

**Hearing before the United States Senate Committee on the Judiciary,
Subcommittee on the Constitution**

**“The Administrative State v. The Constitution:
Dodd-Frank at Five Years”
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**Prepared Statement of
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Chairman Cornyn, Ranking Member Durbin, and members of the Committee, thank you for this opportunity to testify on the constitutionality of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank” or “the Act”).¹

The Dodd-Frank Act has raised serious constitutional questions since its inception five years ago. The Act creates new agencies insulated from political accountability and new procedures that strain due process. Both in law and practice, these structures have transgressed the boundaries of the Constitution. My testimony will focus on the Consumer Financial Protection Bureau (“CFPB” or “Bureau”) created by the Act. The super independence of this Bureau demonstrates many of the problems of administration without meaningful presidential control or congressional oversight.² Moreover, it provides an especially stark example of the types of abuse that can result from overbroad delegations of authority to agencies.³ These concerns with the Bureau existed at enactment, but the passage of time has demonstrated how the constitutional infirmities

¹ Pub. L. 111-203, 124 Stat. 1376 (2010).

² See Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205 (2014) (developing the constitutional requirement of presidential control over all agencies, even those denominated “independent”).

³ See Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. (forthcoming 2015) (arguing that delegations not only expand the power of executive branch agencies, but also allow members of Congress to influence administration outside of their collective lawmaking power).

encourage actions by the Bureau that exceed its legal authority and undermine the predictability and stability of the rule of law.

Regulated entities have raised constitutional challenges to the Bureau and courts should give them serious consideration. Some of these issues may be difficult to redress in the courts because of jurisdictional limits and existing precedent. The Constitution, however, is not the exclusive domain of the courts and judicial doctrine does not exhaust the full meaning of the Constitution. As this hearing before the Subcommittee on the Constitution recognizes, Congress has a duty to evaluate constitutional infirmities in statutes and to provide corrections. No mere academic exercise, the constitutional problems are the foundation for the Act's weaknesses and for its problematic implementation by agencies unencumbered by the mechanisms of democratic accountability.

I SUPER INDEPENDENCE

The Constitution divides the federal government into three branches—the legislature, the executive, and the judiciary—and it gives each branch distinct powers and mechanisms of accountability. The separation of powers “diffused power the better to secure liberty.”⁴ Administrative agencies, however, often combine the three functions of the federal government—they make the rules, enforce the rules, and adjudicate the rules.⁵ In keeping with the progressive ideal of independent expertise, many of these agencies are insulated from political control by the President. The Constitution, however, does not recognize any “independent” entities. Although the Supreme Court continues to recognize some forms of agency independence, in all of the recent cases concerning “independent” agencies, the Court has recognized that such agencies are part of the executive branch.⁶ At least for now, the Supreme Court has maintained the

⁴ *Bowsher v. Synar*, 478 U.S. 714, 721 (1986).

⁵ See generally Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

⁶ See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010) (noting that the Securities and Exchange Commission is a “freestanding component of the Executive Branch” and constitutes a Department for the purposes of Appointments Clause); *Freytag v. Comm’r*, 501 U.S. 868, 912 (1991) (Scalia, J., concurring in part and concurring in the judgment) (“It seems to me entirely obvious that the Tax Court, like the Internal Revenue Service, the FCC, and the NLRB, exercises executive power);

constitutionality of removal limits for independent agencies, but has rejected the reasoning that such agencies form a headless Fourth Branch of government.⁷ Instead, the Supreme Court relies on a more formalist framework in which even independent agencies are squarely within the Executive Branch. For instance, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*,⁸ the justices disagreed on the constitutionality of the PCAOB's structure and double-layer of removal protections, but they all agreed that this "independent" agency exercised executive power as part of the executive branch.⁹

Agencies that implement the laws, such as the CFPB, undoubtedly exercise the executive power and therefore must be within the control of the President, as I argue in greater detail elsewhere.¹⁰ The Court's reasoning in the *Free Enterprise Fund* case strongly suggests that agency independence is unconstitutional because it limits the President's ability to control administration.¹¹ Agencies administering the law must be under the control of the President. While agencies have other forms of accountability, including to congressional oversight and judicial review, they are part of the Executive Branch.

Despite exercising significant executive power, the Bureau enjoys an unprecedented degree of political independence.¹² The Act combines multiple features that insulate the CFPB from political pressures. Other "independent" agencies often have mechanisms by which the President can assert some control and supervision¹³ and most of them remain amenable to congressional oversight through the necessity of securing

Buckley v. Valeo, 424 U.S. 1, 132-33 (1976) (explaining that the Appointments Clause applies to the members of the Federal Election Commission). *See also* Rao, *supra* note 2, at 1231 (discussing the Supreme Court's precedents that consistently recognize that "independent" agencies exercise executive power and that the heads of such agencies are executive officers subject to the requirements of the Appointments Clause).

⁷ The central case upholding removal restrictions, *Humphrey's Executor v. United States*, relied on the reasoning that commissioners of the Federal Trade Commission exercised quasi-judicial and quasi-legislative powers and therefore were not part of the executive branch. 295 U.S. 602, 628 (1935).

⁸ 130 S. Ct. 3138 (2010).

⁹ *See id.* at 3155 (discussing the Board's "executive power without the Executive's oversight"); *id.* at 3165-68 (Breyer, J., dissenting) (discussing members of the PCAOB as "executive Officers" and examining whether for-cause restrictions limit "the President's exercise of executive authority").

¹⁰ *See* Rao, *supra* note 2.

¹¹ *See* Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB*, 79 *FORDHAM L. REV.* 2541 (2011) (arguing that the implications of the *Free Enterprise Fund* decision call into question the constitutionality of all restrictions on the President's removal power).

¹² Rao, *supra* note 2, at 1270-71 (discussing the forms of independence of the CFPB).

¹³ *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 *CORNELL L. REV.* 769 (2013) (cataloguing features of independent agencies).

appropriations. By contrast, the structure of the CFPB creates independence from both presidential control and congressional appropriations, resulting in a rare form of super independence.

Dodd-Frank establishes the CFPB as an “independent bureau...which shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws.”¹⁴ The Director of the Bureau serves for a five-year term and can be removed by the President only “for inefficiency, neglect of duty, or malfeasance in office.”¹⁵ This standard formulation for “independent” agencies is conventionally understood to restrict the President’s ability to remove and therefore to control the actions of the agency. In addition, the CFPB is headed by a single director, rather than a multi-member board or commission, and therefore lacks the bi-partisan deliberation and compromise that can result from such a structure. Moreover, the Act reinforces the Bureau’s independence from the White House by providing that the Director has no “obligation” to consult with the Office of Management and Budget (“OMB”).¹⁶ The Director has discretion to determine whether he will submit to presidential supervision, although as discussed below, nothing prohibits OMB review of the Bureau’s regulations.

The Bureau also combines other features of independence, in particular an unusual degree of budgeting independence. The Director determines the Bureau’s budget and the Federal Reserve must pay this amount from a designated fund.¹⁷ This independence from Congress is further reinforced by a statutory restriction that *prohibits* the Appropriations Committees of the Senate and the House of Representatives from reviewing the budget set by the Director.¹⁸ The Bureau thus operates entirely outside of

¹⁴ 12 U.S.C. § 5491(a).

¹⁵ 12 U.S.C. § 5491(c)(3).

¹⁶ 12 U.S.C. § 5497(a)(4) (E) (providing a “rule of construction” that the statute “may not be construed as implying any obligation on the part of the Director to consult with or obtain the consent or approval of the Director of the Office of Management and Budget with respect to any report, plan, forecast, or other information ...or any jurisdiction or oversight over the affairs or operations of the Bureau”).

¹⁷ 12 U.S.C. § 5497(a)(1) (stating that the Federal Reserve “shall transfer to the Bureau...the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law”). The CFPB’s budget is limited only by a very generous cap. *See* 12 U.S.C. § 5497(a)(2).

¹⁸ 12 U.S.C. § 5497 (c) (“the funds derived from the Federal Reserve System pursuant to this subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate.”).

the congressional appropriations process, which gives members of Congress less leverage over the Bureau's operations and further diminishes political accountability.

Moreover, events after the CFPB's creation further insulated the Bureau from accountability to Congress. Congress maintains various constitutional checks on administration, including the Senate's role in confirming the appointment of principal executive officers such as the Director of the CFPB.¹⁹ At the outset, the President circumvented this important check by appointing Richard Cordray in between the Senate's *pro forma* sessions, invoking his authority under the Recess Appointment Clause.²⁰ Director Cordray's recess appointment was invalid, however, under the reasoning of the Supreme Court's decision in *National Labor Relations Board v. Noel Canning*,²¹ which invalidated appointments to the National Labor Relations Board made during the same time as Cordray's appointment. Although Director Cordray was eventually confirmed by the Senate and has "ratified" actions he took during his "recess" appointment, questions remain about the status of the actions taken during that time. The initial recess appointment sidestepped the Senate's advice and consent power and denied whatever control the Senate could exercise through the confirmation process over the leadership and direction of the CFPB. Similarly, although the President could assert some control over the CFPB as discussed below, the Administration steadfastly refers to the Bureau as "independent," as an entity apart from the President and distinct from other Administration efforts,²² and presumably therefore outside of the President's responsibility.

In addition, Dodd-Frank creates other independent entities, such as the Financial Stability Oversight Council ("FSOC" or "Council"). The FSOC is a kind of "agency of

¹⁹ U.S. Const. art. II, § 2, cl. 2 (the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint...all other Officers of the United States").

²⁰ U.S. Const. art. II, §2, cl. 3 (giving the President the power "to fill up all Vacancies that may happen during the Recess of the Senate").

²¹ 134 S. Ct. 2550 (2014) (holding that the President lacked authority to make recess appointments to the National Labor Relations Board in a three-day period between two *pro forma* sessions of the Senate).

²² See, e.g., White House Fact Sheet, Progress Toward Building a Safer, Stronger Financial System and Protecting Consumers from Unfair and Abusive Practices (Mar. 26, 2015), available at <https://www.whitehouse.gov/the-press-office/2015/03/26/fact-sheet-progress-toward-building-safer-stronger-financial-system-and-> (referring to the CFPB as "a dedicated, independent cop on the beat" and discussing the CFPB's work separately from the "President" and the "Obama Administration").

agencies”²³—chaired by the Secretary of the Treasury with voting members including the heads of other federal agencies and commissions dealing with financial markets.²⁴ Like the CFPB, the Council’s structure reinforces its political independence and its insulation from presidential control and congressional oversight even as it exercises significant administrative authority to identify risks to the financial stability of the United States and to coordinate with agencies to avoid such risks.²⁵

II SWEEPING DELEGATED AUTHORITY

The lack of political accountability raises particular concerns, because the CFPB has especially sweeping powers to regulate consumer finance. Expansive delegated authority, political independence, and plenary budget control combine to give the Bureau significant discretion to define the rules of consumer finance and then to enforce and to adjudicate those same rules.

Dodd-Frank entrusts substantial and open-ended authority to the CFPB. For example, the CFPB can exercise its authority under federal consumer financial law to ensure that “consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination.”²⁶ Such delegations raise constitutional concerns, because they provide the CFPB with capacious authority to enforce the law with only minimal guidance from Congress. In a Constitution of limited and enumerated powers, Congress cannot delegate its “exclusively legislative”²⁷ powers to the Executive (or to the courts)

²³ See Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689, 696-98 (2013) (discussing the Financial Stability Oversight Council as an agency of agencies, which is “an administrative structure composed of the heads of other agencies that is built of grounds of information, expertise, and (intentionally or not) a fair measure of structural political insulation”).

²⁴ The voting members include: the Chairman of the Board of Governors of the Federal Reserve, the Comptroller of the Currency, the Director of the CFP, the Chairman of the Securities and Exchange Commission, the Chairperson of the Federal Deposit Insurance Commission, the Chairperson of the Commodity Futures Trading Commission, the Director of the Federal Housing Finance Agency, the Chairman of the National Credit Union Administration, and a presidential appointee with insurance expertise. See 12 U.S.C. § 5321(b).

²⁵ See Gersen, *supra* note 23, at 693-94 (providing an overview of the FSOC’s structure and duties).

²⁶ 12 U.S.C. § 5511(b)(2).

²⁷ *Wayman v. Southard*, 23 U.S. 1, 42 (10 Wheat) (1823) (Marshall, C.J.) (“It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.”).

because the Constitution vests “All legislative power herein granted...” in Congress.²⁸ This ensures that laws that bind the people are made by the people’s representatives through a legislative process designed to promote deliberation and compromise for the public good. The limitation on delegation is “a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.”²⁹

In practice, however, the modern administrative state relies on open-ended delegations—giving agencies authority to formulate rules of conduct that would be difficult to enact through bicameralism and presentment. Delegations are frequently justified on functional, not constitutional, grounds of expediency, emphasizing agency expertise, flexibility, and responsiveness to changed circumstances. The Supreme Court has tolerated broad delegations to agencies so long as the statute contains an “intelligible principle.”³⁰ Although the Court has maintained the importance of the principle of non-delegation, the Court has repeatedly declined to enforce a more robust non-delegation doctrine.³¹

Concerns about non-delegation, however, persist precisely because of its fundamental importance to a republican form of government and to the constitutional limits on government power. In a recent decision, Justice Samuel Alito explained, “The principle that Congress cannot delegate away its vested powers exists to protect liberty.”³² This individual liberty exists before government action. Under our Constitution the legislature cannot interfere with this liberty unless it follows the “single, finely wrought and exhaustively considered procedure” of Article I, section 7.³³ And the executive branch has no general lawmaking power, independent of a statutory or constitutional grant of authority.³⁴

²⁸ U.S. Const. art. I, § 1, cl. 1.

²⁹ *Field v. Clark*, 143 U.S. 649, 692 (1892).

³⁰ *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 395, 409 (1928).

³¹ *See Whitman v. Am. Trucking Ass’ns*, 581 U.S. 457 (2001).

³² *Dep’t of Trans. v. Ass’n of Am. R.R.*, 135 S.Ct. 1225, 1237 (2015) (Alito, J., concurring). *See also id.* at 1254-55 (Thomas, J., concurring in the judgment) (explaining that the judiciary’s failure to enforce the non-delegation doctrine come at the “cost [of] our Constitution and the individual liberty it protects”).

³³ *INS v. Chadha*, 462 U.S. 919, 951(1983).

³⁴ *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (“[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. ... And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.”).

Excessive delegations undermine separation of powers in several ways. First, delegations have significantly expanded the power of the executive branch. In the course of administering open-ended statutes, executive agencies have to fill in the blanks. While some gap filling and interpretation is an essential part of the executive power, many agencies, including the CFPB have such broad delegated authority that functionally they make binding rules that all but resemble legislation, but without the constitutional checks of bicameralism and presentment.³⁵

Second, and often less visible, delegations to agencies allow individual members of Congress to participate in administration.³⁶ Once an agency possesses significant discretionary authority, members of Congress can try to influence the exercise of that agency's authority. Delegations to agencies favor individual members of Congress over Congress as a lawmaking institution. Reporting about the CFPB, for instance, reflects the understanding that the CFPB responds to Senator Elizabeth Warren, who developed and helped to establish the Bureau.³⁷ Open-ended delegations diminish the constitutional Congress, what I call the "collective Congress," in favor of its individual members.³⁸ Some legislators may find greater short-term benefits in influencing administration, rather than pursuing the difficult task of legislating. This further undermines democratic accountability and can work to serve special interests. "By allowing legislators to satisfy individual interests, delegations disconnect the interests of congressmen from the interests of Congress. Delegations fracture the collective Congress, undermine the institutional power of Congress, and weaken the Madisonian checks and balances between Congress and the President."³⁹

³⁵ Justice Clarence Thomas explained the fundamental problem: "The function at issue here is the formulation of generally applicable rules of private conduct. Under the original understanding of the Constitution, that function requires the exercise of legislative power. By corollary, the discretion inherent in executive power does not comprehend the discretion to formulate generally applicable rules of private conduct." *Dep't of Trans. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1237 (2015) (Thomas, J., concurring in the judgment).

³⁶ See Rao, *Administrative Collusion*, *supra* note 3.

³⁷ See, e.g., Joseph Lawler, *Incoming GOP majority would target Elizabeth Warren's CFPB*, WASHINGTON EXAMINER, Oct. 21, 2014, <http://www.washingtonexaminer.com/incoming-gop-majority-would-target-elizabeth-warrens-cfpb/article/2555055>; Erika Eichelberger, *10 Things Elizabeth Warren's Consumer Protection Agency Has Done for You*, MOTHER JONES, Mar. 14, 2014, <http://www.motherjones.com/politics/2014/02/elizabeth-warren-consumer-financial-protection-bureau>.

³⁸ See Rao, *Administrative Collusion*, *supra* note 3.

³⁹ *Id.*

It is a fundamental principle of our constitutional government that the difficulty of lawmaking serves the public good by requiring lawmakers to account for the diverse interests of society.⁴⁰ Matters regarding consumer finance may benefit from the CFPB’s expertise, but expertise will rarely, if ever, definitively settle the Bureau’s appropriate course of action. Decisions about what to do and at what cost are invariably laden with economic, social, political, and even moral judgments. Without the constitutional mechanisms of control by the President and oversight by Congress, expansive delegated authority will be defined and exercised by bureaucrats. This hardly guarantees expert “independence.” Instead it simply insures that important decisions about consumer finance will be made under influences and interests less visible and less accountable to the public.

III BUREAUCRATS UNBOUND

These constitutional problems of super-independence and delegated authority are linked to problems with agency overreach. When insulated from ordinary political debate and mechanisms of influence, an agency with significant discretion to pursue its broad purposes will predictably attempt to expand its jurisdiction. Proponents of the CFPB tout its super independence as one of the primary advantages to the CFPB’s structure—it can continue with its “mission” without political interference.⁴¹ Yet independence is not part of the constitutional design. Agencies, like other parts of the federal government, must answer to the people through their elected officials. As the examples below demonstrate, the CFPB exercises significant discretion through its supervisory, rulemaking, and enforcement powers. While Congress may allow agencies some discretion in administering the law, the legitimacy of executive branch discretion depends on having proper statutory authority and exercising it with accountability. Actions undertaken in a bureaucratic bubble will predictably differ from what comes out of a more accountable

⁴⁰ See The Federalist No. 10 (James Madison) (commending a republican form of government as most conducive to “secur[ing] the public good, and private rights, against the danger of [faction], and at the same time [preserving] the spirit and form of popular government”).

⁴¹ See, e.g., Eric Garcia, *Elizabeth Warren Strikes Back Against New GOP Efforts to Weaken Dodd-Frank*, THE NATIONAL JOURNAL, Mar. 18, 2015 (noting Senator Warren’s defense of the CFPB that the “big banks don’t like [CFPB rules]—and that’s the number one reason the CFPB should remain free of political influence.”).

process. Insulated from the pull and push of politics, the CFPB can pursue its own approach to consumer finance, disconnected from the specific provisions of Dodd-Frank and not directly sanctioned by the President through control or supervision of the Bureau.

A. “Abusive” enforcement

In the past five years, the CFPB’s actions have undermined Congress’ lawmaking power by using general grants of authority to undermine specific statutory limits and to exercise enforcement power in a way that frustrates the rule of law. For example, the CFPB has authority to regulate “abusive” acts and practices. The statute provides some general guidance as to the standard for “abusive,”⁴² but the term remains largely undefined and under specified. Rather than follow a process of rulemaking to define how the “abusive” standard will be enforced, Director Cordray has taken an “I-know-it-when-I-see-it” approach, choosing to define the term through case-by-case enforcement.⁴³ While this maintains enforcement flexibility for the Bureau, it comes at the cost of predictability and notice for regulated industries.

Defining core statutory violations through enforcement poses particular problems, because open-ended terms like “abusive” have a broad range of meaning and application, leaving substantial discretion with the CFPB. The Director has made clear that “abusive” is a discrete factor from “unfair” and “deceptive,” terms which have more developed meaning in existing law. What makes a practice abusive when it is neither unfair nor deceptive? Various political and economic judgments must inform the meaning of “abusive,” making it precisely the type of issue that, absent legislative clarification, would benefit from public input in the process of administrative rulemaking.

⁴² See 12 U.S.C. § 5531(d) (a practice or act may not be declared abusive unless it “(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) takes unreasonable advantage of-- (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.”)

⁴³ *How Will the CFPB Function Under Richard Cordray: Hearing Before the Subcomm. On TARP, Financial Services, and Bailouts of Public and Private Programs of the H. Comm. on Oversight and Government Reform*, 112th Cong. (2012) (statement of Richard Cordray) (explaining that the definition of “abusive” is “going to have to be a fact and circumstances issue; it is not something we are likely to be able to define in the abstract”).

Even after five years, individual proceedings have not shed much light on the “abusive” standard. In a recent case, PayPal is paying \$25 million to settle charges for practices the CFPB alleges are unfair, deceptive, and abusive.⁴⁴ This is the largest civil penalty sought under a case including the abusive standard.⁴⁵ Yet uncertainty remains about what might constitute an abusive practice. Fleshing out a vague and open-ended law through enforcement rather than notice-and-comment rulemaking undermines predictability, stability, and clarity in the law and imposes massive regulatory conditions and fines at the determination of a single agency.

Moreover, despite conferring such broad authority, the Act tries to cabin the Bureau’s discretion with some specific requirements. Dodd-Frank requires that when prescribing *rules*, the CFPB “*shall* 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.”⁴⁶ Enforcement actions against a single company, however, do not require considering these costs and benefits. Dodd-Frank reflects Congress’ awareness that regulations protecting consumers could have adverse consequences, such as limiting access to financial products or services, and the Act specifically requires the CFPB to take such consequences into account for rulemaking. Yet when proceeding through enforcement, the Bureau can avoid or minimize these considerations, taking a blinkered view of its actions. Much like administrative rules, enforcement proceedings can set industry standards that businesses will feel compelled to follow, imposing new liabilities with less certainty and less accountability.

B. Data collection

The CFPB has been collecting massive amounts of consumer credit data over the past four years. According to the General Accounting Office (GAO), the CFPB has gathered information on 173 million mortgage loans, 20 million private-label mortgages,

⁴⁴ Complaint, CFPB v. PayPal, Inc., Civ. Act. No. 1-15-cv-01426 (D. Md. May 19, 2015).

⁴⁵ See Jenna Greene, “Why the CFPB Found PayPal’s Conduct ‘Abusive,’” *The National Law Journal* (May 19, 2015), available at <http://www.nationallawjournal.com/id=1202726875917/Why-the-CFPB-Found-PayPals-Conduct-Abusive?slreturn=20150610152308>.

⁴⁶ 12 U.S.C. § 5512(b)(2)(A)(ii) (emphasis added).

and 15-40 million payday loans.⁴⁷ Much of this data has been collected at the consumer level, including 25-75 million individual consumer credit card accounts.⁴⁸

According to the GAO Report, the CFPB began data collections without appropriate consultation with OMB, including with respect to compliance with the Paperwork Reduction Act (PRA). For collections subject to PRA, “agencies must seek comments from the public on the necessity of proposed collections, the accuracy of agencies’ estimates of burden, ways to enhance the quality, utility, and clarity of the information collected, and ways to minimize the burden of the collection.”⁴⁹ The Paperwork Reduction Act requires that data collections directed to ten or more entities require an agency to seek and obtain OMB approval. As the GAO Report explains, CFPB staff determined that they did not need to seek OMB approval for their collections because “the agency did not ask exactly the same questions of more than nine financial institutions, which would have necessitated OMB approval.”⁵⁰ The reasoning offered by CFPB staff suggests awareness of not triggering the statutory requirement of OMB approval.

OMB approval, however, would have provided at least some accountability and a mechanism for ensuring that CFPB processes complied with applicable laws, which require a balance between an agency’s need for the information and the burdens placed on entities that must provide the information. Not only did the CFPB not submit to OMB approval, the GAO Report found that the Bureau failed to implement adequate internal safeguards for data collection. The CFPB also lacked written procedures and documentation for addressing privacy risks of data collection and ensuring ongoing and consistent compliance with the web of legal requirements that apply to such collections of information.⁵¹

Agency independence allowed the CFPB to avoid accountability before the data collection, but also discourages presidential accountability of ongoing and expanding collections. Even after the GAO Report documented the scope of the data collection and

⁴⁷ Government Accountability Office Report, *Consumer Financial Protection Bureau: Some Privacy and Security Procedures for Data Collections Should Continue Being Enhanced* 16 (Sept. 2014) [hereinafter GAO Report].

⁴⁸ *Id.*

⁴⁹ *Id.* at 44.

⁵⁰ *Id.* at 45.

⁵¹ *Id.* at 37-50.

infirmities in the CFPB's legal processes for the collection, the White House does not appear to have publicly addressed these issues. I could not locate any White House statements, releases, or discussions about the CFPB's data collection. By contrast, after the public revelations about the bulk phone data collection by the National Security Administration (NSA), the President faced significant pressure to answer difficult questions, implement review of the programs, and take various executive actions and work with Congress on legislative reforms.⁵² The CFPB's data collection occurs on a massive scale, relates to sensitive financial information, and is apparently easily matched to individual consumers. Yet these actions have received relatively little attention, "independence" in part insulating the agency from public outcry and political accountability. Congressional committees have held hearings on the issue and drawn attention to the data collection,⁵³ but their options for disciplining the CFPB are limited because the CFPB is not subject to congressional appropriations and President Obama has repeatedly said he will veto bills proposing reforms to the structure and mandate of the CFPB.⁵⁴

C. Circumventing statutory limits

Overbroad delegations and political independence can encourage an agency to circumvent even specific statutory requirements. For example, Dodd-Frank clearly

⁵² See, e.g., Press Conference, President Barack Obama (Aug. 9, 2013), available at <https://www.whitehouse.gov/the-press-office/2013/08/09/remarks-president-press-conference> ("[I]t's not enough for me, as President, to have confidence in these programs. The American people need to have confidence in them as well. And that's why, over the last few weeks, I've consulted members of Congress who come at this issue from many different perspectives. I've asked the Privacy and Civil Liberties Oversight Board to review where our counterterrorism efforts and our values come into tension, and I directed my national security team to be more transparent and to pursue reforms of our laws and practices.").

⁵³ See, e.g., *The Consumer Financial Protection Bureau's Semi-Annual Report to Congress: Hearings Before the Senate Comm. On Banking, Housing & Urban Affairs*, 114th Cong. (June 10, 2014) (raising concerns with Director Cordray about the extent of the CFPB's data collection and criticizing the security of the information gathered). Chairman Jeb Hensarling of the House Committee on Financial Services has held dozens of hearings about the activities of the CFPB. See Jeb Hensarling, *After Five Years, Dodd-Frank Is a Failure*, WALL STREET JOURNAL, July 19, 2015 (discussing the CFPB and noting "[w]hat is most disturbing about Dodd-Frank is the authority it gives bureaucrats to control huge swaths of the economy.")

⁵⁴ See Jordan Fablan, *Obama looks to defend CFPB from Republican attacks*, THE HILL, Mar. 26, 2015 (noting President Obama's statement, "If Republicans in Congress send me a bill to unravel Wall Street reform, I will veto it.").

exempts financing by auto dealers from CFPB authority.⁵⁵ Nonetheless, the CFPB recently enacted a rule to cover nonbank auto finance companies, which are the financial institutions that back the financing initiated and overseen by auto dealers.⁵⁶ The Bureau relied on its general authority to supervise nonbank “larger participant[s] of a market for other consumer financial products or services,” as the Bureau defines by rule.⁵⁷ These rules do not regulate auto lenders directly, but still significantly impact the lending of auto dealers because they originate the loans that go to auto lenders. The general and open-ended authority of the CFPB trumped specific limitations against the regulation of auto lenders.

Similarly, with regard to data collection, Dodd-Frank allows the CFPB to collect information, but includes a specific prohibition: “The Bureau may not use its authorities...to obtain records from covered persons and service providers...for purposes of gathering or analyzing the personally identifiable financial information of consumers.”⁵⁸ The CFPB, however, has gathered precisely this type of information, providing as justification its broad supervisory powers to enforce consumer financial law.⁵⁹

The CFPB’s actions demonstrate how *statutory* limits will often impose little restraint on an agency with otherwise expansive delegated authority.⁶⁰ Dodd-Frank passed, like all laws, with a series of political compromises, including the exemption for auto dealers. Our Constitution makes it difficult to enact laws, precisely so that Congress

⁵⁵ 12 U.S.C. § 5519(a) (“[T]he Bureau may not exercise any rulemaking, supervisory, enforcement or any other authority, including any authority to order assessments, over a motor vehicle dealer that is predominantly engaged in the sale and serving of motor vehicles, the leasing and serving of motor vehicles, or both.”).

⁵⁶ See Defining Larger Participants of the Automobile Financing Market and Defining Certain Automobile Leasing Activity as a Financial Product or Service, 12 C.F.R. Parts 1001 and 1090 (2015). The CFPB explained that through this rule it would “supervise about 34 of the largest nonbank auto finance companies and their affiliated companies...[that] together originate around 90 percent of nonbank auto loans and leases.” Press Release, CFPB to Oversee Nonbank Auto Finance Companies (June 10, 2015), available at <http://www.consumerfinance.gov/newsroom/cfpb-to-oversee-nonbank-auto-finance-companies/>.

⁵⁷ See 12 U.S.C. § 5514(a)(1)(B).

⁵⁸ 12 U.S.C. § 5512(c)(4)(C).

⁵⁹ See GAO Report, *supra* note 47, at 77 (comments from Richard Cordray regarding the GAO’s Report on data collection).

⁶⁰ See Reforming CFPB Indirect Auto Financing Guidance Act of 2015, H.R. 1737, 114th Cong. (2015) (nullifying “certain guidance of the Bureau of Consumer Financial Protection and to provide requirements for guidance issued by the Bureau with respect to indirect auto lending). As of July 11, 2015, this bi-partisan bill has 117 cosponsors, including 65 Republicans and 52 Democrats.

can balance competing public interests and concerns. Yet broad delegations allow agencies to unravel the work of Congress and replace it with the interests and concerns of the agency.

IV POTENTIAL REMEDIES

As explained above, the CFPB provides a case study of the problems of administrative overreach by agencies that combine significant delegated authority with a high degree of independence from political accountability. These constitutional infirmities have predictably resulted in agency overreach on matters of fundamental importance to the consumer financial marketplace. All three branches of the government have a responsibility to ensure constitutional government. Within their respective spheres, each branch can provide distinct remedies to the constitutional problems with the CFPB.

A. Judicial review

Although serious constitutional challenges have been raised against provisions of Dodd-Frank and continue to be litigated, judicial review may provide only limited relief for a number of reasons. First, it will often be difficult to satisfy jurisdictional requirements. In the most comprehensive challenge to the constitutionality of the CFPB's structure, the district court dismissed the case for lack of standing.⁶¹ That lawsuit also challenged the constitutionality of Dodd-Frank's orderly liquidation authority, but the district court held that such claims were not ripe since no one had been subject to that authority. As of this testimony, appeal is still pending with the D.C. Circuit, which heard oral argument on November 19, 2014.

Second, existing judicial doctrine makes it difficult to resolve certain constitutional infirmities in the courts. Expansive delegated authority provides the foundation for the CFPB's actions. Yet, as discussed above, the Supreme Court has

⁶¹ See *State Nat'l Bank of Big Spring v. Lew*, 958 F. Supp. 2d. 127 (D. D.C. 2013) (holding that the plaintiffs had failed to demonstrate an injury-in-fact caused by the CFPB).

repeatedly declined opportunities to invalidate legislation on non-delegation grounds. The delegations at issue in Dodd-Frank, like nearly all other delegated authority, easily satisfy the Supreme Court’s minimal “intelligible principle” standard. Therefore, invalidation on non-delegation grounds would require the Court to break with its recent precedent, something only Justices Thomas and Alito have indicated a willingness to consider.⁶²

Third, although the CFPB strains any reasonable understanding of separation of powers, the courts are unlikely to invalidate the agency for violating a general separation of powers requirement. In previous cases the Court has upheld principles of separation of powers by ensuring that government action follows the Constitution’s specific allocation of powers.⁶³ One potential and more specific constitutional violation would focus on protecting the President’s removal power. As I have argued elsewhere, the text and structure of the Constitution require that the President have an unfettered removal power over the heads of executive agencies.⁶⁴ In addition, the Supreme Court has suggested in *Free Enterprise Fund v. PCAOB*⁶⁵ that restrictions on the President’s removal power pose serious constitutional concerns, because agencies that execute the laws must be within the control of the Chief Executive. As Chief Justice John Roberts explained, the power to ensure faithful execution of the laws “includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.”⁶⁶ Although the holding of *Free Enterprise Fund* applied to two levels of removal protections, the reasoning of the decision supports invalidating all removal restrictions, including those that insulate the Director of the CFPB.⁶⁷

In an appropriate case, the Court could thus hold that restrictions on the President’s removal power are invalid.⁶⁸ Removal also provides a justiciable standard for

⁶² See *supra* notes 32-35 and accompanying text.

⁶³ See Rao, *supra* note 2, at 1272-73.

⁶⁴ *Id.*

⁶⁵ 130 S. Ct. 3138 (2010).

⁶⁶ See *id.* at 3164.

⁶⁷ See Rao, *A Modest Proposal*, *supra* note 11.

⁶⁸ I provide a detailed explanation of this conclusion that invalidating the removal restriction remedies the constitutional infirmities with the CFPB. See Rao, *supra* note 2, at 1271-73.

courts, because in reviewing the constitutionality of the CFPB, a court could invalidate the agency's "independence" from the President by severing the restrictions that protect the Director from removal by the President. The agency would remain, but with clear accountability to the President. If the President could remove the Director at will, the President would have to answer for the actions of the Bureau, restoring democratic accountability for execution of the laws. Invalidating the removal protections could provide a judicially administrable remedy to the constitutional problems.

Constitutional challenges continue to percolate through the federal courts. As the Bureau continues to expand its domain, further pushing at the boundaries of its delegated power, new cases may present justiciable claims. A recently filed lawsuit alleges that the CFPB violated due process when it changed longstanding interpretations of the Real Estate Settlement Procedures Act (RESPA), imposed a new liability standard for RESPA violations, and ordered a disgorgement remedy of \$110 million.⁶⁹ Perhaps claims relating to specific agency enforcement will provide a vehicle for judicial consideration of the constitutional problems with the structure of the Bureau. The difficulty of securing a judicial decision on constitutional questions, however, does not undermine their seriousness. Instead, it suggests the imperative of political remedies—Congress and the President working together to reform the Act to improve democratic accountability and to bring Dodd-Frank into line with constitutional principles.

B. Presidential control and responsibility

Even if the Court does not invalidate the removal protections, the President can nonetheless exert greater control and supervision over the CFPB. The Act designates the CFPB as an "independent Bureau," but also states that it "shall be considered an "Executive agency."⁷⁰ Indeed, nothing *prohibits* the President from exerting control over

⁶⁹ Motion of Petitioners for Stay Pending Judicial Review, PHH Corp. v. CFPB, No. 15-1177 (D.C. Cir. June 26, 2015).

⁷⁰ 12 U.S.C. § 5491(a). Dodd-Frank uses the definition of "Executive agency" found in 5 U.S.C. § 105, which states, "'Executive agency' means an Executive department, a Government corporation, and an independent establishment."

the CFPB through OMB and OIRA.⁷¹ Admittedly, conventions of agency independence suggest that the President cannot require the Director of the CFPB to take a particular action, precisely because of the restrictions on removing the Director. Nonetheless, such restrictions run against Article II, and therefore the President remains free to direct the Bureau to take particular actions and thereby to take responsibility for the actions of the Bureau.

The President has an independent duty to uphold the Constitution and to take care of faithful execution of the laws⁷² and abdication of executive discretion to an “independent” agency is not part of the constitutional structure. Although current executive orders do not require independent agencies to consult with OMB,⁷³ many “independent” agencies do submit to such supervision and the Office of Legal Counsel has concluded that such supervision would be lawful.⁷⁴

Thus, the President can supervise and direct the activities of the CFPB and therefore should be held responsible for its actions. Labeling the Bureau “independent” should not allow the Chief Executive to evade responsibility for execution of the laws. Congress and members of the public should ask not just the Director, but the politically accountable President, for answers about the CFPB’s policies. For example, just as the Administration had to answer for the NSA’s bulk data collection, it should explain data collection by the CFPB. Why is the Bureau’s massive data collection necessary? What is being done to safeguard sensitive consumer information? Data collection and security, like other matters pursued by the CFPB, involve significant political discretion and have real-life consequences. When the Bureau exercises discretion over matters that affect the

⁷¹ See Gersen, *supra* note 23, at 708 (“[W]hile all or at least most parties seem to agree that the CFPB need not submit rules to OIRA for review, the Statute nowhere expressly exempts the Bureau and need not be read to implicitly exempt the Bureau.”).

⁷² See U.S. Const. art. II, § 3 (providing that the President “shall take Care that the Laws be faithfully executed”).

⁷³ President Barack Obama issued an executive order that provided independent agencies “should” comply with executive orders government executive agencies with respect to cost-benefit analysis and improving regulatory review. Exec. Order No. 13,579, 3 C.F.R. 256-57 (2011). By contrast, executive agencies “shall” take steps to improve regulation and regulatory review. See Exec. Order No. 13,563, 3 C.F.R. 215-17 (2011).

⁷⁴ See Memorandum for the Hon. David Stockman, Dir., Office of Magmt. & Budget, from Larry L. Simms, Acting Ass’t Atty. Gen., Office of Legal Counsel (Feb. 12, 1981) (concluding that the President could legally subject independent agencies to regulatory review).

privacy of millions of Americans, politically accountable officials should answer for these choices.

C. Legislative reforms

Judicial and executive remedies exist for some of the constitutional infirmities with the CFPB. Comprehensive reform of the Bureau, however, will require legislative action. Many bills have been introduced to modify the structure of the CFPB and to improve its accountability.⁷⁵ Some bills have addressed particular issues to restrain the Bureau's expansive authority, for example relating to financial privacy of consumer information.⁷⁶ Other solutions would improve the Bureau's accountability to Congress by subjecting it to the regular appropriations process.⁷⁷ These proposals have received hearings and serious consideration in both the Senate and the House of Representatives.⁷⁸ The constitutional infirmities are closely linked to bureaucratic overreach and to the difficulty of addressing problems with the Bureau's regulation and enforcement. The CFPB flies in the face of basic constitutional principles and Congress need not wait for a judicial declaration to set them straight. In a government of limited and enumerated powers, the CFPB poses a dangerous combination of legislative, executive, and judicial authority without control by the President and without accountability to Congress.

In addition to the CFPB, Dodd-Frank raises constitutional problems in a number of areas not addressed in this testimony, such as with the orderly liquidation authority and the FSOC. Because of the difficulty of obtaining judicial review, the limited nature of judicial remedies, and the possibility that judicial review will be ripe only in the midst of

⁷⁵ See, e.g., The Financial Product Safety Commission Act of 2015, H.R. 1266, 114th Cong. (2015) (replacing the CFPB's single Director with a bi-partisan five-member commission).

⁷⁶ See The Consumer Right to Financial Privacy Act of 2015, H.R. 1262, 114th Cong. (2015) (requiring that the CRPB may not obtain personally identifiable financial records unless it provides clear notification to the consumer and the consumer provides consent).

⁷⁷ See, e.g., The Bureau of Consumer Financial Protection Accountability Act of 2015, H.R. 1261, 114th Cong. (2015) (subjecting the CFPB to the congressional appropriations process).

⁷⁸ In 2013, the House of Representatives passed by a 232-182 vote a bill that would make a series of changes to the CFPB, including creating a five-member commission, subjecting the CFPB to the congressional appropriations process, and requiring the commission to consider the impact to consider the impact of all regulations on the ability of individuals and small businesses to access credit. Consumer Financial Freedom and Washington Accountability Act, H.R. 3193, 113th Cong. (2013).

a financial crisis,⁷⁹ Congress is the institution best positioned to reform these agencies and authorities to bring them into line with constitutional administration.

V CONCLUSION

Constitutional restrictions on administrative power are more than formal abstractions. The constraints of the Constitution ensure that the federal government will exercise power, if not always wisely, at least with due accountability to the people. With super independence and expansive delegated authority, the CFPB's structure undermines the Constitution's checks and balances. The insulation of such agencies reflects a fundamental administrative hubris that bureaucrats know what is best for Americans, a belief that unelected "experts" can chart the proper course for financial markets. Such reasoning stands at odds with our Constitution, which creates a republican form of government and carefully circumscribes its powers. Administration outside of the Constitution will invariably lead to administration outside of the law, threatening individual liberty through the unchecked expansion of government power.

⁷⁹ See Thomas W. Merrill & Margaret L. Merrill, *Dodd-Frank Orderly Liquidation Authority: Too Big for the Constitution?*, 163 U. PENN. L. REV. 165, 171 (2014) (noting that if the lawsuit challenging the orderly liquidation authority is dismissed on jurisdictional grounds "the constitutional arguments are likely to reemerge at the worse possible time—if and when another financial crisis hits and one or more systemically significant financial firms are slated for orderly liquidation. Sorting out these constitutional questions in the midst of a financial crisis could disrupt, or at least delay, the resolution process envisioned by Congress.").