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A BRIEF ESSAY ON THE CONSTITUTIONALITY OF THE CONSUMER FINANCIAL PROTECTION BUREAU

ERIC PEARSON†

I. INTRODUCTION

In 2008, the domestic economy of the United States experienced a severe downturn, prompted by a liquidity crisis triggered by a proliferation of non-performing mortgages.¹ This so-called “economic meltdown” devastated the finances of the nation.² Thousands of homeowners found themselves evicted from their residences. Unemployment floated into double-digits.³ Stock market valuations declined dramatically.⁴

After initial rounds of finger-pointing,⁵ the federal government responded to the crisis with alacrity. The President and Congress first moved to restore liquidity in the markets by enacting the Toxic Assets Relief Program.⁶ Thereafter, they launched a massive govern-

† Eric Pearson is an Associate Dean and Professor at Creighton University School of Law.

1. See, e.g., Juscelino F. Colares, *Global Imbalances and Liquidity-Induced Bubbles: Reflections on the Great Recession and the Need for International Monetary Reform*, 60 SYRACUSE L. REV. 603, 605 (2010).

2. By one estimate, almost \$11 trillion of personal wealth evaporated. In addition to a huge drop in GDP, real estate wealth in the amount of \$3.4 trillion was lost as well as stock market wealth approximating \$7.4 trillion. Margaret M. Blair, *Financial Innovation, Leverage, Bubbles and the Distribution of Income*, 30 REV. BANKING & FIN. L. 225, 233-34 (2010) (reporting on estimates of the Pew Financial Reform Project).

3. “The unemployment rate rose from a low of 4.4% in May 2007 to a high of 10.0% in October 2009, for a 29-month increase of 5.6 percentage points. This far exceeded the largest previous postwar increase over a similar duration, 3.9 percentage points in 1973 to 1975.” Approximately, 4.5 million jobs were lost in the six-month period from late 2008 into 2009. Jesse Rothstein, *The Labor Market Four Years into the Crisis: Assessing Structural Explanations*, 65 INDUS. & LAB. REL. REV. 467 (2012).

4. One broad indicator of valuations, the Dow Jones Industrial Average Index, for example, closed at 11,382.26 on July 1, 2008. A year later, it closed at 8,504.06. Dow Jones Industrial Average Index-Historical Prices, <http://quotes.wsj.com/DJIA/index-historical-prices> (insert “July 1, 2008 to July 1, 2009” in “Historical Prices” date range boxes).

5. Blame for the crisis was variously attributed to greed in the financial community, the widespread use of collateralized debt obligations, low savings rates, inaccurate assessments by credit ratings agencies, perceptions of “too-big-to-fail,” inadequate government regulation, lack of enforcement, trade deficits, and more.

6. See, e.g., Brent Horton & Jack Vrablik, *The Troubled Asset Relief Program (TARP): Uses and Abuses*, 29 BANKING & FIN. SERVS. POL’Y REP. 24, August 2010 (“... TARP’s stated purpose was to restore liquidity . . . to the financial system of the United

mental spending program in hopes of stimulating economic recovery or at least reducing the duration and severity of the recession.⁷

Having addressed the immediate dilemma, albeit largely unsuccessfully,⁸ the federal government next turned to the larger question of how to avoid future economic collapses. It concluded that risks of a repeat market failure would decline if the government would establish an exceedingly more elaborate and comprehensive supervision and regulation of financial markets.⁹ The regulatory package that ultimately emerged installed tighter controls on credit, loan origination and securitization, derivatives sales and more. It also modified international regulatory standards and revived the capacity of states to join in the regulatory enterprise. Consuming hundreds of pages in the Public Laws of the nation and comprising sixteen titles, the new statute enacted for these grand purposes was the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank").¹⁰

As part of its effort to reorganize and consolidate federal regulatory oversight, Dodd-Frank modifies the federal regulatory superstructure. Whereas, pre-Dodd-Frank, regulation of the financial sector was splintered among as many as six agencies,¹¹ themselves administering at least sixteen consumer protection laws,¹² post-Dodd-Frank, there would be a single agency with predominant authority.

States."). See also, Emergency Economic Stabilization Act of 2008 § 2(1), 12 U.S.C. § 5201(1).

7. Colares, *supra* note 1, at 1. "Once expectations of ever rising real estate prices collapsed and the crisis arrived, policy response was strong, initially counting on a certain bipartisan support, to wit the Bush and Obama Administrations' Troubled Asset Relief Program (TARP) and the successive rounds of Federal Reserve agency debt purchases that began in the fall of 2008. Together with a zero-interest policy, this is now the biggest liquidity injection in modern history." *Id.*

8. The major goal of the stimulus program was to improve employment numbers in the short term. Early on, the Obama Administration had promised the stimulus program would create 3.5 million new jobs. The Congressional Budget Office announced in November, 2011, however, that the program had created "far fewer." According to the *Weekly Standard* magazine, each new job that was created cost taxpayers \$278,000. Paul Scicchitano, *Budget Office: Obama's Stimulus Failed on Jobs*, NEWSMAX (Nov. 23, 2011, 12:34 PM) <http://www.newsmax.com/Newsfront/obama-stimulus-fewer-jobs/2011/11/23/id/419003>.

9. U.S. DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION, at 2-5, available at http://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf.

10. 12 U.S.C. §§ 5301-5641 (2012).

11. These included the Federal Reserve, the Office of Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the Federal Trade Commission, and the National Credit Union Administration. CONG. RESEARCH SERV., FINANCIAL REGULATORY REFORM: ANALYSIS OF THE CONSUMER FINANCIAL PROTECTION AGENCY (CFPA) AS PROPOSED BY THE OBAMA ADMINISTRATION AND H.R. 3126, at 3 (July 17, 2009), available at <http://fpc.state.gov/documents/organization/126833.pdf>.

12. See *id.* at 3-4 (listing the sixteen statutes). See also U.S. DEP'T OF THE TREASURY, *supra* note 9, at 3-4.

Among the duties assigned to this new agency would be the responsibility to affirmatively and vigorously protect consumers of financial products. The initial call for such a consumer-focused federal agency came from Elizabeth Warren, then a professor at Harvard Law School, and at this writing a United States Senator from the State of Massachusetts. In a 2007 article, she bemoaned the dearth of protection available for individuals when they deal with banks and other financial entities.¹³ As she provocatively put it, consumers buying small household appliances enjoyed more sophisticated protection from fraudulent and abusive sellers than did consumers of real property and securities.¹⁴ The juxtaposition was palpable: why should a consumer of a financial product – a product that may be critical to that individual's long term fiscal solvency – not receive as much legal protection as enjoyed by a Walmart shopper? Ms. Warren traced the problem to the “current regulatory jumble.”¹⁵

Ms. Warren's thesis found wide favor in the Department of the Treasury, which in 2009 joined the call for precisely such an agency. The Department argued for an independent bureau with “broad jurisdiction to protect consumers . . .”¹⁶ to be run by a Director and a Board.¹⁷ It proposed to invest such an agency with “stable robust funding” the source of which, the Department speculated, might be from fees on transactions and firms in the financial sector.¹⁸ Treasury suggested as well that the new agency be provided “sole authority” to interpret a wide range of statutes¹⁹ and power to promulgate rules to implement those statutes.²⁰ The new agency would also enjoy a full compendium of “supervisory, examination and enforcement” authorities.²¹ In line with these proposals, Dodd-

13. Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY, Summer 2007, at 8, 8-10, available at <http://www.democracyjournal.org/pdf/5/Warren.pdf>.

14. *Id.* at 8.

15. *Id.* at 16.

16. U.S. DEP'T OF THE TREASURY, *supra* note 9, at 14.

17. *Id.* at 58.

18. *Id.*

19. *Id.* The statutes mentioned were the Truth in Lending Act (TILA), Home Ownership and Equity Protection Act (HOEPA), Real Estate Settlement and Procedures Act (RESPA), Community Reinvestment Act (CRA), Equal Credit Opportunity Act (ECOA), and Home Mortgage Disclosure Act (HMDA), and the Fair Debt Collection Practices Act (FDCPA).

20. *Id.*

21. *Id.* at 59. In addition, Treasury also urged the creation of a “Financial Services Oversight Council” to serve an advisory and informational role in the regulatory enterprise. *Id.* at 10. The Council would boast an impressive membership. *Id.* “The membership of the Council should include (i) the Secretary of the Treasury, who shall serve as the Chairman; (ii) the Chairman of the Board of Governors of the Federal Reserve System; (iii) the Director of the National Bank Supervisor; (iv) the Director of the Consumer Financial Protection Agency; (v) the Chairman of the S.E.C.; (vi) the Chairman of the CFTC; (vii) the Chairman of the FDIC; and (viii) the Director of the Federal Housing

Frank established the Consumer Financial Protection Bureau (“CFPB”),²²

It also created a “Financial Stability Oversight Council” (“FSOC”) in line with other recommendations of the Department of the Treasury (“Treasury”).²³

In configuring the CFPB, Congress drew liberally from Treasury’s recommendations but departed from those recommendations in certain significant particulars. First, the CFPB would be an executive rather than an independent agency,²⁴ which means the agency would be led by a single person rather than by a board or panel.²⁵ That per-

Finance Agency (FHFA).” For a more detailed iteration of the events leading up to enactment of the statute see CONSUMER FIN. PROT. BUREAU, *History of the CFPB* <http://www.cfpbspotlight.com/about-the-cfpb/history-of-the-cfpb> (last visited July 25, 2013).

22. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5491 (2012). The CFPB boasts the following functional units and offices:

- A research unit: “[F]unctions shall include researching, analyzing, and reporting on—(A) developments in markets for consumer financial products or services . . . (B) access to fair and affordable credit for traditionally underserved communities; (C) consumer awareness, understanding, and use of disclosures and communications regarding consumer financial products or services; (D) consumer awareness and understanding of costs, risks, and benefits of consumer financial products or services” 12 U.S.C. § 5493(b)(1) (2012);
- A community affairs unit: “[F]unctions shall include providing information, guidance, and technical assistance regarding the offering and provision of consumer financial products or services to traditionally underserved consumers and communities.” *Id.* § 5493(b)(2);
- A complaints unit: “[F]unctions shall include establishing a single, toll-free telephone number, a website, and a database . . . to facilitate the centralized collection of, monitoring of . . . consumer complaints regarding consumer financial products or services.” *Id.* § 5493(b)(3);
- An Office of Fair Lending and Equal Opportunity: Powers include “providing oversight and enforcement of Federal laws intended to ensure . . . nondiscriminatory access to credit . . .” *Id.* § 5493(c);
- An Office of Financial Education: “[R]esponsible for developing and implementing initiatives intended to educate and empower consumers to make better informed financial decisions.” *Id.* § 5493(d);
- An Office of Service Members Affairs: “[R]esponsible for developing and implementing initiatives for service members and their families . . . to educate and empower [them] to make better [financial decisions].” *Id.* § 5493(e);
- An Office of Financial Protection for Older Americans: Functions include “develop[ing] goals for programs that provide seniors financial literacy and counseling . . . help[ing] seniors recognize warning signs of unfair, deceptive, or abusive practices.” *Id.* § 5493(g); and
- An Agency Ombudsman: Responsible for “assur[ing] that safeguards exist to encourage complainants to come forward and preserve confidentiality.” *Id.* § 5493(a)(5).

23. *Id.* § 5321.

24. *Id.* § 5491(a)(2012). The legislation describes the CFPB as an “independent bureau.” *Id.* (emphasis added). However, this language is best read as indicating the agency would be separate and distinct from the Federal Reserve, of which it is formally a part. *See id.*

25. The first appointed Director is Richard Cordray, a former Member of the U.S. House of Representatives and Attorney General of the State of Ohio. There has been

son, moreover, would be removable by the President for good cause only.²⁶ Second, Dodd-Frank “one-upped” the Treasury Department’s proposal for stable agency funding by providing for the CFPB to be entirely self-funding. As currently configured, the agency allocates funds to itself essentially in amounts it chooses.²⁷ Henceforth, the new agency would not be “at the mercy of a political dogfight for its funding.”²⁸ Third, while affording the new agency a broad authority to interpret the financial statutes it administers, the legislation once again exceeds the Treasury’s recommendations by expressly mandating federal courts to review CFPB’s exercises of its interpretive authority more deferentially than they might otherwise do.²⁹

These add-on design features were intended to insulate the CFPB from what is known as “agency capture.” Agency capture occurs when forces external to an agency are positioned to influence to their advantage the agency’s policy formulations. By definition, when agency capture occurs, the affected agency becomes unable to promote the public good. Agency capture has been a real and persistent concern for many years.³⁰ Usually, external forces implicated in agency capture scenarios are non-governmental groups characterized as “special interests.” Congress was clearly mindful of special interests as it assembled the Dodd-Frank legislation.³¹ But in this instance Congress was concerned as well about undue influence from the federal government itself. The Democratic Party-controlled Congress, correctly or incorrectly, worried that Republican Party-controlled Congresses of future years might move to undo the CFPB and reverse any gains it might have made.

The end result is a new agency like no other. Is the CFPB’s assembly of empowerments and immunities wise? Not everyone thinks so, as one commenter termed it, “. . . if one were to sit down and design a policymaking agency that embodied all of the pathologies

significant controversy regarding this appointment, for reasons both political and constitutional. See, C. Boyden Gray & Jim R. Purcell, *Why Dodd-Frank Is Unconstitutional*, WALL ST. J., June 22, 2012, at A17 (arguing that the so-called intra-session appointment of Mr. Cordray fails to qualify as a constitutional “recess appointment” not needing Senate advice and consent); see also, *Canning v. NLRB*, 705 F.3d 490, 505-506 (D.C. Cir. 2013) (holding that a Presidential “recess appointment” accomplished in the same fashion as the appointment of Mr. Cordray was unconstitutional).

26. 12 U.S.C. § 5491(c)(3) (2012).

27. See *infra* notes 57-82 and accompanying text.

28. Michael C. Nissim-Sabat, *Capturing This Watchdog? The Consumer Financial Protection Bureau Keeping the Special Interests Out of Its House*, 40 W. ST. U. L. REV. 1, 21 (2012).

29. See *infra* notes 97-107 and accompanying text.

30. See, e.g., Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1060-63 (2007).

31. See, e.g., Nissim-Sabat, *supra* note 28, at 16.

scholars of regulation have identified over the past several decades, one could hardly do better than the CFPB”³²

Is this assembly constitutional? There are four features that call constitutionality into question. They are (a) the agency’s broad empowerment; (b) its relative immunity from Congressional oversight, courtesy of the agency’s self-funding authority; (c) its relative immunity from executive oversight, courtesy of the Director’s removal protections; and (d) its relative immunity from judicial oversight, courtesy of the requirement for courts to review the CFPB’s statutory interpretations with high deference. As a group, agencies have often been called the “Fourth Branch” of government. They have secured this moniker because they can operate to some degree independent of the three constitutional branches of government. If agencies as a group are the “Fourth Branch,” it may be that the CFPB can lay claim to a status of “Fourth Branch Once Removed.” If it is too far “removed,” if it is de facto a satellite in its own orbit, a “junior varsity government” in its own right, it surely violates the Constitution. The next sections of this Article discuss these four features.

II. ISSUES OF CONSTITUTIONALITY

A. BROAD EMPOWERMENT

Established as an “independent bureau” within the Federal Reserve System,³³ the Consumer Financial Protection Bureau (“CFPB”) boasts rulemaking, adjudication, and so-called guidance powers to be used “as may be necessary or appropriate to enable the [CFPB] to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.”³⁴ Even a cursory review of this language makes obvious the generous breadth of discretion it proffers. First, the language authorizes regulation limited only by the CFPB determination that the regulatory initiative is “necessary or appropriate” “Necessary” means “required” or “unavoidable.”³⁵ “Appropriate,” means “suitable” while “suitable” means “unobjectionable.”³⁶ All of these supposed limits on exercises of dis-

32. Todd Zywicki, *Striking the Right Balance: Investor and Consumer Protection in the New Financial Marketplace: The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856, 858-59 (2013).

33. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. 5491(a) (2012). Section 5491 stipulates that the CFPB shall be “considered an Executive agency” as that term is defined in 5 U.S.C. § 105. 12 U.S.C. § 5491(a). 5 U.S.C. § 105 defines “Executive agency” as “an Executive department, a Government corporation, and an independent establishment.” 5 U.S.C. § 105 (2012).

34. 12 U.S.C. § 5512(b)(1) (2012).

35. New Webster’s Dictionary and Thesaurus 668 (2d ed. 1992).

36. New Webster’s Dictionary and Thesaurus 45 (2d ed. 1992).

cretionary authorities are hardly limits at all. Would an agency ever endeavor to regulate “unsuitably,” for example? The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010³⁷ (“Dodd-Frank”) in other words, frees the agency to formulate standards and policies to govern the financial sector of the domestic economy essentially as it wishes. When it does so by rule, it need not consult the Congress.

In addition to broadly enabling affirmative regulation of the financial sector as “necessary or appropriate,” Dodd-Frank authorizes the CFPB to “conditionally or unconditionally exempt any class of covered persons, service providers, or consumer financial products or services, from any provision of this title, or from any rule issued under this title, as the [CFPB] determines necessary or appropriate to carry out the purposes and objectives of this title . . .” assuming the agency takes into consideration certain factors listed in the following subsection.³⁸ Thus, the agency can regulate as it wishes, or choose to not regulate as it wishes.

The agency may regulate, or not, moreover, with respect to a breathtakingly large swath of the private economy. Dodd-Frank assigns the CFPB with responsibility to administer “the Federal consumer financial laws . . .”³⁹ The phrase “Federal consumer financial law” means “the provisions of this title, the enumerated consumer laws, the laws for which authorities are transferred under subtitles F and H, and any rule or order prescribed by the [CFPB] under this title, an unenumerated consumer law, or pursuant to the authorities transferred under subtitles F and H.”⁴⁰ “Enumerated consumer laws” are eighteen in number⁴¹ and comprise the heart and soul of federal regulation of the financial sector of the economy. “[L]aws for which authorities are transferred under subtitle[s] F . . .” are another matter.⁴² Subtitle F speaks in terms of transfer of “consumer financial protec-

37. 12 U.S.C. § 5301-5641 (2012).

38. 12 U.S.C. § 5512(b)(3)(A) (2012).

39. *Id.* § 5491(a).

40. *Id.* § 5481(14). Expressly omitted from the definition is the Federal Trade Commission Act. *Id.*

41. *Id.* § 5481(12) (listing the eighteen enumerated consumer laws: the Alternative Mortgage Transaction Parity Act of 1982; the Consumer Leasing Act of 1976; the Electronic Fund Transfer Act; the Equal Credit Opportunity Act; the Fair Credit Billing Act; the Fair Credit Reporting Act; the Home Owners Protection Act of 1998; the Fair Debt Collection Practices Act; the Federal Deposit Insurance Act; the Gramm-Leach-Bliley Act; the Home Mortgage Disclosure Act of 1975; the Home Ownership and Equity Protection Act of 1994; the Real Estate Settlement Procedures Act of 1974; the S.A.F.E. Mortgage Licensing Act of 2008; the Truth in Lending Act; the Truth in Savings Act; the Omnibus Appropriations Act; and the Interstate Land Sales Full Disclosure Act).

42. *Id.* § 5517.

tion functions,”⁴³ which are themselves defined as “*all* authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law”⁴⁴ The CFPB may implement these laws “through rules, orders, guidance, interpretations, statements of policy, examinations, and enforcement actions”⁴⁵ Its rulemaking authority, moreover, supersedes that of any other federal regulatory agency in this regard.⁴⁶

This is a broad delegation of discretionary policymaking authority, to be sure, but that fact, standing alone, does not render Dodd Frank unconstitutional. Despite the proclamation of Article 1, Section 1, of the Constitution that “All legislative Powers herein granted shall be vested in a Congress of the United States . . . ,”⁴⁷ the United States Supreme Court has consistently tolerated generous delegations of law-making power to agencies. Why? “Non-delegation” matters such as this are, for constitutional purposes, separation of powers cases. In deciding non-delegation separation of powers cases, the United States Supreme Court uses what is known as a “functionalist” approach.⁴⁸ The functionalist approach recognizes that departments of government are not “airtight” and, therefore, encroachments by one branch on the constitutional authority of another can be unobjectionable and perhaps even preferable for optimal governmental performance.⁴⁹ The functionalist approach, by promoting flexibility, facilitates agencies’ abilities to regulate effectively, even sensitively, in matters novel

43. *Id.* § 5581(a).

44. *Id.* § 5581(a)(1)(A) (emphasis supplied). The section goes on to expressly mandate the transfer of such functions from the Federal Reserve, the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the Federal Trade Commission (under “the enumerated consumer laws”), the National Credit Union Administration, and the Department of Housing and Urban Development. *Id.* § 5581(a).

45. *Id.* § 5492.

46. *Id.* § 5512(b)(4)(A) (“[T]o the extent that a provision of Federal consumer financial law authorizes the [CFPB] and another Federal agency to issue regulations under that provision of law for purposes of assuring compliance with Federal consumer financial law and any regulations thereunder, the [CFPB] shall have the exclusive authority to prescribe rules subject to those provisions of law.”).

47. U.S. CONST. art. I, § 1.

48. See generally Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994). In many, but not all, separation of powers cases *not* dealing with the matter of delegation of legislative power, the Court has eschewed functionalism in pursuit of a “formalist” approach. Formalism calls for respect to the textual commands of the several Articles of the Constitution. See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983). “[S]cholars commonly associate formalism with textualist interpretive approaches, which insist upon a close adherence to rules reflected in the public meaning of some authoritative text, such as a statute or the Constitution.” See also John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1958 (2011). When the Court operates in formalist mode, it is exceedingly less tolerant of any “slippage” in the system.

49. See, e.g., *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

and challenging.⁵⁰ Accordingly, the Court has breezily upheld, for example, the transfer even of taxing power — the much touted “power to destroy”⁵¹—from the Congress to the United States Department of Transportation.⁵² It has upheld as well legislation that authorizes the executive branch to regulate as “requisite to protect the public health,”⁵³ as well as to issue licenses “if public convenience, interest, or necessity will be served thereby.”⁵⁴ All that the Court has required regarding these expansive transfers of legislative power away from the Congress is that the delegating statutes contain some “intelligible principle,” some limit that supposedly would enable a court to observe whether an agency, in its exercise of a delegated power, has overreached.⁵⁵ The result is that agencies can constitutionally regulate matters “quintessentially” legislative in nature.⁵⁶

B. IMMUNITY FROM CONGRESSIONAL OVERSIGHT

But, even if expansive delegations of legislative power are constitutionally tolerable, Dodd-Frank still is constitutionally suspect because, as mentioned earlier, it authorizes the CFPB to exercise its powers essentially immune from interference from the three branches of government. First among these “immunities” is the CFPB’s freedom from Congressional influence: the agency need not depend upon Congress for its funding.⁵⁷

50. In another but related context, the Supreme Court has excoriated the idea of “rigid” controls on agencies, fearing that such constraints “would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise.” *SEC v. Chenery*, 332 U.S. 194, 202 (1947).

51. *McCullough v. Maryland*, 17 U.S. 316, 431 (1819) (“That the power to tax involves the power to destroy. . .”).

52. See *Skinner v. Mid-American Pipeline Co.*, 490 U.S. 212 (1989) (One reading of *Skinner* could maintain the decision involved not the taxing power but rather the power to levy fees, but the Supreme Court clearly viewed the matter as a taxation delegation matter).

53. *Whitman v. American Trucking Ass’ns*, 531 U.S. 457 (2001) (involving the Clean Air Act).

54. 47 U.S.C. § 307(a) (2012).

55. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928).

56. *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring). One indication of the Court’s high level of tolerance: in the decade leading up to *Whitman*, 531 U.S. 457, non-delegation challenges failed in the Supreme Court on fifty-three occasions and prevailed in none. GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 114 (6th ed. 2013). Any who doubt the breadth of CFPB’s statutory authority might be interested in knowing that the agency is currently in the process of amassing a huge database of personal information such as credit card records, mortgage data, car payments, and the like, as part of its efforts to protect consumers. Randy E. Barnett, *The NSA’s Surveillance is Unconstitutional*, WALL ST. J. July 12, 2013, at A13.

57. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5497 (2012).

In the normal circumstance, Congress can exert influence over agencies in several ways. It can do so when it creates an agency. Agencies necessarily take the form Congress mandates and may only exercise powers Congress affirmatively authorizes. Congress can also influence agencies during the appointment process of the officers who will populate agency ranks.⁵⁸ In addition, Congress has informal tools available to it. It can modify agency behavior by its use of oversight hearings and the transmission of subtle or not-so-subtle threats.

Congress's most effective weapon to encourage errant agencies to tow the Congressional line, however, is its appropriations power. The federal Constitution, in Article I, Section 9, provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ." ⁵⁹ This means Congress can control the flow of money to federal agencies. It can shut off the flow of money in part or in full. Alternatively, it can earmark funding for specific agency programs or endeavors, thereby binding agencies to Congressional purposes.⁶⁰ Since the Congress alone can authorize expenditures from the U.S. Treasury, Congress can even deny an agency the right to expend monies the agency itself has raised (those monies are deposited into the Treasury, to be released thereafter upon Congressional fiat).⁶¹

These traditional means of Congressional influence are of diluted value with regard to the CFPB. First, since the CFPB is already in place, the chance to exert influence at the point of agency creation is foregone. Moreover, because of the current political climate in the Nation's capital,⁶² it is well-nigh impossible as a practical matter for Congress to pull the reins in now, that is, to reconfigure the CFPB in some less independent form.

58. U.S. CONST. art. II, § 2, cl. 2.

59. U.S. CONST. art. I, § 9, cl. 7. The process requires agencies to submit budget requests to the Office of Management and Budget ("OMB") of the White House. Requests thereafter flow from the President to Congress. Congress funds agencies by enacting appropriations measures or by use of continuing resolutions. The process places agencies in competition with one another for available monies.

60. Jason A. MacDonald, *Limitation Riders Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766 (Nov. 2010).

61. The Security and Exchange Commission is a case in point. In 2010, for example, the SEC was projected to earn \$1.5 billion but its appropriation was set at \$1.1 billion. See Mary L. Shapiro, Chairman, Security and Exchange Commission, Statement Concerning Agency Self-Funding, April 15, 2010, available at <http://www.sec.gov/news/speech/2010/spch041510mls.htm>. The Chairman argued the earned amount should be dedicated for agency use. *Id.*

62. See, e.g., Ron Fournier, *In Congress, Compromise Is a 4-Letter Word*, NAT'L J., <http://www.nationaljournal.com/politics/in-congress-compromise-is-a-4-letter-word-20130117> (last updated May 30, 2013). Congress's hyper-partisanship in the current day has even spawned a group of activists known as "No Labels," which is dedicated to restoring cooperation in the halls of Congress. See www.nolabels.org.

Second, it would be naive to think that oversight hearings and threats will work to restrain future CFPB endeavors. This is because Congress abdicated the greatest threat it can wield over an agency — the threat of cutting the agency's funding. As noted earlier, the CFPB can self-fund.

The idea of an agency with capacity to fund itself is not entirely novel. In the past, Congress has spared other federal agencies the travails of the appropriations process. But, by one account, Congress has only once created an agency with power to *completely* provide for its own funding. That agency was the Federal Reserve.⁶³ Apart from the CFPB, the list of federal agencies that are supposedly exempt from the appropriations process may be as few as eleven.⁶⁴ Considering that there are more than 400 federal agencies,⁶⁵ it becomes apparent that allowing self-funding in any measure is much the exception.

The CFBP's funding arrangement is even more unique because of two additional factors. First, unlike most of the agencies listed above, which are run by multi-member boards or commissions, the CFPB is run by a single Director.⁶⁶ Second, and more significantly, the self-

63. See Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 525 (2000) (characterizing the Federal Reserve as the only agency that completely provides for its own funding).

64. They are the Federal Reserve, the Office of the Comptroller of the Currency, the Farm Credit Administration, the Farm Credit System Insurance Corporation, the Federal Deposit Insurance Corporation, the Federal Home Loan Mortgage Corporation, the Federal Housing Finance Agency, the Federal Prison Industries, Inc., the National Credit Union Administration, the Public Company Accounting Oversight Board, and the Bureau of Engraving and Printing. See *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV. L. REV. 1822, 1823 n.12 (2012) (listing seven such agencies, not including the Federal Reserve, the Office of the Comptroller of the Currency, the Public Company Accounting Oversight Board, or the National Credit Union Administration) (hereinafter *Independence*); DAVID E. LEWIS & JENNIFER L. SELIN, SOURCE BOOK OF UNITED STATES EXECUTIVE AGENCIES 119-120 (1st ed. 2012) (prepared for the Administrative Conference of the United States) (characterizing all eleven of these agencies as "completely exempt from appropriations" while basing the assertion, in part, upon *Independence*, *supra* note 64, and listing on Table 14 nineteen federal statutes that allow for agency funding other than appropriations [hereinafter *Sourcebook*]). Stipulating an exact number of federal agencies can be problematic because of varying definitions of the term "agency."

65. U.S. Gen. Serv. Admin., *Federal Executive Branch*, www.usa.gov/Agencies/Federal/Executive.shtml (last visited June, 2013) (the site does not itself proffer a final count).

66. Of the agencies listed in *Sourcebook*, *supra*, note 64, three are run by a director rather than by a board or commission. They are the Office of the Comptroller of the Currency, the Federal Housing Finance Agency ("FHFA") and the Bureau of Engraving and Printing. *Id.* at 43 (the directors are the Comptroller of the Currency, the Director of the Office of Federal Housing Enterprise Oversight, and the Director of the Mint, respectively). The FHFA is the resulting agency of the merger between the Federal Housing Finance Board and the Office of Federal Housing Enterprise Oversight. OFFICE OF THE FEDERAL REGISTER NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, THE

funded agencies listed above, unlike the CFPB, engage essentially in tasks of management rather than in policymaking.⁶⁷ The foci of these agencies are comparatively narrow, their discretionary powers limited. Lacking broad discretionary authorities, these agencies are precisely the ones for which Congress has lesser need for oversight.

Thus, the CFPB is truly exemplary: it is a self-funded agency – fully self-funded – with broad policymaking powers, powers that could be used, and probably will be used, to fundamentally restructure the private economy. Congress knew what it was doing when it decided to exempt the CFPB from the appropriation process. As noted previously, it feared that a future Congress unsympathetic to the CFPB's mission might move to frustrate the agency's regulatory initiatives.⁶⁸

Congress did consider other options. One major exploration centered on whether the new agency might be funded by fees. Elizabeth Warren, for one, testified that using fees to fund the CFPB “makes a lot of sense.”⁶⁹ Using fees would have aligned the new agency with several other federal agencies involved in financial regulation.⁷⁰ Another idea was to use a mix of appropriations and fees to fund the

UNITED STATES GOVERNMENT MANUAL 2012, 43 (revised July 1, 2012), <http://www.gpo.gov/fdsys/pkg/GOVMAN-2012-12-07/pdf/GOVMAN-2012-12-07.pdf>.

67. The Federal Reserve controls monetary, credit, and operating functions of the Federal Reserve System; the Office of the Comptroller of the Currency charters, regulates, and supervises national banks and federal savings associations; the Farm Credit Administration examines farm credit lending; the Farm Credit System Insurance Corporation insures timely payments of bonds and other sureties and collects insurance premiums; the Federal Deposit Insurance Corporation examines state-chartered banks that are not part of the Federal Reserve System; the Federal Home Loan Mortgage Corporation oversees Freddie Mac and Fannie Mae; the Federal Housing Finance Agency oversees secondary mortgage markets; the Federal Prison Industries, Inc. provides employment and training for federal inmates; the National Credit Union Administration oversees and insures credit unions; the Public Company Accounting Oversight Board oversees audits of public companies to protect investors; and the Bureau of Engraving and Printing prints money, White House invitations, military identification cards, and other documents.

68. See, e.g., Adam Levitin, *The Political Economy of CFPB Funding*, CREDIT SLIPS (Nov. 29, 2010, 8:06 PM), <http://www.creditslips.org/creditslips/2010/11/the-political-economy-of-cfpb-funding.html> (“The whole point of giving the CFPB a percentage of the Fed’s overall budget was to ensure that the CFPB will always have the financial wherewithall to be effective – consumer financial protection shouldn’t be a politically dependent matter. Congress acted deliberately and intentionally to bind its own hands in the future when political winds change.”). See also, e.g. *Creating a Consumer Financial Protection Agency: A Cornerstone of America’s New Economic Foundation: Hearing Before the S. Comm. on Banking, Housing, & Urban Affairs*, 111th Cong. 31, 87 (2009) [hereinafter *Senate Committee Hearing*] (“Recent history has demonstrated that even an agency with an undiluted mission to protect consumers can be undermined by hostile or negligent leadership or by Congressional meddling on behalf of special interests.”).

69. H.R. REP. NO. 111-49, at 36 (2009) (hereinafter *House Committee Report*).

70. Some examples: the Federal Deposit Insurance Corporation, for one, secures funds from fees generated through deposit insurance. The Office of the Comptroller of the Currency secures revenues from bank assessments. The Federal Reserve System generates revenues through the creation of money in the reserve banks and the interest

CFPB.⁷¹ But the Senate Committee on Banking, Housing and Urban Affairs ultimately eschewed these approaches as unfeasible in this circumstance, for several reasons. First was the simple enormity of the soon-to-be-launched agency. The CFPB was foreseen to be sprawling,⁷² given its regulatory jurisdiction over not only banks but also over credit unions, finance companies, mortgage brokers, payday lenders, and others. It was thought that supporting such an extended bureaucracy by fees would necessitate, in and of itself, the creation of a second bureaucracy for that specific purpose. Second, the routine proliferation of new entrants into the ranks of the CFPB's regulated community would complicate fee collection over time. Simply finding these new entities and incorporating them into the collection system would be a challenge. Third, fees collected from financial entities would likely be passed on to their customers in any event. If that were the case, it would make sense for the government to simply bite the bullet and transfer the money directly.⁷³ Beyond that, fees would not assuredly produce revenues sufficient to sustain the agency⁷⁴ and might well have been viewed by the public as a new and unpopular tax.

One last reason for deciding against a fee-based funding approach was the matter of conflict of interest. Before the CFPB came to be, financial institutions could game the system by "charter shopping." This happens when they shift from one regulatory regime to another. Regulated entities can do this by modifying their governing charters. By so modifying, an entity can often de facto choose the agency that will regulate it. When it chooses to leave one regulator for another, the abandoned agency loses fee income. Therein arises the conflict of interest: an agency with a financial interest in continuing to regulate a particular entity will feel pressure to regulate the entity more benignly if only to keep it in the fold.⁷⁵ Alternatively, the agency may

on resulting reserve balances. The Public Company Accounting Oversight Board is funded by fees levied on all publically traded corporations.

71. See, e.g., Senate Committee Hearing, *supra* note 68, at 31 (statement of Mr. Barr, Assistant Secretary for Financial Institutions, Department of the Treasury) (Mr. Barr testifying that "there would be a mix of appropriated funds as well as the transfer of fees from the bank regulatory agencies with respect to consumer protection functions and fees in the area where such fees have not been collected in the past in the nonbanking sector. So we have a mix of appropriations and fees funding the agency.").

72. The forecast was accurate. The CFPB's 2013 projected budget estimates expenditures of approximately \$448 million. Consumer Finance Protection Bureau, *Fiscal Year 2013 Budget in Brief*, <http://files.consumerfinance.gov/f/2012/02/budget-in-brief.pdf>.

73. Senate Committee Hearing, *supra* note 68, at 77.

74. Senate Committee Hearing, *supra* note 68, at 86.

75. Senate Committee Hearing, *supra* note 68, at 86. Indeed, this was the experience of the Office of the Comptroller of the Currency ("OCC"). Before Dodd-Frank, the OCC was funded almost entirely by industry-assessment fees. Financial institutions

ease regulatory burdens to attract entities to its regulatory regime. These machinations are an especially fertile possibility when regulatory authority over an industry is shared among several government overseers. While the prospect of charter shopping would be diminished with the establishment of the new CFPB because its consolidated regulatory reach would limit shopping opportunities, still Congress determined that a fee-based funding structure was inadvisable.

Dodd-Frank eliminated the worries. Section 5497 provides that “each year (or quarter of such year) . . . and each quarter thereafter, the Board of Governors [of the Federal Reserve System] shall transfer to the [CFPB] from the combined earnings of the Federal Reserve System, the amount determined by the Director to be reasonably necessary to carry out the authorities of the [CFPB] under Federal consumer financial law, taking into account such other sums made available to the [CFPB] from the preceding year (or quarter of such year).”⁷⁶ The legislation caps the funding stream at increasing percentages of total operating expenses of the Federal Reserve System. For fiscal year 2011, Dodd-Frank authorized the transfer to the agency of ten percent of the operating budget of the Federal Reserve System, or about \$450 million. The legislation increased the transfer to 11% in 2012 and to twelve percent in 2013.⁷⁷ Thereafter, the percentage is twelve percent.⁷⁸ These amounts may be adjusted upward based on employment cost indices.⁷⁹

This arrangement virtually assures funding for the CFPB in amounts the Director determines. Seemingly in place to emphasize the point, § 5497(a)(2)(C), which is entitled “Reviewability,” provides that “[n]otwithstanding any other provision in this title, 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.”⁸⁰ Due to the rules of the respective houses of Congress, if the above-identified committees lack subject matter jurisdiction to review CFPB funding matters, it is

changed their charters to place themselves outside the ambit of OCC regulation, preferring to be regulated at the state level or by the federal Office of Thrift Supervision. *Id.*

76. 12 U.S.C. § 5497(a)(1) (2012).

77. *Id.* § 5497(a)(2)(A); see also Bd. of Governors of the Fed. Reserve Sys., *Annual Report Budget Review 2011*, <http://www.federalreserve.gov/publications/budget-review/2011-federal-reserve-system-budget.htm> (last visited Oct. 6, 2013) (stating the total expenses for the Federal Reserve System for 2011 was budgeted at \$4.5209 billion).

78. 12 U.S.C. § 5497(a)(2)(A) (2012).

79. *Id.* § 5497(a)(2)(B).

80. *Id.* § 5497(a)(2)(C).

tantamount to Congress as a whole lacking that authority.⁸¹ Indeed, this funding arrangement has already worked well for the CFPB: the agency escaped the chopping block after the midterm elections of 2010, when the Republican Party resumed control of the House of Representatives and undertook efforts to reduce agency budgets.⁸²

C. IMMUNITY FROM PRESIDENTIAL INFLUENCE

Thus, it is apparent that Congressional influence over the agency is weak. The CFPB is also substantially immune from Presidential influence.⁸³

Presidents can influence agency behavior in a number of ways. One method is by the appointment power – the President nominates agency leaders and therefore can choose people to his or her liking. Second, the President, through the Office of Management and Budget of the White House, can control budget submissions.⁸⁴ A third indirect means of Executive control over agencies is by management of the agency's litigation. By statute, most federal litigation is orchestrated by the Department of Justice.⁸⁵ Last, the President can determine civil service rules, office locations, procurements, and sundry administrative matters.

In some cases, statutory enactments limit the President's influence. For example, the appointment power can be limited by requir-

81. The Rules of the House of Representatives and of the Senate, as a general matter, assign "jurisdiction" over appropriations matters to their respective Committees on Appropriations. Rules of the House of Representatives: Rule X.1(b).

82. See, e.g., Rich Danker, *How the CFBP Got the Fed's Lunch Money*, ROLL CALL, (Jan.9, 2013 1:56 PM) available at <http://www.rollcall.com/news/Danker-How-the-CFBP-Got-the-Feds-Lunch-Money-216345-1.html>.

83. For that matter, but beyond the scope of this article, the CFPB is also free from control by the Federal Reserve, of which it is formally a part. Dodd-Frank declares that the Federal Reserve may not "intervene in any matter or proceeding" of the CFPB, nor may it "appoint, direct, or remove an officer or employee of the [CFPB]," nor may it "merge or consolidate the [CFPB], or any of its functions or responsibilities." 12 U.S.C. § 5492(c). The CFPB is subject to formal oversight by the Federal Stability Oversight Council ("FSOC"), the other agency created by Dodd-Frank, however. Dodd-Frank established the FSOC as a think-tank of sorts. Its mission is to identify risks to national financial stability and to promote market discipline so that "emerging threats to the stability of the United States financial system" might be addressed sooner rather than later. *Id.* § 5322(a)(1). For that purpose, it has the formal power to stay or set aside a CFPB regulation if, (a) upon receipt of a petition, and (b) by a 2/3 or greater vote, of its blue-blooded membership, it decides (c) the regulation "would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk." *Id.* §§ 5513(a)-(c); 5329(c)(3). It is likely the FSOC would set aside a CFPB regulation only in extraordinary circumstances.

84. See generally The Budget and Accounting Act of 1921, Pub. L. 67-13, 42 Stat. 20 (1921).

85. 28 U.S.C. § 516 (2012).

ing that nominated persons meet specified criteria.⁸⁶ With respect to the CFPB, the only limitation imposed upon the President's appointment power is a minor one: the Director must be a citizen of the United States.⁸⁷

Alternatively, a statute might exempt an agency from OMB oversight.⁸⁸ With respect to the CFPB, however, the OMB is not a player. The same self-funding mechanism that frees the CFPB from legislative oversight,⁸⁹ works to free the agency from OMB oversight as well. According to Dodd-Frank, the Federal Reserve "shall transfer to the [CFPB] . . . the amount determined by the Director to be reasonably necessary to carry out the authorities of the {CFPB} . . ." ⁹⁰ The duty is nondiscretionary; Dodd-Frank does require the CFPB to make some reports to the OMB, but nothing more.⁹¹

The most effective method by which a President can control an agency's behavior is by removing uncooperative agency officers. With executive agencies, those headed by a single Secretary, Administrator or Director, Presidential removal authority is typically plenary. Agency leaders can be removed for any reason or for no reason at all, and at any time the President chooses. That is not the case, however, with independent agencies, those led by multi-member bodies. In the usual case, leaders of independent agencies are removable by the President for cause only.⁹² These persons, in other words, can survive a disgruntled President so long as their performances, as distinguishable from the specific decisions they implement, are salutary.

This distinction in treatment between executive and independent agencies is directly tied to the matter of agency subject matter assignment. Single-leadership agencies commonly are assigned regulatory responsibilities of a more discretionary and policymaking sort. The Environmental Protection Agency, the Department of Agriculture, the Federal Bureau of Investigation, and the Department of Defense, to

86. As a case in point, the Secretary of Defense can only be a civilian removed from active duty in the military for at least seven years. 10 U.S.C. § 113(a). The Director of the Federal Housing Finance Agency must meet certain experiential requirements. 12 U.S.C. § 4512(b)(1). Indeed, in some cases, membership ranks are specified entirely by legislation. See, e.g., The Endangered Species Act of 1973, as amended, § 7(e), 16 U.S.C. § 1536(e) (limiting membership in the Endangered Species Committee to seven specific federal office holders and one member of the public). See also Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5321(b) (2012) (limiting membership in the Financial Stability Oversight Council to a similar list of persons).

87. 12 U.S.C. § 5491(b)(3) (2012).

88. For a list of these agencies, see *Sourcebook*, *supra* note 64 at 114.

89. See *supra* notes 66-83 and accompanying text.

90. 12 U.S.C. § 5497(a)(1) (2012) (*emphasis added*).

91. *Id.* § 5497(a)(4).

92. For a list of independent agencies with leadership removal protections, see *Sourcebook*, *supra* note 64 at 108. In some cases, this removal authority is found in entities other than the President. *Id.* at 106 n.275.

name a few, are in this group. The idea has been that agencies engaged in policy matters should be led by single persons who are directly answerable to the Politician-in-Chief. And those single persons are directly answerable because the President can remove them at will: it is not difficult for a Chief Executive to bend an agency to his will if he needs to dismiss only a single leader to get the job done. Multi-member-leadership agencies, on the other hand, which typically engage in matters more administrative and ministerial, need not be so directly answerable to the Chief Executive for that reason: since they deal in matters administrative and ministerial, there is less need for at-will removal authority.

Which brings us to the CFPB. Despite some misleading language in Dodd-Frank,⁹³ the CFPB is a classic executive agency. It is headed by a single Director⁹⁴ and its work broadly implicates matters of policy and, for that matter, politics.⁹⁵ Yet, as noted earlier, the Director of the CFPB is removable by the Chief Executive during his or her five-year term only for “inefficiency, neglect of duty, or malfeasance in office.”⁹⁶ This is extraordinarily unusual in the federal realm. For the CFPB, it is yet another liberation. Just as the Congress’s most powerful constraint has been removed, so has that of the Executive.

D. PROTECTION FROM JUDICIAL INTERFERENCE

In addition to these *de jure* broad immunities from both Congressional and Executive oversight, the CFPB also commands an accommodating nod from the courts when its actions are subject to review. This removes *pro tanto* the prospect of judicial influence over the agency.⁹⁷

A bit of background may be useful. This matter has everything to do with what is known as “scope of review.” In the federal administrative law system, the judicial branch is invested with power to review the legitimacy of a variety of actions undertaken by administrative agencies. In the exercise of this review function, federal courts have

93. The first sentence of § 1011(a) of Dodd-Frank, which established the executive body, characterizes the CFPB as an “independent bureau.” 12 U.S.C. § 5491(a) (2012). The second sentence of that same provision goes on, however, to declare that “the [CFPB] shall be considered an Executive agency, as defined in Section 105 to Title 5, United States Code.” *Id.* These two characterizations, while seemingly contradictory, are perhaps reconcilable on contextual grounds: the reference to the CFPB as being an independent bureau may refer to its positioning within a larger entity, the Federal Reserve System, rather than describe the agency in some unilateral sense.

94. *Id.* § 5491(b)(3).

95. *See, e.g., id.* § 5492(a) (“Powers of the [CFPB]. – The [CFPB] is authorized to establish the general policies of the [CFPB] with respect to all executive and administrative functions . . .”).

96. *Id.* § 5491(c)(3).

97. *Id.* § 5512 (b)(4)(B).

devised a complex and, some would say, convoluted jurisprudence. While in some cases courts will measure the legal correctness of an agency action by evaluating the matter *de novo*, that is, without any regard for the agency's reasoning in the matter, in other instances, courts will assess the legitimacy of the agency action deferentially. When courts review agency actions deferentially, they refrain from substituting their own judgments for those of the agency, but rather will affirm an agency's actions so long as they appear to be "reasonable" or "non-arbitrary" or something of that order. In such cases, a court will uphold an agency even if its action is one the court would not have taken had it, the court, been the decision maker in the first instance.

It is obvious that agencies prefer deferential judicial review as compared to non-deferential review. Again for obvious reasons, they prefer it especially when the matter under review is the agency's interpretation of a statute it administers. Agencies frequently are supplied authority to independently interpret the meaning of the statutes they administer. And they do exactly that, routinely and for good reason. Doing so gives agencies an additional and not insignificant edge in the regulatory enterprise: agencies, already broadly empowered (in part because of the *denouement* of the non-delegation doctrine),⁹⁸ can tilt the regulatory playing field to their liking by declaring, in legally binding form no less, the meaning of broad discretionary statutory terms. Deferential review means what the agency says a statute means will more often than not carry the day.

Happily for federal agencies generally, since 1984, when the United States Supreme Court handed down its landmark decision in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*,⁹⁹ courts have served up deferential review in these circumstances. *Chevron* declared that, subject to some exceptions,¹⁰⁰ when an agency construes the meaning of a statute it administers, courts should affirm the agency's construction so long as it is "permissible."

Important for our purposes, *Chevron* deferential review is unavailable when two or more agencies hold responsibility for administering a single statute and those agencies issue varying

98. See *supra* notes 46-56 and accompanying text.

99. 467 U.S. 837 (1984).

100. Deferential review is unavailable if the term construed by the agency is viewed by the court as unambiguous in the statute itself. *Id.* It is unavailable in several other circumstances as well, such as when the vehicle of interpretation is a non-binding opinion letter (rather than a formal regulation, *Christensen v. Harris County*, 529 U.S. 576 (2000)), or when the court believes the Congress would not have intended for a broadly deferential review. *United States v. Mead*, 533 U.S. 218, 234 (2001).

interpretations on the meaning of a statutory term.¹⁰¹ This possibility relates directly to the CFPB, since it shares administrative responsibilities regarding several statutes with several other agencies.¹⁰² Thus, if both the CFPB and another agency were at odds with respect to the meaning of a statutory provision administered by both, no *Chevron* deference would normally be available. In the absence of *Chevron* deference, the scope of review used by courts is what is known as *Skidmore*¹⁰³ deference.¹⁰⁴ *Skidmore* deference is not much deference at all. It calls for courts to respect an agency's statutory interpretation only to the extent the interpretation has "power to persuade."¹⁰⁵ In other words, under *Skidmore*, courts should defer to agencies only if and when they want to defer.¹⁰⁶

But, again thanks to Dodd-Frank, the possibility of courts defaulting to less comfortable *Skidmore* deference has become largely academic for the CFPB. Dodd-Frank removed the possibility by declaring that:

the deference that a court affords to the [CFPB] with respect to a determination by the [CFPB] regarding the meaning or interpretation of any provision of a Federal consumer financial law shall be applied as if the [CFPB] were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law."¹⁰⁷

III. CONCLUSION

All of the foregoing places the Consumer Financial Protection Bureau ("CFPB") in a unique position. Like many agencies, its empowerment is broad and largely undefined, but unlike many agencies, its subject matter reach is enormous. But, more significantly, as it engages its significant work, the agency can do so insulated from inter-

101. *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F. 2d 898 (D.C. Cir. 1993); *Rapaport v. United States Dep't of the Treasury, Office of Thrift Supervision*, 59 F. 3d 212, 217 (D.C. Cir. 1995).

102. *See supra* notes 76-79 and accompanying text.

103. 323 U.S. 134 (1944).

104. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944).

105. *Skidmore*, 323 U.S. at 139.

106. *Mead*, 533 U.S. at 250 (Scalia, J., dissenting). For this reason, *Skidmore* deference has been roundly rebuked as nothing more than "an empty truism and a trifling statement of the obvious: A judge should take into account the well-considered views of expert observers." *Id.*

107. 12 U.S.C. § 5512(b)(4)(B) (2012). One interesting wrinkle: § 5512 is titled "Rulemaking Authority," which might lead one to argue this deference guarantee should be available only when the agency construes a statute within the context of a rulemaking. Without engaging the point, in your author's view, the sectional title should not control the availability of the guarantee. Accordingly, even when the CFPB interprets a statute in the body of a judicial ruling, that interpretation will likely still warrant this enhanced *Chevron* deference.

ference to a degree to which other agencies can only aspire. It can neatly sidestep the Congress (as Dodd-Frank supplies the agency with generous and dependable funding), it can deflect Executive Branch pressure (because its Director can resist dismissal from office), and it can operate in many respects free of a judicial scrutiny (since *Chevron* deference is more available). It is the convergence of these factors rather than any single factor that brings the issue of constitutionality to the fore. Even if *some* independence from checks and balances is appropriate or even preferable as a matter of policy, the question in this context is whether the simultaneous presence of all of these immunities makes the CFPB *too* independent. While cogent arguments are possible in either direction, in the author's view, the line has been crossed.

The federal Constitution represents a fine balance. On the one hand, the Framers were attempting to create a strong national government, one the earlier Articles of Confederation failed to accomplish.¹⁰⁸ But the Framers confronted a major hurdle, how to fashion a strong national government that would reliably use powers to benefit the public, not to oppress it. These wise gentlemen were intensely aware of looming possibilities of overbearing tyranny, having suffered the oppressions of English rule for many years. Thus, a major goal of the Framers, if not *the* major goal, was to construct a national government that would walk this delicate line: it could be strong and effective, yet still unerringly respectful of the citizenry which created it. The new national government was structured with these ends in mind.

To accomplish this end, the Framers used a multiple-warhead approach. First, they supplied the new government not with generalized power, but only with limited and specifically enumerated powers. The federal government would not have free rein over all matters of interest to the citizenry, akin to states, but rather would dedicate itself to national interests only. As James Madison described it:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally in external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs; con-

108. Alexander Hamilton called the Articles of Confederation an "imbecility." THE FEDERALIST, No. 15 (Alexander Hamilton). Indeed, under the Articles, "[E]ach State was an *imperium in imperio* . . ." Edward Meade Earle, Introduction to *The Federalist*, Random House, 1937, at p. vii.

cern the lives, liberties, and properties of the people, and the internal order improvement, and prosperity of the State.¹⁰⁹ States would remain sovereign within their spheres of retained powers.¹¹⁰

Second, the Framers allocated these powers among the legislative, executive, and judicial branches, in order to prevent aggrandizement of power in a single person or portion of government. Powers so separated were “to a certain extent admitted on all hands to be essential to the preservation of liberty”¹¹¹

Third, the Framers insinuated into the governmental design the network of “checks and balances.” The provision of checks and balances would allow a branch of government, while not encroaching too harshly on the powers of another branch, to nonetheless exert influence at the margins regarding that other branch’s exercise of its powers. Thus, for example, even as the Executive Branch has power to execute the laws, still non-inferior officers appointed by the President to execute the law – as well as treaties negotiated by the President – may take effect only upon “advice and consent” of the Senate.¹¹² Even as the Legislative Branch has power to make law (and it may only do so only upon agreement of both the Senate and the House of Representatives)¹¹³ that legislation still must survive the prospect of an executive veto.¹¹⁴ Once all of that is satisfied, still the Judicial Branch may annul any law that transgresses constitutional safeguards.¹¹⁵ Even though the President is Commander-in-Chief of the military, only the Congress may declare war.¹¹⁶ Of course, no branch can abolish another branch. As a final measure of safety, the Framers took

109. THE FEDERALIST, No. 45 (James Madison).

110. U.S. CONST. amend. X.

111. THE FEDERALIST, No. 51 (Alexander Hamilton). While the combination of powers in agencies is not uncommon in the current day, it does arguably transgress the plan of the Framers of the Constitution. *See, e.g.*, FEDERALIST No. 47 (James Madison): “The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.”

112. U.S. CONST. art. II, § 2, cl. 2.

113. *Id.* art. I, § 7, cl. 2, 3.

114. *Id.*

115. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1801):

It is emphatically the province and duty of the judicial department to say what the law is So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

116. U.S. CONST. art. I, § 8, cl. 11.

care to assure that the Constitution itself could not be amended except with difficulty.¹¹⁷

These checks and balances were consciously installed into the fabric of the Constitution “as a “self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”¹¹⁸

It becomes incontrovertibly clear that the Framers abhorred the prospect of too much governmental power accumulating in a single entity. Their focus in this regard, of course, was the three *branches* of the federal government they were in the process of designing. They took every reasonable step to assure that no one branch would gain an ascendancy over the others. A contrary result would defeat the emergent democracy for which the Revolutionary War had been so ardently fought and only recently concluded. Given this resolve, it is certain that those same wise men would have wholly reviled a Fourth Branch of government that by its very structure would in design and operation undermine the fundamental plan. Yet that is precisely what the CFPB does. Its combination of powers and immunities repudiate the spirit of separation of powers jurisprudence.¹¹⁹

Some persons may contend that the constitutional “slippage” apparent in this context nonetheless falls short of constitutional infirmity. The issue becomes, in effect, how much “stray” from the design of the Framers is too much. In one sense, the answer depends on individual perspective. It seems clear that strict formalists would find the CFPB to be constitutionally deficient. Indeed, formalists can comfortably do so solely on separation of powers grounds, without even getting to checks and balances. Pure formalist theory contends that legislative power may not be delegated away from the Legislative Branch in any degree. Concomitantly, formalist theory holds that judicial power may reside only in the judicial branch. Given these fast principles, formalists would be hard put to find the CFPB to be consti-

117. *See generally*, THE FEDERALIST, No. 9 (Alexander Hamilton).

118. *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). James Madison made the same point early on:

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.

THE FEDERALIST, No. 51 (James Madison).

119. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5512 (2012) (rulemaking powers); 12 U.S.C. §§ 5514-5516, 5561-5568 (enforcement powers); *Id.* § 5563 (adjudicative powers).

tutional. For that matter, this group might find the entire administrative state to be constitutionally offensive.

Those favoring the functionalist approach, on the other hand, face a more difficult question. In sharp distinction with formalists, functionalists are untroubled by the administrative state *per se*. But would functionalists align with formalists on the matter of the CFPB? That remains to be seen, but clearly they should. Their tolerance for slippage does have limits, and those limits are grandly exceeded here. Functionalists accept the "Fourth Branch" of government, the administrative state, for pragmatic reasons. They believe a broadly empowered administrative state is unavoidable and entirely necessary. Accordingly, in their view, effective government cannot exist without slippage. Congress simply cannot do everything and it is foolhardy to expect it to try. In the artful phrasing of one commenter, functionalists, therefore, "are willing to accommodate substantial innovation below the apex of governmental structure." The end result is an exceeding tolerance: "the functionalist model accepts any inter-branch distribution of power so long as it does not 'undermine the intended distribution of authority' among the President, Congress, and the judiciary."¹²⁰ In the functionalist view, "[I]f in 1787 such a merger of function was unthinkable, in 1987 it is unavoidable given Congress's need to delegate at some level the making of policy for a complex and interdependent economy, and the equal incapacity (and undesirability) of the courts to resolve all matters appropriately characterized as 'adjudication.'"¹²¹

That is all well and good: functionalist theory contains at its core more than a nut of common sense. But it remains true that, empowered and unrestrained as it is, the CFPB's very structure seriously "undermines the intended distribution of authority . . ." Simply put, the CFPB can diminish any of the three branches as it likes. With respect to the Congress, it can undercut and usurp a legislative priority or the realization of a Congressional goal by its unilateral initiatives. It can, without fear of opposition, fundamentally reorder the vast financial sector of the private economy. Such an imposing authority cannot be justified even by functionalists' preference for according agencies flexibility adequate to promote responsive and creative regulation. The interest in flexibility is surely legitimate in the absolute, but it is not one of the first principles upon which the Nation is

120. Peter B. McCutcheon, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*. 80 CORNELL L. REV. 1, 6, (1994).

121. Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions - A Foolish Inconsistency?* 72 CORNELL L. REV. 488, 493 (1987).

founded. The Nation's first principles, rather, are those embodied in the Constitution, not those appealing to the Congress at any point in time. Plainly, those first principles have been dishonored here.¹²²

122. A judicial challenge to the constitutionality of the CFPB was recently dismissed for want of standing. *State Nat'l Bank of Big Spring v. Lew*, 2013 U.S. Dist. LEXIS 108308, 2013 WL 3945027 (D.D.C. Aug. 1, 2013). As of this writing, there is no subsequent appellate history.