

COMMENTS

CONSTITUTIONAL IN NAME: THE BUREAU OF CONSUMER FINANCIAL PROTECTION AND THE OBAMA ADMINISTRATION'S TREATMENT OF THE NONDELEGATION PRINCIPLE AND THE APPOINTMENTS CLAUSE

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I. INTRODUCTION

On July 22, 2010, President Barack Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (“the Act”), enacting what many consider to be the most sweeping changes to the United States financial regulatory system since the Great Depression. One of the hallmarks of the Act was its creation of the Bureau of Consumer Financial Protection (the “Bureau”), an independent agency housed within the Federal Reserve, designed to serve as a watchdog for purchasers of consumer financial services. One of the clearest descriptions of the Bureau’s task of “consumer protection” can be gleaned from an anecdote by Elizabeth Warren, the conceiver of the idea for an agency dedicated to consumer financial protection and the Administration’s former “advisor” for the establishment of the Bureau:

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 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 . . . Why are consumers safe when they purchase tangible consumer products with cash, but when they sign up for routine financial products like mortgages and credit cards they are left at the mercy of their creditors?¹

Put in these terms, it is difficult to imagine any politician arguing against the intended objectives of the Bureau. Despite how much consumer protection may sound like a goal worthy of bipartisan sup-

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¹ Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY J., Summer 2007, at 8, <http://www.democracyjournal.org/pdf/5/Warren.pdf>.

port, however, the structure and mere existence of the Bureau have been the subject of much partisan controversy. For example, since the enactment of Dodd-Frank, Republicans in the House of Representatives have introduced at least four bills aimed at limiting the Bureau's powers,² and numerous Republican Senators have threatened to filibuster the appointment of a permanent Bureau director.³

In response to this controversy, I seek in this Comment, as a preliminary matter, to clarify two points of apparent confusion among Bureau opponents: (1) despite the objections directed at the Act for endowing the Bureau with too much power and discretion, the Act is within the bounds of the Supreme Court's nondelegation doctrine; and (2) despite the failure of President Obama to seek Senate confirmation for his appointment of Elizabeth Warren, the appointment did satisfy the requirements of the Court's Appointments Clause doctrine. Notwithstanding this defense of the Bureau, however, the Comment ultimately seeks to establish that, despite the constitutional shelter the Administration may have found under our sometimes convoluted administrative law doctrines, the Act and the appointment of Warren raise significant questions as to whether the Administration is seriously interested in adhering to the spirit of the law rather than simply the letter of it.

Although hard to define, the "spirit of the law" is of fundamental importance to a well-functioning government. Since no court can articulate a doctrine so detailed as to distinguish perfectly every violation of the law from every non-violation, the public must be able to trust that its elected officials will endeavor to act in accordance with the broader purposes of the law. A government that seeks loopholes in the constitutional doctrines developed to regulate *it* will find itself with insufficient credibility to fault private actors for similarly exploiting loopholes in the laws and regulations that *they* are subject to. It is in this regard that criticism of the Bureau is justified, and future administrations have much to learn from.

I begin in Part II of this Comment by providing perspective into the economic and political environment that led to the establishment of the Bureau. In Part III, I describe the Court's nondelegation doctrine and explain that while the Bureau may satisfy the requirements of one version of the doctrine, formed from a survey of case out-

² See *infra* note 23.

³ Ylan Q. Mui, *GOP Senators Vow to Block CFPB Nominee*, WASH. POST, May 5, 2011, http://www.washingtonpost.com/business/economy/gop-senators-vow-to-block-cfpb-nominee/2011/05/05/AFG70f2F_story.html (describing Republican senators' vow to "block any nominee to lead the . . . Consumer Financial Protection Bureau").

comes, the Bureau in many ways seems to fail the requirements of a second version, synthesized directly from statements made by various justices in recent cases involving nondelegation issues. Finally, in Part III, I describe the Court's Appointment's Clause doctrine and apply it to the appointment of Elizabeth Warren, concluding that the undefined nature of the powers granted to Warren during her tenure with the Bureau is itself indicative of the Administration's willingness to stray from the spirit of the law, and arguing for an interpretation of the Act that would have restricted these powers to mostly administrative functions.

II. THE FINANCIAL CRISIS & THE ENACTMENT OF DODD-FRANK

An analysis of the Bureau and its powers would be incomplete without an explanation of the economic and political events that led to its creation. As a context for understanding the importance of the "spirit of the law," I also seek to highlight in this section the consequences that can occur when the private sector fails to adhere to it.

During the final three months of 2007, growth of U.S. gross domestic product decreased on a quarterly basis for the first time since 2001.⁴ The effects of the financial crisis correlating with this recession have been felt by nearly every American household and explanations for its timing have been the subject of much scholarly writing.⁵ Between 1997 and 2006, the price of the average American home increased by 124%.⁶ While during the period from 1981 to 2001 the national median home price ranged between 2.9 to 3.1 times median household income, in 2004 this ratio rose to 4.0 and by 2006 it had climbed as high as 4.6.⁷ The risk associated with reliance on these increases in property value spread from the confines of the balance

4 U.S. BUREAU OF ECON. ANALYSIS, DEP'T OF COMMERCE, GROSS DOMESTIC PRODUCT: PERCENT CHANGE FROM PRECEDING PERIOD (2011), available at <http://www.bea.gov/national/xls/gdpchg.xls>.

5 For background information on the subject, please see the following materials: JOHN B. FOSTER & FRED MAGDOFF, *THE GREAT FINANCIAL CRISIS: CAUSES AND CONSEQUENCES* (2009); ROBERT J. SHILLER, *THE SUBPRIME SOLUTION: HOW TODAY'S GLOBAL FINANCIAL CRISIS HAPPENED, AND WHAT TO DO ABOUT IT* (2008); JOSEPH E. STIGLITZ, *FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY* (2010); BARRY WITHOLTZ WITH AARON TISK, *BAILOUT NATION, WITH NEW POST-CRISIS UPDATE: HOW GREED AND EASY MONEY CORRUPTED WALL STREET AND SHOOK THE WORLD ECONOMY* (2009).

6 *CSI: Credit Crunch*, *THE ECONOMIST* (Oct. 18, 2007), <http://www.economist.com/node/9972489>.

7 Ben Steverman & David Bogoslaw, *The Financial Crisis Blame Game*, *BUSINESSWEEK* (Oct. 18, 2008), http://www.businessweek.com/print/investor/content/oct2008/pi20081017_950382.htm.

sheets of depository institutions to that of the broader macroeconomy, as mortgage-backed securities became increasingly popular within the financial services industry. As was inevitable, the bubble eventually burst and by 2008 housing prices had declined by over 20% from their mid-2006 peak.⁸ The resulting havoc was felt in economic, social, and political terms.

During 2007, lenders began foreclosure proceedings on nearly 1.3 million properties, a 79% increase over 2006,⁹ and by 2008 this number increased to 2.3 million.¹⁰ By August 2008, 9.2% of all U.S. mortgages outstanding were either delinquent or in foreclosure,¹¹ and by September 2009, this number had risen to 14.4%.¹² In 2009, the IMF calculated that major U.S. and European banks had lost more than \$1 trillion on toxic assets and bad loans from January 2007 to September 2009 and estimated that the losses would top \$2.8 trillion for the period from 2007–2010.¹³ During this period, numerous institutions of systemic importance to the U.S. economy declared bankruptcy, were acquired under duress, or were rescued by the government—including Bear Stearns, Lehman Brothers, Merrill Lynch, Washington Mutual, Wachovia, and AIG.¹⁴

8 Press Release, Standard & Poor's, National Trend of Home Price Declines Continues Through the Third Quarter of 2008 According to the S&P/Case-Shiller Home Price Indices (Nov. 25, 2008), available at http://www2.standardandpoors.com/spf/pdf/index/CSHomePrice_Release_112555.pdf.

9 Press Release, RealtyTrac, U.S. Foreclosure Activity Increases 75 Percent in 2007 (Jan. 29, 2008), available at <http://www.realtytrac.com/content/press-releases/us-foreclosure-activity-increases-75-percent-in-2007-3604?acct=64847>.

10 Press Release, RealtyTrac, U.S. Foreclosure Activity Increases 81 Percent in 2008 (Jan. 15, 2009), available at <http://www.realtytrac.com/content/press-releases/foreclosure-activity-increases-81-percent-in-2008-4551?acct=64847>.

11 *Late 2000s Financial Crisis*, WIKIPEDIA.ORG, http://en.wikipedia.org/wiki/Late-2000s_financial_crisis (last visited Sept. 9, 2011) (citing Press Release, Mortgage Bankers Ass'n, Delinquencies and Foreclosures Increase in Latest MBA National Delinquency Survey (Sept. 5, 2008), available at <http://www.mbaa.org/NewsandMedia/PressCenter/64769.htm>).

12 Press Release, Mortgage Bankers Ass'n, Delinquencies Continue to Climb in Latest MBA National Delinquency Survey (Nov. 19, 2009), available at <http://www.mbaa.org/NewsandMedia/PressCenter/71112.htm>.

13 David Cutler, Steve Slater & Elinor Comlay, *Factbox—U.S., European Bank Writedowns, Credit Losses*, REUTERS, (Nov. 5, 2009), <http://www.reuters.com/article/idCNL554155620091105>.

14 Eric Dash & Andrew Ross Sorkin, *Citigroup Buys Bank Operations of Wachovia*, N.Y. TIMES (Sept. 29, 2008), <http://www.nytimes.com/2008/09/30/business/30bank.html>; *The Fed Bails Out AIG*, BLOOMBERG BUSINESSWEEK (Sept. 16, 2008), http://www.businessweek.com/bwdaily/dnflash/content/sep2008/db20080916_387203.htm?chan=top+news_top+news+index++temp_top+story (reporting the “emergency loan” extended to AIG by the government); Christopher Scinta & Tiffany Kary, *WaMu Files for Bankruptcy Following FDIC Seizure (Update2)*, BLOOMBERG (Sept. 27, 2008),

In October 2008, in an attempt to prevent what was perceived to be the next “Great Depression,” President Bush signed into law the Emergency Economic Stabilization Act, authorizing the Secretary of the Treasury to spend up to \$700 billion to purchase distressed assets and make capital injections into the banking system.¹⁵ At the same time, the Federal Reserve began using its powers to make emergency loans to companies ranging from Bank of America and Goldman Sachs to non-financial institutions like Verizon and McDonalds.¹⁶ Perhaps the most significant statistic, however, was the change in the nation’s unemployment rate: rising from 4.7% in September of 2007, to a high of 10.1% in October of 2009.¹⁷

The economy weighed heavily on the minds of voters in the 2008 election, with 62% citing it as their top issue in deciding which candidate to cast their ballot for.¹⁸ The election brought a Democratic majority in both houses of Congress, and ushered in Democratic nominee Barack Obama as the new President. It is with this backdrop that Dodd-Frank was enacted. After numerous measures designed to help stabilize the economy, including a continuation of the Trouble Assets Relief Program (“TARP”) established during the Bush Administration, a stimulus package estimated at the time to cost \$825 billion, and a “bailout” of the auto industry, the Administration shifted focus to putting in place regulations to ensure that a similar economic precipice would never again be reached.

Economists and politicians have disagreed on what the precise causes of the crisis were, but it is clear that the surge in subprime

<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aG.D1cUCF5zU> (reporting Washington Mutual’s bankruptcy filing); Andrew Ross Sorkin & Landon Thomas Jr., *J.P. Morgan Acts to Buy Bear Stearns at Huge Discount*, N.Y. TIMES (Mar. 16, 2008), <http://www.nytimes.com/2008/03/16/business/16cnd-bear.html>; Andrew Ross Sorkin, *Lehman Files for Bankruptcy; Merrill is Sold*, N.Y. TIMES (Sept. 14, 2008), <http://www.nytimes.com/2008/09/15/business/15lehman.html?pagewanted=all> (reporting Lehman Brothers’ bankruptcy filing and Bank of America’s purchase of Merrill Lynch).

15 See *Economic Rescue Swiftly Signed Into Law*, AFP, Oct. 3, 2008, <http://afp.google.com/article/ALeqM5h40yrrEcqjEeVRgcrDXB7egDo2A> (detailing the 700-billion-dollar Wall Street bailout).

16 See Luca Di Leo & Maya Jackson Randall, *Fed Data Show Firms on the Brink*, WALL ST. J., Dec. 1, 2010, <http://online.wsj.com/article/SB10001424052748704594804575648740948074042.html> (“Apart from banks, the Fed also bought short-term debt from McDonalds Corp., Verizon Communications, Inc., Harley-Davidson Inc., and state-owned Korea Development Bank.”).

17 BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY (2011), available at http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?series_id=LNS14000000.

18 David P. Kuhn, *Exit Polls: Economy Top Issue*, POLITICO (Nov. 5, 2008), <http://www.politico.com/news/stories/1108/15270.html>.

loans was at the heart of it. Although some have placed primary blame for the spread of such loans on government enterprises like Fannie Mae¹⁹ or on the Federal Reserve,²⁰ it is difficult to dispute that predatory lending by banks and brokers played a large role in exacerbating it. Evidence of this included charges against Countrywide Home Loans that ended up resulting in what was the largest predatory lending settlement in U.S. history—\$8.4 billion.²¹ In the words of then-California Attorney General Jerry Brown, Countrywide had “turned the American dream into a nightmare.”²² With this type of fraud in mind, Bureau proponents saw the establishment of a consumer financial protection agency as a critical piece of any legislation overhauling the financial system.²³ Finally, on July 22, 2010, following a Senate vote on the Act attracting the support of only three Republicans, Dodd-Frank was signed into law and the Bureau was established.²⁴

While this recap of the financial crisis is on one hand intended to provide the reader with an understanding of the Administration’s reasons for creating the Bureau and endowing it with the controversial range of powers that will be discussed in the following section, it also serves as an example of what can occur when the application of the law is divorced from the spirit of it. As mentioned above, one

19 See, e.g., Peter J. Wallison, *What Got Us Here?*, AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH (Dec. 9, 2008), <http://www.aei.org/article/29047> (stating that “the most persuasive case for the cause of the financial crisis is the U.S. government itself” and claiming that “with [the] financial incentives for homeowners, banks and other mortgage lenders—easy lending terms and a ready market for mortgages through Fannie [Mae] and Freddie [Mac]—a housing bubble was inevitable”).

20 See, e.g., John B. Taylor, *How Government Created the Financial Crisis*, THE WALL STREET JOURNAL (Feb. 9, 2009), <http://online.wsj.com/article/SB123414310280561945.html> (“[m]onetary excesses were the main cause of the boom. The Fed held its target interest rate, especially in 2003-2005, well below known monetary guidelines that say what good policy should be based on historical experience. Keeping interest rates on the track that worked well in the past two decades, rather than keeping rates so low, would have prevented the boom and the bust.”).

21 See Gretchen Morgenson, *Countrywide to Set Aside \$8.4 Billion in Loan Aid*, N.Y. TIMES, Oct. 5, 2008, at B1 (stating that Countrywide Financial agreed to the “largest program ever to modify home loans”).

22 *Id.*

23 See, e.g., U.S. Rep. Maxine Waters, *Statement on the Need for a Consumer Financial Protection Agency*, HOUSE.GOV (Jul. 20, 2009), <http://waters.house.gov/News/DocumentSingle.aspx?DocumentID=140725> (“Another reason we need a consumer financial protection agency is to protect consumers from complicated products and hidden and predatory fees.”).

24 Brian Montopoli, *Obama Signs Sweeping Financial Reform Into Law*, CBS NEWS (July 21, 2010), http://www.cbsnews.com/8301-503544_162-20011201-503544.html (reporting the signing of the Act and the limited Republican support for it).

target of blame for the crisis were the banks and other financial institutions that originated the complex set of instruments that have been seen as its cause. While some institutions like Countrywide have been charged with actual violations of the law, a much broader array have been accused of exploiting holes in the financial regulatory scheme.²⁵ Those who might trivialize the idea of the “spirit of the law” should keep in mind while reading the following sections that if as a society we cannot expect our government to adhere to anything greater than the “letter of the law,” certainly we can not expect private corporations to do so either.

III. THE BUREAU & THE NON-DELEGATION PRINCIPLE

Among the objections levied against Dodd-Frank are complaints that the Bureau it has created is too large, powerful, and immune from oversight, and has been granted too much of a free reign to write and enforce rules without specific Congressional guidance. In fact, since Dodd-Frank’s enactment, Republicans in the House of Representatives have introduced at least four bills aimed at altering the Bureau’s powers and structure.²⁶ Exemplary of its critics is Senator Richard Shelby, who has complained that “the bill has delegated to bureaucrats the authority to devise dozens, if not hundreds, of new rules for our financial system . . . provid[ing] no specific guidance in any number of areas, including . . . consumer protection and systemic

²⁵ See Vigal V. Acharya et al., *Market Failures and Regulatory Failures: Lessons From Past and Present Financial Crises* 12 (ADBI Working Paper Series No. 264, 2011), available at <http://www.adbi.org/files/2011.02.08.wp264.market.regulatory.failures.lessons.gfc.pdf> (“In the crisis of 2007–2009, financial firms managed to shift risk by exploiting loopholes in regulatory capital requirements to take an undercapitalized, US\$2- to 3-trillion, highly leveraged, one-way asymmetric bet on the economy, particularly tied to residential real estate but also to commercial real estate and other consumer credit exposures.”); Jeremy C. Stein, *Securitization, Shadow Banking, and Financial Fragility* 6 (May 2010) (unpublished manuscript), available at <http://www.economics.harvard.edu/faculty/stein/files/SecuritizationShadowBankingAndFragilityRevised.pdf> (“[B]anks were exploiting a regulatory loophole: if they held the loans directly on their balance sheets, they faced a regulatory capital requirement . . . but if the loans were securitized and parked in an off-balance-sheet vehicle . . . the regulatory capital requirement was much reduced.”).

²⁶ See, e.g., H.R. 1121, 112th Cong. (2011) (amending Dodd-Frank so as to “replace the Director of the Bureau . . . with a five person Commission”); H.R. 1315, 112th Cong. (2011) (amending Dodd-Frank so as to “strengthen the review authority of the Financial Stability Oversight Council of regulations issued by the Bureau; H.R. 1640, 112th Cong. (2011) (amending Dodd-Frank so as to “bring the Bureau . . . into the regular appropriations process . . .”); H.R. 1667, 112th Cong. (2011) (amending Dodd-Frank so as “postpone the date for the transfer of functions to the Bureau . . . if the Bureau does not yet have a Director in place”).

risk.”²⁷ Shelby has alleged that “[i]n many instances, Dodd-Frank has outsourced this [Banking] [C]ommittee’s responsibilities to unelected bureaucrats.”²⁸ Similarly, upon reviewing the initial proposal by Senator Christopher Dodd for the legislation creating the Bureau, the U.S. Chamber of Commerce complained that it “[did not] like the vagueness that Dodd’s proposal uses in saying that the Bureau could enforce actions against firms who engage in ‘abusive’ practices,” as it “wonders what ‘abusive’ means.”²⁹ In analyzing the merits of these types of complaints, a natural starting point is determining whether the Bureau is in compliance with the constitutional doctrine designed to quell such worries—the nondelegation principle.

In Part A of this section, I provide an overview of the principle and its history, concluding that today there are two versions of the doctrine, one formed from a survey of case outcomes, and the second synthesized directly from statements made by various justices in recent cases involving nondelegation issues. In Part B, I provide an overview of the Bureau’s structure and powers, as relevant to the nondelegation analysis. Finally, in Part C, I argue that while it is unlikely that the Supreme Court would strike down the Bureau as unconstitutional, there are several features of the Bureau that seem to violate the spirit of the nondelegation principle.

A. *The Doctrine and its History*

While the nondelegation principle can be explained as merely a facet of the broader idea of the separation of powers, its roots can be more specifically traced back to John Locke, who famously wrote in his *Second Treatise of Government* that

the legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others. . . . [T]he power of legislative . . . can be no other than . . . to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in the other hands.³⁰

25 *Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act: Hearing Before the S. Comm. on Banking, Housing, & Urban Affairs*, 111th Cong. 5 (2010) (statement of Richard Shelby, U.S. Senate, Member, S. Comm. on Banking, Housing & Urban Affairs).

28 *Id.*

29 David Indiviglio, *Chamber Stands Against Consumer Financial Protection Bureau*, THE ATLANTIC (Mar. 16, 2010), <http://www.theatlantic.com/business/archive/2010/03/chamber-stands-against-consumer-financial-protection-bureau/37563>.

30 JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* § 141, at 81 (Thomas P. Peardon ed., The Liberal Art Press, Inc., 1952) (1690).

One of the earliest articulations of this principle by the Supreme Court can be found in *J.W. Hampton, Jr. & Co. v. United States*, where Chief Justice Taft upheld Congress's delegation of power to the President through the Tariff Act of 1922 to adjust the duties imposed on imports by the Act.³¹ Specifically, Taft stated what has come to be known as the "intelligible principle" test, writing that "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."³² Taft found that the Tariff Act of 1922 contained such an intelligible principle since it mandated that import tariffs should "equal the difference between the cost of producing [the articles] in a foreign country . . . and the cost of producing and selling like or similar articles in the United States."³³

Despite the deep roots of this principle, however, the Supreme Court has applied it only two times as a basis for invalidating acts of Congress—in *Panama Refining Co. v. Ryan*³⁴ and *A.L.A. Schechter Poultry Corp. v. United States*.³⁵ These two cases, both decided during a period of major reform of the role of government in American society, sparked heavy criticism by the Roosevelt Administration and academics, who accused the Court of "threatening to defeat the efforts of our political democracy to use government as an instrumentality for the effective control of our national economy."³⁶ It soon became clear, however, that the Court would abandon their fight against such Congressional delegation. Since *Schechter*, the Court has yet to strike down any other statute on the basis of the nondelegation principle, and its standards for what type of directives can constitute an "intelligible principle" have been greatly diluted. The Court, for example, has upheld the authority of the SEC to pass rules to ensure that the structures of holding company systems are not "unduly or unnecessarily complicate[d]" and do not "unfairly or inequitably distribute voting power among security holders,"³⁷ and it has approved standards as

31 See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 412–13 (1928) (affirming the constitutionality of the Tariff Act of 1922).

32 *Id.* at 409.

33 *Id.* at 404.

34 See *Panama Refining Co. v. Ryan*, 293 U.S. 388, 392 (1935) (finding the National Industrial Recovery Act's delegation of legislative power as void).

35 See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 500 (1935) (holding that "Congress has set up no intelligible policies to govern the President").

36 James Hart, *Limits of Legislative Delegation*, 221 ANNALS AM. ACAD. POL. & SOC. SCI. 87, 87 (1942).

37 *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946).

vague as “generally fair and equitable and . . . effectuat[ing] the purposes of [an] Act”³⁸ and regulating in the “public interest, convenience, or necessity.”³⁹

This early disablement of the doctrine, however, should not be confused with an end of its vitality. In a number of relatively recent decisions, various members of the Court have made sure to stress the continued importance of the nondelegation principle and describe circumstances under which its revival could come about. In *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, the Court upheld Congress’ delegation of power to the Secretary of Labor to promulgate occupational safety and health standards “reasonably necessary or appropriate to provide safe or healthful employment and places of employment.”⁴⁰ The Act directed the Secretary, in promulgating standards, to “set the standard which most adequately assures, to the extent feasible . . . that no employee will suffer material impairment of health”⁴¹ Justice Rehnquist, concurring in judgment but finding the delegation to be impermissible, stated that “the legislative history contains nothing to indicate that the language ‘to the extent feasible’ does anything other than render what had been a clear . . . standard largely, if not entirely, precatory.”⁴² Rehnquist described what he saw as the three main functions of the nondelegation doctrine: (1) ensuring “to the extent consistent with orderly government administration that important choices of social policy are made by Congress;” (2) guaranteeing that Congress provides the recipient of any delegated authority “an ‘intelligible principle’ to guide the exercise of the delegated discretion;” and (3) ensuring that “courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.”⁴³ Here, Rehnquist found that Congress was faced with a policy choice between “balancing statistical lives and industrial resources” or “elevat[ing] human life above all concerns save massive dislocation in an affected industry” and recognizing the difficulty of the choice improperly deferred to the executive.⁴⁴

38 *Yakus v. United States*, 321 U.S. 414, 420 (1944).

39 *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943) (upholding the FCC’s power to regulate airwaves); *see also* *New York Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24–25 (1932) (upholding the ICC’s power to approve railroad consolidations).

40 448 U.S. 607, 615 (1980).

41 *Id.* at 612.

42 *Id.* at 681–82 (Rehnquist, J., concurring).

43 *Id.* at 685–86 (Rehnquist, J., concurring).

44 *Id.* at 685 (Rehnquist, J., concurring).

Similar guidance is found in *Mistretta v. United States*, which concerned the authority of the newly created United States Sentencing Commission to promulgate federal sentencing guidelines.⁴⁵ The majority upheld the authority and stated that

[o]nly if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose.⁴⁶

In dissent, Justice Scalia commented that “[i]t is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded.”⁴⁷ Scalia stressed that given that intelligible principles as vague as “public interest” standards had survived judicial scrutiny, the critical question was whether the delegated law-making power in question was “ancillary” to the inherent constitutional authority of the government branch entrusted with the power.⁴⁸ Scalia found that “[t]he lawmaking function of the Sentencing Commission [was] completely divorced from any responsibility for execution of the law or adjudication of private rights under the law,” and thus was impermissible.⁴⁹

Finally, the most recent case providing guidance as to what is left of the nondelegation doctrine is *Whitman v. American Trucking Ass'ns*.⁵⁰ In the case below, the D.C. Circuit had ruled that a provision of the Clear Air Act lacked sufficiently determinate criteria for guiding the agency's discretion and remanded the case to the EPA to construe the Act for an intelligible principle by which to govern its decisions.⁵¹ The Court was decisive in reversing the D.C. Circuit, but did reiterate some points made in earlier decisions regarding features of the doctrine. Particularly relevant was the statement by Justice Scalia that although “even in sweeping regulatory schemes we have never demanded . . . that statutes provide ‘determinate criterion’ for saying

45 488 U.S. 361, 370 (1989) (“*Mistretta* moved to have the promulgated Guidelines ruled unconstitutional on the grounds that . . . Congress delegated excessive authority to the [Sentencing] Commission to structure the guidelines.”).

46 *Id.* at 379 (quoting *Yakus v. United States*, 321 U.S. 414, 425–26 (1944)) (internal quotation marks omitted).

47 *Id.* at 415 (Scalia, J., dissenting).

48 *See id.* at 417–18 (“The whole theory of *lawful* congressional ‘delegation’ is . . . that a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action . . .”).

49 *Id.* at 420.

50 531 U.S. 457 (2001).

51 *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1053 (D.C. Cir. 1999), *rev'd in part*, 531 U.S. 457 (2001) (“[W]e are remanding to EPA to formulate adequate decision criteria . . .”).

‘how much [of the regulated harm] is too much,’” that “the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.”⁵²

Synthesizing the above cases yields the conclusion that today there are two versions of the nondelegation doctrine.⁵³ First, there is a version based on some of the actual language used by various Justices in recent nondelegation cases, including those discussed above. Under this version, a determination of the validity of Congressional delegation of power to an agency seems to require a multi-step inquiry into the magnitude of the agency’s powers, the scope of its jurisdiction, and the relation of its rule-making authority to its enforcement and adjudicatory powers. This version seems to revolve more directly around the spirit of that original statement of the doctrine by John Locke, and ultimately seeks to determine the range of discretion available to an agency implementing Congressional decisions regarding issues of national policy. Only if the delegation is so great such that it would be the agency rather than the legislature doing the policy-setting would this version of the doctrine find a constitutional problem.

Then there is the second version of the doctrine, this one based more directly on a survey of case outcomes. Under this version, identifying how much discretion is too much is deemed to be an impossible task, and so the Court is unlikely to strike a statute down as unconstitutional if it can identify even some vague standard to call an “intelligible principle.”⁵⁴ It is this second version of the doctrine that

52 *Whitman*, 531 U.S. at 475 (alteration in original). As an illustrative example, Scalia wrote that “[w]hile Congress need not provide any direction to the EPA regarding the manner in which it is to define ‘country elevators,’ which are to be exempt from new-stationary-source regulations governing grain elevators, it must provide substantial guidance on setting air standards that affect the entire national economy.” *Id.*

53 For alternative views of what the nondelegation is or should be see MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 136 (1995) (analyzing the important role the Constitution plays in dictating the structure of our government, and suggesting that courts should “demand as the prerequisite for legislative action some meaningful level of normative political commitment by the enacting legislators, thus enabling the electorate to judge its representatives”); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231, 1239 (1994) (arguing that the post-New Deal administrative state is unconstitutional and that “the core of the Constitution’s nondelegation principle can be expressed as follows: Congress must make whatever policy decisions are sufficiently important to the statutory scheme at issue so that Congress must make them”).

54 In attempting to answer why the nondelegation doctrine has had “so little a constraining effect” if it is “so fundamental a principle to our constitutional order,” some have argued that judges’ “rhetorical enthusiasm for the nondelegation doctrine was overmatched by their reluctance to confront the legislature.” Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 259–60 (2010).

is more useful in determining how the Court would rule on the constitutionality of the Bureau's power.

B. Overview of the Bureau and its Powers

With the key factors of the nondelegation doctrine in mind, in this section I provide an overview of the Bureau and the Act, focusing on features relevant to the nondelegation inquiry, including: identifying the scope of its jurisdiction and magnitude of its powers; discussing the relation of its rulemaking authority to its enforcement powers; and describing the range of discretion available to it in promulgating rules.

The Bureau has authority to regulate any person who engages in offering or providing a “consumer financial product or service,” and any affiliate service provider of such a person.⁵⁵ Consumer financial products and services are defined to include, among other things, financial products or services provided for use by consumers primarily for personal, family, or household purposes, and certain financial products or services offered in connection with a consumer financial product.⁵⁶

The Act provides a laundry list of such products and services, including: (1) extending credit and servicing loans; (2) extending or brokering certain leases of personal or real property; (3) providing real estate settlement services; (4) engaging in deposit-taking activities; (5) selling payment instruments; (6) providing check cashing or collection services; and (7) providing certain financial advisory services.⁵⁷ If the Bureau does not find this list sufficiently comprehensive, it also has the authority to add additional products or services through regulation.⁵⁸ In lay terms, this means that the Bureau has rule-making authority over a vast swath of the U.S. financial services industry, and will be able to regulate financial products ranging from credit cards to mortgages. The scope of its jurisdiction might, in fact, be better understood by the short list of institutions exempt from its authority, including: certain retailers offering credit in connection with the sale of nonfinancial goods or services, real estate brokerage services, lawyers, insurance companies, and auto dealers.⁵⁹

⁵⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1002(6), 124 Stat. 1376, 1955 (2010) (to be codified at 12 U.S.C. § 5481).

⁵⁶ *Id.* at § 1002(5)(A), (B), 124 Stat. at 1956 (to be codified at 12 U.S.C. § 5481).

⁵⁷ *Id.* at § 1002(15)(A), 124 Stat. at 1957–58 (to be codified at 12 U.S.C. § 5481).

⁵⁸ *Id.* at § 1002(15)(A)(xi), 124 Stat. at 1959 (to be codified at 12 U.S.C. § 5481).

⁵⁹ *Id.* at §§ 1027, 1029, 124 Stat. at 1995–2006 (to be codified at 12 U.S.C. §§ 5517, 5519).

In describing the relation of its rulemaking authority to its enforcement power, the Act divides its jurisdiction into three categories: (1) “very large” depository institutions, (2) “other” depository institutions, and (3) nondepository institutions. The “very large” depository institution category includes insured banks, savings associations, and credit unions with total assets of more than \$10 billion.⁶⁰ In regards to these institutions, the Bureau has exclusive authority to require reports and conduct examinations in connection with the enforcement of consumer financial protection laws, and the primary authority to enforce such laws.⁶¹ The “other” depository institutions category includes insured banks, savings associations, and credit unions with total assets of less than \$10 billion.⁶² What is critically different for this category of institutions, however, is that it is the individual institutions’ prudential banking regulators rather than the Bureau that are authorized to enforce the consumer protection laws against them.⁶³ Thus, while the Bureau may promulgate rules affecting such institutions, it does not actually have authority to enforce the rules against the institutions. Finally, the nondepository institutions category includes a range of other institutions providing consumer financial products or services. The Bureau must consult with the Federal Trade Commission (FTC) prior to issuing rules to define persons covered under this category, and retains, in large part, exclusive rulemaking and enforcement authority against the institutions.⁶⁴

The Act contains two sections that provide insight as to the degree of discretion available to the Bureau when promulgating rules. Broadly speaking, there are two sets of laws that provide the Bureau with the authority to promulgate rules: (1) consumer protection laws in existence prior to the to the Act, the enforcement of which will be transferred to the Bureau from other agencies; and (2) consumer protection laws put in place by the Act, the enforcement of which are assigned directly to the Bureau. Subtitle B, titled “General Powers of the Bureau” deals broadly with both sets of these laws and authorizes the Bureau to “administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.”⁶⁵ Thus, in addition to any guiding statements contained in the Act itself, the Bureau must also take into account the purposes of the

60 *Id.* at § 1025(a), 124 Stat. at 1990 (to be codified at 12 U.S.C. § 5515).

61 *Id.* at § 1025(b)(1), (c), 124 Stat. at 1990–91 (to be codified at 12 U.S.C. § 5515).

62 *Id.* at § 1026(a), 124 Stat. at 1993 (to be codified at 12 U.S.C. § 5516).

63 *Id.* at § 1026(d), 124 Stat. at 1994 (to be codified at 12 U.S.C. § 5516).

64 *Id.* at § 1024(c)(3), 124 Stat. 1987 (to be codified at 12 U.S.C. § 5514).

65 *Id.* at § 1022(b)(1), 124 Stat. at 1980 (to be codified at 12 U.S.C. § 5512).

various consumer protection laws that proposed rules seek to aid the enforcement of.

Although it is plausible that this standard in and of itself could be sufficient to satisfy the loose “intelligible principle” test, the section elaborates much further. Section 1021(b) lists five objectives of the Bureau, including ensuring (1) consumers are provided with timely and understandable information to make responsible decisions about financial transactions; (2) consumers are protected from unfair deceptive, or abusive acts and practices and from discrimination; (3) outdated, unnecessary or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens; (4) Federal consumer financial law is enforced consistently without regard to the status of a person as a depository institution, in order to promote fair competition; and (5) markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.⁶⁶

In addition to these five objectives, 1022(b)(2) also proscribes “standards for rulemaking,” including, among other things that: (1) the Bureau shall consider the potential benefits and costs to consumers and covered persons, including the potential reduction of access to consumer financial products or services resulting from such rule; and (2) the Bureau shall consult with other appropriate agencies regarding consistency with prudential, market, or systemic objectives administered by such agencies.⁶⁷ The Bureau is also allowed to pass rules to exempt any class of covered persons, service providers, or consumer financial products from any provision as it determines “necessary or appropriate to carry out . . . [its] purposes or objectives,” taking into consideration: (1) the total assets of the class of covered persons; (2) the volume of transactions involving consumer financial products or services in which the class of covered person engages; and (3) existing provisions of law applicable to the consumer financial product or services and the extent to which such provisions provide consumers with adequate protections.⁶⁸

Subsection C of the Act, titled “Specific Powers of the Bureau,” deals more narrowly with laws created by the Act and assigned directly to the Bureau for enforcement, including for example, Section 1036, which makes it unlawful for any covered person to, among other things, “engage in any unfair, deceptive, or abusive act or prac-

⁶⁶ *Id.* at § 1021(b)(1)–(5), 124 Stat. at 1979 (to be codified at 12 U.S.C. § 5511).

⁶⁷ *Id.* at § 1022(b)(2)(A), (B), 124 Stat. at 1980 (to be codified at 12 U.S.C. § 5512).

⁶⁸ *Id.* at § 1022(b)(3)(A), (B), 124 Stat. at 1980 (to be codified at 12 U.S.C. § 5512).

tice.”⁶⁹ Section 1031(a) authorizes the Bureau to enforce this law, and Section 1031(b) authorizes it to prescribe rules to identify acts or practices as unfair, deceptive or abusive.⁷⁰

The Bureau can declare an act or practice “unfair” only if it has a “reasonable basis” to conclude that it is “likely to cause substantial injury to consumers which is not reasonably avoided by consumers” and “such substantial injury is not outweighed by countervailing benefits to consumers or to competition.”⁷¹ The Bureau is also allowed to consider “established public policies” as evidence of unfairness, though not as a primary basis for promulgating a rule.⁷²

The Bureau can declare an act or practice “abusive” only if it “materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product” or takes unreasonable advantage of (1) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or services; (2) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (3) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.⁷³ With the above powers of the Bureau in mind, the following section will analyze how they stand up to the requirements of the nondelegation doctrine.

C. Application of the Doctrine to the Bureau

Returning to the two versions of the nondelegation doctrine summarized previously, it seems clear that the guidance provided by the Act is sufficiently determinate to satisfy the requirement of the second version of the doctrine, the “intelligible principle” test. The guidance is at least as specific as that in other statutes upheld by the Court in previous cases, and any court reviewing the authority of the Bureau to promulgate a particular rule will be able to cross-reference the Bureau’s justification of it with the five objectives of the Bureau made explicit by the Act, the various standards of rulemaking contained in it, and the legislative purpose of the particular consumer protection law the rule is designed to help enforce.

What is more debatable, however, is the adherence of the Bureau with the first described version of the doctrine and the spirit of the

⁶⁹ *Id.* at § 1036(a)(1)(B), 124 Stat. at 2010 (to be codified at 12 U.S.C. § 5536).

⁷⁰ *Id.* at § 1031(a), (b), 124 Stat. at 2005 (to be codified at 12 U.S.C. § 5531).

⁷¹ *Id.* at § 1031(c)(1)(A), (B), 124 Stat. at 2005 (to be codified at 12 U.S.C. § 5531).

⁷² *Id.* at § 1031(c)(2), 124 Stat. at 2005 (to be codified at 12 U.S.C. § 5531).

⁷³ *Id.* at § 1031(d)(1), (2), 124 Stat. at 2005 (to be codified at 12 U.S.C. § 5531).

original nondelegation principle. Take for example, the above-discussed “standard for rulemaking” requiring the Bureau to “*consider* the potential benefits and costs to consumers and covered persons, including the potential reduction of access . . . to consumer financial products or services.”⁷⁴ This statement seems to be a clear example of Congressional avoidance of a difficult policy choice, much like that identified by Justice Rehnquist in *American Petroleum Institute*. If Congress intended that the Bureau balance costs and benefits, it would have used language more like that used in §1031(c)(1)(A), which in defining “fairness” calls for a determination of whether “substantial injury is not *outweighed* by countervailing benefits to consumers.”⁷⁵ While the exercise of cost-benefit analysis itself has been the subject of much criticism,⁷⁶ Congress stops short of even going this far, refusing to decide whether consumer protection is even theoretically an important enough goal to justify disproportionate costs to lenders. This raises the question as to under which circumstances a reviewing court will consider the Bureau to have adequately “considered” costs and benefits. Can a rule be promulgated if the Bureau concedes that costs exceed benefits? In my view, a “consideration” of costs and benefits means that the Bureau may pass a rule so long as costs do not grossly outweigh benefits; this certainly does not seem to be the type of guidance that would even remotely be of comfort to John Locke.

Another example of the Administration skirting the boundaries of the doctrine is the Act’s special treatment of “other” depository institutions. As stated earlier, although the Bureau has the authority to promulgate rules that are applicable to these institutions, it does not have any authority to enforce such rules against them. It would be

⁷⁴ *Id.* at § 1022(b)(2)(A), (B), 124 Stat. at 1980 (to be codified at 12 U.S.C. 5512) (emphasis added).

⁷⁵ *Id.* at § 1031(c)(1)(A), (B), 124 Stat. at 2005 (to be codified at 12 U.S.C. § 5531) (emphasis added).

⁷⁶ One of the basic criticisms of cost-benefit analysis is the difficulty of incommensurability, occurring when “relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterized.” Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 796 (1994). For example, it is not entirely straightforward as to how to compare reduction in access to credit for consumers to fungible costs borne on a bank to comply with a Bureau rule. Critics also point to the fact that in quantifying the value of non-market goods, it is difficult to obtain “objective data on individual preferences.” Don B. Hardin, Jr., *Why Cost-Benefit Analysis? A Question (And Some Answers) About The Legal Academy*, 59 ALA. L. REV. 1135, 1165 (2008). For example, some have contended that “the costs of a policy change are often far easier to quantify than its benefits,” and that as a result, policy decisions in such areas tend to “result[] in a bias in favor of the status quo.” Robert H. Frank, *Why is Cost-Benefit Analysis So Controversial?*, 29 J. LEGAL STUD. 913, 928 (2000).

one thing if these institutions comprised a small portion of the Bureau's overall jurisdiction, but the fact that they comprise such a large percentage of it renders it quite another. Banks with assets less than \$10 billion, the amount large enough to put them in the "very large" category over which the Bureau has enforcement authority, comprise 98.7% of the roster of FDIC-insured institutions.⁷⁷ Certainly, this is not quite what Scalia alluded to in *Mistretta* when he said that the lawmaking function of the Sentencing Commission was "completely divorced"⁷⁸ from its responsibility for execution of the law, but it is certainly reminiscent of it. If rulemaking authority is meant to be ancillary to and in aid of enforcement authority, why is it that the Bureau's rules affect so many more institutions than the Bureau has power to enforce them against? Why not allow the Bureau to promulgate rules that account for whatever special situation small depository institutions present? The answer to this question is simple: community banks were in a much better position to influence politicians than the megabanks which, accurately or not, were considered more responsible for causing the crisis. Regardless of the reasoning for the provision, however, its implications are certainly worthy of criticism.

Perhaps even more troubling than these nondelegation concerns are related worries about the insulation of the Bureau from oversight. Most notable among these is the mechanism by which the Bureau is funded. Although most agencies rely on Congressional appropriations for fulfilling their budget, the Bureau is instead funded directly by the Federal Reserve, with a specific provision dictating that its funds "shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate."⁷⁹ In the age of the filibuster, where achieving the sixty vote supermajority that is often required to pass a resolution overruling or preempting an agency rule is very difficult, appropriations threats are a common way of facilitating Congressional oversight of agencies. On the other hand, Bureau proponents are correct in pointing out that the Bureau has less budgetary independence than any other federal bank regula-

⁷⁷ *Banking Giants Control 90% of Industry Assets*, PROBLEM BANK LIST (Sept. 6, 2010), <http://problembanklist.com/banking-giants-control-of-industry-assets-0189/>. The counterpoint to this is that such "very large" institutions with assets over \$10 billion control 78% of industry assets. *Id.*

⁷⁸ *Mistretta v. United States*, 488 U.S. 361, 420 (1989).

⁷⁹ Dodd-Frank Act § 1017(a)(2)(C), 124 Stat. 1376, 1975 (2010) (to be codified at 12 U.S.C. § 5497).

tor.⁸⁰ In particular, the OCC, FDIC, and OTS can increase their budgets by simply increasing their assessments on banks, and the Federal Reserve can do so by simply printing money.⁸¹ It is not clear, however, whether this comparison is fair. In particular, the Bureau is in many ways more similar to an appropriations-funded agency such as the SEC than the banking regulators, whose primary task is to ensure the safety and soundness of the financial system.

A similar concern is the inconspicuous exemption of the Bureau from the Paperwork Reduction Act (“PRA”).⁸² The PRA dictates that all agencies obtain approval from the Office of Information and Regulatory Affairs (“OIRA”) before distributing forms that impose an information collection burden on the general public.⁸³ As such, it serves as a mechanism for the executive branch to oversee even independent agencies. The PRA does contain an exemption, however, whereby an independent agency “administered by 2 or more members” may void any relevant disapproval of its authority.⁸⁴ Since the Bureau is administered by a single Director and not “2 or more members,” it would appear that this exemption would not be applicable to it. The Act, however, amends the PRA and carves out a specific exemption for the Bureau, stating that rules or orders prescribed or proposed by the Director shall be treated “on the same terms and conditions as apply to . . . [those] proposed by the Board of Governors of the Federal Reserve System.”⁸⁵ The Board of Governors, however, *is* a multimember body, and as such, it *does* have the power to void OIRA disapproval. Treating the Bureau the same way would imply that the Bureau’s single Director would also have this power.⁸⁶

The fact that the Bureau is administered by a single Director as opposed to a multimember commission is itself an issue of concern. Although other agencies with similarly broad powers, such as the SEC, are administered by multimember commissions that have limits

80 *Legislative Proposals to Improve the Structure of the Consumer Financial Protection Bureau: Hearing Before the S. Comm. On Financial Institutions and Consumer Credit*, 112th Cong. (2011) (statement of Adam J. Levitin, Assoc. Professor of Law, Georgetown University), available at <http://financialservices.house.gov/media/pdf/040611levitin.pdf>.

81 *Id.*

82 44 U.S.C. § 3501-49 (2006).

83 44 U.S.C. § 3507(a)(2) (2006) (providing that an agency shall not conduct or sponsor the collection of information unless “the [OIRA] Director has approved the proposed collection of information or approval has been inferred, under the provisions of this section”).

84 *Id.* § 3507(f)(1).

85 Dodd-Frank Act § 1100D(c), 124 Stat. 2111 (to be codified at 44 U.S.C. § 3502).

86 CURTIS W. COPELAND, CONG. RESEARCH SERV., THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: REGULATIONS TO BE ISSUED BY THE CONSUMER FINANCIAL PROTECTION BUREAU 26 (2010).

on the maximum number of appointees from a single political party,⁸⁷ there is no similar mechanism to ensure that opposing ideological views are represented at the highest level of Bureau decision-making. The Chamber of Commerce has offered four reasons for its support of H.R. 1121, which would replace the director with a five-member commission: (1) “[c]onform[ing] the Bureau to other independent agencies”; (2) “ensur[ing] better, impartial decision-making”; (3) “minimiz[ing] risk of regulatory capture”; and (4) “ensur[ing] continuity and stability.”⁸⁸ It seems doubtful that the supposedly more streamlined and efficient decision-making made possible by having a single Director⁸⁹ is a sufficient justification for these concerns.

In sum, while it appears that the Bureau is indeed within the bounds of that version of the nondelegation doctrine applied in practice by the Court, there are numerous provisions of the Act that seem to conflict squarely with the spirit of the nondelegation principle. One justification for this could perhaps be the fact that the delegation of such discretion is the small price that must be paid to avoid the even greater administrative overreach that occurred during the financial crisis. In particular, it is arguable that the expansive use by the Federal Reserve of its discount window⁹⁰ and the enactment of

⁸⁷ No more than three of the five members of the Securities and Exchange Commission may be from the same political party. 15 U.S.C. § 78d(a) (2006).

⁸⁸ *Legislative Proposals to Improve the Structure of the Consumer Financial Protection Bureau: Hearing Before the S. Comm. on Financial Institutions and Consumer Credit*, 112th Cong. (2011) (statement of the U.S. Chamber of Commerce), available at <http://financialservices.house.gov/media/pdf/040611sharp.pdf>.

⁸⁹ *See Legislative Proposals to Improve the Structure of the Consumer Financial Protection Bureau: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit*, 112th Cong. (2011) (statement of Adam J. Levitin, Assoc. Professor of Law, Georgetown University), available at <http://financialservices.house.gov/media/pdf/040611levitin.pdf> (“This model enhances accountability and enables streamlined, decisive leadership and decision-making.”).

⁹⁰ Section 13 of the Federal Reserve Act provides that “[i]n unusual and exigent circumstances,” the Board of Governors can authorize any Federal Reserve bank to discount for any corporation “notes, drafts, and bills of exchange [when] . . . indorsed or otherwise secured to the satisfaction of the Federal Reserve bank” so long as “before discounting . . . the Federal reserve bank . . . obtain[s] evidence that such . . . corporation is unable to secure adequate credit accommodations from other banking institutions.” 12 U.S.C. § 343 (2006). Although it had not been used as such since the Great Depression, during and after the crisis, the Fed seized upon this broad language that seemingly allows it to lend to anybody without any realistic fear of judicial review. Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government’s Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 477–78 (2009) (“This particular government action also set a precedent: it was done . . . via the legal authority that would be used for each of the government’s ad hoc bailouts For the legal authority to make this loan, the Federal Reserve relied upon the broad language of its discount window authority . . . a law that was last invoked

TARP⁹¹ represent far greater abdications of legislative responsibility than Dodd-Frank. If the Bureau is indeed able to accomplish the goals that led to its creation and prevent the future need to resort to such dramatic programs, perhaps it should be seen as a positive even to advocates of a revived nondelegation doctrine.

At the same time, however, if principles as supposedly fundamental as the nondelegation doctrine can be abandoned in times of crisis, are they really fundamental at all? If the government itself can not be expected to adhere to the “spirit of the law,” it seems unfair for it to blame private enterprises for seeking regulatory loopholes as well. It appears that in drafting the Act, Congress clearly did have an understanding of what type of statutes would and would not be struck down by the Court as unconstitutional delegations of power; unfortunately, it seems that they did not have an understanding of the real idea behind the nondelegation principle.

to the benefit of nonbanks in the Great Depression. . . . in administering the discount window and providing assistance to banks, the Federal Reserve’s actions are effectively removed from judicial review.”). All in all, the Fed used its discretion to make loans in an amount of \$3.3 trillion during the period from December 2007 to July 2010, and needless to say, Congress played little role in guiding its discretion. Leo & Randall, *supra* note 16 (“The U.S. central bank on Wednesday disclosed details of some \$3.3 trillion in loans made to financial firms, companies and foreign central banks during the crisis.”).

91 TARP authorized the Secretary of the Treasury, with a budget of \$750 billion, to “purchase . . . troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary.” Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 101(a)(1), 122 Stat. 3765, 3767 (2008) (to be codified at 12 U.S.C. § 5211). The act provided little guidance to the Secretary, dictating, for example, that the purchases be limited to those which he “determines promotes financial stability,” that the Secretary “prevent unjust enrichment of financial institutions” and that he “take into consideration” nine equally indeterminate factors. *Id.* at §§ 3(9), 101(e), 103, 122 Stat. at 3767–68, 3770, (to be codified in scattered sections of 12 U.S.C.). Numerous scholars have questioned the constitutionality of these actions. *See e.g.*, Davidoff & Zaring, *supra* note 90, at 516 (“The constitutional question most troublingly presented by the Paulson draft [proposal for the TARP]—albeit less obviously by the congressional statutes that elaborated Treasury’s responsibilities and that followed it—was whether the bill delegated an unconstitutionally undefined amount of power to Treasury.”); Gary Lawson, *Burying the Constitution Under a TARP*, 33 HARV. J.L. & PUB. POL’Y 55, 61 (2010) (“Even assuming that Congress somehow has the power to turn the Treasury Department into a subsidiary of Countrywide, the statutory authorization to the Treasury in TARP violates the constitutional nondelegation principle.”).

IV. ELIZABETH WARREN & THE APPOINTMENTS CLAUSE

Another example of the Administration's failure to adhere to the spirit of long-established constitutional doctrines is the appointment without Senate approval of Elizabeth Warren as "Assistant to the President and Special Advisor to the Secretary of the Treasury on the Consumer Financial Protection Bureau." While Warren has since resigned from this post and President Obama has nominated former Ohio Attorney General Richard Cordray to be the Bureau's first Director, the issues raised by the initial appointment of Warren remain significant.⁹² Exemplary of critics who have chastised the Administration for the exploitation of a constitutional loophole is Professor Bruce Ackerman, who called the appointment "another milestone down the path toward an imperial presidency" and has said that "[d]uring America's first 150 years, Ms. Warren's appointment as a special advisor to the White House would have been unthinkable."⁹³ Much as Congress crafted Dodd-Frank to ensure that the Bureau would not violate the black-letter rules of the non-delegation doctrine, President Obama has made sure not to violate any provision of the Court's Appointments Clause doctrine in his appointment of Warren. As I will argue in this section, however, the appointment did represent a significant deviation from the spirit of the Appointments Clause, and is as great a cause of concern as the above-described non-delegation issues.

Before analyzing the appointment, I will begin this section in Part A by summarizing the Court's relevant Appointments Clause doctrines. In Part B, I will apply these doctrines to the appointment of Warren. Specifically, I will argue in Part B that the undefined scope of the powers granted to Warren during her tenure with the Bureau is itself indicative of the Administration's willingness to stray from the spirit of the law. I will also argue in favor of an interpretation of the Act that would have restricted Warren's powers, and brought the appointment back within the confines of the law's intent.

⁹² Press Release, U.S. Dep't of the Treas., Treasury Department Announces Plans for Leadership Transition at the Consumer Financial Protection Bureau (July 26, 2011), available at <http://www.treasury.gov/press-center/press-releases/Pages/tg1258.aspx>.

⁹³ Bruce Ackerman, *Obama, Warren and The Imperial Presidency*, WALL STREET J., Sept. 22, 2010 <http://online.wsj.com/article/SB10001424052748703989304575503661726493580.html>.

A. *Summary of the Appointments Clause Doctrine*

Article II, Section 2, Clause 2 of the Constitution, commonly referred to as the Appointments Clause, reads in relevant part that:

[The President] shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.⁹⁴

In accordance with this provision, the first step in assessing the constitutionality of the mechanism used to appoint an agency official is determining whether the official is an “Officer of the United States.” The Court in *Buckley v. Valeo* held that a person is such an officer if they exercise “significant authority pursuant to the laws of the United States.”⁹⁵ The Court made clear, however, that the term does not apply to employees of the United States who are “lesser functionaries subordinate to officers of the United States.”⁹⁶

If it is determined that an official is an Officer of the United States, the next step is determining whether he is a “principal” officer or an “inferior” officer. If he is the former, Senate confirmation of his appointment is required, and if he is the latter, Congress may vest appointment power in the President.⁹⁷ In *Morrison v. Olson* the Court acknowledged that the Founders provided little guidance as to where to draw the line between these two categories. Rather than adopting a bright line rule, the Court set out four criteria to provide guidance to courts making such a determination, including: (1) whether the officer is subject to removal by a higher official other than the President; (2) whether the scope of the office is limited in duties; (3) whether the scope of the office is limited in jurisdiction; and (4) whether the length of the officer’s tenure is limited in time.⁹⁸ In *Edmond v. United States* the Court emphasized that it is the first of these four factors that is the most important.⁹⁹

94 U.S. CONST. art. II, § 2, cl. 2.

95 424 U.S. 1, 126 (1976) (per curiam).

96 *Id.* at 126 n.162.

97 *See id.* at 132 (“Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone . . .”).

98 *See Morrison v. Olson*, 487 U.S. 654, 671–72 (1988) (discussing the factors which determined whether the appellant is an inferior officer).

99 *See Edmond v. United States*, 520 U.S. 651, 662 (1997) (“Generally speaking, the term ‘inferior officer’ connotes a relationship with some higher ranking officer or officers be-

B. Application of the Doctrine to the Warren Appointment

Turning now to the application of this doctrine to the Bureau, it seems clear that since the Director has vast investigative, prosecutorial, and adjudicative powers, and is removable by the President only for cause, that he qualifies as a principle “Officer of the United States.” What is more questionable, however, is whether Warren was also such an officer. In this section I separate the analysis of this question into two parts. In the first, I will attempt to identify the scope of the powers that were granted to Warren, and suggest that there are two general possibilities for what they included. I will conclude that the undefined nature of these powers is itself indicative of the Administration’s willingness to stray from the spirit of the law. In the second part, I will analogize the appointment to the issuance of an executive order and argue in favor of an interpretation of the Act that would have restricted Warren’s powers, and brought the appointment back within the confines of the law’s intent.

1. Identifying the Scope of Warren’s Powers

Before deciding whether the appointment of Warren should have been subject to Senate confirmation, we must determine the scope of Warren’s powers. While one can look back on Warren’s tenure and examine what powers she *actually exercised*, the relevant question for our analysis is determining what powers she was *legally authorized to exercise*. Unfortunately, however, the Administration has provided little guidance for this inquiry. The White House press release announcing the appointment said only that “Professor Warren has been a pioneer on the issues before the Consumer Financial Protection Bureau, and she will now help lead the effort to stand up the agency.”¹⁰⁰ The Bureau website, while providing a bullet point list of jobs that the “Implementation Team” is “hard at work on,” also failed to define the outer limits of Warren’s powers.¹⁰¹ This being the case, we must turn

low the President: Whether one is an ‘inferior’ officer depends on whether he has a superior.”).

100 Press Release, White House Office of the Press Secretary, President Obama Names Elizabeth Warren Assistant to the President and Special Advisor to the Secretary of the Treasury on the Consumer Financial Protection Bureau (Sep. 17, 2010), *available at* <http://www.whitehouse.gov/the-press-office/2010/09/17/president-obama-names-elizabeth-warren-assistant-president-and-special-a>.

101 Specifically, the Bureau website provides that the Bureau is “hard at work”: (1) “[m]eeting with consumer groups and financial services companies to ensure the consumer bureau’s work targets real problems people encounter in the marketplace;” (2) “[s]etting up and training the teams that will be responsible for supervising and enforce-

to the text of the Act to speculate on what these powers may have included.

Some have suggested that Warren's position was akin to that of an "interim Director," a position explicitly created in the Act and filled by the Secretary of the Treasury. Section 1066 of the Act authorizes the Secretary of the Treasury "to perform the functions of the Bureau under . . . subtitle [F] until the Director of the Bureau is confirmed by the Senate."¹⁰² If Warren was indeed intended to have been some sort of interim Director, her powers would presumably have been the same as those temporarily granted by the Act to the Secretary. Unfortunately, however, this only leads to another question: What are the powers of the Secretary? There seem to be two different answers to this question depending on how the Subtitle is interpreted.

Subtitle F is, in summary, the section of the Act that describes the "transitional provisions" for the Bureau. The subtitle provides a definition of "consumer financial protection functions," including authority to promulgate rules,¹⁰³ and dictates that these should be transferred from various other agencies to the Bureau by a designated transfer date.¹⁰⁴ Not later than this date, which occurred on July 21, 2011, the Bureau "shall, after consultation with the head of each transferor agency, identify the rules and orders that will be enforced by the Bureau."¹⁰⁵ The Subtitle also directs the Bureau and the heads of various other agencies to identify employees who are to be transferred to the Bureau.¹⁰⁶ Under one interpretation of the Subtitle, the power of the Secretary of the Treasury is limited to these transitional functions. While the Secretary could lay the groundwork for future rulemaking proceedings, the agency would be unable to promulgate any legally enforceable new rules. Although some might argue that

ing Federal consumer financial laws;" (3) "[l]aying the groundwork to enforce Federal consumer financial laws and to write new rules required by the Dodd-Frank Act;" (4) "[d]eveloping a website for complaints and toll-free hotline for consumers;" and (5) "[p]reparing to open offices to assist specific groups of consumers, including offices for Servicemember Affairs and Financial Protection for Older Americans, as specifically required under the Dodd-Frank Act." Consumer Finance Protection Bureau, <http://www.consumerfinance.gov/the-bureau> (last visited July 11, 2011). For an additional source containing this list, see *Consumer Financial Protection BUREAU*, U.S. DEPARTMENT OF THE TREASURY, http://www.treasury.gov/about/budget-performance/Documents/CJ_FY2012_CFPB_508.pdf (last visited Oct. 5, 2011).

102 Dodd-Frank Wall Street Reform and Consumer Protection Act § 1066, 124 Stat. at 2055 (to be codified at 12 U.S.C. § 5586).

103 *Id.* at § 1061(a)(1), 124 Stat. at 2035 (to be codified at 12 U.S.C. § 5581).

104 *Id.* at § 1062, 124 Stat. at 2039 (to be codified at 12 U.S.C. § 5582).

105 *Id.* at § 1063(i)(1), 124 Stat. at 2043 (to be codified at 12 U.S.C. § 5583).

106 *Id.* at § 1064, 124 Stat. at 2043 (to be codified at 12 U.S.C. § 5584).

granting even this authority to Warren would have been unconstitutional, it seems at least relatively unproblematic if the Secretary had final say.

It is under the second interpretation of the Subtitle that things look particularly troubling. Specifically, under this interpretation, the Secretary would not only have the authority to identify rules and orders to be enforced by the Bureau, but also the authority to begin executing the “consumer financial protection functions” transferred to the Bureau—most significantly, initiating new rulemaking proceedings.¹⁰⁷ Support for this interpretation can be found in *National Petroleum Refiners Ass’n v. FTC*, where the D.C. Circuit held that when an agency’s organic statute contains a grant of rulemaking authority, the agency’s expansive interpretation of the ambiguous scope of the authority should receive deference if the disputed rulemaking function would be effective at furthering the purposes of the statute.¹⁰⁸ Specifically, the court upheld the Federal Trade Commission’s authority to promulgate substantive legislative rules to enforce its mandate to prevent “unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce,” despite the fact that the agency itself did not assert the power to promulgate such rules until forty-eight years after its founding, and had “indicated intermittently before that time that it lacked such power.”¹⁰⁹

Analogous to the Federal Trade Commission Act, Dodd-Frank confers a broad grant of rule-making to the Bureau, and Subtitle F contains no specific limitation on this rulemaking authority prior to the confirmation by the Senate of a permanent Director. As such, it is entirely plausible that a court could interpret the statute to allow the Secretary of the Treasury to promulgate rules. Even if Warren would have had to defer final authority to the Secretary, it is possible

107 This second interpretation includes the possibility of the Secretary only having power to promulgate rules enforcing those laws the enforcement of which were transferred to the Bureau from other agencies (as opposed to laws created by the Act and specifically allocated to the Bureau). It also includes the possibility of the Secretary only being authorized to promulgate rules enforceable against financial institutions (as opposed to rules also enforceable against those nonfinancial institutions coming within the Bureau’s jurisdiction).

108 482 F.2d 672, 693 (D.C. Cir. 1973) (“Ambiguous legislative history cannot change the express legislative intent. The Commission is using rule-making to carry out what the Congress agreed was among its central purposes: expedited administrative enforcement of the national policy against monopolies and unfair business practices. Under the circumstances, since Section 6(g) plainly authorizes rule-making and nothing in the statute or in its legislative history precludes its use for this purpose, the action of the Commission must be upheld.”).

109 *Id.*

that she would have had substantial influence on the content of any promulgated rules.

Unfortunately, the administration failed to provide any clear description of how it would interpret the Act. When asked by Senator Robert Corker if he believed the Bureau had rulemaking authority before the confirmation of a Director, Deputy Secretary of the Treasury, Neal Wolin, responded only vaguely, saying “I think there is limited rule-writing authority, but it is constrained until such time as there is a confirmed Director.”¹¹⁰ When asked to elaborate whether there is rulemaking authority before the designated transfer date, Wolin again provided only a squeamish answer, saying “I think the rulemaking authority is circumscribed.”¹¹¹

As indicated by *National Petroleum Refiners*, even if Wolin at one time asserted that there is only limited rulemaking authority, this does not weigh negatively on allowing him to change his mind. Regardless of whether the Bureau eventually decides that it will or will not promulgate rules before the confirmation of a permanent Director, it is the lack of clarity by the Administration on the role of Warren and the powers of the Bureau that suggests that they are willing to divert from the spirit of the law if necessary.

2. *Executive Orders: An Analogy in Support of the Restriction of Warren’s Powers*

No matter how detailed or intricate a legal doctrine is, it is nearly impossible for a court to articulate one that, if followed, would simultaneously prevent all possible exploitations of the law. Even without the formal appointment of Warren, there is nothing that could have stopped the President from unofficially soliciting her advice and forcing it upon his Treasury Secretary.¹¹² After all, if the Secretary refused to obey such an order the President could threaten him with removal from his post. Nevertheless, it seems that there should be some legal mechanism to prevent the more formal appointment of an advisor who is charged with duties identical to those Congress has meant to

110 *Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 111th Cong. 25 (2010) (statement of Neal S. Wolin, U.S., Member, S. Comm. on Banking, Housing, and Urban Affairs).

111 *Id.* at 30.

112 *See e.g.*, Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate Over Law or Politics?*, 12 U. PA. J. CONST. L. 637, 645–46 (2010) (arguing that “any theoretical difference between influence and control, or between oversight and decision, will not be observed in practice . . . [T]he two extremes themselves are, practically speaking, indistinguishable. One person’s ‘oversight’ will be another person’s ‘decision’”).

delegate to a Senate-confirmed appointee. One theoretical way in which a limitation on the authority of such an advisor can be envisioned is by analogizing the advisor's appointment and influence to that of an executive order. If the President would be unable to control the Bureau centrally through the use of executive orders forcing the Secretary of the Treasury to follow his instructions, he also should not be able to usurp the Bureau through the use of an official advisor like Ms. Warren.

For the present purposes, let us adopt the views of the Court's newest member, Elena Kagan, regarding the authority of the President to issue binding executive orders. Under the view of Justice Kagan, the fact that the Court has allowed for Congress to place restrictions on the President's ability to remove an agency head implies that "it can advance the same end by barring the President from imposing his policy choices on them."¹¹³ According to Kagan, the President generally has authority to issue a binding executive order on an agency head if Congress has allowed the President to remove the official without cause, and generally does not if Congress has prohibited such removal.¹¹⁴ Although it is possible for Congress to mix-and-match executive order authority with varied removal restrictions to the extent that the combination does not impede the President's duty to "take Care that the Laws be faithfully executed,"¹¹⁵ since Congress does not tend to be explicit on such matters, courts should adopt the above rule of statutory interpretation.¹¹⁶

There is a peculiar problem, however, with applying this rule to Dodd-Frank; although the permanent Director of the Bureau is removable only for cause, there is no such restriction on the removal of the interim Director, who is a cabinet official removable at the President's whim. The rule's application would imply that the President

113 Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2323 (2001).

114 *Id.* at 2327–28.

115 *Id.* (“[E]ven if Congress has not . . . [chosen to insulate an official from the President’s at-will removal authority], it should be able, as an alternate means of ensuring a measure of independence, to limit the President’s directive authority . . .”). *But see id.* at 2323 n.306 (“It is possible to argue . . . that Congress must choose between limiting the President’s removal power and giving him plenary control over administrative officials . . .”).

116 *Id.* at 2326–27 (“If Congress, in a particular statute, has stated its intent with respect to presidential involvement, then that is the end of the matter. But, if Congress, as it usually does, simply has assigned discretionary authority to an agency official, without in any way commenting on the President’s role in the delegation, then an interpretive question arises. . . . When the delegation in question runs to members of an independent agency Congress has acted . . . to insulate agency decisionmaking from the President’s influence. . . . When the delegation runs to an executive branch official, however, Congress’s intent . . . may well cut in the opposite direction.”).

will have executive order authority before the confirmation of a permanent Director, but will not have such authority thereafter. If this were indeed the case, the President would have no incentive to appoint a permanent Director, for it would result in him abdicating his power to influence the Bureau—a situation clearly outside the conceivable realm of Congressional intent. As such, the Act seems to present an instance where Justice Kagan’s rule of interpretation is inapplicable, and the ability of the President to remove the interim head of the agency should not be viewed as also enabling him to issue a binding executive order on the Bureau. Completing the analogy, the President should also not have authority to make an appointment, the effect of which would be to control the interim Director of the Bureau.

To avoid the problems implicated by this second suggested construction of the Act, granting the Treasury Secretary the authority to execute the “consumer financial protection functions” transferred to the Bureau, I recommend that any reviewing court should instead follow the first suggested interpretation, limiting the Secretary to the less worrisome transitional powers described above. While even this may not quell the worries of all constitutional scholars, it at least in some way limits the influence that a nonelected official can have on issues of national regulatory policy without the confirmation of the Senate. Had the Administration been clearer about its intent in appointing a “special advisor,” however, such worries may never have arisen in the first place.

V. CONCLUSION

The Bureau of Consumer Financial Protection has been envisioned by some to be the “first truly 21st century regulatory agency”—one that “will be engaged with the community and make use of new technology to gather data quickly and put it to use immediately to protect consumers.”¹¹⁷ Although the goals of the Bureau may well set a healthy precedent for the country’s regulatory agenda moving forward in the century, the manner of the Bureau’s conception and the early stages of its life certainly portend trouble for some of administrative law’s longest established principles. While Congress and the Administration have been careful to stay within the bounds of the Court’s nondelegation and Appointments clause doctrines—

¹¹⁷ Preeti Vissa, *Face-to-Face With Elizabeth Warren: Envisioning a 21st Century Consumer Agency for All Americans*, HUFFINGTON POST (Nov. 3, 2010), http://www.huffingtonpost.com/preeti-vissa/facetoface-with-elizabeth_b_778396.html.

explicitly providing standards and objectives for the Bureau's rule-making, and naming Elizabeth Warren as "Special Assistant" rather than an "interim Director"—it appears, unfortunately, that they have not had equal regard for the motivating spirit behind these laws. As stated at the outset of this Comment, courts are inherently limited in their ability to articulate doctrines that fully capture this spirit, and as such, the public must be able to trust that its elected officials will endeavor to act in accordance with the broader purposes of the law rather than a court's mere statement of it. If the Bureau is indeed the prototype of the twenty-first century agency, it seems that this relationship of trust is in dire need of rehabilitation.