Written Testimony of Theodore B. Olson

Partner, Gibson, Dunn & Crutcher LLP and
Former Solicitor General of the United States

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

The Consumer Financial Protection Bureau's Unconstitutional Design

March 21, 2017
Washington, D.C.

I. Introduction

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

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

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

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

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

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

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

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

Our Constitution's separation of powers is the genius of our republic, and must be zealously defended against encroachment in order to secure our liberties. As the late Justice Scalia explained, "[w]ithout a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of

ours."[2] Adhering to separation-of-powers principles is not just a matter of good housekeeping. It is a constitutional imperative.

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

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

---

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

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

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

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

[6] *Id.* art. II, §§ 1, 3.

[7] *Id.* art. III, § 1.

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

[9] *Id.* at 693.

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

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

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

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

---

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

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

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

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

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

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

[18] *Id.* at 425–26.

[19] *Id.* at 428.

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

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

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

---

[20] *Id.* at 428–29.

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

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

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

[24] *Myers*, 272 U.S. at 134–35.

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

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

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

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

---

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

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

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

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

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

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

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

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

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

---

[32] *Id.* at 483.

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

[34] 12 U.S.C. § 5491(a).

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

[36] *Id.* § 5491(c)(3).

[37] *Id.* §§ 5491(b)(5)(A), 5494.

[38] *Id.* § 5491(a).

[39] *Id.* § 5492(c).

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

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

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

---

[40] 15 U.S.C. § 41.

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

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

[43] 12 U.S.C. § 5481(12), (14).

[44] *Id.* § 5531(a).

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

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

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

---

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

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

[47] 12 U.S.C. § 5512(b)(4).

[48] *Id.* § 5493(a)(1)–(2).

[49] *Id.* § 5492(b).

[50] *Id.* § 5493(a)(1)(C).

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

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

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

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

---

[51] *Id.* § 5493(a)(2).

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

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

[54] 12 U.S.C. § 5492(c)(4).

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

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

[57] *Id.*

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

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

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

---

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

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

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

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

[62] *See* 12 U.S.C. §§ 243–244.

[63] *See id.* § 5497(a)(2)(C).

[64] *Id.* § 5497(a)(4)(E).

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

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

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

---

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

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

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

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

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

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

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

[73] *Id.* at 495.

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

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

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

[74] 12 U.S.C. § 5564(e).

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

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

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

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

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

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

---

[76] *Id.*

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

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

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

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

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

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

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

V. Conclusion

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

---

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

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

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

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

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

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