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THE CONSTITUTIONALITY AND ACCOUNTABILITY OF THE CONSUMER FINANCIAL PROTECTION BUREAU

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

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

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

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

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

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

Introduction and Summary

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

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

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

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

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

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

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

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

the ordinary appropriations process."[18]

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

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

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

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

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

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[18] *CFPB v. ITT Educ. Servs., Inc.*, --- F. Supp. 3d ---, No. 14-0292, 2015 WL 1013508, at *12; *accord CFPB v. Morgan Drexen*, *Inc.*, 60 F. Supp. 3d 1082, 1092 (C.D. Cal. 2014); *see Am. Fed'n of Gov't Emps., AFL-CIO, Local 1647 v. FLRA,* 388 F.3d 405, 409 (3d Cir. 2004) ("Congress may . . . decide not to finance a federal entity with appropriations.").

[19] *See infra* notes 76-102 & accompanying text.

[20] 12 U.S.C. § 5491(b)(1), (b)(2), (c)(1).

[21] *Id.* § 5491(c)(3).

[22] *See* Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY J. 8, 16 (Summer 2007).

[23] U.S. GOV'T ACCOUNTABILITY OFFICE, CONSUMER PRODUCT SAFETY COMMISSION: ADMINISTRATIVE STRUCTURE COULD BENEFIT FROM CHANGE, at 3, 6, 9-10 (Apr. 1987); *see* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 67, 71 (2010) (concluding that by 2008 the CPSC had "fallen far short of its statutory mandate" and was "widely regarded as one of the least politically independent and influential agencies in government").

[24] Arthur E. Wilmarth, *The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 REV. BANKING & FIN. L. 881, 919 (2012).

[25] S. REP. NO. 111-176, at 40 (2010).

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

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

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

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

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

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

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[34] 295 U.S. at 629.

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

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

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

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

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

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

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

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

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

[41] 12 U.S.C. § 5491(c)(3).

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

[43] *Id*. at 696.

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

[45] *Id*. at 498.

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

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

[48] *Id.* at 1088.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[63] *See* THE FEDERALIST NO. 26, at 139-42 (C. Rossiter ed., 1961) (Hamilton).

[64] *ITT Educ. Servs.*, 2015 WL 1013508, at *12. If the Constitution did prohibit such insulation, then permanent or indefinite appropriations presumably would be unconstitutional as well. But that clearly is not so, given the Constitution's explicit prohibition on only one form of permanent or indefinite appropriation (to raise and support armies), *see* U.S. CONST. art I, § 8, cl. 12, and Congress has long provided for such appropriations.

[65] *See* 12 U.S.C. § 5497(a)(2)(C).

[66] *ITT Educ. Servs.*, 2015 WL 1013508, at *12; *see Dorsey v. United States*, 132 S. Ct. 2321, 2331 (2012) ("[S]tatutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute[.]").

[67] *PHH Corp.*, 839 F.3d at 36 n.16.

[68] *Id.* (citing *Manigault v. Springs*, 199 U.S. 473, 487 (1905)).

[69] DOJ Memorandum, *supra* note 61, at 25 (citing 1794 statute regarding post-office funding).

[70] Wilmarth, *supra* note 24, at 951. Those two exceptions illustrate why Congress deliberately chose to insulate the CFPB, like nearly all other financial regulators, from the annual appropriations process. As one commentator has noted, "Congress has undermined the effectiveness of CFTC and SEC over the past two decades by frequently failing to provide those agencies with adequate funds." *Id.*

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

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

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

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

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

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[71] Wilmarth, *supra* note 24, at 906.
[72] *See* 12 U.S.C. § 1755(a), (b) (NCUA); 15 U.S.C. § 7219(c)(1), (d)(1) (PCAOB).
[73] *See* Block-Lieb, *supra* note 10, at 33.
[74] Wilmarth, *supra* note 24, at 906.
[75] Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 341 (2013); Wilmarth, *supra* note 24, at 911.
[76] *See* 12 U.S.C. § 4512(a), (b).
[77] The Comptroller of the Currency serves a five-year term unless removed by the President "upon reasons to be communicated by him to the Senate." 12 U.S.C. § 2. While it is unclear whether this requirement of "reasons"—contained in language that dates to 1864—is any different from a typical good-cause removal restriction, Comptrollers in recent decades have frequently served their full terms, spanning intervening changes in presidential administration and political party. *See* Past Comptrollers of the Currency, http://www.occ.gov/about/who-we-are/leadership/past-comptrollers/index-past-comptrollers.html.

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

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

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

In addition, the Bureau's rulemaking "is subject to specific burdens of proof set out in the [Dodd-Frank] Act."[86] For example, the Bureau is "required by statute to undertake a cost-benefit analysis of its rulemakings."[87] Before issuing any rule, "the CFPB must consider 'the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule' as well as the impact on small

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

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

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

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

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

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

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

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

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

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

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

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

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