Winter 2018

The Consumer Financial Protection Bureau's Structural Integrity and a Call for Adaptive and Incremental Agency Design Policy

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The Consumer Financial Protection Bureau’s Structural Integrity and a Call for Adaptive and Incremental Agency Design Policy

HANNAH CLENDENING*

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INTRODUCTION

Since its creation by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010\(^1\) ("Dodd-Frank" or "Dodd-Frank Act"), the Consumer Financial Protection Bureau (CFPB) has been the subject of much debate and controversy, particularly in regards to its relative autonomy compared to that of other independent agencies.\(^2\) The most significant recent development in this enduring debate came in the form of two judicial opinions in *PHH Corp. v. Consumer Financial Protector Bureau*.

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Protection Bureau.\(^3\) In October 2016, the United States Court of Appeals for the District of Columbia Circuit held that the CFPB, as an independent agency, was unconstitutionally structured in violation of Article II of the Constitution.\(^4\) In reviewing an enforcement action of the CFPB against petitioner PHH Corporation—a mortgage lender facing a $109 million order against it—the court ruled against the CFPB and vacated the order against PHH on the grounds that the head of the CFPB possessed unconstitutionally broad, and seemingly unchecked, statutory authority.\(^5\) In February 2017, however, the en banc court vacated the original panel’s decision and ordered a rehearing on the constitutional question to be held in May 2017; on rehearing, the court ultimately found the CFPB’s structure constitutionally sound, rejecting nearly every argument to the contrary put forth by PHH Corporation.\(^6\)

Independent agencies traditionally are characterized, and distinguished from their executive agency counterparts, by three key features: (1) the agency head is removable “for cause” by the President; (2) they are not required to submit regulations to the Office of Information and Regulatory Affairs; and (3) they are led by a multi-member commission or board of directors.\(^7\) While there is no exact formula or set of characteristics that consistently result in an agency being independent (as opposed to executive) for-cause removal protection is often considered the primary distinguishing factor.\(^8\) The CFPB, however, is unique in that it possesses the first element of a head removable for cause by the President,\(^9\) but its leadership lies in just one single head—currently, acting director Mick Mulvaney—who is neither supported nor compromise on many fronts between these two competing groups. See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 73–76 (2010).

3. 839 F.3d 1 (D.C. Cir. 2016), vacated and rehearing granted by No. 15-1177, slip op. at 2 (D.C. Cir. Feb. 16, 2017), remanded by 881 F.3d 75 (D.C. Cir. 2018). Although this development and all subsequent history of this case is obviously important for further clarification of the validity of the arguments made for or against the CFPB’s constitutionality, for purposes of this Note, the ultimate fate and outcome of *PHH Corp.* and the CFPB in this litigation is irrelevant to the argument I pose. Rather, I intend to use the tensions between the arguments laid out by the two opinions—particularly the reliance on historical and traditional agency forms as a basis for constitutionality—as a starting point for a broader argument about agency design policy.

4. *PHH Corp.*, 839 F.3d at 8; see also U.S. Const. art. II (establishing unitary executive power).

5. *PHH Corp.*, 839 F.3d at 8.


7. E.g., Barkow, supra note 2, at 15; see also *PHH Corp.*, 839 F.3d at 6; Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 Vand. L. Rev. 599, 600 (2010). Two additional statutory requirements commonly associated with independent agencies include a fixed term requirement (in conjunction with for-cause removal) and a bipartisan appointment requirement. See, e.g., Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 Duke L.J. 257, 259 (1988). The latter requirement is designed to further the political independence of the agency by preventing built-in partisan bias among the agency’s decision makers. See id.; Humphrey’s Ex’r v. United States, 295 U.S. 602 (1935).


checked in his decision-making and enforcement authorities by a multimember com-
mission of any kind.10

This structural uniqueness is precisely what subjected the agency and relevant
parts of the Dodd-Frank Act to constitutional challenges and review in PHH Corp.,
and the two opinions issued in the case provide thorough examples of the arguments
for and against the CFPB’s structural constitutionality. The first panel decision in
October 2016 found the structure to be in clear violation of the Constitution: not only
does the structure grant the CFPB director “more unilateral authority than any other
officer in any of the three branches of the U.S. Government, other than the
President,”11 but it also represents a completely novel and unprecedented agency
form.12 These departures from traditional federal agency design principles, the court
reasoned, vested the CFPB head with the ability to engage in arbitrary decision mak-
ing, commit abuses of power, and generally threaten individual liberty.13 On rehear-
ing, however, the en banc court reached the opposite conclusion, holding that the
CFPB’s organizational structure lacked any constitutional defects based on precedent
and historical practice, and that the single director was sufficiently accountable to
and overseen by the executive branch.14

Debates over the constitutionality of the CFPB are not new, nor are they unique
to the PHH Corp. decisions; in fact, the very existence of independent agencies as
an entire category has been heavily debated in legal scholarship,15 especially as the
proliferation of such agencies increased throughout the twentieth century.16 In re-
gards to the CFPB, there has been discussion of not only specific elements of its
powers as enumerated by the Dodd-Frank Act—such as its insulation from the other

10. PHH Corp., 839 F.3d at 6–7. In addition to acting as a check on the decision-making
powers of an agency official, multimember leadership bodies are meant more generally to
foster more collaborative decisions than one would expect from an executive agency. See
Verkuil, supra note 7, at 260 (describing multimember organizations as being designed to
result in decision making that is “consensual, reflective and pluralistic”).

11. PHH Corp., 839 F.3d at 7.

12. Id. at 6 (“[N]o independent agency exercising substantial executive authority has ever
been headed by a single person. Until now.”) (emphasis in original).

13. Id. at 6–7.


15. See Susan Bartlett Foote, Independent Agencies Under Attack: A Skeptical View of
the Importance of the Debate, 1988 DUKE L.J. 223 (summarizing the debates surrounding the
two related but distinguishable critiques on the constitutionality and function of independent
agencies); Neomi Rao, Removal: Necessary and Sufficient for Presidential Control, 65 ALA.
L. REV. 1205 (2014) (arguing all independent agencies should instead be executive, led by
officers who directly answer to, and are removable at will by, the President). Interestingly, the
second D.C. Circuit opinion also characterized the challenge by PHH Corporation on the
CFPB’s structure as a challenge to the category of independent agencies as a whole, describing
PHH’s challenge as a “wholesale attack on independent agencies—whether collectively or
individually led—that, if accepted, would broadly transform modern government.” PHH
Corp., 881 F.3d at 80.

16. The first regulatory commissions and independent agencies were created during the
Progressive Era of the late nineteenth century, and the creation of many more occurred during
and after the New Deal. Datla & Revesz, supra note 8, at 770–71.
branches of government\textsuperscript{17} and its funding mechanisms\textsuperscript{18}—but also the convergence of all the statutory characteristics that make the agency uniquely independent: broad regulatory powers, independence from Congress (by virtue of not needing to rely on congressional appropriations for funding), presidential removal powers, and deferent judicial review.\textsuperscript{19} Despite the wealth of commentary on the various individual characteristics of the CFPB, it is rare that any one of those characteristics alone prompts a conclusion that the CFPB violates the Constitution; rather, the consensus seems to be that it is the combination of all those features that presents constitutional questions.\textsuperscript{20}

Given this common sentiment that individual characteristics like for-cause removal protection should not alone give rise to a constitutional conflict, the initial \textit{PHH Corp.} holding and reasoning came as somewhat of a surprise. Rather than coming to a similar conclusion that the CFPB is unconstitutional for the “bundle”\textsuperscript{21} of provisions that provide independence and discretion, the court instead based its decision solely on the broad power vested in the single leader,\textsuperscript{22} and crafted a remedy focusing specifically on the removability of the director.\textsuperscript{23} Citing \textit{Free Enterprise Fund v. Public Co. Accounting Oversight Board},\textsuperscript{24} the court ordered a severance of the for-cause protection from the rest of the statute, which would have allowed the CFPB to continue operation while essentially being converted into a traditional executive agency.\textsuperscript{25}

Perhaps more important, at least for purposes of this Note, than the court’s first holding hinging on this one isolated characteristic and provision is that the holding was reached via an emphasis on the novel and unprecedented nature of the CFPB’s

\begin{itemize}
  \item \textsuperscript{17} See, e.g., David A. Hyman & William E. Kovacic, \textit{Why Who Does What Matters: Governmental Design and Agency Performance}, 82 GEO. WASH. L. REV. 1446, 1487 (2014) (noting that the CFPB is “insulated [] from oversight by almost everyone in the federal government”).
  \item \textsuperscript{18} See, e.g., Charles Kruly, \textit{Self-Funding and Agency Independence}, 81 GEO. WASH. L. REV. 1733 (2013) (commenting on the independence of self-funded agencies generally and concluding the CFPB’s status as self-funded is not necessarily problematic).
  \item \textsuperscript{20} E.g., \textit{id.} at 118 (“It is the convergence of these factors rather than any single factor that brings the issue of constitutionality to the fore. . . . [T]he question in this context is whether the simultaneous presence of all of these immunities makes the CFPB too independent.” (emphasis omitted)); Hyman & Kovacic, \textit{supra} note 17, at 1488 (explaining that provisions for for-cause removal protection and a fixed term for an agency headed by a single person are not unique to the CFPB, but that the total combination of protections granted in Dodd-Frank do create an unmatched uniqueness).
  \item \textsuperscript{21} Hyman & Kovacic, \textit{supra} note 17, at 1488.
  \item \textsuperscript{23} \textit{Id.}
  \item \textsuperscript{24} 561 U.S. 477 (2010).
  \item \textsuperscript{25} \textit{PHH Corp.}, 839 F.3d at 8, 12. The court held that if the CFPB were to remain an independent agency, it would need to be structured with leadership in a multimember commission. \textit{Id.} at 12.
\end{itemize}
leadership structure. Finding “no settled historical practice” of independent agencies being headed in the manner found in the CFPB, the court reasoned that the CFPB’s departure from historical administrative tradition was an indication that the structure violated constitutional separation of powers requirements. On rehearing, the court quickly came to the opposite conclusion on this point: acknowledging that a “constrained role for novelty is well justified,” the court ultimately found no precedent for novelty itself to render agency structure unconstitutional.

With these facets of the PHH Corp. decisions in mind, the problems addressed and presented throughout the litigation are ultimately two-pronged. While the legal problem is fairly straightforward—whether the CFPB’s leadership structure is unconstitutional and must be statutorily altered to fit more tried-and-true agency design norms—there is a secondary, and perhaps more compelling, policy problem that arises from this particular debate. Beyond the constitutional separation of power conflicts, what are the practical concerns with this kind of organizational and power structure—and the ability to freely tailor a government organization’s structure to most effectively suit its unique needs—from the viewpoint of bureaucrats and public managers?

With a particular emphasis on the novelty tenet of the two PHH Corp. opinions, Part I of this Note discusses the implications of the judicial debate over agency structure across the PHH Corp. litigation, and the relationship and compatibility of the courts’ reasoning with two other agency design objectives and ideals—that of policymakers in Congress, and that of leading organizational design scholars and theorists. Part I also includes a supplemental discussion about the threat of agency capture as an inevitable and necessary concern in agency design decisions. After consideration of these competing goals for administrative function and design, Part II then focuses on the CFPB as an illustrative case study on the clear tensions between legal constraints on agency structure and policy and management goals, and as an example of how these tensions may play out in court. These tensions indicate a clear need for innovation in approaches to organizational structure that promote experimentation and adaptability, especially in the face of crisis and change. As shown by the CFPB’s experience, however, these traditional structures are in need of, at the very least, permission to be improved. And although the D.C. Circuit ultimately held in favor of this same conclusion for the CFPB, the arguments posed herein nonetheless remain relevant for their broader applicability in other jurisdictions and as applied to other federal agencies.

26. Id. at 21–22. In separation of powers cases where the constitutional text alone provides no resolution to the matter, a court will turn to historical practice to establish the appropriate limits on the executive and legislative branch powers. Id. at 23. With no mention of administrative agencies (independent or executive), let alone their structure, in the text of the Constitution, the key source for the constitutional status of independent agencies is Humphrey’s Executor v. United States, which established that it was not constitutionally offensive for Congress to limit the President’s removal power over agency officials. Datla & Revesz, supra note 8, at 778 (citing Humphrey’s Ex’r v. United States, 295 U.S. 602, 628–29 (1935)).

I. UNDERSTANDING AND RATIONALIZING COMPETING DESIGN OBJECTIVES

Following the D.C. Circuit decisions, one can identify three competing policy and design goals that have faced the CFPB throughout its existence thus far. First is Congress’s goal in creating the CFPB in the first place. Why did Congress structure the CFPB in the way that they did? What policy concerns underscored the need to distribute power and leadership in such a constitutionally precarious way? Second, of course, is the court’s holding and reasoning throughout the PHH Corp. litigation, which functions now as a supplement for the design decisions of the original policymakers.28 Though the court eventually reached a conclusion in the most recent decision that aligns with the goals sought by Congress, this discussion will more heavily emphasize the holding and reasoning in the first, vacated opinion in PHH Corp. as an example of the arguments against the CFPB’s structure, which could become precedent in another circuit or regarding another agency. Third, and perhaps the perspective most easily overlooked, but equally crucial in conducting an accurate evaluation of the CFPB’s success and next steps, are current leading organizational structure and management theories, which present a framework independent of legal and constitutional concerns for achieving effectiveness and efficiency.29 All of these policy and design objectives are important for assessing the structural soundness of the CFPB (or of any other federal administrative agency for that matter). This Part will also address one additional consideration that arguably underlies the reasoning behind each of these three competing objectives: agency capture and the desire to insulate the agency from particular political or financial influences. The differing ways in which this consideration comes into play for different governmental actors or interests, and its impact on organizational structure, are relevant for a full assessment of the CFPB’s efficacy.

A. Congressional Intent and the CFPB’s Formation

Formed in response to the ongoing consequences of the financial crisis of 2008,30 the CFPB was created as an independent bureau with a stated statutory purpose of “ensuring that all consumers have access to markets for consumer financial products

28. To reiterate, I intend to focus on the pair of decisions in PHH Corp. not for the ultimate holding and outcome, but for how the court got there; regardless of what happened with this particular case and with this particular agency, the argument I make will still have merit, as it is intended to apply to any agency, with the experience of the CFPB meant to highlight the argument’s origin and applicability. Additionally, the PHH Corp. decision sets precedent for only one circuit; other jurisdictions could very well adopt the views of the first opinion in this case, making the holding and reasoning of that first opinion even more important despite being reversed in this particular action. See infra notes 83–84 and accompanying text.


30. See Nissim-Sabat, supra note 2, at 7 (“Congress passed [Dodd-Frank] with the dual aim of both providing some remedy for the harm done by the crisis and preventing another 2008 financial crisis.”).
and services” and ensuring that such markets are “fair, transparent, and competitive.”
As mentioned previously, however, despite being an independent agency, the CFPB is headed only by a single, President-appointed director, who serves an appointment term of five years and is removable only for cause by the President. “For-cause” removal has not been strictly defined, but the general understanding and standard applied by courts is that for-cause removal limits the President’s power to remove the agency head only for “inefficiency, neglect of duty, or malfeasance in office.” For-cause removal shields an appointed agency director from arbitrary discipline or capricious or ill-reasoned removal by the President, such as for purely political motives. This contrasts with removal at will, a characteristic typical of single heads of executive agencies, who are directly accountable to, and whose power is checked by, the President. As a substitute for the presidential check on executive agency power, independent agencies thus typically employ the multimember commission design element, the members of which, in theory, provide checks on each other’s decision-making powers. The single head of the CFPB possesses a relatively broad range of powers and functions: he unilaterally enforces nineteen pertinent consumer protection statutes, is the sole decider of rulemaking initiatives and rule enforcement, and determines the sanctions against violators of the laws he enforces.

Interestingly, the CFPB as originally proposed did not possess its unusual allocation of power in the single head. President Obama proposed a prototype consumer financial protection agency in 2009 to be structured as an independent regulatory agency (as opposed to an executive agency) in order to preserve independence in decision making and accountability; similarly, Senator (then professor) Elizabeth

32. 12 U.S.C. § 5491(b), (c) (2012).
33. Humphrey’s Ex’r, 295 U.S. at 620; see also Bowsher v. Synar, 478 U.S. 714, 729 (1986) (noting that the term “for cause” is broad, and “could sustain removal . . . for any number of actual or perceived transgressions”). The quoted language from Humphrey’s Executor is the same definition that ultimately appeared in the statute establishing the CFPB and its director authorities, and thus is the controlling standard for removal for the CFPB specifically. See 12 U.S.C. § 5491(c)(3).
34. See Verkuil, supra note 7, at 260.
36. Id. at 6; see also Barkow, supra note 2, at 37–39 (arguing that multimember leadership facilitates more deliberation and debate than a single head, so long as there is an appropriate balance in membership between minority and majority political leanings).
37. The court in the first PHH Corp. decision repeatedly employed the term “unilateral” to describe the power possessed by the CFPB director, and defined it to mean “authority to take action on one’s own, subject to no check.” PHH Corp., 839 F.3d at 6–7.
38. Id. at 7.
39. Id. at 15; Barkow, supra note 2, at 72; see also Pearson, supra note 19, at 103 (listing ways in which Congress departed from the Treasury’s and Elizabeth Warren’s initial proposals for a consumer protection bureau).
Warren’s official proposal for the CFPB in 2010 envisioned the agency as a traditional multimember independent agency.\textsuperscript{41} The form the CFPB structure ultimately took was the direct result of compromise between consumer advocates and policymakers like Warren and powerful industry groups who opposed the CFPB having independent and autonomous rulemaking authority.\textsuperscript{42} Aside from representing political compromise, the final legislated structure of the CFPB also carefully accommodated one other key policy goal: insulation from agency capture.\textsuperscript{43}

Generally speaking, Congress will choose to make an agency independent as a result of a mix of concerns regarding agency expertise, due process, and presidential behavior.\textsuperscript{44} Despite debates on the value of independent agencies generally,\textsuperscript{45} structuring and designating a new agency as an independent one is often regarded as an effective way to mitigate the risk of agency capture and reduce the influence of political bias on decision making.\textsuperscript{46} Independence has also been cited as especially necessary in financial regulation.\textsuperscript{47} Part of the motive behind Dodd-Frank and the independence mechanisms it granted the CFPB was to keep the agency independent from other branches of government, but also, crucially, to keep it independent from the special interests of a powerful and aggressive financial services industry; independence was intended as a means of upholding the CFPB’s mission of protecting American consumers.\textsuperscript{48} And while the first opinion in \textit{PHH Corp.} claimed that Congress merely “stumbled” into the structure it chose for the CFPB without any clear reason beyond political compromise,\textsuperscript{49} many more compelling arguments have

\textsuperscript{41} See Elizabeth Warren, \textit{Unsafe at Any Rate}, \textsc{Democracy J.} (2007), \url{https://democracyjournal.org/magazine/5/unsafe-at-any-rate}. A House Bill backed by Congressman Barney Frank and Speaker Nancy Pelosi also featured a consumer protection agency with a multimember, independent form. H.R. 4173, 111th Cong. § 1103 (as passed by House, Dec. 11, 2009).

\textsuperscript{42} See supra note 2, at 74; cf. Pearson, supra note 19, at 103 (stating that the departures from the initial proposals for the agency’s powers and structures were meant to guard against agency capture).

\textsuperscript{43} See Pearson, supra note 19, at 103.


\textsuperscript{45} See supra note 15 and accompanying text.

\textsuperscript{46} See Michael S. Barr, \textit{Accountability and Independence in Financial Regulation: Checks and Balances, Public Engagement, and Other Innovations}, 78 L. & CONTEMP. PROBS. 119, 119 (2015); see also Barkow, supra note 2, at 21 (“To achieve either expert or nonpartisan decision making, one must avoid undue industry influence, or ‘capture.’”).

\textsuperscript{47} Contra Gillian E. Metzger, \textit{Through the Looking Glass to a Shared Reflection: The Evolving Relationship Between Administrative Law and Financial Regulation}, 78 LAW & CONTEMP. PROBS. 129, 130 (2015) (arguing that where most agencies are structured based on fears of agency capture, in the financial regulation sphere, “the defining structural precept is not accountability but independence,” and that instead of guarding against capture, many financial regulatory agencies instead seem to be more susceptible to it).

\textsuperscript{48} Nissim-Sabat, supra note 2, at 2.

been put forth that a single administrator, rather than a multimember board, is indeed a more appropriate leadership form for the CFPB.\textsuperscript{50} It is not unreasonable, then, to think Congress may have chosen such a form based on deliberate and careful reasons, as opposed to the final form being no more than a lowest-common-denominator solution.\textsuperscript{51}

**B. D.C. Circuit’s Reasoning in PHH Corp. v. Consumer Financial Protection Bureau**

Although the first opinion in \textit{PHH Corp.} was vacated by the court on rehearing, the opinion is nonetheless very thorough in its presentation of potential arguments against the constitutionality of the CFPB’s structure. The first opinion therefore provides very useful template for the kinds of arguments that may very well be—and, in fact, already have been\textsuperscript{52}—made in future actions in other courts regarding the CFPB’s structure, and is therefore worthy of closer consideration.

Per the D.C. Circuit’s original determination that the formation of the CFPB was unconstitutional, the CFPB was ordered to restructure, which meant that, in order to remain operational, the relevant for-cause removal provision of the governing statute was to be severed from the rest of the establishing law, leaving the CFPB as a traditional executive agency with a single head who would then otherwise be subject to at-will removal by the President.\textsuperscript{53} This action was deemed a necessary response to what the court determined was a violation of Article II of the Constitution.\textsuperscript{54} The court reached that conclusion by heavily relying on the novelty of the CFPB’s structure as persuasive evidence that the CFPB leadership should not withstand a constitutional challenge.\textsuperscript{55}

\textsuperscript{50.} See \textit{PHH Corp.}, 881 F.3d at 91 (“Financial regulation, in particular, has long been thought to be well served by a degree of independence.”); Nissim-Sabat, supra note 2, at 14–15 (describing accessibility by consumer groups, avoidance of political gridlock, stability, and accountability as benefits to a single-leader structure over a multimember board). Nissim-Sabat also cites efficiency in decision making as an additional benefit, and one that also helps prevent capture by the industry. \textit{Id.} at 25 (“Because a single director will be able to make more efficient decisions than a board of commissioners, the CFPB’s structure will enable it to promote consumers’ interests.”).


\textsuperscript{52.} See infra notes 83–84 and accompanying text.

\textsuperscript{53.} \textit{PHH Corp.}, 839 F.3d at 8.

\textsuperscript{54.} \textit{Id.}

\textsuperscript{55.} See \textit{supra} notes 4–5, 21–26 and accompanying text.
To further rationalize the court’s reasoning, it is important to recognize that Judge Kavanaugh, author of the majority opinion, is not only a notably conservative judge, but also a separation of powers specialist.56 Because the constitutionality of the CFPB has been contested in and out of the court room since the agency’s birth,57 the issues in PHH Corp. would inevitably undergo judicial scrutiny at some point,58 but not necessarily by a panel with Kavanaugh, meaning the decision just as easily could have gone the opposite direction.59

It is also worth considering, though not discussed as part of the court’s analysis, that statutory limitations on presidential removal and appointment powers are quite effective in protecting officials from a President’s influence when the directing official and the President are of opposing political parties.60 Although President Obama (who was President at the time of the CFPB’s formation) and the CFPB’s first director Richard Cordray were both part of the Democratic Party, it is certainly plausible that Congress set the removal powers as they did in order to protect the director from a future President of the opposite political party—such as President Trump—and that Judge Kavanaugh, as a conservative, felt such protection was unwarranted.

Kavanaugh also briefly touches on the issue of agency capture, arguing that a multi-member agency is better protected from capture by the industry and interest groups than a single head would be, simply because one person is more easily and quickly influenced than a group of people.61

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57. See supra notes 2, 15–18 and accompanying text.

58. While the CFPB has suffered other attacks on its constitutionality, this was by far the most serious challenge, and was the first challenge to the CFPB’s enforcement powers. Eric J. Mogilnicki & David A. Stein, DC Circ. Single-Director Ruling Clips CFPB’s Wings, LAW360 (Oct. 14, 2016, 5:31 PM), https://www.law360.com/articles/851887/dc-circ-single-director-ruling-clips-cfpb-s-wings [https://perma.cc/G9ZZ-ZTW5]. In its challenge to the CFPB’s power and enforcement, PHH argued that the alleged constitutional violation warranted a complete dismantling of the CFPB, as well as invalidation of the entire Dodd-Frank Act. PHH Corp., 839 F.3d at 8.

59. Frankel, supra note 56; cf. PHH Corp., 839 F.3d at 56–57 (Henderson, J., concurring in part and dissenting in part) (arguing that the constitutional issue did not even need to be reached to resolve the case and issue a remedy). This also illustrates the uncertainty around how courts in other jurisdictions outside the D.C. Circuit may resolve issues around the CFPB’s structure.

60. Devins & Lewis, supra note 44, at 460–61.

61. PHH Corp., 839 F.3d at 28 (citing Barkow, supra note 2, at 38). This is in direct contrast to the arguments put forth by Nissim-Sabat and Warren on the advantages of a multi-member leadership board. See supra note 51. Agency capture concerns are discussed in more detail in Part I.D.
Regardless of the court’s political leanings and questions of capture, there is a curious tension here: if the CFPB’s structure poses even a potential threat to individual liberty (in the eyes of Kavanaugh and potentially other circuits), how did Congress come to the conclusion that the very same structure was necessary not only to strike a bargain between competing political views, but also to protect the public interest in the realm of consumer protection? Examination of a third set of policy perspectives—foundational theories of organizational structure and function—may help shed light on the tensions between congressional policy choices and judicial debates on the CFPB’s structure and on the structure of government agencies more generally.

C. Basic Tenets of Leading Organizational Design Theories

Management-oriented theories on organizational structure problems and goals provide a key foundation for evaluating the sort of structural predicament faced by the CFPB. Without first understanding these basic social ideologies on how any organization, private or public, should function, accommodating legal constraints and precedents within an organization’s structure is a much more abstract and impractical endeavor.

For starters, the core definition of the term “structure” in the organizational context, when used by management and organizational theorists, typically means “the configuration of the hierarchical levels and specialized units and positions within an organization and the formal rules governing these arrangements.” The structure and design of any organization is heavily influenced by an amalgam of factors, including but not limited to environmental complexity, public or private sector status, goals, and leadership. Though public organizations are not generally regarded as distinct entities when it comes to developing and applying an organizational design theory, the one key difference is the obvious fact that the organization or agency, as a government entity, is necessarily more heavily influenced by and answerable to other governmental and political actors.

According to Richard Hall and Pamela Tolbert, the structure of a properly designed organization should serve three basic functions: (1) produce outputs and

62. The prevailing consensus among organizational theorists is that concepts of structure apply equally to private and public organizations, and that attempts to differentiate between the two rely on simplified assumptions and meaningless stereotypes. RAINEY, supra note 29, at 212.

63. Id. at 211.

64. Id.

65. See supra note 62.

66. Rainey gives several examples of ways such actors can influence a public organization’s structure and design: legislation, political pressure (to force changes to structure—such as in the PHH Corp. decisions), rules and clearances set by oversight agencies for other managers, congressional micromanagement in the form of complex legislation for rules and structure, interest group pressure on legislators and agencies alike, and altering of federal civil service hierarchies. RAINEY, supra note 29, at 213.
achieve goals; (2) minimize individual variations and responses within an organization; and (3) create a setting in which power is exercised and decisions are made. These three functions parallel, or at least align with, the five coordinating mechanisms Henry Mintzberg outlines as integral in the internal coordination of tasks within the organization: mutual adjustment, direct supervision, standardization of work process, standardization of output, and standardization of employee skills. Mutual adjustment refers to the informal process of continual adaptation and development of knowledge as the work progresses among specialists in the organization, ultimately working towards achievement of Hall and Tolbert’s first function of organizational outcomes. Direct supervision is fairly self-explanatory, referring to coordination to achieve outcomes via one person having direct power and control over another—this control, then, can be seen as a form of all three of Hall and Tolbert’s functions. The three standardization mechanisms clearly mirror the minimization of variation function; each entails set programming of various procedures or requirements in order to increase effectiveness by eliminating variation in those processes.

Mintzberg posits that all five of the coordinating mechanisms are typically intermingled and simultaneously present within a given organization, but that often certain mechanisms become more favored and more effective as an organization becomes more complex, moving first from mutual adjustment, then to direct supervision, and on to standardization (with standardization of processes being preferable to standardization of outputs, and standardization of outputs preferable to standardization of skills). Importantly, however, the distribution and use of these mechanisms, along with other features of organizational design, such as centralization, formalization, and complexity, will vary based on the context in which the organization is situated. Under such a contingency model there is arguably “no one best way to organize.”

Even just based on these very basic and unelaborated tenets of organizational design theory, one can extract relevant components of both congressional policy choices and the D.C. Circuit’s decisions on the CFPB’s structure that are clearly compatible with these core principles of organizational theory. This is true even though neither the court nor Congress explicitly refers to the social science and managerial approach, drawing their conclusions instead from a set of strictly legal principles. It should first be noted that the CFPB, because it is part of a larger governmental network of organizations and powers, and because it derives its authority and procedures primarily from legislated terms, has a high degree of complexity and formalization. The court, in its vacated order for the CFPB to sever the for-cause provision and restructure accordingly, places a clear policy emphasis on the need for

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68. MINTZBERG, supra note 29, at 4–6.
69. Id. at 4.
70. See id.
71. See id. at 5–6; see also HALL & TOLBERT, supra note 29, at 30.
72. MINTZBERG, supra note 29, at 7.
73. HALL & TOLBERT, supra note 29.
74. Id. at 42.; RAINEY, supra note 29, at 215.
75. See HALL & TOLBERT, supra note 29, at 32, 45 (defining complexity as an element
standardization of process: the function of the agency should match the standard of agency design traditionally employed in the federal government. The court’s ordered severance also emphasized the need for direct supervision, as illustrated by the predominant concern with the lack of any check on the CFPB director’s authority. Importantly, the final decision in the case on rehearing emphasized these elements as well, just less directly, because the court instead thought such attributes were already sufficiently present in the CFPB’s structure.

Congress, on the other hand, may very well have taken a sort of contingency model76 into account when deciding to form the CFPB’s structure in a way that departs from long-accepted standards and supervisory controls. Contingency theory is a popular approach to effective leadership in public organizations, and refers to an approach that rejects a “one best way” type of leadership and instead emphasizes a correlation between leadership style and organizational environment; a leader’s effectiveness is highly dependent upon context.77 This same idea can easily be applied to a leadership structure or hierarchy of power in an organization—just as there is arguably no one strict formula for what leadership style is most effective, there is certainly no one set model for organizational structure that can prove most effective without consideration of context.78

Because the CFPB was created to combat some of the ills of the national financial crisis at the time,79 legislators and policymakers possibly saw an opportunity to take some innovative liberties in how they structured the CFPB.80 Perhaps, based on some identifiable by things like divisions of labor, job titles, high numbers of divisions or departments, and a clear and large hierarchy, and defining formalization as the extent to which rules and procedures govern the workplace. For a general and graphical overview of the CFPB hierarchy, see Bureau Structure, Consumer Fin. Protection Bureau, http://www.consumerfinance.gov/about-us/the-bureau/bureau-structure [https://perma.cc/96H4-4L5F] (last updated Aug. 8, 2018). This graphic is actually somewhat misleading in its arrangement. While there is a definite hierarchy in place with acting director Mick Mulvaney possessing direct control at the organizational apex over the remaining divisions, upon closer look at the diagram, the flow of command does not actually appear to continue downward through levels of vertical differentiation, even though the diagram lists the divisions in a top-down manner. See id. Rather, it appears that all of the different divisions on the left and offices under the director on the right actually exhibit a high degree of horizontal differentiation, or different specialized tasks that do not necessarily occupy a hierarchical order outside of sitting below the director. See id.; see also Hall & Tolbert, supra note 29, at 34 (defining horizontal differentiation).

76. See Rainey, supra note 29, at 338–40 (summarizing Fielder’s contingency theory of leadership).
77. See id.
78. See id. at 215 (describing that contingency theorists in the mid-twentieth century did in fact apply the contingency model to arguments for adapting an organization’s structure).
80. While theorists’ approach to the study of organizational structure and design may not differ for public versus private organizations, Rainey does concede that, once formed, public organizations inevitably are more rigid, hierarchical, formalized, and centralized. Rainey, supra note 29, at 233–38. Rainey attributes this trend to the lack of performance indicators like profit and sales found in the private sector, which forces government organizations to
policymakers’ expertise in banking and consumer protection, Congress reasoned that the economic context warranted the exact departure from historical standards that the D.C. Circuit would later initially try to condemn because the context itself was unprecedented. Consider the proliferation of governmental agencies and expansion of the bureaucracy during the New Deal era under President Roosevelt.81 Several of those agencies were unprecedented in both power and subject matter, but the innovation and experimentation in their creation was necessary to combat longer-term effects of the Great Depression and to help the country’s economy recover.82 Was a similar situation faced by the Congress that enacted Dodd-Frank and created the CFPB in the midst of the financial crisis? Yes. But, the judicial exchange seen in PHH Corp.—which, though it resolved favorably, initially shuttered the possibility of experimentation even in the face of crisis and dynamic change—serves primarily as a warning that other circuits, or litigation over other agencies, may very easily come to the same conclusion as the first PHH Corp. opinion. In fact, at least one opinion since the end of the PHH Corp. litigation has already done so: Consumer Financial Protection Bureau v. RD Legal Funding, Inc.,83 has already held that the CFPB lacked authority to bring an enforcement action at all because it was unconstitutionally structured with the single head removable only for cause.84 As such, the possibility of experimentation with agency form still remains very much at risk.

D. Another Looming Consideration: Agency Capture

In addition to the very foundational organizational design considerations, the policymakers behind the creation of the CFPB likely had other pressing concerns that motivated the controversial structure decisions. Because the reasoning and legislative history behind the Dodd-Frank Act and the for-cause removal provision is relatively sparse, much of the policy considerations underlying the structure provisions are only inferable or available from other secondary scholarship.85 Even so, there is

instead emphasize rules and hierarchy. Id. at 233. Given the discussion in PHH Corp., however, it is also evident that the governmental emphasis on tradition and reluctance to embrace reform is also a key contributor.

81. See RAINEY, supra note 29, at 215; Datla & Revesz, supra note 8, at 771 n.2 (listing examples of agencies formed in the wake of the New Deal).


84. Id. at *36.

85. The court in PHH Corp. wrote that the single director choice for the CFPB was not a very “legislative” decision and that there was no record of committee reports or other legislative history to shed light on the choice and the benefits of a single-director independent agency over a multimember one. PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 35 (D.C. Cir. 2016), vacated and rehearing granted by No. 15-1177, slip op. at 2 (D.C. Cir. Feb. 16, 2017), remanded by 881 F.3d 75 (D.C. Cir. 2018). As discussed previously in this Note, however, contrasting arguments in favor of independence have been put forth. See supra notes 50–51. Michael S. Barr, a key architect of Dodd-Frank, wrote about the many goals of Dodd-Frank, which included improving the interactions and coordination of regulators, responses to problems, assessment and collecting of information, and public accountability. Barr, supra note 46, at 123. The legislative record may be lacking, but if these truly were some of the main
a strong argument that one of the more implicit concerns of policymakers was designing the CFPB in a way that avoided agency “capture,” or “undue industry influence,” on the agency’s decision making. Capture is an ever-present concern for any governmental regulatory agency and is not a concern unique to independent agencies. It typically occurs when an agency, working and developing close relationships with the industry it regulates, veers from its regulatory mission to instead share the goals of the industry, resulting in a surrender to the very industry it was meant to regulate: enforcement becomes lax and the agency emphasizes industry interests over promotion of best public policy. The call for a separation of political and special interest pressures originates in the late eighteenth-century Progressive era reform efforts to rid the government of both corruption and the tendency to cater to special private and political interests.

Because under-enforcement is such a dominant problem in financial regulation, the CFPB provides a particularly illustrative example of a regulatory context in which powerful industry influence opposes the agency’s public interest goals and the threat of capture is especially prominent. Indeed, in structuring the CFPB so that it could most effectively implement its mission of protecting consumers, the designers of the CFPB saw capture as one of the key concerns, cautioning that “agency capture was the ‘main regulatory design challenge.’”

Considerations going into Dodd-Frank, then it seems apparent that the leadership provisions were, at the very least, not some kind of accident or careless move.

86. Barkow, supra note 2, at 22 (explaining that this kind of disproportionate influence from the regulated industry or powerful interest groups inevitably causes “persistent policy bias in favor of these interests”).
87. Nissim-Sabat, supra note 2, at 3.
88. Datla & Revesz, supra note 8, at 771.
89. Nissim-Sabat, supra note 2, at 10. Once capture has happened, the government fails to represent the majority. Id. at 11 (citing Woodrow Wilson, The New Freedom: A Call for the Emancipation of the Generous Energies of a People 201–02 (1st ed. 1913)).
91. See Rachel E. Barkow, Overseeing Agency Enforcement, 84 Geo. Wash. L. Rev. 1129, 1139–40 (2016). The prevalence of the threat of capture is due to the financial firms in the regulated industry being so well financed and well organized, making it difficult to enforce financial regulation laws to the extent they should be. Id. When the first order in PHH Corp. was issued, many argued the decision would only make effective enforcement even more difficult for the CFPB, but not on the basis of the constitutional part of the holding. See Evan Weinberger, D.C. Circ. Single-Director Ruling May Hinder CFPB Enforcement, Law360 (Oct. 12, 2016, 6:57 PM), https://www.law360.com/articles/850602/dc-circ-single-director-ruling-may-hinder-cfpb-enforcement [https://perma.cc/26AW-77L2].
92. Barkow, supra note 2, at 65 (“[C]onsumer protection agencies tend to be less likely to worry about satisfying consumer groups than the more powerful regulated industries . . . creat[ing] the ideal breeding ground for agency capture and one-sided political pressure.”).
But how does agency capture relate to the internal structure of the agency? The answer lies in the distinguishing features of independent agencies versus executive agencies: by building independence from the executive into the agency’s structure, policymakers insulate, via organizational design and allocations of authority, the agency from capture by the regulated entities. This structural buffer actually mitigates the effects of two distinct types of capture—capture by the regulated industry, which can exert powerful influence on the agency head themselves or via lobbying powers on Congress and policymakers, as well as capture by the President or other political forces in the other branches. Recall the discussion in Part I.A about the definition of for-cause removal typical of independent agency heads. If an agency is created as an independent agency, the President can remove the head only for objective indicators of poor performance like negligence and malfeasance—the President cannot, however, opt for removal of an independent agency head merely because of disagreements or changes in policy objectives. Thus, independence of the agency enables deflection of influence from multiple partisan sources, and the goal of such independence is ultimately to allow the agency to act more consistently in line with its stated policy objectives and the general public interest.

While this explanation provides only surface-level insight into the motivations behind establishing public interest agencies as independent, it is nonetheless helpful in understanding and outlining just one possible supplement to the reasoning of both Congress and the D.C. Circuit in addressing their competing concerns over the CFPB’s structure, and over how to achieve the CFPB’s consumer protection goals via that structure without infringing on any constitutional limits. Such limits may include those on the scope of executive power under Article II, or those on the liberty of the individual, who may be harmed more greatly if the agency does fall prey to capture (either by the executive or the industry) and has unchecked decision-making authority.

II. A NEED FOR ADAPTIVE AND INCREMENTAL APPROACHES TO AGENCY DESIGN

To bridge the divide between (1) the arguments for adherence to history and tradition, as highlighted in the first PHH Corp. decision, as a means of constructing a...
seemingly impenetrable barrier to experimentation and innovation in agency leadership and design,99 and (2) congressional and organizational theorist ideals that advocate for the opposite, this Note proposes consideration of a new adaptive organizational design approach. Specific to the governmental context, an approach that allows first for flexibility in initial design, and then for incremental alteration of structure once formed, would be most effective in allowing an agency to implement and enforce its statutory mission regardless of the economic, political, or social circumstances,100 and would allow continually developing accommodations between the many competing interests going into the formulation and review of an agency.

While there are clear alignments of the policy objectives sought in the design mandates of Congress, the D.C. Circuit, and traditional organizational theorists,101 there still is a wide gap in the applicability of the latter to governmental agency forms. Particularly in regards to the novelty tenet of the court’s holding, how can governmental agencies really hope to adapt, grow, and improve if a court might reprimand them for departing from established (but perhaps ineffective) agency structures? Where the studies on structure fall short is in their broadness: in order to better advise an agency like the CFPB—which, upon creation, faced a unique and urgent public interest goal—on how to best structure their internal divisions and coordination of tasks, it is of utmost importance to be able to reference studies that integrate constitutional limitations into their evaluations and conclusions. Without reference to any kind of legal norms or bounds, studies like those from Mintzberg and Hall and Tolbert are necessarily limited in their compatibility with an incredibly large and powerful segment of organizations—the federal government.

This necessarily begs the question: if compatibility between design theory and legal tradition is low or limited,102 then is there really anything that can be done to improve organizational structures in the federal government—be it for lack of efficiency, accountability concerns, improved performance, or any other number of reasons—without at least risking a constitutional breach?

The need for administrative and government reform and reorganization is by no means a new proposal. Presidents and presidential candidates frequently propose some form of government reorganization as part of their campaign platform.103 In

99. Anticipating an argument that the CFPB’s unique structure should be allowed as a congressional experiment, the court in the first *PHH Corp.* wrote that it “cannot think of this as a one-off case because [it] could not cabin the consequences in any principled manner if [it] were to uphold the CFPB’s single-Director structure.” *PHH Corp.* v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 34 (D.C. Cir. 2016).
100. See, e.g., *Rainey,* supra note 29, at 56 (listing some contingencies affecting organizational structure and function).
101. See *supra* Part I.C.
102. Cf. Verkuil, *supra* note 7, at 267 (suggesting there is a “mismatch” between organizational form and statutory decision-making functions agencies are assigned).
103. Hyman & Kovacic, *supra* note 17, at 1450. In the case of the CFPB specifically, President Trump repeatedly stated during the 2016 presidential campaign that he intended to reduce the CFPB’s authority or get rid of the agency entirely as part of his pro-business, antiregulation platform. Donna Borak & Henry Williams, *Clinton vs. Trump: Where They Stand on Wall Street*, WALL ST. J. (Oct. 25, 2016, 5:00 PM), http://graphics.wsj.com/elections/2016/where-do-clinton-and-trump-stand-on-wall-street [https://perma.cc/EQ57-4NMP] (citing numerous news interviews and public statements made by Trump during his campaign
2003, the National Commission on the Public Service issued an extensive report with a series of enumerated recommendations for improving the organization, operations, and leadership of the federal government, and that at least some revitalization needed to occur as soon as possible, warning that the government otherwise would face “crisis after crisis,” and still be unable to handle the consequences effectively and with the trust of the people.104 Much legal scholarship has also been devoted to proposals for reform, or at least assessment, of government or agency structures, and many of those proposals include some form of increased flexibility or advocate contextual considerations as part of the proposed criteria.105

The bulk of these proposals and analyses, however, by focusing on either creating a new multipart framework for what factors to consider in agency design, or focusing on agency design only in one specific regulatory context, are too narrow to accommodate the broader reforms for which this Note has identified a need. And for proposals that are intended to apply to agencies more generally, those too are limited in their usefulness by a failure to account for constitutional constraints,106 a failure that


106. See, e.g., Hyman & Kovacic, supra note 17. Hyman and Kovacic walk the CFPB through their seven criteria and score the agency accordingly, but because they do not take any constitutional or other legal constraints into much consideration, the framework is limited
seems even more risky in light of the debate seen in \textit{PHH Corp.} and played out in other courts since then.\footnote{107}

These proposals unfortunately amount to yet another “one best way” solution to organizational design, whose factor- and element-based approaches, while touted as promoting flexibility, ultimately amount to another unbending formula. Instead, this Note suggests an adaptive approach that borrows theories about adaptive and incremental decision making and applies them to organizational structure.

Incrementalism is an approach commonly employed in governmental decision-making processes.\footnote{108} Under this approach, decision making and policy making is accomplished via a series of smaller-impact decisions,\footnote{109} each of which institutes only modest change.\footnote{110} This approach recognizes the many constraints faced by public agencies when trying to find the best single and over-arching policy solution for a problem—mainly, that because policymakers often disagree strongly on policy goals and have a hard time defining them, the policy ultimately selected may not be the most effective one, and instead may just be a lowest-common-denominator choice.\footnote{111} Because of this problem, policy making may not ever be based on a truly comprehensive analysis.\footnote{112} Incremental decision-making processes combat that problem too by taking a more step-by-step approach that enables those disagreements to exist and later be adapted to, rather than entirely impede an effective decision.\footnote{113}

If this kind of approach were transferred to the processes determining and influencing organizational structure, a better balance could at last be struck between the types of competing interests described in Part I. Despite the recognition by many that experimentation should be allowed in organizational structure,\footnote{114} and that one size

\footnote{107. See supra notes 83–84 and accompanying text.}
\footnote{108. RAINEY, supra note 29, at 188–91.}
\footnote{109. Smaller-impact decisions contrast with rationality-based or contrasting approaches, where the decision makers “make one grand decision and move on.” Robin Kundis Craig \& J.B. Ruhl, Designing Administrative Law for Adaptive Management, 67 VAND. L. REV. 1, 7 (2014).}
\footnote{110. See id.; Charles E. Lindblom, The Science of “Muddling Through,” 19 PUB. ADMIN. REV. 79 (1959).}
\footnote{111. See Lindblom, supra note 110.}
\footnote{112. Cf. RAINEY, supra note 29, at 184 (describing the contrasting rationality approaches to decision making, which rely on a careful and thorough evaluation of all possible solutions, means of achieving them, and other circumstances in order to find the best possible solution or decision). In legal scholarship, this approach has also been referred to as adaptive management, which has been promoted as an approach where “agencies should be free to make more decisions, but that the timing of those decisions is spread out into a continuous process that makes differentiating between the ‘front end’ and the ‘back end’ of decision making much less relevant.” Craig \& Ruhl, supra note 109, at 7.}
\footnote{113. See RAINEY, supra note 29, at 184.; Lindblom, supra note 104.}
\footnote{114. See REVITALIZING THE FEDERAL GOVERNMENT, supra note 104, at 7–8; Roberta Romano, Regulating in the Dark and a Postscript Assessment of the Iron Law of Financial Regulation, 43 HOFSTRA L. REV. 25, 37 (2014) (arguing that one of the two key components of financial regulation should incorporate to avoid failure is “a structure that is hospitable to regulatory experimentation wherever possible”). The Report by the National Commission on the Public Service emphasized also that the availability of information at the time a decision is
does not necessarily fit all, there appears to be no approach—and certainly none that have been implemented—applying the incremental or adaptive methods found in decision-making theory to administrative structure. There is no guaranteed risk of violating separation of powers mandates; and if any experimentation with or adaptation of the organization’s structure by Congress ever does seem suspect, the other branches and governmental actors will still be able to provide a check on and review of the agency’s constitutionality, much like the court did in *PHH Corp.* To the contrary, a threat to checks and balances can in and of itself necessitate implementation of new institutional forms.

**CONCLUSION**

A review of the underlying motives and reasoning for three different perspectives on a sample agency’s structure demonstrates that there are certainly overlapping trends and themes, and these overlaps are surely present even outside of the CFPB context and in administrative design more generally. A more pressing issue, however, lies where these perspectives diverge: in the push for flexibility and in the law and tradition potentially preventing it.

Even with the final opinion in *PHH Corp.* veering away from the court’s previously heavy reliance on and renewed emphasis of history and tradition as promoters of structural rigidity, it still seems fairly likely that courts in other jurisdictions reviewing a new (and perhaps improved) structure of an agency designed by Congress would view that newness and experimentation unfavorably. Regardless of the subsequent history of the *PHH Corp.* case specifically, and even beyond the context of the CFPB, the proposal in this Note for designing agencies with increased capability to adapt to changing circumstances remains worthy of consideration. This Note urges no sweeping reform, but merely an allowance of novelty in agency design such that it no longer potentially serves as an automatic discount to the agency’s constitutionality. The Constitution may require maintaining separation of powers and proper checks and balances, but it does not require an inflexible and unadaptable framework for doing so.

being made necessarily means that decisions on government reorganization may not involve all the answers or even the correct ones, but that something nonetheless needs to be done, and a better answer can be continually found in the future; this is directly analogous to the processes seen in incremental decision making. See Revitalizing the Federal Government, *supra* note 104, at 34.


116. Levinson & Pildes, *supra* note 96, at 2376 (describing how this occurred during Reconstruction following the Civil War). Or perhaps an additional change is needed not just in the institutional forms, but in how one categorizes them. Datla and Revesz advocate abandoning a binary view of agencies as two distinct categories of independent and executive, and instead viewing agency form as a continuum, “ranging from most independent from presidential influence to least independent.” Datla & Revesz, *supra* note 8, at 773.

117. See *supra* Part I.C.

118. This is not to say that the tradition and history of agency structure should be completely abandoned, but only that it should be informative, rather than controlling. See Verkuil, *supra* note 7, at 267 (“There are undoubtedly good historical reasons why [] agencies evolved to their present state, but that should not bar a reconceptualization of their role.”).