[Fordham Journal of Corporate & Financial Law](https://ir.lawnet.fordham.edu/jcfl)

Volume 24 | Issue 1 Article 5

2019

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## Recommended Citation

Thomas Arning, Note, The Consumer Financial Protection Bureau: A Novel Agency Design With Familiar Issues, 24 FORDHAM J. CORP. & FIN. L. 153 (2018).

# THE CONSUMER FINANCIAL PROTECTION BUREAU: A NOVEL AGENCY DESIGN WITH FAMILIAR ISSUES

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## ABSTRACT

This Note examines the structure of the Consumer Financial Protection Bureau, with a specific focus on its single-director structure. The balance of authority between agencies and the three branches of government has been a point of contention for generations, especially since the early twentieth century. This area of the law became even more contested following the financial crisis in 2008. As part of the response to the perceived abuses that led to the global recession, Congress created the Consumer Financial Protection Bureau, ultimately opting to give it a single director as opposed to a board structure. Proponents of this regime cite a need for a robust and unfettered regulatory entity. Opponents argue that the single director structure grants too much authority to one individual within the administrative state.

This Note analyzes both sides of the debate regarding the single-director structure of the Consumer Financial Protection Bureau. First, this Note begins with a discussion of the jurisprudence on the area of agency authority, specifically as it relates to single-director agencies. Next, it summarizes two major ideological camps that diverge in determining the most effective structure of these agencies. The first group, which this Note terms "legalists," argues for an analytical framework derived only from the relevant precedent and the respective statutory mandates. The second group, which this Note terms "protectionists," argues that agencies must be protected from capture, placing an imperative on the measures most likely to avoid this. Finally, this Note takes a third approach, arguing that the size of the potential regulatory impacts must be taken into account when

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deciding on the structure of a financial regulatory authority. Ultimately, this Note applies the third approach to the Consumer Financial Protection Bureau, suggesting that its single-director structure is unconstitutional. This is primarily due to the director's vast amount of unilateral authority, combined with the organization's lack of political accountability.

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## INTRODUCTION

The United States experienced two major financial disasters in the first ten years of the twenty-first century that would forever transform the financial regulatory state. In 2002, Texas-based energy giant Enron collapsed amid one of the largest corruption scandals in American history, bringing down its auditor, Arthur Andersen. In 2008, the American mortgage crisis brought about one of the worst financial downturns since the Great Depression. Public outcry following these events led Congress to create a new regulatory entity: the Consumer Financial Protection Bureau (CFPB, or the "Bureau").[1] Along with the Public Company Accounting Oversight Board (PCAOB), these agencies brought about sweeping regulatory changes and fundamentally transformed the way many of the largest American financial institutions conduct business. As with all major regulatory mandates, the PCAOB and CFPB have been subject to intense criticism for their respective scopes of authority.

Two major regulatory issues dominate the debates over these agencies.[2] The first issue is whether the PCAOB's initial organizational structure impermissibly restricted the President from removing members of the board.[3] The Supreme Court has long held that for-cause removal restrictions are constitutionally permissible.[4] In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, however, the Supreme Court struck down the PCAOB's structure, holding that it impermissibly restricted the President's Article II authority to remove inferior officers in the executive branch.[5] The second major regulatory issue is whether the CFPB's single-director structure, as opposed to being led by a board, is constitutional.[6] In 2016, the D.C. Circuit held that the single-director structure was unconstitutional in *PHH Corporation v. Consumer Financial Protection Bureau*.[7] The D.C. Circuit later reversed this decision in en banc review, holding that Congress' decision to implement a single-director structure of the CFPB was a valid exercise of its Article I authority.[8] The debate regarding the CFPB's structure largely revolves

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1. *See* Creating the Consumer Bureau, CONSUMER FINANCIAL PROTECTION BUREAU, https://www.consumerfinance.gov/about-us/the-bureau/creatingthebureau/ [https://perma.cc/3LB6-BWYE] (last visited Dec. 30, 3018).

2. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 16 (2010).

3. This is generally referred to as "for-cause" removal.

4. Humphrey's Ex'r v. United States, 295 U.S. 602, 632 (1935).

5. 561 U.S. 477, 478 (2010).

6. *See generally PHH Corp. v. Consumer Financial Protection Bureau*, 881 F.3d 75 (D.C. Cir. 2018) [hereinafter *PHH II*]; *PHH Corp. v. Consumer Financial Protection Bureau*, 839 F.3d 1 (D.C. Cir. 2016) *vacated en banc*, 881 F.3d 75 (D.C. Cir. 2018) [hereinafter *PHH I*].

7. *PHH I*, 839 F.3d at 8.

8. *See PHH II*, 881 F.3d at 84 ("Congress's decision to establish an agency led by a Director removable only for cause is a valid exercise of its Article I legislative power. The for-cause removal restriction fully comports with the President's Article II executive authority and duty to take care that the consumer financial protection laws within the CFPB's purview be faithfully executed.").

around how to best maintain agency independence, specifically, whether checks on policy agendas should come from within a deliberative governing board, or from the political branches of government.[9] There is also debate about how to best protect financial regulatory agencies from capture by special interests.[10] The court also held that limiting the President's ability to remove the director only "for cause" did not impermissibly restrict the President's Article II authority to remove inferior officers.[11] The crucial function of financial regulatory agencies has important policy and legal implications within corporate law.[12] The federal judiciary has emphasized the importance of independence in all regulatory areas, but has stated that independence is of particular importance in financial regulatory agencies.[13]

Scholars who argue that a single agency director is permissible often look to the statutory framework pertaining to the respective agencies.[14] Specifically, advocates of the single director structure argue that the agency's enacting statute should determine the agency structure and protocol for removing officers, so long as these provisions comply with Article II of the Constitution.[15] Adherents to this viewpoint generally reject a philosophy that balances the President's authority as the "unitary executive," and instead emphasize Congress' inherent ability to check the executive.[16] Those who argue for board governance generally believe that

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9. *See generally PHH II*, 881 F.3d 75; *PHH I*, 839 F.3d 1.

10. *PHH II*, 881 F.3d at 110-11.

11. *Id.*

12. *See id.* at 78 ("Congress has historically given a modicum of independence to financial regulators . . . [T]hat independence shields the nation's economy from manipulation or self-dealing by political incumbents.").

13. *See id.*

14. *See, e.g.*, Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 CORNELL L. REV. 769, 832 (2013). Beyond the legal boundaries of permissible structural schemes, advocates for a single-director structure often argue that it is a more efficient scheme. *See* Susan Block-Lieb, *Accountability and the Bureau of Consumer Financial Protection*, 7 BROOK. J. CORP. FIN. & COM. L. 25, 36 (2012).

15. Datla & Revesz, *supra* note 14, at 769.

16. *Id.* at 831-32 ("The argument [that Congress cannot limit the President's authority over administrative agencies] is made by those who espouse the 'unitary executive' theory, which holds that Article II 'is a grant to the [P]resident of all of the executive power, which includes the power to remove and direct all lower-level executive officials.' Instead, we accept that, within limits, Congress can by statute impose certain constraints on the President's exercise of his Article II powers. Our argument is simply against fashioning a constitutional doctrine that would bootstrap onto a statutory

an agency's structure should be determined from historical and judicial evaluation, as well as the agency's specific function.[17] From a legal perspective, proponents of this regime express concern that a single director may be able to usurp power granted to the President under Article II.[18] Fundamentally, the question of governance structure is about who makes crucial decisions, and to whom the agency is accountable.[19]

This Note surveys the research and case law regarding agency governance and applies it to the current controversy over the CFPB. Importantly, this Note takes the position that the Supreme Court in *Free Enterprise Fund* corrected a constitutionally impermissible structure but did not offer guidance on which particular structures are constitutionally impermissible, leaving juridical flexibility for Congress to implement its desired protocol.[20]

This is a question of how Congress and the judiciary should determine how to set the CFPB's independence protections, and which protections, if any, the agency needs in order to be effective. This Note separates this debate into two ideological groups. The first approach, which this Note terms the "legalist" approach, takes the position that the agency's statutory framework dictates what kinds of protections should be implemented. The second approach, termed the "protectionist"

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constraint a set of other constraints not specified in that statute.") (quoting STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 341(2008)).

17. *PHH I*, 839 F.3d 1, 7 (D.C. Cir. 2016) ("The question before us is whether we may extend the Supreme Court's *Humphrey's Executor* precedent to cover this novel, single-director agency structure for an independent agency. To analyze that issue, we follow the history-focused approach long applied by the Supreme Court in separation of powers cases where, as here, the constitutional text alone does not resolve the matter." (citing Humphrey's Ex'r v. United States, 295 U.S. 602 (1935))).

18. *Id.* at 16.

19. *See* Edith Ramirez, *The FTC: A Framework for Promoting Competition and Protecting Consumers*, 83 GEO. WASH. L. REV. 2049, 2051–54 (2015) (describing the Federal Trade Commission's board structure as one of its central institutional strengths in developing policy).

20. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 501 (2010) ("Neither respondents nor the dissent explains why the Board's task, unlike so many others, requires more than one layer of insulation from the President—or, for that matter, why only two. The point is not to take issue with for-cause limitations in general; we do not do that. The question here is far more modest. We deal with the unusual situation, never before addressed by the Court, of two layers of for-cause tenure. And though it may be criticized as elementary arithmetical logic[,] two layers are not the same as one.") (internal reference and quotations omitted).

approach, argues that certain agency attributes, such as scope of authority and historical practice, determine whether an agency requires a board rather than a single director. Essentially, this Note frames the debate as a disagreement on the source of guidance in determining agency structure.

This Note takes a third approach, adopting elements from both the legalist and protectionist philosophies, ultimately advocating for the notion that the CFPB should be governed by a board of directors. Specifically, it argues that the D.C. Circuit's initial holding in *PHH Corporation v. Consumer Financial Protection Bureau* was correct in that the Bureau's single-director structure is unconstitutional due to the director's and the agency's lack of accountability and vast regulatory authority.[21]

Part I provides a brief background regarding the development of administrative law jurisprudence since the early twentieth century, focusing specifically on the governance and structure of financial regulatory agencies. Part II summarizes the positions of the two approaches discussed above, describing the rationale of both sides. Finally, Part III argues that elements on both sides of this debate support the conclusion that the CFPB's single-director structure is unconstitutional, and should instead be led by a board.

## I. THE DEVELOPMENT OF FINANCIAL REGULATORY AGENCIES

### A. THE EARLY CASES IN ADMINISTRATIVE LAW GOVERNANCE

It is important to lay out the Court's jurisprudence on the two fundamental issues at stake in the CFPB controversy, namely, for-cause removal and board governance in financial regulatory agencies. Financial matters in agency law have adopted a more nuanced regime since the collapse of Enron, but issues of appointment and agency authority are hardly a new phenomenon.[22] The Supreme Court faced questions of presidential appointments even before Congress enacted the Administrative Procedure Act in 1946.[23] In modern administrative law

21. *See PHH I*, 839 F.3d 1. This is distinguished from the en banc opinion that later held that the CFPB's structure was constitutional. *See PHH II*, 881 F.3d 75, 96 (D.C. Cir. 2018).

22. *See generally Humphrey's Ex'r*, 295 U.S. at 602 (1935); Myers v. United States, 272 U.S. 52 (1926).

23. *See* Administrative Procedure Act, 5 U.S.C. §§ 500, 596 (1946); *Humphrey's Ex'r*, 295 U.S. at 602; *Myers*, 272 U.S. at 52.

parlance, several high-profile agencies are considered "independent agencies."[24] In part, this designation means that the agency head may only be removed "for cause," as opposed to serving at the pleasure of the President.[25] In 1993, President Clinton issued Executive Order 12866, exempting statutorily-designated "Independent Regulatory Commissions" (IRCs) from centralized review processes, thus recognizing another sub-category of agencies.[26] This development of modern administrative law builds on a series of Supreme Court cases, discussed below.

The first noteworthy case is *Myers v. United States*, in which the Supreme Court held that the President had the ability under Article II to unilaterally remove a postmaster.[27] The Court held that Congress may grant the power to the President alone to remove "inferior officers" of the Executive Branch.[28] *Myers* set a wide scope of presidential removal authority, implying that the authority to appoint inferior officers was a de facto authorization to remove them as well.[29] In 1935, the Supreme Court added some limits to *Myers* and held in *Humphrey's Executor* that Congress may restrict the President's authority to remove agency heads—

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24. *See* Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1138 (2000).

25. *See id.* ("The critical element of independence is the protection . . . against removal except 'for cause.'"); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 610 (2010).

26. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993). Specifically, all executive agencies are subject to rulemaking review by OIRA, except for those IRCs designated as "independent regulatory agencies" by the Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520 (2012). *See also* VIVIAN S. CHU & DANIEL T. SHEDD, CONG. RESEARCH SERV., R42720, PRESIDENTIAL REVIEW OF INDEPENDENT REGULATORY COMMISSION RULEMAKING: LEGAL ISSUES 3 (2012). There are also particular review provisions and exemptions for financial regulatory agencies, specifically that they need not submit legislative recommendations to any other agency before submitting to Congress. *Id.* The CFPB is part of this protocol because it is part of the Federal Reserve, which is an independent agency (for the purposes of this Note, the CFPB is referred to as an "independent agency."). *Id.* Other financial regulatory agencies that are part of this regime include: Federal Reserve, FDIC, Comptroller of the Currency, the FHFA, and the National Credit Union Administration. *Id.* at 4, n.35 (citing 12 U.S.C § 250).

27. 272 U.S. at 163–64.

28. *Id.*

29. *Id.* at 161 ("The power to remove inferior executive officers, like that to remove superior executive officers, is an incident of the power to appoint them, and is in its nature an executive power.").

specifically, a Commissioner of the Federal Trade Commission (FTC).[30] *Humphrey's Executor* set the precedent for "for cause" removal as applied to heads of independent agencies.[31] Under a "for cause" removal regime, the President may only remove a respective inferior officer for "inefficiency, neglect of duty, or malfeasance in office."[32]

The decision in *Humphrey's Executor* drew largely on the explicit actions Congress took to limit the President's ability to remove members of the FTC.[33] A lack of explicit instruction was central to the next case in this discussion, *Wiener v. United States*.[34] In *Wiener*, the Court sought to fill a gap left by *Myers* and *Humphrey's Executor*.[35] Specifically, the Court addressed how difficult it is to interpret whether or not an agency head can only be removed for cause when there is no clear statutory directive on the matter.[36] The Court took a substantially different approach from the previous cases, holding that this determination should be made by looking to the agency's "nature and function" as intended by Congress.[37] This is much closer to an endorsement of a legislative-intent-based approach, rather than simply analyzing the relevant agency or its

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30. Humphrey's Ex'r v. United States, 295 U.S. 602, 619, 632 (1935) (upholding a statutory provision stating that the President could only remove commissioners of the FTC "for cause"). The Court distinguished this case from *Myers* on the basis that the job of postmaster was too unlike the matter in *Humphrey's Executor* to apply. *See Humphrey's Ex'r*, 295 U.S. at 627; *see also* Morrison v. Olson, 487 U.S. 654, 687 (1988).

31. *See Morrison*, 487 U.S. at 687; Wiener v. United States, 357 U.S. 349, 352 (1958) (describing *Humphrey's Executor* as limiting *Myers* to "purely executive officers") (quoting *Humphrey's Ex'r*, 295 U.S. at 628).

32. *Morrison*, 487 U.S. at 604, 632 (internal quotation omitted).

33. *See Humphrey's Ex'r*, 295 U.S. at 626–27 ("Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the congressional intent to create a body of experts who shall gain experience by length of service; a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government.").

34. 357 U.S. at 352–53.

35. *Id.*

36. *Id.*

37. *Id.* at 353–54 ("Thus, the most reliable factor for drawing an inference regarding the President's power of removal in our case is the nature of the function that Congress vested in the War Claims Commission. What were the duties that Congress confided to this Commission? And can the inference fairly be drawn from the failure of Congress to provide for removal that these Commissioners were to remain in office at the will of the President? For such is the assertion of power on which petitioner's removal must rest.").

statutory governance.[38] *Wiener*, therefore, represents a standard that provides more deference to courts on questions of agency authority.[39]

### B. The Modern Cases: *Free Enterprise Fund* and the *PHH* Cases

The modern wave of administrative law jurisprudence in financial regulatory agencies came as a result of two major national events in the financial services industry, as discussed above: the collapse of Enron in 2002 and the global recession in 2008.[40] Both of these events resulted in new, sweeping legislation that had a significant impact on the regulatory state in the financial services sector. Following the Enron collapse, Congress enacted the Sarbanes-Oxley Act (SOX), targeted at reforming practices at the "Big Five" accounting firms.[41] Perhaps most importantly, SOX created the PCAOB, a new entity within the Securities and Exchange Commission (SEC) specifically tasked with overseeing the major accounting firms.[42] Similarly, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) following the 2008 financial crisis.[43] Dodd-Frank created the CFPB, a powerful new agency tasked with regulating a wide range of business functions, specifically student loans, credit card companies, and retail banking.[44]

Shortly after creating these entities, specific legal questions arose regarding their accountability to the political branches and their amount of unilateral authority. The PCAOB was controversial in that it had a

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38. *Id.*

39. *Id.* The Supreme Court's highly publicized decision in *Morrison v. Olson* is also frequently mentioned with this line of cases, as the decision concerned the President's ability to remove inferior officers under Article II. *See* Morrison v. Olson, 487 U.S. 654 (1988). However, in comparison to the case law mentioned in this Note, *Morrison* did not focus as narrowly on regulatory agencies. *Id.* Therefore, it is not discussed at length in this Note.

40. *See supra* Introduction.

41. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (2002). Presently, the major accounting firms are known as the "Big Four," due to the eventual demise of Arthur Andersen, discussed *infra* Part III.

42. *Id.*

43. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376–2223 (2010).

44. *Id.*

"two-layer removal-protection" scheme for PCAOB members.[45] That is, SEC commissioners were the only authorities allowed to fire PCAOB members, and they could only do so "for cause."[46] The President is permitted to remove SEC Commissioners, but may only do so for cause.[47] This left the President with little to no ability to remove the PCAOB members.[48] The CFPB was also controversial given its single-director governing structure and its alleged lack of accountability to the political branches.[49]

The Supreme Court addressed the PCAOB's structural issues in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, holding that the "dual for cause limitation[s] on the removal of [PCAOB] members" violated separation of powers.[50] The *Free Enterprise Fund* court made an effort to balance the holdings from *Myers* and *Humphrey's Executor*, which lie on opposite ends of a spectrum of executive authority.[51] As discussed above, *Myers* held that the President generally

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45. *See* 15 U.S.C.A. § 7217(d)(3) (West 2010) (held unconstitutional in Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 477–78 (2010)):

> The Commission may . . . remove from office or censure any person who is, or at the time of the alleged misconduct was, a member of the Board, if the Commission finds, on the record, after notice and opportunity for a hearing, that such member-
>
> (A) has willfully violated any provision of this Act, the rules of the Board, or the securities laws;
>
> (B) has willfully abused the authority of that member; or
>
> (C) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof.

46. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 478 (2010) (citing 15 U.S.C. §§ 7211(e)(6), 7217(d)(3)) ("The parties . . . agree that the Commissioners, in turn, cannot themselves be removed by the President except for 'inefficiency, neglect of duty, or malfeasance in office.'") (citation omitted) (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 620 (1935)).

47. *Id.* at 525.

48. *Id.* at 478.

49. *See generally PHH II*, 881 F.3d 75 (D.C. Cir. 2018) (en banc); *PHH I*, 839 F.3d 1 (D.C. Cir. 2016).

50. 561 U.S. 477, 478 (2010) (citing *Humphrey's Ex'r*, 295 U.S. at 620). Under its initial structure, PCAOB members could only be removed "for cause" by SEC Commissioners. The President can only remove SEC Commissioners "for cause," thus creating a two-tier structure that insulated PCAOB members from removal by the President. The holding in *Free Enterprise Fund* pertains to provisions of the Sarbanes-Oxley Act which created the PCAOB following the collapse of Enron and the subsequent collapse of Arthur Andersen. *See id.*

51. *See supra* Part I.A. *See generally* Myers v. United States, 272 U.S. 52 (1926).

has authority to remove "inferior officers," representing a greater amount of unilateral authority under Article II.[52] In *Humphrey's Executor*, the Court limited the application of *Myers* by holding that Congress may restrict the President's authority to remove the heads of certain agencies—specifically, the President may only do so "for cause."[53] The implication here is that the President's ability to remove officers of the executive branch is not universal, and that Congress may impose some limitations on the President's ability to do so.[54]

In *Free Enterprise Fund*, the Court found that the PCAOB's dual-layer structure, combined with for-cause removal restrictions, violated the separation of powers doctrine.[55] The Court held that each case upholding limits on presidential removal authority involved only one level of "protected tenure" between the President and the individual exercising executive authority.[56] In each of the earlier cases discussed above, either the President or a subordinate who could be removed at will decided whether good cause existed for removal.[57] The Court distinguished this regime from the PCAOB's dual-layer structure, opining that it did not afford the President "*any* decision on whether that good cause exists [for removal]."[58]

In *PHH Corporation v. Consumer Financial Protection Bureau*, the D.C. Circuit initially held that the CFPB's structure was unconstitutional.[59] As initially proposed, the CFPB was to be led by a

52. *See Myers*, 272 U.S. at 163–64.

53. *See Humphrey's Ex'r*, 295 U.S. at 629 ("We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.").

54. *Id.*

55. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 492 (2010).

56. *Id.* at 495. The *Free Enterprise Fund* decision was based largely on the early administrative appointment cases discussed above. *See id.*

57. *Id.*

58. *Id.* (emphasis added).

59. *See generally PHH I*, 839 F.3d 1 (D.C. Cir. 2016).

single director, rather than a board.[60] The initial *PHH* decision was eventually vacated in an en banc opinion, thereby holding that the CFPB's structure was constitutional.[61] Lack of executive and congressional oversight were issues in both *PHH* cases.[62] The court in *PHH I* declared that the Director of the CFPB was effectively "the single most powerful official in the entire United States Government."[63] In the opinion, then-Judge Brett Kavanaugh specifically alluded to a lack of checks placed on the director by any particular deliberative body, both from a policy determination perspective and from a removal perspective.[64]

The *PHH I* court also found the lack of historical support for the CFPB's governance structure particularly troubling.[65] The court recalled the historical origins of independent agencies, noting that independent agencies are an exception to the general rule under Article II that the President has authority to "supervise, direct, and remove at will subordinate officers in the Executive Branch."[66] What makes these agencies independent is that they exercise "executive power," have heads that are removable only for cause, and are not supervised directly by the President.[67] This vast amount of agency authority has traditionally been mitigated by establishing a board governance structure for independent agencies.[68] The court found that the CFPB represented an unprecedented deviation from this historical construct.[69]

The *PHH II* court disagreed with this analysis and based its holding largely on *Wiener*, opining that the linchpin in the constitutionality of a removal protocol was not history, but rather, "the nature of the function that Congress vested in the agency."[70] This represents a more "functional"

60. 12 U.S.C. §§ 5491(b)(1), (2)(stating that authority to lead the agency would be vested in the hands of a single director).

61. *See generally PHH II*, 881 F.3d 75 (D.C. Cir. 2018) (en banc).

62. *See, e.g.*, *PHH I*, 839 F.3d at 26, 34.

63. *Id.* at 16.

64. *Id.* at 16-18.

65. *Id.* at 18.

66. *See id.* at 5 (citing Myers v. United States, 272 U.S. 52 (1926)).

67. *Id.* at 5–6. Specifically, the "executive power" bestowed upon independent agencies is the ability to bring enforcement actions against members of the public, and rule-making authority that is binding on the subjects of regulation, thereby carrying out statutes passed by Congress. *Id.*

68. *Id.* at 6.

69. *Id.*; *see also* Block-Lieb, *supra* note 14, at 26.

70. *See PHH II*, 881 F.3d 75, 86 (D.C. Cir. 2018) (en banc) (quoting Wiener v U.S., 357 U.S. 349, 353 (1958).

analysis of what the needs are to protect certain agencies.[71] The *PHH II* court rejected the panel opinion's view that *Free Enterprise Fund* had granted the President greater authority than had the earlier decisions.[72] According to the en banc opinion, the CFPB's structure does, in fact, have historical justification,[73] and its mandate of authority was sufficiently limited to justify a single director in the face of historical precedent.[74]

## II. PROTECTING AGENCIES FROM CAPTURE

### A. GENERAL CAPTURE PROTECTIONS

The central question in the CFPB controversy can be applied to many other government agencies, especially those charged with regulating the financial services industry. Since the inception of the CFPB, a debate has emerged on this issue, with some scholars arguing that agencies can be led by a single director, and others arguing the opposite.[75] *Free Enterprise Fund* offered no direction on this matter.[76] While the court in *Free Enterprise Fund* struck down the PCAOB's unique structure, the opinion did not express a particular view on the general concept of for-cause removal.[77] In other words, the Court offered no guidance on when, if ever, an agency head's position *requires* for-cause removal.[78] To understand how this should apply at the CFPB, it is important to see how Congress has handled this decision in the past.

Generally, "independent agencies" are designated in part by the classic protections of for-cause removal and a multi-member board structure.[79] Consistent with the precedential authority discussed here,

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71. *Id.*
72. *Id.* at 90.
73. *Id.* at 91.
74. *Id.* at 101-02.
75. *See* Block-Lieb, *supra* note 14, at 25-26.
76. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 492 (2010).
77. *Id.*
78. *Id.* (emphasis added).
79. *See* Barkow, *supra* note 2, at 16 ("According to the existing legal literature and case law, the defining hallmark of an independent agency is that it is headed by someone who cannot be removed at will by the President but instead can be removed only for good cause."). *See also* CHU & SHEDD, *supra* note 26 (discussing the "independent" aspects of independent agencies, specifically how and why they are granted a greater degree of unilateral authority).

these protections, as applied to the CFPB, will be the focus of this Note's analysis. Agency designers implement these protections in the hope that they will insulate the agency from external control by special interests and internal bureaucratic agendas.[80] The central premise is that board structure is more deliberative, and for-cause removal places a check on the President's political ambitions.[81] The two protections tend to appear together in agencies, though for-cause removal has a far more extensive judicial history.[82] This gives both Congress and the courts substantial guidance on how to approach issues of for-cause removal. Presidential appointment and removal power has a clear foundation in the Constitution, while agency governance design is a more modern legal concept.[83]

The President's ability to appoint and remove inferior officers was surely a matter for the courts long before the administrative state.[84] The nuances of agencies merely added new considerations for the federal judiciary to evaluate in deciding whether or not the President had acted within his Article II authority. The governance structure issue is inherently different from the appointment issue, as it has no textual foundation in the Constitution.[85] This was particularly clear in *PHH I*,

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80. *See* CHU & SHEDD, *supra* note 26.

81. *Id.*

82. *See* Barkow, *supra* note 2. As discussed, the Court has decided several cases upholding for-cause removal protection specifically applied to certain agencies. The Supreme Court has not decided a case in which the *sole* issue was the structure of the agency's governing regime. *Compare* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935), *and* Morrison v. Olson, 487 U.S. 654, 687 (1988) (both concerning for-cause removal), *with PHH II*, 881 F.3d 75, 86 (D.C. Cir. 2018) (en banc), *and PHH I*, 839 F.3d 1 (D.C. Cir. 2016) (neither of which are Supreme Court cases). While the D.C. Circuit decided issues of for-cause removal and structure in *PHH I* and *PHH II*, the key distinction discussed here was that the Court was largely focused on whether the structure of the CFPB amounted to a constitutional violation. The Supreme Court's constitutional analysis has been limited to determining whether the specific for-cause removal protocols were constitutional. *See Free Enter. Fund*, 561 U.S. at 492; *Humphrey's Ex'r*, 295 U.S. at 602; *Morrison*, 487 U.S. at 687.

83. *See* U.S. CONST. art. II, § 2.

84. *See, e.g.*, Marbury v. Madison, 5 U.S. 137, 155 (1803) ("The 2d section of the 2d article of the constitution, declares, that, 'the President shall nominate, and, by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for.'") (quoting U.S. CONST. art. II, § 2); Myers v. United States, 272 U.S. 52, 158 (1926).

85. *See* Datla & Revesz, *supra* note 14, at 769, 832.

where the D.C. Circuit focused its analysis primarily on judicial history, rather than undertaking a new whole-cloth constitutional analysis.[86]

While for-cause removal was not the sole issue in either *PHH* matter, the legal doctrine surrounding the issue has important implications for the CFPB. When legislators create independent agencies, they are often more concerned with "agency capture" than with political manipulation.[87] The court indicated this sentiment in *PHH II*, alluding to the particular importance of independence in financial regulatory agencies.[88] In discussing *Free Enterprise Fund*, Professor Rachel Barkow argues that the focus on for-cause removal is an improper "obsessive focus" because agency designers are rarely motivated by a concern for presidential insulation when creating an independent agency.[89] Barkow argues that the concerns regarding external capture far outweigh concerns of political manipulation from within the federal government.[90] In her view, focusing on political manipulation distracts policymakers from more important capture concerns.[91] Thus, Barkow believes that the traditional hallmarks of agency independence should not be those that protect agencies from the President, but those that shield them from both political forces and external special interests.[92]

This debate shows that the question of the CFPB's structure implicates separation of power questions in addition to important policy questions. An understanding of the most effective measures to protect agencies is a policy question that is best suited for Congress. Regardless of whether the courts ever require a set of agency protections, agency designers will always be concerned with some independence measures.[93]

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86. *See PHH I*, 839 F.3d at 7–8.

87. *See Barkow*, *supra* note 2, at 17; *see also* Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856, 884-85 (2013). In this context, "agency capture" refers to control by special interests, rather than control by political actors such as the President and Congress.

88. *See PHH II*, 881 F.3d 75, 94 (D.C. Cir. 2018) (en banc) ("Indeed, the independence of financial regulators is so well established by tradition and precedent that courts have assumed these agencies' heads have removal protection even in the absence of clear statutory text so directing.") (internal citation omitted).

89. *See Barkow*, *supra* note 2, at 17.

90. *See id.*

91. *See id.*

92. *See id.* at 26-42 (describing the "traditional lodestars" of independent agencies). Barkow further argues that the better indicators of independence are the presence of "equalizing insulators" between these two forces. *Id.* at 42.

93. *See id.* at 26-42.

The related question is one for the judiciary, namely, which agency independence protections are permitted within the scope of Article II.

### B. CFPB Capture Concerns: Funding and Accountability

The agency capture concerns related to appointment powers are mainly an issue for the executive branch. Congress, however, also plays a central role in the administrative state.[94] The constitutional status of independent and executive agencies is inherently nebulous, with some scholars referring to agencies as the "fourth branch."[95] This lack of constitutional guidance complicates separation of power questions.[96] One crucial independence aspect that is particularly pertinent to the CFPB is how agencies are funded.[97]

Congress has granted a small number of agencies the ability to "self-fund" to avoid political influence by Congress.[98] The CFPB is one such entity, as is the PCAOB.[99] Self-funding schemes are perhaps most common in agencies focused on bank regulation.[100] Charles Kruly makes the bold argument that self-funded agencies are "the purest form of independence in the federal government."[101]

The CFPB's funding scheme is particularly revolutionary in two ways: 1) the agency's budget is essentially guaranteed, and 2) unlike other independent agencies, the CFPB does not have to go through an annual appropriations process.[102] This regime certainly removes some

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94. Yoon-Ho Alex Lee, *Beyond Agency Core Mission*, 68 ADMIN. L. REV. 551, 551 (2016).

95. *See PHH I*, 839 F.3d 1, 6 (D.C. Cir. 2016) ("The independent agencies collectively constitute, in effect, a headless fourth branch of the U.S. Government"); *see also* William N. Eskridge, Jr., *America's Statutory "Constitution"*, 41 U.C. DAVIS L. REV. 1, 11 (2007) ("Scholars heatedly disagree as to whether such [independent] agencies and such lawmaking or adjudicatory authority are un-Constitutional.").

96. *See* NLRB v. Noel Canning, 134 S. Ct. 2550, 2560 (2014).

97. *See* Charles Kruly, *Self-Funding and Agency Independence*, 81 GEO. WASH. L. REV. 1733, 1734–35 (2013).

98. "Self-funding" refers to exemption from the traditional congressional appropriations process, allowing the agency to seek its own funds. *Id.* at 1735–36.

99. *Id.*

100. *See id.* at 1737.

101. *Id.* at 1738.

102. *See* Block-Lieb, *supra* note 14, at 26 (citing Harv. L. Rev. Ass'n, Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV. L. REV.

congressional influence over the agency, as Congress effectively shares some of its own authority (the spending power) and grants it to the agency.[103] Kruly further argues that these agencies almost always exhibit the traditional forms of executive independence, making them free of both political branches.[104]

Nothing specifically suggests that the CFPB or any other agency, to secure self-funding, must have executive protections such as multi-member boards and for-cause removal.[105] The assertion is only that this tends to be the nature of these agencies from a practical perspective.[106] In other words, a normative analysis of self-funding agencies indicates that these agencies tend to have the classic features of independent agencies, at least in theory.[107] Even the funding determination, something vital to every agency's ability to operate, does not appear to carry with it any structural mandate regarding governance.

A common criticism of self-funding is that it effectively makes the agency accountable to nobody, as acknowledged by Kruly.[108] The counterargument to this view is that funding alone is not the linchpin in determining agency accountability.[109] Advocates of the self-funding protocol point to the CFPB's substantive activities, and argue that the diffuse statutory protections that the agency enforces make it de facto accountable to several other regulatory institutions.[110]

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1822, 1823 (2012)). The CFPB is also exempt from OIRA review, but that is a feature common to other independent agencies. *See* Zywicki *supra*, note 87, at 891–92.

103. *See* Kruly, *supra* note 97, at 1736.

104. *See id.* at 1738.

105. *See id.*

106. *See id.*

107. *See id.*

108. *See id.*

109. *See* Block-Lieb, *supra* note 14, at 28 ("By statutory design, the CFPB shares its regulatory space with numerous political actors. Because it is indirectly accountable to a wide range of both political and industry interests, the CFPB is less likely to promulgate overreaching regulations that protect consumer interests to the detriment of all else.") (citation omitted); *see also* Keith S. Brown & Adam Candeub, *Partisans & Partisan Commissions*, 17 GEO. MASON L. REV. 789, 809 (2010) (arguing that independent agencies become dominated by congressional agendas rather than the demands of the President).

110. *See* Block-Lieb, *supra* note 14, at 27.

CFPB critics and supporters both agree that the CFPB is unusually immune from direct congressional oversight.[111] The disagreement between proponents and opponents of the CFPB's funding scheme is mainly whether this lack of accountability is a dangerous force or a positive one.[112] CFPB proponents see the self-funding as an insulator from Congress and, by extension, from special interests.[113] Opponents of the CFPB (or at least its structure) see an excessive delegation of authority that is not clearly accountable to any one branch of government.[114] This dispute over funding highlights the disagreement over the very existence of the CFPB in the first place. Both camps realize that the CFPB and Dodd-Frank emerged as a response to the 2008 global recession.[115] Proponents of the organization see a response to a global conflict, while opponents see an unprecedented level of unchecked authority by a federal agency.[116]

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111. *Compare* Block-Lieb, *supra* note 14, at 27, *and* Kruly, *supra* note 97, *with* Zywicki, *supra* note 87, at 888 ("Thus, not only are the more obvious formal controls (removal by the President and appropriations by Congress) absent from the CFPB, many of the informal controls typically seen in other agencies are absent as well.") (citation omitted), *and* William Simpson, Note, *Above Reproach: How the Consumer Financial Protection Bureau Escapes Constitutional Checks & Balances*, 36 REV. BANKING & FIN. L. 343, 371–72 (2016) ("Dodd-Frank's framework is far more egregious than simple unauthorized spending the law expressly prohibits Congress from ever reviewing the CFPB budget") (citation omitted) (citing 12 U.S.C. § 5497(a)(1) (2012)).

112. *See* Simpson, *supra* note 111, at 351; *see also* Block-Lieb, *supra* note 14, at 27.

113. *See* Kruly, *supra* note 97, at 1736.

114. *See* Simpson, *supra* note 111, at 351.

115. *See* Block-Lieb, *supra* note 14 ("The Financial Crisis Inquiry Commission found that regulators were aware of the marketing and mass distribution of subprime mortgages and, due to industry pressure and ideological myopia, determined to do nothing. Congress sought to prevent the possibility of further influence of this sort with the enactment of [Dodd-Frank]") (citations omitted); *see also* Simpson, *supra* note 111, at 357 (arguing that the federal government exploited the financial crisis to create a new agency with a wide scope of authority) ("In the eyes of its critics . . . Dodd-Frank represented a sweeping new open-ended power grant to the administrative state, erecting new barriers to credit access, drying up liquidity, and driving local community banks out of business with burdensome compliance costs."). *See id.*

116. *See* Block-Lieb, *supra* note 14, at 27-28; *see also* Simpson, *supra* note 111, at 353.

### C. THE LEGALIST AND PROTECTIONIST APPROACHES

This Note refers to the first approach to determine which capture protections should be implemented as the "legalist" approach. The legalist approach focuses less on policy merits and more on constitutional and statutory limitations.[117] Legalists place a greater emphasis on the governing precedent and statutory directives than on a preferred regime of capture protections.[118] This, however, does not imply that legalists necessarily come down on one side of this debate of whether the CFPB needs a board structure and if the director should be removable at will. Rather, legalists believe that a chosen capture protection regime must comply with the relevant statutory and judicial guidelines.[119] They also believe that there is no justification to "read in" any other implied form of protection.[120] Legalists generally draw guidance from the agency's statutory framework and from Supreme Court jurisprudence on similar matters.[121] In other words, legalist scholars seem to believe that the CFPB must fit a mold of agency protections endorsed by the Supreme Court and provided for by statute.[122]

As discussed, the Supreme Court has been able to point to specific constitutional provisions on for-cause removal questions, while making more ad hoc decisions on the governance structure aspect.[123] As a result, the Court has a much richer precedential body on removal matters than on agency governance.[124] The Supreme Court in *Free Enterprise Fund* set

117. *See, e.g.*, Datla & Revesz, *supra* note 14, at 773–74 ("[T]here is no reason why any given statutory limitation, or set of limitations, on presidential power should generate additional limitations not provided for by statute.").

118. *Id.*

119. *See id.* ("[B]ecause no one feature of independence perfectly correlates with another, there is no reason why any given statutory limitation, or set of limitations, on presidential power should generate additional limitations not provided for by statute.") (citations omitted) (citing Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 52 n.49 (1986)).

120. *See id.*

121. *See, e.g.*, *id.* at 773-74 (arguing that the only capture protections permitted are those that are mentioned directly by statute).

122. *Id.*

123. *See supra* Part I.

124. As discussed, the Supreme Court has decided several cases upholding for-cause removal protection specifically applied to certain agencies. *See* Barkow, *supra* note 2 and accompanying text for a discussion on the courts' constitutional analyses in the pertinent cases.

a limit on Congress' ability to protect agencies from presidential actions, but never endorsed a "minimum standard" of removal protections.[125] In other words, the Court set a "ceiling" on congressional authority to restrict the President, but never mentioned the relevant "floor."[126] In fact, the Court never actually referenced any benchmark of required protections.[127] Rather, the Court simply found that the PCAOB's structure did not pass a narrow analysis of permissible congressional restriction on the President.[128] The lack of clear judicial determination on the governance matter suggests that the *PHH* cases are revolutionary in that they challenged the constitutionality of the CFPB primarily based on grievances related to governance, rather than a combination of both governance and removal powers.[129]

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125. *See generally* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 477 (2010). The Supreme Court struck down the particular administrative scheme as usurping the President's Article II powers but did not indicate that there was any particular minimum insulation required for independent agencies. *Id.*

126. *Id.*

127. *See id.* at 501 ("The point is not to take issue with for-cause limitations in general; we do not do that. The question here is far more modest. We deal with the unusual situation, never before addressed by the Court, of two layers of for-cause tenure.").

128. *Id.*

129. A crucial distinction between the petitioners' claims in *Free Enterprise Fund* and in the *PHH* cases is that the *Free Enterprise Fund* petitioners challenged the constitutionality of the PCAOB primarily on the President's ability to remove members of the board, while the challenge to the PCAOB's structure was ancillary to the removal matter. *See Free Enter. Fund*, 561 U.S. at 509 ("As the judgment in this case demonstrates, restricting certain officers to a single level of insulation from the President affects the conditions under which those officers might someday be removed, and would have no effect, absent a congressional determination to the contrary, on the validity of any officer's continuance in office. The only issue in this case is whether Congress may deprive the President of adequate control over the Board, which is the regulator of first resort and the primary law enforcement authority for a vital sector of our economy. We hold that it cannot"). The *PHH* petitioners premised their claim primarily on the governance structure of the CFPB, showing a departure from related administrative law jurisprudence. *See PHH II*, 881 F.3d 75, 96 (2018) (en banc) ("[T]he constitutionality of for-cause removal turn[ing] on . . . whether [the agency] is led by an individual or group . . . finds no home in constitutional law"); *see also* Opening Brief for Petitioners at 45–46, *PHH I*, 839 F.3d 1 (2016) (No. 15-1177) ("[T]he CFPB's unconstitutionality lies in its unprecedented level of insulation from all democratic checks and accountability. Thus, perhaps the most telling indication of the severe constitutional problem with the CFPB's structure is the lack of historical precedent for this entity.") (internal quotations omitted) (quoting *Free Enter. Fund*, 561 U.S. at 505). While the *PHH* petitioners also raised

The legalist view has support in areas of administrative law other than the cases mentioned above. One important source of support comes from the debate over the President's ability to control internal agency decisions.[130] There is often some temptation to conflate presidential *control* over agencies with authority to make internal decisions entrusted to the agency head.[131] This is typically called "directive" authority.[132] While there is some speculation on the limits of directive authority, the generally accepted view is that the President does not have directive authority over decisions that are "entrusted by statute to agency heads."[133] Relying on the constitutional limits on the President leaves legalists with an argument that the CFPB as an independent agency is inherently insulated from presidential capture.[134] The judicial clarity on removal authority, taken in conjunction with the lack of clarity on governance, gives legalist scholars a strong argument for removal protections, but little

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concerns about the President's inability to remove the Director of the CFPB, the main thrust of their argument was that the CFPB's structure was unprecedented and, thus, unconstitutional due to the inordinate amount of authority given to the Director. *See* Opening Brief for Petitioners at 47–48, *PHH I*, 839 F.3d 1 (2016) (No. 15-1177).

130. *See generally* Robert V. Percival, *Who's In Charge? Does the President Have Directive Authority over Regulatory Decisions?*, 79 FORDHAM L. REV. 2488, 2509 (2011).

131. *Id.*

132. *Id.* at 2540.

133. *Id. See also* Richard J. Pierce, Jr., *Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of the Unitary Executive by Steven G. Calabresi and Christopher S. Yoo*, 12 U. PA. J. CONST. L. 593, 596 (2010) ("I believe instead that, when Congress has lawfully vested decision-making power in an executive branch officer, . . . that executive branch officer is the only person who can make the decision."); Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 759 (2007) ("If its text chooses between President as overseer of the resulting assemblage, and President as necessarily entitled 'decider,' the implicit message is that of oversight, not decision.").

134. *See* CHU & SHEDD, *supra* note 26; Zywicki *supra* note 87, at 890. Much of the directive authority debate centers on the president's control over non-independent agencies. *See* Percival, *supra* note 130. There is also a countervailing view within the legalist school of thought that suggests the President's constitutional authority includes the ability to remove all "principal officers" at will, and that limits on this authority are unconstitutional, regardless of the "independent agency" designation. *See* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1244 (2014) ("It follows from the necessity of the removal power that the President must be able to remove at will all principal officers.").

guidance on the governance matter.[135] As applied to the CFPB, legalist scholars have support for instituting for-cause removal, but the governance question remains less clear, as held by the *PHH II* court.[136]

This Note refers to the next group of scholars who have expressed a view on the CFPB as "protectionists." Protectionists favor a policy-centric approach rather than a purely judicial one.[137] They believe strong capture protections are necessary for administrative agencies, seeing potential agency for capture as an unacceptable risk.[138] In addition, they believe that the jurisprudential nexus surrounding administrative agency governance allows for a wide range of capture protections.[139] The dissenting opinion in *Free Enterprise Fund* is illustrative of the protectionist position.[140] Rather than undertaking an analysis limited to the bounds of presidential and agency authority, Justice Breyer opted to focus on the applicability and practicality of the majority's opinion, criticizing it as unrealistic and difficult to apply.[141]

There are some capture-prevention measures beyond for-cause removal protection and multi-member boards that are considered indicia of agency independence.[142] For-cause removal, however, seems to have a more hallowed place in administrative law jurisprudence than other protections.[143] The Supreme Court has even deduced an *implied* for-cause

135. *See PHH II*, 881 F.3d 75, 86 (2018) (en banc) (quoting Wiener v. United States, 357 U.S. 349, 352–55(1958)).

136. *Id.*

137. *See, e.g.*, Jonathan H. Adler, *Anti-Disruption Statutory Construction*, 38 CARDOZO L. REV. 509, 525–26 (2013) (describing Chief Justice Roberts' majority opinion in *Free Enterprise Fund* as a "surgical strike," in accordance with a "minimal[ist]" approach to statutory interpretation that avoided larger constitutional issues relevant to the case); Hans Bader, Free Enterprise Fund v. PCAOB*: Narrow Separation-of-Powers Ruling Illustrates That the Supreme Court Is Not "Pro-Business"*, 2010 CATO SUP. CT. REV. 269, 284 (2010) (arguing that the Court in *Free Enterprise Fund* should have gone further by striking down Sarbanes-Oxley in its entirety).

138. *See, e.g.*, NLRB v. Noel Canning, 134 S. Ct. 2550, 2567 (2014); *Wiener*, 357 U.S. at 353–54; Fed. Election Comm'n v. NRA Political Victory Fund, 6 F.3d 821, 826 (D.C. Cir. 1993).

139. *See Wiener*, 357 U.S. at 353–54.

140. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 537 (2010) (Breyer, J., dissenting) (describing the majority's opinion as a "mechanical" rule, "divorced from the context of the case at hand.").

141. *Id.*

142. *See* Datla and Revesz, *supra* note 14.

143. *See Wiener*, 357 U.S. at 354 (holding that Congress did not intend for the President to have at-will removal power under the War Claims Act).

removal protection in several independent agencies, despite lack of clear statutory instructions.[144] This may be one of the strongest arguments in support of the protectionist position. The main justification for an implied for-cause removal restriction is that congressional use of some independence measures is evidence of intent to implement other similar measures.[145] Implied protection indicates that the idea of capture protection is an inherent component of all agencies, regardless of individual agency design decisions.[146] The implication seems to be that capture protection is a necessary, rather than a sufficient, feature of independent agencies.[147] Adopting the idea of implied protection leaves little argument over whether there should be for-cause removal or not, as it is considered implicit in independent agencies.[148]

Nevertheless, the concept of implied protections has been sharply criticized.[149] Kirti Datla and Richard Revesz are among those who reject the idea.[150] They argue that the case law endorsing this doctrine "[is] not grounded in statutory text, historical context, or a tenable theory of congressional intent."[151] This demonstrates a strong legalist counterargument to a protectionist concept by adhering to the relevant statutory text.[152] Applying Datla and Revesz's approach to the CFPB

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144. *See id.*; Datla and Revesz, *supra* note 14, at 833 (citing SEC v. Blinder, Robinson & Co., Inc., 855 F.2d 677, 681 (10th Cir. 1988) and Fed. Election Comm'n v. NRA Political Victory Fund, 6 F.3d 821, 826 (D.C. Cir. 1993)).

145. Datla and Revesz acknowledge that there is effectively one "exception" to their claim. This exception is that for cause removal is "always accompanied by a set term of tenure." *See* Datla and Revesz, *supra* note 14, at 833. However, they claim that, "the relationship does not hold in the opposite direction. A set term of tenure does not always correspond to for-cause removal protection." *Id.*

146. *See Wiener*, 357 U.S. at 354.

147. *Id.*

148. *Id.*

149. *See* Datla & Revesz, *supra* note 14, at 833.

150. *See id.* (arguing that the cases supporting implied protections, including *SEC v. Blinder, Robinson & Co.* and *Federal Election Commission v. NRA Political Victory Fund*, were "incorrectly decided because their central premise—that the presence of certain features of independence is evidence of congressional intent to endow an agency with other features of independence—is wrong.").

151. *See id.* at 835.

152. The parties in *Free Enterprise Fund* both assumed that SEC Commissioners could only be removed "for cause." *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 487 (2010). The Court in *Free Enterprise Fund* agreed to decide the case "with that understanding." *Id. See also* Datla and Revesz, *supra* note 14,

matter, or any other independent agency, is fairly one-dimensional, and strikes at the heart of the legalist view. Datla and Revesz eschew open-ended judicial nuances and rely on the relevant statutes alone.[153] The only analysis required is looking at the statutory text.[154] This leaves the policy decision in Congress' hands, while the courts' mission is only to interpret the statute.[155]

The CFPB naturally presents its own set of independence and capture issues. These have been noticed by both legalists and protectionists. Professor Todd Zywicki argues that the CFPB is particularly prone to agency capture due to its single-industry focus and a perceived lack of accountability.[156] The "single-mission" that Zywicki refers to is the CFPB's mandate to regulate a narrow segment of banking activity.[157] The concern here is that the largest financial institutions will be able to manage the unprecedented amount of regulatory work initiated by the CFPB.[158] Larger banks will, in turn, be able to lobby the agency more effectively than smaller banks, and will be able to curry favor within the agency.[159] Zywicki's theory finds some support in Barkow's research, which takes the position that information imbalance is a key contributor to agency capture.[160] Barkow argues that industry players tend to have access to a great amount of very specific and technical information, and that the regulating agencies do not have this same information.[161] With this level of complexity, it is easy to see how a "revolving door" develops between industry and the private sector.[162] Revolving doors in federal agencies are hardly a new phenomenon, but large imbalances in

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at 843 ("The degree of independence from Presidential control an agency enjoys should be determined only by looking at the agency's enabling statute.").

153. *See* Datla and Revesz, *supra* note 14, at 843.

154. *See id.* at 835, 843.

155. *See id.*

156. *See* Zywicki, *supra* note 87, at 885 (citing MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 44–46 (2009)).

157. Zywicki, *supra* note 87, at 885.

158. *Id.*

159. *Id.* at 886; *see also Barkow*, *supra* note 2, at 23 ("[C]apture operates because of the revolving-door phenomenon: the heads of agencies often anticipate entering or returning to employment with the regulated industry once their government service terminates.") (citation omitted).

160. *See Barkow*, *supra* note 2, at 23.

161. *See id.*

162. *See id.* at 48.

information across regulated industries make the CFPB's revolving door particularly susceptible to capture.[163]

## III. A Third Approach: Precedents Applied to Functionalism

### A. The CFPB Needs a Board of Commissioners

The research and case law on this matter demonstrates that there is still room for debate regarding what the final structure of the CFPB will look like. Three main concerns dominate the debate over the CFPB's structure and authority: lack of oversight, ease of agency capture, and the CFPB's wide range of administrative authority. This Note takes the position that these three factors point to the need to restructure the CFPB, and that the agency's single-director structure is unconstitutional. In other words, the D.C. Circuit's initial decision in *PHH I* should stand.[164] This recommendation ultimately adopts elements from both the legalist and protectionist views. It also suggests that Congress and the courts must consider other factors relating to the CFPB's level and scope of authority.

### B. Lack of Oversight

The first major issue with the CFPB's current structure is its lack of accountability to Congress and the executive branch.[165] As discussed, agency accountability is, at its core, intimately related to questions of separation of powers.[166] Also, the CFPB has a unique structure in terms of leadership and external oversight.[167] This Note argues that a board structure would mitigate some of the unilateral authority of the Director and the CFPB as a whole, while also adding a layer of accountability to other board members.[168]

The history of administrative law jurisprudence and the history of the separation of powers doctrine supports a board governance structure,

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163. *See id.* at 23.

164. *See generally PHH I*, 839 F.3d 1 (D.C. Cir. 2016).

165. For the purposes of this Note, the "current structure" of the CFPB refers to the agency's form as of the decision in *PHH II*.

166. NLRB v. Noel Canning, 134 S. Ct. 2550, 2567 (2014).

167. *See PHH I*, 839 F.3d at 18.

168. *See* Ramirez, *supra* note 19, at 2052-54.

as the court discussed in *PHH I*.[169] In *NLRB v. Noel Canning*, Justice Breyer acknowledged that questions of Presidential appointment powers related to separation of powers require historical analysis rather than mere textual interpretation.[170] Breyer proposed that one possible way to rectify this is to focus on what the "relative practice of government" has been regarding the specific issue.[171]

The historical analysis employed by the Court regarding matters of agency appointment powers supports the central premise of this Note.[172] That is to say, historical practice favors the use of board governance in agencies that have increased levels of authority such as the CFPB.[173] This historical analysis is particularly relevant in accountability matters related to separation of powers.[174] The goal of board governance is partially to create an internal culture of deliberation in place of presidential or congressional control.[175] Under this analysis, the CFPB's structure finds no support in historical practice, nor in the relevant precedent.[176] The holding in *Humphrey's Executor* was premised in large part on Congress' desire to create "a body of experts" to lead the FTC, something wholly absent from the CFPB's structure.[177] The Court saw the importance of

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169. *See PHH I*, 839 F.3d at 7–8 ("[H]istory and tradition are critical factors in separation of powers cases where constitutional text does not otherwise resolve the matter."); *Noel Canning*, 134 S. Ct. at 2560 ("The longstanding 'practice of the government,' can inform this Court's determination of 'what the law is'" in a separation-of-powers case) (quoting McCulloch v. Maryland, 17 U.S. 316, 401 (1819) and Marbury v. Madison, 5 U.S. 137, 177 (1803)).

170. *See Noel Canning*, 134 S. Ct. at 2559-60.

171. *Id.*

172. *See id.*

173. *See PHH I*, 839 F.3d at 6 ("Because of their massive power and the absence of Presidential supervision and direction, independent agencies pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances. To help mitigate the risk to individual liberty, the independent agencies, although not checked by the President, have historically been headed by *multiple* commissioners, directors, or board members who act as checks on one another.").

174. *Id.* at 8.

175. *Id.*

176. *See id.* ("In light of the consistent historical practice under which independent agencies have been headed by multiple commissioners or board members, and in light of the threat to individual liberty posed by a single-Director independent agency, we conclude that *Humphrey's Executor* cannot be stretched to cover this novel agency structure. We therefore hold that the CFPB is unconstitutionally structured.") (citing Humphrey's Ex'r v. United States, 295 U.S. 602 (1935)).

177. *See Humphrey's Ex'r*, 295 U.S. at 625.

maintaining the independence of a deliberative body, thus upholding the for-cause removal protocol.[178]

The *PHH I* court saw the historical weaknesses in the CFPB's argument that *Humphrey's Executor* permitted a single-director structure.[179] As discussed, the FTC's independent board was integral to the Court's decision in *Humphrey's Executor*.[180] During oral arguments, the *PHH I* court asked the CFPB for examples of independent agencies headed by a single administrator that have for-cause removal protections.[181] The CFPB could only come up with three examples in response, none of which have the authority to pursue law enforcement actions against members of the public for violating statutes or agency rules.[182]

Regulatory agencies are naturally created by Congress and overseen by both Congress and the President. They are not, in and of themselves, part of their own branch. Each is created to serve a specific regulatory function in a specialized area, but policy should come from the political branches of government. Congress generally creates agencies with a "core mission" in mind.[183] This model of agencies as regulatory specialists underscores that the agencies are to take their mandate from Congress.[184]

The CFPB's accountability regime effectively reverses this important construct of administrative law. Taken together, the CFPB's funding protocol, its accountability structure, and the inability to remove the director, effectively render the agency nearly untouchable by both the President and Congress.[185] The agency's freewheeling funding protocol is one of the most significant aspects in this lack of oversight.[186] Despite a lack of logical consistency in the type of agencies with self-funding authority, the CFPB is in a small class of other agencies that has both self-funding and a single director.[187] By leaving so much authority in the hands

178. *Id*. at 628-32.

179. *See PHH I*, 839 F.3d at 18.

180. *See Humphrey's Ex'r*, 295 U.S. at 625.

181. *PHH I*, 839 F.3d at 18.

182. *Id.* The three examples that the CFPB provided were the Federal Housing Finance Authority, the Social Security Administration, and the Office of Special Counsel. *Id.*

183. *See* Lee, *supra* note 94, at 559.

184. *Id.*

185. *See* Zywicki, *supra*, note 87, at 888-93.

186. *See id.* at 888-89.

187. *See* Kruly, *supra* note 97, at 1751.

of a single director, the CFPB's structure violates the classic principal-agent view of Congress' relationship with agencies.[188] The ultimate example of the breakdown in this relationship is Congress' inability to even review the CFPB's budget in the annual appropriations process.[189]

Another issue is the CFPB's lack of accountability to the President.[190] This extends beyond the President's inability to remove the director at will.[191] As discussed above, the CFPB is one of a few agencies that is exempt from review by the Office of Information and Regulatory Affairs (OIRA).[192] Due to the CFPB Director's great amount of authority, the President is essentially powerless to coordinate the Bureau's policies with other government entities.[193] Richard Pildes has summarized the value of OIRA review, in that it alleviates some of the tunnel-vision tendencies of specialized agencies, thus serving as an important check on administrative authority.[194] The CFPB is not the only agency exempt from OIRA review, but it is unique in that it has a "single-mission" and a single director.[195] This structure generally suggests that an agency needs to undergo OIRA review, but the CFPB remains exempt.[196]

The CFPB's lack of a board structure compounds many of the accountability issues discussed above. This Note takes the position that the lack of formal oversight from the political branches, combined with a lack of internal checks on the director, is likely to create a highly unaccountable agency.[197] The above comparison to the FTC is illustrative of why the CFPB's structure departs from the Supreme Court's understanding of *Humphrey's Executor*. Unlike the FTC, the CFPB does not have a body of experts to deliberate in favor of the optimal policy outcome.[198] The lack of checks on the CFPB effectively nullifies the

188. *See* Lee, *supra* note 94**,** at 551.

189. *See* Block-Lieb, *supra* note 14, at 39-40.

190. *See* Kruly, *supra* note 97, at 1750-51; Zywicki, *supra* note 87, at 890-92.

191. *See* Kruly, *supra* note 97, at 1750-51; Zywicki, *supra* note 87, at 890-92.

192. *See* CHU & SHEDD, *supra* note 26, at 3; Zywicki, *supra* note 87, at 891.

193. *See* Zywicki, *supra* note 87, at 891–92.

194. *See id.* (citing Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 4 (1995)).

195. Zywicki, *supra* note 87, at 893.

196. Technically, the CFPB is part of the Federal Reserve, which is an independent agency and thus exempt from OIRA review. Zywicki, *supra* note 87, at 893.

197. *See id.* at 893-94 (discussing the lack of judicial supervision of and internal checks on the CFPB).

198. *See PHH I*, 839 F.3d 1, 26 (D.C. Cir. 2016) ("[U]nlike single-Director independent agencies, multi-member independent agencies 'can foster more deliberative

ability of the political branches to monitor its activities, and does little to alleviate the dangers of agency capture.[199]

### C. EASE OF AGENCY CAPTURE

Simply stated, it is easier to capture one person than a group of people. The CFPB emerged at a time of public outcry, with much of the public demanding a robust consumer watchdog that had a particular, consolidated focus on consumer protection.[200] The structure of the CFPB was lauded by many on the political left, despite the Bureau's lack of oversight.[201] It is understandable why many in the government supported this idea immediately after the recession. On the other hand, conflating the need for a consumer watchdog with a requirement that the agency be led by a single director is short-sighted in terms of the potential for agency capture. Choosing the most efficient method to avoid capture of a single director is as much a policy question as it is a legal question, but this Note only addresses the legal matters. In other words, there is the possibility that a single director may be constitutionally permissible at the CFPB or any other agency, which is a question for the courts. But deciding if the agency is sufficiently protected from capture is mainly a question for Congress.

The potential for corruption at the highest levels of administrative agencies remains a major topic in the American political discourse.[202] Not

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decision[-]making.'") (quoting Datla and Revesz, *supra* note 14, at 794); Humphrey's Ex'r v. United States, 295 U.S. 602, 625 (1935) (arguing that in creating the FTC, Congress clearly intended for the Commission to serve as a "body of experts who shall gain experience by length of service"); Ramirez, *supra* note 19.

199. The CFPB also has reduced judicial oversight, as the Dodd-Frank Act states that the CFPB's actions are entitled to immediate *Chevron* deference by the judiciary. This gives the Bureau another tool to expand its policy reach, as it may interpret statutes as it desires, so long as it fits within a reasonable interpretation. *See Zywicki*, *supra* note 87, at 893.

200. *See* Block-Lieb, *supra* note 14, at 27.

201. *See* Sylvan Lane, *Appeals Court Rules Consumer Bureau's Structure is Constitutional*, THE HILL (Jan. 31, 2018), http://thehill.com/policy/finance/371603-dc-circuit-consumer-bureaus-structure-is-constiutional[sic] [https://perma.cc/9XGB-Z9ZV].

202. *See, e.g.*, Juliet Eilperin, Brady Dennis, and Josh Dawsey, *Scott Pruitt's Job In Jeopardy Amid Expanding Ethics Issues*, WASHINGTON POST (Apr. 6, 2018), https://www.washingtonpost.com/news/energy-environment/wp/2018/04/05/top-epa-

only are the governmental oversight protections on the CFPB anemic, the Bureau's structure is an invitation for powerful special interests to capture its leadership. As discussed above, agency capture by private special interests is frequently a principal concern for agency designers.[203] Board governance would add a layer of protection from outside industry actors, resulting in a purer and more deliberate policy approach.[204] While no capture protection method is airtight, these particular protections seem to be a priority among agency designers.[205]

Barkow's research demonstrates that agencies that regulate well-financed agency players are often the most susceptible to capture by special interests.[206] This is a particular concern for the CFPB, since it oversees some of the most fiscally robust private institutions in the world. In fact, the CFPB's very existence gives these institutions a more precise "target" to capture than before the Bureau existed. The functions overseen by the CFPB were previously executed by seven agencies, charged with enforcing eighteen separate statutes.[207] Certainly, there are common-sense arguments for consolidating administrative functions under a single regulatory entity. However, this aggregation of regulatory functions indicates that the CFPB's potential for capture is a legitimate concern. Certainly, it is harder to capture a group of people than to capture one person, but it is even harder to capture a group of entirely separate agencies than to capture only one.

Because there are more capture concerns pertaining to multi-purpose agencies, it is hardly surprising that several independent agencies have leadership structures deliberately designed to impede agency capture.[208] One notorious measure is a partisan balance requirement, meaning that the board of directors (or other board structure titles, i.e. commissioners,

ethics-official-says-he-lacked-key-facts-about-pruitts-condo-rental/?utm_term=.bcc0f367b867 [https://perma.cc/N88V-R99M].

203. *See Barkow*, *supra* note 2, at 15.

204. *See id.*; *see also* Ramirez, *supra* note 19, at 2052-54 (discussing the benefits of decision-making by a collective body rather than a single agency head).

205. *See Barkow*, *supra* note 2, at 15.

206. *See id.* at 21–33.

207. *See PHH II*, 881 F.3d 75, 145 (D.C. Cir. 2018) (citing 12 U.S.C. §§ 5481(12), 5581(a)(2), (b)). There is some disagreement as to exactly how many statutes were folded into the CFPB's mission, though the figure tends to fluctuate only slightly. *See, e.g.*, *PHH I*, 839 F.3d 1, 7 (D.C. Cir. 2016) (stating that the director is tasked with enforcing nineteen statutes, as opposed to eighteen).

208. *See Barkow*, *supra* note 2, at 41.

governors, etc.) has a mandated number of individuals from each of the two major political parties at any given time.[209] While this seems like a measure best designed to prevent partisan capture from within the government, it also helps mitigate the risks of capture from outside the federal government, namely, from wealthy special interest groups.[210] Barkow contends that this effectively encourages both ends of the political spectrum to monitor different industry players, which, in turn, balances the policy outcomes of the agency.[211] One side will likely object and issue a dissent if the other side implements overly strict sanctions, or fails to sanction an errant institution.[212] Ultimately, this is a question for the courts to decide based on the amount of authority granted to the agency. Specifically, the courts will need to decide how much liability for capture Congress is permitted to give one individual charged with a tremendous amount of authority over the American economy.

Regardless of the constitutional limits on agencies, the policy merits of board governance are obvious from both the public and private sectors, as well as from American history.[213] There are also justifications for board leadership that emanate from corporate law itself.[214] Financial regulatory agencies govern in a field of substantive law that places a premium on collaboration, as board governance is the norm in corporate institutions.[215] This preference for deliberation is evident from a few major themes of corporate case law, such as the existence of litigation committees and the legal mandates regarding shareholder voting rights.[216]

### D. THE CFPB'S WIDE RANGE OF UNILATERAL AUTHORITY

Unlike many other independent agencies, the CFPB has a substantial amount of enforcement authority.[217] Specifically, the CFPB has two

209. *See id.* at 39–41.
210. *See id.* at 41.
211. *See id.*
212. *See id.*
213. *See* THE FEDERALIST NO. 51 (James Madison) (discussing the importance of deliberation between the two houses of Congress: "In republican government, the legislative authority necessarily predominates.").
214. Stephen M. Bainbridge, *Why A Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1, 3 (2002).
215. *Id.*
216. *See, e.g.*, Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981).
217. *See* 12 U.S.C. §§§ 5563, 5564(a), (f).

methods of enforcement: administrative enforcement and independent litigation authority, both of which it may pursue without working through the Department of Justice.[218] The CFPB is also authorized to seek a wide array of legal, equitable, and injunctive remedies for alleged violations.[219] Financial penalties on mortgage lenders have been particularly staggering, reaching amounts as high as $2 billion.[220] The argument that the CFPB's range of authority is too large for a single director is not bound to the severity of rendered judgments. Rather, the reasoning focuses on how the Bureau is able to procure these remedies. Based on the CFPB's actions in its first five years of existence, it seems that the subjects of CFPB litigation and administrative enforcement are strongly encouraged to settle, rather than contest, its proposed sanction in court.[221] There is a clear indication that even the threat of administrative action or litigation poses a serious concern for financial entities.[222] What this shows is that the CFPB is not only able to secure large financial remedies, but that it is frequently able to do so without ever even going to trial.[223]

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218. *Id. See also* Donald C. Lampe, Ryan J. Richardson, *The Consumer Financial Protection Bureau at Five: A Survey of the Bureau's Activities*, 21 N.C. BANKING INST. 85, 109 (2017) (citing 12 U.S.C. §§§ 5563, 5564(a), (f)). The CFPB is authorized to file suit in state and federal court, rather than going through the Department of Justice as most other agencies are required to do. *Id.* In addition, there are no subject matter or personal jurisdiction limits placed on litigation by the CFPB. *Id.*

219. Lampe & Richardson, *supra* note 218, at 109 (listing possible remedies, including: "rescission or reformation of contracts, refund of moneys or return of real property, restitution, disgorgement or compensation for unjust enrichment, payment of damages or other monetary relief, public notification regarding the violation, including the costs of notification, limits on the activities of functions of the person; and civil money penalties against any person.") (alteration in original) (citing 12 U.S.C. § 5565(a)(2)).

220. *Id.* at 123 (citing Consumer Financial Protection Bureau, *CFPB, State Authorities Order Ocwen to Provide $2 Billion in Relief to Homeowners for Servicing Wrongs*, CONSUMER FIN. PROTECTION BUREAU (Dec. 19, 2013), https://www.consumerfinance.gov/about-us/newsroom/cfpb-state-authorities-order-ocwen-to-provide-2-billion-in-relief-to-homeowners-for-servicing-wrongs/ [https://perma.cc/S73D-N2B2]).

221. *Id.* at 117–18 ("In addition to the 115 public actions on which the Bureau reached a final disposition between July 21, 2011, and July 21, 2016, the Bureau in that same period filed an additional twenty-two actions that remained pending and in contest. Of these twenty-two actions, two were pending in the administrative forum and twenty were pending in federal court.").

222. *Id.*

223. *Id.*

The *PHH I* court placed great emphasis on the CFPB's inherent authority as a key reason for the Bureau's perceived lack of constitutionality.[224] Then-Judge Kavanaugh's majority opinion stressed several grants of authority that the court felt could not be placed in the hands of a single individual.[225] The court was particularly troubled by the CFPB's ability to bring actions against private citizens—specifically, the Bureau's ability to enforce the now-consolidated consumer protection statutes, and the ability to impose fines and other punishments.[226] Kavanaugh summarized the director's amount of authority by saying, "the Director of the CFPB possesses enormous power over American business, American consumers, and the overall U.S. economy."[227] The majority in *Free Enterprise Fund* expressed a similar sentiment, describing the PCAOB as "a [g]overnment-created, [g]overnment-appointed entity, with expansive powers to govern an entire industry."[228] Kavanaugh's position on the director's level of authority can be broken down into two major principles.[229] First, from a legalist perspective, the CFPB's statutory grant of authority surpasses the permissible authority typically given to independent agencies.[230] Second, from a protectionist perspective, the CFPB's scope of responsibility in the American economy is too broad to be managed by a single person.[231] This Note argues that both of these positions are correct.

First, this Note takes the position that the *PHH I* court was correct in its view that the CFPB was given an unprecedented level of authority.[232] As discussed above, the CFPB was born out of a desire to consolidate several regulatory functions into one entity charged with a generally defined concept of consumer protection.[233] Much of the CFPB's specific

224. *See PHH I*, 839 F.3d 1, 7 (D.C. Cir. 2016).
225. *Id.* at 6–7, 15.
226. *Id.* at 20.
227. *Id.* at 7.
228. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 485 (2010).
229. *See PHH I*, 839 F.3d at 7.
230. *Id.*
231. *Id.*
232. *See id.* at 6 ("[N]o independent agency exercising substantial executive authority has ever been headed by a *single person*. Until now." (emphasis in original)).
233. *See PHH II*, 881 F.3d 75, 145 (D.C. Cir. 2018) (en banc) (citing 12 U.S.C. §§§ 5481(12), 5581(a)(2), (b)); Block-Lieb, *supra* note 14, at 27.

authority from its statutory foundation is rather vague and, thus, ripe for authoritative manipulation.[234]

In the spirit of consumer protection, the CFPB has the ability to regulate "unfair, deceptive, or abusive" business practices and products.[235] While this seems like a fairly innocuous statutory mandate, deeper examination reveals that it can easily be coopted into allowing the Bureau a vast and ill-defined amount of power to target financial entities.[236] By imposing fines, litigating, and imposing excessive rules, the CFPB has broad authority to deem certain products or business practices "abusive," thereby potentially removing them from the market altogether.[237] Perhaps most threatening is that this statute leaves open the possibility for the Bureau to blur the lines of its regulatory boundaries.[238] For example, one key area that the Bureau regulates is consumer credit.[239] Obviously, this is an industry that requires a degree of risk in order to properly function. Based on the "abusive practices" standard articulated above, the Bureau could conceivably use its enforcement authority to drive any new or innovative lending practice out of the market completely.[240] Concerns about the CFPB's ability to flexibly apply the "abusive" standard are affirmed by the CFPB's unwillingness to define the term, opting instead to make ad hoc judgments on which regulated practices meet this standard.[241]

This potential for exploitation is compounded by the director's vast unilateral authority.[242] The opportunity for judicial review is the only clear check on the director's authority, but that would require that the director actually do something outside the bounds of his statutory grant of authority.[243] The court in *PHH I* addressed this particular issue and found that the director alone can enforce the rules of the Bureau, and that he

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234. *See* Zywicki, *supra* note 87, at 917.

235. *See id.* at 917–18 (quoting Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 1036(a)(1)(B), 124 Stat. 1376, 2010 (2010) (codified at 12 U.S.C. § 5536(a)(1)(B) (Supp. IV 2011)).

236. *See id.* at 917–23.

237. *See id.*

238. *See id.* at 922.

239. *See PHH I*, 839 F.3d 1, 38 (D.C. Cir. 2016); Zywicki, *supra* note 87, at 922–23.

240. *See* Zywicki, *supra* note 87, at 922–23.

241. *See id.* at 922.

242. *See PHH I*, 839 F.3d at 7 ("The Director alone decides what rules to issue; how to enforce, when to enforce, and against whom to enforce the law; and what sanctions and penalties to impose on violators of the law.").

243. *Id.*

alone can decide when he wants to do so and against whom.[244] For this reason, the court said, the mere possibility of judicial review has never been held to be a sufficient protection in a separation of powers case.[245] The statutory regime surrounding the CFPB's enforcement and litigation authority will likely encourage the Bureau to pursue enforcement actions instead of using its rulemaking authority.[246] In the spirit of creating a strong watchdog agency, Congress effectively gave the CFPB license to pursue enforcement before undertaking any rulemaking procedures.[247]

The *PHH II* court responded to many of the concerns raised by the panel by looking to the early administrative precedents and arguing that they supported the CFPB's structure.[248] The *PHH II* court mainly addressed this by holding that the CFPB's structural scheme was permitted under the early administrative cases, even though the structure was novel in its conception.[249] In other words, the court found that simply because this particular scheme had not been tried before did not mean that it did not fit within the range of permissible administrative governance schemes.[250] The *PHH II* court took a purely functional approach with regard to the scope of the CFPB's authority in the market, finding that the CFPB had a sufficiently limited scope of authority to justify having a single director.[251]

This leads to the second principle within Kavanaugh's majority opinion, that the CFPB regulates a portion of the American economy that is too large to be overseen by a single individual.[252] This Note agrees with this position, but adds that this analysis should not be limited to the types of industry regulated by the agency. The analysis should also include an

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244. *Id.*

245. *Id.*

246. *See* Zywicki, *supra* note 87, at 923–24 (citing Dodd-Frank Act § 111(b)(1)-(2), 124 Stat. at 1392–93; § 1011(a), 124 Stat. at 1964; § 1022(b)(2)(A)(i), 124 Stat. at 1980; § 1023(c)(3)(B), 124 Stat. at 1986; § 1022(b)(2)(B), 124 Stat. at 1981; § 1023(c)(3)(A), 124 Stat. at 1985).

247. *See id.*

248. *See PHH II*, 881 F.3d 75, 84–95 (D.C. Cir. 2018) (en banc).

249. *Id.* at 103 ("Other constitutional principles beyond novelty must establish why a specific regime is problematic.").

250. *Id.*

251. *Id.* at 102 ("In sum, under the requisite functional analysis, the CFPB's authority is more cabined than either the FTC's or the independent counsel's, and the agency is part of a longstanding tradition, dating back to the founding of the Republic, of financial regulators with a modicum of independence from Presidential will.").

252. *See PHH I*, 839 F.3d 1, 6-7 (D.C. Cir. 2016).

evaluation of the size of the economic space being regulated. The CFPB will clearly have a foothold in some of the largest financial institutions in the nation, and indeed, the world. The specific areas of regulation simply do not provide a complete picture of the CFPB's economic and regulatory magnitude.

This Note takes the position that the CFPB can have wide-reaching impacts well beyond its defined jurisdiction, and that Congress and the courts should evaluate the possible impacts that the agency could inflict on the American economy. Stated more simply, the analysis should account for the impact of potential regulatory consequences, not just specific agency functions. This was a point of contention in the *PHH* cases, with the panel opinion holding that "the CFPB lacks [a] critical check and structural constitutional protection, yet wields vast power over the U.S. economy."[253] The en banc opinion countered this mode of analysis, holding that it "turn[s] not on the breadth of the FTC's jurisdiction or on its social and economic impact, but on its character as a financial and commercial regulator."[254]

While this is certainly a question for the CFPB, it is also an issue for financial regulatory agencies generally.[255] The Enron disaster of 2002 is a powerful example of the domino effect that often results from administrative enforcement and litigation.[256] The scope of regulatory authority is particularly important in white collar litigation.[257] Corporate entities, including those under the supervision of the CFPB, face great risk simply by going to criminal trial or entering civil litigation.[258] This is sometimes called the "trial penalty," implying that corporate entities have a unique trait in that their punishment often results from an indictment or from a threat of sanction, rather than from a verdict.[259] The Enron scandal

253. *Id.* at 8 (internal punctuation omitted).

254. *PHH II*, 881 F.3d 75, 102 (D.C. Cir. 2018) (en banc).

255. *Id.*

256. The PCAOB did not exist at the time of Arthur Andersen's collapse. Rather, the PCAOB was created as part of the Sarbanes-Oxley Act as a response to alleged oversight by auditors employed by Arthur Andersen while serving Enron. *See supra* Part I.

257. Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77, 77–78 (2010) ("[O]ur existing legal system places the risk of going to trial, and in some cases even being charged with a crime, so high, that innocence and guilt no longer become the real considerations.").

258. *Id.*

259. *Id.*

highlighted the possible impacts of the trial penalty.[260] The important part of the Enron collapse for these purposes is not the actual regulatory failings that led to the energy giant's demise, but rather the subsequent folding of Arthur Andersen, once a powerhouse in the public accounting field and one of the "Big Five" professional services firms.[261] Andersen's eventual downfall exemplifies the trial penalty's potentially devastating impacts.[262] Even though the judgment against Andersen was later reversed, the damage caused by the original conviction, and even the indictment, were too great to revive the firm.[263]

Andersen met its demise after having served as Enron's public auditor during the time in controversy.[264] Whether or not Andersen engaged in wrongdoing worthy of its collapse is not evaluated here. However, this milestone in American corporate law had great implications for the regulatory state, and the level of authority it is able to exert on private industry.[265] Mere implication in the Enron matter brought about the end of Andersen.[266] There was never a court order requiring that the firm shut its doors.[267] The simple possibility of an indictment brought about the collapse of the firm long before any conviction was rendered.[268] The Enron controversy became widely-publicized in late 2001, and Andersen was indicted on March 14, 2002.[269] Before an indictment had even been issued, Andersen had already begun to lose a substantial amount of clients, resulting in a devastating blow to its bottom line and

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260. *Id.*

261. *See* Bloomberg News, *Coopers, Price Waterhouse Plan to Merge*, L.A. TIMES, (Sept. 19, 1997), http://articles.latimes.com/1997/sep/19/business/fi-33845 [https://perma.cc/9EJP-HNGF].

262. *See* Podgor, *supra* note 257, at 79.

263. *See id.*

264. *See* Ken Brown & Ianthe Jeanne Dugan, *Arthur Andersen's Fall From Grace Is a Sad Tale of Greed and Miscues*, WALL STREET J., (June 7, 2002 12:01 AM), https://www.wsj.com/articles/SB1023409436545200 [https://perma.cc/RU2E-T9BM].

265. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 484-85 (2010).

266. *See generally* Arthur Andersen LLP v. United States, 544 U.S. 696 (2005).

267. *Id.*

268. *See* Dan Ackman, *Was Arthur Andersen a Mistake?*, FORBES (June 1, 2005, 9:46 AM), https://www.forbes.com/2005/06/01/cx_da_0601topnews.html#60aff71649a0 [https://perma.cc/D6LN-BVRJ].

269. *See Timeline: A Chronology of Enron Corp.*, N.Y. TIMES, (Jan. 18, 2006), https://www.nytimes.com/2006/01/18/business/worldbusiness/timeline-a-chronology-of-enron-corp.html [https://perma.cc/8467-THM8].

its ability to pay its partners and employees.[270] After the indictment, clients continued to fire the firm, its reputation badly tarnished.[271] This attrition of business continued until the firm was forced to shut its doors in August 2002, putting thousands of employees out of work.[272]

The Andersen matter demonstrated the dramatic impact government penalties can have on financial institutions.[273] An indictment so powerful that it can put thousands of employees out of work has clear implications for the CFPB. The Bureau is charged with overseeing regulatory matters in some of the nation's largest financial institutions, "cover[ing] most consumer credit products, including mortgages, student loans and credit cards."[274] Clearly, the CFPB's targeted regulatory areas are crucial aspects of the American economy. While the CFPB's regulatory mission may appear narrowly confined, the number of employees and amount of money it regulates is incredibly vast.[275] The lesson from the Andersen matter may be that the mere ability to *pursue* criminal or civil sanctions against a corporate entity can have an impact reaching far beyond any specific controversy, and possibly going beyond the intended consequences.[276]

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270. *See* Cassell Bryan-Low & Jon E. Hilsenrath, *Freddie Mac Is Latest Firm To Dismiss Arthur Andersen*, WALL STREET J., (Mar. 7, 2002, 12:01 AM), https://www.wsj.com/articles/SB1015428082376916440 [https://perma.cc/3LZN-AAX9]; *see also* Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 109 (2006).

271. *See* Penelope Patsuris, *Andersen Client Loss Could Pile Up*, FORBES (Mar 7, 2002, 03:37 PM), https://www.forbes.com/2002/03/07/0307andersen.html#593938815001 [https://perma.cc/L82S-4KUK]; ABC News, *Arthur Andersen Goes Out of Business*, (Aug. 31, 2002), http://abcnews.go.com/Business/Decade/arthur-andersen-business/story?id=9279255 [https://perma.cc/49CS-A5MD].

272. *See* Bryan-Low & Hilsenrath, *supra* note 270; ABC News, *supra* note 271.

273. *See* Podgor, *supra* note 257, at 79; *see also* Bryan-Low & Hilsenrath, *supra* note 270; ABC News, *supra* note 271.

274. *See PHH II*, 881 F.3d 75, 145 (D.C. Cir. 2018) (en banc); *see also PHH 1*, 839 F.3d 1, 7.

275. *See PHH I*, 839 F.3d 1, 7 (D.C. Cir. 2016).

276. *See* Ainslie, *supra* note 270, at 115 ("It seems likely, for instance, that the Houston office of Arthur Andersen had a different corporate culture from the Arthur Andersen office in Anchorage, Alaska, and it may well be, therefore, that a suspension of practice privileges before the SEC imposed upon many or perhaps all of the Houston partners would have been a very serious sanction without actually punishing offices whose corporate culture was not renegade.").

## CONCLUSION

The totality of administrative law jurisprudence—specifically, decisions regarding capture protections—suggests that there is a sliding scale of constitutionally permissible agency structures. It is clear that within that scale, there is a point at which a given agency structure can, itself, be unconstitutional. The debate over whether a given agency structure is permissible is primarily a debate over which standards to apply in the respective analysis. Some scholars take the "legalist" position, looking only to relevant statutes and the confines of relevant precedent. Others take the "protectionist" position, believing that protection from capture is inherent in the DNA of all independent agencies. Far from being a new question for the judiciary, the CFPB has forced Congress and the courts to apply familiar questions to a novel agency design. This Note takes the position that Congress and the courts should place greater emphasis on the scope of agency authority in designing agencies. The approach suggested in this Note adopts aspects of the legalist and protectionist approaches, in conjunction with heightened functional analysis, amounting to a third approach. These questions are critically important to the CFPB, and to the future of financial regulatory jurisprudence as a whole.

As applied to the matter at hand, this Note takes the position that the CFPB is unconstitutional under the direction of a single administrator. This design implicates serious issues regarding separation of powers and the potential for agency capture, as well as an inordinate amount of authority in the hands of a single bureaucrat. In sum, this Note recommends that the agency be restructured as a board of administrators with staggered terms, who can only be removed by the President for cause. Congress and the courts have resorted to this design throughout the history of the administrative state and should implement it at the CFPB.