
RECENT LEGISLATION

ADMINISTRATIVE LAW — AGENCY DESIGN — DODD-FRANK ACT CREATES THE CONSUMER FINANCIAL PROTECTION BUREAU — Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of the U.S. Code).

Traditionally, consumer financial protection has been scattered among seven agencies¹ and enforced through at least eighteen different laws.² The recent passage of the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act³ (Dodd-Frank Act) promises to consolidate and strengthen consumer financial protection by granting the newly created Consumer Financial Protection Bureau (CFPB or Bureau) the power to enforce existing financial protection laws and to promulgate additional rules. The key point of contention during legislative debates was not the value of consumer protection, but rather the Bureau's design.⁴ The final institutional structure is distinct from that of a traditional independent agency in two important ways. First, while independent agencies are typically insulated from the executive branch⁵ but still accountable to Congress, the Bureau is insulated from both executive and legislative control. Second, while independent agencies typically feature multimember boards with staggered terms, the Bureau features a single director. The Bureau's design thus imports the high degree of independence reserved for the nonpolitical judgments of the Federal Reserve Board into the sphere of general regulatory agencies, which suggests an unprecedented lack of accountability for an agency making policy judgments.

¹ See Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, § 1061(a)(2)(A), 124 Stat. 1376, 2036 (2010) (to be codified at 12 U.S.C. § 5581) (listing agencies). This fragmentation was a key motivation for reform; on the House floor, Representative Keith Ellison stated that “we need a new agency dedicated to consumer financial protection . . . one that takes the interests of the consumer and puts them first.” 155 CONG. REC. H14,430 (daily ed. Dec. 9, 2009) (statement of Rep. Ellison).

² See Dodd-Frank Act § 1002(12), (14), 124 Stat. 1955. Calls for consolidation of these laws date back to at least the 1970s. See Carey Alexander, *Abusive: Dodd-Frank Section 1031 and the Continuing Struggle to Protect Consumers* 2 & n.12 (St. John's Univ. Sch. of Law, Legal Studies Research Paper Series, Paper No. 10-193, 2010) (citing H.R. REP. NO. 95-347 (1977), which proposed an Agency for Consumer Protection).

³ Pub. L. No. 111-203, 124 Stat. 1376.

⁴ See 156 CONG. REC. S2773 (daily ed. Apr. 29, 2010) (statement of Sen. Dodd) (finding “general agreement [that] having a consumer protection agency . . . makes sense”); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 72 (2010) (identifying the institutional framework as a “hotly contested issue”).

⁵ Independent agencies are defined by for-cause removal restrictions on agency heads. See Jacob E. Gersen, *Designing Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 347 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010).

On July 21, 2010, President Barack Obama signed into law the Dodd-Frank Act, which provides for “massive, far-reaching, and complex” reforms to consumer protection law and banking regulation.⁶ Though the Act has significant implications for diverse financial sectors, the CFPB is arguably its most controversial component.⁷

Building on a 2007 paper by Professor Elizabeth Warren,⁸ in 2009 the Obama Administration proposed a standalone Consumer Financial Protection Agency with a board of directors, funded by appropriations.⁹ Then, on July 8, 2009, Representative Barney Frank filed the Consumer Financial Protection Agency Act of 2009.¹⁰ The Act was incorporated into a broader financial reform bill, H.R. 4173,¹¹ which passed the House by a vote of 223 to 202, with no Republicans voting in favor.¹² The House’s proposal resembled the Administration’s in that it involved a standalone agency with a board of directors, but also added an independent revenue stream.¹³ Next, Senator Christopher Dodd filed the Restoring American Financial Stability Act of 2010¹⁴ on April 15, 2010.¹⁵ The Senate substituted its text for that of H.R. 4173 and passed the amended bill on May 20, 2010, by a vote of 59 to 39,

⁶ Linda Singer et al., *Breaking Down Financial Reform: A Summary of the Major Consumer Protection Portions of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 14 J. CONSUMER & COM. L. 2, 3 (2010); see also Satish M. Kini et al., *The Dodd-Frank Act’s Changes to Regulation of Insured Depository Institutions and Their Holding Companies*, BANKING & FIN. SERVICES POL’Y REP., Nov. 2010, at 11, 11 (“The Dodd-Frank Act represents a paradigm shift in . . . bank regulation.”).

⁷ See Michael Hamburger, *The Dodd-Frank Act and Federal Preemption of State Consumer Protection Laws*, 128 BANKING L.J. 9, 9 (2011) (identifying the Bureau as “[p]erhaps the most contentious aspect of this far-reaching legislation”).

⁸ Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY J., Summer 2007, at 8, 16–18. President Obama tasked Professor Warren with setting up the Bureau, but thus far has named her the Assistant to the President and Special Advisor to the Secretary of the Treasury rather than attempting to appoint her as the director. See Press Release, White House, Office of the Press Sec’y, President Obama Names Elizabeth Warren Assistant to the President and Special Advisor to the Secretary of the Treasury on the Consumer Financial Protection Bureau (Sept. 17, 2010) (on file with the Harvard Law School Library).

⁹ See generally DAVID H. CARPENTER & MARK JICKLING, CONG. RESEARCH SERV., R40696, FINANCIAL REGULATORY REFORM: CONSUMER FINANCIAL PROTECTION PROPOSALS (2010); DAVID H. CARPENTER & MARK JICKLING, CONG. RESEARCH SERV., R40696, FINANCIAL REGULATORY REFORM: ANALYSIS OF THE CONSUMER FINANCIAL PROTECTION AGENCY (CFPA) AS PROPOSED BY THE OBAMA ADMINISTRATION AND H.R. 3126 (2009) (outlining Administration’s proposal); DEP’T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION (2009).

¹⁰ H.R. 3126, 111th Cong. (2009). Representative Frank, then chairman and now ranking member on the House Financial Services Committee, also had the support of the House Committee on Energy and Commerce. See H.R. REP. NO. 111-367, at 1 (2009).

¹¹ Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. (2009).

¹² 155 CONG. REC. H14,804 (daily ed. Dec. 11, 2009).

¹³ H.R. 4173 §§ 4101–4103, 4111.

¹⁴ S. 3217, 111th Cong. (2010).

¹⁵ *Id.*

with the supporters numbering 53 Democrats, 4 Republicans, and 2 Independents.¹⁶ The conference committee reconciled the bills¹⁷ and largely adopted the Senate's design: an independent bureau with a single director and an independent revenue stream.¹⁸

The Bureau's powers are sweeping. It has power over "covered persons," defined as a person, or any of its affiliates, who "engages in offering or providing a consumer financial product or service,"¹⁹ with some notable exemptions, including most merchants and retailers.²⁰ The Bureau has rulemaking power under eighteen enumerated consumer financial protection laws²¹ to prevent "unfair, deceptive, or abusive [consumer financial] acts or practices."²² Additionally, the Bureau has varying levels of supervisory and enforcement power over "nondepository covered persons," "very large banks, savings associations, and credit unions," and "other banks, savings associations, and credit unions."²³ Finally, the Bureau may commence a civil action against "any person" who violates federal consumer financial law.²⁴

Three primary mechanisms insulate the Bureau from congressional and executive control. First, the Director²⁵ will have a five-year term and will be removable only for cause.²⁶ Second, though the Bureau is located within the Federal Reserve, the CFPB is equivalent to a standalone agency because the Federal Reserve has little control over it.²⁷ Third, the Act gives the CFPB an independent source of revenue:

¹⁶ 156 CONG. REC. S4078 (daily ed. May 20, 2010).

¹⁷ See H.R. REP. NO. 111-517 (2010) (Conf. Rep.).

¹⁸ Dodd-Frank Act §§ 1011-1013, 1017, 124 Stat. at 1964-73, 1975-79.

¹⁹ *Id.* § 1002(6), 124 Stat. at 1956. Consumer financial products or services are "offered or provided for use by consumers primarily for personal, family, or household purposes." *Id.* § 1002(5), 124 Stat. at 1956. Important categories include, with some exceptions within these categories: loans, leases, real estate services, banking, check cashing, financial data, financial advising, and debt collection. *Id.* § 1002(15), 124 Stat. at 1957-58.

²⁰ However, merchants and retailers are covered if they have significantly engaged in "offering or providing consumer financial products or services"; other exemptions include lawyers, persons regulated by the SEC, and insurance agents. *Id.* § 1027(a)-(c), (e), (i), (m), 124 Stat. at 1995-2003.

²¹ *Id.* § 1022(b)(4)(A), 124 Stat. at 1981.

²² *Id.* § 1031(b), 124 Stat. at 2006.

²³ *Id.* §§ 1024-1026, 124 Stat. at 1987-95.

²⁴ *Id.* § 1054(a), 124 Stat. at 2028. The Bureau may also hold hearings or refer cases for criminal proceedings. *Id.* §§ 1053, 1056, 124 Stat. at 2025-28, 2031. Relief includes civil penalties — up to one million dollars a day — but does not include punitive damages. *Id.* § 1055, 124 Stat. at 2029-31.

²⁵ The Director will be the only appointed employee. See *id.* § 1011(b)(2), 124 Stat. at 1964.

²⁶ *Id.* § 1011(c), 124 Stat. at 1964. The Director will be removable only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* § 1011(c)(3), 124 Stat. at 1964.

²⁷ The Federal Reserve may not "intervene in any matter or proceeding," *id.* § 1012(c)(2)(A), 124 Stat. at 1965, "appoint, direct, or remove any officer or employee of the Bureau," *id.* § 1012(c)(2)(B), 124 Stat. at 1966, or "merge or consolidate the Bureau, or any of [its] functions or responsibilities," *id.* § 1012(c)(2)(C), 124 Stat. at 1966; see also CURTIS W. COPELAND, CONG. RESEARCH SERV., R41380, THE DODD-FRANK WALL STREET REFORM AND CONSUMER

each year, the Director of the CFPB is entitled to request, and the Federal Reserve is required to transfer, an amount “reasonably necessary” from the earnings of the Federal Reserve, up to a statutory cap.²⁸

The Act also contains three primary control mechanisms. First, the Bureau must consult with the “appropriate prudential regulators or other Federal agencies prior to proposing a rule.”²⁹ The Bureau must release any objections and, if it rejects the objections, state its reasons for doing so.³⁰ Second, the Bureau must provide information required for oversight in semi-annual reports to the relevant congressional committees and to the President,³¹ and in semi-annual committee hearings.³² Third, and most powerfully, a two-thirds majority of the Financial Stability Oversight Council³³ can veto CFPB regulations that “would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk.”³⁴

The degree of independence the Bureau holds is unlike that of a standard independent agency because it is largely insulated from both executive and legislative control, especially due to its independent revenue source. The control mechanisms are unlikely to constrain the Bureau significantly and, contrary to popular belief, the single Director gives the CFPB more power to exercise its independence. This insulation resembles the type of independence once reserved to financial agencies like the Federal Reserve, and the Bureau thus possesses a previously unseen degree of insulation for decisions that the public perceives to be based on policy preferences.

PROTECTION ACT: REGULATIONS TO BE ISSUED BY THE CONSUMER FINANCIAL PROTECTION BUREAU 2 (2010) (arguing that the CFPB will function as an independent bureau).

²⁸ Dodd-Frank Act § 1017(a), 124 Stat. at 1975–76. The cap is 10% of the total operating expenses of the Federal Reserve for 2011, 11% in fiscal year 2012, and 12% thereafter. *Id.* § 1017(a)(2)(A), 124 Stat. at 1975. This amount is substantial: 10% of the Federal Reserve’s total operating expenses for fiscal year 2009 was \$498 million. FED. RESERVE BD., 96TH ANNUAL REPORT 2009, FEDERAL RESERVE BANKS COMBINED FINANCIAL STATEMENTS (2010), available at <http://federalreserve.gov/boarddocs/rptcongress/annualog/sec6/c3.htm>.

²⁹ Dodd-Frank Act § 1022(b)(2)(B), 124 Stat. at 1981.

³⁰ *Id.* § 1022(b)(2)(C), 124 Stat. at 1981.

³¹ The relevant committees are the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services and the Committee on Energy and Commerce of the House of Representatives. *Id.* § 1016(b), 124 Stat. at 1974.

³² *Id.* § 1016(a), 124 Stat. at 1974. The Act provides for at least nine other congressional reports. *See id.* at tit. 10.

³³ The members are the Secretary of the Treasury (the Chairperson), the Chairman of the Board of Governors of the Federal Reserve, the Comptroller of the Currency, the Director of the CFPB, the Chairperson of the SEC, the Chairperson of the Federal Deposit Insurance Corporation (FDIC), the Chairperson of the Commodity Futures Trading Commission, the Director of the Federal Housing Finance Agency, the Chairman of the National Credit Union Administration Board, and an independent member with insurance expertise. *Id.* § 111(b), 124 Stat. at 1392–93.

³⁴ *Id.* § 1023(a), 124 Stat. at 1985.

Traditionally, while restrictions on the ability of the executive to remove agency heads except “for cause” enabled independent agencies to limit executive influence,³⁵ Congress generally retained some degree of control.³⁶ However, the Dodd-Frank Act takes the rare step of exempting the Bureau from the most powerful tool for congressional control — appropriations.³⁷ This exemption, which is typically limited to agencies with examinational roles over financial institutions rather than policymaking roles like that of the CFPB, provides significant independence.³⁸ Congress will not be able to use appropriations as a “supply constraint” (to control the overall activity level) or as a signaling mechanism,³⁹ nor will it have the ability to direct specific action

³⁵ See Gersen, *supra* note 5, at 347–48 (noting that independent agencies are defined by for-cause removal restrictions and arguing that Congress may wish to insulate bureaucracies from presidential control to guard against future executive opportunism or to privilege expertise); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247 (2001).

³⁶ See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1815 (2009) (plurality opinion) (“[F]reedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction.”); Kagan, *supra* note 35, at 2271 n.93 (“As a practical matter, successful insulation of administration from the President . . . will tend to enhance Congress’s own authority . . .”). Congress can exercise indirect control over independent agencies via appointments, oversight authority, and the budget. See Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 583 (1994) (“Such indirect political control will necessarily exist with any so-called ‘independent’ agency or officer because absent presidential control, congressional oversight and appropriations powers become the only concern for the officers . . .”). See generally Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006).

³⁷ Dodd-Frank Act § 1017(a)(2)(C), 124 Stat. at 1976; see Beermann, *supra* note 36, at 84 (“The power of the purse is among Congress’s most potent weapons in its effort to control the execution of the laws.”); Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 517 (2000) (noting “the importance of an agency’s financing in terms of its actual political independence”); Matthew C. Stephenson, *Statutory Interpretation by Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW, *supra* note 5, at 285, 295 (noting that, other than statutory override, “[p]erhaps the most important” legislative means of influence over statutory interpretation by agencies “are the appropriations power and general oversight authority”). However, the Act does authorize additional appropriations for the CFPB’s first five years. Dodd-Frank Act § 1017(e), 124 Stat. at 1979.

³⁸ Professor Steven Ramirez claims that “the Fed is the only regulatory agency that is totally self-funded.” Ramirez, *supra* note 37, at 525. Although an independent survey identified a number of additional self-funded agencies, such as the Farm Credit Administration, Farm Credit System Insurance Corporation, Federal Deposit Insurance Corporation, Federal Housing Finance Agency, Federal Reserve System, Federal Prison Industries, Inc., National Credit Union Administration, Office of the Comptroller of the Currency, Bureau of Engraving and Printing, and the Office of Thrift Supervision, the list is a short one. Survey of Self-Funded Agencies (May 5, 2011) (unpublished survey) (on file with the Harvard Law School Library).

The President also influences the appropriations decision through his or her power to propose the budget. See D. Roderick Kiewiet & Mathew D. McCubbins, *Presidential Influence on Congressional Appropriations Decisions*, 32 AM. J. POL. SCI. 713, 714–15 (1988).

³⁹ See Daniel P. Carpenter, *Adaptive Signal Processing, Hierarchy, and Budgetary Control in Federal Regulation*, 90 AM. POL. SCI. REV. 283 (1996) (citing sources that support the budgetary control model and the signaling model, but arguing for the signaling model).

using riders.⁴⁰ The inability to threaten budget cuts also implies that Congress's general oversight authority⁴¹ will be weakened.⁴² While Congress could always threaten legislation, the enactment costs and veto threat make this possibility unlikely, absent severe and united disagreement.⁴³

The Bureau's lack of a multimember board amplifies its independence. Most independent agencies have multimember boards, and the conventional wisdom is that boards increase insulation because typical features such as staggered terms and bipartisan requirements limit the impact of individual appointments.⁴⁴ Thus, when the President exercises his appointment power every five years, it will have a more powerful impact on the shape of the Bureau than if the Bureau had a multimember board. However, given the Bureau's general independence from the executive and legislative branches, the single-director design results in the loss of another form of structural control: the constraint that multimember boards exert on agencies through the "accommodation of diverse or extreme views through the compromise inherent in the process of collegial decision making."⁴⁵ This constraint exists because the presence of appointees from different administrations reduces the variance of policy and improves accuracy through aggregation.⁴⁶ Additionally, the presence of dissenters provides new information and forces the proponent to articulate a coherent rationale, thus acting as a constraining force.⁴⁷ The CFPB will therefore lack substantial executive, congressional, or intra-agency control.

⁴⁰ See Beermann, *supra* note 36, at 85–86.

⁴¹ "General oversight authority" refers to hearings, press releases, and other oversight committee acts. See Stephenson, *supra* note 37, at 295.

⁴² See Beermann, *supra* note 36, at 125 (observing that congressional hearings can be powerful "[g]iven the power of Congress over agency budgets and substantive law"). The history of the Federal Reserve provides additional support for Congress's relative lack of influence when the agency is outside of the appropriations process. See THOMAS HAVRILESKY, *THE PRESSURES ON AMERICAN MONETARY POLICY* 158–87 (2d ed. 1995).

⁴³ See Rui J.P. de Figueiredo, Jr., *Electoral Competition, Political Uncertainty, and Policy Insulation*, 96 AM. POL. SCI. REV. 321, 322 (2002) ("Because of the multiplicity of veto points in the legislative process . . . new laws are extremely difficult to pass . . .").

⁴⁴ See Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 610–11 (2010).

⁴⁵ Barkow, *supra* note 4, at 37–38 (quoting Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1113 (2000)) (internal quotation marks omitted).

⁴⁶ Cf. Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 98 (1986) (observing a "positive relation between improved accuracy and greater number of judges"); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 352 (2004) (observing that groups composed of "like-minded people [tend] to move to relative extremes"). A multimember board with partisan balancing requirements would therefore tend toward moderation.

⁴⁷ Cf. Kornhauser & Sager, *supra* note 46, at 101; Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statu-*

In addition to these insulation mechanisms, the weakness of the control mechanisms heightens the independence of the CFPB. Though the Bureau must consult with other prudential regulators, the Bureau can disregard their advice.⁴⁸ Additionally, though the Act does provide that a two-thirds majority of the Financial Stability Oversight Council can veto CFPB regulations,⁴⁹ this does not offer Congress a strong oversight role for two reasons.⁵⁰ First, the high standard for vetoing regulations — the regulation must “put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk”⁵¹ — will be difficult to establish.⁵² Second, Congress has little control over such a disparate, multi-agency group. For instance, the “God Squad,”⁵³ an analogous group created to oversee application of the Endangered Species Act, illustrates Congress’s limited ability to control the actions of an oversight committee composed of multiple agency heads because of the difficulty and costliness of exercising simultaneous influence over multiple agencies.⁵⁴

Though the CFPB may improve consumer protection, its design may trouble even proponents of the Bureau because, at least on paper, the CFPB possesses a degree of insulation previously reserved for agencies perceived to be nonpolitical, including agencies that oversee financial institutions. Indeed, the independence given to the CFPB resembles that of the Federal Reserve — both have the rare feature of financial independence and are subject to little direct executive or legislative oversight outside of appointments.⁵⁵ Yet, unlike the Federal

tory Interpretations, 120 HARV. L. REV. 528, 536 (2006) (noting the “complex internal decisionmaking dynamics” in administrative agencies and multimember courts); Sunstein et al., *supra* note 46, at 336 (observing a “dampening of differences” when ideological opponents sit on the same panel).

⁴⁸ See Dodd-Frank Act § 1022(b)(2)(B)–(C), 124 Stat. at 1981 (imposing only a consultation requirement). However, this consultation requirement may impose greater political costs on the Bureau’s choice of action by highlighting other agencies’ disagreement, similar to the constraints provided by a multimember decisionmaking body.

⁴⁹ *Id.* § 1023(c)(3)(A), 124 Stat. at 1985–86.

⁵⁰ *But see* Barkow, *supra* note 4, at 75 (noting many Council members’ “long history of favoring the industries they are charged with regulating, making the threat of veto a real one”).

⁵¹ Dodd-Frank Act § 1023(a), 124 Stat. at 1985.

⁵² The Committee on Banking, Housing, and Urban Affairs found “no evidence . . . that consumer protection regulation would put safety and soundness at risk.” S. REP. NO. 111-176, at 166 (2010).

⁵³ The seven members of the “God Squad,” including the Secretaries of Agriculture and the Army, may grant exemptions to the Endangered Species Act’s “no jeopardy” rule. 16 U.S.C. § 1536(e)(2)–(3) (2006).

⁵⁴ See EUGENE H. BUCK ET AL., CONG. RESEARCH SERV., IB10072, ENDANGERED SPECIES: DIFFICULT CHOICES 3 (2003) (noting that only one exemption has ever been granted); Shannon Petersen, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 ENVTL. L. 463, 485–86 (1999) (observing that the God Squad did not overturn the Tellico Dam decision, even though the committee was created for that purpose). However, an oversight committee may still constrain the agency by influencing its actions.

⁵⁵ *Cf.* IRWIN L. MORRIS, CONGRESS, THE PRESIDENT, AND THE FEDERAL RESERVE 19 (2000) (describing the Federal Reserve as one of the “world’s most independent central banks”).

Reserve Board Chairman, the CFPB's Director will not even be constrained by a Board of Governors.⁵⁶

The CFPB's unique institutional design hardly approaches the balance of expertise and accountability struck by other independent policymaking agencies. In contrast to the Federal Trade Commission (FTC) and the Consumer Product Safety Commission (CPSC), which were created amidst political debate and remain politically accountable through the budget process, the CFPB will be largely unaccountable.⁵⁷ This unaccountability is more concerning for an agency making policy judgments than for an agency making decisions perceived to be nonpolitical because it raises the cost to Congress of supervising decisions that the public believes to be within the political sphere.⁵⁸ In addition to the other standard tropes against agency power, the CFPB's design is troubling because of its unprecedented nature. This degree of insulation, and corresponding lack of accountability to the executive or the legislative branches, has been accepted for the Federal Reserve and for financial agencies with oversight roles. Yet the CFPB lacks a similarly depoliticized consensus and is difficult to distinguish from other regulatory agencies that have traditionally been subject to higher degrees of control. Should this design become one that Congress turns to with any frequency, it will open a new chapter in the development of an autonomous administrative state.

However, even the Federal Reserve is not completely independent. *See generally* HAVRILSEKY, *supra* note 42 (discussing executive and congressional attempts at influence).

⁵⁶ The Federal Reserve's independence also rests on the political support for the agency. *See* Ramirez, *supra* note 37, at 518 (noting that agency independence relies on "traditional, bipartisan support for the agency, its reputation, and the strength of the consensus supporting independence"). Political consensus supported the Federal Reserve's independence because of a perceived need for depoliticized monetary policy. *See* Gyung-Ho Jeong et al., *Political Compromise and Bureaucratic Structure: The Political Origins of the Federal Reserve System*, 25 J.L. ECON. & ORG. 472, 473 (2008) (observing that "the celebrated structural independence of the Fed was a product of political compromise among disparate groups"). However, the CFPB's independence was partisan; only three Republicans voted in favor of the Conference Report. *See* Final Vote Results for Roll Call 413, Office of the Clerk, U.S. HOUSE OF REPRESENTATIVES, <http://clerk.house.gov/evs/2010/roll413.xml> (last visited May 5, 2011); U.S. Senate Roll Call Votes 111th Congress — 2nd Session, U.S. SENATE: LEGISLATION AND RECORDS, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=00208 (last visited May 5, 2011).

⁵⁷ *See* Barkow, *supra* note 4, at 67, 71–72 (arguing that the CFPB was modeled on the CPSC, and observing how the CPSC has been limited by its budget); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 780 (1983) (finding congressional control of the FTC).

⁵⁸ *Cf.* *Sierra Club v. Costle*, 657 F.2d 298, 400 n.502 (D.C. Cir. 1981) ("Democratic ideology requires control of administrative action by elected representatives of the people." (quoting Seymour Scher, *Conditions for Legislative Control*, 25 J. POL. 526, 526 (1963)) (internal quotation marks omitted)).