EXTRA ICING ON AN UNCONSTITUTIONAL CAKE ALREADY FROSTED? A CONSTITUTIONAL RECIPE FOR THE CFPB

C. Boyden Gray[*]

INTRODUCTION

Presidential oversight is a "critical part of the Constitutional plan," and it is clearly necessary to control "the growing power of the administrative state."[1] But it is not sufficient. "[W]ith hundreds of federal agencies poking into every nook and cranny of daily life," presidential supervision alone cannot serve as "an effective safeguard against agency overreaching."[2] To ensure that administrative agencies are not a law unto themselves, the Constitution requires that agencies also be checked by Congress and the courts. Congress checks federal agencies primarily through the annual appropriations process.[3] The courts check agency power primarily through judicial review.[4]

But what if Congress, overtaken by some short-term factional interest, exempted an administrative agency from its appropriations process, and then endowed it with such broad statutory authority so as to effectively deprive judicial review of real meaning? The answer is that such an agency could not survive constitutional scrutiny: its "discretion" would be so decoupled "from legislative direction" as to effectively "deprive[] the people of the structural protections guaranteed by . . . the Constitution."[5]

In *PHH Corporation v. CFPB*,[6] a panel of the U.S. Court of Appeals for the D.C. Circuit faced such an agency.[7] The panel, in an opinion written by Judge Brett Kavanaugh, held that the Consumer Financial Protection Bureau

---

* Mr. Gray served as White House counsel under President George H.W. Bush, and U.S. Ambassador to the European Union and Special Envoy for Eurasian Energy under President George W. Bush. He is a founding partner of Boyden Gray & Associates, a boutique law firm focused on constitutional and regulatory issues. In that capacity, he currently represents State National Bank of Big Spring, the 60 Plus Association, and the Competitive Enterprise Institute in a constitutional challenge to the CFPB. *See* State Nat'l Bank of Big Spring v. Lew, 197 F.Supp.3d 177 (D.D.C. July 12, 2016).

1 City of Arlington v. FCC, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting).

2 *Id.*

3 *See* THE FEDERALIST NO. 58 (James Madison).

4 *See City of Arlington*, 133 S. Ct. at 1874 ("The fox-in-the-henhouse syndrome is to be avoided . . . by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority.").

5 United States v. Nichols, 784 F.3d 666, 676 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc) (arguing that a statute that allows prosecutors to effectively define crimes violates the non-delegation doctrine).

6 839 F.3d 1 (D.C. Cir. 2016).

7 *Id.*, *reh'g granted*, No. 15-1177, 2017 WL 631740 (D.C. Cir. Feb. 16, 2017).

(CFPB), an independent agency created by Title X of the Dodd-Frank Act, violated Article II of the Constitution because its single Director was not removable at will by the President.[8] The panel decision was subsequently vacated by the full D.C. Circuit, sitting en banc.[9] The D.C. Circuit held that the for-cause removal protection for a single Director was "a constitutionally acceptable means to protect" the CFPB's independence under existing Supreme Court precedent.[10]

If ultimately endorsed by the Supreme Court, Judge Kavanaugh's panel decision would be a landmark win for advocates of the unitary executive and of representative government. But despite its legal merits, the *PHH* panel decision, even if ultimately reinstated, will do little to restrain the trend toward government by agency decree in the financial sector or elsewhere. Although the panel decision would make the Director removable by the President, it does nothing to resolve other constitutional problems with the CFPB's powers and structure. As the panel recognized, the CFPB wields "enormous power over American business, American consumers, and the overall U.S. economy."[11] Yet unlike other executive law-enforcement agencies, the CFPB is a completely self-funding entity, exempt from the congressional appropriations process.[12] The CFPB is also vested with uncabined legislative and judicial authority to define and punish "abusive" financial practices—a term with no known definition in consumer credit law.[13]

The *PHH* panel decision would have changed none of that. In a footnote, the panel opinion waived off the CFPB's complete budgetary independence from Congress as "at most just 'extra icing on' an unconstitutional 'cake already frosted.'"[14]

The D.C Circuit's en banc majority opinion, by contrast, directly addressed the constitutionality of the CFPB's budgetary independence, holding that the CFPB's budgetary independence poses no constitutional problem even when considered in combination with the CFPB's independence from

---

8 *Id*. at 8.

9 PHH Corp. v. CFPB, 881 F.3d 75 (D.C. Cir. 2018) (en banc).

10 *Id.* at 93.

11 *PHH Corp.*, 839 F.3d at 7.

12 12 U.S.C. § 5497(a)(1)–(2) (2012).

13 *Id.* § 5531(d); Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH L. REV. 856, 918–19 (2013) ("The term 'abusive,' as used in this context, appears to be an entirely novel term with no forerunners in any prior federal or state statute or regulation.").

14 *PHH Corp.*, 839 F.3d at at 36 n.16 (quoting Yates v. United States, 135 S. Ct. 1074, 1093 (2015) (Kagan, J., dissenting)). In his en banc dissent, Judge Kavanaugh resorted to the same unhappy phrase, while at least conceding that "the CFPB's current exemption from the ordinary appropriations process arguably enhances the concern in this case about the massive power lodged in a single, unaccountable Director." *See PHH*, 881 F.3d at 197 n.19 (Kavanaugh, J., dissenting).

the President, because the CFPB's budgetary independence "does not intensify any effect on the President of the removal constraint."[15] Only Judge Henderson, dissenting, would have struck down Title X of Dodd-Frank in its entirety, given the CFPB's unprecedented combination of budgetary independence and removal protection.[16]

This Article argues that the Constitution's structure demands more than presidential control. The system of separation of powers and checks and balances wisely does not concentrate all powers (or even most powers) in the President. That would be "the very definition of tyranny."[17] Instead, the Constitution seeks to control arbitrary power by dividing powers among three branches: legislative, executive, and judicial. At the core of legislative power lies the authority (and duty) to control federal expenditures.[18] At the core of the executive power lies the authority (and duty) to faithfully execute the laws.[19] And at the core of the judicial power lies the authority (and duty) to decide cases independently, according to the law of the land.[20] Through this division of authority, the separation of powers protects the people against the "unchecked will" of a single man or group of men (in the Founders' terms, a faction).[21] To preserve this protection for future generations, the Founders endowed "each department" with "the necessary constitutional means . . . to resist encroachments of the others."[22]

The Dodd-Frank Act nullifies the Constitution's structural arrangement of checks and balances in the broad realm of consumer finance, arrogating to the CFPB's Director an unprecedented level of legislative, executive, and judicial power independent from the Constitution's three departments. The constitutional separation of powers cannot be reconciled with this delegation

15 *PHH Corp.*, 881 F.3d at 96.

16 *Id.* at 155 (Henderson J., dissenting) ("The CFPB is the only agency that combines each and every one of these elements with for-cause removal protection and a mission to 'side' with one segment of the population against others.").

17 *See* THE FEDERALIST NO. 47 (James Madison) (indicating that even an "elective" government concentrating all powers "in the same hands . . . may justly be pronounced the very definition of tyranny.").

18 U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .").

19 *See* U.S. CONST. art. II, § 3, cl. 4; *PHH Corp.*, 839 F.3d at 12.

20 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1156 (10th Cir. 2016) (Gorsuch, J., concurring) (noting that "*Marbury* . . . affirmed the judiciary's duty to say what the law is in a case that involved the interpretation of, yes, a civil statute affecting individual rights.").

21 *See* United States v. Brown, 381 U.S. 437, 443 (1965) ("For if governmental policy is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will.").

22 THE FEDERALIST NO. 51 (James Madison).

run riot, even if the Director is ultimately held to be removable at the President's will.

Part I briefly discusses the *PHH* case. It discusses the relevant constitutional holdings, and more importantly, the constitutional problems that the panel opinion failed to meaningfully address. Part II argues that the CFPB's budgetary independence violates the Appropriations Clause of the Constitution. Part III explains why the panel's chosen remedy was inadequate. Part IV concludes with a brief examination of the possible legislative and executive remedies for the CFPB's unconstitutionality.

I. THE *PHH* DECISION NEGLECTS CONGRESS'S POWER OF THE PURSE.

As part of the Dodd-Frank Act of 2010, Congress created the CFPB, a new independent agency, headed by a single Director.[23] By design, the CFPB's Director enjoys more "unilateral authority than any other officer in any of the three branches of the U.S. Government, other than the President."[24] Indeed, within his vast jurisdiction, encompassing 19 different statutes related to consumer credit markets, the CFPB's Director commands more power than even the President in the field of consumer finance protection law enforcement. Consider the following: Unlike the President, who must ask Congress to approve his proposed budget, the CFPB's Director can set his own budget by unilateral fiat.[25] Unlike the President, the Director is unelected, and may remain in office for a fixed term of five years (longer than the President).[26] And unlike the President, whose lawyers must typically try cases before independent courts, the CFPB's Director sits as judge and jury in cases brought by his own subordinates, a process that unfortunately characterizes many other agencies.[27] Indeed, Title X goes as far as giving the CFPB Director's interpretations deference over those of other federal agen-

---

23 *PHH Corp.*, 839 F.3d at 6.

24 *Id*. at 7.

25 12 U.S.C. § 5497(a)(1) (2012) ("[T]he Board of Governors shall transfer to the Bureau 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 Bureau under Federal consumer financial law . . . ."); Christopher C. DeMuth, Sr. & Michael S. Greve, *Agency Finance in the Age of Executive Government*, 24 GEO. MASON L. REV. 555, 566 (2017) ("The Fed's revenues come from fees on private banks and earnings from open market operations. The Fed covers its own operating budget, along with other expected expenses, from the bank fees and remits the remainder to the Treasury.").

26 12 U.S.C. § 5491(c) (2012); *PHH Corp.*, 839 F.3d at 15.

27 To be sure, the President has long exercised indirect influence over executive agency adjudications through his appointment and removal authorities. *See* Harold J. Krent, *Presidential Control of Adjudication Within the Executive Branch*, 65 CASE W. RES. L. REV. 1083, 1091–1100 (2015). But that is a far cry from the direct judicial role exercised by the Director of the CFPB. And under current precedent, the President may not "remove a member of an adjudicatory body . . . merely because he want[s] his appointees" to adjudicate a case. Wiener v. United States, 357 U.S. 349, 356 (1958).

cies that have been administering financial laws for decades, including agencies controlled by the President.[28] At the risk of repetition, this means that the CFPB's Director may effectively overrule interpretations directed by the President himself.

The *PHH* case amply illustrates the dangers of such concentrated powers. The case arose out of PHH's alleged violations of the Real Estate Settlement Procedures Act (RESPA), a statute that prohibits mortgage companies from accepting "kickbacks" in exchange for referrals.[29] For many years, PHH, a mortgage company, had been referring its customers to insurance companies that entered into reinsurance contracts with PHH's affiliates, a practice known as captive reinsurance.[30] This widespread industry practice does not violate RESPA, because the statute provides that mortgage services provided for "reasonable market value" are not prohibited kickbacks.[31] Interpreting that safe harbor, the Department of Housing and Urban Development had long permitted captive reinsurance arrangements, as long as the premium payments were for reasonable market value.[32]

Enter the CFPB. Taking a dim view of credit markets, the CFPB sought to ban this widespread practice.[33] To achieve its intended end, the CFPB could have promulgated a prospective rule giving regulated entities fair notice, an approach favored by a broad consensus of administrative law experts, or it could have asked Congress to legislate.[34] But as the Treasury Department points out, the CFPB tends to govern its financial subjects through retroactive

28 12 U.S.C. § 5512(b)(4)(B) (2012) ("Notwithstanding any power granted to any Federal agency . . . the deference that a court affords to the Bureau with respect to a determination by the Bureau regarding the meaning or interpretation of any provision of a Federal consumer financial law shall be applied as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law."). Dodd-Frank's framers evidently recognized that if a statute is not committed to the CFPB's *exclusive* interpretation, then the CFPB is not entitled to *Chevron* deference. *See, e.g.*, Dodge v. Comptroller of the Currency, 744 F.3d 148, 155 (D.C. Cir. 2014) ("[T]he court owes no [*Chevron*] deference to" an agency's interpretation of a statute that "several agencies administer.").

29 *PHH Corp.*, 839 F.3d at 10–11.

30 *Id*. at 10.

31 *Id*. at 11.

32 *Id*.

33 *Id*. at 44 ("The CFPB obviously believes that captive reinsurance arrangements are harmful and should be illegal.").

34 The Administrative Conference of the United States has advised agencies against "impos[ing] binding substantive standards or obligations upon affected persons without using legislative procedures (normally including notice-and-comment)." Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure, 57 Fed. Reg. 30,101, 30,101 (July 8, 1992).

adjudication instead of prospective law.[35] Accordingly, the CFPB brought an enforcement action against PHH in its administrative tribunals.[36]

The PHH case was first heard by an administrative law judge (ALJ) housed in the Securities and Exchange Commission.[37] The ALJ found PHH liable for violating RESPA's prohibition against kickbacks and recommended ordering that it pay $6.4 million to disgorge its reinsurance profits.[38] PHH then appealed to the CFPB's Director. In a stunning decision, the Director ordered PHH to disgorge $109.2 million in premium payments from its captive reinsurance business—approximately 17 times the figure ordered by the ALJ.[39] The Director reached this result by announcing what the D.C. Circuit described as a "newly minted" interpretation of RESPA that banned reinsurance arrangements and retroactively applying that interpretation to PHH.[40] The Director furthered inflated the penalty by declaring that no statute of limitations applied to *any* of his decisions.[41] PHH then appealed the CFPB Director's decision to the D.C. Circuit, arguing, among other things, that the CFPB's structure violated Article II of the Constitution.[42]

A three-judge panel agreed with PHH. In a landmark panel opinion authored by Judge Brett Kavanaugh, the panel held that Article II of the Constitution required that the CFPB's Director be removable at will by the President.[43] Judge Kavanaugh's opinion examines in great detail the constitutional law and practice of presidential control over federal agencies and correctly concludes that the Director's insulation from the President's control cannot be reconciled with Article II and controlling Supreme Court precedent.[44] The panel also held that "[t]he retroactive application of the CFPB's

---

35 *See* DEP'T OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: BANKS AND CREDIT UNIONS 82 (2017) (noting that "the CFPB has avoided notice-and-comment rulemaking and instead relied to an unusual degree on enforcement actions and guidance documents, which the CFPB has consistently issued without opportunity for public comment, to announce new standards of conduct."). Indeed, before PHH, several mortgage lenders had already capitulated to the CFPB's ban on terms favorable to the CFPB. *See* CFPB, *The CFPB Takes Action Against Mortgage Insurers to End Kickbacks to Lenders* (Apr. 04, 2013), http://www.consumerfinance.gov/about-us/newsroom/the-cfpb-takes-action-against-mortgage-insurers-to-end-kickbacks-to-lenders/ (announcing four RESPA settlements worth $15.4 million against four companies with captive reinsurance arrangements).

36 PHH Corp., CFPB No. 2014-CFPB-0002, at 1–2 (June 4, 2015).

37 *Id*. at 1.

38 *Id*. at 9.

39 *Id*. at 36–37.

40 *PHH Corp.*, 839 F.3d at 11–12.

41 *Id*. at 50 ("The CFPB says that *no statute of limitations* applies to its case against PHH."). The penalty was also inflated by the Director's finding that every premium payment for reinsurance (as opposed to every contract for reinsurance) was an independent RESPA violation and by refusing to offset any costs incurred by PHH in providing services. *See PHH Corp.*, *supra* note 36, at 35.

42 *PHH Corp.*, 839 F.3d at 12.

43 *Id*. at 12.

44 *Id*.

new interpretation violated the Due Process Clause."[45] Judge Kavanaugh's opinion, however, neglected an important aspect of the constitutional structure. In a decision that spanned dozens of pages and repeatedly stressed the importance of political accountability and the separation of powers, the opinion gave short shrift to the constitutional role of Congress and its essential power of the purse. To the extent an alleged Article I violation was featured at all in the panel's constitutional holding, it was limited to the following casual discussion, buried in a footnote:

> The CFPB's exemption from the ordinary appropriations process is at most just "extra icing on" an unconstitutional "cake already frosted." In any event, Congress can always alter the CFPB's funding in any appropriations cycle (or at any other time). Section 5497 is not an entrenched statute shielded from future congressional alteration, nor could it be.[46]

Sitting en banc, the D.C. Circuit upheld the panel's statutory and Due Process holdings, but reversed the panel's holding that the CFPB Director's tenure protection violated Article II.[47] Unlike the panel, the en banc majority thought there was "nothing constitutionally suspect about the CFPB's leadership structure," because the removal protection afforded to the CFPB's single Director was no different than the protection afforded to Federal Trade Commissioners and upheld by the Supreme Court in *Humphrey's Executor*.[48]

---

45 *Id*. at 46 (emphasis omitted). On the statutory issue, the Court held that RESPA "allow[s] captive reinsurance arrangements so long as the mortgage insurance companies pay no more than reasonable market value to the reinsurers for services actually provided." *Id*. at 44. On the statute of limitations issue, the Court held that a three-year statute of limitations applied to the CFPB's administrative proceedings under RESPA. *Id*. at 55. Judge Randolph issued a concurring opinion, arguing that the proceedings against PHH were unconstitutional because the presiding ALJ was not appointed pursuant to the requirements of Article II. *Id*. at 55 (Randolph, J., concurring). Judge Henderson dissented in part, arguing that the Court should have avoided the separation of powers question and decided only the statutory issues and the Due Process issue. *Id*. at 56 (Henderson, J., concurring in part and dissenting in part).

46 *Id*. at 36 n.16 (citations omitted) (quoting Yates v. United States, 135 S. Ct. 1074, 1093 (2015) (Kagan, J., dissenting)).

47 *See PHH Corp.*, 881 F.3d at 92–93.

48 *Id.* at 93. There were six separate opinions in the en banc *PHH* decision. *Id.* at 75. In addition to the majority opinion authored by Judge Pillard, Judge Tatel filed an opinion addressing statutory issues. *Id.* 110 (Tatel, J., concurring). Judge Wilkins filed a concurring opinion explaining his view "that the Director's significant quasi-judicial duties, as well as the Director's quasi-legislative duties and obligations to coordinate and consult with other expert agencies, provide additional grounds for denial of the separation-of-powers claim before us." *Id.* at 114 (Wilkins, J., concurring). Judge Griffith filed an opinion concurring in the judgment, based on his narrow reading of the CFPB Director's tenure protection as "provid[ing] only a minimal restriction on the President's removal power, even permitting him to remove the Director for ineffective policy choices." *Id.* at 124 (Griffith, J., concurring in the judgment). Judges Henderson and Kavanaugh each filed separate dissenting opinions on the separation of powers issues. *Id.* at 137 (Henderson, J., dissenting); *id.* at 164 (Kavanaugh, J., dissenting). Judge Randolph also filed a separate dissenting opinion, arguing that the Administrative Law Judge that rendered the original "recommended decision" was unconstitutionally appointed. *Id.* at 200–01 (Randolph, J., dissenting).

Indeed, the en banc majority treated *Humphrey's Executor* as the legal baseline, and characterized PHH's constitutional challenge to the CFPB's structure as out of step with the law.[49]

Unlike the panel opinion, the en banc majority directly addressed the CFPB's budgetary independence. The majority held that the CFPB's budgetary independence posed no constitutional problem because "Congress can, consistent with the Appropriations Clause, create governmental institutions reliant on fees, assessments, or investments rather than the ordinary appropriations process," and because "[t]he way the CFPB is funded fits within the tradition of independent financial regulators."[50] The en banc majority also dismissed PHH's argument that the CFPB Director's combination of budgetary autonomy and tenure protection went too far, because the CFPB Director's budgetary independence "does not intensify any effect on the President of the removal constraint."[51]

The D.C. Circuit's en banc decision should be reversed by the Supreme Court. Judge Kavanaugh was correct in holding that the CFPB Director's tenure protection violates Article II. Judge Kavanaugh was also surely correct that "one legislature may not bind the legislative authority of its successors" by shielding a statute from future congressional alteration.[52] But, as this Article argues in the next Part, Judge Kavanaugh was wrong in assuming that the Constitution permitted the Director to spend millions of dollars without any appropriation, as long as the Director can be fired by the President. An Article II cure does not remedy an Article I violation. Moreover, Judge Kavanaugh was also wrong to suggest that the constitutionality of Section 5497 turns on whether or not a future Congress can theoretically enact a new law reasserting Congress's control over the CFPB's budget. The Constitution prescribes exactly the opposite rule: Congress, and only Congress, must exercise its power to appropriate funds *before* an executive agency may spend public money.[53] And Section 5497 is not an appropriation from Congress; it is, instead, a forbidden transfer of Congress's appropriations power.[54] As such, it is unconstitutional.

---

49 *See PHH Corp.*, 881 F.3d 75, 93 ("PHH's constitutional challenge flies in the face of the Supreme Court's removal-power cases, and calls into question the structure of a host of independent agencies that make up the fabric of the administrative state.").

50 *Id.* at 95.

51 *Id.* at 96.

52 United States v. Winstar Corp., 518 U.S. 839, 872 (1996) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *90).

53 U.S. CONST. art. I, § 9, cl. 7.

54 Judge Kavanaugh's opinion is equivocal on this point. The opinion characterizes the statute as an "exemption" from "the annual appropriations process." *PHH Corp.*, 839 F.3d at 36 n.16.

II. THE CFPB REMAINS UNCONSTITUTIONAL, EVEN WITH A REMOVABLE DIRECTOR.

A. *Congress May Not Delegate Its Power of the Purse.*

"The written Constitution is unequivocal, indeed emphatic, in committing fiscal powers to Congress and in withholding them from the executive, the better to safeguard the separation of powers."[55] The Constitution affirmatively vests the power to tax and spend in Congress.[56] At the same time, the Constitution makes it clear that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[57] In simple terms, this means that "not a dollar of [public funds] can be used in the payment of any thing not . . . previously sanctioned" by a congressional appropriation.[58] Or as Alexander Hamilton, the Nation's fiscal father, put it, "no money can be expended, but for an object, to an extent, and out of a fund, which the laws have prescribed."[59] By vesting the spending power in Congress, and by prohibiting any executive spending without congressional appropriation, the Constitution makes it crystal clear that "absolute control of the moneys of the United States is in Congress."[60]

Even if Congress's exclusive power of the purse was not clearly specified by the text, it would have to be implied from the constitutional structure. If the President could spend money without a prior congressional appropriation, "then the constitutional grants of power to the legislature to raise taxes and to borrow money would be for naught because the Executive could effectively compel such legislation by spending at will."[61] Moreover, as Article I of the Constitution makes clear, the legislative power belongs to Congress

55 DeMuth & Greve, *supra* note 25, at 555; *see also* United States v. McIntosh, 833 F.3d 1163, 1175 (9th Cir. 2016) ("The Appropriations Clause plays a critical role in the Constitution's separation of powers among the three branches of government and the checks and balances between them.").

56 U.S. CONST. art. I, § 8, cl. 1.

57 U.S. CONST. art. I, § 9, cl. 7.

58 Reeside v. Walker, 52 U.S. (11 How.) 272, 291 (1850).

59 ALEXANDER HAMILTON, *Explanation*, *in* 8 THE WORKS OF ALEXANDER HAMILTON 122, 128 (Henry Cabot Lodge ed., 1904) (emphasis omitted).

60 Hart v. United States, 16 Ct. Cl. 459, 484 (1880), *aff'd*, 118 U.S. 62 (1886).

61 Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1349 (1988) (internal footnotes omitted).

alone.[62] And no power is more exclusively legislative than the power to raise and spend public money.[63]

The British experience taught the Founders that representative government for a free people under law could not survive unless the legislature had exclusive control over the power of the purse.[64] As James Madison observed, Congress's sole power to provide "the supplies requisite for the support of government" is "that powerful instrument by which . . . an infant and humble representation of the people" in Parliament triumphed over the "overgrown prerogatives" of the English King.[65] Given its tendency to check executive abuse, Madison aptly characterized Congress's power over the purse as "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people."[66]

Other founders were no less emphatic. As Alexander Hamilton put it, a government that vested the power of the purse and of the sword in a single branch "would destroy that division of powers on which political liberty is founded, and would furnish one body all the means of tyranny."[67] Thus, in the Constitution, the Founders sought to ensure that "the legislative department alone has access to the pockets of the people."[68]

Early commentators of all intellectual stripes continued to stress the fundamental importance of Congress's exclusive power of the purse. In his influential commentaries, Justice Joseph Story observed that the Appropriations Clause preserves "in full vigor the constitutional barrier between each department," giving Congress "controlling influence over the executive power, since it holds at its own command all the resources by which a chief magistrate could make himself formidable."[69] Congress's "power to control, and direct appropriations," Story observed, "constitutes a most useful and salutary check . . . upon corrupt influence and public peculation."[70]

---

62 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) ("Article I, § 1, of the Constitution vests '[a]ll legislative Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers . . . .") (quoting U.S. CONST. art. I, § 1) (citing Loving v. United States, 517 U.S. 748, 771 (1996)); *see also* THE FEDERALIST NO. 78 (Hamilton) ("The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated.").

63 *See* BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS, bk. XI, ch. VII (1748) ("Were the executive power to determine the raising of public money otherwise than by giving its consent, liberty would be at an end; because it would become legislative in the most important point of legislation.").

64 Noel Canning v. NLRB, 705 F.3d 490, 510 (D.C. Cir. 2013) ("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.'") (quoting THE FEDERALIST No. 58 (James Madison)), *aff'd*, 134 S. Ct. 2250 (2014).

65 The FEDERALIST NO. 58 (James Madison).

66 *Id*.

67 ALEXANDER HAMILTON, *Convention of New York*, *in* 2 THE WORKS OF ALEXANDER HAMILTON 61 ((Henry Cabot Lodge ed., 1904).

68 THE FEDERALIST NO. 48 (James Madison).

69 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 531 (1833).

70 *Id*. at § 1342.

St. George Tucker agreed. He characterized the Appropriations Clause as "a salutary check, not only upon the extravagance, and profusion, in which the executive department might otherwise indulge itself, and its adherents and dependents; but also against any misappropriation, which a rapacious, ambitious, or otherwise unfaithful executive might be disposed to make."[71] In his view, the Clause was necessary to secure "the right of the people," through their elected representatives, to "be actually consulted upon the disposal of the money which they have brought into the treasury."[72] This security marked "the difference between governments, where there is responsibility, and [governments] where there is none."[73]

For the appropriations power to serve as a useful check on the executive, it was critical that the executive's funding be time-limited, for "[i]f the legislative power was to settle the subsidies, not from year to year, but forever, it would run the risk of losing its liberty, because the executive power would be no longer dependent; and when once it was possessed of such a perpetual right, it would be a matter of indifference whether it held it of itself or of another."[74] That is why from the first Congress until today, Congress has traditionally funded the executive departments through an annual appropriations process.[75]

Modern legal scholars and jurists continue to recognize the importance of Congress's power of the purse as a vital check on the executive branch.[76] Historically, Congress has also recognized the importance of its constitutional power of the purse, enacting several statutes to protect and preserve its authority from executive encroachments.[77] But in recent years, "the general assumption that Congress will jealously guard the powers of the purse as its ultimate means of checking and balancing the executive has become open to serious doubt."[78] No statute casts that assumption more into doubt than Title X of the Dodd-Frank Act, the CFPB's organic statute.

---

71 ST. GEORGE TUCKER, VIEWS OF THE CONSTITUTION OF THE UNITED STATES 298 (1803) (Clyde N. Wilson ed. 1999).

72 *Id.* at 297.

73 *Id.* at 298.

74 MONTESQUIEU, *supra* note 63, bk. XI, ch. VII.

75 *See, e.g.*, An Act Making Appropriations for the Service of the Present Year, 1 Stat. 95 (1789); 2 U.S.C. § 631 (setting forth the "timetable with respect to the congressional budget process for any fiscal year").

76 *See* Brief of State National Bank of Big Spring et al., as Amici Curiae in Support of Petitioners at 22–24, PHH Corp. v. CFPB, No. 15-1177 (D.C. Cir. May 10, 2017).

77 *See* Miscellaneous Receipts Act of 1849, 31 U.S.C. § 3302(b) (2012) (providing that an agent of the U.S. "receiving money for the Government from any source" must deposit the funds into the general Treasury); Anti-Deficiency Act of 1905, 31 U.S.C. § 1341(a)(1)(A) (2012) (making it unlawful for a federal agency to "make or authorize an expenditure or obligation exceeding an amount available in an appropriation").

78 DeMuth & Greve, *supra* note 25, at 557.

B. *Dodd-Frank Unlawfully Delegates the Appropriations Power to the CFPB's Director.*

Section 5497 of the Dodd-Frank Act vests in the CFPB's Director the power to appropriate hundreds of millions of dollars from the Federal Reserve's revenues at will.[79] This authority is truly unprecedented in the history of the United States Constitution. Never before has an executive agency with such broad powers been vested with its own independent budgetary authority.[80]

Section 5497 is not an appropriation. It is, instead, an impermissible "attempt to transfer" Congress's power to appropriate.[81] The *sine qua non* of an appropriation is an act by Congress to authorize the expenditure of certain funds for a limited amount of time. Congress abdicates its responsibility under the Appropriations Clause when it "creates spending authority without . . . time limitations and fails to subject such authority to periodic legislative review."[82] That is what Section 5497 does. The statute identifies a source of public funds (Federal Reserve revenues), and it authorizes the Director to collect funds from that source in perpetuity, and for whatever purpose he deems "reasonably necessary to carry out the authorities of the Bureau," as long as that amount does not exceed twelve percent of the Federal Reserve's operating expenses for fiscal year 2009, adjusted for inflation.[83] Instead of maintaining funds in a Treasury account, the CFPB keeps a "separate fund, to be known as the Bureau of Consumer Financial Protection Fund," which "shall be maintained and established at a Federal reserve bank."[84] These funds are "under the control of the Director," and they are permanently available to the Director without any further action from Congress.[85] Moreover, to remove any doubt, the statute expressly provides that funds in the Bureau Fund "shall not be construed to be Government funds or appropriated moneys."[86] The statute even goes so far as to purport to prohibit the relevant congressional committees from "review[ing]" the Director's collection and use

---

79 12 U.S.C. § 5497(a) (2012).

80 Charles Kruly, *Self-Funding and Agency Independence*, 81 GEO. WASH. L. REV. 1733, 1735 (2013) ("Until the CFPB . . . Congress has utilized self-funding in only a limited number of 'narrowly-focused' independent agencies . . . ."). Some Agencies that engage in quasi-private as well as public functions (e.g., the Federal Reserve) have historically been funded through fees, assessments, or investments that Congress has authorized them to keep. *Id.* at 1735 n.6. None of these agencies are purely executive agencies like the CFPB. *See* Note, *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 the few "narrowly focused" agencies with self-funding characteristics).

81 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935).

82 Stith, *supra* note 61, at 1383.

83 12 U.S.C. § 5497(a)(1), (a)(2)(A)–(B) (2012).

84 12 U.S.C. § 5497(b)(1) (2012).

85 *Id.* § 5497(c)(1) (2012).

86 *Id.* § 5497(c)(3) (2012).

of these funds.[87] As a result, the CFPB's Director may collect each year in perpetuity, and without congressional supervision, over $600 million in public funds.[88] As the CFPB itself has pointed out, this self-funding mechanism ensures the Agency's "full independence" from Congress.[89]

It may not always be easy to distinguish a proper appropriation from fiscal abdication. But "this wolf comes as a wolf."[90] The CFPB's Director possesses the budgetary powers of a "prince": Out of a multi-million-dollar fund, "he levies whatever sums he thinks proper; disposes of them as he thinks proper; and would deem it sedition against him and his government, if any account were required of him, in what manner he had disposed of any part of them."[91] The CFPB's insulation from Congress was evident in a recent congressional hearing. During the hearing, the CFPB's Director refused to answer congressional questions about a wasteful 215-million-dollar renovation project and instead simply retorted, "[a]nd why does it matter to you?"[92]

In a footnote to his panel decision, however, Judge Kavanaugh dismissed a constitutional challenge to the CFPB Director's budgetary independence because "Congress can always alter the CFPB's funding in any appropriations cycle (or at any other time)."[93] This footnote echoed the CFPB's own brief, which pointed out that "if Congress wants to change the Bureau's funding, it has full power to do so pursuant to the ordinary legislative process."[94] This defense cannot withstand scrutiny, for three reasons.

First, Congress can always act to fix unconstitutional statutes (subject to the President's qualified veto), but that hypothetical possibility cannot be used to justify unconstitutional enactments. Otherwise, no law would ever be unconstitutional.

87 *Id.* § 5497(a)(2)(C) ("Notwithstanding 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."). The Federal Reserve also has no authority over the CFPB, and by extension, over the Director's collection and use of Federal Reserve funds. *Id.* § 5492(c).

88 The cap in FY 2017 is estimated to be $646.2 million. CFPB, THE CFPB STRATEGIC PLAN, BUDGET, AND PERFORMANCE PLAN AND REPORT 20 (2016), http://files.consumerfinance.gov/f/2016 02_cfpb_report_strategic-plan-budget-and-performance-plan_FY2016.pdf. In prior years, the CFPB has used its surplus to invest in treasury securities, securing a future source of revenue. *Id*. (acknowledging that "a small portion of the CFPB's budget resources comes from receipts collected from interest on Treasury securities").

89 CFPB, CONSUMER FINANCIAL PROTECTION BUREAU STRATEGIC PLAN: FY 2013 – FY 2017 36 (2013), http://files.consumerfinance.gov/f/ strategic-plan.pdf.

90 *PHH Corp.*, 839 F.3d at 8 (quoting Morrison v. Olson, 487 U.S. 654, 699 (Scalia, J., dissenting)).

91 TUCKER, *supra* note 71, at 298 (discussing the importance of the Appropriations Clause).

92 *The Semi-Annual Report of the Bureau of Consumer Financial Protection: Hearing Before the H. Comm. On Financial Services*, 114th Cong. 72 (2015) (statement of Richard Cordray, Director, CFPB).

93 *PHH Corp.*, 839 F.3d at 36 n.16.

94 *See* Brief of Respondent Consumer Financial Protection Bureau 58, PHH Corp. v. CFPB, No. 15-1177 (D.C. Cir. Nov. 5, 2015).

Second, this defense turns the Appropriations Clause on its head. Under the Appropriations Clause, "[t]he established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."[95] The entire point of that rule is to *force* Congress to take ownership of the government's spending choices, in order to promote accountability and fiscal restraint. Under Dodd-Frank, by contrast, future Congresses can disown the CFPB Director's spending, and forever leave spending decisions in the hands of an individual with a direct interest in enlarging his Agency's budget.

Third, even if "entrenchment" against future congressional action were necessary to violate the Appropriations Clause (it is not), one would be hard pressed to find a clearer example of legislative entrenchment in the U.S. Code. "Self-funding is perhaps the ultimate weapon of legislative entrenchment."[96] "[B]y making an agency self-funded, Congress gives up its most effective tool of agency control."[97] Self-funding provisions exploit two well-known characteristics of our legislative system: as a practical matter, there is "tremendous inertia within the legislative process," and "if Congress is required to take the initiative," congressional control over the CFPB's budget "is unlikely to happen."[98] Moreover, while statutes are "hard to enact," they are "doubly hard to repeal," because statutes "create constituencies" with a strong interest in maintaining the status quo.[99] It is no secret that "the CFPB's congressional framers chose to give up their own power over the CFPB's funding in order to lessen the chance that future Congresses, controlled by another party, might, through the appropriations process, weaken the agency."[100] Or as the enacting Congress put it, this self-funding provision was "absolutely essential" to ensure the CFPB's "independent operations."[101] Independent, that is, from future Congresses.

The CFPB's other arguments in defense of its self-funding mechanism fare no better. In the *PHH* litigation, the CFPB argued that Section 5497 does not violate the Appropriations Clause because the Clause "is a limit on the Executive, not on Congress."[102] This contention cannot be squared with the

---

95 United States v. MacCollom, 426 U.S. 317, 321 (1976).

96 Kruly, *supra* note 80, at 1737.

97 *Id*. at 1740.

98 Jonathan H. Adler, *Placing 'REINS' on Regulations: Assessing the Proposed REINS Act*, 16 J. LEG. & PUB. POL'Y 1, 20 (2013).

99 William N. Eskridge, Jr., *Vetogates,* Chevron, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1453–54 (2008).

100 Kruly, *supra* note 80, at 1736; DeMuth & Greve, *supra* note 25, at 587 ("The CFPB and its financing structure was the product of a Congress and administration under the control of a single party, determined to insulate the newly created agency against interference by a president *or a future Congress* under the control of the other party.").

101 S. REP. NO. 111-176, at 163 (2010).

102 Brief of Respondent Consumer Financial Protection Bureau, *supra* note 94, at 58–59.

text or structure of the Constitution. The Constitution clearly deprives Congress of an "option *not* to require legislative appropriations prior to expenditure."[103] Unlike other prohibitions that apply to particular branches, the Appropriations Clause is written in the passive voice, as a blanket constitutional prohibition against the government in its "united or collective capacity."[104] Its placement in Article I, section 9, among other prohibitions that clearly apply to Congress, shows that Congress is bound by the Clause.[105] And unlike several other prohibitions found in Article I, the Appropriations Clause cannot be lifted with the consent of Congress, a clear demonstration that Congress is bound by the prohibition.[106]

A contrary holding would "subvert the very foundation" of America's written Constitution.[107] If Congress were not bound by the Appropriations Clause, as the CFPB contends, then Congress could in effect delegate its spending power to the executive despite an "express prohibition," in the Constitution.[108] That outcome cannot be reconciled with limited government. Under the American system of government, it is a fundamental axiom that a "law repugnant to the constitution is void; and that courts, *as well as other departments*, are bound by that instrument."[109] This means that Congress may no more authorize the executive to violate the Appropriations Clause than it may authorize executive officers to violate due process or judicial officers to hear cases over which the Constitution denies them jurisdiction.[110] "Such laws . . . are not 'proper means of carrying into [e]xecution' Congress's enumerated powers."[111]

The en banc D.C Circuit's defense of the CFPB's budgetary independence also cannot withstand scrutiny. The en banc court held that "Congress can, consistent with the Appropriations Clause, create governmental institu-

103 Stith, *supra* 61, at 1349.

104 *See* THE FEDERALIST NO. 83 (Alexander Hamilton) ("The United States, in their united or collective capacity, are the OBJECT to which all general provisions in the Constitution must necessarily be construed to refer."). The Appropriations Clause, for instance, also binds the courts. *See* Rochester Pure Waters Dist. v. EPA., 960 F.2d 180, 184 (D.C. Cir. 1992) ("It is beyond dispute that a federal court cannot order the obligation of funds for which there is no appropriation. Nor can it be contended that a court may appropriate funds from which an obligation may be made.") (citations omitted).

105 Stith, *supra* 61, at 1349–50.

106 *See, e.g.*, U.S. CONST. art. I, § 9, cl. 8 ("[N]o Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State").

107 *Marbury*, 5 U.S. at 178.

108 *Id.*

109 *Id*. at 180 (emphasis omitted and emphasis added).

110 *Id*. at 176–77.

111 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2592 (2012) (quoting McCulloch v. Maryland, 17 U.S. 316, 421 (1819)) (observing that "laws, which are not 'consist[ent] with the letter and spirit of the constitution,' are not 'proper [means] for carrying into Execution' Congress's enumerated powers.") (citations omitted).

tions reliant on fees, assessments, or investments rather than the ordinary appropriations process."[112] Without articulating any limiting principle, the court supported its conclusion by pointing to other "independent financial regulators" that it claimed "have complete, uncapped budgetary autonomy": "The Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the National Credit Union Administration, and the Federal Housing Finance Agency."[113]

This analogy does not hold. None of these agencies are purely executive regulatory agencies like the CFPB. The main mission of the Federal Reserve Board is to maintain "growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rate," a special function that is not executive in nature.[114] The Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Federal Housing Finance Agency, are narrowly-focused entities whose missions are, respectively, to insure bank deposits, to charter and insure non-profit federal credit unions, and to supervise government-sponsored enterprises that provide housing finance benefits.[115] Those missions are hardly the stuff from which tyranny is made. By contrast, as the *PHH* case exemplifies, the CFPB Director's only task is to administer a broad array of consumer financial protection statutes that afford plenty of opportunities for arbitrary and capricious law enforcement against private persons. Moreover, unlike the CFPB, the Office of the Comptroller of the Currency is within the Treasury Department, "an agency which is funded by appropriated funds,"[116] and the Comptroller is "subject to the general direction of the Secretary of the Treasury."[117] In any event, the mere existence of other federal financial regulatory agencies with budgetary autonomy, and the

112 *PHH Corp.*, 881 F.3d 95.

113 *Id.* The Court's statement that these agencies all enjoy "uncapped" budgetary autonomy is incorrect. The Federal Reserve Board funds its operations by retaining surplus earnings from the Federal Reserve Banks, but its retention authority is capped, and excess funds must be remitted to the Treasury. *See* 12 U.S.C. § 289(a)(3) (2016).

114 12 U.S.C. § 225a (2012).

115 *See id.* § 1811(a) (2012) ("There is hereby established a Federal Deposit Insurance Corporation . . . which shall insure, as hereinafter provided, the deposits of all banks and savings associations which are entitled to the benefits of insurance under this Act,."); Swan v. Clinton, 100 F.3d 973, 974 (D.C. Cir. 1996) ("The NCUA is entrusted with the responsibility of overseeing federally chartered credit unions and administering the credit union insurance and liquidity funds."); 12 U.S.C. §§ 4502(20), 4513 (a)(1) (2012) (stating the "the duties of the [FHFA] Director shall be" supervising the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and any Federal Home Loan Bank").

116 GAO, Op. B-236399 (May 29, 1991).

117 12 U.S.C.§ 1 (2012).

convenience or wisdom of funding them outside the congressional appropriations process, cannot sanction a congressional departure from the constitutionally exclusive means of funding the executive.[118]

III. CONSTITUTIONAL REMEDIES

In the *PHH* case, the panel held that "severing the for-cause removal provision from the statute" sufficed to cure the separation of powers violation.[119] That is incorrect, because, as explained above, the CFPB's self-funding mechanism also violates the Constitution, and presidential supervision does nothing to mitigate that violation.

While electoral accountability is "the primary control on the government," the Founders believed that "experience ha[d] taught mankind the necessity of auxiliary precautions"; namely, a system of separated powers and checks and balances to give "each department the necessary constitutional means and personal motives to resist encroachments of the others."[120] The purpose of these "auxiliary precautions" is not democratic accountability; rather, these precautions are meant to protect the public against the dangers of faction by ensuring that no man or group of men can unilaterally control governmental policy.[121]

A critical point about the system of checks and balances is that for it to work, each entity must at a minimum be externally checked by another entity. Remove all of the external checks exercised over one branch (or agency), and that branch (or agency) will come to possess "an overruling influence" over the entire government.[122]

Title X of Dodd-Frank is designed to give the CFPB an overruling influence over governmental policy in matters of consumer credit, by eliminating all meaningful constitutional checks on the Agency. First, as emphasized by the panel, the CFPB Director's five-year tenure and lack of presidential accountability liberates the Director from the check of presidential control.[123] Second, the CFPB's self-funding mechanism removes Congress's primary means of controlling and directing the Agency's activities.[124] Third, the CFPB Director's authority to administer numerous vague and punitive laws,

118 *See* INS v. Chadha, 462 U.S. 919, 959 (1983) ("There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President.").

119 *PHH Corp.*, 839 F.3d at 39.

120 THE FEDERALIST NO. 51 (James Madison).

121 *See Brown*, 381 U.S. at 443.

122 THE FEDERALIST NO. 48 (James Madison).

123 *PHH Corp.*, 839 F.3d at 30–31.

124 DeMuth & Greve, *supra* note 25, at 556 (noting that "appropriations are one of the principal means through which Congress controls and directs agencies—ex ante through budgetary appropriations; ex post through 'riders' and earmarks; or by signaling.").

including its authority to punish "abusive" conduct, and the courts deferential review of the Director's interpretations, allow the Director broad leverage to reverse settled executive agency interpretations of the law and force his will on the citizenry though judicially unreviewable enforcement threats. As the Department of the Treasury points out, this leverage allows the CFPB to "reach well beyond its enumerated authorities."[125] These features would all be constitutionally problematic considered alone, but considered together, they are an unprecedented example of unchecked delegation "running riot."[126]

As Judge Henderson would have held in her dissent from the D.C. Circuit's en banc decision, the only proper judicial remedy is to strike down all of Title X.[127] Given Title X's extraordinary departure from the separation of powers, and the dramatic statutory rewrite required to fix the constitutional problems created by Congress, a new, constitutional agency cannot emerge from the fog of litigation. It is clear from Title X's text and context that Congress intended the CFPB to operate as an "independent bureau."[128] This intent is confirmed by the legislative history.[129] Given this coherent agency design, it is not the judiciary's role to undo the clear design of the enacting Congress in order to reframe the CFPB in a constitutional manner.[130] Congress must instead act to fix the CFPB's constitutional defects. Until Congress acts, the CFPB should be enjoined from acting, and its orders denied effect in the courts. The panel decision falls short of supplying the needed constitutional remedy.

---

125 *See* DEP'T OF THE TREASURY, *supra* note 35, at 83 (noting that the CFPB has repeatedly refused to "clearly delineat[e] the reach of the" prohibition).

126 *A.L.A. Schechter Poultry Corp*., 295 U.S. at 553 (Cardozo, J., concurring).

127 *See PHH Corp.*, 881 F.3d at 139 (Henderson J., dissenting) ("I would invalidate Title X in its entirety and let the Congress decide whether to resuscitate—and, if so, how to restructure—the CFPB.").

128 12 U.S.C. § 5491(a) (2012); *see also* 44 U.S.C. § 3502(5) (2012) (designating the CFPB as an "independent regulatory agency," and thus excluding it from E.O. 12866's process for regulatory review by the Office of Management and Budget).

129 The Committee Report declared the CFPB's independence from the political branches to be "absolutely essential." S. REP. NO. 111-176, at 163 (2012). The Report gave the example of another agency (the Office of Federal Housing Enterprise Oversight) that had failed to fulfill Congress's intent because it lacked independence. *Id*.

130 The provisions granting the CFPB independence "are so related and dependent upon" one another that they must fall together. *See* Carter v. Carter Coal Co., 298 U.S. 238, 316 (1936); *see also* R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330, 362 (1935) (holding that "notwithstanding the presumption in favor of divisibility which arises from" a severability declaration, "[the courts] cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole"); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 193–94 (1999) (holding that the provisions of an order setting out "one coherent policy" were not severable).

IV. REPUBLICAN REMEDIES

Members of Congress have already proposed several bills that would remedy the CFPB's constitutional ills.

The Financial Choice Act, sponsored by Congressman Jim Hensarling, would comprehensively reform the CFPB's structure. The bill would, among other things: (1) subject the CFPB to annual congressional appropriations;[131] (2) subject the CFPB's Director to presidential supervision by making him removable at will;[132] and (3) subject the CFPB's actions to de novo judicial review by the courts in matters of law.[133] The bill would also repeal the CFPB's open-ended authority to ban products and services it deems "abusive."[134] The Financial Choice Act was agreed to by the House in June of 2017, by a vote of 233 to 186.[135] If enacted, it would resolve all of the current CFPB's constitutional problems.

Several Senators have introduced their own bills. Senator Ted Cruz has introduced the Repeal CFPB Act, remarkable for its simplicity: it calls for the abolition of the CFPB and a restoration of the status quo prior to the enactment of Title X.[136] That would certainly solve the problem of the CFPB's unconstitutionality. Senator David Perdue has introduced a narrower bill that would eliminate the CFPB's self-funding mechanism and subject the Bureau to the annual appropriations process.[137] Senator Debra Fischer has introduced another bill that would reconstitute the CFPB as a five-member bipartisan commission.[138]

It is too early to say which if any of these bills can succeed. But one thing is clear: the CFPB's future, as it presently exists, is far from guaranteed.

131 H.R. 10, 115th Cong. § 712 (2017).

132 *Id*. § 711(a)(1)(D).

133 *Id*. §§ 341, 717.

134 *Id*. § 736.

135 163 CONG. REC. H4801 (daily ed. June 8, 2017).

136 S. 370, 115th Cong. § 2 (2017). A similar bill was introduced in the House. H.R. 1031, 115th Cong. § 1 (2017).

137 S. 387, 115th Cong. § 2 (2017).

138 S. 105, 115th Cong. § 2 (2017).