COMMISSIONING THE CONSUMER FINANCIAL PROTECTION BUREAU

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There has been much debate over the Consumer Financial Protection Bureau's lack of executive and congressional oversight: its single director removable only for cause and its operations are not subject to appropriations. This paper explains how this very leadership and accountability structure—intended to politically insulate the agency—had the perverse effect of politicizing it. Since

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Director Cordray's departure, there has been increased regulatory uncertainty, discouraging financial innovation and harming consumer welfare. This paper recommends that Congress restructure the Bureau into a multi-member, bipartisan commission to provide industry regulatory predictability and ensure that consumer protection retains its independent seat in the financial regulatory system.

INTRODUCTION

"CFPB head, charged with protecting consumers, says people need 'to help themselves.'"[1]

That was the headline of a Los Angeles Times article reporting on an April 17, 2019 speech by Kathy Kraninger, the Director of the Consumer Financial Protection Bureau ("CFPB" or "Bureau"). To be fair, she did explain that the agency plays a

[1] David Lazarus, *CFPB head, charged with protecting consumers, says people need 'to help themselves'*, L.A. TIMES (Apr. 19, 2019), https://www.latimes.com/business/lazarus/la-fi-lazarus-cfpb-kraninger-takes-consumers-to-school-20190419-story.html.

central role in accomplishing this. "Our first tool is education. . . . Empowering consumers to help themselves, protect their own interests, and choose the financial products and services that best fit their needs is vital to preventing consumer harm and building financial well-being."[2] Kraninger then enumerated the agency's other oversight tools: rulemaking and guidance next, followed by supervision, and finally enforcement. By ranking the agency's tools, she signaled what would be the Bureau's priorities under her leadership: the CFPB would focus on teaching consumers how to protect themselves first and enforcing consumer protection statutes last.

Unsurprisingly, consumer advocates were critical, pointing to the Bureau's history: "This agency was created to be a cop on the beat, not a kindergarten teacher."[3] Fortunately for Kraninger, the agency's priorities are entirely within her prerogative. In fact, regardless of whether President Trump or Congress supports her agenda, they are statutorily powerless to affect the Bureau's policies. Why? For the simple reason that the single director-led CFPB has less executive *and* less congressional oversight than any other existing federal agency.[4] This Article proposes that this level of independence explains in large part why the Bureau is failing to fully implement the statutory program[5] set out in Title X of the

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[2] Kathleen L. Kraninger, Director of the Consumer Financial Protection Bureau, Speech to the Bipartisan Policy Center, a Washington, D.C. think tank (Apr. 17, 2019), https://www.consumerfinance.gov/about-us/newsroom/kathleen-kraninger-director-consumer-financial-protection-bureau-bipartisan-policy-center-speech/.

[3] Lazarus, *supra* note 1.

[4] Many generally consider the Board of Governors of the Federal Reserve System ("Federal Reserve") as the most powerful independent agency with its authority over monetary policy. Unlike the CFPB, however, the Federal Reserve's power is diffused among its seven-member board. 12 U.S.C. § 241 (2015).

[5] *See* Robert O'Harrow Jr. et al., *How Trump appointees curbed a consumer protection agency loathed by the GOP*, WASH. POST (Dec. 4, 2018), https://www.washingtonpost.com/investigations/how-trump-appointees-curbed-a-consumer-protection-agency-loathed-by-the-gop/2018/12/04/3cb6cd56-de20-11e8-aa33-53bad9a881e8_story.html?utm_term=.be04f90c5737 (Former House Financial Services Committee Chairman Barney Frank, co-author of the statute, believes that the agency's mission is not being fulfilled under the Trump administration); Nick Tabor, *Barney Frank on His Regrets From the Great Recession*, N.Y. MAG (Aug. 8, 2018), http://nymag.com/intelligencer/2018/08/barney-frank-on-his-regrets-from-the-great-recession.html (Frank calling the CFPB's acting director a "thug" for refusing to enforce the rules, and noting that the problem is

Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act").[6]

To be clear, the agency has had success since it formally began operations in July 2011. It developed a platform that allows distressed individuals to submit their problems to the agency and to receive a response from financial companies.[7] The CFPB returned well over $12 billion to American consumers by bringing more than 200 enforcement cases.[8] The Bureau even established the first ever federal supervision program over nonbanks to examine them for compliance with consumer financial protection law.[9] These accomplishments, however, belie the Bureau's

specific to the Bureau).

[6] Dodd Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[7] *See CFPB Launches Consumer Complaint Database,* CONSUMER FIN. PROT. BUREAU (June 19, 2012), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-launches-consumer-complaint-database. On July 21, 2011, the same day that it formally began operations, the CFPB started accepting credit card complaints through its website. That December, it began taking mortgage complaints. Now the agency takes complaints on an array of financial products: bank accounts and services, private student loans, and consumer loans (March 2012); credit reporting (October 2012); money transfers (April 2013); debt collection (July 2013); payday loans (November 2013), prepaid cards, credit repair, debt settlement, pawn and title loans (July 2014); virtual currency (August 2014); federal student loans (February 2016); and online market lending (March 2016). The CFPB forwards the consumer's complaint to the company and tracks the company's response. The consumer can also provide the agency with feedback on the company's response. Since 2012, the CFPB publishes certain information from complaints in its Consumer Complaint Database that anyone can use to make comparisons among financial companies. Kraninger has not yet determined whether the Database will remain public. The industry has long lobbied for it to become private, but consumer advocates argue that keeping it public incentivizes companies to resolve consumers' complaints. Pete Schroeder & Katanga Johnson, *Exclusive: New U.S. consumer watchdog chief to continue review of complaints database, fair lending*, REUTERS (Apr. 18, 2019), https://www.reuters.com/article/us-usa-cfpb-interview-exclusive/exclusive-new-us-consumer-watchdog-chief-to-continue-review-of-complaints-database-fair-lending-idUSKCN1RU244.

[8] Christopher L. Peterson, *Dormant: The Consumer Financial Protection Bureau's Law Enforcement Program in Decline,* CONSUMER FEDERATION OF AM. 16 (Mar. 12, 2019), https://consumerfed.org/wp-content/uploads/2019/03/CFPB-Enforcement-in-Decline.pdf (dollar amount is based on both direct relief and forgiven debts from July 18, 2012 to March 8, 2019).

[9] As a general matter, depository institutions have been subject to

vulnerability and its decreasing influence in the consumer financial services industry.

July 21, 2019 marks nine years since the passage of the Dodd-Frank Act, and the partisan attacks over the CFPB—which predated its inception—continue unabated. The period has been an unproductive cycle marked by resistance from the Republicans to purported strong implementation of the Bureau's powers by the Obama administration, followed by resistance from the Democrats to the Trump administration's seemingly weak use of the Bureau's authority. Partisan bickering, however, is not new. Much more concerning is the ensuing regulatory uncertainty. Aside from making compliance unduly burdensome for industry, the lack of regulatory predictability discourages investment. This is especially problematic in fintech, where financial products are based on technological advancements in areas such as machine learning and natural language processing. The lack of a predictable regulatory landscape stymies innovation without any countervailing consumer benefits.

This Article argues that the problem is the Bureau's combination of leadership and accountability structure. Reforming it can place the agency on more stable political footing and establish a more predictable regulatory environment. Considerable academic literature exists on Congress' use of agency design to control the modern administrative state. Yale Law Professor Roberta Romano recently argued that the CFPB's institutional design and accountability, compared to three similar agencies, explains its regulatory strategy.[10] She recommends reforming the Bureau to increase its democratic accountability and legitimacy, but does not address which structure—independent commission or

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examinations for compliance with Federal consumer protection laws. Prior to the CFPB, non-depository institutions offering consumers similar financial products were not subject to the same scrutiny. *See* 12 U.S.C. § 5514 (2014). The CFPB refers to "banks, saving associations, and credit unions" as either "depository institutions" or "banks." In contrast, the agency refers to other companies that provide consumer financial products or services, but are not affiliates of large depository institutions, as either "non-depository institutions" or "nonbanks." *See* CONSUMER FIN. PROT. BUREAU, SUPERVISORY HIGHLIGHTS (Winter 2013), https://files.consumerfinance.gov/f/201401_cfpb_supervisory-highlights-winter-2013.pdf. During my time at the CFPB, the terms "banks" and "nonbanks" were used more often, and thus, I use them throughout this paper.

[10] Roberta Romano, *Does Agency Structure Affect Agency Decisionmaking: Implications of the CFPB's Design for Administrative Guidance*, 36 YALE J. ON REG. 273 (2019).

executive branch agency—would function better.[11] By contrast, this Article explains that a commission (like the Federal Deposit Insurance Corporation or the Securities and Exchange Commission) would better achieve the objectives of Title X of the Dodd-Frank Act.

This Article proceeds as follows. Part I recounts the events leading up to the Great Recession, providing context for why the government embraced a law professor's idea for a new agency. Part II explains how this agency's institutional design, as well as its scope of authority, make it unlike any other independent regulatory body. Part III details how Congress' attempt to insulate the Bureau from partisan politics had the perverse effect of making it even more political. Part IV argues that keeping the agency's independence is critical for consumer welfare and recommends a solution that would reduce the partisan political stakes surrounding the Bureau: Congress should restructure the agency to a bipartisan commission where members serve staggered terms and are removable only for cause. Under this proposal, the CFPB retains a beneficial level of independence from the executive and legislative branches, and at the same time, its structure would be more constitutionally well-established. Most importantly, Congress would give industry a more predictable regulatory landscape that supports consumer-friendly innovation.

I. THE FINANCIAL CRISIS AND THE NEW INDEPENDENT AGENCY

Economists were bewildered that the country's worst recession since the Great Depression stemmed from the housing market[12] when, for decades, owning a home was a reliably "solid investment."[13] In the early 2000s, consumers seized the opportunity to own homes when historically low interest rates made affordable

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[11] *Id.* at 331.

[12] Edmund L. Andrews, *Greenspan Concedes Error on Regulation*, N.Y. TIMES (Oct. 23, 2008), https://www.nytimes.com/2008/10/24/business/economy/24panel.html ("[A] humbled Mr. Greenspan admitted that he had put too much faith in the self-correcting power of free markets and had failed to anticipate the self-destructive power of wanton mortgage lending.").

[13] Anthony Depalma, *In the Nation; Why Owning A Home is the American Dream*, N.Y. TIMES (Sept. 11, 1988), https://www.nytimes.com/1988/09/11/realestate/in-the-nation-why-owning-a-home-is-the-american-dream.html (explaining that the federal government's tax policies have in part facilitated home ownership).

monthly mortgage payments possible.[14] Even before this, mortgage credit had expanded to include "subprime borrowers" who were considered more likely to default on their loans.[15] Many creditors were willing to make these high-risk, subprime mortgages without worrying about borrowers' creditworthiness because they could repackage the loans into asset-backed securities and sell them to Wall Street.[16] The relaxed underwriting standards contributed to

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[14] *See* Krishna Guha, *A Global Outlook*, FIN. TIMES (Sept. 16, 2007), https://www.ft.com/content/976b7442-6486-11dc-90ea-0000779fd2ac (describing interview of former Federal Reserve Chairman, Alan Greenspan, in which he explains that the housing bubble was "fundamentally engendered by the decline in real long-term interest rates"). For a comprehensive discussion about how the monetary policy of the Federal Reserve affected the housing boom, see John B. Taylor, Remarks prepared for the "Causes" Session "Workshop Series on the 2008 Financial Crisis: Causes, The Panic, The Recession, Lessons" (Oct. 19, 2018), https://www.hoover.org/sites/default/files/research/docs/govt_as_cause_of_crisis-a_reassement_10.pdf.

[15] "Borrowers in the subprime market are deemed to be at higher risk of defaulting on their loans based on the underwriting standards adopted by individual lenders and financial factors such as prior credit history, bankruptcies, income, work history, and related characteristics." LARRY KIRSCH & GREGORY D. SQUIRES, MELTDOWN: THE FINANCIAL CRISIS, CONSUMER PROTECTION, AND THE ROAD FORWARD 2 (2017). To be clear, subprime lending was not a result of the Community Reinvestment Act ("CRA"), passed in 1977 to promote universal homeownership by encouraging banks to lend to individuals who were formerly ineligible. Because the CRA applies only to banks, it cannot be responsible for the "overwhelming proportion of subprime loans [that] were issued through non-banking entities." Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis*, 13 N.C. BANKING INST. 5, 27 (2009). The Federal Reserve also concluded that the "CRA was not a significant contributor to the financial crisis." Neil Bhutta & Daniel Ringo, *Assessing the Community Reinvestment Act's Role in the Financial Crisis*, FEDS NOTES. WASHINGTON: BOARD OF GOVERNORS OF THE FED. RESERVE SYSTEM (May 26, 2015), https://www.federalreserve.gov/econresdata/notes/feds-notes/2015/assessing-the-community-reinvestment-acts-role-in-the-financial-crisis-20150526.html ("[E]mpirical research, by and large, also finds little connection between the CRA-related activities of banks and the expansion of risky or subprime mortgage lending.").

[16] *See* John V. Duca, *Subprime Mortgage Crisis*, FED. RESERVE HISTORY (Nov. 22, 2013), https://www.federalreservehistory.org/essays/subprime_mortgage_crisis ("[H]igh-risk mortgages became available from lenders who funded mortgages by repackaging them into pools that were sold to investors."); Jim Zarroli, *Rise and Fall of Subprime Lenders Began on Wall St.*, NPR (Mar. 30, 2007),

the growth of "predatory lending."[17] Unscrupulous lenders offered "no doc,"[18] "negative amortization,"[19] and "teaser rate"[20] mortgages to people who could not afford them or who "weren't savvy enough to turn them down."[21] Individuals who previously would not have qualified for mortgages became homeowners.[22] Notably, consumer advocates were not alone in their concerns about the housing market.[23] While some government officials were alarmed

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https://www.npr.org/templates/story/story.php?storyId=9248739 (explaining that mortgage companies stopped lending their own money when "warehouse lending by Wall Street firms" became available through mortgaged-backed securities).

[17] Kat Aaron, *Predatory Lending: A Decade of Warning*, CENTER FOR PUBLIC INTEGRITY (May 6, 2009), https://publicintegrity.org/business/predatory-lending-a-decade-of-warnings.

[18] Lenders did not require borrowers to provide documentation proving their ability to repay. Julia Kagan, *No Documentation Mortgage (No Doc)*, INVESTOPEDIA (June 17, 2018), https://www.investopedia.com/terms/n/nodocmortgage.asp. Approximately 50 percent of all subprime borrowers in 2005 and 2006 provided little or no documentation of their income. Aaron, *supra* note 17.

[19] With negative amortization loans, the borrowers' principal owed increases over time because the monthly payments are less than the monthly interest owed. Will Kenton, *Negatively Amortizing Loan*, INVESTOPEDIA (Mar. 23, 2018), https://www.investopedia.com/terms/n/negativelyamortizingloan.asp.

[20] Often, lenders encouraged teaser rate loans and reassured borrowers that because home prices were on the rise, they could maintain the low monthly payments by simply refinancing once the higher rate took effect. *See* Julia Kagan, *Teaser Rate*, INVESTOPEDIA (Apr. 2, 2018), https://www.investopedia.com/terms/t/teaserrate.asp.

[21] Zarroli, *supra* note 16.

[22] This increased access to credit also spurred housing demand, further contributing to the upward pressure on home values. Katalina M. Bianco, *The Subprime Lending Crisis: Causes and Effects of the Mortgage Meltdown*, CCH FED. BANKING LAW REPORTER 6 (2008), https://business.cch.com/images/banner/subprime.pdf. In fact, from 1997 to 2006, nominal housing prices increased 188 percent. Adam J. Levitin & Susan M. Wachter, *Explaining the Housing Bubble*, GEORGETOWN UNIV. LAW CTR. 3 (Aug. 31, 2010), http://realestate.wharton.upenn.edu/wp-content/uploads/2017/03/689.pdf. However, due to fears that the rapid increase in home values represented a housing bubble, from 2004 to 2006, the Federal Reserve tried to slow down the growth of housing prices, adjusting interest rates 17 times from 1 percent to eventually 5.25 percent. Bianco at 5.

[23] Aaron, *supra* note 17 ("As the subprime lending industry grew, and accounts of abusive practices mounted, advocates, borrowers, lawyers, and even some lenders clamored for a legislative or regulatory response to what was

by Wall Street's role, banking regulators were convinced that tougher enforcement of existing laws and industry self-regulation would suffice.[24]

In August 2006, falling home prices meant that outstanding debt began to exceed home values.[25] Borrowers who could no longer afford their mortgages faced a difficult choice: either wait for their lender to foreclose or walk away from their homes and default on their mortgages.[26] With foreclosures on the rise, home prices declined further, resulting in more homes going "underwater," perpetuating the cycle of increasing levels of mortgage defaults and families losing their homes.[27] In August 2007, American International Group ("AIG"), one of the world's largest insurance companies, warned that mortgage defaults were not limited to the subprime sector.[28] By mid-December, Wall Street

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emerging as a crisis.").

[24] Then-Director of the Bureau of Consumer Protection of the Federal Trade Commission, Jodie Bernstein, believed that Wall Street's role was "outrageous" and that "they're bundling these things up and then nobody has responsibility for them" because "[t]hey're just passing them on." However, she recognized that she did not have much influence compared to Greenspan, who had little interest in consumer regulation. In an October 2008 congressional testimony, Greenspan conceded a "flaw" in his ideology, "Those of us who have looked to the self-interest of lending institutions to protect shareholder's [sic] equity, myself especially, are in a state of shocked disbelief." *Id.*

[25] *See* Bianco, *supra* note 22, at 5, 19.

[26] As long as housing prices were on the rise, when homeowners could not meet their monthly payments, they could sell their homes and pay off their mortgages or borrow more against the equity in their home to cover their payments. MAJORITY STAFF OF JOINT ECON. COMM., 110TH CONG., REP. AND RECOMMENDATIONS ON THE SUBPRIME LENDING CRISIS 2-3 (2007), https://www.jec.senate.gov/public/_cache/files/148eaf7c-ee62-42f0-b215-006db6a11d65/octobersubprimereport.pdf.

[27] By May 2007, foreclosures were up 90 percent from the previous year. JOINT ECON. COMM., 110TH CONG., SUBPRIME MORTGAGE MARKET CRISIS TIMELINE 23 (July 2008), https://www.jec.senate.gov/public/_cache/files/4cdd7384-dbf6-40e6-adbc-789f69131903/subprimetimelineupdate0710080000000.pdf [hereinafter TIMELINE]. In July 2007, the figure jumped to 93 percent year over year. *Id.* at 20. That same month, credit rating agencies downgraded the subprime mortgage-backed securities that had been sold to investors. *Id.* at 23. Soon thereafter, Bear Stearns announced losses of over $1.4 billion in its two hedge funds that invested in the subprime market. *Id.* at 22.

[28] *Id.* at 21. For a discussion about AIG's role in the mortgage crisis, see Carrick Mollenkam et al., *Behind AIG's Fall, Risk Models Failed to Pass Real-World Test*, WALL ST. J. (Oct. 31, 2008),

had lost more than $40 billion from the mortgage crisis.[29] No one realized it then, but the economy had entered the "Great Recession."[30]

In January 2008, stock markets around the world tumbled as investors feared that the mortgage crisis would spread to the international financial system.[31] Soon, the U.S. government had no choice but to intercede.[32] Bear Stearns, the fifth largest investment

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https://www.wsj.com/articles/SB122538449722784635. Also during August 2007, foreclosures were up 36 percent from the prior month and 115 percent from the prior year. TIMELINE, *supra* note 27, at 18. In October 2007, the former chairman of the Mortgage Bankers Association predicted that "a half million mortgage borrowers each year for the next few years risk foreclosure." *Id.* at 14.

[29] Landon Thomas Jr, *$9.4 Billion Write-Down at Morgan Stanley*, N.Y. TIMES: BUSINESS DAY (Dec. 20, 2007), https://www.nytimes.com/2007/12/20/business/20wall.html.

[30] Kevin J. Lansing, *Gauging the Impact of the Great Recession*, ECON. RESEARCH DEPT. OF THE FED. RESERVE BANK OF S.F. (July 11, 2011), https://www.frbsf.org/economic-research/publications/economic-letter/2011/july/impact-great-recession/ ("The 'Great Recession,' which started in December 2007 and ended in June 2009, was the most severe economic contraction since 1947 as measured by the peak-to-trough decline in real GDP.").

[31] Bianco, *supra* note 22, at 19 ("Stock prices fell more than 7 percent in Germany and India, 5.5 percent in Britain, 5.1 percent in China and 3.9 percent in Japan. Many countries reported their worst market declines since Sept. 11, 2001.").

[32] Initially, the Bush administration was unwilling to interfere. In March 2007, Federal Reserve Chairman Bernanke testified at a congressional Joint Economic Committee hearing, "[T]he turmoil in the subprime mortgage market has created severe financial problems for many individuals and families. . . . At this juncture, however, the impact on the broader economy and financial markets of the problems in the subprime market seems likely to be contained." *The Economic Outlook Before Joint Econ. Comm.*, 110th Cong. (Mar. 28, 2007) (testimony of Ben S. Bernanke, Chairman, Federal Reserve Board of Governors). The following month, when Senate Democrats called for the government's intervention to prevent more home foreclosures, the Bush administration not only expressed reluctance, but appeared to place the blame on home owners. White House Spokesman Tony Fratto was quoted as saying, "[I]ndividuals need to make smart decisions in taking on debt, and there has to be some responsibility for making those decisions." Diana Olick, *CNBC's Olick: Lawmakers Seek Help for Homeowners in Trouble*, CNBC (Aug. 5, 2010), https://www.cnbc.com/id/18092014. The administration was concerned that government involvement "would only encourage risky behavior." *Id.* In August 2007, those sentiments were echoed in a speech by Bernanke, "It is not the responsibility of the Federal Reserve—nor would it be appropriate—to protect lenders and investors from the consequences of their financial decisions." Ben S. Bernanke, Chairman, Federal Reserve Board of Governors, Speech at

bank in the country, was on the brink of failing partly because two of its hedge funds had heavily invested in subprime mortgages.[33] In March 2008, the government incentivized JP Morgan Chase to acquire Bear Stearns by guaranteeing its bad loans.[34] The government again intervened in September 2008, when it took over $5 trillion in mortgages.[35] However, it refused to bail out—seemingly arbitrarily—Lehman Brothers, an even larger investment bank,[36] when it could not meet its debt obligations or find a buyer.[37] On September 15, when Lehman Brothers filed for bankruptcy it "shook Wall Street to its core" with retirement plans and other investment funds losing approximately $700 billion.[38]

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the Federal Reserve Bank of Kansas City's Economic Symposium, Jackson Hole, Wyoming on Housing, Housing Finance, and Monetary Policy (Aug. 31, 2007), https://www.federalreserve.gov/newsevents/speech/bernanke20070831a.htm.

[33] *See* Jeff Pruzan, *Timeline: Bear Stearns' year of turmoil*, FIN. TIMES (Mar. 17, 2008), https://www.ft.com/content/d7936764-f1d5-11dc-9b45-0000779fd2ac.

[34] *Bear Stearns Gets Bailout From the Federal Reserve*, CNBC (last updated Aug. 5, 2010), https://www.cnbc.com/id/23630235 ("The Fed is taking all the risk in this arrangement. . . . They are exposing themselves to a nonmember institution which is highly unusual, if not unprecedented. They could have (made the loan) directly, but they chose not to."); Andrew Ross Sorkin, *JP Morgan Pays $2 a Share for Bear Stearns*, N.Y. TIMES (Mar. 17, 2008), https://www.nytimes.com/2008/03/17/business/17bear.html (Bear Stearns' share price was $170 a year ago).

[35] David Ellis, *U.S. seizes Fannie and Freddie*, CNN MONEY (Sept. 7, 2008), https://money.cnn.com/2008/09/07/news/companies/fannie_freddie/. The Treasury Department declared that the two government-sponsored mortgage companies, Fannie Mae and Freddie Mac, were insolvent, placing them under the conservatorship of the Federal Housing Financial Agency, providing them up to $200 billion to keep them from failing. *Id.*

[36] For a discussion explaining why the government allowed Lehman Brothers to fail, see Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 491-94 (2009); *see also* Phillip Swagel, *The Financial Crisis: An Inside View*, BROOKINGS PAPERS ON ECON. ACTIVITY 1, 39-40 (Spring 2009), https://www.brookings.edu/wp-content/uploads/2009/03/2009a_bpea_swagel.pdf.

[37] *Morning Edition, Lehman Brothers Scrambles To Find A Buyer*, NPR (Sept. 12, 2008), https://www.npr.org/templates/story/story.php?storyId=94545642. For an account of companies that had considered taking over Lehman Brothers, see generally ANDREW ROSS SORKIN, TOO BIG TO FAIL 187-351 (2009).

[38] Matt Egan, *Lehman Brothers: When the Financial Crisis Spun Out of Control*, CNN BUSINESS (Sept. 14, 2008),

The Financial Crisis Inquiry Commission later concluded that when the bank collapsed, "the financial crisis reached cataclysmic proportions,"[39] setting the stage for "unprecedented government intervention in the financial market."[40]

A. Roots in Academia

Before Elizabeth Warren became a U.S. Senator from Massachusetts running for president, she was a Harvard Law professor who had spent years as a consumer advocate.[41] In the summer of 2007—when it was increasingly apparent to consumer advocates that the mortgage market was in crisis, but well before federal officials realized that it could bring the entire financial system to a grinding halt[42]—then-Professor Warren argued that predatory lending in the subprime mortgage market underscored the need to rethink financial regulation. In her article, "Unsafe at Any Rate," she explained that there ought to be a "Financial Product Safety Commission," similar to the Consumer Product Safety Commission ("CPSC"):

> It is impossible to buy a toaster that has a one-in-five chance of bursting into flames and burning down your house. But it is possible to refinance an existing home

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https://www.cnn.com/2018/09/30/investing/lehman-brothers-2008-crisis/index.html.

[39] THE FINANCIAL CRISIS INQUIRY REPORT 343 (2011). For a discussion about the Financial Crisis Inquiry Commission's role and a critique of its report, see Andrew H. Hartlage, *"Never Again," Again: A Functional Examination of the Financial Crisis Inquiry Commission*, 111 MICH. L. REV. 1183 (2013).

[40] Anjan V. Thankor, *Leverage, System Risk and Financial System Health: How Do We Develop a Healthy Financial System?, in* GOVERNANCE, REGULATION AND BANK STABILITY 9, 9 (T. Lindblom, et al. eds., 2014).

[41] Helaine Olen, *Elizabeth Warren: From Consumer Advocate to United States Senator*, FORBES (Nov. 6, 2012), https://www.forbes.com/sites/helaineolen/2012/11/06/elizabeth-warren-from-consumer-advocate-to-united-states-senator/#695a5547f1ab.

[42] In a June 2007 speech, at the International Monetary Conference, Bernanke touted, "[F]undamental factors—including solid growth in incomes and relatively low mortgage rates—should ultimately support the demand for housing, and at this point, the troubles in the subprime sector seem unlikely to seriously spill over to the broader economy or the financial system." Ben S. Bernanke, Chairman, Federal Reserve Board of Governors, Speech to the 2007 International Monetary Conference, Cape Town, South Africa (via satellite) on the Housing Market and Subprime Lending (June 5, 2007), https://www.federalreserve.gov/newsevents/speech/bernanke20070605a.htm.

> with a mortgage that has the same one-in-five chance of putting the family out on the street–and the mortgage won't even carry a disclosure of that fact to the homeowner.[43]

In her view, if "[n]early every product sold in America has passed basic safety regulations well in advance of reaching store shelves," then financial products should also be reviewed for safety to make sure that they "themselves don't become the source of the trouble."[44]

To be fair, well before the financial crisis hit, more than a dozen consumer financial protection statutes already existed. The responsibility for enforcing these statutes was shared among no fewer than seven regulators—the Federal Trade Commission ("FTC"), the Board of Governors of the Federal Reserve System ("Federal Reserve"), the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC"), the National Credit Union Administration ("NCUA"), the Office of Thrift Supervision ("OTS"), and the Department of Housing and Urban Development ("HUD")—with each having authority over certain types of financial entities.[45]

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[43] Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY: A JOURNAL OF IDEAS, (Summer 2007), https://democracyjournal.org/magazine/5/unsafe-at-any-rate/ [hereinafter *Unsafe at Any Rate*].

[44] *Id.*

[45] While the FTC is a consumer protection agency, it does not oversee banks, and thus, has a limited role in financial markets. 15 U.S.C. 45(a)(2) ("The [FTC] is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."). Before the Dodd-Frank Act, the Federal Reserve mainly oversaw bank holding companies, state member banks, and foreign banks operating in the United States. The OCC was responsible for national banks and federal branches of foreign banks. The FDIC was responsible for federally-insured depository institutions, including state banks that are not members of the Federal Reserve. The NCUA oversaw federally-chartered or insured credit unions. The OTS was responsible for savings associations and savings and loan holding companies. WALTER W. EUBANKS, CONG. RESEARCH SERV., RL33036, FEDERAL FINANCIAL SERVICES REGULATORY CONSOLIDATION: AN OVERVIEW 2 (July 10, 2008). With the enactment of the Dodd-Frank Act, Congress eliminated the OTS, transferring its responsibilities: The Federal Reserve took over savings and loan holding companies; the OCC gained federally chartered thrift institutions; and the FDIC became in charge of state-chartered thrift institutions. MARC LABONTE, CONG. RESEARCH SERV., R44918, WHO REGULATES WHOM? AN OVERVIEW OF THE

Depending on how a depository institution structured itself, it could "shop for the regulator [it] thought most congenial."[46] For example, a national bank could become a savings and loan association, thereby changing its primary regulator from the OCC, which was known to be tough, to the OTS, "which was viewed as a regulator that was particularly tolerant."[47] Put another way, it was "a race to the bottom" as the responsibility for enforcing consumer protection statutes turned on the financial institution's chosen charter rather than on the type of financial product offered.[48]

Warren believed that this resulted in financial products being "regulated by a tattered patchwork of federal and state laws."[49] She reported that in 2005, 23 percent of subprime mortgages were issued by thrifts or banks (resulting in oversight by the OTS, the OCC, or the FDIC); another 25 percent were issued by bank holding companies (resulting in oversight by the Federal Reserve); and the remaining 52 percent were not federally regulated at all.[50] To her, this provided "a stunning example of the

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U.S. FINANCIAL REGULATORY FRAMEWORK 8 (Aug. 17, 2017).

[46] ROBERT G. KAISER, ACT OF CONGRESS: HOW AMERICA'S ESSENTIAL INSTITUTION WORKS, AND HOW IT DOESN'T 192 (2013). The OCC and the OTS charged fees to financial institutions they regulated, while the Federal Reserve and the FDIC did not, providing another factor for choosing a regulator. *Id.* at 192-93.

[47] *Id.* at 193. Because a number of financial institutions under OTS supervision had failed (e.g., IndyMac, Countrywide, and Washington Mutual) or would have failed without government intervention (e.g., AIG), critics believed "[i]t deserve[d] to be shuttered." Robert Cyran, *The Downfall of a Regulator*, N.Y. TIMES (Apr. 8, 2009), https://www.nytimes.com/2009/04/09/business/09views.html. For a discussion detailing the bipartisan investigation into OTS' failures, see U.S. SENATE PERMANENT SUBCOMM. ON INVESTIGATIONS, 112TH CONG., WALL STREET AND THE FINANCIAL CRISIS: ANATOMY OF A FINANCIAL COLLAPSE 161-239 (Comm. Print 2011), https://www.hsgac.senate.gov//imo/media/doc/Financial_Crisis/FinancialCrisisReport.pdf?attempt=2 [hereinafter SENATE INVESTIGATIONS REPORT].

[48] U.S. DEPT. OF TREASURY, FINANCIAL REGULATORY REFORM, A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION 8 (2009), https://www.treasury.gov/initiatives/documents/finalreport_web.pdf [hereinafter FINANCIAL REGULATORY REFORM] ("[F]inancial institutions will tend to move their activities to jurisdictions with looser standards, creating a race to the bottom and intensifying systemic risk.").

[49] *Unsafe at Any Rate*, *supra* note 43.

[50] Before the Dodd-Frank Act, nonbanks such as stand-alone mortgage brokers and nonbank finance companies were not subject to federal supervision.

resulting fractured oversight."[51]

To make matters worse, these prudential regulators were focused on the safety and soundness of the banking system rather than protecting consumers.[52] Their central mission was to evaluate risk management and risk mitigation by analyzing the strength of a bank's balance sheet. Georgetown Law Professor Adam Levitin highlighted this inherent conflict of interest:

> Safety-and-soundness ultimately means profitability, because only profitable financial institutions can be safe and sound. Unfair, deceptive and abusive practices, however, can be highly profitable; that is the only reason to engage in them. Placing the two missions together in a single agency ensures that one will trump the other, and historically consumer protection has not won out, except when the most egregious practices are at stake.[53]

Even more troubling was the regulators' apparent disregard for the consumer safety of its regulated entities' financial products. For example, the Federal Reserve had authority over the Home Ownership and Equity Protection Act since its enactment in 1994,[54] but it had long resisted implementing key statutory provisions that could have prevented predatory lending.[55] In June

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See Mark Totten, *The Enforcers & the Great Recession*, 36 CARDOZO L. REV. 1611, 1616-18 (2015).

[51] *Unsafe at Any Rate*, *supra* note 43.

[52] *See* LABONTE, *supra* note 45, at 5. The prudential regulators are the Federal Reserve, the OCC, the FDIC, the NCUA, and the OTS (before it was eliminated under the Dodd-Frank Act). Prudential regulators are not funded through congressional appropriations. *See* HOGUE, ET AL., *infra* note 108, at 27.

[53] Adam J. Levitin, *The Consumer Financial Protection Agency*, 28-OCT AM. BANKR. INST. J. 10, Oct. 2009, at 66.

[54] Home Ownership and Equity Protection Act of 1994, Pub. L. No. 103-325, 108 Stat. 2190 (1994).

[55] To be clear, the Federal Reserve issued regulations implementing certain parts of the statutory program well before the Great Recession. However, the Federal Reserve declined to issue any regulations implementing the provision of the statute that could have prohibited predatory lending. *See* 15 U.S.C. § 1639(l)(2) (2009) ("The Board, by regulation or order, shall prohibit acts or practices in connection with (A) mortgage loans that the Board finds to be unfair, deceptive, or designed to evade the provisions of this section; and (B) refinancing of mortgage loans that the Board finds to be associated with abusive lending practices, or that are otherwise not in the interest of the borrower."). For a discussion outlining the Federal Reserve's refusal to issue regulations implementing this provision, see Patricia A. McCoy et al., *Systematic Risk*

2008, several months into the Great Recession, the Federal Reserve issued rules protecting consumers from unfair, abusive, or deceptive lending and servicing practices.[56] By then, millions of Americans had already lost their homes, were in mortgage default, or at risk of defaulting. The mortgage crisis demonstrated that because no single agency focused on the consumer safety of financial products, consumer protection was often overlooked.[57]

B. Political Will and Public Opinion

Seasoned politicians knew that only a crisis could turn then-Professor Warren's "pipe dream"[58] into reality. Shortly after the November 2008 elections, then-President-Elect Obama's new Chief of Staff Rahm Emanuel candidly advised top CEOs, "You never want a serious crisis to go to waste. And what I mean by that — it's an opportunity to do things you think you could not do before."[59] Within five months of his inauguration, President Obama unabashedly used the financial crisis to introduce an 88-page white paper to modernize the financial regulatory system:[60]

> We did not choose how this crisis began, but we do have a choice in the legacy this crisis leaves behind. So today my administration is proposing a sweeping overhaul of

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Through Securitization: The Result of Deregulation and Regulatory Failure, 41 CONN. L. REV. 1327 (2009).

[56] Press Release, Bd. of Governors of the Fed. Reserve Sys., Board issues final rule amending home mortgage provisions of Regulation Z (Truth in Lending) (July 14, 2008), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20080714a.htm.

[57] Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 330 ("Prior to the CFPB, consumer financial protection regulation was divided among multiple federal and state agencies. . . . [I]t made consumer protection an orphan mission that tended to 'fall between the cracks' because no agency had an exclusive role of consumer protection in financial services.").

[58] ELIZABETH WARREN, A FIGHTING CHANCE 131 (2014) ("My article proposing this new agency was published in 2007. . . . At the time, a consumer financial protection bureau seemed like a pipe dream. George W. Bush was still president, and the Republican leadership was still talking about *de*-regulation, not stronger regulation.").

[59] Gerald F. Seib, *In Crisis, Opportunity for Obama*, WALL ST. J. (Nov. 21, 2008), https://www.wsj.com/articles/SB122721278056345271; *see also* James Albee, *Rahm Emanuel Never Let A Good Crisis Go To Waste*, YOUTUBE (Mar. 20, 2013), https://www.youtube.com/watch?v=JXwjHKEejFc.

[60] FINANCIAL REGULATORY REFORM, *supra* note 48.

> the financial regulatory system, a transformation on a scale not seen since the reforms that followed the Great Depression.[61]

Much to Warren's excitement,[62] Obama's proposal included her call for an agency dedicated solely to consumer welfare:

> [W]e're proposing a new and powerful agency charged with one—just one job: looking out for ordinary consumers. . . . This agency will have the power to set standards so that companies compete by offering innovative products that consumers actually want and actually understand. Consumers will be provided information that is simple, transparent, and accurate. You'll be able to compare products and see what's best for you. The most unfair practices will be banned. . . . And enforcement will be the rule, not the exception.[63]

Unsurprisingly, the proposed agency enjoyed broad public support.[64] In the past 18 months, Americans experienced the worst economic decline since the Great Depression.[65] The economy lost roughly 8.7 million jobs,[66] the unemployment rate more than doubled to 10 percent,[67] and millions of Americans lost their

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[61] *Administration of Barack Obama, 2009*, GOV'T PUBLISHING OFFICE at 844 (2009), https://www.govinfo.gov/content/pkg/PPP-2009-book1/pdf/PPP-2009-book1-doc-pg843-2.pdf [hereinafter GPO].

[62] WARREN, *supra* note 58, at 146 ("At the time, I was too buzzed with excitement to marvel at how truly astonishing this was. I'd heard rumors that some of the president's top financial advisors were unenthusiastic about the concept for the new agency. . . . So where had the support come from? . . . As I would later learn, [Obama] believed passionately that the White House needed to support a reform measure that would help regular people, and he saw the agency as the best way to do that.").

[63] GPO, *supra* note 61, at 844.

[64] KAISER, *supra* note 46, at 377.

[65] Marilyn Geewax, *Did The Great Recession Bring Back The 1930s*?, NPR (July 11, 2012), https://www.npr.org/2012/07/11/155991507/did-the-great-recession-bring-back-the-1930s.

[66] Stephanie Hugie Barello, *Consumer Spending and U.S. Employment from the 2007-2009 Recession Through 2022*, MONTHLY LABOR REVIEW (Oct. 2014), https://www.bls.gov/opub/mlr/2014/article/consumer-spending-and-us-employment-from-the-recession-through-2022.htm.

[67] John Weinberg, *The Great Recession and its Aftermath*, FED. RESERVE HISTORY (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great_recession_and_its_aftermath.

homes. Despite the series of 2008 government bailouts,[68] the lives of ordinary Americans seemingly failed to improve. To add insult to injury, AIG had announced recently that it would provide executive bonuses of $165 million, despite receiving the largest taxpayer bailout.[69] Polls reflected what every politician already knew: Americans were furious, and they expected stricter regulations.[70]

The Obama administration's proposal, however, went far beyond regulating the mortgage market. It addressed nearly every aspect of the consumer financial markets.[71] In fact, the administration sought a comprehensive reform of the entire financial sector,[72] reflecting the belief that no one single factor caused the Great Recession.[73]

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[68] In March 2008, the Federal Reserve provided a $30 billion credit line to ensure that JP Morgan Chase would purchase Bear Stearns. Jesse Nanin & Krista Kjellman Schmidt, *History of U.S. Gov't Bailouts*, PROPUBLICA (Sept. 18, 2008), https://www.propublica.org/article/government-bailouts. In early September 2008, the government "essentially nationalized" mortgage companies Fannie Mae and Freddie Mac. *Id.* One week later, the government loaned AIG $85 billion. *Id.* Later that month, the auto industry received $25 billion in loans. *Id.* In October 2008, Congress created the Troubled Asset Relief Program ("TARP"), giving the Treasury Department $700 billion to shore up financial institutions. *Id.* Over the course of October and November 2008, the government would bail out AIG three more times, and total cost reached $182 billion, some of which came from TARP. Kimberly Amadeo, *2008 Financial Crisis*, BALANCE (last updated May 11, 2019), https://www.thebalance.com/2008-financial-crisis-3305679.

[69] Edmund L. Andrews & Peter Baker, *A.I.G. Planning Huge Bonuses After $170 Billion Bailout*, N.Y. TIMES (Mar. 14, 2009), https://www.nytimes.com/2009/03/15/business/15AIG.html.

[70] KAISER, *supra* note 46, at 378.

[71] FINANCIAL REGULATORY REFORM, *supra* note 48, at 57 ("We propose that the [agency's] jurisdiction should cover consumer financial services and products such as credit, savings and payment products and related services, as well as the institutions that issue, provide, or service these products and provide services to the entities that provide the financial products.").

[72] For example, before the Dodd-Frank Act, there were no regulations on structured finance products, such as synthetic collateralized debt obligations, which had played a role in exacerbating the mortgage crisis. *See* BAIRD WEBEL, CONG. RESEARCH SERV., R41350, THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: BACKGROUND AND SUMMARY 4 (2017) ("The [Dodd-Frank Act] included provisions that affected virtually every financial market and that amended existing or granted new authority and responsibility to nearly every federal financial regulatory agency.").

[73] In April 2011, a congressional investigation confirmed the

II. THE NEW AGENCY IS UNLIKE ANY OTHER

The White House's outline of reforms eventually served as the "template" for drafting the legislative language in both chambers.[74] Then-Representative Barney Frank (D-MA), Chairman of the House Financial Services Committee, and then-Senator Chris Dodd (D-CT), Chairman of the Senate Banking Committee, agreed with Obama that the new agency would have independence and accountability. Yet, they agreed on only two agency features: it would not be subject to congressional appropriations and its leadership would be removable only for cause. On everything else, the administration, Frank, and Dodd diverged.

- The White House proposed that the new agency would have a "stable funding stream, which could come in part from fees assessed on entities and transactions across the financial sector." There would be "a Director and a Board," where the Board would "represent a diverse set of viewpoints and experiences" and "[a]t least one seat on the Board should be reserved for the head of a prudential regulator."[75]

- House bill H.R. 4173 established that funding would come from fees as well as from the Federal Reserve.[76] The new agency would be led initially by a single director removable only for cause and then by a multi-member, bipartisan commission three and one-half years after the bill was enacted.[77]

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administration's belief with the release of a bipartisan Senate Committee Report. *See* SENATE INVESTIGATIONS REPORT, *supra* note 47 (identifying four causative factors: high risk lending, regulatory failure, inflated credit ratings, and investment bank abuses).

[74] KAISER, *supra* note 46, at 91.

[75] FINANCIAL REGULATORY REFORM, *supra* note 48, at 58.

[76] The House passed H.R. 4173 on December 11, 2009. H.R. 4173 § 4111(a)(1) at 861-62 (describing how agency would be funded based on 10 percent of Federal Reserve's expenses); § 4111(b) at 862-69 (describing how agency would be funded based on fees and assessments), available at https://www.congress.gov/111/bills/hr4173/BILLS-111hr4173eh.pdf.

[77] H.R. 4173 § 4101(b) at 822 (describing the initial and subsequent structure of the agency); § 4102(b)(5) at 824 ("The Director may be removed before the end of a term only for cause."), available at https://www.congress.gov/111/bills/hr4173/BILLS-111hr4173eh.pdf.

- Senate bill S. 3127 provided that funding would come only from the Federal Reserve.[78] The new agency structure would be led by a single director removable only for cause, but there would be no Board and the agency's powers would never transition to a commission.[79] The new agency would be independent, but it would fall under the Federal Reserve instead of being a free-standing agency.[80]

Both bills proposed unconventional agency structures. The disparity between the House and Senate bills may have reflected how differently the two chambers viewed independence and accountability, or maybe it was the result of each chamber having a different legislative drafting process. Perhaps, it was simply happenstance. Frank "never worried about pleasing Republicans," and thus, they had little input in the House bill.[81] In contrast, Dodd wanted a bipartisan reform bill but was rebuffed by his Republican counterparts.[82] Ironically, his agency design—which

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[78] For procedural reasons, the Senate passed an amended H.R. 4173 on May 20, 2010. The provisions pertaining to the agency's leadership and accountability structure in amended H.R. 4173 and S. 3127 are identical. Document: Comparing Relevant Sections of Amended H.R. 4173 and S. 3127 (on file with author). Amended H.R. 4173 § 1017(a) at 1240-41 (describing that the Director would request necessary funding from the Federal Reserve pursuant to a cap), available at https://www.congress.gov/111/bills/hr4173/BILLS-111hr4173eas.pdf.

[79] Amended H.R. 4173 § 1011(b)(1) at 1222 ("There is established the position of the Director, who shall serve as the head of the Bureau."); § 1011(c)(3) at 1223 ("The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office."), available at https://www.congress.gov/111/bills/hr4173/BILLS-111hr4173eas.pdf.

[80] *See* Amended H.R. 4173 § 1011(a) at 1222 ("There is established in the Federal Reserve System, the Bureau of Consumer Financial Protection."); § 1012(c) at 1225 (explaining the agency's autonomy from the Federal Reserve), available at https://www.congress.gov/111/bills/hr4173/BILLS-111hr4173eas.pdf.

[81] KAISER, *supra* note 46, at 373.

[82] Despite having only thirty-nine votes in the Senate, Senator Richard Shelby (R-AL), then-ranking Republican on the Senate Banking Committee, refused to continue negotiating unless Dodd took "the independent consumer agency off the table." This was a "nonstarter" when Democrats controlled both the White House and Congress, by substantial margins. KAISER, *supra* note 46, at 191. For a discussion about the Democratic party's success in the 2006 and 2008 elections, see Stuart Rothenberg, *Is 2008 a Realigning Election? Numbers Offer Some Clues*, REAL CLEAR POLITICS (Nov. 11, 2008),

did include a few Republican-inspired features—was much tougher than the House version or the White House's proposal.[83] Because the GOP leadership ordered its members to refrain from offering any amendments, Dodd's bill was reported out of committee without a substantive debate or markup.[84] Frank called for a conference committee with televised proceedings (even though that was no longer the norm) and Dodd had the Senate version serve as the "base text" for the conference.[85] During the committee proceedings, no one offered any changes to the Senate's structural or accountability design for the new agency.[86]

House Republicans never had a chance at influencing financial reform while Senate Republicans squandered whatever opportunity they had to rein in Democrats' plans for a regulatory overhaul. In fairness, the GOP likely was uninterested in the details surrounding the structure when it was entirely opposed to even creating a new agency.[87] Having another federal regulatory

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https://www.realclearpolitics.com/articles/2008/11/is_2008_a_realigning_election.html ("[I]n the past two elections, Democrats gained at least a dozen Senate seats and at least 50 House seats, taking total control of Congress.").

[83] During negotiations with Senator Bob Corker (R-TN), Dodd outlined the four features the agency should have: (1) an independent director or chairman nominated by the president, confirmed by the Senate; (2) a dedicated source of revenue not subject to the annual congressional appropriation process; (3) rulemaking authority over entities that provide consumer credit; and (4) enforcement authority over nonbanks. The idea that the CFPB would be an independent division with the Federal Reserve originated with Corker. KAISER, *supra* note 46, at 250. Originally, Frank had disliked Corker's idea but later recognized it as "clever" because it "gave the Fed no authority over the independent bureau" and "[i]ts director, appointed by the president, would have total freedom of action, and more power than the heads of nearly all other regulatory agencies, most of which were run by bipartisan boards." *Id.* at 343.

[84] Corker expressed his amazement, "It is pretty unbelievable that after two years of hearings on arguably the biggest issue facing our panel in decades the [Senate Banking] committee has passed a 1,300-page bill in a twenty-one-minute, partisan markup. I don't know how you can call that anything but dysfunctional." *Id.* at 262. As a strategic move, the GOP leadership had decided "to let Dodd report his bill out of committee on a party-line vote, without making any attempt to improve it with amendments." *Id.* at 258.

[85] *Id.* at 331-33.

[86] During the proceedings there were countless amendments to the entire 1300-page legislation. For a more detailed discussion about the negotiations surrounding other major issues, such as the Volcker rule, see KAISER, *supra* note 46, at 333-58.

[87] *E.g.*, 156 CONG. REC. H2927-09, H2930 (daily ed. Apr. 27, 2010) (statement of Rep. Scott Garrett (R-NJ)) ("[T]hey want to create as a brand new

body was antithetical to its ideological views about limited government.[88]

Republicans argued that while they were against a new agency, they too supported consumer protection.[89] House Republicans introduced a reform bill,[90] but its proposed consumer safety measures were largely limited to resolving consumer complaints against certain banks, conducting consumer testing prior to issuing rules, and performing a cost benefit analysis on earlier regulations,[91] none of which addressed the practices leading to the mortgage crisis. With the partisan House bill dead on arrival[92] and GOP leadership discouraging its members from working with Dodd, Congress was left to vote on legislation establishing a regulatory body that would be less accountable to

agency here in Washington, as if we don't have enough agencies already in Washington."); 155 CONG. REC. H14480-02, H14482 (daily ed. Dec. 10, 2009) (statement of Rep. Pete Sessions (R-TX)) ("The [CFPB] is a classic example of the government's overstepping its authority into the free enterprise system simply to make government bigger and to further control the free enterprise system and free market.").

[88] President Ronald Reagan, First Inaugural Address (Jan. 20, 1981) (transcript available at http://avalon.law.yale.edu/20th_century/reagan1.asp) ("Government is not the solution to our problem, government is the problem."). Republicans "minimize the role of the federal government" whereas Democrats "promote government as a defender of the weak and provider of opportunity." KAISER, *supra* note 46, at 383-84.

[89] 156 CONG. REC. S5870-02, S5884 (daily ed. July 15, 2010) (statement of Sen. Jon Kyl (R-AZ)) ("All of us here support the concept of consumer protection, so let's don't get off on a tangent of being for or against consumer protection. We all support that. The question is, How do you do it? Safeguards can be strengthened without creating a new regulatory bureaucracy with the powers that exist in this bill and all of the untoward ramifications that result."); 156 CONG. REC. S5891 (daily ed. July 15, 2010) (statement of Sen. Judd Gregg (R-NH)) ("Consumer protection is critical. We all agree to that.").

[90] Representative Spencer Bachus (R-AL), then Ranking Member of the House Financial Services Committee, introduced the Republican regulatory reform plan. Consumer Protection and Regulatory Enhancement Act, H.R. 3310, 111th Cong. (as introduced in House, July 23, 2009).

[91] H.R. 3310 § 311. At the media event introducing the bill, the Republicans summarized it as "no more bailouts." KAISER, *supra* note 46, at 125. No one mentioned that the bailouts of 2008 originated from a Republican administration or that a number of the bill's co-sponsors had also supported those bailouts. *Id.*

[92] The partisan bill was never scheduled for markup, and thus, never debated in committee. *See* H.R. 3310.

both political branches than any other existing agency.[93]

By then, Democrats—even those who were initially wary about a new agency[94]—made clear, that this was the very type of regulator they wanted: an independent agency that would be more politically-insulated from both branches. Representative Carolyn Maloney (D-NY) announced, "For the first time, consumer protection authority will be housed in one place. It will be *completely independent*, with an *independently appointed director*, an *independent budget*, and an autonomous rulemaking authority."[95]

On July 21, 2010, after a Democrat-controlled Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, a Democratic president signed it into law.[96] It had the support of only six Republicans, presaging the agency's vulnerability to changes in political control.[97]

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[93] 156 CONG. REC. S5891 (daily ed. July 15, 2010) (statement of Sen. Judd Gregg (R-NH)) ("It is totally independent of everybody else. It doesn't answer to anyone except on a very limited and narrow way to the systemic risk council. It is a single person with an $850 million unoversighted [sic] revenue stream with no appropriations."); 156 Cong. Rec. S5879 (daily ed. July 15, 2010) (statement of Sen. Mitch McConnell (R-KY)) ("[H]ere is a bill that fails to address the root causes of the kind of crisis it is meant to prevent, that creates a vast new unaccountable bureaucracy. . .").

[94] KAISER, *supra* note 46, at 115-17.

[95] 156 CONG. REC. H5233-01, H5239 (daily ed. June 30, 2010) (statement of Rep. Carolyn Maloney (D-NY)) (emphasis added).

[96] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). There were nearly 200 legislative actions leading up to the passage of the act. *All Actions H.R.4173 — 111th Congress (2009-2010)*, CONGRESS.GOV, https://www.congress.gov/bill/111th-congress/house-bill/4173/all-actions?r=19&overview=closed#tabs.

[97] The Conference Report to accompany H.R. 4173, "Wall Street Reform and Consumer Protection Act of 2009," passed the House, 237-192. Representatives Joseph Cao (R-LA), Mike Castle (R-DE), and Walter Jones (R-NC) were the only House Republicans who voted for it. *Final Vote Results for Roll Call 413*, OFFICE OF THE CLERK U.S. HOUSE OF REPRESENTATIVES (June 30, 2010, 6:54 PM), http://clerk.house.gov/evs/2010/roll413.xml. It passed the Senate, 60-39. Senators Scott Brown (R-MA), Susan Collins (R-ME), and Olympia Snowe (R-ME) were the only three to cross party lines. *Roll Call Vote 111th Congress – 2nd Session*, UNITED STATES SENATE (July 15, 2010, 2:29 PM), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=00208.

A. Designing an Unconventional Agency

On its face, Title X of the Dodd-Frank Act appeared to accomplish exactly what the Democrats sought. Unlike most other independent regulatory agencies, the CFPB is not led by a multi-member, bipartisan commission. Instead, it is led by a single director.[98] But, unlike other single-headed agencies, there is far less executive control because the CFPB's director can only be removed by the president for cause.[99] Further, Congress too has limited control as the agency's funding is not through the regular appropriations process. Instead, it receives funding from the Federal Reserve.[100] Democrats set out to ensure the agency's independence and they seemingly achieved that with the Bureau's unconventional design.

Remarkably, there is no legally definitive set of characteristics that describes independent agencies. In fact, the U.S. Constitution makes no mention of them.[101] The term "independent agency" is statutorily defined only once, and even then, the term is simply defined to mean a list of government entities and "any other similar agency designated by statute as a Federal independent regulatory agency or commission."[102]

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[98] 12 U.S.C. § 5491(b)(1) (2010) ("There is established the position of the Director, who shall serve as the head of the Bureau.").

[99] *Id.* § 5491(c)(3) ("The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.").

[100] 12 U.S.C. § 5497 (2010) ("[E]ach quarter. . .the 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.").

[101] *Cf.* U.S. CONST. art. II, § 2 (The President "may require the opinion, in writing, of the principal officer in each of the executive departments.").

[102] 44 U.S.C. § 3502(5) (2019) (defining "independent regulatory agency" to mean "the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Agency, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Regulatory Commission, the Securities and Exchange Commission, the Bureau of Consumer Financial Protection, the Office of Financial Research, Office of the Comptroller of the Currency, and any other similar agency designated by statute as a Federal independent regulatory agency or commission.").

Notably, this definition did not appear until the enactment of the Paperwork Reduction Act of 1980 ("PRA").[103] Yet, as early as the 1880s, Congress had created what has come to be recognized as the first independent agency.[104]

Since then, Congress has created other independent agencies such as the Social Security Administration ("SSA"),[105] the Office of Special Counsel ("OSC"),[106] the Federal Housing Finance Agency ("FHFA"),[107] the OCC,[108] the FDIC,[109] the Commodity

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[103] The definition is found in a section of the PRA that directs the coordination of federal information policy. *See* 44 U.S.C. §§ 3501-3521.

[104] When Congress created the Interstate Commerce Commission in 1887, it was placed under the Department of Interior and only later became an independent agency as a "product of political negotiations responding to the need for efficient regulation of the railroad industry." Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1115-16 (2000).

[105] "There is hereby established, as an independent agency in the executive branch of the Government, a Social Security Administration." 42 U.S.C. § 901(a) (1994).

[106] The OSC's enabling statute is silent on independence. *See* Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified as amended at 5 U.S.C. §§ 1211-1219 (1999)). Congress, however, intended it to be independent. 134 Cong. Rec. H9313-23, H9320 (daily ed. Oct. 3, 1988) (statement of Rep. Schroeder) ("As for the conduct of the Office of Special Counsel, correction required precise provisions limiting the authority of the Special Counsel. We made the office an independent agency to avoid any possibility of undue influence."). *Id.* at H9323 (The Whistleblower Protection Act "strengthens rights of civil service employees by. . .[e]stablishing the OSC as an independent agency.") (statement of Rep. Gilman).

[107] "There is established the Federal Housing Finance Agency, which shall be an independent agency of the Federal Government." 12 U.S.C. § 4511(a) (2008).

[108] The OCC is located within the Department of Treasury. *See* National Bank Act, 12 U.S.C. §§ 1-16 (2010) (the relevant sections relating to the Office of Comptroller of Currency). Yet, it is considered an independent agency. *See* HENRY B. HOGUE, ET AL., CONG. RESEARCH SERV., R43391, INDEPENDENCE OF FINANCIAL REGULATORS: STRUCTURE, FUNDING, AND OTHER ISSUES 7-8 (2017).

[109] The FDIC's enabling statute is silent on independence. *See* Federal Deposit Insurance Act, 12 U.S.C. §§ 1811-31bb (1993). Nevertheless, it has long been considered independent. Independence of Regulatory Agencies, 12 U.S.C. § 250 (defines FDIC as an independent agency); S. REP. NO. 93-902, 93th Cong., 2d Sess. 1974, *as reprinted in* 1974 U.S.C.C.A.N. 6119, 29 ("The purpose of this section is to preserve and strengthen the independence of these agencies, which were originally created by the Congress to be free of control by the executive branch.

Futures Trading Commission ("CFTC"),[110] the Securities Exchange Commission ("SEC"),[111] and the FTC.[112] While they have varying characteristics, all are "insulated to some extent from Presidential control."[113] In the last decade, two legal scholars identified a set of seven agency characteristics and showed that, depending on their combination, agencies fall along a spectrum ranging from more independent to less.[114] This Article modifies

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[110] "There is hereby established, as an independent agency of the United States Government, a Commodity Futures Trading Commission." 7 U.S.C. § 2(a)(2)(A) (2015).

[111] The SEC's enabling statute is silent on independence. *See* Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk. Nonetheless, courts have considered the SEC independent. *E.g.*, United States v. Baker, 912 F.3d 297, 308 (5th Cir. 2019) ("The SEC is an independent agency with its own litigating authority."). Further, the agency has considered itself independent. In her speech, "The SEC after the Financial Crisis: Protecting Investors, Preserving Markets," then Chair Mary Jo White explained the importance of the agency's independence:

> Like many Chairs and Commissioners before me, I strongly believe that the agency's independence has been critical in allowing it to use its expert judgment to do what is best for investors and the markets – a task that could otherwise be rendered impossible by the whims of political pressure or the public mood. The Commission, in fact, was created as an independent expert agency in 1934 precisely because Congress identified a need for that strength in overseeing the American capital markets.

Mary Jo White, U.S. Securities and Exchange Commission Chair, The SEC after the Financial Crisis: Protecting Investors, Preserving Markets, Speech at The Economic Club of New York (Jan. 17, 2017), (transcript available at https://www.sec.gov/news/speech/the-sec-after-the-financial-crisis.html).

[112] The FTC's enabling statute is silent on independence. *See* Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41-58. However, it has long been considered independent. *See* Bowsher v. Synar, 478 U.S. 714, 746 (1986) (Stevens, J., concurring) ("[I]t is quite obvious that the Comptroller General, and the General Accounting Office, have a fundamentally different relationship with Congress than do independent agencies like the Federal Trade Commission.").

[113] CHARLES H. KOCH, JR. & RICHARD MURPHY, ADMINISTRATIVE LAW & PRACTICE § 7:11 (3d ed.); *see also* 2 AM. JUR. 2D ADMINISTRATIVE LAW § 27 ("The term 'independent' agency or commission is often used to designate an agency independent of the executive branch.").

[114] *See generally* Kirti Datla & Richard L. Revesz, Deconstructing Independent Agencies (and Executive Agencies), 98 CORNELL L. REV. 769 (2013). The authors put forth seven features that provide an "indicia of independence: removal protection, specified tenure, agency structure, partisan

their criteria to better compare the CFPB against agencies defined as independent by their enabling statute or that have long been considered independent.[115]

As shown in Figure 1 and as discussed in the following sections, the Bureau is more independent and has more authority than any other regulatory body.

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balance requirements, litigation authority, budget and congressional communication authority, and adjudication authority." *Id.* at 784. They analyze an extensive array of agencies to argue that all agencies are in fact executive, and that varying characteristics make them either more or less independent. *Id.* at 825. According to them, "there is no single feature that every agency commonly thought of as independent shares, not even a for-cause removal provision. *Id.* at 842. Professor Romano refers to the same set of characteristics in her comparison of the CFPB and three other agencies. Romano, *supra* note 10, at 273, 291.

[115] Unlike Datla's and Revesv's scholarly contribution, this Article has a far more modest undertaking and only compares agencies to show that the CFPB's structure *and* scope of authority is entirely unique. This Article uses only four characteristics from Datla and Revesz: agency structure (i.e., single director), removal protection, litigation authority, and adjudicative authority. Also, this Article modifies one of Datla's and Revesz's characteristics: rather than evaluate the budget and congressional communication authority, this Article considers only whether the agency's economically significant regulations are subject to OIRA's review pursuant to Executive Order ("EO")12,866. Finally, this Article includes two characteristics not identified by them: whether the agency is subject to Congress' power of the purse and the scope of the agency's jurisdiction.

Figure 1. Comparison of the CFPB and Other Independent Agencies

	CFPB	SSA	OSC	FHFA	OCC	FDIC	CFTC	SEC	FTC
No OIRA review of economically significant rules[116]	✓			✓	✓	✓	✓	✓	✓
Single director[117]	✓	✓	✓	✓	✓				
Removable for cause[118]	✓	✓	✓	✓		Likely	Likely	✓	✓
Funding outside of congressional control[119]	✓			✓	✓	✓			
Independent litigation authority[120]	✓			✓	✓	✓	✓	✓	✓
Adjudicative authority[121]	✓	✓		✓			✓	✓	✓
Broad jurisdiction[122]	✓								✓

[116] Under Section 6(a)(3) of EO 12,866, when agencies plan to undertake a "significant regulatory action," they must submit certain materials for OIRA's review and approval. Agencies listed under the PRA's definition of "independent regulatory agency" are exempted from OIRA's review. 44 U.S.C. § 3502 (2019). These agencies include the CFPB, the FHFA, the OCC, the FDIC, the CFTC, the SEC, and the FTC. *See* note 102 and accompanying text. The SSA and the OSC are excluded from the list, and therefore, are subject to OIRA's review. Exec. Order No. 12,866, 3 C.F.R. § 638 (1993).

[117] The CFPB is led by a single director. 12 U.S.C. § 5491(b)(1) (2010). There are other single director-led independent agencies. 42 U.S.C. § 902(a)(1) (1996) (For the SSA, "There shall be in the Administration a Commissioner of Social Security . . . who shall be appointed by the President, by and with the advice and consent of the Senate."); 5 U.S.C. § 1211(a) (1994) (For the OSC, "There is established the Office of Special Counsel, which shall be headed by the Special Counsel."); 12 U.S.C. § 4512(a) (2008) (For the FHFA, "There is established the position of the Director of the Agency, who shall be the head of the Agency."); 12 U.S.C. § 1(b)(1) (2011) (For the OCC, "The chief officer of the Office of the Comptroller of the Currency shall be known as the Comptroller of the Currency.").

[118] The CFPB director is removable only for cause. 12 U.S.C. § 5491(c)(3) (2010). Generally, removal protection indicates an agency is independent. *See* 42 U.S.C. § 902(a)(3) (1996) (For the SSA, "An individual serving in the office of Commissioner may be removed from office only pursuant to a finding by the President of neglect of duty or malfeasance in office."); 5 U.S.C. § 1211(b) (1994) (For the OSC, "The Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office."); 12 U.S.C. § 4512(b)(2)

(2008) (For the FHFA, "The Director shall be appointed for a term of 5 years, unless removed before the end of such term for cause by the President."); 15 U.S.C. § 41 (2010) (For the FTC, "Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."). The OCC is an exception. 12 U.S.C. § 2 (1935) ("The Comptroller of the Currency. . .shall hold his office for a term of five years unless sooner removed by the President, upon reasons to be communicated by him to the Senate."). Nevertheless, the OCC is considered an independent agency. *See* HOGUE, ET AL., *supra* note 108, at 8 ("It is said that the OCC is part of the Treasury, but that is a real estate statement since the OCC in policy-making is, by statute, independent of the Treasury."). The enabling statutes of the SEC, the FDIC, and the CFTC are silent on removal. However, it has long been considered that SEC commissioners can be removed only for cause. *See, e.g.,* SEC v. Blinder, Robinson & Co., Inc., 855 F.2d 677, 681 (10th Cir. 1988) (accepting that "it is commonly understood that the President may remove a commissioner only for 'inefficiency, neglect of duty or malfeasance in office'"). Though never litigated, there is a general expectation that the President can remove the heads of the FDIC or the CFTC only for cause. *See generally* HOGUE, ET AL., *supra* note108, at 7-8.

[119] The CFPB's funding is from the Federal Reserve. 12 U.S.C. § 5497 (2010). Other independent regulators also receive funding outside of the annual appropriations process. 12 U.S.C. § 4516 (2008) (FHFA); 12 U.S.C. § 16 (2010) (OCC); 12 U.S.C. § 1817(b) (2018) (FDIC). It is just as common for Congress to exert its "power of the purse." 15 U.S.C. § 78kk (SEC); 15 U.S.C. § 57c (FTC); 42 U.S.C. §§ 903(j) (SSA's Social Security Advisory Board), 904(b) (SSA's main budgetary appropriation requests), and 907a(h) (SSA's National Commission on Social Security). OSC receives funding through the Financial Services-General Government Appropriations Bill. JUSTIN MURRAY, CONG. RESEARCH SERV., R40858, LOCATE AN AGENCY OR PROGRAM WITHIN APPROPRIATIONS BILLS 11 (2019). For an understanding of the CFTC's reauthorization process, see RENA S. MILLER, CONG. RESEARCH SERV., R44733, COMMODITY FUTURES TRADING COMMISSION: PROPOSED REAUTHORIZATION IN THE 115TH CONGRESS 2-5 (2017).

[120] The CFPB has independent litigation authority, and thus, does not have to rely on the Department of Justice for bringing enforcement actions. 12 U.S.C. § 5564(a)-(e) (2010). Other independent agencies are similarly situated. 12 U.S.C. § 4513(c) (2008) (FHFA); 2 Op. O.L.C. 129 (1978) (concluding that OCC has independent litigation authority); 12 U.S.C. § 1819 (1994) (FDIC); 7 U.S.C. §§ 2(a)(4), 9(4), 13a-1 (2010) (CFTC); 15 U.S.C. §§ 78aa, 78u, 78u-1, 78u-3, 78y (2010) (SEC); 15 U.S.C. § 56(a)-(c) (2006) (FTC).

[121] The CFPB has adjudicative authority. 12 U.S.C. §§ 5492(a)(10), 5563. Other independent agencies also have adjudicative authority. 42 U.S.C. 405 (2019) (SSA); 12 U.S.C. § 4581 (2008) (FHFA); 7 U.S.C. § 18 (2008) (CFTC); 15 U.S.C. § 78w (2011) (SEC); 15 U.S.C. § 45(b) (2006) (FTC).

[122] The CFPB has broad jurisdiction. Romano, *supra* note 10, at 298 ("The CFPB's expansive grant of authority to 'ensur[e] that all consumers have access

B. Less Executive and Less Congressional Oversight

Independent agencies are never completely free from executive influence, but they are subject to far less presidential oversight than any executive branch agency. As a general matter, presidents cannot remove the heads of independent agencies for political reasons and can terminate them only for cause. Heads of executive branch agencies, however, are often removed when administrations change.[123] Also, presidents cannot easily impact how an independent agency implements a statutory program. In contrast, presidents can issue executive orders that executive branch agencies must follow. Independent agencies are merely "requested," "asked," "encouraged," or told they "should" comply with them.[124] Further, the president can control the regulatory agenda of executive branch agencies through the Office of Information and Regulatory Affairs ("OIRA") in the Office of Management and Budget ("OMB").[125]

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to markets for consumer financial products and services' that are 'fair, transparent, and competitive,' is the antithesis of a narrow, technical mission."). In comparison, other agencies have a far narrower scope of authority: private claims for social security benefits (SSA); conduct of federal employees (OSC); oversight of housing government-sponsored enterprises (FHFA); regulation of certain banks (OCC and FDIC); oversight of derivatives markets (CFTC); and oversight of securities markets (SEC). While the FTC arguably has broad jurisdiction as a consumer protection agency, its lack of jurisdiction over banks means its authority is substantially limited in comparison to the CFPB.

[123] *See generally* Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 479-84 (2011).

[124] Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?*, 12 U. PA. J. CONST. L. 637, 639 (2010).

[125] For a discussion of OIRA's role in rulemaking, see Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 FORDHAM URBAN L.J. 1257 (2006). In 1993, then President William Clinton issued EO 12,866, "Regulatory Planning and Review," which sets forth a process for presidential review of rulemaking (and is still in effect). For proposed and final economically significant rules, executive branch agencies (but not independent agencies) must prepare a substantial amount of information for OIRA review and approval. Under section 6(a)(3)(B), each agency must provide OIRA:

> (i) The text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need; and (ii) An assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent

The CFPB's leadership structure, therefore, tests the bounds of independence from the executive branch. Independent agencies are typically led by multi-member commissions, not single directors. Moreover, single director-led agencies generally fall under the executive branch. For CFPB critics, this raises two concerns. First, the president cannot fire the Bureau's director at will, and can only remove for "inefficiency, neglect of duty, or malfeasance in office."[126] Thus, the agency's leadership is subject to far less presidential control than any other existing single director-head. Second, though the CFPB is led by a single individual, its regulatory agenda is not subject to a president's policies because OIRA does not review the Bureau's proposed or final regulations.[127] Thus, a president has less influence over the Bureau than any other single director-led agency.

CFPB detractors also call into question the agency's source of funding. Congress cannot use its "power of the purse" to control the Bureau's priorities.[128] As Figure 1 shows, a number of independent agencies are similarly funded outside of the regular appropriations process,[129] but those agencies are nowhere near as powerful as the CFPB.

> permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions.

Exec. Order No. 12,866, 3 C.F.R. § 638 (1993). It is no surprise that independent agencies would prefer to bypass an OIRA review because it has long been considered "the place where regulations go to die." KENNETH GODWIN ET AL., LOBBYING AND POLICYMAKING 65 (2013).

[126] 12 U.S.C. § 5491 (2010).

[127] Under Title X section 1100D, which amends the Paperwork Reduction Act, the Director of Office of Management and Budget must "treat or review a rule or order prescribed or proposed by the Director of the Bureau of Consumer Financial Protection on the same terms and conditions as apply to any rule or order prescribed or proposed by the Board of Governors of the Federal Reserve System.'' 44 U.S.C. § 3513 (2012). Because EO 12,866, by its own terms, does not apply to independent agencies and has never been applied to the Federal Reserve Board, the CFPB does not submit its rules to OIRA. *See supra* note 125 and accompanying text.

[128] *See* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1353 (1988) ("All appropriations thus may be conceived of as lump-sum grants with 'strings' attached. These strings, or conditions of expenditure, constitute legislative prescriptions that bind the operating arm of government.").

[129] For an overview of the appropriations process, see JAMES V. SATURNO, CONG. RESEARCH SERV., R42388, THE CONGRESSIONAL APPROPRIATIONS PROCESS: AN INTRODUCTION (2016).

C. More Congressional Delegation of Authority

Congress made the Bureau primary responsible for "Federal consumer financial law." Specifically, it instructed the agency to:

- Issue "rules, orders, and guidance implementing Federal consumer financial law;"[130]

- "[E]nforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services" and that such markets are "fair, transparent, and competitive;"[131] and

- Conduct hearings and adjudicate proceedings to "ensure or enforce compliance" with Federal consumer law.[132]

From these directives alone, it is not apparent that Congress entrusted the CFPB with thoroughly changing the regulatory landscape. Even those who had been adamantly opposed to just the agency's creation did not fully appreciate the scope of its authority.[133] Only with a careful parsing of Title X provisions does it become evident that Congress designed a remarkably ambitious statutory program.

1. Transfer of Powers Once under Several Regulators

"Federal consumer financial law" is defined broadly,[134] and

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[130] 12 U.S.C. § 5511(c)(5) (2010).

[131] *Id.* § 5511(a).

[132] 12 U.S.C. § 5563 (2010).

[133] During his first press conference as Acting Director, Mulvaney declared, "I'm just learning about the powers that I have as acting director." *See* Bre Payton, *Mick Mulvaney Just Savaged the CFPB In His Firsts Press Conference as Director*, FEDERALIST (Nov. 27, 2017), https://thefederalist.com/2017/11/27/mick-mulvaney-just-savaged-the-cfpb-in-his-first-press-conference-as-director/.

[134] The term "Federal consumer financial law" means "provisions of [Title X], the enumerated consumer laws, the laws for which authorities are transferred under subtitles F and H, and any rule or order prescribed by the Bureau under this title, an enumerated consumer law, or pursuant to the authorities transferred under subtitles F and H. The term does not include the Federal Trade Commission Act." 12 U.S.C. § 5481(14) (2010).

includes the term "enumerated consumer laws," which is in turn defined as the eighteen federal consumer protection statutes that previously had been under the purview of seven federal regulators.[135] In addition to transferring authority over these statutes, Congress used the opportunity to increase consumer protections under the Fair Debt Collection Practices Act ("FDCPA")[136] and the Equal Credit Opportunity Act ("ECOA").[137]

2. Increased Authority

Title X granted the agency supervision, enforcement, and rulemaking powers over "covered persons" and "service providers." An analysis of the terms' definitions suggests that Congress understood that given limited resources, the CFPB would be unable to police the entire consumer financial services industry. Through strategic definitions, Congress incentivized each regulated entity to monitor its own compliance management systems as well as those of their business partners':

- A "covered person" means "any person that engages in offering or providing a consumer financial product or

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[135] *See supra* note 45 and accompanying text. The definition of "enumerated consumer laws" lists 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 Fair Debt Collection Practices Act; subsections (b) through (f) of section 43 of the Federal Deposit Insurance Act; sections 502 through 509 of the Gramm-Leach-Bliley Act; the Home Mortgage Disclosure Act of 1975; the Home Ownership and Equity Protection Act; 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; section 626 of the Omnibus Appropriations Act; and the Interstate Land Sales Full Disclosure Act. 12 U.S.C. § 5481(12) (2010).

[136] When Congress enacted the FDCPA in 1977, it withheld rulemaking authority (except in limited circumstances) from the FTC, the agency then responsible for its enforcement. At the time, Congress believed that the statute represented "comprehensive legislation which [would] fully address[] the problem of collection abuses." S. REP. NO. 95-382, 95th Cong., 1st Sess., at 6 (1977). Because the problems continued, Congress amended the FDCPA, granting the Bureau authority to "prescribe rules with respect to the collection of debts by debt collectors." 15 U.S.C. § 1692*l*(d) (2010).

[137] Congress amended ECOA to allow the Bureau to collect data "to facilitate enforcement of fair lending laws," among other things. 15 U.S.C. § 1691c–2 (2010).

service."[138]

- A "service provider" is a person who provides a "material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service." It also includes a person who "participates in designing, operating, or maintaining the consumer financial product or service" or "processes transactions relating to the consumer financial product or service."[139]

In business-to-business relationships, it is not always clear who is the service provider and who is the covered person. Also, a "financial product or service" is defined to include business activities traditionally offered by nonbanks.[140] For the first time, a federal agency would have broad authority over these entities.

There is an added layer of complexity to Congress' grant of Title X authorities. The Bureau's supervisory, enforcement, and rulemaking powers vary in scope.[141] The Bureau's rulemaking authority extends over "covered persons" and "service providers." In contrast, the agency's enforcement authority is much broader. For instance, its investigatory powers are expansive because the CFPB may issue a civil investigative demand to any "person"[142] when the agency "has reason to believe that [such] person" has "relevant" information regarding a violation of Federal consumer financial law.[143] The Bureau's supervisory authority is more restricted, extending only to certain covered persons defined by statute or rule.[144]

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[138] 12 U.S.C. § 5481(6)(A) (2010). The term "covered person" also means "any affiliate of a person [that engages in offering or providing a consumer financial product or service] if such affiliate acts as a service provider to such person. 12 U.S.C. § 5481(6)(B).

[139] *Id.* § 5481(26)(A).

[140] *See id.* § 5481(15).

[141] For example, the CFPB has "exclusive" supervisory authority and "primary" enforcement authority over banks as long as their assets are over $10 billion. 12 U.S.C. § 5515(b) (2010).

[142] The term "person" means "an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative, or other entity." *Id.* § 5481(19).

[143] Pursuant to a CID, the CFPB can require a person to produce documents as well provide oral testimony, among other things. 12 U.S.C. § 5562(c)(1)(A)-(E) (2010).

[144] *See generally* 12 U.S.C. §§ 5514, 5515.

The Bureau's powers as well as the interplay among the definitions of "covered person," "service provider," and "financial product or service" may impact entities unexpectedly. For example, in May 2015, the CFPB found that two telecommunications firms violated Title X.[145]

3. Directive to Enforce New Consumer Protections

For over a century, statutory law has protected consumers from business conduct that is unfair or deceptive. Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce."[146] With Title X, Congress expanded the FTC Act's unfair and deceptive language.[147] Specifically, Title X makes

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[145] On May 12, 2015, CFPB announced a settlement with two telecommunications companies for unfair billing practices in violation of section 1036(a)(1)(B) of Title X, 12 U.S.C. § 5536(a)(1)(B) (2010). *See* Press Release, CFPB, Statement on Sprint and Verizon Settlement (May 12, 2015), https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-obtain-120-million-in-redress-from-sprint-and-verizon-for-illegal-mobile-cramming/. According to the CFPB, each telecommunications company "provid[es] a consumer financial product or service," and therefore, each is a "covered person." Specifically, the companies "extend[] credit to, and processes payments for, consumers in connection with goods and services that [they] do[] not directly sell or that consumers do not directly purchase from [Sprint or Verizon]." It is not clear that these firms anticipated that their operations could be characterized as:

> "extending credit and servicing loans, including acquiring, purchasing, selling, brokering, or other extensions of credit," 12 U.S.C. § 5481(15)(A)(i); and
>
> "providing payments or other financial data processing products or services to a consumer by any technological means, including processing or storing financial or banking data for any payment instrument, or through any payments systems or network used for processing payments data, including payments made through an online banking system or mobile telecommunications network," 12 U.S.C. § 5581(15)(A)(vii).

See Complaint, CFPB v. Sprint Corp., No. 14 CV 9931 (S.D.N.Y. Dec. 17, 2014); *see also* Complaint, CFPB v. Cellco Partnership d/b/a Verizon Wireless, No. 15 CV 3268 (D. N.J. May 12, 2015).

[146] 15 U.S.C. § 45(a)(1) (2012).

[147] What constitutes "unfair" for purposes of Section 5 of the FTC Act and Title X are substantially the same. *Compare* 15 U.S.C. § 45(n) (2006) (an unfair act or practice is one that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidably by consumers themselves and not outweighed by countervailing benefits to consumers or competition") with 12

it unlawful for entities "to engage in any unfair, deceptive, or abusive act or practice" ("UDAAP").[148] By adding the term "abusive," Congress essentially codified the common-law concept of unconscionability.[149] Despite a statutory definition of the term "abusive,"[150] CFPB detractors continue to raise concerns about its vagueness and ambiguity.[151] Notably, the agency has brought only two enforcement cases (in over 200) solely on allegations of

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U.S.C. § 5531(c)(1) (2010) (an unfair act or practice is one that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidably consumers; and such substantial injury is not outweighed by countervailing benefits to consumers or to competition"). Neither statute defines "deceptive." According to the CFPB, its interpretation of both terms generally comports with FTC's. CFPB, CONSUMER LAWS AND REGULATIONS UDAAP EXAMINATION MANUAL (Oct. 2012), https://files.consumerfinance.gov/f/documents/102012_cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf ("The principles of 'unfair' and 'deceptive' practices in [Title X] are similar to those under [the FTC Act]" and the FTC and federal banking regulators "have applied these standards through case law, official policy statements, guidance, examination procedures, and enforcement actions that may inform CFPB.").

148 12 U.S.C. § 5536(a)(1)(B).

149 *See generally* Carey Alexander, *Abusive: Dodd-Frank Section 1031 and the Continuing Struggle to Protect Consumers*, 85 ST. JOHN'S L. REV. 1105 (2011) (detailing how the legislative history of Title X's definition of "abusive" comports with the common-law doctrine of unconscionability).

150 Title X section 1031(d) defines an "abusive" act or practice to mean one that:

> 1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
> 2) takes unreasonable advantage of—
>   A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
>   B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
>   C) the reasonable reliance by the consumer on a [entity] to act in the interests of the consumer.

12 U.S.C. § 5531(d) (2010).

151 Adam Levitin, *Dodd-Frank's "Abusive" Standard: The Dog that Didn't Bark*, CREDIT SLIPS (June 20, 2017), https://www.creditslips.org/creditslips/2017/06/abusive-the-dog-that-didnt-bark.html ("The CFPB's critics have been complaining about the vagueness of the 'abusive' power ever since the Dodd-Frank Act was in the legislative process.").

"abusive acts or practices."[152] In all other UDAAP enforcement cases, allegations of "abusive" conduct accompanied purported conduct that was either "unfair" or "deceptive."[153]

4. Authority to Expand its Regulatory Jurisdiction

Perhaps the most impressive authority is the Bureau's ability to broaden its regulatory jurisdiction—on its own accord—over the consumer financial services industry through rulemaking.

- The CFPB may augment its Title X authorities over covered persons and service providers by issuing regulations defining a "financial product or service." Congress defined the term to include certain activities,[154] but it recognized that the agency is in the better position to develop a complete list. Therefore, Congress granted the CFPB discretionary rulemaking authority to define "*other* financial product[s] or service[s]" when certain conditions are met.[155] In June 2015, the CFPB issued its first final rule defining certain automobile leases as a financial product or service.[156] The agency has not exercised this authority since.

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[152] Complaint, Consumer Prot. Fin. Bureau v. Aequitas Capital Mgmt., Inc., No. 17-1278 (D. Or. Aug. 17, 2017); Consent Order, Consumer Prot. Fin. Bureau v. Zero Parallel, LLC, No. 17-0017 (Sept. 6, 2017).

[153] *See* Joshua L. Roquemore, *The CFPB's Ambiguous "Abusive" Standard*, 22 N.C. BANKING INST. 191, 192 (2018) ("CFPB v. Aequitas Capital Management, Inc., and the Zero Parallel proceeding. . .represent the only two occasions the CFPB has brought a stand-alone abuse claim.").

[154] 12 U.S.C. § 5481(15)(A)(i)-(x) (2010).

[155] *Id.* § 5481(15)(A)(xi) (emphasis added).

[156] 12 C.F.R. § 1001.2 (2015).

- The CFPB may extend its supervisory authority over nonbank entities beyond those explicitly listed.[157] Congress granted the CFPB authority to supervise nonbank "larger participant[s]" of markets for other consumer financial products or services as it defines by rule.[158] Since 2012, the agency has exercised this rulemaking authority five times, and it now has the authority to supervise larger participants of markets for Consumer Reporting,[159] Consumer Debt Collection,[160] Student Loan Servicing,[161] International Money Transfers,[162] and Automobile Financing.[163]

- The CFPB may identify new consumer protections beyond those explicitly provided under "Federal consumer law." Specifically, the CFPB can issue rules that would identify certain conduct as unfair, deceptive, or abusive.[164] More importantly, the Bureau has the authority to issue rules that would require companies to *prevent* UDAAPs.[165] The agency's first UDAAP rulemaking is the Payday Rule,[166]

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[157] Congress tasked the agency to supervise nonbanks of all sizes in the residential mortgage, private education lending, and payday lending markets for compliance with federal consumer financial law. 12 U.S.C. § 5514(a)(1) (2014). Congress also granted CFPB authority to supervise any nonbank (regardless of size) if the Bureau has "reasonable cause to determine. . .that such [nonbank] is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services." 12 U.S.C. § 5514(a)(1)(C). On July 3, 2013, the Bureau finalized a rule that sets forth the procedures by which a nonbank may become subject to the agency's supervision. 12 C.F.R. § 1091.

[158] 12 U.S.C. § 5514(a)(1)(B).

[159] 77 Fed. Reg. 42,874 (July 20, 2012) (codified at 12 C.F.R. § 1090.100 (2017)).

[160] 77 Fed. Reg. 65,775 (Oct. 31, 2012) (codified at 12 C.F.R. § 1090.105).

[161] 78 Fed. Reg. 73,383 (Dec. 6, 2013) (codified at 12 C.F.R. § 1090.106).

[162] 79 Fed. Reg. 56,631 (Sept. 23, 2014) (codified at 12 C.F.R. § 1090.107).

[163] 80 Fed. Reg. 37,496 (June 30, 2015) (codified at 12 C.F.R. § 1090.108).

[164] 12 U.S.C. § 5531(b) (2010).

[165] *Id.* § 5531(b) ("Rules under this section may include requirements for the purpose of preventing such acts or practices.").

[166] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 Fed. Reg. 47,863 (July 22, 2016) (proposed rule July 22, 2016) (to be codified at 12 C.F.R. pt. 1041). After reviewing over 1.4 million comments, the CFPB finalized its rule. *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472 (final rule Nov. 17, 2017) (codified at 12 C.F.R. § 1041). Under the regulation, lenders cannot make a loan without first determining if the customer has the ability to repay (ATR) it.

which would have become effective in January 2018, but was reopened for further consideration.[167]

Title X's complex statutory language suggests Congress' intent for an overhaul in the regulation of the consumer financial services industry.[168] It is no surprise that those who support free markets continue opposing what they view as unacceptable government intrusion.

III. POLITICIZATION AND LEGAL CHALLENGES

Like many other federal agencies, Congress tasked the CFPB with: (i) law-making power (promulgating regulations to implement Title X); (ii) enforcement authority (conducting investigations and bringing actions); and (iii) judicial oversight (ruling on administrative proceedings). Yet, our Founding Fathers were clear:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny.[169]

Nevertheless, the modern administrative state is replete with agencies that have all three.[170] But the CFPB in particular is an easy target for critics because its agency design is unlike any other.

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[167] *See infra* note 249 and accompanying text.

[168] *See generally* Dee Pridgen, *Sea Changes in Consumer Financial Protection: Stronger Agency and Stronger Laws*, 13 WYO. L. REV. 405 (2013).

[169] THE FEDERALIST NO. 47 (James Madison).

[170] The Supreme Court has long approved of them. *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (finding that FTC, with its quasi-legislative and quasi-judicial functions and its commission members removable for cause, does not violate separation of powers); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 508 (2010) (noting that "existence" of Board, which has all three powers, does not violate separation of powers). Some legal scholars continue to argue that federal agencies are unconstitutional, but even they concede that our government could not function without them. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 158 (1990) ("Thus, it is too late to overrule not only the decision legalizing paper money but also those decisions validating certain New Deal and Great Society programs pursuant to the congressional powers over commerce, taxation, and spending. To overturn those would be to overturn most of modern government and plunge us into chaos.").

It is exactly this unconventional structure along with its expansive powers that makes partisan attacks against the Bureau inevitable. The stakes over the agency's leadership and priorities are far higher than for traditional independent regulatory commissions or executive branch agencies. In that way, Congress' attempt to shield the Bureau from politics had a perverse effect. This section will discuss the political and legal objections against the CFPB, and then evaluate the trade-off inherent in choosing between a single-head agency and a multi-member commission.

A. Legislative Proposals & Constitutional Attacks

During Obama's first midterm elections, every Republican "competing for national office, from Hawaii to New Hampshire, ran against his agenda and made it the centerpiece of the campaign."[171] He called the results of the November 2010 elections a "shellacking,"[172] recognizing that the outcome was a check to his agenda.[173] The Democrats handed over control of the House, losing sixty-three seats to Republicans.[174] Though the Democrats managed to retain control of the Senate, Republicans picked up six seats.[175] The upcoming Congress would be controlled by different parties and conservatives were buoyed by the results. A top agenda item was resolving some of the problems they saw in the Dodd-Frank Act.[176]

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[171] James Ceaser, *The 2010 Verdict*, REAL CLEAR POLITICS (Nov. 10, 2010), https://www.realclearpolitics.com/articles/2010/11/10/the_2010_verdict_107908.html.

[172] *After 'Shellacking,' Obama Laments Disconnect with Voters*, NBC NEWS (Nov. 3, 2010), http://www.nbcnews.com/id/39987154/ns/politics-decision_2010/t/after-shellacking-obama-laments-disconnect-voters/#.XNCDAC-ZMWp.

[173] *See* Ceaser, *supra* note 171 ("The midterm election is one of the distinctive features of America's constitutional system. By allowing for an expression of voter sentiment separate from the selection of the president, midterms help supply the concrete political support in Congress for checking presidential programmatic power."). The November 2010 elections was the greatest defeat for a newly elected president in a midterm since 1922 with the Republican party under Warren Harding. *Id.*

[174] David C. Beckwith, *U.S. 2010 Midterm Elections*, ENCYCLOPEDIA BRITANNICA (Dec. 17, 2010), https://www.britannica.com/topic/U-S-2010-Midterm-Elections-1740742.

[175] *Id.*

[176] *See* Dave Clarke & Rachelle Younglai, *Republicans ability to reshape Dodd-Frank limited*, REUTERS (Nov. 3, 2010), https://www.reuters.com/article/us-usa-elections-financial-

With Republicans firmly in control of the House, the legislative attacks on financial regulatory reform started on the first day of the first session of the 112th Congress. On January 5, 2011, Representative Michele Bachman (R-MN) introduced a bill to repeal the Dodd-Frank Act in its entirety.[177] She was not alone in her efforts. Fourteen Republican congressmembers co-sponsored her bill.[178] Less than three months later, on March 31, Senator Jim DeMint (R-SC) introduced an identical bill, entitled "Financial Takeover Repeal Act of 2011."[179] His bill had twenty-eight co-sponsors.[180] On April 6, Senator Richard Shelby (R-AL) proposed similar legislation.[181] Even though all three bills died in

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regulation/republicans-ability-to-reshape-dodd-frank-limited-idUSTRE6A282N20101103 ("With Democrats still controlling the Senate . . . any major legislative changes would likely fall flat, even before facing a veto threat from the White House."). Though Senate Republicans were in the minority, they used parliamentary procedures to stall Obama's nomination of Richard Cordray to head the CFPB. Cordray was not confirmed until then-Senate Majority Leader Harry M. Reid (D-NV) threatened to change filibuster rules to allow for confirmation of agency nominees by a simple majority and Reid and Senator John McCain (R-AZ) reached a compromise. Paul Kane & Ed O'Keefe, *Senate reaches tentative deal on filibuster rules*, WASH. POST (July 16, 2013), https://www.washingtonpost.com/politics/senate-poised-to-take-up-key-rule-changes/2013/07/16/167045da-ee1d-11e2-9008-61e94a7ea20d_story.html?utm_term=.055c0f42f7e6.

[177] To repeal the Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 87, 112th Cong. (2011).

[178] Representatives Tom McClintock (R-CA), Bill Posey (R-FL), W. Todd Akin (R-MO), Darrell E. Issa (R-CA), John J. Duncan, Jr. (R-TN), Steve King (R-IA), Dennis A. Ross (R-FL), Paul C. Broun (R-GA), Joe Walsh (R-IL), Rob Bishop (R-UT), Trent Franks (R-AZ), Sam Johnson (R-TX), David Schweikert (R-AZ), and Benjamin Quayle (R-AZ) supported Bachman's bill. *See* H.R. 87.

[179] Financial Takeover Repeal Act of 2011, S. 712, 112th Cong. (2011).

[180] Senators Lamar Alexander, (R-TN), Tom Coburn (R-OK), John Cornyn (R-TX), Mike Crapo (R-ID), John Ensign (R-NV), Kay Bailey Hutchison, (R-TX), James M. Inhofe (R-OK), Johnny Isakson (R-GA), Mike Johanns (R-NE), Ron Johnson (R-WI), Jon Kyl (R-AZ), Mike Lee (R-UT), Mitch McConnell (R-KY), Rand Paul (R-KY), James E. Risch, (R-ID), Jeff Sessions (R-AL), John Thune (R-SD), David Vitter, (R-LA), Richard C. Shelby (R-AL), Pat Toomey (R-PA), Saxby Chambliss (R-GA), Jerry Moran (R-KS), Bob Corker (R-TN), Roger F. Wicker (R-MS), Lindsey Graham (R-SC), Roy Blunt, (R-MO), John Boozman, (R-AR), and Dean Heller (R-NV) supported DeMint's bill. *See* S. 712.

[181] Dodd-Frank Repeal Act of 2011, S. 746, 112th Cong. (2011). The only difference from DeMint's bill was that Shelby's proposed legislation would have kept Title XVI of the Dodd-Frank Act, which amounted to less than one page about derivates. It is unlikely that Shelby felt strongly about Title XVI because he had also co-sponsored DeMint's bill which had called for a wholesale repeal.

committee, Republicans were relentless in their attempts to repeal the entirety of the Dodd-Frank Act. They continued to introduce such legislation during the 113th and 114th Congress.

Republicans' attacks were not limited to a wholesale repeal of the statute. They mounted an aggressive campaign directed at just the CFPB. On February 8, 2011, well before the agency was scheduled to open its doors on July 21,[182] Representative Randy Neugebauer (R-TX) put forth the "Consumer Financial Protection Oversight Act of 2011."[183] He sought to strip the CFPB of its independence, making it an executive branch agency under the Department of Treasury. This bill also died in committee,[184] but that did not discourage Republicans from introducing half a dozen more bills that targeted the Bureau before it could even begin its operations.[185] Republicans also tried curbing the agency's powers. In addition to introducing three more bills that would make CFPB subject to more congressional oversight, Republicans proposed legislation that either repealed a statutorily-granted power or created additional hurdles before it could exercise its authority.[186]

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[182] Then-Treasury Secretary, Timothy Geithner, selected July 21, 2011 as the designated transfer date. 75 Fed. Reg. 57,252, 57,253 (Sept. 20, 2010).

[183] Consumer Financial Protection Oversight Act of 2011, H.R. 557, 112th Cong. (2011).

[184] H.R. 557 (2011).

[185] Four bills sought to put a commission in place, instead of a single director. *See* Consumer Financial Protection Safety and Soundness Improvement Act of 2011, H.R. 1315, 112th Cong. (2011); H.R. 2081, 112th Cong. (2011); Responsible Consumer Financial Protection Regulations Act of 2011, S. 737, 112th Cong. (2011); Responsible Consumer Financial Protection Regulations Act of 2011, H.R. 1121, 112th Cong. (2011) (related to S. 737). One bill would have the agency subject to the regular appropriations process. Bureau of Consumer Financial Protection Accountability Act, H.R. 1640, 112th Cong. (2011). Another bill sought to limit its authority until a director was confirmed by the Senate. Bureau of Consumer Financial Protection Transfer Clarification Act, H.R. 1667, 112th Cong. (2011).

[186] Three bills would subject the CFPB to congressional appropriations. Sequester Replacement Reconciliation Act of 2011, H.R 5652, 112th Cong. (as passed by House, May 10, 2012); Averting the Fiscal Cliff, H.R. 6688, 112th Cong. (as reported to Subcommittee on Health, Dec. 20, 2012); Spending Reduction Act, H.R. 6684, 112th Cong. (as passed by House, Dec. 20, 2012). One bill sought to repeal the Bureau's UDAAP authority. H.R. 2612, 112th Cong. (as referred to Subcommittee on Financial Institutions and Consumer Credit, Aug. 22, 2011). Three other bills would subject the CFPB to additional requirements. S. 3571, 112th Cong. (as introduced in Senate, Sept. 19, 2012); Independent Agency Regulatory Analysis Act of 2012, S. 3468, 112th Cong. (as introduced in Senate, Aug. 1, 2012); Financial Regulatory Responsibility Act of 2011, S. 1615,

Since 2011, Republicans have taken a "throw everything at the wall and see what sticks" approach, introducing well over 165 bills—nearly two dozen bills during the 112th Congress, approximately fifty bills during both the 113th and 114th, and roughly forty-five bills during the 115th—to eliminate the agency, amend its leadership structure, subject it to congressional appropriations, restrict its powers, or some combination of the above.[187] With a divided government from 2011 through 2016, and even with a Republican president and a Republican-controlled Congress in 2017 and 2018, the GOP has been unsuccessful.[188] Nevertheless, Republicans remain undeterred, despite Democrats regaining control of the House after the November 2018 midterm elections. In May 2019, Senator Ted Cruz (R-TX) proposed eliminating the CFPB and repealing Title X entirely. The bill has no chance of passing, but still garnered seven Republican co-sponsors.[189] It is evident that legislation aimed at reforming the Bureau must have strong bipartisan support. Thus, the CFPB remains a single director-led independent agency that does not rely on congressional appropriations.

Its structure is far from secure, however. Even before the Bureau had been operating for a year, its detractors have sought judicial relief. In June 2012, the State National Bank of Big Spring ("State National Bank") brought suit in D.C. federal district court,[190] claiming that the CFPB's formation violates separation of powers because the agency is not subject to Congress' "power of the purse," its director can be removed only for cause, and its interpretation of "Federal consumer financial law" is entitled to

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112th Cong. (as introduced in Senate, Sept. 22, 2011).

[187] Document: Analysis of CFPB-Related Bills Proposed from January 5, 2011 to June 15, 2019 (on file with author).

[188] To be sure, legislation amending certain sections of the Dodd-Frank Act was eventually enacted. *See infra* note 214 and accompanying text.

[189] Senators Mike Lee (R-UT), James M. Inhofe (R-OK), Ben Sasse (R-NE), Mike Rounds (R-SD), Marsha Blackburn (R-TN), Rand Paul (R-KY), and John Cornyn (R-TX) supported Cruz's bill. Repeal CFPB Act, S. 1335, 116th Cong. (as introduced in Senate, May 6, 2019).

[190] State National Bank of Big Spring, along with two free market advocacy groups, filed suit challenging the constitutionality of the CFPB, the Financial Stability Oversight Council, and Cordray's appointment. Complaint, State Nat'l Bank of Big Spring v. Geithner, No. 12 CV 1032 (D.D.C. June 21, 2012). In August 2013, the district court dismissed the case for lack of jurisdictional standing. Memorandum Opinion, *State Nat'l Bank of Big Spring*, No. 12 CV 1032. That case was later overturned on appeal and remanded to the district court.

judicial deference.[191] State National Bank also seemed to argue that the Bureau's UDAAP power is an unconstitutional delegation of legislative authority because of Congress' failure to define "unfair" and "deceptive."[192] The case was put on hold until a decision could be made in another constitutional challenge, *PHH Corp. v. CFPB*.[193]

In October 2016, a three-judge panel of the D.C. Circuit agreed with PHH, finding that the CFPB's structure was unconstitutional.[194] The majority opinion, written by then-Judge Kavanaugh, seemingly rebuked Congress for responding to the worst financial disaster since the Great Depression with an unconventional solution, focusing on the novelty of the agency's structure.[195] In January 2018, the D.C. Circuit sitting en banc reversed.[196] The majority opinion took aim at Kavanaugh's apparent disdain, "Novelty is not necessarily fatal; there is a first time for everything," making explicit that "novelty alone [is] insufficient to establish a constitutional defect."[197]

In February 2018, the State National Bank and the CFPB filed a joint motion, agreeing that the *PHH Corp.* en banc decision controls.[198] After the appellate court summarily affirmed, State

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[191] Complaint, State Nat'l Bank of Big Spring, No. 12 CV 1032 at ¶¶ 73-75.

[192] Complaint, State Nat'l Bank of Big Spring, No. 12 CV 1032 at ¶¶ 34-43. Specifically, State National Bank argues that the statute "provides *no* definition for 'unfair' or 'deceptive' acts or practices, leaving those terms to the CFPB to interpret and enforce, either through *ad hoc* litigation or through regulation." No. 12 CV 1032 at ¶ 36. This is inaccurate. Congress did not define the term "deceptive" in Title X (consistent with the FTC Act), but it did define the term "unfair." 12 U.S.C. § 5531(c)(1) (2010) (an "act or practice is unfair" if it "causes or is likely to cause substantial injusry to consumers which is not reasonably avoidable by consumers; and such substantial injury is not outweighed by countervailing benefits to consumers or competition.").

[193] PHH Corp v. CFPB, Docket No. 15-01177 (D.C. Cir. Jun 19, 2015).

[194] PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 12 (D.C. Cir. 2016), *reh'g en banc granted, order vacated* (Feb. 16, 2017).

[195] Judge Kavanaugh's majority opinion uses the word "novel" or "novelty" nearly a dozen times to describe the agency's structure and other structures or practices that were found unconstitutional. *E.g.*, *PHH Corp*, 839 F.3d at 7 (CFPB's "novel, single-Director agency structure"); *Id.* at 8 ("the novelty of the Board's structure"); *Id.* at 10 (CFPB's "novel agency structure"); *Id.* at 40 ("novel practice").

[196] PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75 (D.C. Cir. 2018) (en banc decision).

[197] *Id.* at 103.

[198] Joint Motion for Requesting Entry of Judgement Against the Plaintiffs,

National Bank filed a petition for certiorari with the Supreme Court in September 2018.[199] With the change in the administration, the Department of Justice sided with State National Bank, but still urged the Court to deny the petition. It claimed that this case "would be a poor vehicle for considering the constitutionality of the Bureau's structure."[200] In January 2019, the Court agreed, denying certiorari.[201]

Though it refrained from evaluating the agency's constitutionality, it is likely only a matter of time before the Court does, especially if a split emerges among the circuit courts. Only one other circuit has addressed the issue. In May 2019, relying on the D.C. Circuit's en banc decision in *PHH Corp.*, a unanimous Ninth Circuit panel agreed that the Bureau's structure was not constitutionally defective in *CFPB v. Seila Law*.[202] Two more circuits are poised to review the agency's design in the coming months. In the Fifth Circuit, the court must rule on an interlocutory appeal from the district court's finding that the structure is constitutional.[203] In the Second Circuit, the CFPB and the New York Attorney General[204] are appealing Judge Loretta Preska's ruling that both the agency's structure and Title X in its entirety are unconstitutional.[205]

After losing its constitutional challenge, Seila Law has asked the Supreme Court to weigh in, giving the Court another opportunity to rule on the matter.[206] With Justice Kavanaugh now

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State Nat'l Bank of Big Spring v. Lew, No. 12 CV 1032 (D.D.C. Feb. 16, 2018).

[199] Petition for Writ of Certiorari, State Nat'l Bank of Big Spring v. Mnuchin, 139 S. Ct. 916 (2019), 2018 WL 4331933.

[200] Brief for Respondent in Opposition at 9-10, State Nat'l Bank of Big Spring v. Mnuchin, 139 S. Ct. 916 (2019), 2018 WL 6504249 (reasoning that Justice Kavanaugh participated in matter as a judge on the D.C. Circuit such that a full Court could not render a decision and that jurisdictional concerns exist such that the Court may not even reach the constitutional issue).

[201] State Nat'l Bank of Big Spring v. Mnuchin, 139 S. Ct. 916 (2019).

[202] Consumer Fin. Prot. Bureau v. Seila Law LLC, 923 F.3d 680, 684 (9th Cir. 2019).

[203] Consumer Fin. Prot. Bureau v. All American Cashing, Inc., No. 16-356 (S.D. Miss. Mar. 21, 2008).

[204] *See* 12 U.S.C. § 5552 (2010) (provides state attorneys general authority to enforce Title X provisions).

[205] Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC, 332 F. Supp. 3d 729, 784 (S.D.N.Y. 2018).

[206] On June 28, 2019, Seila Law filed a petition for a writ of certiorari with the Supreme Court. Petition for a Writ of Certiorari at 1, *Seila Law LLC*, 923 F.3d 680 (No. 17-56327).

on the highest bench and the other sitting Justices' positions on separation-of-powers, nondelegation, and the modern administrative state, it would surprise no one if the Court struck down the CFPB's constitutionality.[207] Therefore, without Congress' intervention, the Bureau could be eliminated or more likely, be coopted by whichever party happens to hold the executive branch.

B. The Inherent Trade-Off in Leadership Design

In 1788, Founding Father James Madison, wrote of "political experiments" when discussing the document that would become our U.S. Constitution.[208] Over 200 years later, that document with its three branches of government and its systems of checks and balances continues to serve as a blueprint for our political experiments. And make no mistake, the CFPB was a political experiment in agency design.

During the CFPB's first six years, Congress' experiment appeared successful. The Bureau operated as intended: "to serve

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[207] *See* Gundy v. United States, No. 17-6086 (U.S. June 20, 2019), available at https://www.supremecourt.gov/opinions/18pdf/17-6086_2b8e.pdf. In *Gundy*, a plurality of the Court (Justices Kagan, Ginsburg, Breyer and Sotomayor) declined to revive the nondelegation doctrine (i.e., Congress cannot delegate its legislative authority). Justice Alito concurred in the judgment, but separately opined that "If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort." *Id.* at *23. Unsurprisingly, Justice Gorsuch disagreed. His dissenting opinion, joined by Chief Justice Roberts and Justice Thomas, is a history lesson on his views of the framers' vision of Congress' role and the nondelegation doctrine, and why the doctrine must be revisited. *Id.* at *24. (Justice Kavanaugh did not participate because he had not been confirmed when the case was argued. Thus, his view on the doctrine is unclear. Nevertheless, his earlier opinions in *PHH Corp.* make evident his thoughts on the CFPB's structure.) *See also* Kisor v. Wilkie, No. 16-1929 (U.S. June 26, 2019), available at https://www.supremecourt.gov/opinions/18pdf/18-15_9p6b.pdf. In *Kisor*, a plurality of the Court declined to overrule *Auer v. Robbins*, which provides that as long as an agency has a reasonable interpretation of its own regulations, then courts will defer to the agency. Justices Kagan, Ginsburg, Breyer and Sotomayor supported the *Auer* deference on the merits while Chief Justice Roberts' decision was grounded in stare decisis. Again, unsurprisingly, Justice Gorsuch strongly disagreed with judicial deference to agencies, signaling future attacks on the role of agencies. *Id.* at *28-29. He was joined by Justices Thomas, Alito, and Kavanaugh who would have overturned *Auer*.

[208] THE FEDERALIST No. 39 (James Madison).

as a cop on the beat."[209] When the November 2010 midterm elections resulted in a "shellacking" for the Democrats, nothing changed for the agency.[210] It was business as usual after the November 2012 elections[211] and even after the 2014 midterm elections when Republicans gained control of both chambers of Congress for the first time since the agency's inception.[212] Even the November 2016 elections—which brought the political branches entirely under Republican control[213]—failed to impact the CFPB's operations (at least statutorily).[214]

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[209] *See* KAISER, *supra* note 46, at 72 (In his initial impressions on Congress' response to the financial crisis, Dodd believed that [r]egulators would have to become 'strong cops on the beat,' not enablers of risky behavior.").

[210] *See After 'Shellacking,' Obama Laments Disconnect with Voters*, *supra* note 172.

[211] *See* Janna Harron, *CFPB's existence at stake in election*, BANKRATE (Oct. 12, 2012), https://www.bankrate.com/finance/politics/cfpb-existence-at-stake-election.aspx ("It's a no-brainer that the CFPB, which was created during Obama's administration, would stay in business if the president wins re-election.").

[212] *See* Stephen Collinson, *Republicans seize Senate, gaining full control of Congress*, CNN POLITICS (Nov. 5, 2013), https://www.cnn.com/2014/11/04/politics/election-day-story/index.html. With a Democratic president, a Republican-controlled Congress would need Democrats' votes to override any veto. Domenico Montanaro et al., *President Obama draws a line in the sand with State of the Union*, PBS NEWS HOUR (Jan. 21, 2015), https://www.pbs.org/newshour/politics/president-obama-draws-line-sand-state-union ("[T]he speech contained veto threats on everything from a rollback of his health care law, Dodd-Frank Wall Street regulations, immigration and Iran sanctions."); *Vetoes by President Barack Obama*, U.S. SENATE (last visited June 16, 2019), https://www.senate.gov/reference/Legislation/Vetoes/ObamaBH.htm (Obama's 12 vetoes during his administration, ten of which occurred after the November 2014 midterm elections, were unrelated to the CFPB.).

[213] Sarah Frostenson, *Republicans now control the presidency, the Senate, and the House*, VOX (Nov. 9, 2016), https://www.vox.com/presidential-election/2016/11/9/13572972/republicans-control-presidency-senate-house.

[214] There had been grand plans to diminish the CFPB's authority. Marilyn Geewax, *Trump Team Promises To 'Dismantle' Dodd-Frank Bank Regulations*, NPR (Nov. 10, 2016), https://www.npr.org/sections/thetwo-way/2016/11/10/501610842/trump-team-promises-to-dismantle-dodd-frank-bank-regulations. What was enacted, however, had no impact on the CFPB. Aaron Klien, *No, Dodd-Frank was neither repealed nor gutted. Here's what really happened*, BROOKINGS (May 25, 2018), https://www.brookings.edu/research/no-dodd-frank-was-neither-repealed-nor-gutted-heres-what-really-happened/ ("The legislation itself does not touch the CFPB."). A Republican-controlled Congress along with a Republican president

Then, almost a year into Trump's presidency, it became evident the agency's insulation from politics was in fact illusory. Of course, those who helped design the Senate's version of the Bureau's leadership and accountability structure had to have recognized that someday there would be a Republican-controlled Congress, a Republican-controlled White House, or both. It was foreseeable that individuals who believe in less government oversight would someday select the agency's director.

And yet, CFPB supporters have been stunned by the agency's new direction. Possibly, no one expected the directional change to happen as early as it did.[215] Maybe, no one expected leaders such as Mulvaney, who openly disparaged the CFPB,[216] or Kraninger, who has no expertise in consumer finance.[217] Perhaps,

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managed to revise only certain provisions of the Dodd-Frank Act. *See generally* Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, 132 Stat. 1296 (2018).

[215] Conventional wisdom suggested that a Clinton administration would take over on January 20, 2017. *See* Danielle Kurtzleben, *4 Possible Reasons The Polls Got It So Wrong This Year*, NPR (Nov. 4, 2016), https://www.npr.org/2016/11/14/502014643/4-possible-reasons-the-polls-got-it-so-wrong-this-year ("[C]hances are that you expected Hillary Clinton to win last week."). CFPB supporters likely did not expect a deregulatory environment within a decade after the worst financial crisis since the Great Depression.

[216] Mulvaney's appointment was in line with Trump's previous track record of selecting individuals who are critical of the agencies they would lead. *See, e.g.*, Brad Plumer, *Rick Perry once wanted to abolish the Energy Department*, VOX (Dec. 13, 2016, 12:10 PM), https://www.vox.com/energy-and-environment/2016/12/13/13936210/rick-perry-energy-department-trump; *see also*, Dominique Mosbergen, *Scott Pruitt Has Sued the Environmental Protection Agency 13 Times*, HUFFPOST (Jan. 17, 2017, 9:44 AM), https://www.huffpost.com/entry/scott-pruitt-environmental-protection-agency_n_5878ad15e4b0b3c7a7b0c29c.

[217] Kraninger's appointment was consistent with Trump's preference for selecting individuals to run agencies for which they have no expertise. *See, e.g.*, Anya Kamenetz, *How Betsy DeVos Became Trump's Least Popular Cabinet Pick*, NPR (Feb. 3, 2017), https://www.npr.org/sections/ed/2017/02/03/513037533/how-betsy-devos-became-trump-s-least-popular-cabinet-pick (detailing Betsy Devos' lack of experience and limited understanding of major federal education law); Camila Domonoske, *Ben Carson Confirmed As Secretary Of Housing And Urban Development*, NPR (Mar. 2, 2017), https://www.npr.org/sections/thetwo-way/2017/03/02/518160876/ben-carson-confirmed-as-secretary-of-housing-and-urban-development ("Carson was a controversial nominee to lead HUD because of his lack of experience in either housing or development — or government in general.").

no one could have predicted a White House that does not adhere to presidential customs or traditions.[218] More likely, the answer is all of the above. Nevertheless, those that supported CFPB's unconventional structure and continue to do so are likely operating under misconceptions about institutional design.

An agency with a single director can move fast, but that does not mean necessarily better. Even CFPB supporters must concede that the Bureau's structure is not inherently preferable. As discussed in this section, they had little recourse when Mulvaney's leadership resulted in agency actions that were entirely counter to those under his predecessor.

On November 24, 2017, Director Cordray resigned before completing his five-year term.[219] Just before stepping down, he reassigned then Chief of Staff Leandra English to serve as deputy director.[220] Relying on a provision in Title X, the move allowed her to serve as CFPB's director in an acting capacity.[221] That same

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[218] *E.g.*, Jonathan Lemire, *How Trump has rewritten the rules of the presidency*, PBS NEWS HOUR (Dec. 27, 2018), https://www.pbs.org/newshour/politics/how-trump-has-rewritten-the-rules-of-the-presidency.

[219] Letter of Resignation from Richard Cordray, Dir., Consumer Fin. Prot. Bureau, to Donald J. Trump, President, U.S. (Nov. 24, 2017), https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2017/11/Resignation-letter.pdf.

[220] Letter from Richard Cordray, Dir., Consumer Fin. Prot. Bureau, to Staff, Consumer Fin. Prot. Bureau, (Nov. 24, 2017), https://www.politico.com/f/?id=0000015f-efff-d90d-a37f-ffff72670000. On the same day, the agency issued a press release, "announc[ing] that Leandra English has been officially named deputy director of the agency." Press Release, Consumer Fin. Prot. Bureau, Leandra English Named Deputy Director of the Consumer Fin. Prot. Bureau (Nov. 24, 2017), https://www.consumerfinance.gov/about-us/newsroom/leandra-english-named-deputy-director-consumer-financial-protection-bureau/. Prior to the Cordray's announcement, David Silberman, Associate Director of Research, Markets, and Regulations had served as the agency's Acting Deputy Director. Without an official Deputy Director, it was unlikely that one acting in that capacity could simultaneously serve as Acting Director. *See* Gillian B. White, *The Departing Consumer-Finance Director Moves to Thwart Trump*, ATLANTIC (Nov. 24, 2017), https://www.theatlantic.com/business/archive/2017/11/cfpb-cordray-trump/546734/ ("By installing an official deputy, Corday. . .is providing the agency with its best defense against a Trump appointee taking over the Bureau's leadership.").

[221] 12 U.S.C. § 5491(b)(5)(B) (2010) ("There is established the position of Deputy Director who shall serve as the acting Director in the absence or

day, Trump installed his own acting director under a federal statute that allows a president to appoint an interim replacement without Senate confirmation.[222] He appointed his OMB Director Mick Mulvaney.[223]

The appointment caused an uproar. When Mulvaney was a congressman he had said, "I don't like the fact that the CFPB exists"[224] and co-sponsored legislation to eliminate the agency.[225] He had called the Bureau a "joke,"[226] introducing bills that would have made it more difficult for the CFPB to enforce its authority.[227]

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unavailability of the Director.").

[222] The Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345-3349c (2004). An individual may not serve for longer than "210 days beginning on the date the vacancy occurs" or "once a first or second nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate." *Id.* § 3346(a). If the first or second nomination is "rejected, withdrawn, or returned," the 210-day clock may reset. *Id.* § 3346(b). Accordingly, Trump's acting director could serve in this capacity for years.

[223] Press Release, White House, Statement on President Donald J. Trump's Designation of OMB Director Mick Mulvaney as Acting Director of the Consumer Fin. Prot. Bureau (Nov. 24, 2017), https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trumps-designation-omb-director-mick-mulvaney-acting-director-consumer-financial-protection-bureau/.

[224] Renae Merle, *The CFPB now has two acting directors*, WASH. POST (Nov. 24, 2017), https://www.washingtonpost.com/news/business/wp/2017/11/24/the-cfpb-now-has-two-acting-directors-and-nobody-knows-which-one-should-lead-the-federal-agency/?noredirect=on&utm_term=.b2531f583980.

[225] Then-Representative Mulvaney (R-SC) was an original cosponsor to H.R. 3118, which sought to dismantle the Bureau. To eliminate the Bureau of Consumer Financial Protection by repealing title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, commonly known as the Consumer Financial Protection Act of 2010, H.R. 3118, 114th Cong. § 1 (2015).

[226] Credit Union Times, *Rep. Mick Mulvaney: "CFPB 'Sick, Sad Joke'*, YOUTUBE (Sept. 10, 2014), https://www.youtube.com/watch?v=RaVeNafdyVA.

[227] Then-Representative Mulvaney (R-SC) introduced three unsuccessful bills:

(i) Legislation would have placed restrictions on how the agency conducts its investigations. Bureau Examination Fairness Act, H.R. 4804, 113th Cong. (as ordered to be reported by House, June 11, 2014);

(ii) Legislation would have placed conditions on the agency's rulemaking authority over payday loans, vehicle title loans, and other similar loans. State and Tribal Government Sovereignty Protection Act of 2016, H.R. 4737, 114th Cong. (as introduced in House, Mar. 14, 2016); and

After his appointment, Mulvaney did not alleviate concerns about the agency's future, telling reporters that his opinion of the CFPB remained unchanged.[228]

On Sunday, November 26, English sued, asking the court to declare her the rightful acting director.[229] She also filed a motion for a temporary restraining order ("TRO") to prevent Mulvaney's appointment.[230] It made for great political theatre.[231] And while those close to the situation knew how it would eventually play out,[232] there was an upside. The news coverage ensured that many more Americans learned about the CFPB and its purpose.[233]

On Monday morning, November 27, English and Mulvaney both turned up at the Bureau, both sending staff emails claiming to be the agency's acting director.[234] That afternoon,

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(iii) Legislation would have required the CFPB Director to verify the accuracy of consumer complaints before publishing them. H.R. 5491, 114th Cong. (as referred to House Committee on Financial Services, June 15, 2016).

[228] Payton, *supra* note 133. This was in marked contrast to how Energy Secretary Rick Perry handled his nomination. Jay Brady, *Rick Perry, Energy Nominee, Says He No Longer Wants To Dissolve Agency*, NPR (Jan. 19, 2017), https://www.npr.org/2017/01/19/510585966/rick-perry-energy-nominee-says-he-no-longer-wants-to-dissolve-agency.

[229] Complaint at 8, English v. Trump et al., No. 1:17-cv-02534 (D.C. Cir. 2017).

[230] Motion for Temporary Restraining Order, English v. Trump et al., No. 1:17-cv-02534 (D.C. Cir. 2017).

[231] Anthony Zurcher, *CFPB in Chaos as Chief Refuses to Step Aside for Trump's Man,* BBC (Nov. 27, 2017), https://www.bbc.com/news/world-us-canada-42141367 ("'High drama' and 'bureaucratic power struggle' are words that don't usually go together, but these are unusual times in Washington, DC.").

[232] Doyle McManus, *It's 'High Noon' at the CFPB*, L.A. TIMES (Nov. 29, 2017), https://www.latimes.com/opinion/op-ed/la-oe-mcmanus-cfpb-elizabeth-warren-trump-20171129-story.html ("Eventually, President Trump will nominate a new director who will obey his desire to be more accommodating to banks and other lenders.").

[233] *See* Fred O. Williams, *Poll: Few aware of embattled consumer watchdog*, CREDITCARDS.COM (Mar. 1, 2017), https://www.creditcards.com/credit-card-news/cfpb-consumer-watchdog-poll.php ("Despite $12 billion in refunds to 27 million consumers, CFPB is largely unknown."); Maria LaMagna, *Even before Cordray's exit, the CFPB had an image problem as well as a political one*, MARKET WATCH (Nov. 16, 2017), https://www.marketwatch.com/story/most-americans-say-they-dont-have-a-clue-about-this-federal-agency-2017-03-02 ("[M]any Americans indicate they would in theory support an agency like the CFPB, if they knew it existed.").

[234] Renae Merle, *Dueling officials spend chaotic day vying to lead federal consumer watchdog*, WASH. POST (Nov. 27, 2017),

twenty-five former and current members of Congress (all Democrats) filed an amicus brief supporting English's motion.[235] The next day, eight state attorneys general (all Republicans) moved to file an amicus brief supporting Mulvaney's appointment.[236] That same day, the court denied English's TRO motion, finding that there was not a substantial likelihood that the case would succeed on its merits.[237] While legal scholars disagreed,[238] English

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https://www.washingtonpost.com/business/economy/two-dueling-officials-spend-chaotic-day-vying-to-lead-federal-consumer-watchdog/2017/11/27/381eada2-d39c-11e7-b62d-d9345ced896d_story.html?noredirect=on&utm_term=.74d15d9f9f95; Katie Rogers, *2 Bosses Show Up to Lead the Consumer Financial Protection Bureau*, N.Y. TIMES (Nov. 27, 2017), https://www.nytimes.com/2017/11/27/us/politics/cfpb-leandra-english-mulvaney.html.

[235] Brief of Current and Former Members of Congress as Amici Curiae in Support of Plaintiff's Motion For A Temporary Restraining Order, English v. Trump et al., No. 1:17-cv-02534 (D.C. Cir. 2017). From the Senate, the signatories were Senators Sherrod Brown (D-OH), Catherine Cortez Masto (D-NV), Bob Menendez (D-NJ), Brian Schatz (D-HI), Charles E. Schumer (D-NY), Chris Van Hollen (D-MD), and Elizabeth Warren (D-MA). From the House, the signatories were now Speaker Nancy Pelosi (D-CA), Representatives Michael E. Capuano (D-MA), Charlie Crist (D-FL), John Delaney (D-MD), Keith Ellison (D-MN), Bill Foster (D-IL), Vicente Gonzalez (D-TX), Denny Heck (D-WA), Jim Himes (D-CT), Steny Hoyer (D-MD), Dan Kildee (D-MI), Carolyn B. Maloney (D-NY), Gwen S. Moore (D-WI), Brad Sherman (D-CA), Juan Vargas (D-CA), Nydia M. Velazquez (D-NY), and Maxine Waters (D-CA), former Rep. Barney Frank (D-MA), and now former Rep. Ruben J. Kihuen (D-NV).

[236] Motion of the States of Texas, West Virginia, Alabama, Arkansas, Georgia, Louisiana, Oklahoma, and South Carolina to File Brief as Amici Curiae in Support of Defendants, English v. Trump et al., No. 1:17-cv-02534 (D.C. Cir. 2017). Because the court denied English's motion for a TRO, the motion was denied as moot. Transcript of Motion Hearing, English v. Trump et al., No. 1:17-cv-02534 (D.C. Cir. 2017).

[237] Transcript of Motion Hearing, English v. Trump et al., No. 1:17-cv-02534 (D.C. Cir. 2017). A week later, on December 6, English moved for preliminary injunction. Later that month, the court again heard oral arguments and on January 10, 2018, it denied her motion. Jim Puzzanghera, *Federal judges indicate they could remove Mulvaney as acting CFPB chief*, L.A. TIMES (Apr. 12, 2018), https://www.latimes.com/business/la-fi-cfpb-mulvaney-english-hearing-20180412-story.html. Two days later, she appealed.

[238] Adam Levitin, *CFPB Director Succession: What the Dodd-Frank Act's Legislative History Tells Us*, CREDITSLIPS (Nov. 20, 2017), https://www.creditslips.org/creditslips/2017/11/cfpb-directorship-succession-what-legislative-history-tells-us.html.

eventually dropped her suit[239] after Trump nominated Kraninger,[240] then-OMB Deputy Director under Mulvaney.[241]

During the year before a new director could be confirmed and sworn in,[242] Mulvaney was true to his word: "Elections have consequences at every agency, and that includes the CFPB."[243] In April 2017, under Cordray, the CFPB filed suit against four online payday lenders, who charged annual interest rates ranging from 440 percent up to 950 percent, for deceiving consumers and withdrawing funds from their bank account for debts not legally owed.[244] In January 2018, under Mulvaney, the CFPB withdrew the suit without explanation.[245] The number of enforcement

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[239] The appellate court held oral argument in April 2018, but English dropped her suit before the court issued a ruling. Jim Puzzanghera, *Leandra English Resigns from CFPB and Drops her Legal Fight to be its acting Director*, L.A. TIMES (July 6, 2018), https://www.latimes.com/business/la-fi-leandra-english-cfpb-20180706-story.html.

[240] Nominations & Appointments, White House, President Donald J. Trump's Announces Intent to Nominate and Appoint Personnel to Key Administration Posts (June 18, 2018), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-appoint-personnel-key-administration-posts-11/. This was likely a strategic move. Kraninger had barely any consumer finance experience, but CFPB supporters were hesitant to restart the 210-day clock on Mulvaney's appointment. *See* Doug Sword, *Despite New CFPB Nominee, Mulvaney Could Be Around a Long Time*, ROLL CALL (June 19, 2018), https://www.rollcall.com/news/politics/despite-new-cfpb-nominee-mulvaney-around ("[If Kraninger is withdrawn or rejected by the Senate, that merely starts another 210-day clock for Mulvaney to remain as acting director.").

[241] Glenn Thrush, *White House Confirms That Mulvaney Deputy is Pick to Lead Consumer Bureau*, N.Y. TIMES (June 16, 2018), https://www.nytimes.com/2018/06/16/us/politics/kraninger-consumer-financial-bureau.html.

[242] Mulvaney served as acting director from November 25, 2017 (when Trump appointed him) until Kraninger was sworn in on the evening of December 10, 2018. Jim Puzzanghera, *New CFPB Director Kathy Kraninger says she won't be a puppet of Mick Mulvaney*, L.A. TIMES (Dec. 11, 2018), https://www.latimes.com/business/la-fi-kathy-kraninger-cfpb-20181211-story.html.

[243] Allie Malloy, *Showdown over top post at key watchdog agency*, CNN (Nov. 27, 2017), https://www.cnn.com/2017/11/26/politics/leandra-english-cfpb-lawsuit-donald-trump/index.html.

[244] Complaint for Permanent Injunction and Other Relief at 7, Consumer Prot. Fin. Bureau v. Golden Valley Lending, Inc. et al., No. 17 CV 3155 (N.D. Ill. Apr. 27, 2017).

[245] *CFPB signals shift by dropping payday lender lawsuit*, AM. BANKER (Jan. 18, 2018), https://www.americanbanker.com/articles/cfpb-signals-shift-by-

actions dropped dramatically: 48 were brought during Cordray's last year while only 11 during Mulvaney's tenure.[246] Cordray's last quarterly budget request to the Federal Reserve was $217.1 million. For Mulvaney's first quarterly budget, he asked for zero dollars.[247] Mulvaney also reorganized the Bureau, effectively diminishing the oversight of anti-discriminatory lending laws.[248] He sought to rollback regulations, reopening the agency's final Payday Rule on the day it was scheduled to go into effect.[249] He

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dropping-payday-lender-lawsuit ("This is signaling that the CFPB is going to stand down on the online payday lenders who refuse to comply with state interest-rate caps.").

[246] Document: Analysis of Enforcement Actions under Cordray and Mulvaney (on file with author). On April 20, 2018, the Bureau reached a settlement with Wells Fargo, fining the company $1 billion. Consent Order, Bureau of Consumer Fin. Prot. v. Wells Fargo Bank, No. 18-BCFP-0001 (Apr. 20, 2018). Though this was the first enforcement action under Mulvaney, the matter was opened under Cordray, and according to former CFPB officials, Mulvaney "had little to do with the case." Devin Leonard & Elizabeth Dexheimer, *Mick Mulvaney Is Having a Blast Running the Agency He Detests*, BLOOMBERG BUSINESSWEEK (May 25, 2018), https://www.bloomberg.com/news/features/2018-05-25/mick-mulvaney-on-the-cfpb-we-re-still-elizabeth-warren-s-child.

[247] Michael Grunwald, *Mulvaney requests no funding for Consumer Financial Protection Bureau*, POLITICO (Jan. 18, 2013), https://www.politico.com/story/2018/01/18/mulvaney-funding-consumer-bureau-cordray-345495.

[248] Congress mandated the establishment of the Office of Fair Lending and Equal Opportunity ("OFLEO"). 12 U.S.C. § 5493(c) (2015). During Cordray's tenure, the Division of Supervision, Enforcement, and Fair Lending was comprised of OFLEO, Office of Supervision Policy, and Office of Enforcement. This ensured that there would be an office entirely dedicated to the oversight and enforcement of fair lending laws. During Mulvaney's tenure, he stripped supervisory and enforcement powers from OFLEO, moving it to a division that had been established to promote diversity within the agency. *See* O'Harrow Jr. et al., *supra* note 5; Deborah Goldstein, *Trump Appointee Move Invites Lending Discrimination*, CTR. FOR RESPONSIBLE LENDING (Feb. 5, 2018), https://www.responsiblelending.org/media/trump-appointee-move-invites-lending-discrimination.

[249] On January 16, 2018, the effective date of the Payday Rule, the CFPB issued a Statement announcing that it "intends to engage in a rulemaking process so that the Bureau may reconsider" the rule. CFPB, *CFPB Statement on Payday Rule*, (Jan. 16, 2018), https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-payday-rule/; *see also supra* note 166 and accompanying text. On February 14, 2019, in its new Notice of Proposed Rulemaking, the Bureau proposes delaying the compliance date to August 2019 and that lenders would no longer have to make ATR determinations before

issued over a dozen Requests for Information ("RFI"),[250] generally the first step to amending rules or policies already in place.[251] Mulvaney even sought to change the agency's name to the Bureau of Consumer Financial Protection, which consumer groups saw as a move away from being a consumer-focused agency.[252] He likely would have been successful, but for the $300 million price tag that the industry would have had to incur.[253]

While Mulvaney is no longer leading the agency,

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issuing the loan. Payday, Vehicle Title, and Certain High-Cost Installment Loans; Delay of Compliance Date, 84 Fed. Reg. 4298 (proposed Feb. 14, 2019) (to be codified at 12 C.F.R. pt. 1041).

[250] *Archive of Closed Notices*, CFPB (June 15, 2019), https://www.consumerfinance.gov/policy-compliance/notice-opportunities-comment/archive-closed/?categories=request-comment-info&from_date=12%2F1%2F2017&to_date=12%2F11%2F2018. Mulvaney's RFIs included calls for public opinion on how the Bureau writes regulations, 83 Fed. Reg. 10,437 (2018), enforces consumer laws, 83 Fed. Reg. 5999 (2018), and supervises companies, 83 Fed. Reg. 7166 (2018).

[251] *Mick Mulvaney Puts All CFPB Operations Under Review*, CBS NEWS (Jan. 17, 2018, 3:34 PM), https://www.cbsnews.com/news/mick-mulvaney-all-cfpb-operations-under-review/. Senator Sherrod Brown (D-OH) issued a report criticizing Mulvaney, claiming that the RFIs "reflect a strong bias toward industry." MINORITY STAFF REPORT OF S. COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, 116TH CONG. REP. ON PUSHING THE ENVELOPE: THE CONSUMER FINANCIAL PROTECTION BUREAU UNDER THE TRUMP ADMINISTRATION 21 (Sherrod Brown, Nov. 2018), https://www.banking.senate.gov/imo/media/doc/Pushing%20the%20Envelope%20-%20Mick%20Mulvaney%20at%20CFPB%20FINAL.pdf.

[252] Victoria Finkle, *What's in a Name? For Mulvaney's CFPB, Quite a Lot,* AM. BANKER (Apr. 25, 2018, 9:00 AM), https://www.americanbanker.com/opinion/whats-in-a-name-for-mulvaneys-cfpb-quite-a-lot ("Mulvaney's efforts to downgrade 'Consumer' in favor of 'Bureau' reflect his attempt to not only weaken but also depersonalize the only federal agency with only one job, protecting consumers.").

[253] Sylvan Lane, *Exclusive: Consumer Bureau Name Change Could Cost Firms $300 Million*, THE HILL (Dec. 3, 2018), https://thehill.com/policy/finance/419527-exclusive-consumer-bureau-analysis-says-name-change-could-cost-firms-300. It also would have cost the agency anywhere from $9 million to $19 million to update materials and its website. *Id.*

Kraninger[254] appears to be following her former boss' footsteps.[255] The events following Cordray's departure plainly demonstrate how Congress' design experiment does nothing to stop an independent regulator from acting as an executive branch agency.

Even after the wild fluctuation in regulatory oversight under Cordray's tenure to Mulvaney's, many CFPB supporters continue to believe that a single director is far better than a commission. They argue that a commission-led agency inevitably leads to delays, and that such agencies are inherently slow and unresponsive. Most often, the SEC is cited as an example of why multi-member, bipartisan commissions fail.[256]

The SEC's criticisms may very well be deserved. Before the passage of the Dodd-Frank Act, many had doubts about the agency's effectiveness. In fact, there were discussions about combining the SEC with the CFTC, placing the SEC under the monitoring of a more robust agency, and even eliminating the agency altogether.[257] Nearly nine years after the passage of the

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[254] On December 11, 2018, Kraninger was sworn in as the second director of the CFPB. *Vote Summary on Roll Call Vote 115th Congress – 2nd Session,* U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=2&vote=00255. She was confirmed by a Republican-controlled Senate to a five-year term. *Id.* Her confirmation was along party lines, 50-49. *Id.* Senator Tom Tillis (R-NC) did not vote. *Id.*

[255] For example, like Mulvaney, Kraninger believes that Congress must give the Bureau explicit authority before it can examine regulated entities for compliance with the Military Lending Act, which provides servicemembers consumer protections (e.g., caps interest rates to 36 percent). Katie O'Donnell, *Military personnel caught in crossfire over lending law*, POLITICO (Apr. 9, 2019), https://www.politico.com/story/2019/04/09/military-personnel-caught-in-crossfire-over-lending-law-1290791. According to news reports, in August 2018, Mulvaney intended to cease monitoring for the law's compliance because he did not believe the CFPB had legal authority. Colin Dwyer, *Pentagon Was Not Notified Of Proposal To Change Military Lending Act*, NPR (Sept. 11, 2008), https://www.npr.org/2018/09/11/646790785/pentagon-consumer-agency-didnt-discuss-plan-to-relax-oversight-of-military-lendi.

[256] Liz Goodwin, *Warren's consumer dream dismantled*, BOSTON GLOBE (Mar. 3, 2018), https://www.bostonglobe.com/news/nation/2018/03/03/warren-responds-mulvaney-cfpb-taunts-this-isn-about/Iv53cIPjzQ6FrSiNblsjfM/story.html (Not regretting CFPB's single director structure, Senator Warren explains, "Look at the SEC, which has a board and has been tangled for years and years and years in partisan bickering. The consequence of a board has been to freeze the SEC so that it's often not able to follow through on its mission to protect individual investors.")

[257] Joan MacLeod Heminway, *Reframing and Reforming the Securities and*

Dodd-Frank Act the SEC has yet to meet over 20 percent of its statutorily-mandated rulemaking deadlines.[258]

The SEC's performance, however, is not reflective of all commissions. The CFTC, which has a similar leadership structure,[259] has largely met its Dodd-Frank mandatory rulemaking deadlines.[260] The multi-member, bipartisan led Federal Communications Commission ("FCC")[261] also met its statutorily-mandated rulemakings under the Telecommunications Act of 1996,[262] which was the first major overhaul of the 1934 Communications Act.[263] Congress gave the FCC six months to implement the statutory program.[264] On the day of the deadline, the FCC released a 737-page document, containing the regulations necessary to implement the new law.[265]

IV. INDEPENDENCE IS STILL IMPORTANT

As a political (not necessarily constitutional) matter, the CFPB's structural design arguably went too far in insulating it

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Exchange Commission: Lessons from Literature on Change Leadership, 55 VILL. L. REV. 627, 632-34 (2010).

[258] The SEC has failed to meet seventeen of its seventy-five mandatory rulemaking deadlines. Document: Mandatory Dodd-Frank Act Rulemaking Deadlines (on file with author).

[259] *See* HOGUE, ET AL., *supra* note 108, at 8-18 (both led by five commissioners with staggered terms and no more than three commissioners can be from the same political party).

[260] The CFTC has met all but six of its fifty-one mandatory rulemaking deadlines. Document: Mandatory Dodd-Frank Act Rulemaking Deadlines (on file with author).

[261] 47 U.S.C. § 154(b)(5) ("The maximum number of commissioners who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission.").

[262] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[263] *See Telecommunications Act of 1996*, FCC.GOV (last updated June 20, 2013), https://www.fcc.gov/general/telecommunications-act-1996 ("The Telecommunications Act of 1996 is the first major overhaul of telecommunications law in almost 62 years.").

[264] 47 U.S.C. § 251(d)(1) (Supp. II 1997) ("Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.").

[265] First Report and Order, 96 F.C.C. 325 (1996); David Solomon, 68 FED. COMM. L.J. 60 (Feb. 2016) ("The FCC acted unanimously in virtually all its early 1996 Act implementation decisions.").

from both branches, but it does not follow that Congress was misguided in making it independent.

Keeping the CFPB's independence means it would remain on equal footing with all other federal financial regulators, which was a critical aspect of the Obama administration's proposal for financial reform.[266] Sound reasons exist for separating financial regulation from partisan politics. The work of financial regulation—whether it is setting monetary policy or regulating the systematic risk of financial institutions *or* markets (e.g., securities or futures) *or* a financial product or activity (e.g., credit cards or payment processing)—requires developing policies based more on technical expertise and much less on political ideology. When financial regulators are insulated from changes in administration, their policies are more likely to be based on subject matter expertise than influenced by political concerns. Moreover, these regulators' functions are not entirely executive. They have legislative (i.e., rulemaking) and judicial (i.e., adjudicating hearings) powers, and therefore, it would be inappropriate to house these agencies under the executive branch, subject to presidential control.

Also, an independent agency would benefit the Bureau's public servants, who too often are forgotten in the escalating partisan warfare of Washington. During Mulvaney's tenure, there was the "largest exodus" in the agency's workforce since its creation,[267] and morale certainly suffered.[268] As one CFPB employee confided, "I think there is a great deal of confusion and uncertainty . . . and fear about what a director that once called our organization a 'sick joke' might do at [its] helm."[269] In his

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[266] FINANCIAL REGULATORY REFORM, *supra* note 48, at 58.

[267] O'Harrow Jr. et al., *supra* note 5. The attrition was not unexpected. Mulvaney's top aides considered moving employees to the basement of its headquarters office, relocating others to Dallas, and having employees share desks. Elizabeth Dexheimer, *Mulvaney's CFPB Considers Moving Staff to the Basement, or Dallas,* BLOOMBERG BUSINESSWEEK (May 1, 2018), https://www.bloomberg.com/news/articles/2018-05-01/mulvaney-s-cfpb-considers-moving-staff-to-basement-or-to-dallas.

[268] Sylvan Lane, *Consumer Bureau Morale Plummeted Under Mulvaney: Report*, THE HILL (Dec. 12, 2018), https://thehill.com/policy/finance/421007-consumer-bureau-morale-plummeted-under-mulvaney-analysis.

[269] Allan Smith, *Employees Dish on the Chaos Gripping America's Top Consumer Watchdog Agency Amid a Dramatic Showdown with Trump*, BUSINESS INSIDER (Nov. 30, 2017), https://www.businessinsider.sg/cfpb-employees-mulvaney-english-consumer-financial-protection-bureau-trump-2017-11/.

resignation letter, CFPB's Assistant Director & Student Loan Ombudsman Seth Frotman accused leadership of "repeatedly undercut[ting] and undermin[ing] career CFPB staff working to secure relief for consumers."[270] One public servant perhaps summarized it best:

> I personally find it sad to see the organization that was intended to be a nonpartisan organization charged with the important mission of protecting consumers being dragged into a political fight. The CFPB has consistently been characterized as partisan when, I would argue, our record — and mission — is not.[271]

With the growing ideological divide about the role of government,[272] the Bureau and its legislative mandate should not be stuck in a political tug of war.

A. Returning to Tradition and Convention

CFPB detractors complain that the Bureau's structural deficiencies are yet another example of government overreach. With a constitutionally well-established structure, however, they would have to focus on the agency's policies rather than its legitimacy. CFPB supporters should shift the attention back to protecting American consumers by compromising and reforming the agency's structure.

Professor Roberta Romano also argues that the Bureau's structure should be changed, but for different reasons. In her article, she uses empirical data to prove that the CFPB is less democratically accountable than other independent agencies with more conventional structures, and therefore, should be redesigned.[273] To evaluate accountability, she tests how often

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[270] Resignation Letter from Seth Frotman to Acting Director Mick Mulvaney (Aug. 27, 2018), https://static.politico.com/ff/88/08ab4cda4c9491650caba9d90fbb/frotman-letter.pdf. Former colleague Frotman also accused the leadership of "suppress[ing] the publication of a report prepared by Bureau staff" that showed the nation's largest banks were charging students excessive fees. *Id.*

[271] Smith, *supra* note 269.

[272] *See* KAISER, *supra* note 46, at 384 ("Political scientists who study polarization in Congress have found that, judged by the votes they cast, Republican members have become steadily more conservative over the last generation, and have moved to the right more quickly than Democrats have moved to the left.").

[273] Romano, *supra* note 10, at 273.

agencies use what she considers as "the most publicly accountable regulatory instrument: notice-and-comment rulemaking,"[274] as set forth under section 553 of the Administrative Procedure Act ("APA").[275] Her statistical analysis shows that the CFPB uses notice-and-comment rulemaking less frequently than the CPSC, the CFTC, and the SEC, which are each led by a multi-member commission. She reasons that the problem lies in the Bureau's degree of insulation from the political branches because it is the only agency led by a single director and not subject to congressional appropriations or reauthorization. Professor Romano recommends that Congress make the CFPB subject to the appropriations process and design the agency as either (i) an independent multi-member commission, with partisan balance requirements or (ii) an executive branch agency, with a single director serving at the will of the president.[276]

As Figure 1 shows, there are any number of combinations of agency features that would make the CFPB more accountable to the political branches. For example, as Professor Romano suggests, Congress could amend Title X to subject the agency to the regular appropriations process, regardless of whether the CFPB becomes an independent commission or an executive branch agency.[277] Her proposal is not without merit. If Congress had had more oversight authority in 2018, it could have influenced the Bureau's activities under Mulvaney by simply adjusting its funding or placing limitations on the use of appropriated funds. But then the Bureau would have less independence than the prudential regulators, signaling that consumer protection is once again subordinated to safety and soundness concerns. This would directly contradict a key lesson learned from the financial crisis: protecting consumers is just as important as ensuring stability in the financial system.[278]

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[274] *Id.* at 273. She believes that because unelected officials draft and finalize regulations, "the political legitimacy of rulemaking" requires "public participation under 'procedures designed to ensure the rationality of the agency's decision.'" She further explains that "public comments can illuminate gaps in an agency's knowledge and provide an understanding of real-world conditions, as well as assist an agency in gauging a rule's acceptance by those affected." *Id.* at 277-78.

[275] 5 U.S.C. § 553 (1966).

[276] Romano, *supra* note 10, at 330-31.

[277] *Id.* at 331.

[278] "[W]e need to acknowledge that the failure to protect consumers is not just a moral failing. It can also cause the collapse of our largest financial institutions, upon which our very economy relies. Consumer

Also, as a practical matter, the political environment is such that it would stretch credulity to expect House Democrats to subject any independent agency to congressional appropriations. The operations of both the SEC and the FTC came to a standstill for an unprecedented thirty-five days in December 2018 and January 2019.[279] Their lack of funding was wholly unrelated to their policies or regulatory agenda. With expectations of another government shutdown,[280] House Democrats are unlikely to agree to use Congress' power of the purse to make the Bureau only "theoretically" more accountable.

The following sections address the two solutions that Professor Romano believes are equally suitable to making the CFPB more democratically accountable. This Article suggests she

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protections. . .should be on an equal footing with supervision that ensures the safety and soundness of our financial system." Sen. Christopher J. Dodd Holds a News Conference on Priorities for the Next Congress, 2008 WL 4817177 (Nov. 6. 2008). Other academic scholars have reached a similar conclusion. Adam J. Levitin, *Hydraulic Regulation: Regulating Credit Markets Upstream*, 26 YALE J. ON REG. 143 (2009).

[279] Lisa Rein et al., *Federal Employees Return to Backlog of Work After 35-Day Shutdown*, WASH. POST (Jan. 28, 2019), https://www.washingtonpost.com/politics/federal-employees-return-to-backlog-of-work-after-35-day-shutdown/2019/01/28/10030766-231c-11e9-81fd-b7b05d5bed90_story.html?utm_term=.d274de772c34; Denise Lu & Anjali Singhvi, *Government Shutdown Timeline: See How the Effects are Piling Up,* N.Y. TIMES (Jan. 28, 2019), https://www.nytimes.com/interactive/2019/01/08/us/politics/government-shutdown-calendar.html.

[280] *See, e.g.*, Caitlin Emma & Jennifer Scholtes, *Trump's Budget Sets Up Another Shutdown Battle*, POLITICO, https://www.politico.com/story/2019/03/11/trump-fiscal-budget-2020-1215609 (last updated Mar. 11, 2019, 3:07 PM). The appropriations process is no longer an effective tool to make independent agencies fall into line when the budget is subject to wholesale government shutdowns. *See* Ian Shapira, *Meet the Democrat Who Paved the Way for Government Shutdowns. Yes, a Democrat*, WASH. POST (Jan. 17, 2019), https://www.washingtonpost.com/history/2019/01/17/meet-democrat-who-paved-way-government-shutdowns-yes-democrat/?utm_term=.e4794a31fc0b ("I couldn't have ever imagined these shutdowns would last this long of a time and would be used as a political gambit."). Moreover, it would be surprising if House Democrats subjected another consumer protection agency to congressional appropriations. *See* Jon Schuppe, *Shutdown Blocks Help for Identity Victims, as FTC Goes Dark*, NBC NEWS (Jan. 12, 2019, 1:34 PM), https://www.nbcnews.com/news/us-news/shutdown-blocks-help-identity-theft-victims-ftc-goes-dark-n957721.

is only partially correct. The CFPB must be restructured, but how the agency is designed—as an executive branch agency or as an independent commission—leads to substantially divergent regulatory outcomes that would have considerable import to financial innovation, the industry, and consumer welfare.

B. Executive Branch Agency

There are sound reasons for having an agency head serve at the president's pleasure. Then-Professor Elena Kagan's constitutional theory of "presidential administration" provides two benefits of presidential oversight of executive branch agencies: (1) regulatory effectiveness; and (2) accountability.[281] Kagan describes the first benefit, regulatory effectiveness, to include "technocratic values" such as "cost-effectiveness, consistency, and rational priority-setting."[282] As a "unitary actor" in control of the executive branch, the president can set forth a consistent policy view across all agencies through OIRA's centralized review of regulatory agendas.[283] Kagan's second benefit is quite simple. Executive branch agencies are under the direction of the president who is accountable to the American people, and the American people elect a president whose policy views most closely align to theirs.

These views appear to be consistent with Professor Romano's. To be sure, she does not compare the CFPB with any executive branch agency, and thus, her analysis does not address how often such agencies use notice-and-comment rulemaking. Her indifference to how the Bureau should be structured suggests that her main opposition to the CFPB's current structure is its general lack of accountability to the political branches. In her discussion of a failed Republican House bill that would have restructured the CFPB into an executive branch agency, she opines, "[T]he key fact is that, had the bill been enacted, compared to the present arrangement, the agency would have been rendered more accountable to elected officeholders."[284]

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[281] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331-47 (2001).

[282] *Id.* at 2339.

[283] *But see* note 127 and accompanying text. Title X requires that proposed or finalized rules or orders by the CFPB and the Federal Reserve be treated similarly. *See* 44 U.S.C. § 3513 (2012). This raises an interesting issue. Even if the Supreme Court were to restructure the Bureau into an executive agency by striking the "for cause" provision, it is unclear that the CFPB would then become subject to OIRA's review process.

[284] Romano, *supra* note 10, at 317.

Yet, restructuring the CFPB into an executive branch agency would not put the Bureau on more stable political footing to implement Title X's objectives. The problems that happened under Mulvaney's tenure exposed the uncertainty that occurs when a financial regulator effectively operates as an executive agency. Such a legislative solution would basically endorse the unpredictable variability in policy caused by political change in administrations. Regulatory uncertainty would become the new normal, and as discussed in the following section, the lack of predictability would hinder financial innovation. Surely, the CFPB should not be restructured just because it would make it more accountable to one of the political branches. In my view, determining the agency structure that would be more suitable for regulating the consumer financial services industry is the decisive issue.

C. Multi-member, Bipartisan Commission

Professor Romano suggests reforming CFPB to a commission because then the agency would more likely use the most publicly accountable instrument, notice-and-comment-rulemaking. I agree with her suggestion, but for entirely different reasons.

First, it is not clear that such rulemaking is in fact the most publicly accountable regulatory instrument. APA section 553(b) requires agencies to publish in the Federal Register a notice that includes "either the terms or substance of the proposed rule or description of the subjects and issues involved."[285] Section 553(c) requires agencies to provide the public with an opportunity to submit comments, which agencies must review and evaluate. It also requires agencies to explain the basis for its final rule.[286] The APA certainly speaks to public accountability, but the courts' interpretation of it has led to contradictory results. For example, the CFPB generally publishes the full text of its actual proposed regulation even though section 553(b) calls for much less.[287] The

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[285] 5 U.S.C. § 553(b) (1966).

[286] *Id.* § 553(c).

[287] *See, e.g.*, Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act and the Truth in Lending Final Rule, 81 Fed. Reg. 72,160 (Oct. 19, 2016) (explaining agency's provisions are finalized or adopted "largely as proposed"); Defining Larger Participants of the Automobile Financing Market and Defining Certain Automobile Leasing Activity as a Financial Product or Service Final Rule, 80 Fed. Reg. 37,496 (June 30, 2015) ("The Bureau is now issuing this final rule . . . largely as proposed.");

Bureau publishes substantially more information because courts test the adequacy of an agency's notice by evaluating whether the final rule is a "logical outgrowth" of the proposal.[288] Moreover, courts have held that a final rule cannot "substantially depart" from the proposed rule, resulting in increased pressure to draft a proposed rulemaking in such a way that it can be finalized largely as proposed.[289] This inevitably leads to delays. For instance, the CFPB published its Notice of Proposed Rulemaking for its Debt Collection Rule, nearly six years after it issued the Advanced Notice of Proposed Rulemaking.[290]

The practice of reviewing the public's comments and nevertheless finalizing rules largely as proposed suggests that the comments have limited value.[291] Industry and consumer advocacy groups are well aware of this and often provide draft regulatory language to the CFPB's Office of Research, Markets, and Regulations well in advance of the Bureau's notice of proposed

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Amendment to the Annual Privacy Notice Requirement Under the Gramm-Leach-Bliley Act Final Rule 79 Fed. Reg. 64,057 (agency is "adopting" provisions "substantially as proposed" or "largely as proposed").

[288] Shell Oil Co. v. EPA, 950 F.2d 741, 746-47 (D.C. Cir. 2019) ("The relationship between the proposed regulation and the final rule determines the adequacy of notice. A difference between the two will not invalidate the notice so long as the final rule is a 'logical outgrowth' of the one proposed. If the deviation from the proposal is too sharp, the affected parties will not have had adequate notice and opportunity for comment.").

[289] Chocolate Mfrs. Assoc. v. Block, 755 F.2d 1098, 1105 (4th Cir. 1985) ("[I]f the final rule 'substantially departs' from the terms or substance of the proposed rule," the notice is inadequate.").

[290] Debt Collection Practices (Regulation F), 84 Fed. Reg. 23,274 (proposed rule, May 21, 2019); Debt Collection (Regulation F), 78 Fed. Reg. 67,848 (advanced notice of proposed rule, Nov. 12, 2013).

[291] To be clear, pursuant to section 553(c), agencies must review all comments and respond accordingly. If the agency were to make a substantial change in the proposed rule, then the agency must reopen the comment period or risk a 553(b) challenge. Notably certain agencies take a more democratic approach to rulemaking and go beyond the process set forth under section 553. For example, the FCC routinely provides the public two comment periods: (1) an opportunity to submit comments to a proposed rulemaking; (2) and an opportunity to reply to what others have said in the first comment period. *Rulemaking at the FCC*, FCC, https://www.fcc.gov/general/rulemaking-fcc (last visited June 24, 2019). This reply period provides the public an opportunity to address concerns with others' initial comments. Other agencies including the National Labor Relations Board, the U.S. Sentencing Commission, the Federal Energy Regulatory Commission, and the U.S. Regulatory Commission have also provided a reply period for their rulemakings.

rulemaking. There is nothing untoward about special interests petitioning agency officials, but the rulemaking process has evolved to where organized groups have access and ordinary Americans do not. It is not evident why a process that effectively allows interest groups more access to influence government regulations has greater democratic legitimacy than a process that relies on impartial bureaucrats with expertise.

Second, Congress provides agencies with a regulatory toolkit spanning an array of instruments (like supervisory examinations or investigations) that have little to no public involvement. Though such tools lack a public comment process, that does not necessarily make them inferior or suspect. Also, because the courts' interpretation of section 553 has made rulemaking increasingly burdensome, good reasons exist for using other regulatory tools. Proposing and finalizing regulations is a multi-year endeavor and would be an ill-suited means for overseeing a fast-changing marketplace. This is especially true in the consumer financial services industry where startups are using advancements in technology to displace market incumbents. General policy statements or guidance documents would be a much more effective means for CFPB to protect consumers *while* keeping pace with industry developments. Unlike amending regulations, policy statements and guidance documents are more easily modified to address rapid technological advancements.[292] With incentives for decreasing the use of notice-and-comment rulemaking, it is not a reliable indicator for democratic legitimacy.

Third, political accountability is critical, but it is not always the most important factor. While substantial academic literature exists about how Congress or the President can better control the modern administrative state through institutional design,[293] there is far less research determining the agency structure best suited for any given regulated industry. This Article proposes that for consumer financial services, an industry beset by "disruptive

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[292] Romano, *supra* note 10, at 333 ("[G]uidance can be reversed. . .with relative ease, in contrast to policies implemented through notice and comment, which can be reversed solely by using that more arduous process once again, with judicial examination of the new rationale.").

[293] *E.g.*, Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth_Branch,* 84 COLUM. L. REV. 573 (1984); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655 (2006).

technologies,"[294] regulatory predictability—not political accountability—is a far more essential feature of an agency's structure.

An agency led by a multi-member, bipartisan commission, where members have staggered terms, would provide the consumer financial services industry much needed regulatory predictability. A change in administration would not lead to a wholesale change in the agency's leadership, and thus, agency actions are not subject to ideological swings. When presidents nominate an individual (someone who likely shares their policy views), a multi-member commission limits the influence of any single person. The partisan balance requirement (i.e., no more than a simple majority from one political party) means that agency actions are more likely based on informed decisions reached through debate and compromise. Minority views can also help temper those of the majority.[295] Finally, having staggered terms generally avoids multiple vacancies occurring at the same time, providing continuity and stability in the agency's leadership. Without an agency structure that promotes stability, it is near impossible to have regulatory predictability.

And such predictability is necessary in the consumer financial services industry. First, regulated entities need consistency in their obligations and predictable enforcement standards. Without this, companies are more likely to focus on "reading tea leaves" than on increasing consumer welfare through innovative products. Worse, if the regulatory environment becomes so unpredictable that firms consider the CFPB's enforcement actions as random or arbitrary, then "playing by the rules" no longer provides a competitive advantage and firms become incentivized to race to the bottom.

Second, when a regulator provides a stable and predictable business environment, it encourages a company to make investments in research and development to improve its own operations. It also encourages lenders to provide companies with funding. Such a business environment invites venture capitalists and private equity firms to invest. In contrast, regulatory

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[294] *See generally* KLAUS SCHWAB, THE FOURTH INDUSTRIAL REVOLUTION (2016) (proposes that the world is at the beginning of the Fourth Industrial Revolution in which disruptive technologies will have an unprecedented level of impact.).

[295] *See generally* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71 (2000) (discussing implications of group polarization and importance of hearing other viewpoints).

uncertainty makes investing less attractive.[296] Economics teaches us that an investment's expected value or return is simply the sum of all anticipated returns on investment multiplied by the likelihood (i.e., probability) of each of those returns occurring.[297] When there is regulatory unpredictability, the likelihood of achieving the return on investment either becomes reduced or too difficult to even determine. In either instance, the investment's expected value decreases as the probability of realizing any benefit is lowered. Consequently, firms may delay making an investment until there is more regulatory stability, or worse, refrain from investing altogether. Lenders may also be less willing to provide funding. Similarly, venture capitalists and private equity firms may invest in other areas where there is more stability and predictability.

Consumers in the market for financial products and services lose when businesses delay or refrain from making investments in technology such as artificial intelligence ("AI"), which is considered the "most disruptive technology of the modern era."[298] With respect to the consumer financial services industry, developments in AI and some of its sub-fields—machine learning, deep learning, natural language processing—have the potential to increase consumers' access to credit, leading to the democratization of the industry. With machine learning, lenders can use "big data" to make better credit decisions, lowering the cost of credit. They can also use "alternative data" to serve consumers who previously had limited access to credit because they lacked a traditional credit score. Deep learning, which is a more advanced form of machine learning, can help companies detect fraud, also lowering the cost of credit. With natural language processing, individuals who use sign language can communicate with customer service representatives who don't. Surely, investment in

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[296] *See* AVINAH K. DIXIT & ROBERT S. PINDYCK, INVESTMENT UNDER UNCERTAINTY 282 (1994) ("[A]n environment of ongoing uncertainty. . .has effect of making firms less eager to invest. . . . [U]ncertainty makes waiting more valuable and discourages immediate investment.").

[297] *Calculating Expected Rate of Return*, JONATHAN LAW, BUSINESS, THE ULTIMATE RESOURCE (3d ed. 2011).
The formula for an investment's expected return is:

$$E[r]=\Sigma_s P(s)r_s$$

where $E[r]$ is the expected return, $P(s)$ is the probability that the r_s occurs, and r_s is the anticipated return.

[298] Karl Manheim & Lyric Kaplan, *Artificial Intelligence: Risks to Privacy and Democracy*, 21 YALE J. L. & TECH. 106, 108 (2019).

AI has tremendous potential to increase consumer welfare.

Today's business environment, however, does not encourage companies to invest because of increased regulatory uncertainty since Cordray's departure. Under his tenure, the CFPB took the lead in enforcing consumer protection statutes and influencing market behavior. When Trump picked an acting director, who had referred to the CFPB as a "joke," many state attorneys general announced they would step in if the Bureau's enforcement approach changed.[299] Mulvaney embraced their offer. In a February 2018 speech to the National Association of Attorneys General, Mulvaney declared that the CFPB would leave consumer protection enforcement to states and turn its attention to consumer education.[300] Now, California and others are considering creating a "state level CFPB" or "mini-CFPB."[301] Maryland,[302] New

[299] In a December 17, 2017 letter to Trump, the attorneys general of New York, California, Connecticut, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Mexico, North Carolina, Oregon, Vermont, Virginia and Washington State wrote, "Regardless of the future direction or leadership of the CFPB, we as state attorneys general will vigorously enforce state and federal laws to ensure fairness and deter fraud." Letter from Eric T. Schneiderman, N.Y. Attorney General, et al., to President Donald J. Trump (Dec. 12, 2017), https://ag.ny.gov/sites/default/files/sign_on_letter_re_cfpb.pdf.

[300] CONSUMER FINANCIAL PROTECTION BUREAU ACTING DIRECTOR MICK MULVANEY (C-SPAN Feb. 28, 2018).

[301] *California Lawmaker Explores Creating a "State CFPB"*, NATIVE AM. FIN. SERVICES ASS'N (Mar. 28, 2019), https://nativefinance.org/news/california-lawmaker-explores-creating-a-state-cfpb/.

[302] On May 15, 2018, Maryland Governor signed into law the Financial Consumer Protection Act of 2018. H.B. 1634 (Md. 2018).

Jersey,[303] New York,[304] and Pennsylvania[305] have already done so. To date, Arizona, Wyoming, and Utah have created their own fintech "regulatory sandboxes."[306] In December 2018, while still under Mulvaney's leadership, the Bureau proposed changes to its approach to financial innovation.[307] The Conference of State Bank

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[303] News Release, Office of the Attorney General of N.J., Attorney General Grewal Announces New Leadership at the Division of Consumer Affairs (Mar. 27, 2018), https://nj.gov/oag/newsreleases18/pr20180327a.html.

[304] On April 29, 2019, the New York State Department of Financial Services announced its new Consumer Protection and Financial Enforcement division. Press Release, Dep't of Fin. Services of N.Y., Acting DFS Superintendent Lacewell Announced Appointment of Katherine Lemire as Executive Deputy Superintendent of Newly Created Consumer Prot. & Enforcement Division (Apr. 29, 2019), https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1904291. Earlier in 2019, New York Attorney General hired former colleague, Christopher D'Angelo to serve as the Chief Deputy Attorney General for Economic Justice. He helped stand up the CFPB, and over the years wore many hats, taking on the most recent in 2016 as the Associate Director of Supervision, Enforcement and Fair Lending. Kate Berry, *CFPB's No. 3 to depart, join New York AG*, AM. BANKER (Jan. 24, 2019), https://www.americanbanker.com/news/cfpbs-no-3-to-depart-join-new-york-ag.

[305] On July 20, 2017, Pennsylvania Attorney General announced a new Consumer Financial Protection Unit that would be led by former colleague, Nicholas Smyth who helped stand up CFPB and served as an enforcement attorney. Press Release, Office of the Attorney General of Pa., Attorney General Josh Shapiro Announces Consumer Financial Protection Unit (July 20, 2017), https://www.attorneygeneral.gov/taking-action/press-releases/attorney-general-josh-shapiro-announces-consumer-financial-protection-unit/.

[306] Press Release, Az. Attorney General, Arizona Becomes First State in U.S. to Offer Fintech Regulatory Sandbox (last visited June 17, 2019), https://www.azag.gov/press-release/arizona-becomes-first-state-us-offer-fintech-regulatory-sandbox; H.B. 57, 65th Leg. (Wyo. 2019); H.B. 378, 63rd Leg. (Utah 2019). For a discussion about the history of regulatory sandboxes, see Ryoji Kashiwagi, *The Rise of the Regulatory Sandbox*, FIN. IT (Dec. 4, 2017), https://financialit.net/blog/rise-regulatory-sandbox.

[307] On December 13, 2018, the Bureau published in the Federal Register a notice ("2018 Notice") seeking public comments on (i) a proposed change to its 2016 Policy on No-Action Letters ("2016 Policy") and (ii) the creation of a "Product Sandbox." 83 Fed. Reg. 64,036 (Dec. 13, 2018).

Under the 2016 Policy, a company may apply for a No-Action Letter (NAL), which states that the "CFPB staff has no present intention to recommend an enforcement or supervisory action" for a limited time period, if the entity agrees to certain data-sharing requirements. 81 Fed. Reg. 8686 (Feb. 22, 2016). Under the 2018 Notice, the Bureau would streamline the application process, would be

Supervisors and 22 state attorneys general have expressed their opposition to these changes on state preemption grounds, and a race to the courthouse seems certain.[308] States will inevitably have differing enforcement approaches and regulatory sandbox parameters. For startups, market incumbents, and investors, the

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more open to UDAAP-based NALs, eliminate data sharing as well as the temporal nature of the letter. Further, the CFPB intends to respond to any company's application within 60 days and the NAL would be "issued by duly authorized officials of the Bureau to provide recipients greater assurance that the Bureau itself stands behind the no-action relief" instead of being a staff recommendation. The proposed changes ("NAL Proposal") are "designed to increase the utilization" of the No-Action Letter, but it is not clear how beneficial such a letter is when Kraninger has stated that education—not enforcement—is the Bureau's first priority. Moreover, obtaining a UDAAP-based NAL has substantial downside risks because states have similar laws. Former colleague Dan Quan said it best, "You're literally drawing a state target on your back." Lydia Beyoud, *2019 Outlook: CFPB Innovation Policies May Face State Challenges*, BLOOMBERG LAW (Dec. 28, 2018), https://news.bloomberglaw.com/banking-law/2019-outlook-cfpb-innovation-policies-may-face-state-challenges.

The Bureau's Product Sandbox is remarkable in its scope. First it would allow a trade association to apply on behalf of an entire industry. Second, it would provide substantially the same relief under the NAL Proposal as well two additional forms of relief that would be legally binding on the agency and other parties, such as states and private parties, for an expected period of two years: (i) approvals by order under the statutory provisions giving an entity a safe harbor; and (ii) exemptions by order from statutory or regulatory provisions. Again, by CFPB's own leadership statements about decreased enforcement activity, entities may have little to gain and are more likely to get caught in the crossfire between states and the CFPB.

[308] Letter from John Ryan, President & CEO of CSBS, to Paul Watkins, Assistant Director of the CFPB (Feb. 11, 2019), https://www.csbs.org/csbs-strongly-opposes-cfpb-preemption-state-authority-using-fintech-sandbox ("State regulators strongly oppose the attempt to preempt state enforcement authority via the creation of the Product Sandbox"); Letitia James, Attorney General of N.Y., to Kathy Kraninger, Director of the CFPB (Feb. 11, 2019), https://ag.ny.gov/sites/default/files/cfpb_nal_and_sandbox_comment_final.pdf ("[A]pprovals or exemptions granted by the CFPB would purportedly confer on the recipient immunity. . . from a CFPB enforcement action. . .[and] from 'enforcement actions by any Federal or State authorities, as well as from lawsuits brought by private parties.' The CFPB has no authority to issue such sweeping immunity absent formal rulemaking."); *Consumer Bureau's Shocking New "No Consumer Protection" Policy*, NAT'L CONSUMER LAW CTR. (Dec. 11, 2018), https://www.nclc.org/media-center/pr-consumer-bureau-s-shocking-new-no-consumer-protection-policy.html ("The CFPB's proposals are unlawful, outside its authority, and undoubtedly will face a legal challenge.").

investment calculation appears more complicated today than under Cordray's tenure. Moreover, it is unclear whether there would even be countervailing consumer benefits.[309]

Congress could, of course, do nothing. It can take a wait-and-see approach to whether a circuit split arises and whether the Supreme Court holds the agency unconstitutional. These events, however, are largely inevitable—in fact, expected. It is entirely foreseeable that the Court will strike the "for cause" provision, thereby making the Bureau an executive branch agency. The CFPB's director then would serve at the pleasure of the president, and every political change in administration foreshadows a challenging transition—resulting in the exact opposite outcome from the independent consumer financial protection regulation that Title X had intended. The Supreme Court's involvement would effectively put its seal of approval on allowing erratic policy changes to affect the consumer financial services industry. Such a scenario is not conjecture. Within two months of taking over the CFPB, Acting Director Mulvaney changed the regulatory agency's mission statement to explicitly focus on deregulation.[310]

Accordingly, Congress' inaction would be akin to ceding

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[309] Paula Dwyer, *The New Way to Deregulate*, BLOOMBERG BUSINESSWEEK (Feb. 15, 2019), https://www.bloomberg.com/news/articles/2019-02-15/regulators-create-sandboxes-as-a-place-to-foster-fintech ("Ten years ago, we went through a crisis because the loosening of regulations permitted institutions to take on risk at the expense of the consumer," says [Maria] Vullo, the former New York regulator. "It's like people have amnesia.").

[310] The agency originally described its mission as follows:

> The Consumer Financial Protection Bureau is a 21st century agency that helps consumer finance markets work by making rules more effective, by consistently and fairly enforcing those rules, and by empowering consumers to take more control over their economic lives.

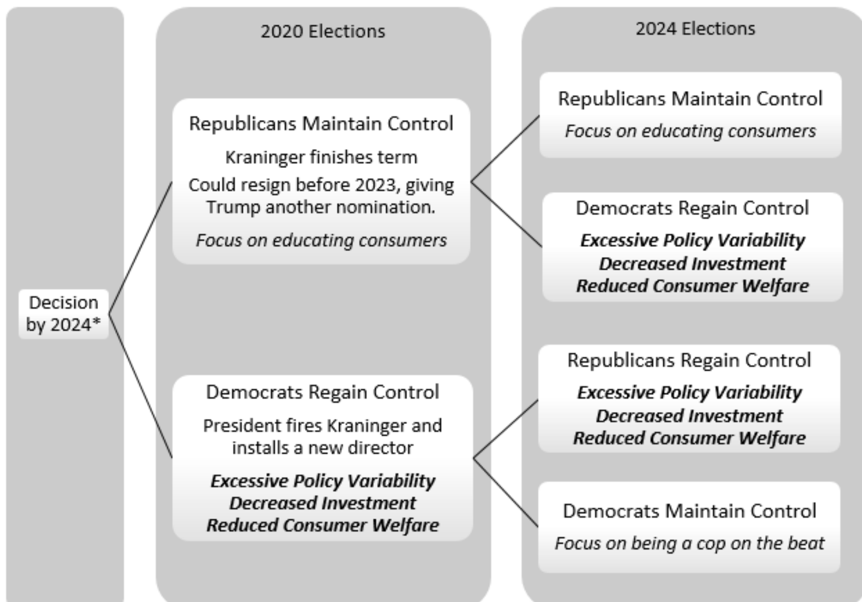
Under Acting Director Mulvaney, the agency changed its mission to focus on deregulation:

> The Consumer Financial Protection Bureau is a 21st century agency that helps consumer finance markets work **by regularly identifying and addressing outdated, unnecessary, or burdensome regulations**, by making rules more effective, by consistently enforcing federal consumer financial law, and by empowering consumers to take more control over their economic lives.

Ian Milliser, *Under Trump, the Consumer Financial Protection Bureau isn't even pretending to protect consumers*, THINK PROGRESS (Jan. 2, 2018), https://thinkprogress.org/cfpb-protect-consumers-8d50e60ba5d6/.

control to the political winds. Let's assume arguendo that the Supreme Court weighs in before 2024. As Figure 2 shows,[311] the rate of investment in financial innovation would hinge on the result of upcoming elections.

Figure 2. Congress Inaction Leads to Unacceptable Results



For Democrats, Republicans retaining control through to 2028 likely means more than enough time will have passed to eliminate most (if not all) consumer protections gained under Cordray's tenure. Such a result should be unacceptable for Democrats. For Republicans, Democrats regaining and maintaining control through 2028 means that Kraninger could be fired and a Democrat-installed director could well be serving into 2030. Resignations and the Federal Vacancy Act can be used to the Democrats' advantage just as it was for Republicans under Trump. This outcome should be similarly objectionable for Republicans. Most problematic, however, are when the

[311] For illustrative purposes only, this Article addresses just the 2020 and 2024 presidential elections. Because a presidential nominee must be confirmed by the Senate, the agency's future is also contingent on which party controls the Senate (and by how many seats). Therefore, the Senate seats up for reelection (and of those, which are in play) in 2020, 2022, 2024 and 2026 are also important.

administration changes between political parties every four years.

Notwithstanding the serious debate over the constitutionality of the CFPB, a pressing concern is the health of the consumer financial services industry. The only long-term solution is for Congress to reform the agency's structure in a way that maintains its independence. Why? For one rather simple reason: A financial regulator beholden to the president leads to unpredictability and excessive variability in policy with every political change in administration.

CONCLUSION

Something has to give. The Great Recession proved that consumer financial protection is critical to the country's financial system. It is far too important for its regulator to be at the mercy of political whims.

A Democrat-controlled Congress along with a Democratic president sought to create an independent regulatory agency that would be politically-insulated from changes in administration and from congressional horse-trading. They designed the CFPB unlike any other despite Republicans' strong opposition to even creating a new regulator. The party that unsuccessfully introduced over 165 bills seeking to eliminate or reform the Bureau must feel vindicated to some extent. After all, it was the CFPB's own acting director who revealed how Democrats' best laid plans had the perverse effect of politicizing the agency. Now that both parties, however, have seen how Title X operates in practice, it should be evident that Congress must reach a compromise that reforms the Bureau into a multi-member, bipartisan commission.[312] Yet, there is little appetite. Independent Community Bankers of America Executive Paul Merski explained the political environment best, "With the divided Congress, it's challenging because both sides of the aisle look at a commission differently. When Director Cordray was in there, the commission was viewed as a way to undermine Cordray

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[312] Notably, members of both parties are well aware of this. In March 2018, Representatives Dennis A. Ross (R-FL), Krysten Sinema (D-AZ), David Scott (D-GA), and Ann Wagner (R-MO) introduced legislation that would have restructured the agency to a multi-member, bipartisan commission where members have staggered terms. Financial Product Safety Commission Act of 2018, H.R. 5266, 115th Cong. (as referred to House Financial Services Committee, Mar. 13, 2018). The bipartisan bill had fourteen Republicans and two Democratic sponsors, but it was never scheduled for markup, and thus, never debated in committee.

by the Democrats. Now that you have Kathy Kraninger in there, the commission may be viewed as a way to undermine her for Republicans."[313]

However, should Congress fail to reform the Bureau, it would likely repeat the futile cycle of the last few years. Although CFPB supporters might resist the idea of any reform that seemingly weakens the Bureau, such a view is shortsighted. Either of the alternatives to legislative reform—doing nothing or waiting until the Supreme Court possibly forces change by finding the agency's current structure unconstitutional—risks losing an effective centerpiece of President Obama's financial reform legacy: a strong and stable agency that gives "consumer protection an *independent* seat at the table in our financial regulatory system."[314]

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[313] Neil Haggerty, *CFPB commission goes from idea to afterthought*, AM. BANKER (May 30, 2019), https://www.americanbanker.com/news/cfpb-commission-goes-from-idea-to-afterthought. To be fair, both parties are not misguided in being wary of restructuring the agency. Since 2011, Republicans introduced over fifteen bills seeking to reform the Bureau into a commission. In fact, they proposed such legislation in the 112th, 113th, 114th, and 115th Congress, but have yet to introduce a similar bill in the 116th Congress. Document: Analysis of CFPB-Related Bills Proposed from January 5, 2011 to June 15, 2019 (on file with author). It is understandable why Democrats may now be amendable to a director serving at the pleasure of the President. If Democrats reclaim the White House in the 2020 election, Kraninger's tenure becomes questionable. It is also understandable why Republicans are unlikely to agree to restructuring the agency's leadership now that Kraninger is at the helm. For the political parties to compromise and reform the agency's structure, the effective date for transitioning to a commission must be far enough into the future such that there would be sufficient political uncertainty. One only has to look to H.R. 4173 (as passed in the House in December 2009) to find an example of how to draft such a compromise.

[314] FINANCIAL REGULATORY REFORM, *supra* note 48, at 56 (emphasis added).