“REVIEWING INDEPENDENT AGENCY RULEMAKING”

Testimony of
Adam J. White
The Hoover Institution[1]

Before the United States Senate,
Committee on Homeland Security and Government Affairs,
Subcommittee on Regulatory Affairs and Federal Management

SEPTEMBER 8, 2016

Chairman Lankford, Ranking Member Heitkamp, and other members of the Subcommittee, thank you for inviting me to testify today. Much of my legal and academic career has been spent studying, working with, or litigating against independent regulatory agencies, and so it is an honor and pleasure to appear before the Subcommittee to discuss independent agencies' increasingly important role in American government.

I. Independent Agencies: A Brief Overview and Historical Background.

A. *Defining "Independent Agencies"*

At the outset it must be noted that there is no single, authoritative definition or list of "independent" agencies. Perhaps the most familiar definition is found at

---

[1] Research Fellow, the Hoover Institution; Adjunct Professor, the Antonin Scalia Law School at George Mason University. He is of counsel to the firm of Boyden Gray & Associates PLLC in cases involving two independent agencies: the CFPB and the FCC. The views expressed in this testimony are mine alone, and are not offered on behalf of the Hoover Institution or any other organization.

44 U.S.C. § 3502(5), which defines "independent regulatory agency" as a nonexhaustive list of nineteen such agencies, ranging from the Federal Reserve Board of Governors to the Postal Regulatory Commission.[2] This list is incorporated by reference in Executive Order 12866, which excludes those agencies from review by "OIRA," the Office of Information and Regulatory Affairs.[3]

But that list is not exhaustive; Congress has designated other agencies as "independent" even though they do not appear in Section 3502(5)'s list. For example, the National Credit Union Administration is "an independent agency," even though it does not appear on that list.[4]

Taking a more functional approach, the courts tend to consider an agency "independent" if Congress has limited the President's ability to fire the agency's head.[5] Congress drafts such statutory protections in a variety of terms. Members of the Federal Trade Commission, for example, can be removed only "for inefficiency, neglect of duty, or malfeasance in office."[6] Members of the Federal Reserve's Board

---

[2] One of the listed agencies, the Interstate Commerce Commission (ICC), no longer exists. It was abolished in 1995, in the suitably named ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 (1995). The ICC was replaced in part by the Surface Transportation Board, which itself enjoys a measure of independence from the President. 49 U.S.C. § 701(b).

[3] *See* E.O. 12866 §3(b).

[4] 12 U.S.C. § 1752a(a).

[5] *See, e.g.*, *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 483 (2010) ("Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause").

[6] 15 U.S.C. § 41.

of Governors, by contrast, can be removed only "for cause."[7] Then again, some regulatory commissions are generally considered "independent" even though their statute contains *no* explicit protection against removal at will, such as the Securities and Exchange Commission (SEC) and the Federal Communications Commission (FCC).[8] Yet even in the absence of explicit protection, a court may hold that Congress implicitly made an agency independent, based on the nature of the agency's structure and functions.[9]

Furthermore, in at least one case an agency has been designated "independent" even though its head enjoys *no* removal protection: Congress lists the Office of the Comptroller of the Currency as an "independent agency,"[10] even though

---

[7] 12 U.S.C. § 242.

[8] *See* 15 U.S.C. §78(d) (each SEC "commissioner shall hold office for a term of five years"); 47 U.S.C. § 154(c) (FCC "commissioners shall be appointed for terms of five years"); *SEC v. Blinder, Robinson, & Co.*, 855 F.2d 677, 681 (10th Cir. 1988) (observing that although the statute does not expressly give the SEC independence, "it is commonly understood that the President may remove a commissioner only for 'inefficiency, neglect of duty or malfeasance in office'"); *Free Enter. Fund*, *supra*, 561 U.S. at 487 ("The parties agree that the [SEC] Commissioners cannot themselves be removed by the President except under the *Humphrey's Executor* standard of 'inefficiency, neglect of duty, or malfeasance in office'"). It is worth noting that the SEC's and FCC's statutes were enacted in the brief period after the Court cast doubt on the constitutionality of agency "independence" in *Myers v. U.S.*, 272 U.S. 52 (1926), before the Court affirmed independence in *Humphrey's Executor v. U.S.*, 295 U.S. 602 (1935).

[9] *Wiener v. U.S.*, 357 U.S. 349, 353-56 (1958).

[10] 44 U.S.C. § 3502(5).

the President is free to remove the Comptroller at will, upon communicating his reason to the Senate.[11]

Independent agencies are generally multi-member commissions, such as the Federal Energy Regulatory Commission or the Federal Reserve's Board of Governors. But not always: the Consumer Financial Protection Bureau (CFPB) is an independent agency headed by a single officer.[12] So is the Federal Housing Finance Agency (FHFA).[13]

And to confuse matters still further, sometimes Congress disregards the usual dichotomy between "independent" agencies and non-independent "executive agencies," by designating an agency as both "independent" and "executive." As I noted, Congress established the CFPB as an "independent" agency led by a Director with express protection against removal at will.[14] But Congress elsewhere refers to the CFPB as "an *Executive* agency."[15]

I am not trying to be pedantic; rather, I am simply trying to illustrate that when we speak of "independent agencies," we are not speaking of a single, easily defined class of agencies. That said, for present purposes I think it is fair to say that

---

[11] 12 U.S.C. § 2.

[12] 12 U.S.C. § 5491 (creating the CFPB as an "independent bureau" led by a single Director); 44 U.S.C. § 3502(5) (listing the CFPB as an "independent agency").

[13] 12 U.S.C. § 4511 (creating the FHFA as an "independent agency"); *id.* § 4512 (providing that the FHFA will be led by a single Director); 44 U.S.C. § 3502(5) (listing the FHFA as an "independent agency").

[14] 12 U.S.C. § 5491.

[15] *Id.* § 5491(a) (emphasis added).

we are generally speaking of agencies which, whether headed by a single director or a multi-member body, enjoy some measure of explicit or implicit congressional protection against removal by the president, and which are exempt from OIRA's review of their regulations.

B. *Changing Views of Independent Agencies, from 1887 to FDR to Reagan*

While today's independent agencies seem materially identical to executive agencies, in terms of their role in modern government, it is important to acknowledge the historical roots of independent agencies, to understand why they historically were treated differently from executive agencies.[16]

The first independent agencies—or, as they once were known, independent regulatory commissions—were created by Congress to handle relatively specific corners of industrial policymaking. But, crucially, the first independent agencies were largely created to supplant not executive agencies, but *courts*. Beginning first with the Steamboat Inspection Service in 1852,[17] and then the much more famous Interstate Commerce Commission in 1887,[18] Congress created these agencies to replace courts as the primary lawmakers for purposes of common-carrier regulation

---

[16] Portions of this section of my testimony are adapted from my chapter in a forthcoming collection of essays on "the Imperial Presidency," from the American Enterprise Institute.

[17] *See* Jerry L. Mashaw, *Creating the Administrative Constitution* 189 (2012)

[18] *See*, *e.g.*, Robert E. Cushman, *The Independent Regulatory Commissions* 40-41 (1941); Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920*, p. 138 (1982); John G. Burke, *Bursting Boilers and the Federal Power*, 7 Technology and Culture 1, 23 (1966);

and the definition of negligence. While today we tend to think of independent agencies in terms of their relationship to the *executive* branch, at the outset they were most controversial for their relationship to the *judicial* branch.[19]

That is why the independence of ICC Commissioners was so uncontroversial when the Commission was created in 1887—which was, coincidentally, the very same year that Congress repealed the controversial Tenure of Office Act,[20] the post-Civil-War law by which congressional Republicans had attempted to prevent President Johnson from removing Secretary of War Edwin Stanton and other members of the late President Lincoln's cabinet. Simply put, the ICC was not seen as an "executive" agency, and restrictions on the President power to remove ICC commissioners was not seen as a restraint on "executive" power; it was exercising "quasi-legislative" ratemaking powers and "quasi-judicial" adjudicatory power—but not "executive" power.

The ICC became the benchmark for the regulatory commissions that followed: the Federal Trade Commission (1914),[21] Federal Power Commission (1920),[22] and the Federal Communications Commission (1934).[23] In these statutes,

---

[19] Skowronek at 154; *see also* Cushman at 58-59; Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 Colum. L. Rev. 939, 953-55 (2011).

[20] Act of Mar. 3, 1887, 24 Stat. 500 (repealing Tenure of Office Act).

[21] *See* Cushman at 188 ("A controlling force moving legislative leaders to create the independent Federal Trade Commission was the model of the Interstate Commerce Commission.").

[22] *Id.* at 281.

[23] *Id.* at 322.

Congress and the President were creating an administrative state separate from the President's executive-branch departments, and vesting those independent regulatory commissions with discretion to make law and policy outside of the direct oversight of the President.

Only under President Roosevelt and the New Deal did advocates of executive power begin to reframe the debate over independent regulatory commissions into one of *executive* power. In *Humphrey's Executor v. United States*, the FDR Administration argued that the distinction between "executive" agencies and "independent" commissions was phony: although the FTC had been created as an "independent" regulatory commission exercising "so-called quasi-judicial functions," those functions were "not different from those regularly committed to the executive departments."[24] Accordingly, the FDR Administration argued, statutory restraints on the President's power to fire FTC Commissioners would constitute "a substantial interference with the constitutional duty of the President to 'take care that the laws be faithfully executed.'"[25]

And even if the FTC, ICC, and other independent regulatory commissions were meaningfully distinct from executive agencies in decades past, the passage of time had erased such distinctions, the FDR Administration argued. "To ignore the extent to which these functions have been conferred upon the regular executive

---

[24] Br. for the United States, *Rathburn as Ex'r of the Estate of Humphrey v. United States*, No. 667, Oct. Term 1934, at p. 26 (filed Apr. 6, 1935).

[25] *Id.* at 23.

departments is to ignore much of the development of administrative law in this country."[26]

The FDR Administration's arguments did not succeed in winning the *Humphrey's Executor* battle: the Supreme Court ruled unanimously in favor of the former FTC Commissioner who (posthumously) challenged FDR's decision to remove him without cause.[27] But the FDR Administration's arguments won a much longer war: a half-century later, the Reagan Administration adopted wholeheartedly FDR's position that independent agencies exercise "executive" power, not "quasi-legislative" or "quasi-judicial" power.[28] This is the theory of the "unitary executive," under which Presidents have full constitutional power to control not just executive agencies, but also *independent* agencies, because the Constitution vests the President alone with "the executive power"[29] and because the it obliges the President to "take Care that the Laws be faithfully executed."[30]

---

[26] *Id.* at 26.

[27] 295 U.S. at 624-28.

[28] For example, when Attorney General Meese addressed the Federal Bar Association in 1985, he pressed firmly against *Humphrey's Executor*, urging—in rhetoric indistinguishable from the FDR Administration's briefs—that "federal agencies performing executive functions are themselves properly agents of the executive. They are not 'quasi' this or 'independent' that. In the tripartite scheme of government a body with enforcement powers is part of the executive branch of government. Power granted by Congress should properly be understood as power granted *to the Executive*."

[29] U.S. Const. Art. II, § 1, cl. 1.

[30] U.S. Const. Art. II, § 3, cl. 5.

II. Today's Independent Agencies Need OIRA's Oversight.

A. *Independent Agencies Were Exempted From OIRA Oversight for Reasons that No Longer Hold Today*

Given that the Reagan Administration adopted unflinchingly the FDR Administration's view that the President has full constitutional authority to control "independent" agencies, one may wonder why the Reagan Administration *excluded* independent agencies from OIRA's centralized regulatory review process established by Executive Order 12291, the predecessor to today's Executive Order 12866.

In fact, the exemption for independent agencies had nothing to do with any doubts about the President's constitutional power. The Reagan Justice Department had *no* doubt that the Constitution empowered the President to include independent agencies in the OIRA process, if the President chose to include them. In the Reagan Administration's first weeks, Larry Simms, the Office of Legal Counsel's acting chief, sent a memorandum to Office of Management and Budget Director David Stockman, making clear that the forthcoming executive order on regulatory review could lawfully include independent agencies.[31]

Rather, the Reagan Administration excluded independent agencies from the OIRA review process for prudential political reasons. As C. Boyden Gray, a co-director of President Reagan's Regulatory Task Force and counsel to Vice President

---

[31] *See* Memorandum from Larry L. Simms to David Stockman, *Proposed Executive Order on Federal Regulation* (Feb. 12, 1981), *reprinted in* "Role of OMB in Regulation," H.R. Rep. No. 70, 97th Cong., 1st. Sess. 152 (1981), *available at* http://njlaw.rutgers.edu/collections/gdoc/hearings/8/82601518/82601518_1.pdf.

Bush, explained in a 1981 hearing, President Reagan exempted independent agencies simply because their relatively small role in regulatory affairs of 1981 did not justify picking a political fight:

> The EO, by its terms, does not cover the independent agencies. This is not so much that we thought we lacked certain legal authority to do certain things, since I think we could have extended the EO and might still in the future. We chose not to do it really because of policy reasons that we had our plate more than full with the Executive Branch Agencies which do impose by far the greatest percentage of capital costs burdens that we think were issues during the campaign. We just didn't want to spread ourselves too thin. If we can get the main regulatory problems under control, we'll actually focus at that point more on the independents, but we'll wait and see how much progress we make with the Executive Branch.[32]

Those reasons may have justified independent agencies' exemptions from OIRA in 1981, but they no longer hold today. Independent agencies play a much more significant role in the federal government today—especially after the Dodd-Frank Act,[33] which not only creates the new Consumer Financial Protection Bureau but also expands significantly the powers of existing independent agencies such as the SEC, the CFTC, and the Federal Reserve Board of Governors.

And financial policy is not the only area where independent agencies have taken on dramatically greater power since 1981. The FCC, for example, recently asserted unprecedented authority to assert the immense burdens of "common

---

[32] *Id.* at 94 (quoting Gray's remarks at the Chamber of Commerce, April 10, 1980).

[33] Pub. L. 111-203, 124 Stat. 1376 (2010). As noted in footnote 1, I am of counsel to Boyden Gray & Associates, and in that capacity I am co-counsel for plaintiffs challenging the CFPB's constitutionality.

carrier" regulation on broadband Internet access service, without a legislative authorization from Congress.[34] And the Federal Energy Regulatory Commission has played a major role in furthering the Obama Administration's energy and environmental policies.[35]

Simply put, independent agencies are no longer the sleepy regulatory ratemakers and adjudicators that they once were. They now play a central role in modern regulatory policymaking, largely indistinguishable from executive agencies in terms of the regulations that they produce. Their exclusion from OIRA's review authority reflects a regulatory world that no longer exists.

Given these modern realities, it is no surprise that the American Bar Association's Administrative Law Section has supported OIRA review of independent agencies since 1986, as the ABA most recently explained to this committee in its July 23, 2015 letter in support of S. 1607, the "Independent Agency Regulatory Analysis Act of 2015."[36] Similarly, the Administrative Conference of the United States has supported OIRA review of independent agencies since 1988.[37]

---

[34] *See* 80 Fed. Reg. 19737 (Apr. 13, 2015). As noted in footnote 1, I am of counsel to Boyden Gray & Associates, and in that capacity I am co-counsel for a coalition of intervenors challenging the FCC's rules in the D.C. Circuit.

[35] *See* 76 Fed. Reg. 16658 (Mar. 24, 2011), *aff'd*, *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016).

[36] *See* Ltr. From ABA to Sen. Homeland Security & Governmental Affairs Comm. (July 23, 2015), *at* http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2015july23_independentagencyreg_l.authcheckdam.pdf.

[37] ACUS Recommendation No. 88-9, "Presidential Review of Agency Rulemaking" (Dec. 8, 1988), *at* https://www.acus.gov/recommendation/presidential-review-agency-rulemaking.

B. *OIRA Oversight Would Improve Independent Agencies' Cost-Benefit Analyses*

With students returning to school this week, the need for OIRA review of independent agencies might best be put this way: *independent agencies should not be allowed to grade their own homework.* When independent agencies know that their cost-benefit analyses will not be reviewed by OIRA, they have too little incentive to do their best possible work. If those agencies were instead required to submit their major rules to OIRA for review of costs and benefits, the agencies' own work would certainly improve. To say this is not to cast aspersions upon independent agencies, but rather to recognize a basic fact of human nature—a trait that is not necessarily improved in independent-agency bureaucracies.

OIRA would be among the first to point this out. In its annual report to Congress this year, it stressed that "for the purposes of informing the public and obtaining a full accounting, it would be highly desirable to obtain better information on the benefits and costs of the rules issued by independent agencies. *The absence of such information is a continued obstacle to transparency, and it might also have adverse effects on public policy*. Consideration of costs and benefits is a pragmatic instrument for ensuring that regulations will improve social welfare; *an absence of information on costs and benefits can lead to inferior decisions*."[38]

---

[38] OIRA, *2015 Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act*, p. 32 (Mar. 10, 2016) (emphasis added), *at* https://www.whitehouse.gov/sites/default/files/omb/inforeg/2015_cb/2015-cost-benefit-report.pdf.

Studies justify OIRA's concerns. Perhaps the most exhaustive examination of independent agencies' cost-benefit analyses was produced by Curtis Copeland, a researcher at the Congressional Research Service, for the Administrative Conference of the United States.[39] His report illustrates the inconsistent and often unrigorous approaches that various independent agencies employ in evaluating their major rules' costs and benefits:

> Examination of the 22 major rules issued by independent regulatory agencies during FY2012 indicates a somewhat similar pattern. Only one rule contained any quantitative benefit information, but 18 of the 22 rules contained at least some quantitative or monetized information about expected costs. Although paperwork costs were most commonly quantified and monetized, some of the rules were primarily about reporting and recordkeeping, so most of their costs appeared to be paperwork related. Some agency officials noted that their agencies are not required to prepare cost-benefit analyses, and said that data on costs and benefits are often not available, particularly when they are required to regulate in new areas with tight statutory deadlines.[40]

The Government Accountability Office (GAO) has been even blunter, with respect to the independent agencies administering the Dodd-Frank laws. In a 2012 report, GAO reviewed 54 rulemakings promulgated by Dodd-Frank agencies, and found that "[w]hile most financial regulators said that they attempt to follow OMB's guidance in principle or spirit, we found that they did not consistently follow key

---

39 *See* Curtis W. Copeland, *Economic Analysis and Independent Regulatory Agencies* (Apr. 30, 2013), *at* http://bit.ly/2cvAfn9.

40 *Id.* at 4.

elements of the guidance in their regulatory analyses."[41] Too often, the agencies failed to attempt to quantify costs and benefits,[42] or failed to amass data for such analyses,[43] or failed to compare their rules' costs and benefits to those of alternative possible regulatory approaches.[44]

Similar criticisms can be found in the report of the Inspector General for the Commodity Futures Trading Commission (CFTC), which published a scathing indictment of that agency's cost-benefit analyses in 2011.[45] The Inspector General reviewed cost-benefit analyses and found that the process was driven by lawyers, not economists, in service of the agency's policy decisions:

> [I]t is clear that the Commission staff viewed section 15(a) compliance to constitute a legal issue more than an economic one, and *the views of the Office of General Counsel therefore trumped those expressed by the Office of Chief Economist*, at least for the four rules we reviewed. *We do not believe this approach enhanced the economic analysis* performed under section 15(a) for the four rules.[46]

---

[41] GAO, *Dodd-Frank Act: Agencies' Efforts to Analyze and Coordinate Their Rules,* p. 10 (Dec. 2012), *at* http://www.gao.gov/assets/660/650947.pdf.

[42] *Id.* at 14.

[43] *Id.* at 16.

[44] *Id.* at 16–17.

[45] Office of the Inspector General, CFTC, *An Investigation Regarding Cost-Benefit Analyses Performed by the Commodity Futures Trading Commission in Connection with Rulemakings Undertaken Pursuant to the Dodd-Frank Act* (April 15, 2011), *at* http://www.cftc.gov/idc/groups/public/@aboutcftc/documents/file/oig_investigation_041511.pdf.

[46] *Id.* at 22 (emphasis added).

Indeed, the CFTC's staff called cost-benefit analysis the "caboose," riding along on a train driven by other forces: "The cost-benefit analysis, [Paperwork Reduction Act] discussion, and Regulatory Flexibility Act discussion was referred to by team members as the regulation's 'caboose.'"[47] The Inspector General did not hesitate to draw the obvious conclusion: "This treatment of the cost-benefit analysis discussion might have given the impression that *it was merely an administrative task associated with the rulemaking, rather than a substantive analysis of the rule*."[48]

Shortly after the Inspector General published his report on the CFTC, the U.S. Court of Appeals for the D.C. Circuit issued a similarly negative verdict on the SEC's own cost-benefit analysis. In *Business Roundtable v. SEC*, the D.C. Circuit held that the SEC failed to satisfy its own obligation to review the costs and benefits of a major rule, the controversial "Proxy Access Rule," pursuant to SEC-specific statutory requirements (15 U.S.C. §§ 78c(f), 78w(a)(2), 80a–2(c)). Specifically, the court held that the SEC "inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters."[49]

---

[47] *Id.* at 15.

[48] *Id.* (emphasis added).

[49] 647 F.3d 1144, 1149 (D.C. Cir. 2011).

The D.C. Circuit's decision spurred many reactions (mostly overheated and overstated), but for this Subcommittee's purposes the most important reaction came from the regulators themselves: recognizing that their cost-benefit analyses in other rulemakings might not pass muster, agencies returned to the drawing boards and *improved* their work before finalizing the next wave of rules. SEC Chairman Mary Jo Schapiro told *Bloomberg* that "[w]e are clearly taking more time on cost-benefit analysis."[50] When critics bemoaned the momentary delay in agencies finalizing these major rules, they missed the point: if these rules were worth doing, they were worth doing *right*.

In sum: those Dodd-Frank agencies did not take their own cost-benefit analyses seriously enough until they recognized that a superior authority might someday grade their homework. In this case, the superior authority was federal judges, acting pursuant to a limited number of agency-specific statutes. We would expect to see similarly salutary results if OIRA asserted similar review authority over *all* independent agencies—either pursuant to a new executive order or, better still, pursuant to legislation by Congress.

---

[50] Jesse Hamilton, "Dodd-Frank Rules Slow at SEC After Court Cost-Benefit Challenge," *Bloomberg* (Mar. 6, 2012), *at* http://www.bloomberg.com/news/articles/2012-03-06/dodd-frank-rules-slow-at-sec-after-court-cost-benefit-challenge; *see also* Steven Sloan, "Cost-Benefit Analysis Puts the Brakes on Dodd-Frank," *Bloomberg* (May 7, 2012), *at* http://www.bloomberg.com/news/articles/2012-05-07/cost-benefit-analysis-puts-the-brakes-on-dodd-frank.

C. *OIRA Oversight Would Improve Independent Agencies' Collaboration With Other Agencies*

Subjecting independent agencies to OIRA's ordinary review authority would have a second salutary effect: it would promote dialogue and collaboration between the independent agency in question and *other* agencies.

As former OIRA Administrator Cass Sunstein stressed in his recent *Harvard Law Review* essay on OIRA's crucial role in federal government, OIRA's most important job is not overseeing cost-benefit analysis, but overseeing the interagency process to ensure that all relevant federal agencies have an opportunity to weigh in on a particular agency's proposed rule, and to ensure that the administration's top lawyers vet the most important legal questions raised by a rule:

> [M]ost of OIRA's day-to-day work is usually spent not on costs and benefits, but on working through interagency concerns, promoting receipt of public comments (for proposed rules), ensuring discussion of alternatives, and promoting consideration of public comments (for final rules). OIRA also engages lawyers throughout the executive branch to help resolve questions of law, including questions of administrative procedure. As noted, OIRA considers itself a guardian of appropriate procedure, and much of its role is associated with that guardianship (including the promotion of public comments).[51]

Independent agencies do not benefit from this OIRA-facilitated interagency collaboration. To be fair, the independent financial regulatory agencies sometimes collaborate (sometimes pursuant to statutory requirements), on an *ad hoc* basis

---

[51] Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 Harv. L. Rev. 1838, 1842–43 (2013).

sometimes involving semiformal "memoranda of understanding."[52] These efforts are laudable but insufficient. Independent agencies should coordinate with other agencies on *all* of their major rules, not just on the ones that trigger scattered statutory coordination requirements. And they should undertake this coordination pursuant to OIRA's oversight, and not on a disjointed, *ad hoc* basis.

One notable episode highlights the need for such interagency collaboration. In 2011, as the Dodd-Frank agencies were pressing forward with their immense rulemakings, Federal Reserve Chairman Bernanke spoke at a public event, where JPMorgan Chase's chief executive, Jamie Dimon, asked him whether all of the agencies' complicated and overlapping rulemakings might interact in counterproductive ways.

"Has anybody done a comprehensive analysis of the impact on credit? I can't pretend that anybody really has," Chairman Bernanke answered. "You know, it's just too complicated. We don't really have the quantitative tools to do that."[53]

I do not mean to imply that financial regulation is not complicated, or that a rule's future impacts can be easily predicted by an agency—even when the agency is the Federal Reserve Board of Governors, to whom Congress and the American people commit immense power, discretion, and responsibility. But I *do* believe that such analysis would be improved significantly if it were undertaken in the context

---

[52] *See generally* GAO, *Dodd-Frank Regulations: Agencies Conducted Regulatory Analyses and Coordinated but Could Benefit from Additional Guidance on Major Rules* (Dec. 2013), *at* http://www.gao.gov/assets/660/659586.pdf.

[53] Dealbook, "What Dimon Told Bernanke," *N.Y. Times* (June 8, 2011), *at* http://dealbook.nytimes.com/2011/06/08/what-dimon-told-bernanke.

of a collaborative, interagency process under OIRA's guidance. The Federal Reserve Board of Governors may not have the tools to singlehandedly perform these analyses, but they do not need to do it alone; they can and should benefit from the expertise and experience of other agencies, informed by public comments.

III. Independent Agencies Need More Congressional Oversight, Not Less.

Let me offer a brief note in closing. As I have explained throughout this written statement, independent agencies need much greater oversight by OIRA, either pursuant to a new executive order replacing E.O. 12866, or—*ideally*—pursuant to legislation from Congress. But as Congress considers whether to subject independent agencies to greater White House oversight, I hope that it also recognizes the need to subject agencies to greater *congressional* oversight.

Unfortunately, in some respects the trend may be moving in the opposite direction. In Dodd-Frank, Congress created a new independent agency that enjoys a dangerous combination of independence from both the President *and* Congress. The CFPB enjoys total freedom from Congress's "power of the purse," because it is able to fund itself entirely with non-appropriated funds from the Federal Reserve.[54] In FY 2017 alone, this independent funding will total *$646.2 million*.[55] As the CFPB

---

[54] 12 U.S.C. § 5497(a).

[55] CFPB, *The CFPB Strategic Plan, Budget, and Performance Plan and Report*, p. 9 (Feb. 2016), *at* http://files.consumerfinance.gov/f/201602_cfpb_report_strategic-plan-budget-and-performance-plan_FY2016.pdf.

has boasted in public reports, this un-appropriated source of funding "ensure[s] that the CFPB enjoys "*full independence*" from Congress.[56]

As much as the CFPB enjoys this arrangement, it gets our constitutional design precisely backwards.[57] The Constitution commits the "power of the purse" to Congress precisely in order to ensure that the other parts of government are held accountable to the people. As James Madison stressed in *Federalist 58*, "[t]his power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance," to protect the people against "all the overgrown prerogatives of the other branches of the government." Madison would be entirely unsurprised by the ramifications of granting such financial independence to an agency—such as the agency's director rebuffing a congresswoman's questions about the agency's controversial expenditures of hundreds of millions of dollars by asking her, defiantly, "why does that matter to you?"[58]

I hope that Congress's decision to free the CFPB from truly meaningful oversight power proves to be a temporary mistake, and not a harbinger of things to

---

[56] CFPB, *Consumer Financial Protection Bureau Strategic Plan: FY2013–FY2017*, t p. 36 (Apr. 2013) (emphasis added), *at* http://files.consumerfinance.gov/f/strategic-plan.pdf.

[57] Again, as disclosed above, I am also co-counsel to plaintiffs challenging the CFPB's constitutionality. Nevertheless, I express these views strictly in my own capacity, and not on behalf of any other organizations or parties.

[58] CFPB Director Cordray told this to Rep. Ann Wagner at a 2015 hearing of the House Financial Services Committee. The video clip is available at https://www.youtube.com/watch?v=5IxSfJ638cs.

come. While independent agencies' regulatory actions will be improved significantly by increased White House oversight and interagency coordination, such reforms must be a complement to—not a replacement for—increased oversight by *Congress*.[59]

Thank you for inviting me to testify today.

---

[59] On the need to improve Congress's oversight capabilities, *see*, *e.g.*, Kevin R. Kosar, "How to Strengthen Congress," *Nat'l Affairs* (Fall 2015), *at* http://www.nationalaffairs.com/publications/detail/how-to-strengthen-congress; Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463 (2015).