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# SYMBOLISM AND SEPARATION OF POWERS IN AGENCY DESIGN

*Kristin E. Hickman\**

The political polarization of our time has profound implications for the ability of federal government agencies to perform the functions and accomplish the goals that Congress has given them.<sup>1</sup> Congress depends heavily on agencies to implement and administer government programs, not limited to but certainly including policymaking through the promulgation of regulations and the adjudication of individual enforcement actions.<sup>2</sup> No matter how doggedly an agency enforces statutory and regulatory requirements, however, the efficacy of government programs ultimately depends on the willingness of their targets and beneficiaries to accept and comply with the pronouncements of the agencies tasked with administering those programs.<sup>3</sup> If we want people voluntarily to comply with statutory requirements, we ought to have some concern for public perceptions regarding the fairness

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1 See, e.g., Gillian E. Metzger, Essay, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1746–48 (2015) (summarizing some of the implications of political polarization for administrative agencies).

2 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.3 (5th ed. 2010) (observing that agencies are responsible for most of the government’s policy decisions, rules of conduct, and adjudications of individual cases).

3 IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 20–21 (1992) (recognizing that “[i]ncreasingly within both scholarly and regulatory communities there is a feeling that the regulatory agencies that do best at achieving their goals are those that strike some sort of sophisticated balance between” deterrence of noncompliance through enforcement and penalties versus “gentle persuasion” to secure compliance with legal requirements).

and legitimacy of agencies and agency action.<sup>4</sup> Meanwhile, in the current political climate, a substantial portion of the electorate questions that fairness and legitimacy.<sup>5</sup>

Administrative law has seen several cases in recent years focused on agency design and separation of powers principles. In particular, the Supreme Court and the D.C. Circuit have found the statutory design of a particular federal government agency or office within an agency to be constitutionally flawed on separation of powers grounds.<sup>6</sup> When a court finds a legal problem with an agency's structure or actions, the traditional remedy is to vacate the action or actions giving rise to the challenge.<sup>7</sup> With structural deficiencies in an agency's design, this traditional remedy means that none of the agency's actions are valid until Congress resolves the problem. But in these recent cases, upon finding constitutional violations, the courts' remedy *du jour* has been to take it upon themselves to tweak the details of the challenged agency's design—specifically, by severing a sentence or two from the agency's governing statute to allow particular agency officials to be removed from office by the President at will rather than only for cause.<sup>8</sup> Meanwhile, the courts left the actions of the challenged agency, and the structures and actions of identically or similarly designed agencies, largely or entirely untouched. In short, the challenging parties achieved a symbolic victory in favor of their vision of the Constitution, but otherwise not much changed.

My goal with this Essay is a modest one: to raise a few reservations regarding judicial refashioning of agency design via this severance remedy for separation of powers violations. To that end, the Essay will proceed fairly straightforwardly. I will describe three cases or sets of cases in which the Supreme Court or the D.C. Circuit has employed the severance remedy: *Free Enterprise Fund v. Public Company Accounting Oversight Board*,<sup>9</sup> a series of D.C. Circuit cases brought by the Intercollegiate Broadcasting System against the

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4 See, e.g., Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 376–78 (2006) (linking legitimacy, defined as “the belief that authorities, institutions, and social arrangements are appropriate, proper, and just,” with voluntary compliance with legal requirements).

5 See, e.g., PHILIP WALLACH, CTR. FOR EFFECTIVE PUB. MGMT. AT BROOKINGS, *THE ADMINISTRATIVE STATE'S LEGITIMACY CRISIS* (2016); Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 8–9 (2017).

6 See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016), *rev'd en banc*, 881 F.3d 75 (D.C. Cir. 2018); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332 (D.C. Cir. 2012).

7 3 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 18.1, at 1675 (5th ed. 2010) (“In most cases, successful prosecution of a review proceeding yields instead a judicial decision setting aside the agency action and remanding the proceeding for further agency action not inconsistent with the decision of the reviewing court.”).

8 See, e.g., *Intercollegiate Broad. Sys.*, 684 F.3d at 1340–41.

9 561 U.S. 477.

Copyright Royalty Board,<sup>10</sup> and *PHH Corp. v. Consumer Financial Protection Bureau*.<sup>11</sup> Then I will highlight three reservations I have about using the severance remedy in this way: (1) that the remedy may not reflect the judicial restraint that motivates it; (2) that the remedy is sufficiently weak that its repeated use will chill litigation of legitimate constitutional challenges; and (3) that the remedy makes agency officials more politically accountable when, arguably, popular understandings of separation of powers principles might counsel otherwise. To the extent these reservations are accurate, judicial use of the severance remedy to address agency design flaws may, in turn, exacerbate questions regarding the fairness and legitimacy of agency actions.

I have no grand proposals for addressing these reservations. Conceding longstanding administrative law precedents, realities of contemporary governance, and institutional constraints faced by the judiciary, I am not even prepared to say that the severance remedy is not the best alternative available in at least some agency design cases. To the extent one concludes that the severance remedy is a problem, the only true solution may be for Congress to amend existing statutes or think again before getting too creative with agency design. At a minimum, however, courts ought to at least contemplate the potential drawbacks, as well as the arguable benefits, before employing the severance remedy.

## I. THREE RECENT AGENCY DESIGN CASES

Perhaps not unlike some academic articles, judicial opinions that address agency design and separation of powers principles are often rhetorically lofty but abstract and largely detached from the details of the underlying dispute and the day-to-day reality of agency operations. To lay some groundwork for the concerns I wish to raise, the following paragraphs describe three recent cases in which the Supreme Court or D.C. Circuit has used the severance remedy to alter the design of a federal agency after concluding that the statutory scheme governing the agency violated separation of powers principles.

### A. Free Enterprise Fund v. PCAOB

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*,<sup>12</sup> the Court considered the constitutionality of the Public Company Accounting Oversight Board (PCAOB). Congress established the PCAOB as part of the

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10 *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111 (D.C. Cir. 2015); *Intercollegiate Broad. Sys.*, 684 F.3d 1332; *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 571 F.3d 69 (D.C. Cir. 2009) (per curiam).

11 839 F.3d 1. Although the three-judge panel in *PHH* applied the severance remedy, *id.* at 37–39, the en banc court's conclusion did not require it to consider the remedy. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 77 (D.C. Cir. 2018) (en banc). Nevertheless, separate dissenting opinions authored by Judges Brett Kavanaugh and Karen LeCraft Henderson debated the severance remedy.

12 561 U.S. 477.

Sarbanes-Oxley Act of 2002 (SOX).<sup>13</sup> The PCAOB's purpose is "to oversee the audit of companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports."<sup>14</sup> SOX called for the SEC to appoint the PCAOB's members, and also gave the SEC the power to remove a member of the PCAOB for cause after an evidentiary hearing.<sup>15</sup> SOX gave the PCAOB expansive rulemaking and enforcement powers, including the authority to conduct investigations and disciplinary proceedings, and to impose sanctions upon public accounting firms for violating PCAOB rules.<sup>16</sup> In short, the PCAOB makes rules governing accountants and uses agency-level adjudication to enforce those rules by imposing sanctions on accountants who violate them. SOX also gave the SEC the power to review and potentially reject the PCAOB's rules, orders, and sanctions.<sup>17</sup>

Beckstead and Watts was a small Nevada accounting firm.<sup>18</sup> In 2004 and 2005, PCAOB inspectors investigated the firm, issued a publicly available inspection report criticizing the firm's auditing practices, and initiated formal enforcement proceedings against the firm.<sup>19</sup> Beckstead and Watts filed a complaint seeking declaratory and injunctive relief and claiming that the firm's efforts to comply with PCAOB requirements had forced it to turn away most of its clients, thereby substantially reducing the firm's earnings.<sup>20</sup> Beckstead and Watts was joined in that action by the Free Enterprise Fund, a nonprofit membership organization described as "promot[ing] economic growth, lower taxes, and limited government" that "[sought] to vindicate the interests of its members . . . subject to the Board's authority and . . . injured by the [PCAOB's] regulations."<sup>21</sup> Although the complaint briefly alleged that PCAOB requirements were unreasonable for the types of companies that Beckstead and Watts audited, the complaint did not challenge any particular PCAOB rule as arbitrary and capricious.<sup>22</sup> Rather, the complaint focused exclusively on constitutional challenges to the PCAOB's statutory design.<sup>23</sup>

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13 Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered titles of the U.S. Code).

14 15 U.S.C. § 7211(a) (2012); *see also About the PCAOB*, PCAOB <https://pcaobus.org/About> (last visited Jan. 25, 2018) (documenting the same on the PCAOB's website).

15 15 U.S.C. § 7211(e)(4), (e)(6).

16 *Id.* § 7211(c).

17 *Id.* §§ 7211(c), 7217(b)–(c).

18 Complaint for Declaratory and Injunctive Relief ¶¶ 69–70, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, No. 1:06-cv-00217, 2007 WL 891675 (D.D.C. Mar. 21, 2007), *aff'd*, 537 F.3d. 667 (D.C. Cir. 2008), *aff'd in part, rev'd in part*, 561 U.S. 477 (2010).

19 *Id.* ¶¶ 74–79.

20 *Id.* ¶¶ 73, 77.

21 *Id.* ¶ 11.

22 *Id.* ¶ 73.

23 *Id.* ¶¶ 81–95.

By the time the case made it to the Supreme Court,<sup>24</sup> the issues had been honed to the following: Did SOX violate separation of powers principles by restricting the President's authority to appoint and remove PCAOB members?<sup>25</sup> Were PCAOB members principal officers (who should have been appointed by the President with advice and consent of the Senate) or inferior officers?<sup>26</sup> If the latter, were the SEC's Commissioners collectively the "head of a department" for Appointments Clause purposes?<sup>27</sup>

The Court held that the members of the PCAOB were inferior officers who could be appointed by the SEC.<sup>28</sup> All of the Justices agreed that the SEC Commissioners, acting collectively, constituted the head of a department eligible to appoint inferior officers under the Appointments Clause.<sup>29</sup> But the Justices differed in their reasoning for why the PCAOB members were inferior officers. The dissenting Justices reasoned that the SEC's supervisory authority over the PCAOB's functions alone offered sufficient basis to conclude that the members of the PCAOB were inferior officers.<sup>30</sup> But with Chief Justice John Roberts writing on behalf of the five-Justice majority, the Court conditioned its holding on the remedy it imposed: striking a sentence from SOX limiting the SEC's power to remove PCAOB members.<sup>31</sup> Without that change, the PCAOB's statutory design would have been unconstitutional.

As the Court noted, SOX severely limited the SEC's power to remove PCAOB members in three ways. First, SOX established an unusually stringent standard for removing a PCAOB member. Rather than the traditional, and somewhat mushy, statutory language listing "inefficiency, neglect of duty, or malfeasance in office" as grounds for removal,<sup>32</sup> SOX required specific

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24 *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 556 U.S. 1234 (2009) (mem.) (granting petition for writ of certiorari).

25 *Petition for a Writ of Certiorari i*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (No. 08-861) (articulating questions presented).

26 *Id.*

27 *Id.*

28 *Free Enter. Fund*, 561 U.S. at 510.

29 *Id.* at 512–13.

30 *Id.* at 529–30 (Breyer, J., dissenting).

31 *Id.* at 495–98 (majority opinion).

32 *See, e.g.*, 5 U.S.C. § 1202(d) (2012) (limiting removal of Merit Systems Protection Board members to such circumstances); 5 U.S.C. § 7104(b) (2012) (same for Federal Labor Relations Authority members); 12 U.S.C. § 5491(c)(3) (2012) (same for CFPB Director); 29 U.S.C. § 661(b) (2012) (same for Occupational Safety and Health Review Commission members); 31 U.S.C. § 751(d) (2012) (same for General Accounting Office Personnel Appeals Board members); 42 U.S.C. § 5841(e) (2012) (same for Nuclear Regulatory Commission members); 46 U.S.C. § 301(b)(5) (2012) (same for Federal Maritime Commissioners); 49 U.S.C. § 1111(c) (2012) (same for National Transportation Safety Board members); *see also Free Enter. Fund*, 561 U.S. at 487 (noting that the parties to the case agreed that SEC Commissioners could only be removed by the President pursuant to that standard); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 622 (1935) (addressing the constitutionality of such language in connection with the removal of members of the Federal Trade Commission).

findings that the member “willfully violated” SOX, PCAOB rules, or the securities laws; “willfully abused” his authority; or “failed to enforce compliance” with SOX, PCAOB rules, or professional standards “without reasonable justification or excuse.”<sup>33</sup> Even then, SOX only authorized removal “as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of” the statute or securities laws.<sup>34</sup> Second, SOX required the SEC to conduct a formal, on-the-record hearing in making such findings.<sup>35</sup> Third, by requiring a formal SEC order for removal, SOX subjected any such decision to judicial review.<sup>36</sup> Each of these three features distinguished the removal provision in SOX from those the Court had previously upheld.<sup>37</sup> In considering the SOX removal provision, the Court suggested that each of those three unusual features raised serious constitutional concerns.<sup>38</sup>

Ultimately, however, the Court predicated its assessment that PCAOB was unconstitutionally designed on the fact that, not only did SOX limit the SEC’s power to remove PCAOB members, but the President’s authority to remove SEC Commissioners was also subject to a for-cause limitation—albeit the more traditional and less restrictive presidential finding of “inefficiency, neglect of duty, or malfeasance in office.”<sup>39</sup> According to the Court, such “dual for-cause limitations on the removal of [PCAOB] members contravene the Constitution’s separation of powers” by interfering with the President’s ability to take care that the laws be faithfully executed.<sup>40</sup> “[I]f allowed to stand, this dispersion of responsibility could be multiplied” by adding more and more layers of insulation between the President and his subordinates.<sup>41</sup>

Having found the PCAOB’s statutory design to be unconstitutional, however, the Court declined to impose the standard administrative law remedy of invalidating the PCAOB’s actions against Beckstead and Watts.<sup>42</sup> Instead, although SOX lacks a severability clause, the Court held that the unconstitutional limits on the President’s removal power could be severed from the rest of the statute and, accordingly, struck the offending sentence.<sup>43</sup> Thus, after

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33 15 U.S.C. § 7217(d)(3) (2012).

34 *Id.*

35 *Id.* § 7211(e)(6).

36 See *Free Enter. Fund*, 561 U.S. at 486 (citing provisions of the Administrative Procedure Act and Securities Exchange Act in support of this premise).

37 *Id.* at 502–03.

38 *Id.*

39 *Id.* at 487 (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 620 (1935)) (internal quotation marks omitted). As Justice Breyer’s dissenting opinion observed, however, the Securities Exchange Act, which established the SEC, does not contain a provision limiting the President’s ability to remove SEC Commissioners. *Id.* at 546 (Breyer, J., dissenting).

40 *Id.* at 492 (majority opinion).

41 *Id.* at 497.

42 See 3 PIERCE, *supra* note 7, § 18.1 (recognizing invalidation as the standard remedy).

43 *Free Enter. Fund*, 561 U.S. at 508 (“[W]e agree with the Government that the unconstitutional tenure provisions are severable from the remainder of the statute.”).

the Court's decision, the SEC continues to appoint PCAOB members, but those members are subject to potential at-will removal by the SEC.<sup>44</sup> Hence, the PCAOB members are now inferior officers.

Justice Breyer wrote the dissenting opinion for four Justices. He disagreed that adding a second layer of insulation from potential removal would interfere with the President's ability to execute the laws.<sup>45</sup> Rather, he defended that extra degree of removal protection as justified both by the need to ensure that PCAOB adjudications are undertaken free of political influence and the need to ensure that the PCAOB will make decisions based on its expertise rather than on political considerations.<sup>46</sup> Regardless, Justice Breyer devoted a large part of his dissent and two lengthy appendices to documenting the several dozen agencies and hundreds of agency officials across the federal government with similar dual for-cause removal arrangements.<sup>47</sup> As Justice Breyer observed, the *Free Enterprise Fund* decision raises significant questions regarding the constitutionality of the actions of all of those agencies and officials.

Meanwhile, with the Court's adjustment to the PCAOB's statutory design, the agency continued to function just as it did before the *Free Enterprise Fund* litigation commenced. The PCAOB's proceedings against Beckstead and Watts continued for eight more months, when the parties settled the matter with the PCAOB withdrawing its formal inspection report and closing its investigation of the firm, but reserving the authority to pursue future investigations of the firm's "past or future conduct."<sup>48</sup>

### B. *The Saga of the Copyright Royalty Board*

In 2004, the Copyright Royalty and Distribution Reform Act replaced a system of Copyright Arbitration Royalty Panels that relied on professional arbitrators with a new agency, the Copyright Royalty Board (CRB), that utilized full-time personnel to determine "reasonable terms and rates of royalty

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44 *Id.* at 509 ("Concluding that the removal restrictions are invalid leaves the Board removable by the Commission at will, and leaves the President separated from Board members by only a single level of good-cause tenure."); see also Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. (forthcoming 2018) (noting that the statute has not actually changed but rather must be read in conjunction with the *Free Enterprise Fund* decision).

45 *Free Enter. Fund*, 561 U.S. at 533 (Breyer, J., dissenting) (noting that removal insulation creates decisional independence by freeing the decisionmaker from fear of summary removal and promotes public confidence in decisionmakers).

46 *Id.* at 522.

47 *Id.* at 540–45, 549–85.

48 Michael Cohn, *Beckstead and Watts Settles Inspection Case with PCAOB*, ACCT. TODAY (Feb. 23, 2011), <https://www.accountingtoday.com/news/beckstead-and-watts-settles-inspection-case-with-pcaob>; see also Joint Status Report, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, No. 1:06-cv-00217, 2007 WL 891675 (D.D.C. Mar. 21, 2007), *aff'd in part, rev'd in part*, 537 F.3d 667 (D.C. Cir. 2008), *aff'd in part, rev'd in part*, 561 U.S. 477 (2010); Judgment, *Free Enter. Fund*, 2007 WL 891675.



payments” for various copyrighted works.<sup>49</sup> Whereas the Copyright Office had appointed the arbitration panels, the new legislation provided for the Librarian of Congress to appoint three Copyright Royalty Judges (CRJs), who sit collectively as the CRB, with one of the three designated as “Chief.”<sup>50</sup> The same legislation authorized the Librarian of Congress to suspend a CRJ for violating standards of conduct or for “misconduct, neglect of duty, or any disqualifying physical or mental disability” and, after a hearing, to remove a CRJ for the same reasons.<sup>51</sup> Ratemaking is rulemaking under the Administrative Procedure Act,<sup>52</sup> and the CRB uses formal rulemaking procedures in making its determinations.<sup>53</sup> Nevertheless, formal rulemaking is very trial-like, with discovery, oral testimony, and cross-examination of witnesses.<sup>54</sup> Correspondingly, the D.C. Circuit has described the CRB’s decisionmaking process as “adversarial.”<sup>55</sup> Hence, perhaps, the reason for labeling the CRB’s three members as “judges.”

Intercollegiate Broadcasting System (“Intercollegiate”) is a nonprofit membership organization established in 1940 to serve high school and college radio, television, and now webcasting stations.<sup>56</sup> Unhappy with terms and rates established for webcasters by the CRB, Intercollegiate sought judicial review on behalf of its members in what ultimately became three separate trips to the D.C. Circuit.

Intercollegiate initially challenged several aspects of the CRB’s webcasting determination as arbitrary and capricious, and the D.C. Circuit upheld parts of the CRB’s determination and rejected and remanded others for reconsideration.<sup>57</sup> In a supplemental brief filed long after its initial appeal, Intercollegiate argued also that the appointment of the CRJs by the Librarian of Congress violated the Appointments Clause.<sup>58</sup> Despite allowing the filing and ordering supplemental briefs in response, in its decision now known as *Intercollegiate I*, the D.C. Circuit declined to resolve such an “important ques-

49 Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, pmlb., § 3(a), 118 Stat. 2341, 2341 (noting the purpose of the legislation).

50 *Id.* § 3(a), 118 Stat. 2341–45 (adopting 17 U.S.C. § 801 (2012)).

51 *Id.* § 3(a), 118 Stat. 2348 (adopting 17 U.S.C. § 802(h), (i)).

52 5 U.S.C. § 551(4)–(5) (2012) (defining “rule” and “rule making” to include “prescribing the future of rates”).

53 See Andrew D. Stephenson, Note, *Webcaster II: A Case Study of Business to Business Rate Setting by Formal Rulemaking*, 7 HASTINGS BUS. L.J. 393, 405 (2011) (characterizing the procedures utilized by the CRB as formal rulemaking under the Administrative Procedure Act).

54 5 U.S.C. §§ 556–557 (providing formal rulemaking procedures); see also JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 50 (5th ed. 2012) (describing formal rulemaking).

55 *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 571 F.3d 69, 73–74 (D.C. Cir. 2009) (per curiam) (describing CRB proceedings).

56 See *About IBS—Intercollegiate Broadcasting System, Inc.*, IBS, <http://www.collegebroadcasters.us/content/about/index.html> (last visited Apr. 4, 2018).

57 *Intercollegiate Broad. Sys.*, 571 F.3d at 74.

58 Final Supplemental Brief for Appellant at 3, *Intercollegiate Broad. Sys.*, 571 F.3d 69 (Nos. 07-1123, 07-1168, 07-1172, 07-1174, 07-1177, 07-1178).

tion of far-reaching significance’ on the basis of hasty, inadequate, and untimely briefing.”<sup>59</sup>

The Appointments Clause issue returned to the D.C. Circuit a few years later in *Intercollegiate II*.<sup>60</sup> This time, the government conceded that the CRJs were officers of the United States, and the court agreed, recognizing that the CRJs “exercise significant authority”<sup>61</sup> by determining rates through application of an open-ended standard that accords them “vast discretion.”<sup>62</sup> The court also concluded that the CRJs were principal officers rather than inferior officers because they could only be removed by the Librarian of Congress for cause.<sup>63</sup> Because principal officers can only be appointed by the President, while the CRJs were appointed by the Librarian, the court’s conclusion produced a holding that the Act was unconstitutional.<sup>64</sup>

Following the Supreme Court’s lead from *Free Enterprise Fund*, however, the *Intercollegiate II* court remedied the constitutional flaw by invalidating and severing the statutory for-cause limitation on the Librarian’s power to remove CRJs.<sup>65</sup> With that provision deleted, the court said that the CRJs would be inferior officers.<sup>66</sup> The court also determined that the Librarian of Congress is the head of a department for Appointments Clause purposes.<sup>67</sup> Accordingly, by removing the statutory removal restriction, the court made the statute constitutional. And, having “fixed” the CRB’s statutory design, the court remanded the CRB’s webcasting determination for reconsideration.<sup>68</sup>

The three CRJs reconsidering the webcasting determination were different from those who had issued the webcasting determination originally, although the turnover appears unrelated to the case.<sup>69</sup> The new CRB

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59 See *Intercollegiate Broad. Sys.*, 571 F.3d at 76 (brackets omitted) (quoting Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983)).

60 *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332 (D.C. Cir. 2012).

61 *Id.* at 1337, 1339; see also *Buckley v. Valeo*, 424 U.S. 1, 125–26 (1976) (per curiam) (adopting as the standard for distinguishing officers from nonofficers whether the individual in question “exercis[es] significant authority”).

62 *Intercollegiate Broad. Sys.*, 684 F.3d at 1339–40.

63 See *id.* at 1340.

64 See *id.*

65 See *id.* at 1340–41.

66 See *id.* at 1341.

67 See *id.*

68 See *id.* at 1342.

69 See *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 114 (D.C. Cir. 2015) (observing that the Librarian of Congress appointed a new CRB after *Intercollegiate II*). The timing of the turnover appears more coincidental than inspired by the court. The original three CRJs were James Sledge, Stanley Wisniewski, and William Roberts. See Press Release, Library of Cong., Librarian of Congress James H. Billington Appoints Three Copyright Royalty Judges (Jan. 11, 2006), <https://www.loc.gov/item/prn-06-010/billington-appoints-three-copyright-royalty-judges/2006-01-11/>. Suzanne Barnett was appointed to succeed James Sledge in April 2012, while *Intercollegiate II* was pending, after Sledge completed a statutory six-year term. See Press Release, Library of Cong., Librarian of Congress Names New Chief Copyright Royalty Judge (Apr. 13, 2012), <https://www.loc.gov/>

declined to allow the submission of new evidence or conduct additional hearings, however, and instead limited itself to reviewing de novo the written record supporting the old CRB's action.<sup>70</sup> Based on its review of that existing record, the new CRB adopted the same terms and rates as the old CRB.<sup>71</sup>

In *Intercollegiate III*, Intercollegiate again challenged the CRB's webcasting determination, this time claiming that, because the new CRB merely reviewed their predecessors' written record rather than pursuing new proceedings, its determination was "tainted" by and merely "enshrine[d] the constitutional violations that [*Intercollegiate II*] sought to cure."<sup>72</sup> The D.C. Circuit rejected that claim, concluding that the new CRB could rely on the record developed by the old CRB and upholding the new CRB's action.<sup>73</sup>

In short, the resolution of the CRB's saga was a little different from that of the PCAOB. A new CRB with three new CRJs reconsidered the determination that inspired Intercollegiate's challenge, whereas the PCAOB remained practically unchanged as it continued its engagement with Beckstead and Watts. On the other hand, Intercollegiate ended up with the same dissatisfactory webcasting terms and rates after *Intercollegiate III* as prompted its suit in *Intercollegiate II*, whereas Beckstead and Watts were able, in the end, to settle with the PCAOB. Presumably, the difference in outcomes is attributable at least partly to the fact that the CRB's determination was broadly applicable across webcasters, whereas the PCAOB's actions against Beckstead and Watts involved an individual enforcement action.

### C. PHH Corp. v. CFPB

In *PHH Corp. v. Consumer Financial Protection Bureau*,<sup>74</sup> the D.C. Circuit addressed the constitutionality of the Consumer Financial Protection Bureau (CFPB). In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") established the CFPB for the purposes of "regu-

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item/prn-12-081/librarian-names-new-chief-copyright-royalty-judge/2012-04-13/. Stanley Wisniewski retired in August 2012, shortly after *Intercollegiate II* was decided, and was replaced in an interim capacity by Richard Strasser. See Press Release, Library of Cong., Librarian of Congress Names Interim Copyright Royalty Judge (Sept. 17, 2012), <https://www.loc.gov/item/prn-12-176/interim-copyright-royalty-judge/2012-09-17/>. James Roberts resigned several months later, and the Librarian of Congress appointed David Strickler and Jesse Feder to replace Wisniewski and Roberts, respectively, in May 2013. See David Oxenford, *Changes at the Copyright Royalty Board—Two New Judges Make for an All-New Board for the Upcoming Internet Radio Royalty Rate Setting Proceeding*, BROADCAST L. BLOG (May 9, 2013), <https://www.broadcastlawblog.com/2013/05/articles/changes-at-the-copyright-royalty-board-two-new-judges-make-for-an-all-new-board-for-the-upcoming-internet-radio-royalty-rate-setting-proceeding/>.

<sup>70</sup> See *Intercollegiate Broad. Sys.*, 796 F.3d at 116–17.

<sup>71</sup> See *id.* at 117.

<sup>72</sup> *Id.* (quoting Final Brief of Petitioner at 15, *Intercollegiate Broad. Sys.*, 796 F.3d 111 (No. 14-1068)).

<sup>73</sup> See *id.* at 126–27.

<sup>74</sup> 839 F.3d 1 (D.C. Cir. 2016), *rev'd en banc*, 881 F.3d 75 (D.C. Cir. 2018).

lat[ing] the offering and provision of consumer financial products or services under the Federal consumer financial laws”<sup>75</sup> and “ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.”<sup>76</sup> To facilitate these goals, the legislation gave the CFPB extensive rulemaking<sup>77</sup> and enforcement powers,<sup>78</sup> including the authority to issue cease-and-desist orders after formal adjudicatory hearing procedures.<sup>79</sup>

The design of the CFPB was an issue of some congressional debate and compromise, as some members of Congress wanted to insulate the CFPB from political influence, while others desired more political oversight and control of the agency.<sup>80</sup> Dodd-Frank called for the head of the CFPB to be a single Director who would be appointed by the President, with the advice and consent of the Senate, to serve for a five-year term and who could only be removed by the President for cause.<sup>81</sup> To give the CFPB even more independence from political influence, the legislation made the CFPB an independent agency and placed it within the Federal Reserve System, thereby insulating it from the congressional appropriations process and permitting it to avoid congressional as well as presidential oversight.<sup>82</sup>

PHH Corp. is a large multinational corporation in the financial services industry.<sup>83</sup> The PHH case arose after an administrative law judge working for the CFPB concluded that certain business transactions involving two PHH subsidiaries—a mortgage lender and a mortgage reinsurance provider—violated the Real Estate Settlement Procedures Act (RESPA).<sup>84</sup> The administrative law judge recommended both injunctions and disgorgement of roughly \$6 million in reinsurance premiums.<sup>85</sup> The CFPB’s Director upheld the administrative law judge’s decision that PHH violated RESPA but adopted a slightly different reading of relevant statutory language to raise the ordered

75 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011(a), 124 Stat. 1376, 1964 (2010).

76 *Id.* § 1021(a), 124 Stat. at 1979–80.

77 *See id.* § 1022, 124 Stat. at 1980–85.

78 *See id.* §§ 1051–1058, 124 Stat. at 2018–35.

79 *See id.* § 1053, 124 Stat. at 2025–28.

80 *See* Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 339–40 (2013) (describing the congressional debate).

81 *See* § 1011(b)(1)–(2), (c)(3), 124 Stat. at 1964.

82 *Id.* § 1011(a), 124 Stat. at 1964; *see also* Levitin, *supra* note 80, at 339–40 (describing the CFPB’s structure).

83 *See* Opening Brief for Petitioners at 10, *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016) (No. 15-1177); *PHH Corp. by the Numbers*, BALTIMORE SUN (Aug. 27, 1991), [http://articles.baltimoresun.com/1991-08-27/business/1991239026\\_1-phh-corp-kunisch-real-estate](http://articles.baltimoresun.com/1991-08-27/business/1991239026_1-phh-corp-kunisch-real-estate).

84 *See* Opening Brief for Petitioners, *supra* note 83, at 10–14.

85 *Id.* at 14.

disgorgement to \$109 million.<sup>86</sup> PHH challenged the order on various grounds, including the constitutionality of the CFPB's design.<sup>87</sup>

A divided D.C. Circuit panel declared the CFPB's structure as an independent agency headed by a single Director to be unconstitutional as a violation of separation of powers principles.<sup>88</sup> Writing at great length for the court, Judge Brett Kavanaugh contended that independent agencies in general raise constitutional concerns because they are "unchecked" by presidential oversight.<sup>89</sup> To compensate for this shortcoming and to protect individual liberty, he said, independent agencies traditionally are headed by multimember commissions to diffuse agency power across several commissioners and foster collaborative decisionmaking.<sup>90</sup> Pointing to a long line of Supreme Court precedents including *Free Enterprise Fund*,<sup>91</sup> Judge Kavanaugh argued that historical practice is an important guide to applying separation of powers principles.<sup>92</sup> By deviating from the traditional multimember structure, he said, the CFPB's single-director model is unconstitutional.<sup>93</sup>

Again citing *Free Enterprise Fund* as well as the D.C. Circuit's *Intercollegiate IP*<sup>94</sup> decision, the court remedied the constitutional difficulty by striking the for-cause limitation on the President's ability to remove the CFPB Director from office.<sup>95</sup> "The President of the United States now has the power to supervise and direct the Director of the CFPB, and may remove the Director at will at any time."<sup>96</sup>

The D.C. Circuit granted en banc review in *PHH* and, ultimately, declared the CFPB's single-director design to be constitutional.<sup>97</sup> Thus, the for-cause limitation on the President's ability to remove the CFPB's Director from office has been restored. In light of the en banc court's holding,

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86 *Id.* at 15–16.

87 *PHH*, 839 F.3d at 7.

88 *Id.* at 36. Judge A. Raymond Randolph joined Judge Kavanaugh's opinion for the court but wrote a separate concurring opinion to express the view that the ALJ whose decision the CFPB Director confirmed in finding that PHH violated RESPA was improperly appointed under the Constitution's Appointments Clause. *Id.* at 55 (Randolph, J., concurring). Judge Karen LeCraft Henderson concurred in part and dissented in part, agreeing with Judge Kavanaugh's opinion rejecting the CFPB's interpretation of RESPA on statutory grounds, but contending that the court's resolution of the statutory question made consideration of the constitutional issue unnecessary. *Id.* at 56 (Henderson, J., concurring in part and dissenting in part).

89 *See id.* at 8 (majority opinion).

90 *Id.*

91 *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *see also supra* Section I.A (describing this case).

92 *PHH*, 839 F.3d at 21–24.

93 *Id.* at 36.

94 *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332 (D.C. Cir. 2012); *see also supra* Section I.B (describing this case).

95 *PHH*, 839 F.3d at 39.

96 *Id.*

97 *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 77 (D.C. Cir. 2018) (en banc).

neither the majority opinion nor most of the separate concurring and dissenting opinions filed in the case discussed the severance remedy.<sup>98</sup> Writing in dissent, based on reasoning similar to that of his prior opinion for the panel, Judge Kavanaugh continued to maintain that the CFPB's single-director model is unconstitutional and that severing the statutory language limiting the President's removal power constitutes the appropriate remedy.

Judge Karen LeCraft Henderson dissented separately, offering her own analysis of why the CFPB's design violates Article II of the Constitution, but disagreeing with Judge Kavanaugh principally with respect to his proposed remedy.<sup>99</sup> Eliminating the removal restriction would make the CFPB "responsive to the President" and would upset Congress's intended balance between the legislative and executive branches.<sup>100</sup> Labeling the CFPB's independence as its "*sine qua non*,"<sup>101</sup> she said, "Congress would not have created" the agency with a structure and powers as Judge Kavanaugh's limited remedy would leave in place.<sup>102</sup> Although Dodd-Frank includes a severability clause, such a provision "is [not] a license to cut out the 'heart' of a statute."<sup>103</sup> Other structural adjustments that would solve the perceived constitutional difficulty while preserving the Agency's independence require adding as well as subtracting statutory text, and such rewrites are beyond the powers of the judiciary.<sup>104</sup> Accordingly, Judge Henderson would "invalidate" the CFPB "top to bottom" and strike all of the statutory provisions creating the CFPB and establishing its powers.<sup>105</sup>

## II. THREE RESERVATIONS

With each of the above-described cases, a court (or, in the *PHH* case, Judges Kavanaugh and Randolph) found the agency design in question

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98 Collectively, the en banc court filed seven separate opinions running approximately 250 pages. The majority opinion, authored by Judge Cornelia Pillard, represented six of the ten participating judges. Judge David Tatel filed a concurring opinion joined by Judges Patricia Millett and Pillard stating that they would have resolved the statutory interpretation question in the CFPB's favor as well. *Id.* at 111 (Tatel, J., concurring). Judge Robert Wilkins filed a concurring opinion, joined by Judge Judith Rogers, offering additional grounds in support of the majority's holding. *Id.* at 113–14 (Wilkins, J., concurring). Judge Thomas Griffith concurred in the judgment only based on his own interpretation of the statutory removal restriction. *Id.* at 124 (Griffith, J., concurring in the judgment). Judges Karen LeCraft Henderson, Brett Kavanaugh, and A. Raymond Randolph each filed a separate dissenting opinion, although Judge Randolph also joined Judge Kavanaugh's dissent. *Id.* at 137 (Henderson, J., dissenting); *id.* at 164 (Kavanaugh, J., dissenting); *id.* at 200 (Randolph, J., dissenting). Of all of those opinions, only those authored by Judges Henderson and Kavanaugh discussed the severance remedy.

99 *See id.* at 139 (Henderson, J., dissenting).

100 *Id.* at 162–63.

101 *Id.* at 161–62 (quoting amici defending the CFPB).

102 *Id.* at 139, 163.

103 *Id.* at 163 (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 691 (1987)).

104 *See id.*

105 *Id.* at 164.

unconstitutional and resolved the constitutional defect by severing just a small amount of statutory language to adjust the agency's structure to satisfy separation of powers principles. At first blush, the severance remedy has much to recommend it. In each of these cases, the constitutional infirmities were resolved with the least amount of day-to-day disruption possible. In practical terms, the agencies continued to function much as they had. For those who value judicial restraint, the severance remedy might seem ideal—resolving constitutional problems while minimizing judicial intrusion into the legislative and regulatory spheres. For those who may care less about judicial restraint but support the agencies and their functions, the severance remedy probably seems a godsend.

Of course, the regulated parties who raised the challenges in the first place may feel a little less satisfied. In both *Free Enterprise Fund* and the CRB litigation, the challenging parties won, but the agency actions that prompted them to bring those cases at the outset remained unchanged by the supposedly favorable court decision. The enforcement proceedings that prompted *Free Enterprise Fund* continued for several months after the Supreme Court declared the PCAOB's design unconstitutional, ending only when the parties agreed to a settlement.<sup>106</sup> The webcasting terms and rates at the heart of the CRB litigation did not change at all.<sup>107</sup> In *PHH*, the court (both panel and en banc) declared that the CFPB's interpretation of the statute was flawed,<sup>108</sup> so the challenging parties had the satisfaction of overturning the agency action at issue. But with Judge Kavanaugh's application of the severance remedy, the CFPB would have continued to function much as if the case had never happened, notwithstanding the finding that the agency's design was unconstitutional.

Beyond the potential disappointment of the challenging parties themselves, upon further consideration, the severance remedy raises concerns. These concerns may or may not be sufficient to outweigh the benefits of the severance remedy, and the balance of concerns versus benefits may differ from case to case. Nevertheless, before the courts wholeheartedly embrace the severance remedy as a solution to agency design problems, they may wish to at least reflect a little more carefully upon the potential implications.

#### A. *Judicial Restraint, or Perhaps Not?*

Judicial restraint clearly motivates the courts' use of the severance remedy to resolve unconstitutional agency design issues. Chief Justice John Roberts, writing for the Supreme Court in *Free Enterprise Fund*, nodded in that direction. In explaining why severing the removal restriction language from SOX was the appropriate remedy in that case, Roberts described the petition-

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106 See *supra* note 48 and accompanying text.

107 See *supra* notes 69–74 and accompanying text.

108 *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 9–10 (D.C. Cir. 2016); see also *PHH*, 881 F.3d at 83 (en banc) (reinstating the panel's rejection of the CFPB's interpretation of RESPA).

ers' proposed remedy of invalidating all of the PCAOB's actions as "broad."<sup>109</sup> By comparison, he said that, "[g]enerally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.'"<sup>110</sup> Judge Brett Kavanaugh echoed the same point in *PHH*.<sup>111</sup>

Yet Chief Justice Roberts's justification for why the Court's chosen remedy was the most limited was brief. Drawing from various Court precedents discussing severability, Chief Justice Roberts defended severing the SOX's removal restriction on two grounds. First, he offered that the rest of the statute would remain "fully operative as a law" and was "not 'incapable of functioning independently'" if the Court struck the removal restriction.<sup>112</sup> Second, although SOX lacked a severability clause, Chief Justice Roberts construed that silence as congressional acquiescence, saying that "nothing in the statute's text or historical context makes it 'evident' that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will."<sup>113</sup> He then rejected other possible modifications to the statute, such as altering the PCAOB's statutory responsibilities "so that its members would no longer be 'Officers of the United States'" or "restrict[ing] the [PCAOB's] enforcement powers," as "far more extensive than" the chosen remedy of severing the removal restriction.<sup>114</sup>

Subsequently writing for the D.C. Circuit in *Intercollegiate II*, Judge Stephen Williams merely cited *Free Enterprise Fund* and offered that severing the removal restriction for CRJs would fix the constitutional difficulty in that case.<sup>115</sup> By comparison, Judge Kavanaugh in *PHH* offered a more extensive justification for why severing the removal restriction for the CFPB's Director is a more restrained remedy than preventing the CFPB from continuing to operate.<sup>116</sup>

Judge Kavanaugh drew from *Free Enterprise Fund* a two-part test of whether "(i) Congress would have preferred the law with the offending provision severed over no law at all; and (ii) the law with the offending provision severed would remain 'fully operative as a law.'"<sup>117</sup> Regarding the first of these two elements, Judge Kavanaugh suggested looking for a severability

109 *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010).

110 *Id.* (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328–29 (2006)).

111 *See PHH*, 839 F.3d at 37.

112 *Free Enter. Fund*, 561 U.S. at 509 (first quoting *New York v. United States*, 505 U.S. 144, 186 (1992); then quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987)).

113 *Id.*

114 *Id.* at 509–10.

115 *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1340–41 (D.C. Cir. 2012).

116 *See PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 199 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting); *PHH*, 839 F.3d at 8–9.

117 *PHH*, 839 F.3d at 37 (quoting *Free Enter. Fund*, 561 U.S. at 509).



clause.<sup>118</sup> The Dodd-Frank Act contained one: “‘If any provision’ of the Act ‘is held to be unconstitutional, the remainder of’ the Act ‘shall not be affected thereby.’”<sup>119</sup> Moving on to the second element, Judge Kavanaugh said that striking the for-cause removal restriction would allow both Dodd-Frank and the CFPB to continue functioning.<sup>120</sup> Echoing Chief Justice Roberts in *Free Enterprise Fund*, Judge Kavanaugh suggested that other court-imposed statutory rewrites such as “restructuring the CFPB as a multi-member independent agency” would go too far, requiring the court to step “far beyond [its] judicial capacity.”<sup>121</sup>

Legal scholars have questioned, however, whether the severance remedy is really as restrained as it might seem. David Gans has suggested that the severance remedy lacks meaningful constraints and gives courts too much power to rewrite statutes, thereby cutting off dialogue between courts and legislatures and giving legislatures an incentive to disregard possible constitutional constraints when drafting legislation.<sup>122</sup> John Harrison has argued that the comparatively limited impact of the severance remedy may embolden courts to address issues they might otherwise (and more properly) avoid.<sup>123</sup> Harrison is particularly critical of lower court applications of the remedy, as with the D.C. Circuit in *Intercollegiate Broadcasting II* and *PHH*, suggesting that severance of statutory text is more appropriately reserved for the Supreme Court.<sup>124</sup>

Even if one accepts the severance remedy as a reasonable alternative for some types of constitutional violations, however, one can still question whether responding to separation of powers violations by severing a statutory removal restriction to alter an agency’s structure is restrained. The reasoning on this issue in *Free Enterprise Fund* but also in *PHH* is at best incompletely articulated, if not outright shallow. Both *Free Enterprise Fund* and *PHH* seem to gauge the extent of the reviewing court’s restraint or violence to the statute by reference to the number of words or provisions in the statute affected. Changing more words would intrude more on the legislature’s prerogative, so changing fewer words must be more restrained. Chief Justice Roberts is almost explicit in this regard, rejecting the alternative of “blue-pencil[ing] a sufficient number of the Board’s responsibilities” as exercising too much “editorial freedom” more appropriately left to Congress without further

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118 *Id.*

119 *Id.* at 38 (quoting 12 U.S.C. § 5302 (2012)).

120 *See id.*

121 *Id.* at 38–39 (emphasis omitted).

122 *See* David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 663–87 (2008) (raising objections to severance as a remedy).

123 *See* John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 GEO. WASH. L. REV. 56, 70–80 (2014) (making this argument specifically with respect to *Free Enterprise Fund* as well as *NFIB v. Sebelius*, 567 U.S. 519 (2012)).

124 *Id.* at 97–100 (raising this criticism particularly with respect to *Intercollegiate Broadcasting II*).

explanation.<sup>125</sup> Judge Kavanaugh was undoubtedly correct that *adding* words to “create a variety of new offices, designate one of the offices as Chair, and specify various administrative details” to restructure the CFPB as a multimember independent agency would be relatively unrestrained.<sup>126</sup> But he did not directly address the alternative of striking *more* language but less than the whole of Dodd-Frank—as, for example, “striking down at least those statutory provisions creating the CFPB and defining the CFPB’s duties and authorities,” which he suggested earlier in his analysis might be a possibility.<sup>127</sup>

Perhaps instead of focusing merely on the number of words severed, however, Chief Justice Roberts and Judge Kavanaugh were taking the position that judicial restraint required leaving in place a functioning agency to administer the statutes at issue. Indeed, both Chief Justice Roberts in *Free Enterprise Fund* and Judge Kavanaugh in *PHH* seem of the view that the purposes of Congress with SOX and Dodd-Frank can be served only by preserving ongoing agency operations as well as the statutes’ substantive legal requirements. At that point, however, their analysis in these opinions conflates the continued operation of the agency tasked with implementing and enforcing a statute with the operation of the statute itself.

Certainly, declaring an administering agency’s structure to be unconstitutional and the agency’s actions to be inoperative will stop the issuance of regulations elaborating a statute’s terms and the actual enforcement of a statute’s requirements for some period of time while Congress works to fix the agency’s structure. But temporarily delaying regulation drafting and active enforcement is not synonymous with invalidating a statute altogether. Even an outright declaration that the government will not pursue enforcement against private parties for their failure to follow statutory commands does not nullify the statute’s legal force. The very reason why applying the severance remedy to restructure an agency does not stop the rest of the statute from functioning—one of the criteria evaluated in both *Free Enterprise Fund* and *PHH*—is that statutory prohibitions and requirements with respect to private party behavior do not depend upon the existence of an enforcing agency to function as law. Or are we now so cynical that we think private parties will only obey the law if the stick of government enforcement hovers in the background?

Moreover, temporarily halting the functions of an agency does not necessarily eliminate that enforcement stick. Some statutes may contain limitations periods precluding enforcement actions after too much time has passed. But so long as a statute’s prohibitions and requirements remain in place, and so long as Congress moves expeditiously to resolve the constitutional difficulty, the now-constitutional successor agency should be able to pursue subsequent enforcement actions against private parties for behavior

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125 *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509–10 (2010).

126 *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 200 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).

127 *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 37 (D.C. Cir. 2016).

during the interim. Judge Kavanaugh in *PHH* seemed at least somewhat aware of the distinction between agency operations and a statute's legal force when he suggested that "the CFPB's operation as an executive agency will not in any way prevent the overall Dodd-Frank Act from remaining operative as a law."<sup>128</sup> But he ignored that an inoperative CFPB similarly would not stop the Dodd-Frank Act from operating as law.

Meanwhile, Chief Justice Roberts and Judge Kavanaugh ignored altogether the severance remedy's disruption of the legislative compromises that often go into crafting an agency's design in the first place. In all three of the examples discussed in this Essay, Congress actively deliberated how best to design the agencies it was creating. Agency design was thoroughly considered and deliberately chosen to accomplish legislative goals. And in all three instances, creating the agency in question was not merely incidental to, but rather a significant part of, the legislation establishing it.

Creating an agency to oversee the accounting industry was a key component of SOX.<sup>129</sup> In fashioning the PCAOB for this purpose, Congress considered establishing the PCAOB as independent from the SEC as well as the executive branch, but ultimately opted to subordinate the PCAOB to the SEC's supervision and control.<sup>130</sup> SOX enjoyed bipartisan support, though only after extensive discussion and debate over the PCAOB's design.<sup>131</sup>

Replacing Copyright Arbitration Royalty Panels with the CRB was Congress's principal goal with the Copyright Royalty and Distribution Reform Act of 2004.<sup>132</sup> Legislative discussion about the CRB's design does not seem to have been especially contentious. Congress shifted appointment responsibility from the Copyright Office to the Librarian of Congress expressly to satisfy constitutional requirements.<sup>133</sup> But concerned about losing the Copyright Office's expertise, Congress also required the Librarian to consult with that office in making CRB appointments.<sup>134</sup>

Congress initially contemplated making the CFPB a multimember independent agency before settling on the single-director model rejected by the

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128 *Id.* at 38.

129 HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, *SARBANES-OXLEY ACT IN PERSPECTIVE* §§ 1:8–10 (2016).

130 See Richard H. Pildes, *Putting Power Back into Separation of Powers Analysis: Why the SEC-PCAOB Structure Is Constitutional*, 62 VAND. L. REV. EN BANC 85, 93–94 (2009); Warren Richey, *Can Congress Create Agencies Insulated from White House Control?*, CHRISTIAN SCI. MONITOR (Dec. 5, 2009), <https://www.csmonitor.com/USA/Politics/2009/1205/can-congress-create-agencies-insulated-from-white-house-control>.

131 See Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975, 996–1006 (2005) (documenting the legislative process leading to the PCAOB's creation, including various design alternatives proposed and the final House and Senate vote margins).

132 Pub. L. No. 108-419, pmb., 118 Stat. 2341, 2341.

133 See H.R. Rep. No. 108-408, at 22 (2004).

134 See *id.*

D.C. Circuit three-judge panel.<sup>135</sup> Congress additionally discussed at length insulating the CFPB from political influence by exempting it from the congressional appropriations process.<sup>136</sup> As ably documented in Judge Henderson's *PHH* dissent, the CFPB's structure and Dodd-Frank as a whole were both hotly debated and enormously controversial.<sup>137</sup> Dodd-Frank passed Congress on a largely party-line vote.<sup>138</sup>

In short, to varying degrees, the design of all of these agencies was both at the heart of the legislation creating them and determined through legislative debate and compromise. It is nearly impossible for the courts to know which adjustments and compromises were essential to the enactment of the associated legislation. Yet the courts, with a flick of a pen, and without hesitation, altered those legislative compromises. Maybe Congress should be a little more attuned to and respectful of separation of powers principles when it designs these agencies in the first place. But eliminating a removal restriction undermines that legislative give and take.

### B. *Potential for Chilling Valid Legal Claims*

As should be evident with both the PCAOB and the CFPB, Congress presently has no qualms about designing new agencies in ways that push the constitutional envelope. It is up to the courts, therefore, to keep Congress within constitutional boundaries. Indeed, as Justice Breyer observed in *Free Enterprise Fund*, the dual-cause removal restriction the Court deemed unconstitutional in that case is replicated in dozens of agencies and hundreds of individual officials across the federal government. Given that the litigants in the agency design cases have repeatedly received the weak remedy of statutory severance, however, another question is whether people will continue to litigate these cases. Litigation is time consuming and expensive. And, as Kent Barnett has observed, regulated parties that appear often before an agency might be wary of engendering hostility by challenging the agency's structure if the severance remedy is all the reviewing court will provide.<sup>139</sup>

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135 See *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, at 8 (D.C. Cir. 2016), *rev'd en banc*, 881 F.3d 75 (D.C. Cir. 2018); see also Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856, 860–61 (2013).

136 See *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 162 & n.19 (D.C. Cir. 2018) (en banc) (Henderson, J., dissenting).

137 See, e.g., Zywicki, *supra* note 134, at 860–64 (documenting the controversy over the CFPB's structure).

138 See Recent Legislation, *Administrative Law—Agency Design—Dodd-Frank Act Creates the Consumer Financial Protection Bureau*, 124 HARV. L. REV. 2123, 2124–25 (2011); Binyamin Appelbaum & David M. Herszenhorn, *Financial Overhaul Signals Shift on Deregulation*, N.Y. TIMES (July 15, 2010), <http://www.nytimes.com/2010/07/16/business/16regulate.html?pagewanted=print>.

139 See Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. REV. 481, 485 (2014) [hereinafter Barnett, *To the Victor*]; see also Kent Barnett, *Standing for (and up to) Separation of Powers*, 91 IND. L.J. 665, 714–16 (2016) (arguing for “maximal remedies”).

“[L]imited remedies and frequent interaction with agencies sometimes encourage timidity in challenging administrative structure.”<sup>140</sup>

Good reasons exist to believe that at least some parties will continue to bring such challenges. A large multinational corporation like PHH, facing more than \$100 million in additional penalties based purely on differing interpretations of statutory text, is likely to challenge the agency’s action on whatever grounds may be available to it, including a claim that the agency’s design is unconstitutional. Likewise, perhaps, a small business like Beckstead and Watts that believes its very viability as a going concern may be at stake might be motivated to pursue such litigation. For that matter, hope truly does spring eternal,<sup>141</sup> and some challenging parties may genuinely believe that their cases are different from past ones and will yield more concretely beneficial outcomes.

Additionally, legal scholars have recognized that litigation often is driven by noneconomic values and goals rather than rational economic calculation.<sup>142</sup> The emergence and expansion of cause lawyering means that parties who lack the means to pursue protracted litigation can find sophisticated lawyers willing to advance their claims.<sup>143</sup> For that matter, Ben Depoorter has suggested that “litigation entrepreneurs” in the cause litigation space may even pursue litigation that they know they will lose in order to raise awareness and accomplish their long-term goals.<sup>144</sup>

*Free Enterprise Fund* exemplifies these points. Brad Beckstead, managing partner of the accounting firm that challenged the PCAOB’s structure in *Free Enterprise Fund*, later articulated broader motivations:

Our best-case scenario would have been for the Supreme Court to strike down certain provisions of the SOX Act and toss it back to Congress so small business lobbyists could push them for exemptive relief, but I think this case brought to light the burden that over-regulation and over-zealous inspectors can place on the shoulders of small business.<sup>145</sup>

*Free Enterprise Fund*, which joined Beckstead and Watts in their suit against the PCAOB, was known more for lobbying than pursuing cause litigation, but was dedicated to an ideological agenda consistent with the account-

140 Barnett, *To the Victor*, *supra* note 138, at 510.

141 See, e.g., Alexander Pope, *An Essay on Man: Epistle I*, POETRY FOUND., <https://www.poetryfoundation.org/poems/44899/an-essay-on-man-epistle-I> (last visited Apr. 4, 2018) (“Hope springs eternal in the human breast . . .”).

142 See, e.g., Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 15–23 (2000) (summarizing the academic literature and discussing alternative reasons for pursuing litigation).

143 Patrick J. Bumatay, *Causes, Commitments, and Counsels: A Study of Political and Professional Obligations Among Bush Administration Lawyers*, 31 J. LEGAL PROF. 1, 4–10 (2007) (describing features of cause lawyering as compared with conventional lawyering).

144 See Ben Depoorter, *Essay, The Upside of Losing*, 113 COLUM. L. REV. 817, 821–24 (2013).

145 Cohn, *supra* note 48.

ing firm's claims.<sup>146</sup> One anticipates that the participation of conservative legal luminaries such as Kenneth Starr, Viet Dinh, Michael Carvin, and Noel Francisco on behalf of the petitioners in that case was attributable to Free Enterprise Fund, rather than Beckstead and Watts, seeking them out.

On the other hand, Kent Barnett is undoubtedly correct that parties considering whether to challenge agency action will take into account the available remedies (or lack thereof). Judicial reliance on a weak severance remedy surely will cause some parties to decide not to litigate in the first instance. As noted, the constitutional issues highlighted in the above-described cases may be replicated elsewhere in the regulatory state. The weakness of the severance remedy seems to have encouraged those agencies to continue their activities unconcerned about their potential litigation exposure. Thus, whether or not parties subjected to or targeted by the actions of such agencies possess the willingness and wherewithal to pursue litigation challenging the agencies' design, the mere fact that those agencies continue to operate unfettered by the Court's decisions seems likely to increase the cynicism of regulated parties regarding the agencies' legitimacy.

### C. *Symbolism and Legitimacy*

My third and last concern about the severance remedy is its adequacy to preserve public perceptions of agency legitimacy. My thoughts on this point, however, rely more on personal observation and intuition than scholarly analysis. To illuminate this concern, therefore, I offer anecdotes from two conversations with nonlawyers in my life.

First, in August 2017, I was visiting an old friend, a Canadian citizen, in her hometown of Ottawa—Canada's capital city. My friend is a longtime Canadian civil servant who holds a high-level managerial position in her government's equivalent to one of our cabinet-level departments. My friend is smart and highly educated, but not a lawyer, and she lived in the United States for three years as a child and learned some of our nation's history. She routinely interacts with U.S. government officials as part of her job, but she does not follow our political arguments closely, nor is she an expert on the U.S. Constitution or scholarly debates regarding its meaning.

As my friend was guiding my family and me on a tour of downtown Ottawa, including Parliament Hill, she mentioned that the Canadian Supreme Court would be housed for a few years in a downtown office building while its historic home underwent renovation. The office building in question is adjacent to another office building that houses the Canadian Department of Justice. The two buildings are connected by a pedestrian tunnel and an elevated, enclosed walkway to protect people walking from one building to the other from wind, rain, and snow. The tunnel and the walkway would be not only closed but physically blocked by walls for the duration of the Canadian Supreme Court's occupancy in the first office building.

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146 See, e.g., Kate Ackley, *Free Enterprise Fund Walks the Walk*, ROLL CALL, July 27, 2005, 2005 WLNR 11780875 (describing the origins and activities of the Free Enterprise Fund).

When I asked my friend why the Canadian government would block the tunnel and walkway—expending government resources and inconveniencing pedestrians—her response was, “Separation of powers.” Her point was that judges need to be independent of political influence from executive branch officials. When I observed that judicial independence is more a matter of mental attitudes, systemic influences, and structural protections, rather than physical walls, she simply shrugged and said, “It’s symbolic.” Indeed, some quick research turned up a Canadian news article quoting a representative of the Canadian government as saying that physically blocking the tunnel and walkway will “ensure the conceptual and operational independence of the Supreme Court of Canada is maintained during their interim occupancy.”<sup>147</sup>

Of course, this was one conversation with one individual, and a Canadian at that. Nevertheless, Canada is a democratic country with its own, parliamentary version of separated and shared powers<sup>148</sup> and with an educated populace that at least casually contemplates how its government functions. Regardless, that conversation came to mind a few months later, as I listened to my teenaged son recount lessons from his eighth-grade social studies class, wherein he was learning about the structure of American government.

Consistent with recollections from my own junior high school American history class some decades ago, my son learned that the U.S. government has three branches that to some extent share powers but for the most part perform different functions: the legislative branch, or Congress, enacts laws; the executive branch, consisting of the President and his subordinates, executes and enforces laws; and the judicial branch, meaning the courts, decides individual cases and, in so doing, interprets laws—that sort of thing. Of course, reality is more complicated, and judges, lawyers, and scholars analyze, debate, and appreciate the nuances and complexities of American government. But most Americans are not judges, lawyers, or scholars. Most Americans likely understand American government in terms closer to the lessons of my son’s social studies class. And I realized that, rightly or wrongly, my son’s lessons on separation of powers are framed in fairly formalist terms.<sup>149</sup>

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147 Dean Beeby, *Walkway Barrier Planned to Ensure Supreme Court’s Independence*, CBC NEWS (Aug. 10, 2017), <http://www.cbc.ca/news/politics/supreme-court-makeover-west-memorial-walkway-1.4224491>.

148 See, e.g., Joseph E. Magnet, *Separation of Powers in Canada*, CONST. L. CAN., [http://www.constitutional-law.net/index.php?option=com\\_content&view=article&id=24&Itemid=38](http://www.constitutional-law.net/index.php?option=com_content&view=article&id=24&Itemid=38) (last visited Jan. 3, 2018) (contending that the Canadian constitution institutes a “very real structural separation of powers” despite adopting a “parliamentary government [that] fuses the legislative and the executive branches”).

149 See, e.g., Gary Lawson, *Prolegomenon to Any Future Administrative Law Course: Separation of Powers and the Transcendental Deduction*, 49 ST. LOUIS U. L.J. 885, 887–93 (2005) (developing definitions of formalism and functionalism). Although Lawson is undoubtedly correct that “ordinary people . . . uncorrupted by advanced degrees” might find his methodological definition of formalism “odd,” *id.* at 888–89, his explanation as to why, under his definition, many administrative agencies would be inconsistent with constitutional requirements seems to be more consistent with the understanding of separation of powers principles espoused by such ordinary people as my friend and my son. See *id.* at 888–89.

Taken together, these anecdotes yield a few related revelations. The first is that there is a certain symbolism associated with formal adherence to separation of powers principles that hits many ordinary people at a very visceral level and contributes to perceptions of the fairness and legitimacy of government actors in a democratic society. The second is that popular understandings of separation of powers principles anticipate that some government actors will be politically accountable and others will be independent of politics. Elected officials are paradigmatic examples of the former. Article III judges are paradigmatic examples of the latter. My third revelation, unfortunately, is that the severance remedy as applied by the courts in *Free Enterprise Fund*, *Intercollegiate Broadcasting II*, and *PHH* does not fit very well with the first two revelations.

Agencies have always fit a little oddly with the Constitution's tripartite structure, at least when blending quasi-legislative and quasi-judicial powers with traditional executive functions. As a result, on a continuum of democratic legitimacy with political accountability on one end and independence from politics on the other, agency officials, to varying degrees, fall somewhere in the murky middle.

Most agencies are headed by political appointees nominated not only for their subject-matter expertise but also for their willingness to pursue priorities consistent with the President's political agenda. When agencies engage in notice-and-comment rulemaking, the rules and regulations they develop are quasi-legislative and inherently policy oriented. The procedures agencies follow in adopting rules and regulations emphasize public participation, transparency, and accountability in a manner reasonably characterized as a second-best proxy to the legislative process. Elections have consequences, and past experience tells us that agency rules and regulations will sometimes change in response to electoral politics, notwithstanding judicial efforts to constrain agencies to reasoned decisionmaking. Maximizing the political accountability of agency officials—for example, by giving the President the ability to remove them—correspondingly facilitates the political legitimacy of administrative action.

By comparison, when agencies adjudicate in the manner of the PCAOB or the CFPB,<sup>150</sup> or seem to in the manner of the CRB,<sup>151</sup> the procedures they follow more clearly resemble a judicial trial. Here the expectation is that agencies will not act politically and decisionmaking will be more neutral. In other words, the political legitimacy of agency adjudications turns substantially on the perception that adjudicative decisionmakers are independent of political influence—like judges. Even the formal rulemaking procedures followed by the CRB incorporate elements, like a ban on ex parte communica-

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150 MICHAEL ASIMOW, ADMIN. CONFERENCE OF THE U.S., EVIDENTIARY HEARINGS OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT (2016), <https://www.acus.gov/sites/default/files/documents/adjudication-outside-the-administrative-procedure-act-draft-report.pdf> (describing types of agency adjudications).

151 See *supra* notes 52–55 and accompanying text (discussing CRB procedures).



tions with decisionmakers, aimed at emphasizing the supposed neutrality of the decisionmaking process.<sup>152</sup>

The Supreme Court has long acknowledged and accepted that the same agency may engage in both rulemaking and adjudication, which creates a certain tension that nevertheless is not insurmountable so long as agency officials maintain a certain separation between those two functions.<sup>153</sup> Yet, since the case known as *Chenery II* in 1947, the Supreme Court has allowed agencies to exercise policymaking discretion through adjudication as well as through rulemaking.<sup>154</sup> And the Court's jurisprudence additionally counsels courts to review agency interpretations of ambiguous statutes advanced through formal adjudication procedures under the highly deferential *Chevron* standard.<sup>155</sup> These decisions may reflect the reality of agency decisionmaking, but they also countenance conscious and deliberate policymaking through decisionmaking formats in which, given popular understandings of separation of powers principles, private parties may anticipate greater independence from political influence. In other words, cases like *Chenery II* and *Chevron* collapse the two ends of the democratic legitimacy continuum—political accountability and independence from political influence—in on one another, and thus intensify the tension created by combining both rulemaking and adjudication functions within the same agency. In light of this tension, designing agencies to strike the right balance between political accountability and independence from political influence becomes even more critical.

Congress cannot design agencies in a manner that violates constitutional principles. And, ultimately, whether a particular agency design is constitutional is a question for the Supreme Court rather than for Congress to resolve.<sup>156</sup> But within constitutional boundaries as defined by the Court, Congress is in a better position than the courts to ascertain where the right balance between political accountability and independence from political influence lies. The severance remedy as employed in *Free Enterprise Fund* and *Intercollegiate Broadcasting*, and as Judge Kavanaugh would apply it in *PHH*, alters that congressionally determined balance. Again, both *Free Enterprise Fund* and *PHH* concerned the actions of agency officials using adjudication procedures to evaluate whether the private parties broke the law, while *Intercollegiate Broadcasting II* involved officials who bore the title of “judge” and pursued in proceedings that, while legally constituting formal rulemaking,

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152 See Lubbers, *supra* note 54, at 50.

153 See *Withrow v. Larkin*, 421 U.S. 35, 52 (1975) (permitting the combination of rulemaking and adjudication powers within the same agency so long as some separation of functions is maintained).

154 *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

155 See *United States v. Mead Corp.*, 533 U.S. 218, 226–27, 230 (2001); see also *Negusie v. Holder*, 555 U.S. 511, 513–15 (2009) (evaluating agency adjudication using the *Chevron* standard); *United States v. Eurodif S.A.*, 555 U.S. 305 (2009) (same); *SEC v. Zandford*, 535 U.S. 813 (2002) (same).

156 See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

nevertheless would have seemed largely adversarial and trial-like to participants and observers. One would expect the agency design objective in such circumstances to be greater independence from political influence. Yet, in striking statutory removal restrictions, the courts in those cases removed one of the structural shields protecting the agency officials in question from political influence. Thus, agency officials engaged or seemingly engaged in adjudicative functions were made less independent and more politically accountable.

On the other hand, perhaps what inspired the severance remedy in these cases more broadly was the recognition that the agency officials in question were not and could never be truly independent of politics and policy in the way that Article III judges are. Again, in a world in which *Chenery II* and *Chevron* are black letter law, agencies use adjudications to advance policy preferences and receive *Chevron* deference for interpretive choices with policy implications. Although the agency actions in question may have been or looked like adjudications, the decisionmakers were also policymakers. Hence, perhaps, moving these agency officials in a more politically accountable direction is appropriate.

I do not know where the right spot between political accountability and independence from political influence lies for the PCAOB, the CRB, or the CFPB. But I am not sure the courts do, either. At least, none of *Free Enterprise Fund*, *Intercollegiate Broadcasting II*, nor *PHH* engaged this question before severing statutory removal restrictions. Moreover, the *Intercollegiate Broadcasting II* court in particular seemed to interpret *Free Enterprise Fund* as creating a one-size-fits-all remedy for constitutional deficiencies in agency design, without inquiring more carefully into whether the remedy that made sense for one agency did so for another. More thorough, and less rote, consideration is needed.

#### CONCLUSION

So where does this leave us? Given the unrepresentativeness of the fourth branch, public perceptions of agency fairness and legitimacy are crucial if we want people to have faith in government agencies and the rule of law and, correspondingly, to comply with regulatory mandates. To a great extent, the existing tension between political accountability and independence from political influence with respect to agency officials is baked into the agency cake. If litigants and observers are especially sophisticated regarding constitutional jurisprudence and are inspired by principled and passionate beliefs regarding the nuances of agency design, perhaps severing a small bit of statutory text is sufficient to assuage their concerns in some instances, while at most minimally interfering with agency activities. In declaring agency structures unconstitutional, the courts are rightly concerned about overstepping their role and intruding upon legislative prerogatives with their remedies. Correspondingly, if more pragmatically, the courts are rightly wary of wreaking havoc on the day-to-day functioning of government agencies.

There's no need to kill a fly with a baseball bat when a newspaper will do the trick.

The current political climate, however, features a fair amount of skepticism among many Americans regarding the fairness and legitimacy of the administrative state and a "business as usual" approach to agency actions. Failing to account for those concerns in remedying unconstitutional agency design flaws is a mistake. Courts ought to at least contemplate a little more thoroughly whether the severance remedy is adequate to the task.