X. Funding the Consumer Financial Protection Bureau

A. Introduction

The 2008 Financial Crisis and its aftermath was a calamitous period in the United States: the real estate market had been torn asunder, wages for the majority of American workers had declined precipitously, and states slashed spending at record rates.[1] Personal financial ruin gave way to historic lows in consumer spending[2] as American households, both young and old, had to reprioritize their fiscal affairs.[3] Congress looked to address the underlying causes of the financial crisis, and a goal in the eyes of the federal government was to mitigate the risk of repeated market failures.[4] This meant bolstering regulatory oversight over financial markets.[5] Arguably the most significant product of the legislative process during this period was the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).[6]

In its preamble, the Dodd-Frank makes clear its purpose "to protect consumers from abusive financial services practices."[7] To help realize this purpose, Congress created a new agency: the Consumer

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[1] Jake Grovum, *2008 Financial Crisis Impact Still Hurting States*, USA TODAY (Sep. 15, 2013, 12:00PM), https://www.usatoday.com/story/money/business/2013/09/14/impact-on-states-of-2008-financial-crisis/2812691 [https://perma.cc/ARM8-ZRJ9?type=image].

[2] Mariacristina De Nardi, et al., *Consumption and the Great Recession*, ECON. PERSP., 2012, at 1 (characterizing the Great Recession by a "severe year-over-year decline in consumption" not seen since the end of Second World War).

[3] *See generally* Michael Hurd & Susann Rohwedder, *Effects of the Economic Crisis on the Older Population: How Expectations, Consumption, Bequests, and Retirement Responded to Market Shocks* (The Wharton Sch. Pension Research Council, Working Paper No. 2011-09, 2011).

[4] Eric Pearson, *A Brief Essay on the Constitutionality of the Consumer Financial Protection Bureau*, 47 CREIGHTON L. REV. 99, 100 (2013) (concluding the federal government viewed the stability of financial markets as the key to preventing similar economic failures in the future).

[5] *Id*. (providing that the regulatory reforms that emerged from the collapse placed tighter controls on credit, securitization, derivatives and more).

[6] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010) (proclaiming that the act sought to end "too big to fail," prevent future bailouts, and protect consumers).

[7] *Id*. (explaining the purpose of Dodd-Frank in the preamble).

Financial Protection Bureau (CFPB, Bureau).[8] Seeking to meet expectations to construct an agency specializing in consumer issues, the Bureau's founders sought ample independence from congressional oversight and its politics.[9] The Bureau's funding mechanism—unique among agencies—was crucial to achieving that goal.

This article discusses the purpose behind the CFPB and how its structure, especially its funding mechanism, is intended to keep it unaffected by partisan politics, and focused on its mission to protect everyday consumers. Section B delves into the Bureau's purported purpose and the extent of its authority over consumer protection law, and provides a brief overlay of the Bureau's parts and how they interact with one another. This section includes discussions on the CFPB's relationship with the Federal Reserve System (Federal Reserve), and the position of CFPB Director (Director). Part C is a analyzes the CFPB's funding mechanism, as well as debates concerning its constitutionality, and how it is intended to stave off both political influence and industry capture. Part D argues that, notwithstanding Congress's best intentions, the CFPB is not free of political influence and may even be more vulnerable to capture than expected. Part E concludes with a discussion on the future of the CFPB, and what role Justice Brett Kavanaugh and his ascent to the Supreme Court will have on that future.

B. CFPB Background

1. Purpose and Authority

Dodd-Frank is comprehensive in setting out the purpose and objectives of the CFPB.[10] The CFPB is tasked with implementing and enforcing Federal consumer financial laws in order to ensure consumers "have access to markets for consumer financial products and services" and that those markets remain "fair, transparent, and competitive."[11] Upon its creation, the CFPB was given authority over a

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[8] *Id.* (providing that Congress sought to protect taxpayers from "abusive financial services practices . . . .").
[9] Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY, Summer 2007, https://democracyjournal.org/magazine/5/unsafe-at-any-rate [https://perma.cc/22MC-MMF7] (proposing the new agency reflect the independence of the U.S. Consumer Product Safety Commission (CPSC)).
[10] *See* Dodd-Frank Act §§ 1001–12, 124 Stat. at 1961–65.
[11] 12 U.S.C. § 5511(a) (2012).

number of consumer laws.[12] Some of the Bureau's objectives include providing consumers with information to help them make responsible financial decisions,[13] protecting consumers from "unfair, deceptive, or abusive acts and practices" and discrimination,[14] removing outdated financial regulations,[15] and enforcing federal financial laws in order to promote fair competition.[16]

The Director enjoys wide latitude in her authority latitude to prescribe rules, so long as those rules are for the purpose of administering, enforcing, or implementing the provisions of federal consumer financial law.[17] Before adopting a new rule, the Bureau must consider the "potential benefits and costs to consumers"[18] as well as the impact such proposed rules will have on consumers in rural areas along with other specified persons.[19] Likewise, prior to adopting a rule, the Bureau must consult with the appropriate prudential regulator or other federal agency.[20] If a prudential regulator objects to a proposed rule, the Bureau must include a description of the objection in the adopting release and an explanation as to why the Bureau did or did not accept the objection.[21] A member of the Financial Stability Oversight Council may find success in stalling the implementation of such regulation if it can show that the proposed rule would threaten the "safety and soundness of the United States banking system."[22] Some

[12] *Id*. § 5481(12) (providing a list of "enumerated consumer laws" transferred to the Bureau).
[13] *Id.* § 5491(a) (requiring the Bureau to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws).
[14] *Id.* § 5511(b)(2) (providing that Bureau is empowered to protect consumers from discrimination, unfair acts and deceptive practices, or abusive acts).
[15] *Id.* § 5511(b)(3) (providing that the Bureau should ease the regulatory burden by culling unnecessary regulation).
[16] *Id.* § 5511(b)(4).
[17] *Id.* § 5512(b)(1) (providing that the Director may prescribe "rules and issue orders and guidance, as may be necessary or appropriate")
[18] *Id.* § 5512(b)(2)(A)(i).
[19] *Id.* § 5512(b)(2)(A)(ii). *See also id.* § 5516 (2012) (defining "covered persons" as used in § 5512(b)(2)(A)(ii)).
[20] *Id.* § 5512(b)(2)(B) (directing the Bureau to consult with the appropriate authority to ensure consistency in prudential, market, and systemic objectives).
[21] *Id.* § 5512(b)(2)(C) (ordering the Bureau to include a description of the objection and its decision in the proposed rule).
[22] *Id.* §§ 5513(a), 5513(b)(1).

argue that this veto by the Council on the Bureau is the most effective limitation on the agency's sovereignty.[23]

2. *CFPB Structure*

a) The Federal Reserve

What has caused significant controversy for the Bureau has been its statutory structure, which is unique among federal regulatory agencies.[24] Dodd-Frank positions the Bureau within the Federal Reserve, tasking the agency with regulating the "offering and provision of consumer financial products or services under the Federal consumer financial laws."[25] This location was, in fact, a political compromise made between then Representative Barney Frank (D-Mass.) and Senator Bob Corker (R-Tenn.).[26] CFPB proponents wanted the new agency to be as independent as possible, while the Bureau's antagonists would have preferred no agency at all.[27] Housing the Bureau within the Federal Reserve eliminated the possibility of a free-standing agency.[28] Despite its location within the Federal Reserve, Dodd-Frank provides for substantial limitations on the Federal Reserve's authority, specifically its Board of Governors (Board).[29] In particular, the Board cannot intervene in a matter before the Director—

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[23] Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 78 (2010) ("The Council's veto threat appears to be the greatest limit on the agency's independence.").

[24] Adam L. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L 321, 339 (2013).

[25] 12 U.S.C. § 5491(a).

[26] David Cho et al., *Dodd's Quest Ends with Financial Overhaul*, WASH. POST, May 23, 2010 at A1 (detailing efforts to pass the landmark financial reform bill). *See also* Barkow, *supra* note 23, at 73 (explaining how the Obama Administration was encouraged "to give up on a free-standing agency to get the legislation passed in the Senate").

[27] Erik Sherman, *Opponents Seek To Kill Consumer Protection Agency By A Thousand Cuts*, Forbes, (May 10, 2018, 11:59AM), https://www.forbes.com/sites/eriksherman/2018/05/10/opponents-seek-to-kill-consumer-protection-agency-by-a-thousand-cuts/#258aaa211349 [https://perma.cc/YY8D-HB5P] (describing efforts to kill the CFPB or at least place it in "a hospital bed on life support").

[28] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010); Levitin, *supra* note 24, at 339.

[29] 12 U.S.C. § 5492(c)(3).

namely "examinations or enforcement actions, unless otherwise specifically provided by law,"[30] it may not alter in any fashion positions of employment,[31] nor is the Board permitted to "merge or consolidate the Bureau" or its functions, with any part of the Board or the Federal Reserve banks.[32] Thus, while the Bureau is technically located within the Federal Reserve, the Federal Reserve appears to have less than substantive dominion over the Bureau.

b) The Director

Another aspect of the Bureau's architecture that has garnered significant pushback both politically and legally has been the Director position.[33] At the apex of the Bureau's hierarchy is the Director,[34] appointed by the President of the United States, by and with the advice and consent of the Senate[35] for a term of five years.[36] The President may nominate any citizen of the United States to the position.[37] The Director may be removed by the President only for cause, namely, "for inefficiency, neglect of duty, or malfeasance in office."[38] As it concerns the Director's powers and duties, he or she has control over the number of employees who may work in the Bureau.[39] The Director must present annual reports to Congress by March 31 of each year regarding any complaints the Bureau received about consumer finan-

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[30] *Id.* § 5492(c)(2)(A) (prohibiting the Federal Reserve from interfering with any matter before the Director unless specifically provided for by law).
[31] *Id.* § 5492(c)(2)(B) (prohibiting appointment, direction, or removal of CFPB personnel).
[32] *Id.* § 5492(c)(2)(C) (forbidding consolidation of the CFPB with other portions of the Federal reserve board or banks).
[33] Norbert J. Michael, *The Consumer Financial Protection Bureau Undermines Economic Freedom*, HERITAGE FOUND., (Jan. 8, 2018), https://www.heritage.org/markets-and-finance/commentary/the-consumer-financial-protection-bureau-undermines-economic-freedom [https://perma.cc/9NU8-FB9P] (critiquing the for-cause removal status of the CFPB's director)
[34] 12 U.S.C. § 5491(b)(1) (providing that the Director shall serve as head of the Bureau).
[35] *Id.* § 5491(b)(2) (providing that the President shall nominate the Director subject to senatorial consent).
[36] *Id.* § 5491(c)(1).
[37] *Id.* § 5491(b)(3).
[38] *Id.* § 5491(c)(3).
[39] *Id.* § 5493(a)(1)(A) (empowering the Director to fix the number of employees and appoint them pursuant to title 5).

cial products and services.[40] Furthermore, the Director must appear before the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services and the Committee on Energy and Commerce of the House semi-annually.[41]

There have been several controversies with respect to the Bureau Director position, beginning even before the agency had a nominee before the Senate.[42] More recently, two prominent court cases have raised issues that concern the Director position directly[43] and consider the CFPB structure as a whole.[44] In the first case, former Director Richard Cordray, upon his resignation on November 24, 2017, commissioned Leandra English, his then-Chief of Staff, to succeed him.[45] That same day, President Trump nominated then-Director of the Office of Management and Budget, Mick Mulvaney, to serve as the Bureau's acting Director.[46] The D.C. District court ultimately ruled in favor of the Trump Administration, holding that Dodd-Frank—despite apparently contradictory language in the Federal Vacancies Reform Act of 1998—authorizes the President to appoint the acting Director of the Bureau.[47] Another controversy concerning the Director position appeared before the United States Court of Appeals for the District of Columbia in 2017.[48] In that case, the court

[40] *Id.* § 5493(b)(C) (ordering the Director to inform Congress regarding the Bureau's activities including information and analysis regarding complaints).
[41] *Id.* § 5496(a).
[42] President Obama, in order "to avoid a confirmation battle," named Elizabeth Warren to an "interim position" in the Consumer Financial Protection Bureau where she could help "shape the powerful but controversial agency she conceived." Then Representative Barney Frank called it "a very creative way to put Elizabeth where she ought to be" while Senator Bob Corker and other members of his party criticized the decision as a way of bypassing the Senate confirmation process. Jim Puzzanghera & Peter Nicholas, *Problematic Strategy for New Agency*, L. A. TIMES, Sep. 17, 2010, at B1.
[43] English v. Trump, 279 F. Supp. 3d 307, 311 (D.D.C. 2018) (questioning whether the President has the power to name an acting Director of the Bureau or whether "his choice must yield to the ascension of the Deputy Director").
[44] PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 77 (D.C. Cir. 2018) (holding as constitutional the statute's making the Director's removal possible only for cause by the President).
[45] *English,* 279 F. Supp. 3d at 311.
[46] *Id*.
[47] *Id.* at 317.
[48] *PHH,* 881 F.3d at 77.

affirmed the constitutionality of the for-cause removal standard for the Director as well as the Bureau's leadership structure writ large.[49]

C. The CFPB Funding Mechanism

The final aspect of the CFPB that has occasioned perhaps the most virulent dissensions has been the Bureau's funding mechanism.[50] The Treasury Department has previously vocalized its support for an entity like the CFPB, and in 2009 stated that such an agency should enjoy "stable and robust funding."[51] At the time, the Treasury Department recommended the agency's funding come, at least in part "from fees assessed on entities and transactions across the financial sector . . . ."[52] Dodd-Frank went beyond the pale of the Treasury Department's recommendations,[53] though, and made the new agency essentially self-sufficient. This funding mechanism, described below, along with the aforementioned structural characteristics, was intended to accomplish two goals: (i) to protect the Bureau from political battles over its funding;[54] and (ii) insulate the Bureau from "agency capture."[55]

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[49] *Id.* at 93 ("There is nothing constitutionally suspect about the CFPB's leadership structure.").

[50] Suzy Khim, *Why the CFPB's Funding is Guaranteed*, WASH. POST (Feb. 15, 2012), https://www.washingtonpost.com/blogs/wonkblog/post/why-the-cfpbs-funding-is-guaranteed/2012/02/15/gIQA1pAQGR_blog.html?utm_term=.4f7bdcca2722 (explaining the relationship between the Bureau and the Federal Reserve with respect to budgeting).

[51] U.S. DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION 58, *available at* http://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf [https://perma.cc/DP3Y-X72X] ("The CFPA should be an independent agency with stable and robust funding.").

[52] *Id*. (advising that the CFPB should have a "stable funding stream").

[53] Eric Pearson, *supra* note 4, at 103 asserting Dodd-Frank "one-upped" the Treasury Department by making the CFPB self-funding).

[54] Michael C. Nissim-Sabat, *Capturing this Watchdog? The Consumer Financial Protection Bureau Keeping the Special Interests out of its House*, 40 W. ST. U. L. REV. 1, 21 (2012).

[55] Pearson, *supra* note 4, at 103.

To wit, the CFPB, unlike other administrative agencies, is not funded through the congressional appropriations process.[56] Instead, it receives its funding directly from the Federal Reserve Board.[57] The Director determines the amount "reasonably necessary to carry out the authorities of the Bureau."[58] It is important to note the statute's qualifying language, specifically the statutory mandate that the Board "shall transfer" such funds that have been deemed "reasonably necessary."[59] It appears the Board lacks the power to outright deny the Director's request. Furthermore, the statute explicitly states that the Director does not need to obtain the "consent or approval" of Office of Management and Budget (OMB) for any budgetary requests,[60] nor are any funds derived from the request reviewable by either Appropriations Committee in the House of Representatives or Senate.[61]

Notwithstanding the Director's power to request funding without the need for OMB or Congressional approval, the Director must adhere to a statutorily-imposed funding cap.[62] The cap is currently set at twelve percent of the total operating expenses of the Federal Reserve.[63] The Bureau must also prepare annual financial statements[64] separate from those of the Board and the Federal Reserve,[65] and maintain a financial management system that conforms with Federal accounting standards.[66] The Bureau is also subject to an

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[56] HENRY B. HOGUE ET AL., CONG. RESEARCH SERV., R43391, INDEPENDENCE OF FEDERAL FINANCIAL REGULATORS: STRUCTURE, FUNDING, AND OTHER ISSUES 25 (2017), https://fas.org/sgp/crs/misc/R43391.pdf [https://perma.cc/8MLN-WD7P].

[57] 12 U.S.C. § 5497(a)(1) (2012) (directing the Federal Reserve to transfer to the CFPB an amount the Director considers "reasonably necessary" to carry out the Bureau's work).

[58] *Id*.

[59] *Id*.

[60] *Id.* § 5497(a)(4)(E) (2012) (providing that the Director has no obligation to obtain approval for any plan, forecast, or report).

[61] *Id.* § 5497(a)(2)(C) (2012) (exempting the funds from review by Committees on Appropriations).

[62] *Id.* § 5497(a)(2)(A) (2012).

[63] *Id.* § 5497(a)(2)(A)(iii) (providing that it 2012 and onward, the CFPB's funding cap would be twelve percent of the Federal Reserve's budget).

[64] *Id.* § 5497(a)(4)(B).

[65] *Id.* § 5497(a)(4)(F) .

[66] *Id.* § 5497(a)(4)(C) (directing the Bureau to maintain financial management systems that "comply substantially" with federal requirements and accounting standards).

annual audit from the Comptroller General,[67] which the Comptroller General must submit to Congress.[68]

Separate but related to the Bureau's funding is the establishment of a separate coffer in the Federal Reserve, known as the Consumer Financial Civil Penalty Fund.[69] All civil penalties obtained against persons in any judicial or administrative action by the Bureau are deposited into the Civil Penalty Fund.[70] The money in the Civil Penalty Fund is available to the Bureau for payments to the victims of the civil penalties.[71] If the Bureau cannot locate the victims or if payment is "otherwise not practicable," the Bureau may use the funds for "consumer education and financial literacy programs."[72] Between its inception and fiscal year 2018, the Bureau collected approximately $525 million in civil penalties.[73]

1. Constitutionality of the Funding Mechanism

The Bureau's funding mechanism renders it immune from the influences of Capitol Hill.[74] Congress has several tools it may use to exercise power over agencies, chief among them, however, is the Legislature's power of the purse through the appropriations process.[75]

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[67] *Id.* § 5497(a)(5)(A) (directing the Comptroller General to annual audit the Bureau's financial transactions to ensure compliance with generally accepted government accounting standards). *See also id.* §§ 5496(a)–(b) (ordering the Bureau to appear semi-annually to appear before various Congressional committees to discuss its reports).
[68] *Id.* § 5497(a)(5)(B).
[69] *Id.* § 5497(d)(1).
[70] *Id*. (providing that all civil penalties from administrative and judicial actions should be deposited in this account).
[71] *Id.* § 5497(d)(2).
[72] *Id.*
[73] U.S. GOV'T ACCOUNTABILITY OFF., FINANCIAL AUDIT: BUREAU OF CONSUMER FINANCIAL PROTECTION'S FISCAL YEARS 2018 AND 2017 FINANCIAL STATEMENTS 21 (2018), https://www.gao.gov/assets/700/695503.pdf [https://perma.cc/73Q5-K8G5] (providing the precise amount of cash collections throughout the life of the Bureau).
[74] Eric Pearson, *supra* note 4, at 107 ("[T]he agency need not depend upon Congress for its funding.").
[75] U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."); Eric Pearson, *supra* note 4, at 108 (providing that Congress's "most effective weapon" against errant agencies is its appropriations power).

The traditional procedure for acquiring agency funding begins with agencies submitting budget requests to the White House Office of Management and Budget of the White House.[76] The Executive Branch then sends those requests to Congress which doles out funds as it sees fit vis-à-vis appropriations measures or continuing resolutions.[77] The procedure encourages agencies to fight jealously over limited funds.[78]

The most glaring problem with the conventional agency funding method is that it simply does not apply to the CFPB, as the Bureau is self-funded.[79] The Director does not have to engage with the OMB.[80] The only other agency that is entirely self-funded is the Federal Reserve itself.[81] To be sure, there are other agencies that do not partake in the appropriations process.[82] But this group is well within the minority.[83] Being an exception to the rule probably is not sufficient grounds for a Constitutional violations claim, but it would likely be one part of any argument.[84] To this end, one scholar emphasizes an important difference between the Bureau and the other ten agencies, namely, a distinction in duty.[85] The other agencies "engage essentially in tasks of management" while the Bureau can make and enforce substantive law.[86] The Bureau is awarded substantial rule-making and enforcement authority.

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[76] Pearson, *supra* note 4, at 108.
[77] *Id*.
[78] *Id*.
[79] *See id*. at 103 (providing that *Dodd-Frank* "one-upped" the Treasury Department by making the Bureau self-funded).
[80] 12 U.S.C. § 5497(a)(4)(E) (2012) (stating explicitly that the Director need not obtain OMB approval of any plans or forecasts).
[81] *See* Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 525 (2000) (providing that the Federal Reserve was—as of date of publication—the only self-funded agency).
[82] Pearson, *supra* note 4, at 109 (providing that Congress has, in the past, spared some agencies the "travails of the appropriations process").
[83] *Id*. (citing some eleven of 400 agencies exempt from the appropriations process).
[84] *See id.* at 109 (providing that at least eleven other agencies are funded in this manner).
[85] *Id.* 110.
[86] *Id*. (contrasting the CFPB's policymaking function with the management tasks that other self-funded agencies undertake).

The issue of CFPB constitutionality does not come down to delegation of legislative power.[87] Congress delegates its power regularly, and the result is often a more effective government structure.[88] Rather, the constitutional issue with the CFPB is how its funding mechanism gives it immunity from any of the three branches—including Congress—despite its adopting characteristics of a legislative body.[89] Without the power to defund an agency, Congress will struggle to ensure the agency complies with the will of the electorate.[90]

2. Agency Capture Avoided?

An early concern for the Bureau was avoiding agency capture.[91] Its structure, as described above, was intended to avoid this problem.[92] There are many definitions for agency capture,[93] and the phenomenon manifests itself in different ways. For example, there is the "revolving door" capture whereby an industry hires a one-time regulator who may then use previous connections within the agency to the advantage of the new employer.[94] At its most basic level, however, agency capture describes a perverse relationship between a regulator and its regulated industry that undermines, taints, or at least calls into question the regulator's duty to the "public interest."[95]

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[87] *Id.* at 106 (explaining the "functionalist approach" the Supreme Court takes to analyzing delegation of power issues and how this approach recognizes that departments of government are not "airtight").
[88] *Id*. at 106–07.
[89] *Id.* at 107 (providing that administrative can regulate in manner that is "quintessentially" legislative).
[90] *Id*. at 108.
[91] Kathering Kane, *Regulatory Capture? The CFPB Has a Couple Answers,* AM. BANKER, (July 10, 2012, 8:30am), https://www.americanbanker.com/opinion/how-to-avoid-regulatory-capture-cfpb-has-a-couple-answers).
[92] Nissim-Sabat, *supra* note 54, at 9 ("[T]he CFPB has measures in place to combat its agency from being captured.").
[93] *Id*. at 12 (providing that regulatory capture can appear through "several different avenues").
[94] *Id*. at 13.
[95] *Id*. at 11 (quoting Senator Sheldon Whitehouse (D-RI) stating that "[i]nch by inch, the tentacles of industry reach further and further into the regulator").

Many believed that connecting the Bureau's budget to the Federal Reserve would eliminate the "appropriations gamesmanship"[96] that often plagues other agencies. As the Bureau needs not procure congressional funding, there exists a stopgap between it and lobbyists.[97] Better yet, argue CFPB supporters, because the Bureau is not dependent on collecting industry fees, it avoids the need to please industry players, thereby evading industry capture.[98] In the end, because the Bureau is financially independent, it is thought to be insulated from any sort of "capture," whether political or by the industry.[99] This allows the Bureau to focus on its mission to protect consumers and effectively oversee the financial markets and its products.[100]

D. Not So Fast—Politics as Usual

1. The Appointment of Mulvaney and Nomination of Kraninger

The statutory structure of the CFPB is intended in part to keep this unique agency as independent as possible in order to avoid industry "capture."[101] However, it appears opponents of the Bureau may have identified a vulnerability. The Trump Administration began the process of exposing this weakness by appointing Mick Mulvaney, a staunch CFPB opponent and critic, to the position of acting Director.[102] As discussed in Part B, the Director retains sole authority to request the necessary funding from the Federal Reserve in order to finance Bureau activity.[103] The statutory language imposes a duty on

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[96] *Id.* at 20 (quoting Zach Carter, *GOP Budget Plan Would Cut CFPB Funding Nearly in Half*, HUFFINGTON POST (May 25, 2011, 3:40PM), http://www.huffingtonpost.com/2011/02/16/gop-budget-plan-would-cut_n_824179.html [https://perma.cc/P2ND-2CFE]).
[97] *Id*. at 21 (providing that Congress's choice of funding mechanism creates "some insulation" between the CFPB and lobbyists).
[98] *Id*.
[99] *Id*.
[100] *Id*.
[101] Barkow, *supra* note 23, at 17.
[102] Tara Siegel Bernard, *Agency Picked A New Leader; So Did Trump*, N. Y. TIMES, Nov. 25, 2017, at A1 (quoting Mulvaney as once characterizing the Bureau as a "sad, sick joke"); Evan Weinberger, *New Director Could Wield Budget Ax at Consumer Finance Watchdog*, BLOOMBERG LAW (Dec. 6, 2018, 2:26 PM), https://www.bna.com/new-director-wield-n57982094553.
[103] Khim, *supra* note 50.

the Board to transfer whatever funding is requested[104] so long as such request is deemed "reasonably necessary" by the Director and falls safely within the mandated cap of twelve percent.[105] Nothing in the language of the statute imposes a similar duty on the Director to make such a request at all. Recognizing the shortcoming, in the Second Quarter of Fiscal Year 2018, Acting Director Mick Mulvaney sent a letter to Federal Reserve Chair Janet Yellen informing her that "the Bureau is requesting $0."[106]

This conservative approach in Bureau leadership is expected to continue with the appointment of new a Director in Kathleen Kraninger.[107] Kraninger has spent most of her career in the field of homeland security and has no discernible experience in financial regulation.[108] Several lawmakers decry the nominee as a continuation of Mulvaney.[109] These accusations are not unfounded—Senate Majority Leader Mitch McConnell alluded to such a strategy after he interviewed the nominee.[110] With little to work from in the way of Kraninger's personal opinions on the Bureau, many have pointed to the Director's work on the Trump Administration's budget proposal as evidence that Kraninger will continue to try to weaken the agency.[111]

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[104] 12 U.S.C. § 5497(a)(1) (2012) ("[T]he Board of Governors *shall transfer* . . . the amount determined by the Director . . . .").

[105] *Id*. (obligating the Federal Reserve to transfer those funds that are reasonably necessary); Pearson, *supra* note 4, at 112.

[106] Michael Grunwald, *Mulvaney Requests No Funding for Consumer Financial Protection Bureau*, POLITICO (Jan. 18, 2018, 9:00AM), https://www.politico.com/story/2018/01/18/mulvaney-funding-consumer-bureau-cordray-345495 [https://perma.cc/W45G-L9CG]; Jim Puzzanghera, *Mulvaney Requests Zero Funding for the Consumer Financial Protection Bureau*, L. A. TIMES (Jan. 18, 2018, 12:40PM), https://www.latimes.com/business/la-fi-cfpb-mulvaney-funding-20180118-story.html .

[107] Renae Merle, *Pick for Consumer Agency Faces Fight*, WASH. POST, June 22, 2018, at A16.

[108] *Id*.

[109] *Id*.

[110] *Id*. (quoting the Senate Majority Leader as saying "Ms. Kraninger's resume and reputation suggest she's well-suited to continue on the course Acting Director Mulvaney has charted toward transparency, accountability, and effectiveness within proper limits").

[111] The Trump Administration released a proposed fiscal year budget for 2019 which included language entertaining the possibility of reducing CFPB funding. This request would likely be of no avail without amending Dodd-Frank and the CFPB funding mechanism. Nevertheless, opponents of Kraninger's nomination pointed to her work on the budget proposal as

2. *Nomination of Brett Kavanaugh to the Supreme Court*

The nomination of Brett Kavanaugh to the Supreme Court caused considerable consternation to proponents of the CFPB.[112] Their concerns may be warranted. While on the United States Court of Appeals for the District of Columbia, then-Judge Kavanaugh authored two opinions in which he expressed strong apprehensions towards the constitutionality of the Bureau.[113] In one of the cases, Judge Kavanaugh began his dissent stating the case against the Bureau implicated "executive power and individual liberty."[114] Kavanaugh's dissent strongly criticized the Bureau's single Director leadership structure and argued that, absent a multi-member format, the Executive Branch should enjoy at-will removal power over the Director in order to fulfill its constitutional duty to enforce the laws of the nation.[115]

Kavanugh's dissent makes no mention of the CFPB's funding mechanism because that aspect of the Bureau was not at issue in the

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evidence of her support for weakening the Bureau. *See* OFF. OF MGMT & BUDGET, AN AMERICAN BUDGET 136 (2018), https://www.whitehouse.gov/wp-content/uploads/2018/02/budget-fy2019.pdf [https://perma.cc/YM8W-WA43] (identifying Kraninger as a contributor). See also Megan Leonhardt, *Buried in Trump's Budget: A New Attempt to Kill a Powerful Consumer Watchdog*, CNN MONEY (May 23, 2017), http://money.com/money/4790486/trump-budget-2018-cuts-cfpb-consmers [https://perma.cc/RQC8-V3PB] (asserting that Republicans seek to "slash" or kill the CFPB).

112 Emily Stewart, *Consumer Advocacy Groups are Extremely Worried About Brett Kavanaugh*, VOX (July 11, 2018, 10:53 AM), https://www.vox.com/policy-and-politics/2018/7/11/17556120/brett-kavanaugh-elizabeth-warren-cfpb-regulations [https://perma.cc/SW7P-ZWNR] (reporting concerns from consumer advocacy groups that now-Justice Kavanaugh displayed a "deregulatory bent").

113 Sarah Harrington, *Kavanaugh on the Executive Branch: PHH Corp. v. Consumer Financial Protection Bureau*, SCOTUSBLOG (Aug. 8, 2018, 10:25 AM), https://www.scotusblog.com/2018/08/kavanaugh-on-the-executive-branch-phh-corp-v-consumer-financial-protection-bureau [https://perma.cc/7547-F6XQ].

114 *PHH Corp.*, 881 F.3d at 164 ("This is a case about executive power and individual liberty.").

115 *Id*. at 165–66 ("In lieu of Presidential control, the multi-member structure of independent agencies operates as a critical substitute check on the excesses of any individual independent agency head."); *see also id*. at 164 (quoting U.S. CONST. art., II, §1: "The executive Power shall be vested in a President of the United States of America.").

case.[116] However, Kavanaugh does mention the problem of regulatory capture that the forefathers of the Bureau such as then-Professor Elizabeth Warren, sought to mitigate.[117] While some may hope Kavanaugh's presence on the Supreme Court signals the beginning of the end of the "administrative state," it appears more likely that the newest Justice would favor the more mild approach of simply restraining agency power.[118] This, one could argue, is evinced in Justice Kavanaugh's aforementioned comment on the issue of regulatory capture. It seems, at least from that excerpt of the dissent, that he is not unwelcoming to the policy rationales that motivated the CFPB's structure.

What is certain is that if the issue of the CFPB funding mechanism is brought before the Supreme Court, Justice Kavanaugh would likely be skeptical of its constitutionality.[119] He would likely be joined by his conservative colleagues like Justice Clarence Thomas, as well as Justice Neil Gorsuch, who has himself expressed skepticism about core administrative law principles such as the *Chevron* doctrine.[120] The Trump Administration's reasons for nominating then-Judge Kavanaugh to the highest court seem clear.[121] In one document issued around the time of Kavanaugh's nomination, the White House touted then-Judge Kavanaugh's role in limiting regulators "75 times

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116 *See generally id.*

117 *PHH Corp.*, 881 F.3d at 185 (contending that multi-member agency heads are "better structured than single-Director independent agencies to guard against 'capture' . . . .").

118 Jennier A. Dlouhy et al., *Kavanaugh Could Usher in Even More Business-Friendly Era on Supreme Court*, BLOOMBERG (July 10, 2018, 2:59 PM), https://www.bloomberg.com/news/articles/2018-07-10/kavanaugh-could-usher-in-business-friendly-era-on-supreme-court ("Kavanaugh's skepticism of agency power and major federal regulations could immediately come into play with the very first case on the Supreme Court docket in October.").

119 *Id*.

120 Eric Citron, *The Roots and Limits of Gorsuch's Views on Chevron Deference*, SCOTUSBLOG (Mar. 17, 2017, 11:26 AM), https://www.scotusblog.com/2017/03/roots-limits-gorsuchs-views-chevron-deference [https://perma.cc/EX5S-S55Y] ("All in all, there is no question that a deep dive into Gorsuch's wrtitings in this area marks him as a unique skeptic of certain core doctrines of administrative law and the deference they provide to agencies—particularly on questions of how to read their operative statutes.").

121 Lorraine Woellert, *Trump Asks Business Groups for Help Pushing Kavanaugh Confirmation*, Politico (July 9, 2018, 11:04 PM), https://www.politico.com/story/2018/07/09/brett-kavanaugh-business-groups-trump-705800 [https://perma.cc/NV64-EDVH].

on cases involving clear air, consumer protections, net neutrality and other issues."[122] Consequently, the Supreme Court may have a role in forcing substantial structural changes to the CFPB and its funding processes.

E. Conclusion

The CFPB was intended to protect everyday consumers. A product of a devastating economic collapse, the CFPB was meant to serve as a prophylactic against nefarious consumer spending practices. To satisfy expectations of independence, Congress created an agency whose funding would not be influenced by politics or special interests. Housing the Bureau within the Federal Reserve was seen as the ideal way of isolating this integral agency and ensuring impartiality. Yet Congress's efforts to protect the CFPB from politics may have proven to be nothing more than wishful thinking. After all, the President appoints the Director, and will assign to the position someone who shares the President's views on how the agency should approach issues of consumer protection. In addition, the Director has ample discretion in deciding the amount of fiscal dollars dedicated to dealing with such issues. Depending on the appointee, the CFPB can significantly scale back its enforcement of consumer protection law. Furthermore, Congressional oversight is, by all accounts, moot since the Bureau is not funded by the appropriations process. As a result, the CFPB's structure does not protect it from politics, and instead shifts the battle from the Legislature to the Executive. In the end, the Supreme Court will probably have the next word on the matter.

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[122] *Id*.
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