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A TRAGEDY OF NOVELTY: IS FOR-CAUSE REMOVAL PROTECTION FOR THE CONSUMER FINANCIAL PROTECTION BUREAU'S SINGLE DIRECTOR A FATAL FLAW?

Abstract: On January 31, 2018, the *en banc* United States Court of Appeals for the District of Columbia Circuit held, in *PHH Corp. v. Consumer Financial Protection Bureau*, that the Consumer Financial Protection Bureau ("CFPB") was permissibly organized under the Supreme Court's removal power jurisprudence. In doing so, the court found that the CFPB's structure, which provided the agency's single director for-cause removal protection, did not impinge on the President's powers under Article II of the U.S. Constitution. Nonetheless, the fate of the CFPB remains in doubt. The United States Court of Appeals for the Second Circuit has agreed to hear an appeal in *Consumer Financial Protection Bureau v. RD Legal Funding,* after the United States District Court for the Southern District of New York found that the CFPB was unconstitutionally structured, adopting, *in toto*, sections I–IV of then-Judge Kavanaugh's *PHH Corp.* dissent. This Comment argues that then-Judge Kavanaugh's dissenting opinion inappropriately supplants Congress's judgment regarding the appropriate structure of the CFPB.

INTRODUCTION

The Consumer Financial Protection Bureau (CFPB) is among the most important and controversial reforms of the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act ("CFPA") of 2010.[1] As an independent

[1] Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 322 (2013). Historically, consumer protection was a matter for state law. *Id.* at 323. Prior to the New Deal, states provided a limited range of protections, such as allowing citizens to enforce consumer protection rights through contract and tort law, capping interest rates through usury laws, and limiting the types of products offered by state-chartered financial institutions. *Id.* Federal involvement in consumer protection grew during the New Deal and World War II. *Id.* at 324–25. But, like past state involvement, it was primarily aimed at ensuring financial institutions' solvency to prevent bank failures, not protecting individual consumers. *Id.* The passage of the Consumer Credit Protection Act of 1968 began a period of predominate and, at times, exclusive and preemptive federal control of consumer financial protection. *Id.* at 327. Still, many believed this change failed to adequately protect consumers because enforcement responsibility was spread among at least twelve different federal agencies, where pursuing other agency directives took priority over consumer protection. *Id.* at 327–28. Furthermore, state laws were frequently preempted by weaker federal protections aimed at increasing banks' profitability and the number of financial instruments available to consumers. *Id.* at 328–29. A central theme in the creation of the Consumer Financial Protection Bureau ("CFPB") was to aggregate consumer protection in a single agency to assure that it would no longer

agency within the Federal Reserve, the CFPB governs nearly all consumer financial services firms through its rulemaking, supervision, and enforcement authority.[2] Because of the role consumer financial products played in bringing about the 2008 financial crisis, Congress tasked the CFPB with making consumer credit products safer.[3]

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be subordinate to other agency concerns, to improve regulatory expertise, and prevent arbitrage of a poorly integrated regulatory framework. *Id.* at 329–34. The Dodd-Frank Act also recognized the harm wrought by preemption, allowing states to enact stronger consumer protection laws and state regulators and Attorneys General to enforce consumer protections laws and CFPB regulations. MICHAEL S. BARR ET AL., FINANCIAL REGULATION: LAW AND POLICY 594 (2018); *see* 12 U.S.C. § 5551 (2012) (providing that state law which strengthen consumer protection regulations will not be preempted); *id.* § 5552 (allowing state attorneys general and state regulators to bring civil actions).

[2] Levitin, *supra* note 1, at 322. *See generally* 12 U.S.C. § 5512(a) (governing the CFPB's rulemaking authority); *id.* §§ 5514–5515 (governing the CFPB's supervision authority); *id.* § 5564(a) (governing the CFPB's ability to bring a civil action for violations of Federal consumer financial law). The distinction between an executive agency and an independent agency within the executive branch has historically hinged on the agency leadership's accountability to the president: an independent agency's leadership can only be removed "for cause," while the leadership of an executive agency can be removed by the president "at will." *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 16, 42 (2010) (noting that for-cause removal is a touchstone of agency independence). Independent agencies are intended to allow regulatory experts latitude to solve complex problems by insulating them from party politics, such that they can act impartially and in the long-term interest of the public. *Id.* at 19–21; *see* Daryl J. Levinson & Richard H. Piles, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2376–77 (2006) (indicating that independent regulatory commissions of the late nineteenth century emerged as a way to limit the influence of partisan political power).

[3] Levitin, *supra* note 1, at 334–35. In the years before the financial crisis, advocates of consumer financial protection decried the state of consumer credit product regulation in the United States. *See* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 3–7 (2008) (emphasizing that the United States ought to regulate potentially harmful financial products just as it regulates potentially harmful physical products); Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1317–21 (2002) (calling for government intervention to disincentivize predatory home-mortgage lending). This weak regulation, coupled with the ability to securitize and sell home mortgages to investors, led to a massive expansion in subprime lending in the early 2000s, dramatically increasing the number of loans made to risky borrowers with poor credit scores, significant debt, and "difficult-to-document income." BARR ET AL., *supra* note 1, at 59–60; *see* FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 70 (2011) (highlighting that in 2006 subprime mortgages totaled $600 billion and represented 23.5 percent of mortgages originated). Lenders frequently exploited borrowers, luring them in with minimal down payment requirements and low initial monthly payments while disguising—through complex and misleading terms—exorbitant fees, high interest rates, and prepayment penalties that commenced after the initial "teaser" period. FIN. CRISIS INQUIRY COMM'N, *supra*, at 78, 104–05. In addition to these exploitive practices, lenders often undertook fraudulent practices such as forging signatures and falsifying income appraisals. *Id.* In spite of the higher risk of delinquency and default, lenders continued to make the loans, which could be securitized, pooled with other loans, and sold to investors with high credit ratings. *Id.* at 73, 127–29. The 2008 Financial Crisis began as home prices fell, which prevented homeowners from refinancing their home mortgages, leading to defaults. *Id.* at 213–21. As a result, credit rating agencies reduced the rating mortgage-backed securities to reflect the increased likelihood of default, significantly eroding the value of the pooled loans to financial firms holding these assets. *Id.* at 226–27.

In *PHH Corp. v. Consumer Financial Protection Bureau* ("*PHH Corp. II*"), the *en banc* Court of Appeals for the District of Columbia Circuit determined that the CFPB's structure was constitutional.[4] At issue in the case was whether it was permissible for the CFPB to be headed by a single director who could only be removed by the President for "inefficiency, neglect of duty, or malfeasance in office."[5] The court's decision reversed a three-judge D.C. Circuit panel ruling that held that the CFPB lacked the authority to bring a civil action because the for-cause removal provision impinged on the separation of powers and the President's Article II removal power.[6]

Despite the D.C. Circuit's rejection of PHH's constitutional claim, the argument reemerged in *Consumer Financial Protection Bureau v. RD Legal Funding, LLC*.[7] In that case, the United States District Court for the Southern

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[4] PHH Corp. v. Consumer Fin. Prot. Bureau (*PHH Corp. II*), 881 F.3d 75, 110 (D.C. Cir. 2018) (en banc) (determining that the structure of the CFPB is constitutionally sound because Supreme Court precedent upholding for-cause protections of independent agencies is binding).

[5] *Id.* at 81; *see* 12 U.S.C. § 5491(c) (2012) (providing the CFPB director a five-year term and for-cause removal protection).

[6] *PHH Corp. II*, 881 F.3d at 110; *see also* PHH Corp. v. Consumer Fin. Prot. Bureau (*PHH Corp. I*), 839 F.3d 1, 8 (D.C. Cir. 2016) (determining that CFPB was unconstitutionally structured because single-headed agencies are unsupported by historical precedent, diminish the authority of the president, and threaten liberty). Concerns about the structure of the CFPB are hardly new. Levitin, *supra* note 1, at 337–38. Opponents of the CFPB have expressed concern about the agency's highly independent design and scope of power since its inception. *Id.*; *see* BARR ET AL., *supra* note 1, at 580 (noting opposition from the banking industry). In particular, the use of a unitary directorship, instead of a bipartisan committee structure, led many opponents to fear that the profitability of the financial services industry would be reduced because the CFPB was not politically accountable and had extensive regulatory powers. Levitin, *supra* note 1, at 337–38. In contrast, proponents of the agency felt that the CFPB needed to be highly independent to avoid industry capture and "heavy-handed political interference by Congress and the White House." *Id.* at 339. This concern was particularly acute given the strength of the financial services lobby and the danger that a president with influence over the CFPB director could attempt to jump-start the economy by demanding lending rules be relaxed, leaving the next administration to deal with the aftermath. *See* Brief of Amici Curiae Consumer Fin. Regulation Scholars in Support of Plaintiff-Appellant at 8–9, English v. Trump, No. 18-5007 (D.C. Cir. July 13, 2018) (highlighting the importance of agency independence to CFPB). Industry capture occurs when agency decisions unduly favor the industry it is attempting to regulate. *See* Barkow, *supra* note 2, at 21 n.23 (defining capture as the extent to which the agency is responsive to the industry regulated). This dynamic frequently occurs when agencies attempt to regulate well-financed, complex, and politically-connected industries where agency officials often return to the industry for employment following their tenure in government. *Id.* at 22–23. For-cause removal protection is intended to both insulate agency heads from partisan political pressure and reduce industry capture by allowing agency officials long-term job stability and the latitude to oppose a president influenced by industry groups. *Id.* at 28–30. Although a unitary directorship allows for quick and decisive regulatory action, scholars believe that multi-membered commissions of mixed political affiliations are better positioned to avoid industry capture because they are more likely to generate dissent. *Id.* at 37–41.

[7] *See* Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC, 332 F. Supp. 3d 729, 784 (S.D.N.Y. 2018) (disagreeing with the *en banc* holding of the D.C. Circuit in *PHH Corp. II* and instead adopting Sections I–IV of then-Judge Kavanaugh's dissent regarding the constitutionality of the agency and Section II of Judge Henderson's dissent regarding the severability of the removal provision, therefore invalidating the CFPB in its entirety). Since dissenting in *PHH Corp. II*, Brett Ka-

District of New York determined that the CFPB was unconstitutionally structured and that the removal provision was not severable, thus invalidating the CFPB in its entirety.[8] The Second Circuit has accepted the CFPB's appeal of that decision.[9] Moreover, the Court of Appeals for the Fifth Circuit has agreed to hear an interlocutory appeal in *Consumer Financial Protection Bureau v. All American Check Cashing, Inc.* raising the same constitutional question in response to a CFPB complaint filed in the United States District Court for the Southern District of Mississippi.[10]

The looming possibility of a circuit split between the Second, Fifth, and D.C. Circuits places the future of the CFPB in doubt and may, more broadly, circumscribe Congress's ability to structure independent administrative agencies.[11] The elimination of the for-cause removal provision or whole-sale invalidation of the CFPB would have profound effects on the enforcement of the consumer protection laws and fundamentally alter Congress's vision for the post-financial crisis financial services industry.[12]

Part I of this Comment examines the factual and procedural backgrounds of *PHH Corp.*, *RD Legal Funding*, and *All American Check Cashing*.[13] Part II

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vanaugh was elevated to the Supreme Court. This Comment refers to Justice Kavanaugh as "Judge Kavanaugh" to make clear it is discussing his dissent in *PHH Corp. II* during his time as a Circuit Judge.

[8] *Id.*

[9] Docketing Notice, Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC, No. 18-2860 (2d Cir. Sept. 28, 2018).

[10] Order Granting Interlocutory Appeal in Part, Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc., No. 3:16-cv-00356 (S.D. Miss. Mar. 27, 2018) (granting interlocutory appeal on question of whether the CFPB is constitutionally structured). The prospect of a circuit split between the Fifth Circuit and D.C. Circuit is particularly high given that the Fifth Circuit recently determined that the Federal Housing Finance Agency ("FHFA") was unconstitutionally structured. Collins v. Mnuchin, 896 F.3d 640, 646 (5th Cir.), *reh'g granted*, 908 F.3d 151 (5th Cir. 2018). The FHFA is an independent agency formed by the Housing and Economic Recovery Act of 2008, which is similarly independent of congressional appropriations and led by a single director with for-cause removal protections. *Id.* at 645, 649; *see* 12 U.S.C. § 4512(a) (2012) (establishing a single director of the agency); *id.* § 4512(b)(2) (providing for-cause removal protection); *id.* § 4516 (governing the agency's funding structure). The Fifth Circuit's reasoning closely tracked Judge Kavanaugh's dissent in *PHH Corp. II*. *See Collins*, 896 F.3d at 659–60, 668 (highlighting that independent agencies play a significant role in American life and the long history of independent agencies headed by multi-member commissions). Nonetheless, the Fifth Circuit's opinion noted some features that distinguish the CFPB and the FHFA. *Id.* at 673. Specifically, the CFPB has an additional oversight feature, the Financial Stability Oversight Council, which makes the CFPB accountable to the President, while the FHFA has no formal oversight. *Id.*

[11] *Compare PHH Corp. II*, 881 F.3d at 77 (determining that a single-headed agency with for-cause removal was constitutionally sound so long as the agency required that level of independence), *with RD Legal Funding*, 332 F. Supp. 3d at 784 (determining that a single-headed agency with for-cause removal protection is unconstitutional).

[12] *See* Levitin, *supra* note 1, at 322–29 (highlighting the poor state of consumer protection prior to the enactment of the CFPB due to federal preemption and the dispersion of enforcement authority among numerous branches).

[13] *See infra* notes 16–43 and accompanying text.

discusses the development of the removal power doctrine and the application of the doctrine by the majority and dissents in *PHH Corp. II*.[14] Finally, Part III argues that the dissenters in *PHH Corp. II* inappropriately supplanted Congress's judgment regarding the appropriate measure of agency independence.[15]

I. THE EMERGENCE OF A CONSTITUTIONAL CONTROVERSY

This Part discusses the facts and procedural history of three cases challenging the constitutionality of the CFPB.[16] Section A illustrates how *PHH Corp. II* arrived before the *en banc* D.C. Circuit.[17] Section B details the actions taken by the United States District Court for the Southern District of New York in *RD Legal Funding*, which the Second Circuit Court of Appeals has since agreed to hear on appeal.[18] Section C provides a brief description of *All American Check Cashing*, which is now before the Fifth Circuit Court of Appeals on an interlocutory appeal from the United States District Court for the Southern District of Mississippi.[19]

A. PHH Corp.*'s Procedural History*

On January 29, 2014, the CFPB brought a Notice of Charges against a large mortgage lender, PHH Corporation, and its captive reinsurer, Atrium, for violations of the Real Estate Settlement Procedures Act ("RESPA").[20] The CFPB alleged that PHH and its affiliates had been operating an illegal insur-

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[14] *See infra* notes 44–94 and accompanying text.

[15] *See infra* notes 96–112 and accompanying text.

[16] *See infra* notes 20–43 and accompanying text.

[17] *See infra* notes 20–29 and accompanying text.

[18] *See infra* notes 34–39 and accompanying text.

[19] *See infra* notes 41–43 and accompanying text.

[20] Notice of Charges at 1, 17–18, *PHH Corp.*, No. 2014-CFPB-0002 (Jan. 29, 2014) (alleging that the premiums paid by mortgage insurance companies to PHH were kickbacks and were either not for the services performed or that they grossly exceeded the value of any service performed). The CFPB's enforcement authority extends to violations of "[f]ederal consumer financial law," which includes provisions of the Consumer Financial Protection Act ("CFPA") and "enumerated consumer laws" found in 12 U.S.C. § 5481(12). *See generally* 12 U.S.C. § 5516(b)–(d) (2012) (governing the CFPB's ability to require reports, perform regulating examination, and enforce Federal consumer financial protection law); *id.* § 5481(12) (defining the enumerated consumer financial laws); *id.* § 5481(14) (defining "[f]ederal consumer financial law"). The CFPB may initiate an administrative adjudication proceeding by filing a Notice of Charges that alleges a violation of a consumer protection law as they did in *PHH Corp.*, or they may initiate a civil suit by bringing an action in federal district court. 12 U.S.C. §§ 5563, 5564; *see* Notice of Charges, *supra*, at 17–18 (initiating an administrative adjudication procedure against PHH); Levitin, *supra* note 1, at 357–58 (detailing parties CFPB may bring an enforcement action against). Administrative proceedings occur before an agency tribunal overseen by an administrative law judge pursuant to their authority under the Administrative Procedure Act. Administrative Procedure Act, 5 U.S.C. § 500 *et seq.* (2012); *Administrative Adjudication Proceedings*, CONSUMER FIN. PROT. BUREAU https://www.consumerfinance.gov/administrative-adjudication-proceedings/ [https://perma.cc/PM9A-2ZKW].

ance kickback program since at least 1995.[21] A Securities and Exchange Commission (SEC) administrative law judge found PHH in violation of RESPA and recommended that the Director disgorge the company of $6.4 million in profits.[22] Rather than pay the fine, PHH appealed the decision to then-CFPB Director Richard Cordray, who determined that the administrative law judge's findings were too narrow and increased the disgorgement to $109 million.[23] PHH appealed the Director's ruling to the D.C. Circuit, where a three-judge panel unanimously vacated the Director's decision in *PHH Corp. v. Consumer Financial Protection Bureau* ("*PHH Corp. I*").[24] The court further considered whether the for-cause removal provision of the CFPA unconstitutionally treads on the separation of powers.[25] A two-judge majority determined that the CFPB's structure was unconstitutional and severed the removal provision, making the director removable by President at will.[26] The CFPB successfully petitioned the D.C. Circuit to rehear the case *en banc*.[27] A divided court ultimately found that § 5491(c), which provides the Director of the CFPB a five-year term and allows removable by the President only for "inefficiency, neglect of duty, or malfeasance in office," was constitutionally permissible.[28] The Court reinstated the panel's statutory holding that the Director's decision ex-

[21] *CFPB Takes Action Against PHH Corporation for Mortgage Insurance Kickbacks*, CONSUMER FIN. PROT. BUREAU (Jan 29, 2014) [hereinafter *CFPB Takes Action*], https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-phh-corporation-for-mortgage-insurance-kickbacks/ [https://perma.cc/G8EN-MF4U]. When a borrower cannot make a 20% down payment on the value of the home they are often required to purchase mortgage insurance to protect lenders from the elevated risk of default. *Id.* This, however, adds an additional cost for borrowers who must pay for the insurance as part of their monthly payments. *Id.* Because lenders, not borrowers, select the insurer, there are often opportunities for kickbacks that hurt consumers. *Id.* The Real Estate Settlement Procedures Act ("RESPA")—a federal consumer financial law that the CFPB may enforce per 12 U.S.C. § 5481(12)—bans kickbacks that "unnecessarily increase the cost of mortgage settlement services." *Id.*; *see* 12 U.S.C § 2607 (2012) (governing the prohibition against kickbacks and unearned fees in real estate settlement services). The CFPB investigation found that PHH referred consumers to certain partner mortgage insurers who purchased "reinsurance" from PHH subsidiaries with PHH taking fees as kickbacks. *CFPB Takes Action*, *supra*.

[22] *PHH Corp. II*, 881 F.3d at 82 (citing Director's Decision at 11, 22, *PHH Corp.*, No. 2014-CFPB-0002 (June 4, 2014)).

[23] *Id.* at 82–83 (disagreeing with Director Cordray's broad interpretation of RESPA, which held that payments were not permissible unless they were in no way connected to a referral business and that "RESPA's three-year statute of limitations does not apply to the agency's administrative enforcement proceedings").

[24] *PHH Corp. I*, 839 F.3d at 10.

[25] *Id.* at 7, 15; *see* 12 U.S.C. § 5491(c)(3) (providing that "the President may remove the director for inefficiency, neglect of duty, or malfeasance in office").

[26] *PHH Corp. I*, 839 F.3d at 8 (holding that the CFPB is unconstitutionally structured and that the removal provision should be severed to make the director removable at-will by the President).

[27] Clerk's Order at 1, *PHH Corp. II*, 881 F.3d 75 (No. 15-1157).

[28] *PHH Corp. II*, 881 F.3d at 77, 81; *see* 12 U.S.C. § 5491(c) (providing the CFPB director a five-year term and for-cause removal protection).

ceeded REPSA's scope and remanded to the CFPB, who dismissed the case.[29] PHH declined to appeal the constitutional question to the Supreme Court.[30]

Nonetheless, an appeal to the Supreme Court was filed in *State National Bank of Big Spring v. Mnuchin*, a case that similarly challenged the constitutionality of the CFPB's structure, but was held in abeyance by the District Court while awaiting the outcome of *PHH Corp.*[31] After the *PHH Corp. II* decision, the district court entered judgment against State National Bank of Big Spring, which the D.C. Circuit Court summarily affirmed.[32] The Supreme Court, however, denied State National Bank of Big Spring's petition for writ of certiorari on January 14, 2019.[33]

B. RD Legal Funding*'s Procedural History*

In *Consumer Financial Protection Bureau v. RD Legal Funding, LLC* the CFPB brought an action against RD Legal Funding in the United States District Court for the Southern District of New York.[34] The government alleged that RD Legal Funding engaged in abusive loan practices against 9/11 first responders and former National Football League players suffering from brain injuries in violation of five sections of the CFPA.[35] In response, RD Legal

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[29] *See PHH Corp. II*, 881 F.3d at 83 (determining that captive reinsurance arrangements were permissible so long as reinsurance does not exceed market value and the three-year statute of limitations applies to the administrative proceeding meaning profits could not be disgorged dating back to the start of the program in 1995); Order Dismissing Notice of Charges at 1, *PHH Corp.*, No. 2014-CFPB-0002 (June 7, 2018) (indicating that the CFPB was dropping its charges against PHH for violations of RESPA).

[30] Yuka Hyashi, *PHH Decides Not to Appeal CFPB Case to Supreme Court*, WALL STREET J., (May 3, 2018), https://www.wsj.com/articles/phh-decides-not-to-appeal-cfpb-case-to-supreme-court-1525369924 [https://perma.cc/TBT8-DYCH].

[31] State Nat'l Bank v. Lew, 197 F. Supp. 3d 177, 186 (D.D.C. 2016). An abeyance is a discretionary procedure that the court may use to delay the proceedings pending the outcome of another case. *See* Aaron-Andrew P. Bruhl, *Deciding When to Decide: How Appellate Procedure Distributes the Costs of Legal Change*, 96 CORNELL L. REV. 203, 219–20 (indicating that an abeyance is a technique courts use to conserve judicial resources where "a change in law appears to be in the offing").

[32] State Nat'l Bank v. Mnuchin, 2018 U.S. App. LEXIS 16266, at*4 (D.C. Cir. June 8, 2018), *cert. denied*, 139 S. Ct. 627 (2019).

[33] State Nat'l Bank v. Mnuchin, 139 S. Ct. 627, 627 (2019). Notably, Justice Kavanaugh did not take part in the consideration of the petition. *Id.*

[34] Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC, 332 F. Supp. 3d 729, 745–46 (S.D.N.Y. 2018). RD Legal Funding offered cash advances to consumers awaiting settlement agreement and judgment payouts after verdicts in their favor. *Id.* at 746.

[35] *Id.* at 746–48. The 9/11 first responders were claimants under the James Zagroda 9/11 Health and Compensation Act of 2010. Complaint at 1–2, *RD Legal Funding*, 332 F. Supp. 3d 729 (No. 00-890). The other group consisted of former National Football League players diagnosed with neurodegenerative diseases such as chronic traumatic encephalopathy, Alzheimer's, or Parkinson's disease. *Id.* at 6. Specifically, the CFPB alleged that RD Legal Funding and other defendants engaged in abusive and "deceptive . . . practices . . . by misrepresenting that the [p]urchase [a]greements constituted valid and enforceable assignments" and that "they could 'cut through red tape' and expedite a Consumer's award payment when in fact they could not," delivered late payments though they represented

Funding argued that the CFPB's structure was unconstitutional and it therefore lacked the authority to bring the claims.[36] The United States District Court for the Southern District of New York determined that the CFPB was unconstitutionally structured.[37] The court adopted, *in toto*, Sections I–IV of D.C. Circuit Judge Kavanaugh's dissent in *PHH Corp. II* regarding the CFPB's structure.[38] Adopting, *in toto*, Section II of Judge Henderson's *PHH Corp. II* dissent, the court further decided that the for-cause removal provision was not severable and that Title X—which created the CFPB—should be stricken in its entirety.[39] The CFPB has since appealed the Southern District of New York's decision.[40]

C. All American Check Cashing*'s Procedural History*

On May 11, 2016 the CFPB brought actions against pay-day lenders All American Check Cashing, Inc., Mid-State Finance, Inc., and Michael E. Gray for violations of the CFPA in the District Court for the Southern District of Mississippi.[41] On April 24, 2018 the court certified the defendants' interlocuto-

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otherwise, and collected usurious interest rates under state law. *RD Legal Funding*, 332 F. Supp. 3d at 748. The Dodd-Frank Act expanded consumer protection, which previously extended to acts that were unfair or deceptive, to include abusive practices. BARR ET AL., *supra* note 1, at 586. Instead of further defining "abusive practices" through rulemaking, the CFPB released guidance on practices that are considered "abusive," but noted that the guidance was not exhaustive. *Id.* at 587. Controversially, the CFPB pushed for a more expansive conception of the term through administrative and judicial enforcement actions. *Id.*; *see* Jeffrey P. Naiman & Kirk D. Jensen, *The UDAP-ification of Consumer Financial Services Law*, 128 BANKING L.J. 22, 32 (2011) (highlighting the challenge faced by industry groups if agencies and courts apply a more expansive interpretation to conduct thought fair at the time of the transaction).

[36] *RD Legal Funding*, 332 F. Supp. 3d at 745–46.

[37] *Id.* at 784.

[38] *Id.* (citing *PHH Corp. II*, 881 F.3d at 166–67 (Kavanaugh, J., dissenting) (concluding that the CFPB is unconstitutionally structured because a unitary directorship of an independent agency—one that only provides for "for cause removal"—is historically unprecedented, places enormous unchecked power in the hands of one individual, and impermissibly reduces the President's authority to control his own branch)).

[39] *Id.* (citing *PHH Corp. II*, 881 F.3d at 163–64 (Henderson, J., dissenting) (determining that the CFPB's independence was essential to the statute, thus Title X should be stricken entirely)).

[40] Notice of Civil Appeal, Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC, No. 18-3156 (2d Cir. Oct. 23, 2018).

[41] Complaint for Permanent Injunction and Other Relief at 1, Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc., No. 3:16-cv-00356 (S.D. Miss. 2016). Specifically, the Bureau brought claims for violations of Sections 1031(a), 1036(a) and 1054(a) of the CFPA. *Id.* The CFPB alleged that the defendants made deceptive statements about fees, misrepresented the difference in costs between loans programs to push consumers into disadvantageous programs, pressured consumers into a monthly lending model, and violated Mississippi law regarding rollover loans, meaning subsequent loans were provided to pay off prior loans. *Id.* at 17–22; *see CFPB Takes Action Against Check Cashing and Payday Lending Company for Tricking and Trapping Consumers*, CONSUMER FIN. PROT. BUREAU (May 11, 2016), https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-check-cashing-and-payday-lending-company-tricking-and-trapping-consumers/ [https://perma.cc/4VMA-VP62] (detailing the CFPB's enforcement action against All American Check Cashing).

ry appeal to the Fifth Circuit on the question of whether the structure of the CFPB violates the Constitution's separation of powers.[42] The Fifth Circuit accepted the appeal and has docketed the case for oral argument on March 12, 2019.[43]

II. THE REMOVAL POWER: HISTORY AND APPLICATION

The Supreme Court has rarely addressed the scope of the President's removal power.[44] Nonetheless, debate regarding the removal power is contentious and dates back to the First Congress and the Decision of 1789.[45] This Part examines the limited array of cases that make up the Court's jurisprudence on the issue, and how the *PHH Corp. II* majority and dissents came to vastly different conclusions regarding the permissibility of the CFPB's removal restriction.[46] Section A of this Part describes the foundational law underlying the

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[42] Order Granting Interlocutory Appeal in Part, *supra* note 10. An interlocutory appeal is an immediate appeal to the relevant Court of Appeals that a district judge may grant if it will hasten the ultimate termination of litigation. 28 U.S.C. § 1292(b) (2012). The Court of Appeals may permit the order at its discretion. *Id.*

[43] Case Calendared, *All Am. Check Cashing, Inc.*, No. 18-90015 (5th Cir. Jan. 25, 2019); Motion for Leave to Appeal from an Interlocutory Order, Appeal in Part, *All Am. Check Cashing, Inc*., No. 18-90015 (5th Cir. Apr. 24, 2018).

[44] *See* PHH Corp. v. Consumer Fin. Prot. Bureau (*PHH Corp. II*), 881 F.3d 75, 79 (D.C. Cir. 2018). The Court has addressed presidential removal just five times since 1926. *Id.* (first citing Humphrey's Ex'r v. United States, 295 U.S. 602 (1926); then citing Wiener v. United States, 357 U.S. 349 (1958); then citing Bowsher v. Synar, 478 U.S. 714 (1986); then citing Morrison v. Olson, 487 U.S. 654 (1988); and then citing Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010)) (addressing the five removal power cases in the Supreme Court precedent since *Myers v. United States*, 272 U.S. 52 (1926)).

[45] *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 36–41 (1997) (highlighting the disparate views held by members of Congress regarding which branch possessed the removal power). The Decision of 1789 refers to the debate ignited by James Madison's proposal that the Secretary of the Department of Foreign Affairs be removable by the president elicited vigorous debate about the removal power in the First Congress. *See* Myers v. United States, 272 U.S. 52, 151 (1926) (quoting Senator Daniel Webster's 1835 speech which refers to the removal debate as the "[D]ecision of 1789"). Some congressmen believed that the Senate, which was charged with appointing officers, had the power of removal or else the President could evade Senate authority by removing and replacing an officer during a recess. CURRIE, *supra*, at 37. An additional argument emerged that the President did not possess the removal power because it was not an enumerated power under Article II. *Id.* at 38. Two claims soon countered this assertion. *Id.* Some congressmen posited that the Necessary and Proper Clause empowered Congress to determine whether the President could remove an official. *Id.* Conversely, others argued that removal was an executive power "implicit in the *enumerated* powers of the President, because he could exercise none of them without subordinates subject to his supervision and control." *Id.* at 39–40. An amendment that distinguished these two approaches was introduced in the House of Representatives in an effort to divide support for presidential removal, however, both approaches won majorities, with similar numerical support but from different coalitions. *Id.* at 40–41. In sum, Congress determined that the President could remove the Secretary of Foreign Affairs, yet "there was no consensus as to whether he got that authority from Congress or from the Constitution itself." *Id.* at 41.

[46] S*ee infra* notes 49–94 and accompanying text.

President's removal power.[47] Section B discusses the application of that law in *PHH Corp. II*.[48]

A. Foundational Removal Power Law

The power to remove federal officers is not explicitly codified in the Constitution.[49] The Supreme Court, however, has recognized a presidential power to remove executive branch officials as part of the Take Care Clause.[50] The Take Care Clause dictates that the President "shall take Care that the Laws be faithfully executed."[51] The Court has determined that, absent the power to supervise executive branch members, the President could not carry out this power.[52] Though it was not the first instance where the Court considered presidential removal power, *Myers v. United States* is the seminal case in the Court's removal power jurisprudence.[53] The case arose after President Wilson fired the Portland postmaster, violating a statutory provision that required Senate approval for such a termination.[54] The postmaster sued for back-wages, which the Government defended by arguing that the President had a constitutional right to remove executive officers and that the statute's Senate approval requirement violated the President's Article II powers.[55] In a majority opinion

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[47] S*ee infra* notes 49–67 and accompanying text.

[48] *See infra* notes 68–94 and accompanying text.

[49] *PHH Corp. II*, 881 F.3d at 84 (quoting *Free Enter. Fund*, 561 U.S. at 492) ("The Constitution makes no explicit provision for presidential removal of duly appointed officers, but the Supreme Court has long recognized that 'the executive power include[s] a power to oversee executive officers through removal.'").

[50] *Id.* at 84–85; *see* U.S. CONST. art. II, § 3. There are, however, numerous interpretations of the Take Care Clause, many of which fail to see it as a grant of authority. *See* Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1835–39 (2016) (critiquing the Court's cursory evaluation of the meaning of the Take Care Clause); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 1 (1994) ("That the framers constitutionalized a strongly unitary executive . . . is just a plain myth . . . . It ignores strong evidence that the framers imagined not a clear executive hierarchy with the President at the summit, but a large degree of congressional power to structure the administration as it thought proper."). *But see* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 616–22 (1994) (arguing that at the Founding the Take Care Clause was understood as grant of power to the President to enforce the law).

[51] U.S. CONST. art. II, § 3.

[52] *See Free Enter. Fund*, 561 U.S. at 484 ("The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them.").

[53] Goldsmith & Manning, *supra* note 50, at 1839. *See generally Myers*, 272 U.S. 52 (considering the presidential removal power). The Court had first addressed the issue in 1903. *See* Shurtleff v. United States, 189 U.S. 311, 317 (1903) (holding that the President may exercise removal powers pursuant to the Take Care Clause and that "it would be a mistaken view to hold that the mere specification in the statute of some causes for removal thereby excluded the right of the President to remove for any other reason which he, acting with a due sense of his official responsibility, should think sufficient").

[54] *Myers*, 272 U.S. at 106–08.

[55] *Id.*

authored by Chief Justice, and former President, Taft, the Court determined that the President had vast authority to remove executive branch officers.[56] The Court principally reasoned that if the President could not remove an officer exercising executive power on his behalf, he would be unable to discharge his Take Care Clause duties.[57]

Less than a decade after *Myers*, the Supreme Court narrowed the sweeping grant of removal authority given to the President.[58] In *Humphrey's Executor v. United States*, the Court considered a restriction on the President's ability to remove members of the Federal Trade Commission (FTC).[59] The Court looked to the nature of the power exercised and determined that because the FTC fulfilled a legislative and judicial function, which distinguished it from a postmaster's purely executive function at issue in *Myers*, the restrictions on the removal power were constitutional.[60]

The Supreme Court again revisited the removal power in *Morrison v. Olson*, where it considered a provision of the 1978 Ethics in Government Act that only allowed the Independent Counsel to be removed by the Attorney General for good cause.[61] The majority jettisoned *Humphrey's Executor*'s consideration of the nature of the power exercised, and instead looked to whether the remov-

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[56] Goldsmith & Manning, *supra* note 50, at 1839.

[57] *Myers*, 272 U.S. at 135. The decision, however, was not without detractors who thought that the Court's interpretation of the Decision of 1789 was incorrect. *Id.* at 283–87 & nn.72–75 (Brandeis, J., dissenting) (arguing that the Decision of 1789 was inconclusive and did not advocate that the President had an uncontrollable power to remove inferior officers); *see* Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 360–79 (1927) (detailing the inaccuracies of the Court's parsing of the legislative history of the Decision of 1789 in *Myers*).

[58] *See Humphrey's Ex'r*, 295 U.S. at 626–27 (determining that the holding of *Myers* was narrow, and simply provided that the President could remove the postmaster general without the advice and consent of the Senate).

[59] *Id.* at 618–19. The act provides that "[a]ny commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office . . . ." 15 U.S.C. § 41 (2012).

[60] *Humphrey's Ex'r*, 295 U.S. at 627–28. Similarly, in *Wiener v. United States*, the Supreme Court determined that President Eisenhower did not have the ability to remove members of the War Claims Commission at-will because the commission was similar to the Federal Trade Commission, and thus the President had no inherent constitutional power to do so, nor had Congress specified that the President could remove members of the Commission. *Wiener*, 357 U.S. at 355–56. Additionally, in *Bowsher v. Synar*, the Court considered a removal provision which provided that the Comptroller General may not be removed by the President and was instead solely removable by a joint resolution of Congress or impeachment. *Bowsher*, 478 U.S. at 720. The Court determined the provision was unconstitutional because "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws . . . ." *Id.* at 726.

[61] *Morrison*, 487 U.S. at 692. Section 596(1) of the 1978 Ethics in Government Act provided that: "An independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." 28 U.S.C. § 596 (1994). The Act was not renewed by Congress and expired in 1999. *See id.* § 599 (2012) (governing the termination of the Independent Counsel Reauthorization Act of 1994).

al restriction interfered with the President's Article II duties.[62] The Supreme Court upheld the restriction though the President was denied any direct removal power, highlighting that for-cause removal provided the Attorney General sufficient authority to assure that the Independent Counsel was adequately performing his or her duties.[63]

Most recently, in *Free Enterprise Fund v. Public Co. Accounting Oversight Board* the Supreme Court considered a "two-tiered" for-cause removal protection.[64] The Sarbanes-Oxley Act provided that members of the Public Company Accounting Oversight Board could only be removed for good cause by SEC Commissioners, who were also insulated from removal by good cause protection.[65] In contrast with *Morrison*, where removal power was granted exclusively to a member of the executive branch who was removable at-will, the President could not remove the SEC Commissioners at-will.[66] The Supreme Court determined that the protection unconstitutionally encumbered the President's ability to ensure the faithful execution of the law.[67]

B. Application of the Doctrine in PHH Corp. *and* RD Legal Funding

In *PHH Corp. II*, the majority employed the Supreme Court's *Morrison* analysis to determine whether the CFPB's removal restrictions, and structure more broadly, impeded the President's ability to perform his constitutional duty pursuant to the Take Care Clause.[68] The court determined that the answer to this Constitutional question depended on whether for-cause removal provisions were permissible, and, if so, whether the CFPB required that degree of independence to carry out its congressionally assigned mission.[69] The majority held

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[62] *Morrison*, 487 U.S. at 689–90 (noting that the purpose of the Court's removal power analysis is "not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take Care that the laws be faithfully executed'").

[63] *Id.* at 692.

[64] *Free Enter. Fund*, 561 U.S. at 483–84.

[65] *Id.* at 485–86; *see* 15 U.S.C. §§ 7211(e)(6), 7217(d)(3) (2012) (providing that SEC Commissioners may remove members for good cause). Nonetheless, although there is a general consensus that SEC Commissioners are removable only for-cause, the statute is silent on the matter. *Free Enter. Fund*, 561 U.S. at 545–48 (Breyer, J., dissenting).

[66] *Free Enter. Fund*, 561 U.S. at 495–96.

[67] *Id.* at 484; *see* U.S. CONST. art. II, § 3 (the President "shall take Care that the laws be faithfully executed . . . .").

[68] *PHH Corp. II*, 881 F.3d at 79 (citing *Morrison,* 487 U.S. at 691 n.30) (noting that a "good cause" removal standard "does not impermissibly burden the President's Article II powers, where 'a degree of independence from the Executive . . . is necessary to the proper functioning of the agency or official'").

[69] *Id.* at 78 (quoting *Wiener*, 357 U.S. at 353) ("To analyze the constitutionality of the CFPB's independence, we ask two questions: *First*, is the means of independence permissible . . . ? *Second*, does 'the nature of the function that Congress vested in' the agency call for that means of independence?").

that the CFPB's structure, which included for-cause removal, budgetary independence, and a unitary directorship, met both standards and was constitutionally permissible.[70] Regarding the for-cause removal provisions, the court pointed to the fact that the language of the for-cause removal statute of the CFPB was identical to the FTC's, which the Supreme Court had upheld in *Humphrey's Executor*.[71] Moreover, in assessing whether the CFPB required independence, the court emphasized the long history of financial regulators receiving similar independence.[72] The majority similarly rejected PHH's argument that the CFPB's budgetary independence rendered it unconstitutional, emphasizing that in addition to the tradition of affording financial regulatory agencies exemptions from appropriations, the CFPB's independent funding structure impacted congressional but not presidential power.[73] The court concluded the President's execution of his Article II duties was not impinged by a single-headed independent agency any more than it would be by a multimember commission.[74] In contrast, the court noted that a single director may be more accountable because responsibility for the enforcement of consumer protection laws was vested in one person, rather than being spread across a commission or multiple agencies.[75] Finally, the court rejected PHH's wider theories of unconstitutionality regarding the scope the CFPB's power, its supposedly "novel" structure, the lack of structural safeguards provided by a group-led agency, and that allowing for-cause protection of single-headed agencies would allow Congress to institute for-cause protection of cabinet officers.[76]

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[70] *Id.* at 100–01; *see* 12 U.S.C. § 5491(c)(3) (2012) (providing the CFPB director a five-year term and for-cause removal protection); *id.* § 5497(a)(1) (providing the CFPB with independent funding).

[71] *PHH Corp. II*, 881 F.3d at 93 (noting the long history of the constitutional permissibility of single-level for-cause removal protection).

[72] *Id.* at 91–92, 94–95 (highlighting examples such as Comptroller of the Treasury, the Federal Reserve Board, Federal Trade Commission, Commodity Futures Trading Commission, the Federal Deposit Insurance Corporation, and the SEC which received similar latitude.)

[73] *Id.* at 95–96. Moreover, the Court found PHH's argument that the combination of for-cause removal and budgetary independence made the CFPB unconstitutional unavailing. *Id.* For-cause removal limits the President while budgetary independence serves as a restraint on Congress, which does not amplify the effect of the President's removal constraint. *Id.* at 96. Notably, the CFPB's budgetary independence is not without limits. *See* 12 U.S.C. § 5497(a)(2) (2012) (capping the CFPB's budget at twelve percent of the Federal Reserve System's "total operating expenses").

[74] *PHH Corp. II*, 881 F.3d at 97–98.

[75] *Id.* at 98 ("Before Congress established the Bureau, multiple agencies—most of them independent—had jurisdiction over consumer financial protection, and that dispersion hampered executive ability to diagnose and respond to problems. The creation of the CFPB . . . enhanced public accountability and simplified the President's ability to communicate policy preferences and detect failings.").

[76] *Id.* at 101. The court determined that the scope of the CFPB's authority was not constitutionally relevant because the Supreme Court's analysis never centered on the number of laws the agency was tasked with implementing, but even if scope of power were constitutionally relevant, the CFPB's power would certainly be less than the independent counsel's in *Morrison*, who could charge any federal criminal law. *Id.* at 102–03. The majority additionally rebuffed PHH's argument that the CFPB's structure was

The *PHH Corp. II* dissenters fundamentally disagreed about the nature of the Court's case law and instead argued that independent agencies are at odds with the Constitution's three-branch set-up and decisions blessing their existence are merely limited accommodations.[77] Sections I–IV of Judge Kavanaugh's dissent, which the District Court for the Southern District of New York adopted in *RD Legal Funding*, rejected the majority's use of *Humphrey's Executor* and *Morrison* as the constitutional guide in the case.[78] Judge Kavanaugh found the *Morrison* test inapplicable because the independent counsel

novel, and that this novelty rendered it unconstitutional because the CFPB is not historically anomalous, exemplified by single-headed financial regulators such as the Comptroller of the Treasury, the Office of the Comptroller of the Currency, the Social Security Administration, and the Office of the Independent Counsel. *Id.* Moreover, novelty alone does not automatically make a feature unconstitutional according to the court. *Id.* at 105. The court additionally rejected PHH's assertion that the CFPB unconstitutionally imperils liberty. *Id.* First, separation of powers serves a number of functions beyond preserving liberty and singling out one of those objectives could lead to any number of conclusions. *Id.* (quoting John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 56–57 (2014)) ("[T]he purposes of separation of powers are too general and diverse to offer much concrete guidance. Among other things, the separation of powers . . . promote efficiency, energy, stability, limited government, control of factions, deliberation, the rule of law, and accountability."). Secondly, while the CFPB may, as PHH argues, threaten financial services providers' liberty, it preserves the liberty of consumers by guarding against fraud and coercion, which impair freedom of contract, an essential marketplace liberty. *Id.* at 106. Third, a free-standing liberty analysis finds no home in the Supreme Court's separation of powers precedent. *Id.* On this point, the majority noted additional provisions beyond for-cause removal, which prevent the CFPB director from transgressing statutory and constitutional boundaries including the Financial Stability Oversight Council ("FSOC") ability to intervene to protect markets, judicial review of disgorgement penalties, and congressional reporting requirements. *Id.*; *see* 12 U.S.C. § 5513 (2012) (governing the ability of the FSOC to invalidate a CFPB action if it "would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk"); *id.* § 5563(b)(4) (providing that administrative adjudications may be reviewed by United States Courts of Appeals); *id.* § 5496(a) (requiring appearances before Congress); *id.* § 5496(b) (requiring semi-annual reports to Congress). Finally, the majority rejected PHH's slippery-slope argument that Congress could then institute for-cause removal protection for cabinet level officers because the permissibility of a removal provision depends on the function performed by the agency, cabinet officers would undoubtedly be excluded from for-cause protection as they aid the President in carrying out essential constitutional duties. *PHH Corp. II*, 881 F.3d at 106. Moreover, cabinet-level officers and the heads of independent agencies operate on separate constitutional planes. *Id.* at 107 (suggesting that the directors of independent agencies are not considered "principal officers of the executive departments" who could vote to remove the President under the Twenty-fifth Amendment and that the President would rightfully be able to remove "principal officer of the executive departments" at-will).

[77] *PHH Corp. II*, 881 F.3d at 140 (Henderson, J., dissenting) (quoting FTC v. Rubervoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting)) ("[A]dministrative bodies have become a veritable fourth branch of Government, which has deranged our three-branch legal theories . . . ."); *id.* at 164 (Kavanaugh, J., dissenting) (noting that *Myers* recognized the President's ability to remove members of the Executive Branch while *Humphrey's Executor* provided an exception to that rule).

[78] *PHH Corp. II*, 881 F.3d at 193–95; Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC, 729 F. Supp. 3d 729, 784 (S.D.N.Y. 2018).

was unlike the director of an independent agency.[79] Moreover, the issue of whether the independent counsel was unconstitutional because of its single-headed-structure was never brought before the Court, rendering it non-binding.[80] Similarly, Judge Kavanaugh noted that *Humphrey's Executor* did not control because it validated a multi-member commission.[81] In Judge Kavanaugh's view, even the most charitable reading of the case left the constitutional question concerning the CFPB's unitary directorship unanswered.[82] Rather, in determining whether the CFPB violated Article II, Judge Kavanaugh looked to the agency's consistency with historical practice, the danger it posed to individual liberty, and the extent to which it reduced the President's authority.[83]

Judge Kavanaugh argued that Supreme Court precedent in separation of powers cases where the constitutional text did not control requires a strong consideration of the entity's historical precedent.[84] Accordingly, a lack of historical precedent indicates that an entity is constitutional suspect.[85] Finding that the CFPB lacked historical precedent, Judge Kavanaugh distinguished the CFPB from other independent agencies with single directors based on the CFPB's more extensive powers and highlighted that those other agencies were recently created and constitutionally disputed.[86] Additionally, Judge Ka-

[79] *PHH Corp. II*, 881 F.3d at 195 (Kavanaugh, J., dissenting) (noting that the independent counsel had "a narrowly defined jurisdiction in cases where the Department of Justice had a conflict of interest," possessed solely enforcement authority, and was an inferior—rather than principal—officer).

[80] *Id.* (citing BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 46, 84, 226–28 (2016)) ("[I]t is black-letter law that cases are not precedent for issues that were not raised or decided . . . it is impossible to rely on the result in *Morrison* as binding precedent on the single-Director question.").

[81] *Id.* at 193–94.

[82] *Id.* at 194 ("At best for the CFPB, *Humphrey's Executor* leaves open the single-Director question. *Humphrey's Executor* does not hold that single Director independent agencies are constitutional."). Judge Kavanaugh's expansive vision of executive power is apparent in his discussion of *Humphrey's Executor*. *See id.* at 195–96 n.18. He highlights criticism of *Humphrey's Executor* and notes that, while the Court of Appeals is bound to adhere to Supreme Court precedent, overruling the case "would not mean the end of agencies that are now independent. The agencies would instead transform into executive agencies supervised and directed by the President." *Id.*

[83] *Id.* at 166–67.

[84] *Id.* at 179–81. In a footnote, Judge Kavanaugh suggested that independent agencies, as a whole, are constitutionally unsound. *Id.* at 179 n.7. He stated, "As a matter of first principles, there would be a strong argument that this case could and should be resolved in PHH's favor by the constitutional text alone—on the ground that independent agencies violate Article II. But *Humphrey's Executor* rejected that broad argument, and we as a lower court are bound by that case." *Id.*

[85] *Id.* at 183 (quoting *Free Enter. Fund*, 561 U.S. at 505) ("'Perhaps the most telling indication of the severe constitutional problem' with the CFPB 'is the lack of historical precedent for this entity.'").

[86] *Id.* at 174. Specifically, Judge Kavanaugh argued that the Social Security Administration—altered by Congress in 1994 from a multi-member independent agency to an agency headed by a single-director—did not serve as precedent because the agency's structure was contested on constitutional grounds in a signing statement by then President Bill Clinton. *Id.* (citing President William J. Clinton, Statement on Signing the Social Security Independence and Program Improvements Act of 1994,

vanaugh argued that multi-member commissions reflect the constitutional principle of divided power, which, in contrast with the concentrated power of single-headed agencies, promotes thoughtful decision-making and safeguards individual liberty.[87] Finally, Judge Kavanaugh determined that, compared to a multi-headed independent agency, the single-headed structure further reduced the President's ability to exercise authority over the CFPB.[88] Specifically he argued that, because the CFPB has a single director, the President may not select or remove a commissioner from the chair position, as he can with multi-member commissions, thus denying the President influence over agency's agenda.[89] Moreover, unlike the staggered terms of multi-member commissions, which allow every President to exercise some authority through appointment, the CFPB provides a five-year term to one person, meaning that some Presidents may be completely unable to exercise any influence through appointment.[90]

While Judge Kavanaugh concluded in Section V of his dissent that the removal provision was severable, Judge Henderson disagreed, arguing that the

2 Pub. Papers 1471, 1472 (Aug. 15, 1994)). Furthermore, the Commissioner of the Social Security Administration cannot independently "bring law enforcement actions against private citizens, which is the core of the executive power, and the primary threat to individual liberty posed by the Executive Power." *Id.* at 174–75 (citing *Morrison*, 487 U.S. at 706 (Scalia, J., dissenting)). The Office of Special Counsel, which was enacted in 1978, suffered similar defects. *Id.* Judge Kavanaugh noted that the Office of Special Counsel was recently created and faced constitutional objections from the Executive Branch. *Id.* at 175. The original bill was objected to by President Carter's Department of Justice. *Id.* (citing Memorandum Opinion for the General Counsel, Civil Service Commission: Presidential Appointees—Removal Power—Civil Service Reform Act—Constitutional Law (Article II, § 2, cl. 2), 2. Op. O.L.C. 120, 120 (May 26, 1978)). Additionally, President Reagan vetoed subsequent legislation regarding the office because of his belief that the agency's independence was unconstitutional. *Id.* (citing President Ronald W. Reagan, Memorandum of Disapproval on a Bill Concerning Whistleblower Protection, 2 Pub. Papers 1391, 1392 (Oct. 26, 1988)). Judge Kavanaugh dismissed the single-director Federal Housing Finance Agency as a comparable example because its creation in 2008 made it too contemporary to serve as a historical precedent. *Id.* at 175–76. Moreover, he noted that the Comptroller of the Currency did not qualify because the position did not have for-cause removal protection. *Id.* at 177 n.4 (citing 12 U.S.C. § 2 (2012)) ("The Comptroller of the Currency . . . shall hold his office for a term of five years unless sooner removed by the President, upon reasons to be communicated by him to the Senate.").

[87] *Id.* at 184–86. Judge Kavanaugh highlighted that varied perspectives push multi-membered commissions towards moderate and carefully considered decisions, an essential check on agency power. *Id.* at 184–85. Moreover, he favorably compared the multi-member commissions with the Framers' decision to separate power between and within branches and compose the Supreme Court of multiple judges. *Id.* at 187.

[88] *Id.* at 188.

[89] *Id.* at 189–90 (noting that agency chairs typical control the agency's budget, personnel, and agenda).

[90] *Id.* at 190 (noting that a "new Director may be appointed in 2028. That Director could serve until 2033, meaning for the entirety of the term of the President elected in 2028," assuming that President was elected to only one term).

removal provision was not severable.[91] Instead, Judge Henderson argued that rendering the CFPB an executive agency by severing the removal provision would inappropriately eliminate agency independence.[92] Moreover, it would alter the division of power between the executive and legislative branches, increasing the President's ability to influence the financial services industry while the legislative branches' self-imposed limitations remained in place—a structure which Judge Henderson argued would not have passed in the 111th Congress.[93] She concluded that these factors overcame the presumption of severability.[94] The Southern District of New York adopted that portion of Judge Henderson's *PHH Corp. II* dissent in *RD Legal Funding*, holding the CFPB wholly unconstitutional and unredeemable by severability.[95]

III. JUDGE KAVANAUGH'S OPINION INAPPROPRIATELY SUPPLANTED THE COURT'S JUDGMENT FOR CONGRESS'S

In establishing the CFPB, Congress recognized that inadequate consumer protections played an important role in precipitating the 2008 financial crisis.[96] Federal preemption and scattered enforcement authority allowed for the explosion of abusive and unfair mortgage lending practices, which resulted in millions of home foreclosures and nearly $11 trillion in lost household wealth.[97]

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[91] *Id.* at 200. Judge Kavanaugh employed the two-factor analysis used by the Supreme Court in *Free Enterprise Fund*, which looks to 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 'full operative as a law.'" *Id.* at 199 (citing *Free Enter. Fund*, 561 U.S. at 509). He answered both question in the affirmative. *Id.* at 199–200. First, he concluded that Congress would have favored the severed law because the Dodd-Frank Act has an express severability clause. *Id.* at 199; *see* 12 U.S.C. § 5302 (2012) ("If any provision of this Act . . . is held to be unconstitutional, the remainder of this Act . . . shall not be affected thereby."). Secondly, severing the removal provision would not alter the CFPB's ability to regulate and supervise financial service companies or its ability to enforce consumer financial services laws. *PHH Corp. II*, 881 F.3d at 199–200. Therefore, the Dodd-Frank Act and provisions tied to the CFPB would continue to be "fully operative as a law." *Id.*; *see Free Enter. Fund*, 561 U.S. at 509 (determining that the two-tier removal protection was severable because eliminating the provision would not render the Sarbanes-Oxley Act inoperative). Justice Henderson on the other hand argued, "[T]he presumption of severability is rebutted here. A severability clause 'does not give the court power to amend' a statute. Nor is it a license to cut out the 'heart' of a statute. Because Section 5491(c)(3) is at the heart of Title X [Dodd Frank], I would strike Title X in its entirety." *Id.* at 163–64. Judge Henderson also pointed to the fact that Congress had sacrificed its own oversight powers over the CFPB as evidence that the provision was not severable. *Id.* at 162.

[92] *PHH Corp. II*, 881 F.3d at 162.

[93] *Id.* at 163.

[94] *Id.*

[95] *RD Legal Funding*, 332 F. Supp. 3d at 784 (citing *PHH Corp. II*, 881 F.3d at 163–64).

[96] *See* FIN. CRISIS INQUIRY COMM'N, *supra* note 3, at 68–78 (documenting the role abusive and unfair lending practices in precipitating the financial crisis).

[97] *See* FIN. CRISIS INQUIRY COMM'N, *supra* note 3, at xv (reporting the financial toll on American households caused by the 2008 financial crisis); Levitin, *supra* note 1, at 322–29 (highlighting scattered federal enforcement responsibility and problems associated with growing federal preemption).

Congress sought to address those inadequacies by centering responsibility for the administration of consumer protection laws in the CFPB, delegating it authority to respond to the fast-evolving financial services industry and prohibit any "unfair, deceptive, or abusive act or practice" relating to consumer financial products or services.[98] To carry out that mission, Congress determined that a single director was more appropriate given the need for decisive action and prompt operation.[99] Judge Kavanaugh's dissent inappropriately supplanted the court's judgment for Congress's regarding the appropriate measure of agency accountability.[100]

Judge Kavanaugh's separation of powers analysis is untethered to Supreme Court precedent.[101] His dissenting opinion places undue emphasis on *Myers*, which subsequent Supreme Court decisions reduced to the proposition that the legislature cannot give itself a role in removal decisions, and wrongly paints *Humphrey's Executor* as an exception to a rule against removal restrictions.[102] Viewing the limited array of removal power cases that have reached the Supreme Court as the outer range of permissible restrictions tremendously limits Congress's ability to respond to changed circumstance.[103] Moreover, Judge Kavanaugh's opinion is overly reliant on the nebulous concept of the agency's impact on liberty.[104] That approach fails to take into account that the separation of powers protects interests beyond liberty.[105] Among

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[98] 12 U.S.C. § 5531(a) (2012); *see* PHH Corp. v. Consumer Fin. Prot. Bureau (*PHH Corp. II*), 881 F.3d 75, 80–81 (D.C. Cir. 2018) (noting that in response to the financial crisis Congress integrated in the CFPB authority over consumer financial laws).

[99] *PHH Corp. II*, 881 F.3d at 81 (indicating that appointing enough members to reach a quorum for a multi-member body would take more time, thus a single director would allow the CFPB to be fully operative quicker).

[100] *See* Manning, *supra* note 76, at 47–48 (arguing that the Court overstepped its bounds in *Free Enterprise Fund* in determining that it was impermissible that removal power run through the SEC if Congress has the constitutional power to structure the President's supervision of the executive branch).

[101] *See PHH Corp. II*, 881 F.3d at 90 (majority opinion) (noting that *Myers* had not been revived by *Humphrey's Executor*, *Morrison*, *Wiener*, or *Free Enterprise Fund*, and was cited to "only for general restatements of the law, all of which are consistent with *Morrison*").

[102] *See id.* at 164 (Kavanaugh, J., dissenting) ("In 1935, however, the Supreme carved out an exception to *Myers* . . . .").

[103] *Id.* at 77–78 (majority opinion).

[104] *Id.* at 105, 164, 166. Judge Kavanaugh's opening line, "[t]his is a case about individual liberty and executive power" is instructive. *Id.* at 164 (Kavanugh, J., dissenting). The majority conversely noted that determining the constitutionality of the CFPB's removal provision on the basis of its impact on liberty not only deviates from precedent but requires two additional assumptions. *Id.* at 105 (majority opinion). First, it assumes that measuring the constitutionality of a provision based on one of the broader goals of the separation of powers is a judicially manageable goal when in fact any number of conclusions could be fairly drawn based on how one perceived liberty. *Id.* Second, it assumes that the CFPB actually inhibits liberty. *Id.* at 106.

[105] Manning, *supra* note 76, at 56–57 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 334 U.S. 579, 635 (1952) (Jackson, J., concurring)) ("While the Constitution diffuses power the better to

those conflicting interests are "efficiency, energy, stability, limited government, control of factions, deliberation, the rule of law, and accountability."[106] An analysis confined solely to the agency's impact on liberty fails to give proper accord to these numerous other interests.[107]

Moreover, Judge Kavanaugh's reliance on the CFPB's novelty is inappropriate.[108] While anti-novelty analyses are certainly in vogue, they should not be used to prove unconstitutionality because doing so improperly assumes that the legislative branch has previously exercised the full extent of its power, when in fact there may be many reasons why Congress elected not to exercise its full power until recently.[109] Such an analysis unnecessarily limits legislative choices and fails to allow the political branches to respond to changed circumstances.[110] Instead, separation of powers cases regarding the removal power ought to be decided with a greater degree of deference to the political branches.[111] The *PHH Corp. II* majority's analysis, which looks to the means and necessity of the agency's independence to determine whether the President's ability to faithfully execute the law has been unconstitutionally impinged, provides such deference.[112]

CONCLUSION

Judge Kavanaugh and Judge Henderson's dissents in *Consumer Financial Protection Bureau v. PHH Corp.* ("*PHH Corp. II*"), which were adopted by the

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secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.").

[106] *Id.* at 57.

[107] *See id.* at 56–57 (noting that "the purposes of the separation of powers are too general and diverse to offer much concrete guidance 'about the extent to which' Congress may structure the exercise of the allocated powers.").

[108] *See* Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1412 (2017). The proposition that a lack of historical precedent indicates a "severe constitutional problem" has its roots in the Court's monumental decision, *McCulloch v. Maryland*. *Id.* at 1411 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819)). Notably the author of that decision, Chief Justice John Marshall, was not looking for the absence of historical practice to show the legislature's action was unconstitutional. *Id.* Instead he believed that evidence of historical practice suggested that the practice was constitutional—or as modern scholars Professor Curtis Bradley and Trevor Morrison have explained, whether the other branch has "acquiesced" to the practice by failing to challenge it. *Id.* Still, in the 1990s the Court began to apply the inverse, that novelty indicates unconstitutionality, eventually using the analysis in cases regarding the separation of powers. *Id.* at 1415–18.

[109] *Id.* at 1415–21 (highlighting the growing use of novelty in Supreme Court and Federal Circuit decisions, including *PHH Corp. II*).

[110] *Id.* at 1427–29 (arguing that novelty should not serve as evidence of unconstitutionality because the multitude of barriers that inhibit and problematize the enactment of laws push back against such assumptions).

[111] Manning, *supra* note 76, at 4–5.

[112] *See PHH Corp. II*, 881 F.3d at 78 (determining that the permissibility of a for-cause removal provision depends on whether the method Congress used to render the agency independent is permissible and whether the agency requires that measure of independence).

United States Southern District Court of New York in *Consumber Financial Protection Bureau v. RD Legal Funding*, invalidated the CFPB on the ground that a single-headed independent agency with for-cause removal protection runs afoul of the Constitution's separation of powers. Rather than analyzing the structure using the *Morrison v. Olson* test, the *PHH Corp. II* dissenters relied on nebulous notions of liberty and novelty in determining that a single-headed agency with for-cause removal protections was unconstitutional. That analysis inappropriately substituted the judgment of the court for Congress's by placing undue emphasis on *Myers v. United States*, the novelty of the CFPB's structure, and failing to consider the numerous interests other than liberty that the separation of powers protects.

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