCUA, and an independent member having insurance expertise; the nonvoting members are the directors of the newly created Office of Financial Research and the Federal Insurance Office along with a state insurance commissioner, a state banking supervisor and a state securities commissioner) has the authority to (1) determine which non-bank financial institutions are subject to Title II seizure and (2) control the activities of any financial institution on a two-thirds vote of its members. The courts are not authorized to review whether the FSOC, in making its determinations and conducting its activities, has correctly interpreted the Act.
- The Treasury is authorized to petition the United States District Court for the District of Columbia to seize banks and any non-bank financial institution that the government thinks is in danger of default and could, in turn, pose a risk to U.S. financial stability.[19] If the entity does not acquiesce or consent to the seizure,[20] the petition proceedings are secret, with a federal district judge given 24 hours[21] to decide "on a strictly confidential basis"[22] whether to allow receivership.
- There is no stay pending judicial review built into the Act. Review of a seizure occurs only if the "board of directors (or body performing similar functions) of the covered financial company does not acquiesce or consent to the appointment of the [FDIC] as receiver, is limited to the question of an entity's soundness. As stated in Section 202 of the Act, "[o]n a strictly confidential basis, and without any prior public disclosure, the [United States District Court for the District of Columbia], after notice to the covered financial company and a hearing in which the covered financial company may oppose the petition, shall determine whether the determination of the Secretary that the covered financial company is in default or in danger of default and satisfies the definition of a financial company under section 201(a)(11) is arbitrary and capricious."[23]

*Constitutionality arguments:*

- The Orderly Liquidation Authority for systemically important financial institutions like the FDIC resolution authority, gives the FDIC a range of tools to liquidate a large nonbank financial institution, including bank holding companies[24] while also mitigating systemic risk. The resolution authority is simply an alternative insolvency regime.
- Although in cases of an expedited 24 hour District Court processes, the Act attempts to eliminate stays or injunctions, a party can still appeal to a circuit court and ask it to make a determination that the actions of the Treasury were arbitrary and capricious. A successful appeal, if given prompt court attention, would serve as a powerful check on the resolution authority of the Treasury in case it overreaches. The existence of exigent circumstances coupled with the ability to appeal justifies the abbreviated 24 hour "due process" limitation.
- Faced with a 24 hour deadline, a court could make default rulings against the Treasury unless the Treasury agrees to waive any deadline imposed by the Act and/or agrees to implement a plan that would allow a financial institution to break free from government control at a later date without undue difficulty. In effect, should a court find that the 24 hour limitation in a particular instance to be unfair, a court could provide what would amount to a partial injunction in all but name.
- Faced with a 24 hour deadline, a court could simply ask the Treasury for a waiver of the deadline. This is not dissimilar to what is commonly done by Agency staff members when an examiner reviewing an application is faced with having to make a determination within a time frame imposed by statute or regulation and the examiner believes that, given underlying facts, additional review is prudent. It is rare that a party will turn down a reviewer's request for a time extension, in part due to risk that playing "hardball" could result in an unfavorable outcome.
- Contemplating how best to deal with matters brought before the court under the Act, the United States District Court for the District of Columbia has adopted Local Civil Rule 85.[25] Requirements include:

  (1) At least 48 hours prior to filing of a petition under the Act, the Secretary of the Treasury shall provide written notice under seal to the Clerk of the Court that a petition will likely be filed with the Court (thus allowing the court to gear up for appropriate action).

(2) A petition under Act by the Secretary of the Treasury must contain all relevant findings and recommendations under the Act and material must be provided in PDF form on a CD-Rom (thus making review a bit easier than it would be otherwise).

(3) The petition shall be assigned to the Chief Judge or Acting Chief Judge (thus petitions will be directed to someone who has presumably fully reviewed the Act, related precedent and will have experience with matters under the Act).

(4) The financial company named in the petition may file an opposition to the petition under seal and may appear at a hearing to oppose the petition. The opposition shall be served on the Secretary of the Treasury by the most expeditious means available (thus procedures are in place to allow opposition to petition under the OLA authority to be somewhat relaxed).

(5) Each petition and opposition shall be accompanied by a proposed order (thus making a response by a judge in the 24 hour period somewhat easier).

(6) Upon the granting of a petition, the Secretary of the Treasury shall promptly notify the court of the appointment of the receiver. The court shall then issue an Order to Show Cause to the Secretary of the Treasury as to why the proceedings, or any part thereof, shall not be unsealed. Thus, unless the Secretary of the Treasury has good reason why its case should remain secret, the United States District Court for the District of Columbia intends to make all material available to the public.

The above procedures in Local Civil Rule 85, in particular item 1 and 6 provide important safeguards to companies and provide for procedural and substantive due process.

- In recent history, a number of federal courts have accepted, without significant constitutional challenge, a stated lack of authority to review matters, in particular with regard to Guantanamo Bay detainees,[26] for example by reasoning that the power to grant a petition for release of Guantanamo Bay detainees is beyond the Judicial Branch's power as courts do not have the power to override immigration laws and force the executive branch to release non-U.S. legal residents held as prisoners into the United States.
- In *Kucana v. Holder*, 130 S.Ct. 827 (2010),[27] the US Supreme Court recently noted, in a 9-0 decision, that Congress can, via a properly written statute, limit the jurisdiction of the federal courts. In Kucana, although the Court did not find for the government, it did note, "If Congress wanted the jurisdictional bar to encompass decisions specified as discretionary by regulation along with those made discretionary by statute, moreover, Congress could easily have said so." It noted that "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Nken* v. *Holder* 129 S.Ct. 1749 (2009). Thus the current Supreme Court understands that Congress can clearly limit the right of any court to review actions of an administrative body (the case in question revolved around the reviewability of a decision of the Board of Immigration Appeals of the U.S. Department of Justice) without a violation of any separation of powers doctrine.
- While the Act provides that the courts are not authorized to review whether the FSOC has correctly interpreted the Act, any court would find little in the way of statutory direction against any reasonable interpretation of the terms interpreted by the FSOC or the BCFP, especially as the Act specifically provides that courts must apply interpretations of provisions (to the extent that an interpretation of the BCFP exists) as if the BCFP "was the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law." As per dicta in *Kucana,* Congress has wide discretion in limiting the authority of the courts as long as it does so clearly and unambiguously – and thus a court should respect agency interpretations as provided for in the Act.

3. Secrecy Arguments:

The right of due process and judicial review is of modest value unless information and time is available to actually conduct an appropriate process before a decision is reached or at least the parties involved are provided with the ability to contest the actions of the government after the fact. Some have said that the Act permits the Treasury and the FDIC to potentially act as a secret legislative appropriator, executive and judiciary all in one.

*Unconstitutional arguments:*

- A court can extinguish the opportunity for judicial review of resolution authority exercised by the FDIC[28] by not taking action for 24 hours, after which the petition is granted automatically and liquidation may commence. Any party who "recklessly discloses" information concerning the government's seizure or the pending court proceedings faces criminal fines and five years' imprisonment. Certain parties analogize the limited time permitted to decide cases under the financial stability provisions of the Act, combined with the secret nature of certain proceedings, to a "star chamber" arrangement.

- Some have suggested that the process required by the Act that involves levels of secrecy and significant amounts of administrative discretion was designed to permit the kind of favoritism seen in the rescue of bankrupt automakers and the AIG bailout, with an indirect taxpayer subsidy available as the government loans to favored creditors to be repaid by "assessments" on large banks and non-bank financial firms.

***Constitutionality arguments:***

- To find someone in violation of a provision of the Act within the power of the FSOC or the BCFP, a court would have to make an appropriate finding, such as what might constitute the "reckless disclosure" of information and what disclosures might be protected by existing constitutional rights separate and apart from those legislated by Congress in the Act. As many of the secrecy related provisions are vague, a court could choose to err on the side of the party disclosing "secret" information. *See*, i.e., *United States v. Granderson*, 511 U.S. 39 (1994)[29] (concerning sentencing) that in "circumstances, where the text, structure, and statutory history fail to establish that the Government's position is unambiguously correct, the rule of lenity... resolve[s] the statutory ambiguity in [the impacted party's] favor."
- While some have argued that the secrecy and administrative discretion found in the Act would aid in an AIG type "bailout," others see that that, at a minimum, the Act provides a statutory process and framework to consider the future of possible AIG-like issues before a subject company starts to disintegrate. Actions concerning an AIG-like company taken under the Act might be seen to have greater legal support than those taken in 2008.
- Existing law and court interpretations allows for secrecy in special/exigent circumstances (and even "secret laws"), when arguably such laws and/or procedures are in the interest of the nation in times of danger, financial[30] or otherwise.[31] Rules and regulations under the Act would be, at a minimum published. As noted above, the Act requires at least 243 new formal rulemakings by 11 different federal agencies, with at least 95 by the SEC, 24 by the BCFP and 56 by the FSOC.
- Actions under the OLA authority under the Act are filed under seal. To make use of the OLA authority provided by the Act, a petition would have to be brought to the United States District Court for the District of Columbia. In January, 2011, the United States District Court for the District of Columbia enacted Rule 85, specific procedures for Dodd-Frank matters before the court. On the government's appointment of a receiver for a company under the OLA authority, the Secretary of the Treasury will have to respond to an automatically-generated Order to Show Cause to the Secretary of the Treasury as to why the proceedings in the matter, or any part thereof, shall not be made public.[32] Thus, OLA proceedings, absent good reason, would likely only be "secret" for a short period of time.

4. Composition of Board - Separation of Power Arguments; Appointments Clause:

***Unconstitutional arguments:***

- Various Agencies and boards under the Act are given considerable power – power which under the Constitution should generally reside with the President or by individuals chosen by the President and confirmed by the Senate.

  The Act delegates power to officials not selected by the President and confirmed by the Senate. The FSOC, which makes determinations about which financial companies are subject to seizure by the government, includes four members who are not appointed by the President, but rather by groups of state officials. As such, depending on interpretational issues, the composition of the FSOC board may be a violation of the Appointments Clause of the Constitution, which states that:

  *[the President] shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.*[33]

  From 1999 to 2008, a change in the statute governing the United States Patent and Trademark Office (USPTO) permitted a number of judges of the Board of Patent Appeals and Interferences and the Trademark Trial and Appeal Board to be appointed by the USPTO Director. This arrangement was challenged as unconstitutional under the Appointments Clause because the appointing party was not the Head of the Department. In order to avoid the crisis that would result from new challenges to many decisions made in that period, Congress passed a 2008 amendment to the statute which specifies that the Secretary of Commerce is responsible for such appointments, and permitting the Secretary to retroactively appoint those persons named by the USPTO Director.

- In *Buckley v. Valeo*, 424 U.S. 1 (1976),[34] the Supreme Court struck down a provision allowing Congress to name four members of the Federal Election Commission on the grounds that it violated the president's appointments power. In *Bowsher v. Synar*, 478 U.S. 714 (1986)[35] the Supreme Court struck down one provision of the Gramm-Rudman-Hollings balanced budget act giving the comptroller general, a congressional official, a role in enforcing the act's spending reduction requirements.
- The director of the BCFP (who is appointed by the President and confirmed by the Senate) is independent of both the Federal Reserve, which houses and provides most of its funding, and the White House. The Act precludes the House and Senate Appropriations Committees from reviewing the bureau's budget.[36]
- There is an open question as to how much legislative power (re: the various regulations that must be created by executive agencies under the Act) Congress may permissibly delegate to the Executive Branch, while not violating separation of powers principles.

*Constitutionality arguments:*

- It is open to interpretation as to whether the members of the FSOC Board or the BCFP are "inferior Officers" as the Constitution only specifically notes that "Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all such Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law" are not "inferior" Officers.[37] In the Act, Congress did not see fit to require, "by Law" that members of the FSOC Board or the BCFP be appointed with the "Advice and Consent of the Senate" as required for non-inferior Officers and the conclusion may be reached that the duties and powers of the members of the FSOC Board and the BCFP were deemed by Congress to be that of "inferior Officers." The voting members of the FSOC Board (the 10 of the 15 members who hold voting power) are the Treasury Secretary, who serves as the FSOC chair, and the heads of the Federal Reserve Board, OCC, Bureau of Consumer Financial Protection, SEC, FDIC, CFTC, FHFA, NCUA, and an independent member having insurance expertise and who is appointed by the President[38] with Senate confirmation and meets the criteria of the Appointments Clause.
- The BCFP is headed by a Director appointed by the President with Senate confirmation and is formally an entity within the Federal Reserve. The Director of the BCFP appoints the members of the Consumer Advisory Board.[39]

  In the 2010 case *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[40] the United States Supreme Court heard a challenge to the constitutionality of the Public Company Accounting Oversight Board (PCAOB). The PCAOB was created as part of a series of accounting reforms in the Sarbanes-Oxley Act of 2002 and exists to register public accounting firms, establish auditing and ethical standards, conduct inspections of firms, and issue citations when appropriate or deemed necessary. All public accounting firms are required to register and maintain a certain standard as required by the PCAOB and the PCAOB has expansive powers to govern an entire industry. The PCAOB is composed of five members appointed by the Securities and Exchange Commission. In a 5-4 decision, the Supreme Court refused to invalidate the existence or method of appointment of the PCAOB, saying the board's mere existence did not violate the Constitution (and in particular the Appointments Clause). With some minor modifications pertaining to the possible removal of members of the PCAOB, the court permitted the PCAOB to resume business as usual.
- In the context of separation of powers questions, there is a significant difference between one branch unilaterally grabbing power from another branch and one branch willingly ceding power to another branch to deal with exigent or potentially exigent circumstances. The second case (willingly and seamlessly ceding some degree of power) can be seen as not invoking separation of powers concerns that are significant or material, due to the fact that the "giving branch" is losing power voluntarily, can oversee and manage the power to a degree, and can ultimately take back the power if it should desire to do so (for example, though a modification or a partial repeal of the Act).

5. What if a Portion of the Act Is Found to Be Unconstitutional?

On January 31, 2011, a portion of The *Patient Protection and Affordable Care Act,* Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (*PPACA or Obamacare*) was declared unconstitutional in *Attorney General Pam Bondi, et al. v. United States Department of Health And Human Services, et al.* In a finding by senior federal judge Roger Vinson of the United States District Court for the Northern District of Florida, it was found that (emphasis added):

> For the reasons stated, I must reluctantly conclude that Congress exceeded the bounds of its authority in passing the Act with the individual mandate. That is not to say, of course, that Congress is without power to address the problems and inequities in our health care system. The health care market is more than one sixth of the national economy, and without doubt Congress has the power to reform and regulate this market. That has not been disputed in this case. The principal dispute has been about how Congress chose to exercise that power here.
>
> **Because the individual mandate is unconstitutional and not severable, the entire Act must be declared void.**

The court found that no injunctive relief was needed, as:

> there is a long-standing presumption 'that officials of the Executive Branch will adhere to the law as declared by the court. As a result, the declaratory judgment is the functional equivalent of an injunction.' *See Comm. on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008); *accord Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985) ("declaratory judgment is, in a context such as this where federal officers are defendants, the practical equivalent of specific relief such as an injunction . . . since it must be presumed that federal officers will adhere to the law as declared by the court") (Scalia, J.)

The Dodd-Frank Act was part of a much longer and more collaborative legislative process, where many provisions were either known or gradually evolved over several months[41] The Act contains both Section 3: "SEC. 3. SEVERABILITY. If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby" and Section 542 of Title 3 "Title 3 SEC. 542. SEVERABILITY. If any section or subsection of this subtitle, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this subtitle, and the application of the provision to any other person or circumstance, shall not be affected."[42]

In the PPACA ruling, Judge Vinson based the nonseverability decision in part on what he believed to be Congressional intent, as the core purpose of the PPACA was to cover more people at lower cost, and given that the invalidation of the mandate that individuals obtain insurance would undermine that core purpose, that Congress would not have passed the rest of the PPACA without the mandate.[43] In the Ruling it is noted that "the severability analysis is 'eased' when there is a severability clause in the statute, such that only 'strong evidence' can overcome it. By necessary implication, the evidence against severability need not be as strong to overcome the general presumption when there is no such clause."

As set forth in detail in the PPACA decision:

> Severability is a doctrine of judicial restraint, and the Supreme Court has applied and reaffirmed that doctrine just this past year: "'**Generally speaking**, when confronting a constitutional flaw in a statute, [courts] try to limit the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.'" Free Enterprise Fund v. Public Co. Accounting Oversight Board, — U.S.—, 130 S. Ct. 3138, 3161, 177 L. Ed. 2d 706 (2010) (citation omitted) (emphasis added). Because the unconstitutionality of one provision of a legislative scheme "does not necessarily defeat or affect the validity of its remaining provisions," the "**normal** rule" is that partial invalidation is proper. Id. (citations omitted) (emphasis added). Where Congress has "enacted a statutory scheme for an obvious purpose, and where Congress has included a series of provisions operating as incentives to achieve that purpose, the invalidation of one of the incentives should not ordinarily cause Congress' overall intent to be frustrated." *New York, supra,* 505 U.S. at 186 (emphasis added). As the emphasized text shows, the foregoing is not a rigid and inflexible rule, but rather it is the general standard that applies in the typical case. However, this is anything but the typical case.
>
> The question of severability ultimately turns on the nature of the statute at issue. For example, if Congress intended a given statute to be viewed as a bundle of separate legislative enactment or a series of short laws, which for purposes of convenience and efficiency were arranged together in a single legislative scheme, it is presumed that any provision declared unconstitutional can be

struck and severed without affecting the remainder of the statute. If, however, the statute is viewed as a carefully-balanced and clockwork-like statutory arrangement comprised of pieces that all work toward one primary legislative goal, and if that goal would be undermined if a central part of the legislation is found to be unconstitutional, then severability is not appropriate. As will be seen, the facts of this case lean heavily toward a finding that the Act is properly viewed as the latter, and not the former.

The standard for determining whether an unconstitutional statutory provision can be severed from the remainder of the statute is well-established, and it consists of a two-part test. First, after finding the challenged provision unconstitutional, the court must determine if the other provisions can function independently and remain "fully operative as a law." See *Free Enterprise Fund, supra*, 130 S. Ct. at 3161. In a statute that is approximately 2,700 pages long and has several hundred sections --- certain of which have only a remote and tangential connection to health care --- it stands to reason that some (perhaps even most) of the remaining provisions can stand alone and function independently of the individual mandate. The defendants have identified several provisions that they believe can function independently: the prohibition on discrimination against providers who will not furnish assisted suicide services; an "Independence at Home" project for chronically ill seniors; a special Medicare enrollment period for disabled veterans; Medicare reimbursement for bone-marrow density tests; and provisions devised to improve women's health, prevent abuse, and ameliorate dementia [Def. Opp. at 40], as well as abstinence education and disease prevention [doc. 74 at 14]. And as was mentioned during oral argument, there is little doubt that the provision in the Act requiring employers to provide a "reasonable break time" and separate room for nursing mothers to go and express breast milk [Act § 4207] can function without the individual mandate.

Importantly, this provision and many others are already in effect and functioning. However, the question is not whether these and the myriad other provisions can function as a technical or practical matter; instead, the "more relevant inquiry" is whether these provisions will comprise a statute that will function "in a manner consistent with the intent of Congress." See *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685, 107 S. Ct. 1476, 94 L. Ed. 2d 661 (1987) (emphasis in original). Thus, the first step in the severability analysis requires (at least to some extent) that I try to infer Congress' intent. Although many of the remaining provisions, as just noted, can most likely function independently of the individual mandate, there is nothing to indicate that they can do so in the manner intended by Congress. The analysis at the second step of the severability test makes that conclusion pretty clear.

At this second step, reviewing courts may look to "the statute's text or historical context" to determine if Congress, had it been presented with a statute that did not contain the struck part, would have preferred to have no statute at all. *See Free Enterprise Fund, supra*, 130 S. Ct. at 3161-62. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *See Alaska Airlines, Inc., supra*, 480 U.S. at 684. But once again, that presupposes that the provisions left over function in a manner consistent with the main objective and purpose of the statute in the first place. Cf. New York, supra, 505 U.S. at 187 (unconstitutional provision held to be severable where the remaining statute "still serves Congress' objective" and the "purpose of the Act is not defeated by the invalidation" of the unconstitutional provision) (emphasis added). While this inquiry "can sometimes be 'elusive'" [Free Enterprise Fund, supra, 130 S. Ct. at 3161], on the unique facts of this particular case, the record seems to strongly indicate that Congress would not have passed the Act in its present form if it had not included the individual mandate. This is because the individual mandate was indisputably essential to what Congress was ultimately seeking to accomplish. It was, in fact, the keystone or lynchpin of the entire health reform effort.

In response to a later motion to "clarify" filed by the Government, Judge Vinson did not revise any of his conclusions, and restated that

"[t]he individual mandate was declared unconstitutional. Because that "essential" provision was unseverable from the rest of the Act, the entire legislation was void. This declaratory judgment was expected to be treated as the 'practical' and 'functional equivalent of an injunction' with respect to the parties to the litigation. This expectation was based on the 'longstanding presumption' that the defendants themselves identified and agreed to be bound by, which provides that a declaratory judgment against federal officials is a de facto injunction. To the extent that the defendants were unable (or believed that they were unable) to comply, it was expected that they would immediately seek a stay of the ruling, and at that point in time present their arguments for why such a stay is necessary, which is the usual and standard procedure. It was not expected that they would effectively ignore the order and declaratory judgment for two and one-half weeks, continue to implement the Act, and only then file a belated motion to 'clarify."

However, in his March 3, 2011 clarifying order,[44] Judge Vincent did ultimately decide to grant a stay, "conditioned upon the defendants filing their anticipated appeal within seven (7) calendar days of this order and seeking an expedited appellate review, either in the Court of Appeals or with the Supreme Court under Rule 11 of that Court." The appeal was subsequently filed.[45]

Using the framework of the PPACA decision and applying it to the Act, a court would likely find the vast majority of the Act to be severable, as (a) most provisions can stand alone (in fact, a number of provisions were derived from separate bills that were later incorporated into the text of the Act), and (b) Congress specifically intended provisions of the Act to be severable. From a Constitutional perspective, perhaps the weakest portion of the Act detailed above may be the resolution authority procedures involving an element of secrecy and tight timelines. However, with the "secrecy" elements removed and the 24 hour court determination deadline struck (or even with a few points of United States District Court for the District of Columbia Local Civil Rule 85 expanded), the Orderly Liquidation Authority of the Act would fall significantly closer to level of abilities held by the FDIC prior to the Act (but with a larger group of companies being subject to FDIC power).

## Endnotes

1 Many of such arguments have been made in the article *The Dodd-Frank Wall Street Reform & Consumer Protection Act of 2010: Is It Constitutional?* by C. Boyden Gray and John Shu and are repeated, noted and/or summarized below. The article and other resources are available at http://www.fed-soc.org/publications/pubid.2012/pub_detail.asp.

2 *See* Section 1031 of the Act. The BCFP does not have the power to declare an act or practice abusive unless it finds that the act or practice (1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) takes unreasonable advantage of a consumer lack of understanding of material risks, costs, or conditions of the product or service ; inability of the consumer to protect its interests in selecting or using a consumer financial product or service; and/or the reasonable reliance by the consumer of a party covered by the Act to protect its interests.

3 A "covered financial company" is a company **other than an insured depository institution**, for which the Secretary of the Treasury has determined:

"(1) the financial company is in default or in danger of default;

(2) the failure of the financial company and its resolution under otherwise applicable Federal or State law would have serious adverse effects on financial stability in the United States;

(3) no viable private sector alternative is available to prevent the default of the financial company;

(4) any effect on the claims or interests of creditors, counterparties, and shareholders of the financial company and other market participants as a result of actions to be taken under this title is appropriate, given the impact that any action taken under this title would have on financial stability in the United States;

(5) any action [taken] would avoid or mitigate such adverse effects, taking into consideration the effectiveness of the action in mitigating potential adverse effects on the financial system, the cost to the general fund of the Treasury, and the potential to increase excessive risk taking on the part of creditors, counterparties, and shareholders in the financial company;

(6) a Federal regulatory agency has ordered the financial company to convert all of its convertible debt instruments that are subject to the regulatory order; and

(7) the company satisfies the definition of a "financial company".

4 http://www.gpoaccess.gov/constitution/pdf2002/046.pdf.

5 In the 1950s and 1960s, the Supreme Court decided over 50 cases involving communism and subversion in government. A number pertained to specific federal laws, such as the case of United States v. Robel, 389 U.S. 258 (1967) where a provision of the subversive activities control Act making it unlawful for member of a Communist front organization to work in a defense plant was held to be an overbroad infringement of the right of association protected by the First Amendment.

6 Such as the Joint Resolution of June 5, 1933 (48 Stat. 113, § 1) concerning the abrogation of gold [the metal] clauses in Government obligations that was struck by *Perry v. United States*, 294 U.S. 330 (1935), available at http://supreme.justia.com/

us/294/330/. In *Perry*, the plaintiff held government bonds for the payment of principal and interest "in United States gold coin of the present standard of value", but 48 Stat. 113, § 1 undertook to nullify such gold clauses in obligations of the United States and pay cash only (after the then-current administration had withdrawn gold coins from general circulation). Notably, while the court found the statute unconstitutional, it did not grant the plaintiff the gold he was owed under his bonds or its market value, but only the value in cash declared by the Federal Government (i.e. based on the $20 face value of gold coins of the era rather than the $35 such coins would have on foreign markets or toward the settlement of Government debts abroad).

7 However, the Supreme Court has weighed in as to the limited level of effective judicial authority that may be granted to parties who are not "Article III" judges. In *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the court opined on the Bankruptcy Act of 1978, which had granted the bankruptcy courts independent jurisdiction over all civil proceedings arising under Title 11 or arising in or related to cases under Title 11 and all "powers of a court of law or equity", except for issuing injunctions against other courts and punishing criminal contempt outside of court (or otherwise punishable by imprisonment). Marathon argued that the Bankruptcy Act of 1978 unconstitutionally conferred Article III judicial power upon judges who lacked life tenure and protection against salary diminution (i.e. non-Article III judges).

As a result of the court's finding that the power granted by the Bankruptcy Act of 1978 to non-Article III judges was unconstitutional, Congress passed a new statute authorizing federal district courts to effectively "refer" bankruptcy cases to the bankruptcy courts, and in so called "non-core" proceedings, required bankruptcy courts to submit proposed findings of fact and conclusions of law to an applicable district court for *de novo* review.

8 See, e.g., Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 645-46 (1980) (plurality opinion) (invalidating an occupational safety and health regulation, and observing that the statute should not be interpreted to authorize enforcement of a standard that is not based on an "understandable" quantification of risk); National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974) ("hurdles revealed in [Schechter and J. W. Hampton, Jr. & Co. v. United States] lead us to read the Act narrowly to avoid constitutional problems"), as cited in the article entitled "*Delegation of Legislative Power, The History of the Doctrine of Nondelegability*" available at http://supreme.justia.com/constitution/article-1/03-delegation-of-legislative-power.html.

9 The nondelegation doctrine is derived, in part, from Article I of the US Constitution, which states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States". According to various estimates, the Act requires at least 243 new formal rule-makings by 11 different federal agencies, with at least 95 by the SEC, 24 by the BCFP and 56 by the FSOC, rules which will likely total many thousands of pages. Due to the vagueness and undefined nature of many of the key terms in the Act, various agencies, the members of which are not appointed by Congress, will have a significant ability to determine a substantial number of final rules.

10 *See* posting Dodd-Frank and the Non-Delegation Doctrine, available at http://www.professorbainbridge.com/professorbainbridgecom/2010/07/doddfrank-and-the-nondelegation-doctrine.html.

11 There is a great deal of precedent for the use of "unfair" and "deceptive" standards under Title 5 of the Federal Trade Commission Act (15 U.S.C. § 45), which declares that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful" and is no more descriptive than the Act, in that it states that "the term "unfair or deceptive acts or practices" includes "acts or practices involving foreign commerce that— (i) cause or are likely to cause reasonably foreseeable injury within the United States; or (ii) involve material conduct occurring within the United States." *See also* http://www.ftc.gov/privacy/privacyinitiatives/promises.html.

12 *See* footnote 11.

13 *See* report of January 13, 2011 of the Special Investor General for the Troubled Asset Relief Program (SIGTARP), available at http://www.sigtarp.gov/reports/audit/2011/Extraordinary%20Financial%20Assistance%20Provided%20to%20Citigroup,%20Inc.pdf, which notes "Treasury Secretary Timothy F. Geithner told SIGTARP that he believed creating effective, purely objective criteria for evaluating systemic risk is not possible, saying "it depends too much on the state of the world at the time. You won't be able to make a judgment about what's systemic and what's not until you know the nature of the shock" the economy is undergoing. He also said that whatever objective criteria were developed in advance, markets and institutions would adjust and "migrate around them." And "[t]he Dodd-Frank Act was intended in part to address the problem of institutions that are 'too big to fail.'

Whether it will successfully address the moral hazard effects of TARP remains to be seen, and there is much important work left to be done. As Secretary Geithner told SIGTARP, while the Dodd-Frank Act gives the Government 'better tools,' and reduced the risk of failures, '[i]n the future we may have to do exceptional things again' if the shock to the financial system is sufficiently large. Secretary Geithner's candor about the prospect of having to 'do exceptional things again' in such an unknowable future crisis is commendable. At the same time, it underscores a TARP legacy, the moral hazard associated with the continued existence of institutions that remain 'too big to fail."

14 *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). If a statute is silent *or ambiguous* with respect to the specific question, the court must review whether the agency's answer is based on a permissible construction of the statute.

15 Current rules promulgated under the Investment Company Act of 1940 are available at http://taft.law.uc.edu/CCL/InvCoRls/index.html

16 *See* posting of July 20, 2010 entitled *Dodd-Frank Financial Reform: "I'll Have the Meatless Entrée, Please"* and available at http://www.thefacultylounge.org/2010/07/dodd-frank-forum-ill-have-the-meatless-entrÃ©e-please.html.

17 It should be noted that the above limitations placed on courts under the Act are not dissimilar to those provided to the FDIC under its pre-Dodd-Frank authority granted under Title 12 of the United States Code and continue to be operative law. The resolution authority under the Act for a non-depository systemically important financial institution simply provides alternative mechanisms to reach the same end. The "Orderly Liquidation Authority" which empowers the FDIC to unwind, for example, a failing investment bank or insurance company without forcing it into bankruptcy requires the FDIC to determine that such action is necessary for purposes of the financial stability of the United States (and not for the purpose of preserving the covered financial company), not take an equity interest in the entity being liquidated, not pay shareholders until all other claims are paid and "ensure that unsecured creditors bear losses in accordance with priority of claim provisions stated in [the Act]."

18 The FSOC has made public a proposed rulemaking whereby an analytical framework would be established for the designating of nonbank financial companies for supervision by the Board of Governors of the Federal Reserve. *See* http://www.treasury.gov/initiatives/Documents/Nonbank%20NPR%20final%2001%2013%2011%20formatted%20for%20FR.pdf. Under the Act, the authority for the FSOC to promulgate rules may be more limited, perhaps largely to rules of the nature set forth in Section 11(e) of the Act "[t]he Council shall adopt such rules as may be necessary for the conduct of the business of the Council. Such rules shall be rules of agency organization, procedure, or practice for purposes of section 553 of title 5, United States Code" with the Federal Reserve Board being provided with the power to implement rules concerning the substantive criteria to be used by the FSOC.

19 *See* definition of "financial company" in Section 201 of the Act. As noted in Section 202(a)(1)(A)(i) of the Act, "[s]ubsequent to a determination by the Secretary under section 203 that a financial company satisfies the criteria in section 203(b), the Secretary shall notify the Corporation and the covered financial company. If the board of directors (or body performing similar functions) of the covered financial company acquiesces or consents to the appointment of the Corporation as receiver, the Secretary shall appoint the Corporation as receiver. If the board of directors (or body performing similar functions) of the covered financial company does not acquiesce or consent to the appointment of the Corporation as receiver, the Secretary shall petition the United States District Court for the District of Columbia for an order authorizing the Secretary to appoint the Corporation as receiver."

20 The Act provides that the Secretary of the Treasury shall notify the FDIC in the case a determination is made to use the resolution authority provided under the Act on a "covered" financial company. "If the board of directors (or body performing similar functions) of the covered financial company acquiesces or consents to the appointment of the [FDIC] as receiver, the Secretary [of the Treasury] shall appoint the [FDIC] as receiver. If the board of directors (or body performing similar functions) of the covered financial company does not acquiesce or consent to the appointment of the [FDIC] Corporation as receiver, the Secretary [of the Treasury] shall petition the United States District Court for the District of Columbia for an order authorizing the Secretary to appoint the Corporation as receiver. [...] The Secretary [of the Treasury] shall present all relevant findings and the recommendation made pursuant to section 203(a) to the Court. The petition shall be filed under seal."

21 Section 202(a)(1)(A)(v) of the Act states: "PETITION GRANTED BY OPERATION OF LAW.— If the Court does not make a determination within 24 hours of receipt of the petition— (I) the petition shall be granted by operation of law; (II) the Secretary shall appoint the Corporation as receiver; and (III) liquidation under this title shall automatically and without further notice or action be commenced and the Corporation may immediately take all actions authorized under this title.

22 Section 202(a)(1)(A)(iii) of the Act states: " DETERMINATION.—On a strictly confidential basis, and without any prior public disclosure, the Court, after notice to the covered financial company and a hearing in which the covered financial company may oppose the petition, shall determine whether the determination of the Secretary that the covered financial company is in default or in danger of default and satisfies the definition of a financial company under section 201(a)(11) is arbitrary and capricious."

23 *See* footnote 21.

24 The new OLA resolution authority does not apply to depository institutions but could be used on the holding company of a depository institution. Other parts of the Act were designed "to streamline and rationalize the supervision of depository institutions and the holding companies of depository institutions".

25 Available at http://www.dcd.uscourts.gov/dcd/sites/dcd/files/DFWSR.pdf.

26 *See* http://www.immigrationforum.org/policy/courts-display/immigration-related-cases-march-2010-update/index.html.

27 Available at http://www.supremecourt.gov/opinions/09pdf/08-911.pdf, noting in part that "If Congress wanted the jurisdictional bar to encompass decisions specified as discretionary by regulation along with those made discretionary by statute [in the matter in question], moreover, Congress could easily have said so."

28 If the United States District Court for the District of Columbia the Court is petitioned by the Secretary of the FDIC in a matter of the resolution authority granted in the Act, "If the Court does not make a determination within 24 hours of receipt of the petition— (I) the petition shall be granted by operation of law; (II) the Secretary shall appoint the Corporation as receiver; and (III) liquidation under this title shall automatically and without further notice or action be commenced and the Corporation may immediately take all actions authorized under this title."

29 Available at http://www.law.cornell.edu/supct/html/92-1662.ZS.html ; Commentary available at http://www.oyez.org/cases/1990-1999/1993/1993_92_1662.

30 See C-Span recorded testimony concerning then-secret meetings between Congress and then Treasury Secretary Henry Paulson in the wake of the Lehman disaster and just prior to the passage of the TARP Program – testimony available at http://dailybail.com/home/kanjorski-asks-paulson-to-describe-his-greatest-fears-from-t.html.

31 *See*, for example, Gilmore v. Gonzalez, 435 F.3d 1125 (9th Cir. 2006), available at http://bulk.resource.org/courts.gov/c/F3/435/435.F3d.1125.04-15736.html. The Supreme Court denied a petition for Certiorari.

The matter involved a lawsuit against various federal agencies and departments as well as against two airlines. Gilmore claimed that being required to show identification for a domestic flight was an unconstitutional restriction of his rights to travel, to petition government, and to speak anonymously. Gilmore also complained about being subject to "secret law" when the airlines and government refused to show the directive under which they were requesting ID.

The district court hearing the case dismissed Gilmore's complaint with prejudice, in part claiming lack of jurisdiction to hear due process arguments. As to other matters, the lower court noted that as the identification policy had been classified as "sensitive security information" and as such did not review any official documentation of the identification policy (rather, for purposes of its jurisdictional ruling, the district court assumed, as Gilmore had alleged, that the identification policy was a Security Directive issued by TSA). The circuit court did review material pertaining to the identification *in camera and ex parte*, but held that there was no constitutional violation because air passengers could still theoretically travel without identification if they instead underwent the more stringent "secondary screening" search.

32 Rule 85 requires that "A petition [by the Treasury] under this Act must contain all relevant findings and recommendations under the Act, and must be filed under seal. The original and one copy of the petition and a PDF version on a CD-ROM shall be tendered to the Clerk. The original and copy of the petition and all related documents shall be submitted securely in an envelope/box appropriate to accommodate the documents. The envelope/box containing such documents shall have a conspicuous notation as follows: "DOCUMENT UNDER SEAL."

33 Available at http://topics.law.cornell.edu/constitution/articleii.

34 Available at http://www.law.cornell.edu/supct/html/historics/USSC_CR_0424_0001_ZS.html.

35 Available at http://www.law.cornell.edu/supct/html/historics/USSC_CR_0478_0714_ZS.html.

26 However, Congress would have authority should the BCFP require funds in excess of 12% of the Federal Reserve System's operating expenses – the Act authorizes up to $200 million of additional funding per year.

37 The Constitution does not define the term "inferior Officers." No official "test" has been devised to determine "inferior" status for officials that are not a named "Head" of a "Department" or specifically provided for in the Constitution. A more facts and circumstance approach is generally taken, i.e. in *Morrison v. Olson*, 487 U.S. 654 (1988) (available at http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=487&invol=654) concerning the constitutionality of the independent counsel provisions of the Ethics in Government Act of 1978 which provided for the creation of a special counsel to investigate and if appropriate prosecute certain high-ranking government officials for violations of federal criminal laws. In *Morrison*, the court stated that "[t]he line between 'inferior' and 'principal' officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn. See, e. g., 2 J. Story, Commentaries on the Constitution 1536, pp. 397-398 (3d ed. 1858) ('In the practical course of the government there does not seem to have been any exact line drawn, who are and who are not to be deemed inferior officers, in the sense of the constitution, whose appointment does not necessarily require the concurrence of the senate')." In *Morrison*, the court ultimately held that position in question was indeed "inferior" for purposes of the applicable clause of the Constitution despite the independent discretion to exercise delegated powers afforded an independent counsel, in part due to the fact that a party other than the President (in this case, the Attorney General) could remove such officer, the position was temporary, and the officer was empowered to perform only certain limited and defined duties.

38 *See* http://www.treasury.gov/initiatives/Documents/FAQ%20-%20FinancialStabilityOversightCouncilOctober2010FINALv2.pdf.

39 "In appointing the members of the Consumer Advisory Board, the Director shall seek to assemble experts in consumer protection, financial services, community development, fair lending and civil rights, and consumer financial products or services and representatives of depository institutions that primarily serve underserved communities, and representatives of communities that have been significantly impacted by higher priced mortgage loans, and seek representation of the interests of covered persons and consumers, without regard to party affiliation. Not fewer than 6 members shall be appointed upon the recommendation of the regional Federal Reserve Bank Presidents, on a rotating basis."

40 Opinion available at http://www.supremecourt.gov/opinions/09pdf/08-861.pdf.

41 See, i.e. Dodd-Frank financial regulatory issues discussed in a Pepper Hamilton webinar in late December, 2009 http://www.pepperlaw.com/webinars_update.aspx?ArticleKey=1632 as compared to the final Act signed into law on July 21, 2010.

42 See Severability as Judicial Lawmaking, by David H.Gans, available at http://docs.law.gwu.edu/stdg/gwlr/issues/pdf/Gans%2076-3.pdf.

43 The PPACA decision of January 31, 2011 includes the following: "I note that the defendants have acknowledged that the individual mandate and the Act's health insurance reforms, including the guaranteed issue and community rating, will rise or fall together as these reforms "cannot be severed from the [individual mandate]." See, e.g., Def. Opp. at 40. As explained in my order on the motion to dismiss: "the defendants concede that [the individual mandate] is absolutely necessary for the Act's insurance market reforms to work as intended. In fact, they refer to it as an 'essential' part of the Act at least fourteen times in their motion to dismiss." Thus, the only question is whether the Act's other, non-health-insurance-related provisions can stand independently or whether they, too, must fall with the individual mandate."

44 Available at http://aca-litigation.wikispaces.com/file/view/Vinson+stay+order.pdf.

45 Copy of appeal available at http://dl.dropbox.com/u/3174287/Notice%20Of%20Appeal.pdf.

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