Statement before the House Committee on Financial Services
Subcommittee on Financial Institutions and Monetary Policy

“Agency Audit: Reviewing CFPB Financial Reporting & Transparency”

The CFPB’s Unconstitutional Exemption from Congress’s Power of the Purse

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“THE CFPB’S UNCONSTITUTIONAL EXEMPTION FROM CONGRESS’S POWER OF THE PURSE”

Testimony of Adam J. White

American Enterprise Institute
& Antonin Scalia Law School

Before the United States House of Representatives,
Committee on Financial Services,
Subcommittee on Financial Institutions and Monetary Policy

April 16, 2024

Chairman Barr, Ranking Member Foster, and other members of the subcommittee, thank you for inviting me to testify on the Consumer Financial Protection Bureau’s finances.

In 2017, when I testified before this Committee’s Subcommittee on Oversight and Investigations, I explained why the CFPB was doubly unconstitutional. First, the CFPB’s independence from the president—without the multi-member leadership structure common to other independent regulatory commissions—violated Article II of the Constitution. Second, the CFPB’s independence from Congress’s power of the purse violated Article I of the Constitution.

The Supreme Court solved the first problem four years ago, in Seila Law v. CFPB. And the Court is considering the second problem, in CFPB v. Community Financial Services Association this term.

My 2017 testimony, which I incorporate here by reference and attach as an appendix, explained why the CFPB’s extraordinary and unprecedented funding structure—namely, that it completely funds its enforcement activities from the

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1 Senior Fellow, American Enterprise Institute; Co-Executive Director, Antonin Scalia Law School’s C. Boyden Gray Center for the Study of the Administrative State. This year I also am serving as Chairman of the American Bar Association’s Administrative Law Section, and I am a Senior Fellow at the Administrative Conference of the United States, but today I am testifying in my individual capacity.

2 140 S. Ct. 2183, 2197 (2020) (“We hold that the CFPB’s leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers.”).

3 No. 22-448. The Court heard oral arguments on Oct. 3, 2023, and the case is still pending.
Federal Reserve—violates Article I, Section 9 of the Constitution. In 2022, the U.S. Court of Appeals for the Fifth Circuit adopted the same reasoning when it held that the CFPB’s funding structure was unconstitutional. I hope the Supreme Court reaches the same conclusion in its pending review of the Fifth Circuit’s decision for the sake of constitutional government.

The Constitution prohibits the CFPB’s funding structure. Article I, Section 9 plainly states: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]” The CFPB’s funds are indeed “drawn from the Treasury,” because Federal Reserve funds that go to the CFPB would otherwise have reverted to the Treasury’s general fund as required by law.

And, crucially, the CFPB takes those funds without “Appropriations made by Law.” The CFPB recently began to pretend otherwise, asserting to the Supreme Court—after its constitutionality was suddenly called into judicial question—that its funding is “appropriated.” But from the agency’s very beginnings, the CFPB itself consistently recognized that its funds are not appropriated, and it emphasized its non-appropriated status as proof of its independence from Congress.

From its 2013 Financial Report onward, the agency repeatedly called itself “an independent, non-appropriated bureau.” The CFPB continued to call itself “non-appropriated” as recently as November 2023. For example: In a 2016 proceeding before the Government Accountability Office, the CFPB attempted to evade the GAO’s jurisdiction over bid protests by arguing that the CFPB’s funds were non-appropriated. The GAO agreed that the CFPB “is funded by nonappropriated funds,” but it further concluded that the CFPB’s non-appropriated

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4 See Appendix, pp. 8–13; see also 12 U.S.C. § 5497 (allowing the CFPB to draw money from the Federal Reserve without appropriations); Adam J. White, The CFPB’s Blank Check—or, Delegating Congress’s Power of the Purse, YALE J. REG’S NOTICE & COMMENT (Nov. 28, 2022).

5 Community Financial Services Ass’n of America v. CFPB, 51 F.4th 616 (5th Cir. 2022); see also CFPB v. All-American Check Cashing, 33 F.4th 218, 220 (5th Cir. 2022) (Jones, J., concurring).

6 12 U.S.C. § 289(a)(3)(B) (“Any amounts of the surplus funds of the Federal reserve banks that exceed, or would exceed, the limitation under subparagraph (A) shall be transferred to the Board of Governors of the Federal Reserve System for transfer to the Secretary of the Treasury for deposit in the general fund of the Treasury.”)

7 See note 13 and accompanying text, below, on the CFPB’s new theory that the Dodd-Frank Act itself was a perpetual “appropriation.”


status did not affect the GAO’s jurisdiction over the matter.\textsuperscript{11} The GAO has repeatedly recognized that the CFPB’s funds are not appropriated.\textsuperscript{12}

But in May of 2023, more than a decade into its existence, the CFPB abruptly changed its story and told the Supreme Court that its funds actually do come from appropriations, because the Dodd-Frank Act itself supposedly was the CFPB’s perpetual “appropriation” law.\textsuperscript{13}

Given the CFPB’s years-long record of consistent statements to the contrary, this was an astonishing argument by the agency. At the very least, the CFPB’s utter failure to mention (let alone explain) its myriad statements describing its funds as “non-appropriated) was a striking lack of candor.\textsuperscript{14}

Before the federal courts called the CFPB’s funding structure into constitutional question, the agency trumpeted that its unprecedented ability to claim hundreds of millions of dollars from the Federal Reserve ensured the CFPB’s “full independence.”\textsuperscript{15} But under our Constitution, no agency can have “full independence.”

The very notion is anathema to constitutional self-government and the rule of law. As James Madison wrote in \textit{Federalist No. 58}, Congress’s “power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.” My 2017 testimony summarized this point, in light of a century of judicial and scholarly emphasis of the importance of Congress’s financial responsibility over administrative agencies.\textsuperscript{16}

The CFPB and its defenders have attempted to portray the CFPB as

\begin{itemize}
\item \textsuperscript{11} Id. at 1.
\item \textsuperscript{12} GAO, Permanent Funding Authorities (Dec. 2016) (including the CFPB among agencies whose funding is “provided by laws other than appropriations acts”); GAO, Government-Wide Inventory of Accounts with Spending Authority and Permanent Appropriations, Fiscal Years 1995 to 2015 (Nov. 2018) (not including the CFPB among agencies with permanent appropriations).
\item \textsuperscript{13} The Justice Department and the CFPB made this argument in their briefs in the pending \textit{CFPB v. Community Financial Services Association} case. See, e.g., Brief for the Petitioners at 25–26 (May 8, 2023); Reply Brief for Petitioners at 2–8 (Aug. 2, 2023).
\item \textsuperscript{14} See Adam J. White, \textit{The CFPB Engages in Legal Deception}, \textit{Wall St. J.} (Dec. 4, 2022) (detailing the CFPB’s record of statements regarding its “non-appropriated” funds, in contrast to the CFPB’s initial petition to the Supreme Court).
\item \textsuperscript{15} See, e.g., Consumer Financial Protection Bureau Strategic Plan (April 2013) at 36, https://files.consumerfinance.gov/f/strategic-plan.pdf.
\item \textsuperscript{16} See Appendix pp. 9–11; see also Adam J. White, \textit{The CFPB’s Blank Check—or, Delegating Congress’s Power of the Purse}, \textit{Yale J. Reg’s Notice & Comment} (Nov. 28, 2022).
\end{itemize}
unexceptional, by analogizing it to other financial regulators. But the analogies are false. To be sure, financial regulators often fund some or all of their regulatory activities from the revenues generated by their own operations—say, the Federal Reserve’s market operations, of the Federal Deposit Insurance Corporation’s assessments on the banks that it insures. But no such agency, to the best of my knowledge, is completely funded by simply reaching into an entirely separate source of federal money—namely, the Federal Reserve’s funds.\(^{17}\)

We are lucky that the CFPB is the only agency to enjoy this privileged access to nearly $1 billion from the Federal Reserve every year. If other agencies were entitled to treat the Federal Reserve as a regulatory slush fund, then Federal Reserve itself would be impaired. When Congress created the CFPB with a right to draw on the Federal Reserve, it set a very dangerous precedent. Perhaps the Supreme Court will end this threat to the Fed by declaring the CFPB’s funding structure unconstitutional, but if not, then Congress should amend the Dodd-Frank Act as soon as possible, to restore the appropriations process.

Just a month ago, the Securities & Exchange Commission submitted its “Congressional Budget Justification,” asking Congress for appropriations to fund its ongoing regulatory operations.\(^{18}\) It strains credulity to suggest that the CFPB should be exempt from the same basic legislative process.

More importantly, it strains the Constitution.

I am grateful for the opportunity to testify on this matter of profound constitutional importance, and I welcome the subcommittee’s questions.

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\(^{17}\) In the current Supreme Court litigation, the parties challenging the CFPB’s unconstitutional funding mechanism explained why analogies to other agencies are inapt. See Brief for Respondents at 34–41.

APPENDIX

Testimony of Adam J. White

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

March 21, 2017
“THE CFPB’S UNCONSTITUTIONAL DESIGN”

Testimony of
Adam J. White
The Hoover Institution

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

MARCH 21, 2017

Chairman Wagner, Ranking Member Green, and other members of the
Subcommittee, thank you for inviting me to testify on “the Bureau of Consumer
Financial Protection’s Unconstitutional Design.” As my testimony here makes clear,
I agree unequivocally with this hearing’s premise: the CFPB’s structure is
unconstitutional, for reasons identified recently by a panel of the U.S. Court of
Appeals for the D.C. Circuit, and for other equally important reasons that the
panel did not reach.

These issues are profoundly important, and not just because of any particular
policies that the CFPB might formulate now or in the future. If Congress and the
courts allow the CFPB’s original structure to remain intact, then it will become the
new benchmark for the next generation of “independent agencies.” The current
benchmark—the multi-member commission model pioneered in the late 19th
century and entrenched during the Progressive Era and the New Deal—is not
without faults of its own, but it has come to serve a reliable and worthy purpose in
modern administration, while remaining accountable to Congress.

I urge you not to allow that history to be discarded in favor of a new form of
“independent” agency that enjoys not only a measure independence from the
President, but also “full independence” from Congress, as the CFPB has repeatedly

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George Mason University; Council Member, the ABA’s Section of Administrative Law and
Regulatory Practice. The views expressed in this testimony are mine alone, and are not offered on
behalf of the Hoover Institution or any other organization.

2 PHH Corp. v. CFPB, 839 F.3d 1 (D.C. Cir. 2016). The panel’s decision was vacated when the
Court granted the CFPB’s petition for rehearing en banc, on Feb. 16, 2017. The case awaits en banc
re-argument.
No matter what the courts ultimately do on these issues, Congress itself ought to reform the CFPB in order to restore constitutional accountability to this unprecedented, unconstitutional agency.  

I. The CFPB is unprecedented and unconstitutional.

Administrative agencies are, in a sense, as old as our Republic itself. The Constitution expressly assumed that our government would have “Departments” accountable to the President. The First Congress legislated the first Departments into being, after significant debate over their nature and powers.

And we have had “independent” agencies since at least the mid-19th century, with the creation of the Steamboat Inspection Service in 1852 and the Interstate Commerce Commission in 1887. By FDR’s time, the basic structure of independent regulatory agencies was well-established, as were the problems inherent in vesting government power in “independent” agencies. But in that same period, beginning with the seminal case of Humphrey’s Executor, we have seen the Supreme Court settle into a well-established framework that allows for some measure of agency “independence,” within limits. And the Court recently made clear that this body

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3 See Part II, below, for examples of the CFPB boasting of its “full independence” from Congress.


5 U.S. Const., art. II, § 2 (providing for the appointment of “Officers” and empowering the President to require “the principal Officer in each of the executive Departments” to report to him “upon any subject relating to the Duties of their respective Offices”).


8 See Robert E. Cushman, The Independent Regulatory Commissions (1941).

9 See, e.g., Report of the President’s Committee on Administrative Management (1937) (“They constitute a headless ‘fourth branch’ of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers. They do violence to the basic theory of the American Constitution that there should be three major branches of the Government and only three.”)


of precedent marks the *outermost boundary* of what the Constitution can abide in terms of “independent” agencies.\(^\text{12}\)

As the Supreme Court repeatedly has observed on matters of constitutional structure, this long history is crucially important, for it helps to illuminate and delineate the principles and prudential judgments undergirding modern government’s balance between republican first-principles and administrative accommodations. As the Court explained in *Mistretta*, “traditional ways of conducting government give meaning to the Constitution.”\(^\text{13}\) Where constitutional lines are fuzzy, the Court often has “treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.”\(^\text{14}\)

To borrow Justice Oliver Wendell Holmes’s famous observation, such “experience” is “[t]he life of the law.”\(^\text{15}\) Or, to put it in the words of James Madison the substantive meaning of our Constitution’s implicit limits on agency independence has been “liquidated and ascertained” by nearly a century of judicial and legislative precedents.\(^\text{16}\)

But when President Obama and the 111th Congress created the CFPB, they cast aside this entire body of accumulated experience and legal doctrine, and instead created something unprecedented: an agency with not just a measure of independence from the President, but also complete independence from Congress, headed by a single man with effectively open-ended regulatory powers. This wholly unprecedented combination of structural independence and immense power goes beyond anything the Court has previously allowed; indeed, under existing precedent it is palpably unconstitutional.

**A. The CFPB is unconstitutional under *Morrison* and *Free Enterprise Fund*.**

First, and most simply, the Dodd-Frank Act violated the Constitution by making the CFPB Director independent from the President despite the CFPB’s

\(^{12}\) *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 514 (2010) (“While we have sustained in certain cases limits on the President’s removal power, the Act before us imposes a new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power. Congress cannot limit the President’s authority in this way.”).

\(^{13}\) *Mistretta v. U.S.*, 488 U.S. 361, 401 (1989) (quoting the *Steel Seizure Case*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)).


\(^{16}\) *Federalist 37* (James Madison).
immense powers. Under *Morrison v. Olson*, an officer can enjoy statutory “independence” from the President if and only if the officer enjoys only “limited jurisdiction and tenure and lack[s] policymaking or significant administrative authority.”

Here, by contrast, the Dodd-Frank Act gave the CFPB Director statutory independence from the President, yet also vested the Director with an immense delegation of power to regulate and prosecute whatever he deems to be an “unfair, deceptive, or abusive act or practice.” The D.C. Circuit panel aptly summarized the practical meaning of that power in its recent decision *PHH Corp. v. CFPB*: “In short, when measured in terms of unilateral power, the Director of the CFPB is the single most powerful official in the entire U.S. Government, other than the President. Indeed, within his jurisdiction, the Director of the CFPB can be considered even more powerful than the President. It is the Director’s view of consumer protection law that prevails over all others. In essence, the Director is the President of Consumer Finance.”

This grant of independent power goes far beyond the lines that the Court drew around the independent counsel statute in *Morrison*, and thus should be struck down by the courts—or, better still, reformed by Congress. As the D.C.

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17 *Morrison*, 487 U.S. at 691.

18 Specifically, during the CFPB Director’s five-year term the President cannot fire him at will; the President can fire him only for “inefficiency, neglect of duty, or malfeasance in office.” 12 U.S.C. § 5491(c)(3).


21 487 U.S. at 691.

22 At the same time, we must take care not to *overstate* the CFPB Director’s independence from the President. While his independence is significant, it is not unlimited. The Director can be removed for “inefficiency, neglect of duty, or malfeasance in office.” 12 U.S.C. § 5491(c)(3). The Supreme Court has recognized that this standard is capacious enough to allow an officer to be fired based on his policy positions. *Bowsher v. Synar*, 478 U.S. 714, 729 (1986) In that case, involving a statute empowering Congress, not the President, to fire an officer for “inefficiency, neglect of duty,” or “malfeasance,” the Court noted that “[t]hese terms are very broad and, as interpreted by Congress, could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will.”

Prominent scholars of all ideological stripes have endorsed this interpretation of for-cause removal statutes. See, e.g., Richard J. Pierce, Jr., *Morrison v. Olson, Separation of Powers, and the Structure of Government*, 1988 Sup. Ct. Rev. 1, 25 (1988) (“officers whose responsibilities include both policymaking and some significant role in adjudicatory proceedings can be the subject of ‘for cause’ limits on the President’s removal power, but ‘cause’ must include failure to comply with any valid policy decision made by the President or his agent”); Lawrence Lessig & Cass Sunstein, *The
Circuit panel observed, there is no precedent supporting the CFPB’s radical new form of independence.23

B. As the D.C. Circuit recognized in its recent panel decision, the CFPB’s lack of a multi-member commission structure exacerbates the CFPB’s constitutional flaws.

When the D.C. Circuit’s three-judge panel declared the CFPB’s structure unconstitutional, it focused not just on the independent CFPB’s immense powers, but also on the fact that those powers are vested in a single man—the CFPB Director—instead of a multi-member commission.24 In that part of its analysis, the D.C. Circuit panel intuited and vindicated a fundamental principle of “independent” agencies: namely, that such independence should be reserved only for “quasi judicial and quasi legislative” bodies that exercise power through multi-member deliberation rather than through unilateral action.25

While that principle had been occluded by the Supreme Court in Morrison,26 it was self-evident to the Congress and Supreme Court that first created and endorsed independent agencies.

1. The Court’s recognition of this principle is well known: it was the bedrock distinction upon which the Court based its seminal decision of Humphrey’s Executor, where the Justices upheld as constitutional the FTC Act provision granting FTC Commissioners a limited measure of independence from presidential control.27 Just years after famously declaring (in Myers) that purely executive

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24 PHH, 839 F.3d at 17–30.

25 Humphrey’s Ex’r, 295 U.S. at 624.

26 See Morrison, 487 U.S. at 689.

27 Id.
officers cannot be given independence from the President because they serve as his “alter ego,” the Court in *Humphrey’s Executor* distinguished the FTC, the Interstate Commerce Commission, and other multi-member commissions whose “members are called upon to exercise the trained judgment of a *body of experts* appointed by law and informed by experience.”

Those multi-member commissions can be made independent precisely because they are intended “to be nonpartisan” and to “act with entire impartiality.” By focusing on the structure and nature of independent commissions, the Court in *Humphrey’s Executor* “drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President’s constitutional powers, and those who are *members of a body* ‘to exercise its judgment without the leave or hindrance of any other official or any department of the government.’”

2. The Court’s approach reflected common-sense insight into the nature of single-headed bodies versus multi-member bodies. When a multi-member commission exercises its judgment, it is exercising *collective* judgment, in a process that differs starkly from single-leader agencies. Single-leader agencies, like the President himself, do not exemplify deliberation—they exemplify energy. As Alexander Hamilton observed in *Federalist* 70, the fact that “unity” in leadership “is conducive to energy will not be disputed. *Decision, activity, secrecy, and despatch will generally characterize the proceedings of one man* in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.”

Multi-member commissions present precisely the opposite qualities: decision and activity are replaced by deliberation; secrecy is replaced by transparency; despatch is replaced by friction. Like congressmen or appellate judges, the members

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29 *Humphrey’s Ex’r*, 295 U.S. at 624 (emphasis added); cf. *Standard Oil Co. v. U.S.*, 283 U.S. 235, 239 (1931) (cited in *Humphrey’s Ex’r*) (observing that the Interstate Commerce Commission’s order reflected a determination that “is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable, and such acquaintance is commonly to be found only in a *body of experts*”) (emphasis added).

30 *Humphrey’s Ex’r*, 295 U.S. at 624.


32 *Federalist* 70 (Alexander Hamilton).
of a commission debate one another, challenging each other’s positions and ultimately producing a collective judgment and perhaps dissenting opinions.

As former FTC Commissioner Joshua Wright has explained, placing a single director in control of an agency prevents “the agency from enjoying the benefits of deliberation which produces more informed judgments about the direction of regulatory policy.”33 “[M]ultimember structures,” on the other hand, foster collegiality and thereby increase “the potential for exposure to a variety of views and improved decisionmaking.”34

Or, as Professor Todd Zywicki observes, “collective governance can constrain overconfidence or cognitive errors by providing critical assessments and viewpoints of proposals,” and “can also constrain shirking, self-dealing, and capture by providing multilateral monitoring and raising the number of people who need to be corrupted for improper action to occur.”35

3. The Supreme Court and scholars are not alone in recognizing the character of multi-member commissions. Congress has recognized it for more than one and a quarter centuries, as evidenced by the fact that the bipartisan multimember commission structure has been the benchmark and premise for independent agencies since the 1880s.36 Congress’s consistent use of this structure reflects “a desired focus on expertise above partisanship; an effort to form a bipartisan solution to difficult policy issues; and a desire to foster a sense of legitimacy in the agency’s actions in the public’s eye,” as well as Congress’s desire to have “significant input” on the appointment of the commissions’ members.37

Indeed, Congress’s recognition of the special nature of independent commissions can be traced to the very creation of the Interstate Commerce Commission: Congress created that independent, multi-member commission just weeks before it ended the infamous Tenure of Office Act, the post-Civil-War act by which Congress had attempted to limit presidents’ ability to fire executive branch officers.38 The Congress that removed those limitations on the President’s power to fire executive officers took care to place those very same limitations on the

34 Id.
37 Id. at 982–983.
President’s control over the quasi-legislative, quasi-judicial Interstate Commerce Commission. In so doing, it signaled its understanding that those two types of agencies were of significantly different character.

Given that history, it is no surprise that then-Professor Warren originally envisioned the CFPB as a multi-member “Financial Product Safety Commission” modeled upon the Consumer Product Safety Commission.\(^{39}\) So did the original House legislation that gave rise to Dodd-Frank.\(^{40}\) So did the Senate bill originally proposed by Senators Schumer, Kennedy, and Durbin, titled the “Financial Product Safety Commission Act of 2009.”\(^{41}\)

So, for that matter, did the Obama Administration’s original blueprint for financial regulation reform, which urged that the new consumer financial regulatory agency “should be structured to promote its independence and accountability,” and thus should “have a Director and a Board”—and the “Board should represent a diverse set of viewpoints and experiences.”\(^{42}\)

All of those proposals reflected the basic presumptions of more than a century’s experience of independent agencies in our constitutional system. But in the end, President Obama and Congress created the radically different CFPB, an agency lacking all the internal expertise-producing checks and balances normally provided by an independent regulatory commission. When the D.C. Circuit panel declared the CFPB’s independence unconstitutional because the CFPB is not a multi-member commission, it was simply recognizing the principles and pragmatic judgments of more than a century of legislative and judicial precedent.

II. The CFPB’s “full independence” from Congress is a profoundly dangerous departure from constitutional government.

The CFPB’s independence from the President is not its only constitutional problem. Indeed, its independence from the President may not even be the CFPB’s most dangerous constitutional problem. The CFPB’s independence from the President is matched—perhaps exceeded—by its independence from Congress.

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\(^{39}\) Elizabeth Warren, “Unsafe at Any Rate,” Democracy: A Journal of Ideas, Summer 2007, p. 8; see also Oren Bar-Gill & Elizabeth Warren, Making Credit Safer, 157 U. Penn. L. Rev. 1, 98 (2008) (urging the creation of a Financial Product Safety Commission but warning that it should make policy through quasi-legislative rulemaking, not through after-the-fact litigation that is “too blunt to provide a comprehensive regulatory response to unsafe consumer credit products”).

\(^{40}\) H.R. 4173, 111th Cong., § 4103 (passed Dec. 11, 2009).

\(^{41}\) S. 566, 111th Cong., § 4(a)(2) (introduced Mar. 10, 2009).

The CFPB is not funded by appropriations. The Dodd-Frank Act preemptively severed that tie between Congress and the CFPB, by allowing the CFPB to fund itself through a statutory entitlement to \textit{hundreds of millions of dollars} annually from the Federal Reserve.\footnote{12 U.S.C. § 5497(a).} According to the CFPB, that entitlement will amount to \textbf{$646.2 million} in fiscal year 2017 alone.\footnote{CFPB, \textit{The CFPB Strategic Plan, Budget, and Performance Plan and Report} (Feb. 2016), p. 9, at http://files.consumerfinance.gov/f/201602_cfpb_report_strategic-plan-budget-and-performance-plan_FY2016.pdf.} Under Dodd-Frank, the House’s and Senate’s appropriations committees are \textit{prohibited} from even “review[ing]” the CFPB’s self-funded budget.\footnote{12 U.S.C. § 5497(a)(2)(C).}


When the CFPB used to boast about its “full independence” from Congress’s appropriations process, it seemed to think that this was a virtuous arrangement. But men much wiser—the Founding Fathers—recognized that it actually is a \textit{vicious} one. As James Madison stressed in \textit{Federalist 58}, Congress’s “power of the purse” is “the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.”\footnote{\textit{Federalist 58} (James Madison).} Alexander Hamilton agreed: while the President “holds the sword,” Congress “commands the purse.”\footnote{\textit{Federalist 78} (Alexander Hamilton).}

The courts repeatedly have recognized the crucial importance of Congress’s power of the purse—most recently the district court hearing the House of Representatives’ lawsuit challenging the Obama Administration’s unconstitutional expenditure of unappropriated funds: “appropriations are an integral part of our constitutional checks and balances, insofar as they tie the Executive Branch to the Legislative Branch via purse string”\footnote{\textit{U.S. House of Representatives v. Burwell}, 130 F. Supp. 3d 53, 59 (D.D.C. 2015).} and thus “maintain constitutional

The district court was elaborating a principle long held by the Supreme Court and D.C. Circuit. “The Framers placed the power of the purse in the Congress in large part because the British experience taught that the appropriations power was a tool with which the legislature could resist ‘the overgrown prerogatives of the other branches of government.”52 It is “a bulwark of the Constitution’s separation of powers among the three branches of the National Government,” and “particularly important as a restraint on Executive Branch officers.”53 It enables Congress to maintain oversight of “the wisdom and soundness of Executive action,” especially where judicial review of executive action is unavailable.54

This, too, is a point that scholars have long emphasized. Robert Cushman’s authoritative mid-century study of independent agencies placed Congress’s “control over commission finances” first and foremost among the tools for oversight of independent agencies: “The most constant and effective control which Congress can exercise over an independent regulatory commission is financial control. . . . Viewed broadly, the financial control exercised by Congress over the [independent] commissions is a necessary and desirable form of supervision.”55 Myriad other scholars have echoed this insight, then and now.56 So does the Government

50 Id. at 57–58.
51 Id. at 75.
52 *Noel Canning v. NLRB*, 705 F.3d 490, 510 (D.C. Cir. 2013) (quoting *Federalist 58*).
54 *Laird v. Tatum*, 408 U.S. 1, 15 (1972); *see also Public Citizen v. NHTSA*, 489 F.3d 1279, 1295 (D.C. Cir. 2007) (“To the extent Congress is concerned about Executive under-regulation or under-enforcement of statutes, it also may exercise its oversight role and power of the purse.”) (citing *Laird*).
Accountability Office, which begins its *Principles of Federal Appropriations Law* by reiterating that, “[t]hrough the Constitution, the framers provided that the legislative branch—the Congress—has power to control the government’s purse strings,” which “ensured that the government remained directly accountable to the will of the people,” and preserved for Congress “a key check on the power of the other branches.” It is nothing less than “the most important single curb in the Constitution on Presidential power.”

But most importantly, *Congress* has recognized this fundamental constitutional truth: “The appropriations process is the most potent form of congressional oversight, particularly with regard to the federal regulatory agencies.” And to that end, Congress today must take care to *reclaim* the power that it forfeited seven years ago.

The 111th Congress gave its power of the purse away for reasons of its own. But while an individual Congress, like an individual President, “might find advantages in tying [its] own hands,” subsequent Congresses must fight to reclaim that power, because “the separation of powers does not depend on the views of individual [Congresses].” As counsel to plaintiffs filing the original constitutional lawsuit against the CFPB, I spent years urging the courts to correct Congress’s mistake. Even now that I am no longer involved in that litigation, I still hope that the courts will correct that mistake—but I hope all the more that *Congress will correct it.* As Justice Jackson urged in the *Steel Seizure Case,* in the end “only Congress itself can prevent power from slipping through its fingers.”

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58 *Id.* at p. 1-5.
60 *Free Enter. Fund*, 561 U.S. at 497.
61 The D.C. Circuit panel that originally ruled against the CFPB in the *PHH case* declined to reach the appropriations issue, concluding that “[t]he CFPB’s exemption from the ordinary appropriations process is at most just ‘extra icing on’ an unconstitutional ‘cake already frosted.’” *PHH*, 839 F.3d at 36 n.16. I respectfully but strongly disagree with the panel’s minimization of the appropriations issue.
62 *Steel Seizure Case*, 343 U.S. 654 (Jackson, J., concurring) (emphasis added).
III. Director Cordray’s record exemplifies the very dangers inherent the CFPB’s unconstitutional structure.

As I noted earlier, Holmes famously observed that the “life of the law” is “experience.”63 And in this case, the last seven years’ experience confirms over and over again the Framers’ wisdom that Congress must maintain its power of the purse over the other branches of government. Director Cordray’s record as director of the CFPB exemplifies the dangers inherent in making a single-member agency independent of the President, and in freeing it from Congress’s appropriations.

Most startlingly, Director Cordray demonstrated astonishing contempt for this Committee generally, and Chairman Wagner specifically, when he bluntly refused to answer her straightforward and good-faith question as to the CFPB’s lavish spending on its building, in a March 2015 hearing:

Rep. Wagner: Someone made a decision to spend upwards . . . of $215.8 million dollars, and you’re telling me there’s no record, no one responsible—

Director Cordray: I didn’t say that.

Rep. Wagner: Then who is it? What individual—

Director Cordray: No, I mean, there’s lots of records on this, including my reaffirmation of the decision . . .

Rep. Wagner: Who signed off? Who gave the authorization for such an incredible—

Director Cordray: And why does that matter to you?

Rep. Wagner: Because it’s $215 million in taxpayers’ money. That’s why it matters to me.64

Such basic questions remain unanswered—not simply as to who Director Cordray authorized to undertake such lavish renovations, but also as to why such opulence was actually necessary for the CFPB’s efficient execution of its statutory responsibilities.65 The same could be said of the CFPB’s millions of dollars in

64 Video of this exchange is available at https://youtu.be/5IxSfJ638cs.
65 See also Richard Pollock, “CFPB’s renovation costs skyrocket to $216 million; IG sees ‘no sound basis’ for it,” Washington Examiner (July 2, 2014); Richard Pollock, “No space in CFPB’s $139m renovated headquarters for a third of its employees,” Washington Examiner (Mar. 20, 2014).
spending on advertising, or any of the other matters on which Director Cordray has long resisted answering this Committee’s inquiries.

Meanwhile, Director Cordray’s tenure has been marked by other major failings, such as widespread complaints of racial discrimination within his agency.

And his failings are not merely acts of omission. There are also acts of commission, such as his decision to take the ALJ’s $6.4 million fine against PHH Corporation and increase it to a staggering final sum of $109 million, an act interpreted by some observers as a preemptive warning to any other defendants who might consider filing an administrative appeal of an ALJ decision in a CFPB enforcement case. These are precisely the sorts of excessive, aggressive actions that one might expect an independent agency to undertake when it is freed from Congress’s appropriations-backed oversight—the “overgrown prerogatives” against which James Madison and the other Framers hoped that Congress would protect us against, using its power of the purse.

IV. The CFPB’s Excesses Hurt Small Banks Most of All.

When I was co-counsel in CFPB litigation, I represented the State National Bank of Big Spring, Texas. I saw how that the CFPB’s excesses fall most heavily on community banks and other small companies. Unlike the biggest banks, community banks cannot afford armies of lawyers, lobbyists, and compliance officers to challenge, change, or comply with CFPB regulations. Indeed, the biggest banks know this: JPMorgan Chase’s CEO told analysts in 2013 that new regulations could

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67 See, e.g., Rep. Randy Neugebauer, “A $447 Million Consumer Alert,” Wall St. J., Sept. 19, 2012 (“My House Subcommittee on Oversight and Investigations has tried unsuccessfully to gain greater visibility into the bureau's budgetary planning process. I have repeatedly asked to review the bureau's statutorily required financial operating plans and forecasts. These requests were denied. I have repeatedly requested that the bureau expand its Fiscal Year 2013 budget justification for $447,688,000 to more than a scanty 25 pages. These requests were denied.”)


69 See, e.g., Evan Weinberger, “Cordray Hikes PHH Penalty to $109M in 1st Appeal Decision,” Law360.com (June 4, 2015) (“the decision provides a useful, if painful, lesson for other firms considering CFPB administrative appeals”).

70 Federalist 58.
be the “moat” that makes the industry (in the analysts’ words) “more expensive and
tend to make it tougher for smaller players to enter the market.”

Goldman Sachs’s CEO made the same point two years later, in 2015: “More
intense regulatory and technology requirements have raised the barriers to entry
higher than at any other time in modern history,” he told an investor conference.
“This is an expensive business to be in, if you don’t have the market share in scale.
Consider the numerous business exits that have been announced by our peers as
they reassessed their competitive positioning and relative returns.”

And the facts suggest that the Jamie Dimon’s and Lloyd Blankfein’s
predictions were well founded. As the Mercatus Center, AEI, and others have
reported, the years since Dodd-Frank have witnessed significant consolidation in
the banking industry, as community banks give up and merge. While too many in
Congress and elsewhere simply assume that all regulation necessarily hurts Wall
Street, the fact remains that Dodd-Frank truly was “the biggest kiss” that
Washington could have given to Wall Street, at least in terms of increasing the
biggest banks’ advantages over smaller competitors.

Restoring the Constitution’s fundamental principles of separated powers, and
its checks and balances, will benefit all Americans. But it will first and foremost
benefit small banks and the communities and people who depend on them.

Thank you for the opportunity to testify today.

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