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DOES *STATE NATIONAL BANK OF BIG SPRING V. GEITHNER* STAND A FIGHTING CHANCE?

DEVON J. STEINMEYER*

INTRODUCTION

The 2008 Financial Crisis sent ripple waves through the domestic and global financial markets that will keep everyone on their toes for years to come.[1] The crisis prompted Congress to act. After nearly two years of research, hearings, investigations, and negotiations,[2] President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "the Act").[3] The Act has wide-reaching effects on nearly every aspect of the U.S. economy, not just the financial services industry.[4]

Congress' passage of the Act was not easy and the debate over whether the Act is necessary, constitutional, or economically beneficial still rages today.[5] A recently filed complaint in the D.C. District Court raises constitutional challenges to numerous parts of the Act.[6] If the plaintiffs in *State National Bank of Big Spring v. Geithner* ("*SNB v. Geithner*" or "*SNB*") are successful, the decision could dismantle a large portion of the Dodd-Frank Act.[7]

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1. Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis*, 13 N.C. BANKING INST. 5, 7 (2009).

2. *See generally* Thomas L. Hazen & Jerry W. Markham, *The Dodd-Frank Act of 2010*, 23 BROKER-DEALER OPERATIONS SEC. & COMM. LAW § 2A:19.

3. 12 U.S.C. §§ 5301-5641 (2012).

4. Khademian, A.M., *The Financial Crisis: A Retrospective*, 71 PUBLIC ADMINISTRATION REVIEW 821, 841 (2011).

5. *See generally* C. Boyden Gray, *Congressional Abdication: Delegation Without Detail and Without Waiver*, 36 HARV. J.L. & PUB. POL'Y 41 (2013); Responsible Consumer Financial Protection Regulations Act of 2013, S. 205, 113th Cong. (2013).

6. First Amended Complaint for Declaratory and Injunctive Relief at ¶¶ 42-54, State Nat'l Bank of Big Spring v. Geithner, No. 1:12-cv-01032, 2012 WL 4229466 (D.D.C. filed Sept. 20, 2012) [hereinafter First Amended SNB Complaint].

7. *See* Paul Mirengoff, *Major Lawsuit Challenges the Constitutionality of Dodd-Frank*, POWERLINE (June 21, 2012), *available at* http://www.powerlineblog.com/archives/2012/06/major-lawsuit-challenges-the-constitutionality-of-dodd-frank.php.

This note will address constitutional challenges to the Financial Stability Oversight Council (FSOC) and the Consumer Financial Protection Bureau (CFPB) raised in *SNB v. Geithner* and illustrate why the D.C. District Court should find in favor of the plaintiffs on some of their challenges.[8] Part I will briefly describe the events that led to the 2008 Financial Crisis, provide an overview of the Dodd-Frank Act and the legislative history behind its passage, and provide a summary of the challenges to the Dodd-Frank Act's constitutionality raised in *SNB v. Geithner*. Part II will quickly address whether the parties in the suit have standing to bring their claims. Part III will address the Supreme Court's current separation of powers jurisprudence, as it relates to the *SNB* Amended Complaint. Finally, Part IV will use *SNB v. Geithner* to test the constitutionality of the CFPB and the FSOC.

I. CAUSES OF THE 2008 FINANCIAL CRISIS AND CONGRESS' RESPONSE

A. Brief Overview of the 2008 Financial Crisis

The 2008 Financial Crisis actually started in August 2007[9] after a slowing of the global economy and unprecedented decreases in U.S. home values.[10] Relatively low interest rates during the period encouraged investors to look for high yielding, relatively safe (or so they thought) investment vehicles.[11] Collateralized Debt Obligations (CDOs) backed by subprime mortgages became commonplace in the market.[12] A CDO is es-

8. For the purposes of this note, I will only address Counts I and III of the *SNB v. Geithner* Amended Complaint. At the outset of my research process, only Counts I through III were included in the complaint, and for space and time constraints, the portions of the complaint that deal with the "Orderly Liquidation Authority" will not be discussed or analyzed. Brent Horton provides an in depth review of the "Orderly Liquidation Authority" and its constitutionality. *See generally* Brent J. Horton, *How Dodd-Frank's Orderly Liquidation Authority for Financial Companies Violates Article III of the United States Constitution*, 36 J. CORP. L. 869 (2011). Additionally, during the writing the of this article the D.C. Circuit Court struck down the recess appointment of the three of the five members of the National Labor Relations Board. Canning v. N.L.R.B., 705 F.3d 490, 499 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (June 24, 2013). Since Richard Cordray, the Director of the CFPB, was appointed at the same time as the NLRB members, it stands that his appointment was also unconstitutional; this obviates the need to discuss Count II. *See Financial Regulatory Reform: GOP Senators Continue to Press Case for CFPB Structural Reform*, CCH BANK DIGEST, Vol. 2013-23, Feb. 4, 2013, *available at* 2013 WL 3836494; Timothy S. Crisp & Ryan N. Parsons, *CFPB Powers Could Be Invalidated Following Ruling On NLRB Recess Appointments*, *Intelligence*, FOLEY & LARDNER, LLP (Jan. 25, 2013), http://www.foley.com/cfpb-powers-could-be-invalidated-following-ruling-on-nlrb-recess-appointments-01-25-2013/.

9. William Poole, *Cause and Consequences of the Financial Crisis of 2007-2009*, 33 HARV. J.L. & PUB. POL'Y 421, 422 (2010). *See generally* DAVID WESSEL, IN FED WE TRUST: BEN BERNANKE'S WAR ON THE GREAT PANIC (2009).

10. Poole, *supra* note 9, at 426.

11. *Id.* at 424.

12. *Id.*

sentially a bundle of individual loans (i.e., home loans, car loans, credit default swaps, etc.) repackaged and sold to investors on the secondary market.[13]

At the time, most investors and analysts generally accepted the principle that real estate would continue to appreciate and therefore extended loans to borrowers who did not have the income or assets to service the loan; lenders assumed that they would have the appreciated home as collateral and could therefore recoup the loan amount if the borrower defaulted. However, home values reached unsustainable levels and began to fall, which in conjunction with increasing adjustable interest rates and a slowing economy caused many homeowners to default on their home mortgages. Furthermore, the homeowners were unable to refinance their homes because the value of their mortgages exceeded the values of their homes. When the individual creditors defaulted, the banks foreclosed on homes that were worth significantly less than the mortgage value. This decrease in value directly affected the CDOs that bundled and sold these mortgages.

Once it became apparent that many of the largest financial institutions in the world had massive exposure to mortgage-backed CDOs, the credit markets froze. Banks were not willing to or did not have the capacity to extend credit to other banks and financial institutions, and available liquidity in capital markets around the world dried up.

The financial crisis occurred in several waves.[14] The first wave occurred in March 2008 when financial markets, realizing Bear Sterns was over-exposed to risky investments, cut off the company's ability to secure funding to maintain its operations.[15] In order to keep Bear Sterns afloat, the U.S. Government provided an emergency loan to the company and brokered a deal with JP Morgan to purchase the investment bank.[16] The second wave of the financial crisis occurred on September 15, 2008 when the U.S. government refused to bail out Lehman Brothers, a company much larger than Bear Stearns, forcing Lehman to file for bankruptcy protection.[17] The third wave started the day following Lehman's bankruptcy filing when lending institutions responded by effectively freezing credit markets.[18] The Government's determination that American Insurance

13. Neal Deckant, *X. Reforms of Collateralized Debt Obligations: Enforcement, Accounting and Regulatory Proposals*, 29 REV. BANKING & FIN. L. 79, 80 (2009). CDOs offer varying levels of risk depending on the "tranche" each investor wishes to enter into, with each "tranche" being independently rated by credit rating agencies.

14. Poole, *supra* note 9 at 422-23.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

Group (AIG) was "too big to fail" and its subsequent bail out of the company further exacerbated the credit crisis.[19] Finally, after several months, the credit markets began to loosen and liquidity returned to the markets, but not after a huge decrease in economic activity and wealth across the world.[20] Given the tremendous loss in net worth stemming from the financial crisis, it was inevitable that Congressional investigation and action would occur.

B. Response to the 2008 Financial Crisis

Immediately following the 2008 financial crisis and the bail out of some of the world's largest companies, Congress set out to determine what caused the massive meltdown and how to keep another similar crisis from occurring.[21] Congress' answer was the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[22] When President Obama signed the 848-page bill,[23] it became the most significant piece of legislation to target the financial industry since the enactment of the Securities Exchange Act of 1934.[24] Congress passed the Act to "promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail', [sic] to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes."[25] Along with countless new banking and financial industry regulations, the Act also created two new government entities.[26] The Act is broken down into eight subchapters, with each subchapter directed at a different issue that surfaced in the wake of the financial crisis. For purposes of this article and the *SNB v. Geithner* case, only the following subchapters are relevant.[27]

19. *Id.*

20. *Id.*

21. Cody Vitello, *The Wall Street Reform Act of 2010 and What it Means for Joe & Jane Consumer*, 23 LOY. CONSUMER L. REV. 99, 99 (2010-2011).

22. 12 U.S.C. §§ 5301-5641 (2012).

23. *The Dodd-Frank Act: Too Big Not to Fail*, ECONOMIST, Feb. 18, 2012, *available at* http://www.economist.com/node/21547784

24. Vitello, *supra* note 21, at 99.

25. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub L. 111-203, Preamble, 124 Stat 1376 (2010).

26. 12 U.S.C. § 5321 (2012) (establishing the Financial Stability Oversight Council); 12 U.S.C. § 5491 (2012) (establishing the Consumer Financial Protection Bureau).

27. For purposes of this article, the following Subchapters of the Dodd-Frank Act will not be addressed: Subchapter III (Transfer of Powers to the Comptroller of the Currency, the Corporation, and the Board of Governors); Subchapter IV (Payment, Clearing, and Settlement Supervision); Subchapter VI (Federal Reserve System Provisions); and Subchapter VII (Improving Access to Mainstream Financial Institutions).

1. Subchapter I: Financial Stability

Subchapter I of the Act established the Financial Stability Oversight Council. The primary purposes of the FSOC are to: (1) identify nonbank financial companies[28] or bank holding companies that may become "systemically important" and threaten the financial stability of the United States if they were to fail; (2) provide stability to financial markets and set the expectation that the Government "will [not] shield [companies] from losses in the event of failure"; and (3) identify new risks that emerge in the global financial market.[29] The FSOC includes ten voting members,[30] consisting of the heads of various other regulatory bodies and five non-voting members. The FSOC has the power to force the Federal Reserve, following a two-thirds majority vote, to designate a nonbank financial company as "systemically important." A so-designated company must fulfill stringent reporting and regulatory requirements that the FSOC and Federal Reserve, and notably *not* Congress, deem necessary. Additionally, the FSOC has the power to review and overturn any of the CFPB's regulations and administrative decisions.[31]

2. Subchapter II: Orderly Liquidation Authority

The Act created a systematic approach for dismantling a nonbank financial company whose default "would have serious adverse effects on financial stability in the United States."[32] In enacting this provision, Congress attempted to signal that no company was "too big to fail," and no matter what the interconnectivity or dependence that the market had on a company, the government would have a mechanism to liquidate the company.[33]

28. 12 U.S.C. § 5311 (2012) (providing definition of "nonbank financial company").

29. 12 U.S.C. § 5322(a)(1)-(2) (2012).

30. Voting members are: the Secretary of the Treasury, who shall serve as Chairperson of the Council; the Chairman of the Board of Governors; the Comptroller of the Currency; the Director of the Bureau; the Chairman of the Commission; the Chairperson of the Corporation; the Chairperson of the Commodity Futures Trading Commission; the Director of the Federal Housing Finance Agency; the Chairman of the National Credit Union Administration Board; and an independent member appointed by the President, by and with the advice and consent of the Senate, having insurance expertise. 12 U.S.C. § 5321(b)(1) (2012).

31. 12 U.S.C. § 5513(a) (2012).

32. 12 U.S.C. § 5383(b)(2) (2012).

33. Jamieson L. Hardee, *The Orderly Liquidation Authority: The Creditor's Perspective*, 15 N.C. BANKING INST. 259, 272-75 (2011).

3. Subchapter V: Bureau of Consumer Financial Protection

Prior to the enactment of Dodd-Frank, seven agencies[34] were involved in protecting consumers with respect to financial matters. With the passage of Dodd-Frank, the CFPB became the sole enforcer of the eighteen pre-existing consumer protection laws,[35] and the CFPB has the ability to promulgate new rules, as it deems necessary. Arguably, the CFPB is the most controversial portion of the Dodd-Frank legislation.[36] The main point of controversy surrounding the CFPB is its structure: namely, whether the executive or the legislative branches have any meaningful oversight power in regards to the CFPB's operations.

The Act meets an almost immediate constitutional challenge in the *SNB v. Geithner* lawsuit, the driver of this article, and to this lawsuit we must now turn.

C. The Facts, Parties, and Claims in SNB v. Geithner

One plaintiff, State National Bank of Big Spring, is located in Big Spring, Texas,[37] with two other locations in neighboring communities. The bank, chartered in 1909, is a community bank with less than $275 million in customer deposits.[38] Another plaintiff, 60 Plus Association, Inc. ("60 Plus"), is a nonprofit senior advocacy group promoting free enterprise and less government for senior-related issues.[39] Yet another plaintiff, Competitive Enterprise Institute ("CEI"), is an organization dedicated to "advancing the principles of limited government, free enterprise, and individual liberty."[40] Just recently, eleven States (Alabama, Georgia, Kansas, Michigan, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, and West Virginia) joined the lawsuit as plaintiffs as well.[41] SNB alleges various harms and damages resulting from the Dodd-Frank regulations. Specifical-

34. 12 U.S.C. § 5581(b)(1)-(7) (2012); Recent Legislation, *Administrative Law—Agency Design—Dodd-Frank Act Creates the Consumer Financial Protection Bureau-Dodd-Frank Act*, 124 HARV. L. REV. 2123, 2123 (2011) [hereinafter *Recent Legislation*].

35. 12 U.S.C. § 5581(b) (listing the agencies that transferred their "consumer financial protection functions" to the Board of Governors).

36. *Recent Legislation*, *supra* note 34, at 2123.

37. Big Spring, Texas, is located on Interstate-20 in west central Texas, approximately five hours due west from the Dallas/Ft. Worth area.

38. Jeff Bater, *Three States Join Suit Challenging Constitutionality of Dodd-Frank Reform Law*, 99 BANKING REPORT (BNA) 492, 497 (2012).

39. *About 60 Plus*, 60PLUS.ORG, http://www.60plus.org/about/ (last visited Nov. 22, 2013).

40. *About CEI*, CEI.ORG, http://cei.org/about-cei (last visited Nov. 20, 2013).

41. Second Amended Complaint for Declaratory and Injunctive Relief, State Nat'l Bank of Big Spring v. Geithner, No. 1:12-cv-01032, 2013 WL 1909751, at *1 (D.D.C. filed Feb. 19, 2013) [hereinafter Second Amended SNB Complaint].

ly, SNB's Amended Complaint alleges the following: (1) the Consumer Financial Protection Bureau (CFPB) violates the Constitution's separation of powers; (2) President Obama's appointment of Richard Cordray to the CFPB violates the Appointments Clause of the U.S. Constitution; (3) the Financial Stability Oversight Committee (FSOC) violates the Constitution's separation of powers; (4) the Orderly Liquidation Authority granted in Subchapter II violates the Constitution's separation of powers; (5) the Orderly Liquidation Authority violates the Due Process Clause; and (6) the Orderly Liquidation Authority violates the uniform law of bankruptcy pursuant to Article I, Section 8.[42]

The Plaintiffs have added various defendants including: (1) Secretary of the Treasury Timothy Geithner; (2) Director of the CFPB Richard Cordray; (3) Chairman of the Board of Governors Benjamin Bernanke and the other members of the Board of Governors; (4) the CFPB; (5) the Financial Stability Oversight Council and its members; and (6) various other government agencies and directors of those agencies.[43] Essentially, the Plaintiffs have created an exceedingly large defendant pool by naming anyone that plays a part in the Dodd-Frank regulations.

SNB argues that the CFPB and its Director, Richard Cordray, have promulgated rules that unduly constrain the bank's ability to offer services to its customers (e.g., CFPB's regulations forced SNB to drop its international remittance transfer offerings).[44] Additionally, SNB alleges that, because the CFPB can retroactively punish the bank for its lending practices, the bank is constrained in its ability to make business decisions without knowing what the actual CFPB regulations are, which will ultimately force the bank to abandon its consumer mortgage business until the CFPB regulations are clear.[45] Finally, SNB asserts that the FSOC's ability to anoint certain financial institutions as "systemically important" provides these institutions with a direct cost-of-capital subsidy. This subsidy stems from customers and other banks' views that a bank that is "systemically important" is less risky, and thus is able to obtain financing at a lower rate and pass the cost savings onto customers. SNB argues that this subsidy directly harms them because they do not receive the subsidy and thus cannot offer services at competitive rates.

CEI and 60 Plus each allege that the increased compliance costs associated with the CFPB forces banks to pass costs to customers or drop ser-

42. First Amended SNB Complaint, *supra* note 6, at 6-8.
43. *Id.* at 12-14.
44. *Id.* at 8-9.
45. *Id.*

vice offerings, which directly affects the ability of the members of these organizations to obtain affordable banking services (e.g., checking accounts, mortgages, credit cards, etc.).[46] Finally, the Attorneys General from the eleven States that have joined the suit claim that, because their States' pension funds have investments with financial companies subject to the "orderly liquidation" provisions of Dodd-Frank, the States would only get cents on dollar for their investments in such a liquidation, and would be on the hook for any deficiencies in their employee pension funds.[47]

With a base-level understanding of the events that precipitated the Dodd-Frank Act and the main arguments and facts surrounding the SNB lawsuit, we can now proceed with the analysis of the claims alleged in *SNB v. Geithner*. Congress' intent to consolidate the regulation of America's financial markets and institutions and provide a more efficient, transparent body of regulations emerges as a common theme in the Dodd-Frank Act. However, in attempting to create this more coherent financial regulatory scheme, Congress violated several of the Constitution's separation of powers provisions. As a threshold issue, it is unclear whether each plaintiff in *SNB v. Geithner* has standing to assert it claims, so a brief standing analysis provides a logical starting point.

II. Which Parties Have Standing to Allege Their Claims?

In order to engage the wheels of the judiciary, a plaintiff must allege sufficient facts to state an actual case or controversy.[48] The case or controversy requirement of Article III is one of the most important mechanisms to limit the courts, and it functions as a key element of the Constitution's separation of powers.[49] Both constitutional standing, under Article III, and court-imposed prudential standing rules limit a court's ability to hear and decide a case.[50]

The Constitution first requires the plaintiff to show an injury in fact, which is concrete and particularized, and actual or imminent, not conjectural or hypothetical.[51] Second, the injury in fact must have caused the plaintiff's injury. "[T]he injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent

46. *Id.* at 9-10.
47. *Id.* 37-38.
48. U.S. CONST. art. III, § 2, cl. 1
49. Allen v. Wright, 468 U.S. 737, 750 (1984).
50. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004).
51. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

action of some third party not before the court.'"[52] The third and final requirement of standing is redressability, which, simply stated, means that a favorable decision for the Plaintiff by the court will benefit the plaintiff or cure the plaintiff's injury.[53]

On the prudential side of the table, courts have developed three self-imposed limitations on the granting of federal jurisdiction: (1) "the general prohibition on a litigant's raising another person's legal rights;" (2) "the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches;" and (3) "the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked."[54] In order for a plaintiff to have its case heard, it must meet both the "case or controversy" requirements of Article III and avoid the prudential limitations developed by the courts. The Court in *Warth v. Seldin* summarized the idea of standing by saying:

> In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society.[55]

There seems to be a common theme running through the standing case law: if a court wants to get to the merits of the case they will find standing, and if they do not want to decide the case on the merits they will not find standing.[56]

With a cursory overview of the Supreme Court's standing jurisprudence, we will proceed with a brief analysis of the plaintiffs' standing in the *SNB v. Geithner* case. First, SNB likely has standing to enter the federal courts and pursue Counts I and II.[57] SNB has alleged an injury in fact: the inability to provide banking services because of the Dodd-Frank regulations.[58] They have also alleged that the defendants caused their injuries, as the CFPB's international remittance transfer regulations caused the bank to discontinue offering the services. Furthermore, SNB alleges that the

52. *Id.* (quoting Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 41-42 (1976)).

53. *Simon*, 426 U.S. at 39.

54. *Allen*, 468 U.S. at 751.

55. Warth v. Seldin, 422 U.S. 490, 498 (1975) (citations omitted).

56. *See* Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982); Craig R. Gottlieb, *How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns*, 142 U. PA. L. REV. 1063, 1064 (1994).

57. *But see generally* Memorandum in Support of Defendants' Motion to Dismiss the Amended Complaint, State Nat'l Bank of Big Spring v. Geithner, No. 1:12-cv-01032, 2012 WL 8017567 (D.D.C. filed Nov. 20, 2012).

58. First Amended SNB Complaint, *supra* note 6, at ¶ 68.

CFPB's open-ended grant of power and the uncertainty surrounding the ultimate CFPB rules have caused them to stop offering services for fear of retroactive punishment. Finally, a decision in SNB's favor would redress their harm, since they would be able to again offer services that they had to discontinue because of the enactment and promulgation of the Dodd-Frank regulations. SNB may not have standing in Count III simply because the FSOC has yet to designate any "systemically important" nonbank financial companies, so the controversy is not ripe.[59]

We will quickly dispense with the other parties to the suit because they are irrelevant to the analysis of SNB's core claims and as such fall outside of the scope of this article. CEI and 60 Plus likely have standing, but the court could dismiss their claims as potential "generalized grievance[s]." Michigan, Oklahoma, and South Carolina probably do not have standing to bring their claims because they have not incurred actual damage; they only allege hypothetical scenarios to challenge the FSOC's Orderly Liquidation Authority under the Dodd-Frank Act.[60]

For purposes of this article, we will assume that SNB does have standing to pursue Counts I, II, and III. Working off that assumption, Counts I, II, and III all raise separation of powers concerns and thus the next section will survey the Supreme Court's historical and current separation of powers jurisprudence.

III. THE SUPREME COURT'S CURRENT SEPARATION OF POWERS JURISPRUDENCE

The Supreme Court has had a checkered past when it comes to pronouncing a coherent and predictable analytical framework for separation of powers challenges.[61] The Supreme Court's decisions are very tough to

59. "Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 807-08 (2003) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148–149 (1967)).

60. Specifically, each plaintiff alleges that "[t]he [State] is ultimately liable for the payment of pensions . . . and thus any loss of property rights or investment value [attributable to the FSOC's Orderly Liquidation Authority] directly harms the State." SNB Complaint, *supra* note 6, at 10-12. These plaintiffs could argue that the rules regarding orderly liquidation are clear. It is inevitable that another large financial institution will be forced into liquidation by the FSOC, so their injury is imminent. However, this is quite the stretch of an argument.

61. E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 506-08 (1989).

synthesize in theory and even harder to apply in practice.[62] This section will first discuss how the Supreme Court distinguishes procedural or structural separation of powers violations from substantive or theoretical separation of powers violations. Next, this section will zero in on three particular separation of powers challenges relevant to the *SNB v. Geithner* case.

A. Separation of Powers, Generally

The first three articles of the Constitution establish the basis of the separation of powers doctrine.[63] The Constitution created a legislative branch with a Congress that has the power to make the laws,[64] an executive branch with a President to execute the laws,[65] and a judicial branch with one Supreme Court, and as many lower courts as Congress deems necessary, to interpret the laws.[66] Separation of powers is an inherently challenging concept to apply because there is not a single "separation of powers clause" like the Commerce Clause,[67] Appointments Clause,[68] Tax and Spending Clause,[69] etc. This lack of a separation of powers clause requires courts to look at all of the applicable provisions of the Constitution that develop the United States' tripartite system of government.[70]

When an act of one of the branches of government implicates separation of powers concerns, it is usually on a "you know it when you see it" basis. The inherent ambiguity of the idea requires attorneys, judges, and legislators to use their intuition to spot potential separation of powers violations. The Supreme Court cases dealing with separation of powers fall into two rough categories: (1) cases posing structural or procedural separation of powers concerns; and (2) cases posing substantive separation of powers concerns.[71]

62. *See, e.g.*, Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517-18 (1991); Ryan D. Newman, *From* Bivens *to* Malesko *and Beyond: Implied Constitutional Remedies and the Separation of Powers*, 85 TEX. L. REV. 471, 471 (2006).

63. Miller v. French, 530 U.S. 327, 341 (2000) (citing INS v. Chadha, 462 U.S. 919, 946, (1983)); William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263, 265-66 (1989).

64. U.S. CONST. art. I.

65. U.S. CONST. art. II.

66. U.S. CONST. art. III.

67. U.S. CONST. art. I, § 8, cl. 3.

68. U.S. CONST. art. II, § 2, cl. 2.

69. U.S. CONST. art. I, § 8, cl. 1.

70. Jack M. Beerman, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 472 (2011); Elliott, *supra* note 61, at 508. *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) ("The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.").

71. Beerman, *supra* note 70, at 472.

Courts strictly apply the separation of powers provisions when one of the key "structural aspects," enumerated above, is violated. Separation of powers inherent in the Constitution is a product of the structure defined in the Constitution and the process a particular government action must follow in order to become effective.[72] The key structural and procedural aspects of the Constitution are:

> [N]o simultaneous service in the Legislative and Executive Branches of government; independent election of the President and Congress; an independent judiciary with life tenure and protected compensation; the requirement that all laws be passed by both houses of Congress and presented to the President, who has the power to veto them; appointment of executive branch officials, ambassadors, and the like by the President with the advice and consent of the Senate; the Constitution's specification of the President's military and foreign affairs powers; and the imposition on the President of the duty to faithfully execute the laws.[73]

When an act of one of the branches of government is challenged for violating the separation of powers, the challenge typically hinges on the meaning and application of the procedure by which the action was taken and not an overarching separation of powers theory.[74]

For instance, in *INS v. Chadha*,[75] the Supreme Court effectively ended the concept of the legislative veto.[76] A legislative veto refers to an act of Congress that overturns (i.e., vetoes) an act or decision made by the executive branch.[77] Specifically in *Chadha*, the House of Representatives, pursuant to the Immigration and Nationality Act ("INA"), vetoed the decision of the executive branch to suspend Chadha's deportation.[78] The Court struck down the legislative veto provision in the INA because Congress did not follow the "finely wrought and exhaustively considered" procedure of bicameralism and presentment.[79]

Another example of the Court's strict adherence to the structural separation of powers provisions occurred in *Clinton v. City of New York*.[80] In *Clinton*, the Supreme Court struck down the Line Item Veto Act[81] because it essentially gave the President the authority to amend a statute without

72. *Id.* at 474.
73. *Id.* at 475.
74. *Id.* at 474.
75. INS v. Chadha, 462 U.S. 919 (1983).
76. *Id.* at 956-58.
77. BLACK'S LAW DICTIONARY 1700 (9th ed. 2009).
78. *Chadha*, 462 U.S. at 927-28.
79. *Id.* at 951.
80. 524 U.S. 417 (1998).
81. 2 U.S.C. §§ 691-92 (2000).

approval from Congress, which is not an enumerated Article II power.[82] The Court went to great lengths to differentiate the President's power to veto an entire bill and return it to Congress from his power to veto individual line items without Congress approving or rejecting the changes to the bill; the Court said that the latter was tantamount to legislating.[83] In both *Chadha* and *Clinton,* the Supreme Court made it abundantly clear that a statute, which attempted to alter the key structural aspects of the Constitution, was unconstitutional.[84]

However, if Congress leaves untouched the Constitution's procedural and structural guarantees, the Supreme Court is much more cautious to strike down legislation that only raises substantive (i.e., theoretical) separation of powers concerns.[85] *Morrison v. Olson*[86] is representative of the Supreme Court's unwillingness to strike down a statute for only general and minimal separation of powers violations. In *Morrison*, the Court upheld a general challenge to the Independent Council (IC) provision of the Ethics in Government Act, which Congress enacted in the wake of the Watergate Scandal.[87] The important issue in *Morrison* was whether the overall scheme enacted by Congress violated the general tripartite construction of government.[88] Under the scheme, a special D.C. District Court panel could appoint an IC to investigate "high-ranking Government officials for violations of federal criminal laws," and the IC did not report directly to the Attorney General or any other executive branch member.[89]

In dismissing the constitutional challenge, the *Morrison* Court found that the IC Appointment Provisions did not: (1) increase the powers of Congress at the expense of the executive branch; (2) cause judicial usurpation of functions properly reserved for the executive branch; or (3) undermine the powers of the executive branch or tip the balance of power to Congress by restricting the executive branch's ability to perform its constitutionally assigned functions.[90] The Court's holding makes it clear that it will uphold a general separation of powers provision if *only minimal* in-

82. *Clinton*, 524 U.S. at 438.

83. *Id.* at 439.

84. *See also* Buckley v. Valeo, 424 U.S. 1, 124-25 (1976) (finding that the appointment of Federal Election Commissioners violated the Appointment Clause of the Constitution and thus determining that a general separation of powers violation occurred was not necessary).

85. *See Clinton*, 524 U.S. at 476; Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 484 (1989) (Kennedy, J., concurring). *See also* Beerman, *supra* note 70, at 476.

86. 487 U.S. 654 (1988).

87. *Id.* at 658.

88. *Id.* at 660.

89. *Id.*

90. *Id.* at 694-96.

fringement of a branch occurs or if the branch retains sufficient control over a constitutionally assigned function.[91] However, in a more recent case, the Court "recognized that the three branches are not hermetically sealed from one another, but it remains true that Article III imposes some basic limitations that the other branches may not transgress."[92]

As the case law seems to suggest, it is helpful to break down the analysis into bipartite relationships when reviewing whether a statute impermissibly violates the Constitution's separation of powers. These relationships pose three typical questions and will each be discussed in turn: (1) Did Congress pass a law usurping power belonging to the executive branch under Article II?; (2) Did Congress pass a law delegating its legislative authority under Article I to the executive branch?; and (3) Did Congress pass a law usurping power belonging to the judicial branch under Article III?

B. Did Congress Pass a Law Usurping Power Belonging to the Executive Branch Under Article II?

Congress has, at times, enacted legislation that went beyond the "legislative sphere"[93] and encroached on the executive branch's power. To ensure that this encroachment does not occur, the Supreme Court has developed two basic restraints on Congress: (1) it may not "invest itself or its Members with . . . executive . . . power"[94] and (2) "when it exercises its legislative power, it must follow the 'single, finely wrought and exhaustively considered, procedures' specified in Article I."[95]

The first restraint, properly characterized as a substantive or theoretical restraint, was illustrated most recently in *Bowsher v. Synar*,[96] where the Supreme Court found that the Comptroller General's role under the Balanced Budget and Emergency Deficit Control Act of 1985[97] unconstitutionally usurped executive power from the executive branch.[98] In the event

91. *Id.* at 696. *See* I.N.S. v. Chadha, 462 U.S. 919, 972-74 (1983) (White, J., dissenting) (arguing that the legislative veto did not take enough power away from the executive branch to warrant striking down the statute). *See generally* Matthew James Tanielian, *Separation of Powers and the Supreme Court: One Doctrine, Two Visions*, 8 ADMIN. L.J. AM. U. 961 (1995).

92. Stern v. Marshall, 131 S. Ct. 2594, 2609 (2011), *reh'g denied*, 132 S. Ct. 56 (2011) (citations omitted).

93. Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 274 (1991).

94. *Id.* (citations and quotations omitted).

95. *Id.* (quoting I.N.S. v. Chadha, 462 U.S. 919, 951 (1983)).

96. 478 U.S. 714 (1986).

97. 2 U.S.C. §§ 901-22 (1988).

98. *Bowsher*, 478 U.S. at 727.

a budget deficit existed, the Comptroller General's role was to review and make spending reduction recommendations of the program-by-program budgets submitted by the Directors of the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO).[99] The Comptroller General reported his findings to the President who was then required to enter an order based on the Comptroller's recommendations to the budgets of all governmental agencies.[100] The Court struck down the Comptroller General's role because it was effectively an execution of the laws, exclusively reserved for the executive branch, but the President had no control over the Comptroller, only Congress did.[101]

Another purely procedural challenge is best exemplified in *I.N.S. v. Chadha*.[102] As previously discuss, the Court found § 244(c)(2) of the Immigration and Nationality Act unconstitutional because it violated the bicameralism and presentment provisions of the Constitution.[103] The Court reasoned that, even though Congress had the power to "establish an uniform Rule of Naturalization," one house *alone* could not act in a legislative function to alter the rights of anyone except under express language from the Constitution, but that is precisely what § 244(c)(2) allowed Congress to do.[104] The one-House veto of the Attorney General's suspension of deportation with respect to Chadha was a legislative act, and for such acts the Constitution mandated bicameralism and presentment.[105] Some restraints have both procedural and theoretical separation of powers foundations.

For instance, the President has the power to appoint principal officers by and with the advice and consent of the Senate,[106] which is key to his responsibility to faithfully execute the laws.[107] Along with this power is the President's "power to oversee executive officers through removal."[108] Although the Constitution gives the President his removal powers, the Supreme Court has sanctioned limits on those powers by upholding congressionally crafted "for cause" removal requirements as long as those requirements do not "impermissibly burden[] the President's power to con-

99. *Id.* at 717-19.
100. *Id.*
101. *Id.* at 740-41.
102. *See supra* notes 75-79 and accompanying text.
103. I.N.S. v. Chadha, 462 U.S. 919, 959 (1983).
104. *Id.* at 953-56 (quotations omitted).
105. *Id.* at 958-59.
106. U.S. Const. art. II, § 2, cl. 2. For a good overview of the Appointment Clause, see Matthew Hunter, *Legislating Around the Appointments Clause*, 91 B.U. L. REV. 753 (2011).
107. U.S. CONST. art. II, § 1, cl. 1.
108. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3152 (2010).

trol or supervise" the executive branch.[109] Although Congress has the power to enact "for cause" removal requirements on officers appointed by the President, the decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board* places limits on this power.[110]

In *Free Enterprise Fund*, the Supreme Court reviewed the congressionally enacted scheme that prohibited the Securities and Exchange Commission (SEC) from removing Public Company Account Oversight Board ("PCAOB") members except "for good cause shown."[111] Congress then insulated the SEC members by requiring the President to show "inefficiency, neglect of duty, or malfeasance in office" to warrant removal.[112] This double layer of protection made it so the President could "neither ensure that the [PCAOB's] laws [were] faithfully executed, nor be held responsible for a [PCAOB] member's breach of faith."[113] The Court found the "dual for-cause" restrictions contravened the Constitution's separation of powers provisions by removing the President's ability to faithfully execute the law.[114]

Although Congress has the power to construct inventive ways to legislate, it cannot do so in such a way that gives it executive-type powers or impermissibly removes the President's power to oversee the executive branch. The next subsection will address potential issues that arise when Congress gives away its legislative authority.

C. Did Congress Pass a Law Delegating its Legislative Authority Under Article I to the Executive Branch?

1. Intelligible Principles

The idea of nondelegation "is rooted in the principle of separation of powers that underlies our tripartite system of Government,"[115] and Congress generally "cannot delegate its legislative power to another [b]ranch."[116] Congress does have the power to provide guidelines to other branches and administrative agencies, which allow those agencies to develop and enforce the laws, as long as "Congress clearly delineates the general

109. Morrison v. Olson, 487 U.S. 654, 692 (1988). *See also* Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935).
110. *Free Enter. Fund*, 130 S. Ct. at 3153.
111. *Id.* at 3148.
112. *Id.* at 3154.
113. *Id.*
114. *Id.* at 3155.
115. Mistretta v. United States, 488 U.S. 361, 371 (1989).
116. *Id.* at 372.

policy, the public agency which is to apply it, and the boundaries of this delegated authority" to enable courts to properly analyze and adjudicate disputes.[117] The Court has coined this the "intelligible principle" concept[118] and has only struck down two statutes because they lacked an intelligible principle.[119] Thus, it appears that the "intelligible principle" standstandard is fairly low, similar to that of the "minimum rationality" test[120] under the Equal Protection clause.[121]

Whitman v. American Trucking Associations provides a clear picture of the Supreme Court's current non-delegation doctrine.[122] Multiple private parties and several States brought claims in the D.C. District Court alleging that § 109(b)(1) of the Clean Air Act (CAA) delegated Congress' legislative power to the Administrator of the Environment Protection Agency (EPA).[123] "Section 109(b)(1) instructs the EPA to set primary ambient air quality standards 'the attainment and maintenance of which . . . are requisite to protect the public health' with 'an adequate margin of safety.'"[124] The Court of Appeals affirmed the District Court's findings that § 109(b)(1) impermissibly delegated legislative power to the EPA because the language of the statute did not provide an intelligible principle to limit the EPA's administrative authority to regulate.[125] However, the D.C. Circuit refrained from striking down the statute as unconstitutional by assuming that the EPA employed a "restrictive construction" of the statute.[126]

The Supreme Court disagreed with the reasoning of the lower courts.[127] The Supreme Court quickly dismissed the notion that an administrative agency could make an unconstitutional delegation of authority constitutional by simply declining to extend some of the power Congress delegated to it.[128] Next, the Court found that the word "requisite" in the

117. American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946).

118. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

119. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (guidance providing that administrative agency must foster "fair competition" was not sufficient to uphold the agency's power to regulate substantially all of the U.S. economy); Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935) (statute that provided absolutely no guidance for the exercise of discretion violated nondelegation doctrine).

120. *See, e.g.*, Saenz v. Roe, 526 U.S. 489, 504 (1999) (discussing minimum rationality); City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 470 (1985) (same); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) (same).

121. U.S. CONST. amend. XIV, § 1.

122. 531 U.S. 457 (2001).

123. *Id.* at 462.

124. *Id.* at 465 (quoting 42 U.S.C. § 7409(b)(1) (1977)).

125. American Trucking Assns., Inc. v. EPA, 175 F.3d 1027, 1034 (D.C. Cir. 1999).

126. *Id.* at 1038.

127. *Whitman*, 531 U.S. at 486 (summarizing the holding).

128. *Id.* at 473.

statute, which referred to the appropriate level of air quality standards necessary to protect the public health, provided an adequately intelligible principle for the EPA to regulate appropriately.

Moreover, the Court in *Whitman* specifically noted that it had only found a statute lacking an intelligible principle in two cases, *Panama Refining Co. v. Ryan* and *A.L.A. Schechter Poultry Corp. v. United States*.[129] The Court seemed to suggest these two cases marked the "outer limits" of the nondelegation doctrine, and as such the Court would only strike down statutes that fell beyond those limits.[130] However, the Court did leave the door open to a potential nondelegation challenge when it said, "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."[131] This assertion creates a sliding scale approach to the intelligible principle doctrine where the greater the scope of power conferred to an administrative agency, the more intelligible Congress' principle must be.

2. Power of the Purse

Congress can also improperly delegate its constitutional right to enact appropriations bills. The Constitution places the "power of the purse"[132] squarely in Congress' hands.[133] The "Necessary and Proper Clause"[134] and the "Appropriations Clause"[135] define Congress' power of the purse. Article I, section 8, grants Congress the power to enact "Laws which shall be necessary and proper for carrying into Execution . . . [the] Powers vested by this Constitution in the Government of the United States."[136] Moreover, "Article I, section 8 also grants Congress the obverse power . . . to prevent the spending of public funds except as authorized by Congress."[137] Finally,

129. *Id.* at 474 (referring to A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), and Panama Refining Co. v. Ryan, 293 U.S. 388 (1935)).

130. *Whitman*, 531 U.S. at 474 (providing a listing of cases and statutes that the Supreme Court upheld and conferring an intelligible principle).

131. *Id.* at 475. *See also* Loving v. United States, 517 U.S. 748, 772-73 (1996) ("Had the delegations here called for the exercise of judgment or discretion that lies beyond the traditional authority of the President, Loving's last argument that Congress failed to provide guiding principles to the President might have more weight.").

132. United States v. Butler, 297 U.S. 1, 86 (1936) (Stone, J., dissenting) ("That the governmental power of the purse is a great one is not now for the first time announced.").

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

134. U.S. CONST. art. I, § 8.

135. U.S. CONST. art. I, § 9, cl. 7.

136. U.S. CONST. art. I, § 8.

137. Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1349 (1988) ("If Congress could not prohibit the Executive from withdrawing funds from the Treasury, then the constitutional

the Appropriations Clause of Article I[138] limits Congress' power to expend funds to instances when it properly passes an appropriation bill.[139] Congress' power to control the spending of the federal government is one of its most powerful tools[140] and serves as an important check on executive branch actions.[141]

To sum up, if Congress decides to delegate some of its legislative authority to the executive branch, it must tread carefully and provide adequate guidance, and in no case should Congress delegate its power of the purse. The final subsection will address the usurpation of the judiciary's power.

D. Did Congress Pass a Law Usurping Power Belonging to the Judicial Branch Under Article III?

In determining whether a particular statute infringes on the judicial branch's authority, the Court will look to whether the "institutional integrity" of the judiciary is threatened.[142] The Court's review has not been based on "formalistic and unbending rules."[143] Rather, the Court has reviewed the extent to which the "essential attributes of [Article III] judicial power"[144] are transferred to non-Article III tribunals, the level of influence or power the non-Article III tribunal has, the type of right being adjudicated, and Congress' rationale for changing the typical adjudication process.[145]

grants of power to the legislature to raise taxes and to borrow money would be for naught because the Executive could effectively compel such legislation by spending at will.").

138. U.S. CONST. art. I, § 9, cl. 7.

139. Stith, *supra* note 137, at 1349.

140. *Id.* at 1360; Reeside v. Walker, 52 U.S. 272, 291 (1850) ("However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion.").

141. *See also, e.g.*, Act of Dec. 21, 1982, Pub. L. No. 97-377, § 793, 96 Stat. 1865 ("Boland I" prohibiting CIA use of appropriated funds "for the purpose of overthrowing the Government of Nicaragua"); Act of Oct. 12, 1984, Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1935 ("Boland II" prohibiting the CIA, Department of Defense "or any other agency or entity of the United States involved in intelligence activities" from spending "funds available" in support of the contras).

142. Commodity Futures Trading Comm'n (CFTC) v. Schor, 478 U.S. 833, 851 (1986).

143. *Id.* at 851 ("Although such rules might lend a greater degree of coherence to this area of the law, they might also unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers."). *See also* Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568, 586 (1985).

144. The "essential attributes of judicial power" include "the power to issue final judgments, the lack of judicial review or review only on a highly deferential standard, the power to issue writs of habeas corpus and preside over jury trials, and jurisdiction over state law claims." Beerman, *supra* note 70, at 496. *See also* J. Anthony Downs, *The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates*, 52 U. CHI. L. REV. 1032, 1042-45 (1985) (discussing the "essential attributes of judicial power").

145. *See, e.g.*, CFTC, 478 U.S. at 851; Thomas, 473 U.S. at 587, 589-93.

For instance, in *Commodity Futures Trading Commission v. Schor*, the Court set out to determine whether the Commodity Exchange Act[146] properly empowered the Commodity Futures Trading Commission (CFTC) to adjudicate state law counterclaims in a customer reparations action.[147] In *Schor*, the Court upheld the CFTC's authority to adjudicate state law counterclaims because the CFTC only adjudicated a "particularized area of law,"[148] and parties could choose whether or not to have the CFTC adjudicate their claims.[149] Conversely, in *Stern v. Marshall*, the Supreme Court determined that non-Article III bankruptcy courts could not, constitutionally, adjudicate counterclaims arising in or under a Title 11 bankruptcy case.[150] The Court distinguished *Stern* from its prior decision in *Schor* by pointing out that in *Schor* the CFTC was merely an agency, whereas in *Stern*, the statute created an entirely separate non-Article III court.[151]

In addition, when assessing the constitutionality of a given statute, the Supreme Court will look to any restrictions Congress places on the Article III court's ability to review agency decisions. Administrative government is an ever-increasing function within our tripartite system, and its legitimacy is "inextricably intertwined" with judicial review.[152] Not only does the ability given to Article III courts by congressionally-enacted statutes to review executive agency decisions provide a check on the executive and legislative branches, but it also prohibits rogue agencies from operating outside the confines of the Constitution.[153] The Supreme Court has recognized the right of Congress to prohibit judicial review but only in instances where Congress provided "'clear and convincing' evidence" of its intent "to restrict access to judicial review."[154]

The structure, jurisdiction, and procedures Congress crafts for a non-Article III tribunal are of the utmost constitutional importance. Furthermore, when Congress does grant non-Article III tribunals the right to hear and decide issues, the availability of review and the standard of review

146. 7 U.S.C. §§ 1-27 (1936).

147. *CFTC*, 478 U.S. at 835-36.

148. *Id.* at 852 (quoting Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 85 (1982)).

149. The Court also discussed the adjudication of public versus private rights, the procedural aspects of the CFTC's adjudicatory process, and the "weight of evidence" standard of review of CFTC Orders by the District Courts. CFTC, 478 U.S. at 852-54.

150. 131 S. Ct. 2594, 2611, *reh'g denied,* 132 S. Ct. 56 (2011).

151. *Id*. at 2615.

152. Sidney A. Shapiro, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 395 (1987).

153. *Id. See* Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 670 (1986).

154. Johnson v. Robison, 415 U.S. 361, 373-74 (1974) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 141 (1967).

authorized by Congress play an increasingly large role in the separation of powers analysis.

As illustrated by the length of the "brief" exposition of the separation of powers jurisprudence, the idea is complicated, and in general, prior case law only provides a rough framework for analysis. With an understanding of the separation of powers jurisprudence, it is now time to assess SNB's claims.

IV. *SNB*'S SEPARATION OF POWERS CHALLENGES

The Dodd-Frank Act is an attempt by Congress to create new and inventive ways to legislate and govern, and with respect to the FSOC, it did not undermine the Constitution. Unfortunately, the structure Congress enacted for the CFPB twists and transfers power in ways that violate the Constitution. In terms of *SNB v. Geithner*, and with respect to the FSOC and CFBP, the following questions arise: First, did Congress usurp any power from the executive branch that would violate the Constitution's separation of powers? Second, did Congress delegate too much of its own legislative power to the executive branch under the Dodd-Frank Act? Third, do the restraints or adjudicatory provisions of the Dodd-Frank Act unconstitutionally usurp the Judiciary's powers? The CFPB will be first to enter the constitutional gauntlet.

A. SNB's Assault on the CFPB

Following the 2008 Financial Crisis, it became abundantly clear that Congress was going to act in some fashion. Most will agree that certain aspects of the CFPB's purpose and objectives provide necessary consumer protections.[155] However, by attempting to isolate the CFPB from political pressures and special interests, Congress created an entity that violates the Constitution's separation of powers. First, Congress stripped the President of his ability to effectively control, review, and oversee the CFPB, an executive agency. Second, although the guiding principle Congress enacted is likely intelligible, and thus constitutional, Congress improperly delegated its power over the public fisc to the Director of the CFPB. Finally, while the deference afforded to the CFPB by the courts is constitutional, the combination of minimal executive branch oversight, almost no Congres-

155. 12 U.S.C. § 5511 (2012); *See also, e.g.*, 156 CONG. REC. S5878 (daily ed. July 15, 2010) (statement of Sen. Todd); Alec C. Covington, *Fighting Yesterday's Battles: Proposed Changes to the Consumer Financial Protection Bureau*, 16 N.C. BANKING INST. 299, 302-04 (2012).

sional oversight, and only minimal judicial review creates an unconstitutional independent agency answerable to no one.

1. Executive Branch Problems

The *SNB v. Geithner* Amended Complaint raises several executive branch separation of powers concerns. First, even though the CFPB is an executive agency,[156] Congress has removed nearly all of the President's tools to hold the CFPB accountable. No other agency, nor the electorate, has enough power to hold the CFPB accountable either. For instance, although the Board of Governors of the Federal Reserve[157] ceded significant administrative authority to the CFPB, 12 U.S.C. § 5492 completely removed the Board of Governors from the equation and thus insulated the CFPB from presidential review via the Board of Governors. Under Subchapter V, the Board of Governors has no power to: (1) scrutinize CFPB adjudicatory actions; (2) appoint, direct, or remove any officer or employee of the CFPB; (3) reorganize the CFPB; or (4) approve or review any rule promulgated by the CFPB.[158] The CFPB is a wholly separate, distinct, and independent executive agency.

With the Board of Governors removed, the CFPB is able to operate without meaningful review by the President, and "[t]his contravenes the President's 'constitutional obligation to ensure the faithful execution of the laws.'"[159] This added layer of protection and autonomy granted to the CFPB is eerily reminiscent of the "dual for-cause"[160] removal restriction with which Congress insulated the Public Company Accounting Oversight Board (PCAOB or the "Board") under the Sarbanes-Oxley Act of 2002.[161]

Although the CFPB is not protected by a "dual for-cause" removal provision, the CFPB's protections are even stronger. First, the CFPB does not have a direct superior agency watching over it, like the SEC watched over the PCAOB. With regards to PCAOB, the SEC had the power to "approve the Board's budget, § 7219(b), issue binding regulations, §§ 7202(a), 7217(b)(5), relieve the Board of authority, § 7217(d)(1), amend Board sanctions, § 7217(c), or enforce Board rules on its own, §§ 7202(b)(1),

156. 12 U.S.C. § 5491(a) (2012).

157. The Board of Governors is made up of seven individuals that are appointed by the President, with the advice and consent of the Senate, to fourteen-year terms. 12 U.S.C. § 241 (2006).

158. 12 U.S.C. § 5492(c)(2) (2012).

159. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3147 (2010) (quoting Morrison v. Olson, 487 U.S. 654, 693 (1988)).

160. For-cause removal is in contrast to at-will removal, where the President or superior officer is not required to show any reason for removing the principal or inferior officer. *Free Enter. Fund*, 130 S. Ct. at 3142.

161. 152 U.S.C. §§ 7201-66 (2002).

(c)."[162] Similar restraints do not hamper the CFPB. In fact, only the FSOC maintains any sort of supervisory capacity over the CFPB, and that supervision is limited.

The FSOC has the power to review regulations[163] promulgated by the CFPB, but it can only overturn regulations if two-thirds of the FSOC members believe the regulation poses a threat to the "safety and soundness" or "the stability of the [United States'] financial system."[164] The statute provides no guidance to the FSOC to make their determinations and very few, if any, cases, regulations, or scholarly articles address the "safety and soundness" standard, thus making it very ambiguous. Without a clear standard from Congress, it becomes nearly impossible to articulate a meaningful standard to assess whether the "safety and soundness" of the U.S. financial system is threatened. A standard that is triggered only when the *entire* U.S. financial system is at risk is not really a standard at all, and as such, the FSOC's supervisory role is largely irrelevant.[165]

Next, Congress vested too much power in the Director of the CFPB with too little oversight. The President can only remove the Director "for cause,m" and although SNB does not necessarily challenge the premise of a "for cause" removal restriction, SNB does challenge the CFPB's particular "for cause" removal restriction because the CFPB has only one Director, not a board or commission of multiple leaders. From a practical standpoint, the CFPB functions more like an "independent agency" than an "executive agency."[166]

For instance, the CFPB: (1) makes its own regulations; (2) provides interpretations of the statutes it oversees; (3) enforces and adjudicates disputes under the statutes it oversees; and (4) has subject matter expertise in a highly particularized area of administrative law.[167] These characteristics

162. *Free Enter. Fund*, 130 S. Ct. at 3158.

163. The FSOC does not have the power to review CFPB orders and decisions in adjudicatory proceedings. 12 U.S.C. § 5322(a)(2) (2012) (listing the duties delegated to the FSOC).

164. 12 U.S.C. § 5513(a) (2012).

165. *See* Arthur E. Wilmarth, Jr., *The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 REV. BANKING & FIN. L. 881, 891-92 (2012); Alan Charles Raul, *CFPB Lacks Constitutional Checks and Balances*, THE HILL (Jan. 25, 2012, 3:19 PM), http://thehill.com/blogs/congress-blog/economy-a-budget/206583-alan-charles-raul-former-vice-chairman-of-the-privacy-and-civil-liberties-oversight-board.

166. Congress has not provided a definition for "independent agency." However, in 1980, it listed sixteen "independent agencies" in the Paper Reduction Act, and multi-member commissions or boards controlled all of those agencies. Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1137 (2000).

167. Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 261-62 (1988).

are common of independent agencies.[168] But, what is alarming is that only one person controls the CFPB, and the President can only remove the CFPB's Director for good cause shown.[169] The CFPB's structure provides the Director with independence in adjudicatory decision-making, which is desirable, but other co-Directors do not moderate his decisions, nor is the Director monitored by a supervisory agency.[170] The "for cause" removal restriction is fundamentally different than similar restrictions on other agencies for the simple reason that one person, not a group, controls the CFPB. This distinction is important because it transforms an executive agency under the control of the President into a hybrid independent agency that lacks the checks and balances of a commission-type leadership structure.[171]

Finally, one other provision of Subchapter V, which further insulates the CFPB from executive branch review, is troubling. Even though the CFPB is an "executive agency" by statute,[172] the President has no ability to review or comment, let alone, approve "legislative recommendations, or testimony or comments on legislation" before the CFPB makes those recommendations, testimony, or comments to Congress.[173] Furthermore, any views expressed by the Director or CFPB officer to Congress "do not necessarily reflect the views of the Board of Governors or the President."[174] This lack of oversight is similar to that of the Comptroller's position in *Bowsher v. Synar*, and the Court found that structure unconstitutional because the President did not maintain enough control of the *executive* agency.[175] SNB's Amended Complaint highlights and challenges several key provisions of Dodd-Frank that may be unconstitutional, and SNB has a good chance of prevailing on those challenges, which would basically dismantle the CFPB.

168. Humphrey's Ex'r v. United States, 295 U.S. 602, 624 (1935) (discussing the duties of the Federal Trade Commission); United States v. Bogle, 689 F. Supp. 1121, 1159-60 (S.D. Fla. 1988) (discussing the typical characteristics of independent agencies); George F. Fraley, III, *Is the Fox Watching the Henhouse?: The Administration's Control of FEC Litigation Through the Solicitor General*, 9 ADMIN. L.J. AM. U. 1215, 1240-43 (1996) (same).

169. *GOP Senators Continue to Demand CFPB Structural Reform*, 2505 Fed. Banking L. Rep. (Feb. 6, 2013), *available at* 2013 WL 3835802.

170. In *Free Enterprise Fund v. PCAOB*, the Dissent's key contention was that the SEC still maintained sufficient control over the PCAOB, and as such, the President also maintained sufficient control over the PCAOB. But as has already been shown, the CFPB does not have a big brother, like the SEC, to watch over it and keep it in line. 130 S. Ct. 3138, 3172-73 (2010).

171. Breger & Edles, *supra* note 166, at 1137. *See* Verkuil, *supra* note 167, at 260 (providing an analysis of the common and distinguishing characteristics of independent agencies).

172. 12 U.S.C. § 5491(a) (2012).

173. 12 U.S.C. § 5492(c)(4) (2012).

174. *Id.*

175. 478 U.S. 714, 731-32 (1986).

2. Legislative Branch Problems

SNB also raises two legislative branch separation-of-power concerns. First, SNB challenges the constitutionality of the CFPB's power to promulgate regulations and enforce laws that protect consumers from "unfair, deceptive, or abusive acts and practices."[176] Second, SNB alleges that Congress unconstitutionally tied its own hands by relinquishing its power of the purse.

SNB faces an uphill battle with respect to its nondelegation claim that the language "unfair, deceptive, or abusive acts" in Congress' directive to the CFPB was impermissibly vague and removed Congress' legislative power. The Supreme Court has, so far, only found two statutes lacking an intelligible principle, that is, where an administrative agency could not reliably promulgate regulations based on the statutes.[177]

Unfortunately for SNB, 12 U.S.C. § 5531 provides an intelligible principle by which the CFPB can create regulations reasonably designed to protect consumers from "unfair, deceptive, or abusive practices."[178] Although Congress conferred significant authority to the CFPB, the definitions Congress provided meet the relatively low "intelligible principle" standard in light of the case law in the area.[179] Congress' intelligible principles pro-

176. 12 U.S.C. § 5511 (2012).

177. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). Both of these cases were decided prior to the "Switch in Time That Saved Nine," which marked a change in the Supreme Court's voting that occasioned a more expansive federal government. *See* United States v. Rothacher, 442 F. Supp. 2d 999, 1000-01, 1001 n.1 (D. Mont. 2006); Alan C. Kohn, *A Legal Essay: The Judicial Activism Myth*, 67 J. MO. B. 106, 109 (2011), *available at* http://www.mobar.org/uploadedFiles/Home/Publications/Journal/2011/03-04/A%20Legal%20Essay%20The%20Judicial%20Activism%20Myth.pdf.

178. Congress provided that "unfairness" must cause "or [be] likely to cause substantial injury to consumers" that is unavoidable and that "such substantial injury is not outweighed by countervailing benefits to consumers or to competition." 12 U.S.C. § 5531(c) (2012). Congress also allows the CFPB to use public policy as one basis for determining unfairness, as long as it is not the primary basis. *Id.* An act or practice is abusive if it (1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) takes unreasonable advantage of: (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer. 12 U.S.C. § 5531(d).

179. *See, e.g.*, Lichter v. United States, 334 U.S. 742, 785-786 (1948) (upholding delegation of authority to determine excessive profits); Am. Power & Light Co. v. S.E.C., 329 U.S. 90 , 105 (1946) (upholding delegation of authority to Securities and Exchange Commission to prevent unfair or inequitable distribution of voting power among security holders); Yakus v. United States, 321 U.S. 414, 426 (1944) (upholding delegation to Price Administrator to fix commodity prices that would be fair and equitable, and would effectuate purposes of Emergency Price Control Act of 1942); FPC v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944) (upholding delegation to Federal Power Commission to determine just and reasonable rates); Nat'l Broad. Co. v. United States, 319 U.S. 190, 225-26 (1943) (upholding delegation to Federal Communications Commission to regulate broadcast licensing "as public interest, convenience, or necessity" require).

vide the CFPB with sufficient guidance to promulgate adequate rules. SNB's challenge to the CFPB on nondelegation grounds is weak at best.

SNB's assertion that Congress impermissibly tied its own hands with respect to the CFPB's funding is a stronger argument. The Supreme Court recently stated that the "separation of powers does not depend on the views of individual [Sessions of Congress], nor on whether 'the encroached-upon branch approves the encroachment.'"[180] Furthermore, it is axiomatic that the power to appropriate money is vested solely in Congress, and the Constitution does not allow Congress to transfer this power to any other branch or agency.[181] But that is exactly what Congress did with the Act. The CFPB, through its Director, is allowed to set its own budget without congressional, or any other entity's, approval.[182] The budget amount is capped at twelve percent[183] of the Federal Reserve System's appropriated funds, but that is the only restriction.[184]

Although the CFPB's budget is transferred from the Federal Reserve System's budget, which helps enforce the twelve percent cap, it does not help the fact that the CFPB is empowered to unilaterally appropriate its owns funds. In the future, even if Congress challenges the CFPB's budget, its only course of action would be to shrink the Federal Reserve's budget, which would shrink the amount but not the percentage available to the CFPB. This mechanism for controlling the CFPB's appropriations is dangerous because it potentially harms the Federal Reserve without the Federal Reserve having any control over the situation. Furthermore, Congress gave the CFPB a $200,000,000 rainy day fund: in the event that the CFPB spends more than it budgeted, all the Director has to do is submit a report to Congress and up to two hundred million dollars is available to the CFPB,[185] with no approval required.[186]

In summary, SNB's claim that Congress provided the CFPB with an open-ended grant of power without an intelligible principle to guide the CFPB's regulations and decisions is probably not meritorious because of the adequate definitions Congress provided. However, SNB does raise

180. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3155 (2010) (citations omitted) (quoting New York v. United States, 505 U.S. 144, 182 (1992)).

181. *See supra* notes 132-141 and accompanying text.

182. 12 U.S.C. § 5497 (2012).

183. Adjusted annually for inflation. 12 U.S.C. § 5497(a)(2)(B).

184. Federal Reserve System actual expenditures for 2011, the last year formally reported, were $4.4 billion. ANNUAL REPORT: BUDGET REVIEW 2012, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM 2 (2012), *available at* http://www.federalreserve.gov/publications/budget-review/files/2012-budget-review.pdf.

185. 12 U.S.C. § 5497(e)(2).

186. *Id.* The two hundred million dollar cushion is available through 2014.

legitimate concerns about Congress' delegation of appropriations power to the CFPB, since the CFPB submits its budget for approval to no one, and Congress does not have a safe mechanism to control their funding.

3. Judicial Branch Problems

Finally, SNB's Amended Complaint raises questions regarding the level of deference a reviewing court is required to give to the CFPB's interpretations of its rules.[187] All CFPB decisions and actions are subject to chapter V of Title V of the Administrative Procedure Act (APA),[188] and thus all final decisions are reviewable, first by the District Court and second by the Court of Appeals.[189] No constitutional concerns exist regarding this process. SNB only alleges one constitutional issue with respect to the appeal process: the level of deference given to CFPB interpretations.

Regarding any Federal consumer financial law,[190] the reviewing court must defer to the CFPB "as if the [CFPB] were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law."[191] Normally courts afford *Chevron* deference to administrative agency regulations and interpretations when Congress leaves a gap in the statute, so it is unclear exactly what Congress was attempting to convey with this language.[192]

However, since the CFPB subsumed the consumer protection laws from eighteen other agencies, the provision likely means that *Chevron* deference is afforded to all new CFPB interpretations, and all prior interpretations by the respective agencies are binding as if the CFPB issued the regulation or interpreted the statute. This language will also allow the CFPB to trump any interpretations by other agencies that are contrary to its own. Given that the Supreme Court has sanctioned legislative action based on *Chevron*-type deference in other agency schemes, there do not appear to be any constitutional issues here.

To summarize SNB's challenges to the CFPB and the provisions that establish and guide the CFPB are novel, and some of them pass constitu-

187. First Amended SNB Complaint, *supra* note 6, at ¶¶ 105, 138.

188. 12 U.S.C. § 5563 (2012). This section refers to the Administrative Procedure Act of 1966. 5 U.S.C. §§ 551-59 (2012).

189. 5 U.S.C. §§ 701-06 (2012).

190. Defined in 12 U.S.C. § 5481(14) (2012).

191. 12 U.S.C. § 5512(b)(4)(B) (2012).

192. United States v. Mead Corp., 533 U.S. 218, 227 (2001) (quoting Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837, 843-44 (1984) ("When Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,' and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.")).

tional muster. Unfortunately, the biggest problem with Congress' attempt to protect the independence of the CFPB is that it failed to provide adequate checks on the CFPB's power. The CFPB operates on its own island, the President can only remove the Director for cause shown, and no other agency has *actual* supervisory authority over the CFPB. The CFPB is also single-headed, not multi-headed like other similarly situated independent agencies. Congress also removed its power to influence and control the scope of the CFPB by relinquishing its power of the purse. The Director sets his own budget, and as long as the Federal Reserve System receives funds, the CFPB receives funds. Finally, in a vacuum, the judicial review provisions of the CFPB are constitutional, but when combined with very minimal control by the legislative and executive branches, the entire CFPB scheme violates the fundamental idea of our tripartite form of government.

Thus it appears that SNB raised some winning and some losing arguments as to the constitutionality of the CFPB. SNB attempts to weave similar constitutional arguments regarding the FSOC, but the powers Congress conferred to the FSOC do not raise the same concerns as those raised by the creation of the CFPB.

B. SNB's Assault on the FSOC

SNB argues that Congress provided an open-ended grant of power (i.e., an unintelligible principle) to designate nonbank "systemically important" financial institutions (SIFIs) without proper judicial review and no third-party remedy to challenge the FSOC's determinations.[193] However, SNB's claims fall short of establishing a violation of the Constitution's separation of powers concepts.

First, Congress committed an entire section of the Dodd-Frank Act to dictate what the FSOC is required to consider and the process it is required to follow to designate a nonbank financial company as "systemically important."[194] Congress enumerated eleven principles, with multiple elements to each, which the FSOC must evaluate when making its designations. Furthermore, Congress requires the FSOC to work with other financial agencies when making their determinations, and ultimately, the FSOC must report to Congress and justify its determinations.

Second, the deference granted to the FSOC, and consequently the limitations placed on judicial review, are constitutional because of the complexity involved in determining which companies are "systemically

193. First Amended SNB Complaint, *supra* note 6, ¶207.
194. 12 U.S.C. § 5323 (2012).

important." A SIFI designation is appealable by the nonbank financial company receiving the designation, and the reviewing court can rescind the FSOC's determination if the decision was "arbitrary and capricious."[195]

SNB argues that the appropriate standard of review in an Article III court for an administrative agency's final decision is whether the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[196] The omission of "otherwise not in accordance with law" from Dodd-Frank is curious, but the potential impact seems absurd: an FSOC SIFI determination could break the law? This is not possibly what Congress had in mind when it left out the phrase "otherwise in accordance with law."

Furthermore, Congress can alter the standard of review of agency decisions for compelling reasons,[197] and prior case law supports a change in the standard of judicial review when the decision of the agency relates to complex financial concepts and markets and requires specialized expertise to fully understand.[198] In most cases, judges do not, nor are they required to, understand what a "systemically important" nonbank financial entity is, and thus an "arbitrary and capricious" standard of review is constitutionally permissible.

Next, SNB avers that it should, as a third party, be able to challenge an FSOC's determination of whether a nonbank financial company is a SIFI or not, because a SIFI designation will work to lower the risk of that company and thus give it a cost-of-capital competitive advantage in the market. At the outset, the Act does not expressly forbid a third party from appealing a decision by the FSOC. Section 5323(h) speaks only of the right, of a nonbank financial company receiving the designation, to appeal the determination, but 5 U.S.C. § 702 provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Since no decision interpreting § 5323(h) currently exists, SNB could attempt to challenge an FSOC determination, once one is actually made.

195. 12 U.S.C. § 5323(h).

196. 5 U.S.C. § 706 (2012).

197. Kucana v. Holder, 130 S. Ct. 827, 830 (2010); Reno v. Catholic Soc. Services, Inc., 509 U.S. 43, 63-64 (1993) (citing Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967), *abrogated by* Califano v. Sanders, 430 U.S. 99 (1977)).

198. CFTC v. Schor, 478 U.S. 833, 845 (1986) (declaring that, when a court is reviewing a dispute that rests squarely in the expertise of the agency charged with making the decision, the court must afford the agency substantial deference); Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 103 (1983) (when a court reviews complex scientific issues, it must be "at its most deferential").

Assuming SNB can challenge a SIFI designation, its allegation that a SIFI will be viewed as "too big to fail" and thus receive government backing in the event of financial distress, which will in turn lower the risk and cost of capital of that firm, is precisely what Dodd-Frank seeks to discourage, that is, allowing and perpetuating "too big to fail" companies.[199] Thus, SNB's argument must fail. The purpose of a SIFI designation is to monitor "systemically important" companies and limit their potential negative influence on the market, but in the event that a "systematically important" company fails, Congress made it clear that it would not bail the company out.[200] Instead, Congress established the Orderly Liquidation Authority to ensure that a failing company is wound down with as little disruption as possible to the markets.[201] Therefore, the Dodd-Frank Act expressly authorizes the failure of "systemically important" companies, and thus a SIFI determination, and the potential for a government bailout, in no way reduces the risk and cost of capital of a SIFI-designated firm.

Additionally, even if SNB's proposition that a SIFI designation equates to an implicit understanding that the U.S. Government will bail out the company, the designation is still largely irrelevant, if one assumes financial markets are efficient.[202] If markets are efficient, then they already know which nonbank financial companies are "systemically important" (and would receive government assistance in the event of failure regardless of the Dodd-Frank provisions) and have thus adjusted the risk related to those companies. With that assumption in place, an FSOC "systemically important" determination will have no effect on its cost of capital, so an FSOC determination is largely irrelevant.

Overall, SNB's Amended Complaint fails to raise sufficient separation of powers concerns related to the FSOC. Congress provided an intelligible principle that the FSOC can apply to designate SIFIs, and the lowered level of judicial scrutiny is warranted given the complexity of the SIFI determination process. While SNB's right, as a third party, to challenge an FSOC

199. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub L. 111-203, Preamble, 124 Stat 1376 (2010) ("An Act To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail', to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes."); *but see generally* Arthur E. Wilmarth, Jr., *The Dodd-Frank Act: A Flawed and Inadequate Response to the Too-Big-to-Fail Problem*, 89 OR. L. REV. 951 (2011).

200. 156 CONG. REC. H5234 (daily ed. June 30, 2010) (statement of Rep. Frank).

201. 12 U.S.C. §§ 5381-94 (2012). *See* Wilmarth, *supra* note 199, at 993.

202. The Efficient Market Hypothesis (EMH) assumes that securities reflect all available information at a given point in time and are thus priced perfectly at that instant. Burton G. Malkiel, *The Efficient Market Hypothesis and Its Critics*, 17 J. ECON. PERSP. 59, 59 (2003). EHM theory also assumes that "markets do not allow investors to earn above-average returns without accepting above-average risks." *Id.* at 60.

determination likely exists, SNB's arguments are unavailing because of Congress' creation of the Orderly Liquidation Authority and the idea of efficient markets.

CONCLUSION

The 2008 Financial Crisis was a very trying time for the United States, and it exposed many weaknesses in our financial system. Congress set out to mend those weaknesses. In some respects it succeeded, but in others it violated the Constitution by defining administrative agencies that lack sufficient controls. The *SNB v. Geithner* case attempts to expose those unconstitutional provisions of the Dodd-Frank Act, and has a chance to prevail where Congress has erred.