Statement of
Saikrishna Bangalore Prakash
James Monroe Distinguished Professor of Law
Miller Center Senior Fellow
University of Virginia

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

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

I have three points. First, I'll argue that "for cause" removal restrictions are unconstitutional under the Constitution. Second, I'll contend that the restriction on the

removal of the CFPB Director is deeply problematic under Supreme Court precedent, especially in a context where the Court seems increasingly to look askance at the so-called Fourth Branch of Government. Third, I'll address how Congress might resolve the constitutionality difficulties.

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

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

In contrast, there is nothing about removal in Article II, save for a lone reference to impeachment in Article II, section 4. Nonetheless, early discussants assumed that the chief executive would superintend and direct officers, other than Article III judges. The general tenor of the Philadelphia Convention was that the President would "prevent[] and correct[] errors [and] detect[] and punish[] mal-practices" of officers. 3 The Records of the Federal Convention of 1787, at 111 (Max Farrand rev. ed., 1966). After the proposed Constitution went to the states, both Federalists and Anti-federalists recognized that the vesting of executive power granted the President the power to control and remove officers. One American noted that the President would "superintend[] the execution of the laws of

the Union." 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 106 (Jonathan Elliot ed., 2nd ed. 1836). Another observed that a single executive was "peculiarly well circumstanced to superintend the execution of laws with discernment and decision, with promptitude and uniformity." The Federal Farmer No. 14 in 20 The Documentary History of the Ratification of the Constitution 1035, 1038 (John P. Kaminski et al. eds. 2004).

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

The dominant view, expressed in debates in the House, was that the grant of "executive power" included authority to remove officers of the United States, other than Article III judges. As James Madison put it, "[t]he constitution affirms, that the executive power shall be vested in the president . . . . Is the power of displacing an executive power? I conceive that if any power whatsoever is in its nature executive it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Congress 481 (1789). Regarding the Take Care Clause of Article II, Madison noted that "[i]f the

duty to see the laws faithfully executed be required at the hands of the executive magistrate, it would seem that it was generally intended he should have that species of power which is necessary to accomplish that end." Id. at 516. Madison meant that the Take Care Clause presupposes that the President may remove officers as a means of fulfilling his faithful execution duty, save for when the Constitution itself establishes a more durable tenure (good behavior tenure).

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

The consensus that removal is an executive power goes well beyond the first several Congresses. The Father of the Country, George Washington, also took this position. Without any statutory warrant and relying upon his constitutional authority alone, he repeatedly noted in the commissions that he issued that all officers (other than Article III judges) served at his "pleasure", meaning he could remove them at any time and for any reason. He issued such commissions to ambassadors, district attorneys, marshals, tax collectors and many, many others. *See* Saikrishna Bangalore Prakash, Imperial from the Beginning: The Constitution of the Original Executive 196-97 (2015). Consistent with the Decision of 1789 and the commissions he issued, Washington removed some two-dozen officers, including ambassadors, consuls, and tax collectors. Id. at 197. To my knowledge, no one voiced constitutional objections to these commissions or removals. No

one in Congress, none of the appointed officials, and none of those whom Washington fired, lodged a protest.

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

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

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

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

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

Only in unusual instances does the Constitution authorize Congress to abridge or restrain presidential powers. One such exception: the Constitution expressly authorizes Congress to vest the appointment of inferior officers with someone other than the President, thereby limiting the President's power to appoint. In contrast, Congress cannot decree that the President shall not pardon treason, murder, or immigration violations. Nor can Congress bar the President from proposing treaties to the Senate. In both of these instances, Congress lacks constitutional authority to withdraw or curtail the relevant

presidential power. The same can be said of removal. Though the Constitution grants the President the power to remove, it nowhere grants Congress power to retract or limit that authority. Neither the Necessary and Proper Clause nor any other provision authorizes Congress to regulate the president's power to remove. Another way of putting the point is that the Constitution does not generally treat presidential powers as if they were modifiable by congressional decree. Rather the Constitution's grants to the Presidents are not defeasible by statute.

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

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

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

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

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

In the Sarbanes-Oxley Act, Congress created the Public Company Accounting Oversight Board (PCAOB), with authority over accounting firms. Id. at 484. Under the Act, the members of the PCAOB would be appointed by the Securities and Exchange Commission (SEC) and could be removed only by the SEC for cause. Id. at 484-85. For purposes of the case, the Court assumed that the President could remove SEC commissioners only for cause. Id. at 487. Faced with this "novel structure" of double for-

cause protections (the President could remove SEC commissioners only for cause and those commissioners could remove PCAOB members only for cause), the Court concluded that the Act unduly constrained the President's ability to ensure a faithful execution of federal law. "Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. The President['s] ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired." Id. at 496. This impairment proved to be the Act's fatal constitutional defect.

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

Drawing from *Humphrey's Executor*, *Morrison* and *Free Enterprise Fund*, one can see much in the CFPB that is problematic under existing doctrine. Unlike the commissioners of *Humphrey's Executor*, the Director has vast amounts of power that he may wield unilaterally. Rather than having to act in a consensual way, the Director is not answerable to anyone else. He is not answerable to the President or to Congress, and need not work

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

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

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

Congressional Fixes

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

who may serve as an independent executive officer into the administration of a President Sanders or a President Warren.

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

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