# "THE CFPB'S UNCONSTITUTIONAL DESIGN"

**Testimony of**
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**The Hoover Institution**[1]

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

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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,[2] 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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[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.

boasted.[3] 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.[4]

## 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.[5] The First Congress legislated the first Departments into being, after significant debate over their nature and powers.[6]

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.[7] By FDR's time, the basic structure of independent regulatory agencies was well-established,[8] as were the problems inherent in vesting government power in "independent" agencies.[9] 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,"[10] within limits.[11] 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.

[4] Some of the arguments presented in this testimony reflect arguments that I previously made as co-counsel for private parties challenging the CFPB's constitutionality in a pending federal case. *See State National Bank v. Lew*, 795 F.3d 48 (D.C. Cir. 2015), *on remand*, 197 F. Supp. 3d 177 (D.D.C. 2016); *see also PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016) (amicus brief); *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (amicus brief). I am no longer counsel in that case.

[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").

[6] *See*, *e.g.*, Fergus M. Bordewich, *The First Congress* (2016), pp. 58–64, 95–98.

[7] 10 Stat. 61 (Aug. 30, 1852) (establishing the Steamboat Inspection Service); 24 Stat. 379 (Feb. 4, 1887) (establishing the Interstate Commerce Commission). *See also* Adam J. White, "The Administrative State and the Imperial Presidency," in Gary J. Schmitt *et al.*, *The Imperial Presidency and the Constitution* (2017) (summarizing the history of early administration).

[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.")

[10] *Humphrey's Ex'r v U.S.*, 295 U.S. 602 (1935).

[11] *Wiener v. U.S.*, 357 U.S. 349 (1958); *Morrison v. Olson*, 487 U.S. 654 (1988).

of precedent marks the *outermost boundary* of what the Constitution can abide in terms of "independent" agencies.[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."[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."[14]

To borrow Justice Oliver Wendell Holmes's famous observation, such "experience" is "[t]he life of the law."[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.[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

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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)).

14 *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014).

15 Oliver Wendell Holmes Jr., *The Common Law* (1881), p. 1.

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."[17]

Here, by contrast, the Dodd-Frank Act gave the CFPB Director statutory independence from the President,[18] 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."[19] 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."[20]

This grant of independent power goes far beyond the lines that the Court drew around the independent counsel statute in *Morrison*,[21] and thus should be struck down by the courts—or, better still, reformed by Congress.[22] 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).

19 12 U.S.C. § 5531(a).

20 *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016) (panel decision), *order vacated and en banc reh'g granted*, Feb. 16, 2017.

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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*President and the Administration*, 94 Colum. L. Rev. 1, 110–111 (1994); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive* (2008), p. 423.

I believe this to be a better construction of the statute than that provided in other dicta by the Supreme Court and D.C. Circuit, assuming a much more aggressive construction. *Free Enter. Fund*, 561 U.S. at 502; *PHH*, 839 F.3d at 15. While the for-cause removal standard prohibits a President for firing an independent officer without actually identifying *any* specific policy disagreement or other cause for removal, the Court has never made a holding as constrictive as the courts' dicta in *Free Enterprise Fund* or *PHH*. *See Humphrey's Ex'r*, 295 U.S. at 619; *Wiener*, 357 U.S. at 350.

[23] *PHH*, 839 F.3d at 18–20 (rejecting the CFPB's attempts to find precedent in the Social Security Administration, the Office of Special Counsel, and the Federal Housing Finance Agency); *see also* C. Boyden Gray & John Shu, "The Dodd-Frank Wall Street Reform & Consumer Protection Act of 2010: Is It Constitutional?," *Engage* (Nov. 16, 2010) (examining the CFPB's unprecedented degrees of independence), *at* http://www.fed-soc.org/publications/detail/the-dodd-frank-wall-street-reform-consumer-protection-act-of-2010-is-it-constitutional.

[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,"[28] 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.'"[29]

Those multi-member commissions can be made independent precisely because they are intended "to be nonpartisan" and to "act with entire impartiality."[30] 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.'"[31]

**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."[32]

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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[28] *Myers v. U.S.*, 272 U.S. 52, 133 (1926).

[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.

[31] *Wiener v. U.S.*, 357 U.S. 353 (1958) (emphasis added). The Court also alluded to such distinctions in its seminal "nondelegation" case, where it suggested that Congress can more safely delegate broad powers to expert multimember commissions like the Interstate Commerce Commission and the Federal Communication Commission's predecessor. *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 539–540 (1935).

[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

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[33] Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: The Two Policies at War With Each Other*, 121 Yale L.J. 2216, 2260 (2012).

[34] *Id.*

[35] Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 Geo. Wash L. Rev. 856, 897–98 (2013).

[36] Ronald J. Krotoszynski, Jr. *et al.*, *Partisan Balance Requirements in the Age of New Formalism*, 90 N.D. L. Rev. 941, 962 *et seq.* (2015).

[37] *Id.* at 982–983.

[38] *See* Act of March 3, 1887, 24 Stat. 500 (repealing the Tenure of Office Act).

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).

[42] U.S. Dep't of the Treas., *Financial Regulatory Reform: A New Foundation: Financial Supervision and Regulation* (2009), p. 58 (emphasis added).

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 *hundreds of millions of dollars* annually from the Federal Reserve.[43] According to the CFPB, that entitlement will amount to **$646.2 million** in fiscal year 2017 alone.[44] Under Dodd-Frank, the House's and Senate's appropriations committees are *prohibited* from even "review[ing]" the CFPB's self-funded budget.[45]

That is a profoundly dangerous provision. When President Obama and the 111th Congress enacted it as part of Dodd-Frank, they gave the CFPB "full independence" from Congress. That is not my characterization—that is the CFPB's *own* characterization, repeated in the agency's early annual reports.[46]

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 *vicious* one. As James Madison stressed in *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."[47] Alexander Hamilton agreed: while the President "holds the sword," Congress "commands the purse."[48]

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"[49] and thus "maintain constitutional

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43 12 U.S.C. § 5497(a). Dodd-Frank defines that entitlement as a percentage of the Federal Reserve's operating costs.

44 CFPB, *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.

45 12 U.S.C. § 5497(a)(2)(C).

46 *See*, *e.g.*, CFPB, *The CFPB Strategic Plan, Budget, and Performance Plan and Report* (Mar. 2014), p. 89, *at* http://files.consumerfinance.gov/f/strategic-plan-budget-and-performance-plan-and-report-FY2013-15.pdf; CFPB, *Consumer Financial Protection Bureau Strategic Plan, FY2013–FY2017* (Apr. 2013), p. 36, *at* http://files.consumerfinance.gov/f/strategic-plan.pdf.

47 *Federalist 58* (James Madison).

48 *Federalist 78* (Alexander Hamilton).

49 *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 59 (D.D.C. 2015).

equilibrium between the Executive and the Legislature."[50] *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 57–58 (D.D.C. 2015). "[W]hen the appropriations process is itself circumvented, Congress finds itself deprived of its constitutional role."[51]

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

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[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*).

[53] *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1347 (D.C. Cir. 2012).

[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*).

[55] Cushman, *The Independent Regulatory Commissions*, pp. 674–675.

[56] *See*, *e.g.*, Arthur W. Macmahon, *Congressional Oversight of Administration: The Power of the Purse [Part I]*, 58 Pol. Sci. Q. 161, 173 (1943) ("Through [appropriations] is accomplished most of the oversight that Congress exercises over administration."); Kate Sith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1360 (1988) ("Appropriations limitations constrain every government action and activity and, assuming general compliance with legislative prescriptions, constitute a low-cost vehicle for effective legislative control over executive activity."); Jack M. Beermann, *Congressional Administration*, 43 San Diego L. Rev. 61, 84 (2006) ("One way in which Congress has supervised agencies with great particularity, both formally and informally, is through the appropriations process"); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 816 (2013) ("Congress primarily exerts influence over agency heads . . . through the power of the purse. Thus 'an agency has an incentive to shade its policy choice toward the legislature's ideal point to take advantage of that inducement.'" (alteration omitted)

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."[57] It is nothing less than "the most important single curb in the Constitution on Presidential power."[58]

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."[59] 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]."[60] 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.[61] As Justice Jackson urged in the *Steel Seizure Case*, in the end "only *Congress itself* can prevent power from slipping through its fingers."[62]

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(quoting Randall L. Calvert *et al.*, *A Theory of Political Control and Agency Discretion*, 33 Am. J. Pol. Sci. 588, 602 (1989)); Joseph Cooper & Ann Cooper, *The Legislative Veto & the Constitution*, 30 Geo. Wash. L. Rev. 467, 491 (1961) ("Congress constantly uses the appropriations bills to control and supervise executive decision-making with regard to both policy and operations."); *cf.* Edward S. Corwin, *The War & the Constitution: President & Congress*, 37 Am. Pol. Sci. Rev. 18, 24 (1943) ("[I]n its control of the purse-strings Congress possesses its most effective check on Presidential power.").

[57] GAO, *Principles of Federal Appropriations Law* (4th ed. 2016), vol. 1, pp. 1-4 to 1-5.

[58] *Id.* at p. 1-5.

[59] S. Comm. on Gov't Operations, 95th Cong. 1st Sess., *Study on Federal Regulatory Agencies* (1977), vol. 2, p. 42.

[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—
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> *Director Cordray*: I didn't say that.
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> *Rep. Wagner*: Then who is it? What individual—
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> *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—
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> *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

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[63] Oliver Wendell Holmes Jr., *The Common Law* (1881), p. 1.

[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,[66] or any of the other matters on which Director Cordray has long resisted answering this Committee's inquiries.[67]

Meanwhile, Director Cordray's tenure has been marked by other major failings, such as widespread complaints of racial discrimination within his agency.[68]

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 an CFPB enforcement case.[69] 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.[70]

## 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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66 Yuka Hayashi & Brody Mullins, "Consumer-Finance Agency, Under Fire, Accelerates Ad Spending," *Wall St. Journal* (June 12, 2016).

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.")

68 Rachel Witkowski, "CFPB Staff Evaluations Show Sharp Racial Disparities," *Am. Banker* (Mar. 6, 2014); GAO, *CFPB: Additional Actions Needed to Support a Fair and Inclusive Workplace*, GAO-16-61 (May 2016) at p. 23; Kelly Riddell, "Bureaucrats gone wild: Feds describe racial hostility, discrimination inside new Obama agency," *Washington Times* (Aug. 27, 2014); Testimony of Angela Martin, House Fin. Servs. Comm., Oversight & Investigations Subcomm. (Apr. 2, 2014) (emphasis added), *at* http://financialservices.house.gov/uploadedfiles/hhrg-113-ba09-wstate-amartin-20140402.pdf.

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."[71]

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."[72]

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.[73] 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.[74]

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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[71] Citi Research, *JP Morgan Chase & Co. (JPM): Meeting Notes w/CEO Jamie Dimon; Reiterate Buy and $53 Target as Solid Execution Drives Double-Digit Returns in 2013* (Feb. 3, 2013); *quoted in* John Carney, "Surprise! Dodd-Frank Helps JPMorgan Chase," *CNBC* (Feb. 4, 2013), http://www.cnbc.com/id/100431660; *see also* Hugh Son, "Dimon Says Banks to Gain as Crisis-Era Rules Sting Poor," *Bloomberg* (Apr. 10, 2014) (quoting 2014 annual letter).

[72] Editorial, "Regulation Is Good for Goldman," *Wall St. Journal* (Feb. 11, 2015).

[73] Hester Peirce et al., *How Are Small Banks Faring Under Dodd-Frank?*, Mercatus Working Paper No. 14-05 (Feb. 2014); Tanya D. Marsh & Joseph W. Norman, AEI, *The Impact of Dodd-Frank on Community Banks* (May 2013).

[74] C. Boyden Gray & Adam J. White, "The Biggest Kiss," *Weekly Standard* (Oct. 29, 2012).