

## INDEPENDENT AGENCIES: A CONSTITUTIONAL VIOLATION WITH A NEGLIGIBLE REMEDY

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### INTRODUCTION

Congress makes some agencies “independent” from the President by providing removal protection—so the President may only fire directors of that agency “for cause.”<sup>1</sup> Academic scholars and courts have dubbed independent agencies the “headless ‘fourth branch’” of government because they lack governmental oversight.<sup>2</sup> The “fourth branch” has been the subject of constant questioning and criticism: Is it constitutional?<sup>3</sup> Who

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<sup>1</sup>Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2376 (2001); Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1138 (2000).

<sup>2</sup>*Ameron, Inc. v. U.S. Army Corps of Eng’rs*, 787 F.2d 875, 886 (3d Cir. 1986) (“[The] headless ‘fourth branch’ of government consist[s] of independent agencies having significant duties in both the legislative and executive branches but residing not entirely within either.”); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984).

<sup>3</sup>*See, e.g.*, Blake Emerson, *The Departmental Structure of Executive Power: Subordinate Checks from Madison to Mueller*, 38 YALE J. ON REG. 90, 140 (2021); Andrew M. Grossman & Sean Sandoloski, *The End of Independent Agencies? Restoring Presidential Control of the Executive Branch*, 22 FEDERALIST SOC’Y REV. 216, 223 (2021); Bernard W. Bell, *Revisiting the Constitutionality of Independent Agencies*, REG. REV. (July 21, 2020), <https://scholarship.law.upenn.edu/regreview-opinion/356/>.

controls it?<sup>4</sup> What are its limits?<sup>5</sup> The Roberts Court has taken the matter into its own hands and begun answering some of these questions in ways few expected.

For nearly 200 years, the U.S. government has relied on the human power and expertise of federal agencies to carry out the government's goals.<sup>6</sup> In the late nineteenth century, social and economic developments revealed weaknesses in the ability of the three traditional branches of government to carry out statutory programs.<sup>7</sup> Legislatures are the closest governmental body to the people and thus are best suited to identify problems affecting the public.<sup>8</sup> So Congress, the federal legislative body, has been creating federal agencies for nearly 200 years. Although Congress identifies concerns and creates agencies to deal with them, the agencies it creates ultimately fall into the executive branch of government.

Reviewing the history of independent agencies helps frame the recent shift in the administrative state. In 1872, Congress created one of the first agencies—the Post Office Department—and appointed postmasters to lead it.<sup>9</sup> Congress gave the postmasters four-year terms of office, and the President could only fire them for good cause.<sup>10</sup> Fifty years later, the Supreme Court found that the limitation on the President's ability to fire postmasters unconstitutionally restricted his exercise of executive power, and thus, the limitation was invalid.<sup>11</sup> *Myers v. United States* held that the postmaster at

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<sup>4</sup> See, e.g., Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 51 (2006) (“We conclude, somewhat paradoxically, that agencies, though not comprising elected officials, may better promote political accountability than the White House.”); Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1778 (2012); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 203 (1986) (describing independent agencies as “somewhat remote from presidential direction”).

<sup>5</sup> See, e.g., Sasha W. Boutilier, Note, *Simplistic Structure and History in Seila Law*, 96 N.Y.U. L. REV. 1582 (2021); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1 (2021).

<sup>6</sup> See, e.g., Mark V. Tushet, *The Administrative State in the Twenty-First Century: Deconstruction and/or Reconstruction*, DAEDALUS J. AM. ACAD. ARTS & SCI. 5 (2021).

<sup>7</sup> *Id.* at 6.

<sup>8</sup> *Id.* at 7.

<sup>9</sup> *Myers v. United States*, 272 U.S. 52, 168 (1926).

<sup>10</sup> *Id.* at 106–08.

<sup>11</sup> *Id.* at 176.

issue exercised only executive power, as opposed to judicial or legislative.<sup>12</sup> So, after *Myers*, Congress understood that it could create agencies with insulation from the President and still respect the separation of powers as long as the agency did not undermine the President's ability to control the executive. This understanding was confirmed in the Supreme Court's holding in *Humphrey's Executor*, which explained that Congress may limit the President's power to remove officers who are not "purely executive officers."<sup>13</sup>

Until recently, Congress has relied on the assumption that it can create agencies constitutionally even if they are not directly accountable to the President, so long as they do not wield executive power. Congress created the Securities and Exchange Commission, the National Credit Union, the Federal Trade Commission, the Consumer Financial Protection Bureau, and the National Labor Relations Board—all with insulation from the President's removal power. On the flip side, Presidents have been unable to directly control these agencies because, without the threat of removal, these agencies essentially answer to no one.<sup>14</sup>

In a series of holdings over the past few years, the Supreme Court has decided these agencies cannot constitutionally function while insulated from the President because such formations violate separation of powers.<sup>15</sup> These holdings spring from cases where plaintiffs complained of agency action and brought up constitutional challenges regarding agency directors' lack of presidential oversight. The majority of the Court accepted these constitutional arguments, so these plaintiffs should celebrate, right?

Although the Court showed little restraint in changing the political landscape of these agencies, the Justices found a way to avoid causing significant disruption to their operations—by only providing extremely limited remedies for such violations. However, a weak remedy for a constitutional violation is not necessarily an anomaly, particularly when the violation is rooted in separation of powers.<sup>16</sup> Many scholars have addressed the long-term concerns of independent agencies' looming downfall.<sup>17</sup> This article will address the short-term effects by discussing the aftermath of these

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<sup>12</sup> *Id.* at 127–28.

<sup>13</sup> 295 U.S. 602, 632 (1935).

<sup>14</sup> *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020) (noting that the director of the independent agency had "no boss, peers, or voters to report to").

<sup>15</sup> *See generally, id.*; *Collins v. Yellen*, 141 S. Ct. 1761 (2021).

<sup>16</sup> *See infra* Part III.

<sup>17</sup> *See supra* notes 3–6.

lawsuits and providing guidance for plaintiffs seeking redress. Further, this article argues that, contrary to scholarly criticism, the *Collins* remedy adequately addresses the problem at hand.

First, this note will provide background on the historical function of independent agencies, their constitutional issues, and how two recent Supreme Court cases expanded on the constitutional issue of removal protection in Part I. Then, this note will outline the unique battle plaintiffs face after those two cases in order to secure a remedy when they complain of unconstitutional agency action in Part II. Finally, the note argues that plaintiffs in cases involving separation of powers violations typically are not entitled to a remedy because the violation is often too attenuated from the plaintiff's injury. Thus, the remedial framework in *Collins* is appropriately narrow, providing appropriate relief when plaintiffs have suffered real harm.

## I. BACKGROUND

### A. History of Independent Agencies

The Constitution vests executive power in the President of the United States and bestows on him the duty to “take Care that the Laws be faithfully executed.”<sup>18</sup> The Court has interpreted the Constitution to empower the President to control “officers of the United States.”<sup>19</sup> Directors of federal agencies are considered “Officers of the United States” because they exercise significant authority of the U.S. government.<sup>20</sup> One way the President keeps officers accountable is through the threat of removal.<sup>21</sup> Most agency directors serve “at the pleasure of the President.”<sup>22</sup> In other words, the President appoints the directors, and the President can fire them at any time, for any reason.<sup>23</sup> This threat of removal ensures that the President retains complete

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<sup>18</sup>U.S. CONST. art. II, §§ 1, 3.

<sup>19</sup>Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483 (2010).

<sup>20</sup>Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018).

<sup>21</sup>Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1817 (2006) (“Because the powers the executive officers help exercise are ultimately the President’s, he may withdraw his authorization. When the President rescinds his authorization, he disempowers the executive officer and thereby removes her.”).

<sup>22</sup>See Manners & Menand, *supra* note 5, at 3; Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 786 (2013) (finding that of eighty-one agencies studied, twenty-three agencies possessed statutory removal protection and fifty-eight did not).

<sup>23</sup>See *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 627 (1935).

control of the executive branch.<sup>24</sup> As the Court in 1935 explained, “it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter’s will.”<sup>25</sup> Presidents frequently use this power of removal when agency directors are not furthering the goals of the President’s administration.<sup>26</sup>

With certain exceptions, “the executive power of the United States is completely lodged in the President.”<sup>27</sup> The *Myers* opinion revolves around executive power, ultimately holding that a restriction on the President’s ability to remove the postmaster was an unconstitutional restriction of his ability to control the executive branch.<sup>28</sup> The Court in *Myers* drew a clear line between executive and non-executive power, noting that the President cannot properly influence or control the discharge of officers exercising quasi-judicial duties.<sup>29</sup> Nine years later, the Court in *Humphrey’s Executor* explained that the inherent presidential power to remove officers it recognized in *Myers* was limited to “purely executive officers.”<sup>30</sup>

Some agencies do not exercise executive power and thus would not disrupt the President’s ability to control the executive branch.<sup>31</sup> For example, in *Humphrey’s Executor*, the Supreme Court held that the Federal Trade Commission (FTC) exercised quasi-legislative and quasi-judicial power and

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<sup>24</sup> *Id.* at 629.

<sup>25</sup> *Id.*

<sup>26</sup> E.g., Jim Tankersley, *Biden Fires Trump Appointee as Head of Social Security Administration*, N.Y. TIMES (Oct. 13, 2021), <https://www.nytimes.com/2021/07/09/business/biden-social-security-administration.html>; Michael D. Shear & Matt Apuzzo, *F.B.I. Director James Comey Is Fired by Trump*, N.Y. TIMES (May 9, 2017), <https://www.nytimes.com/2017/05/09/us/politics/james-comey-fired-fbi.html>; Helene Cooper & David E. Sanger, *Obama Says Afghan Policy Won’t Change After Dismissal*, N.Y. TIMES (June 24, 2010), <https://www.nytimes.com/2010/06/24/us/politics/24mcchrystal.html>; John Dickerson, *What Happened When President Carter Fired Five Cabinet Officials*, SLATE (Aug. 2, 2017, 1:47 PM), <https://slate.com/news-and-politics/2017/08/whistlestop-on-carters-cabinet-purge.html>; Ryan Kelly, *A List of Notable Presidential Firings Since 1951*, ROLL CALL (Nov. 7, 2018), <https://rollcall.com/2017/05/10/a-list-of-notable-presidential-firings-since-1951/>.

<sup>27</sup> *Myers v. United States*, 272 U.S. 52, 139 (1926) (quoting 7 ALEXANDER HAMILTON, *Pacificus No. I*, in WORKS OF ALEXANDER HAMILTON 76, 81 (John C. Hamilton ed., 1851)).

<sup>28</sup> *Myers*, 272 U.S. at 176.

<sup>29</sup> *Id.* at 135.

<sup>30</sup> 295 U.S. at 631–32.

<sup>31</sup> See *id.* at 624 (noting that the FTC is not charged with enforcing any policy, so its duties are neither political nor executive).

insignificant executive power.<sup>32</sup> In contrast to the postmaster at issue in *Myers*, Congress empowered the FTC to fill in gaps in statutes (legislative), recommend prosecution to the DOJ (judicial/executive), and investigate to inform Congress (legislative).<sup>33</sup> The Constitution does not empower the President to control the legislative or judicial branches.<sup>34</sup> So, the Court found Congress's decision to give the five-member board of the FTC removal protection constitutional.<sup>35</sup>

Congressional decisions to insulate agencies from presidential control reflect Congress's judgment on the values of independence and political control.<sup>36</sup> Agencies with independence from the President are "designed with the purpose of shielding expert decisionmakers from the shifting winds of politics."<sup>37</sup> Congress often creates agencies that regulate the economy or the environment with independence from the President.<sup>38</sup> These independent agencies reflect Congress's determination that certain areas require expertise and stability, not political pressure.<sup>39</sup>

Over the past few years, however, the Supreme Court has declared multiple agency structures unconstitutional for their lack of presidential oversight.<sup>40</sup> The Court's holdings stand in contrast with the last one-hundred years of precedent recognizing the operation and authority of independent agencies. Nevertheless, the Court's remedial holdings signal their hesitation to rock the boat too much, or at least too much too soon.

When a plaintiff complains of action taken by an agency whose structure violates the Constitution, the plaintiff's remedy will depend on the

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<sup>32</sup>*Id.* at 628 ("Such a body cannot in any proper sense be characterized as an arm or an eye of the executive.").

<sup>33</sup>*Id.*

<sup>34</sup>*Id.* at 629–30.

<sup>35</sup>*Id.* at 629 ("We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named.").

<sup>36</sup>Cristina M. Rodríguez, *Regime Change*, 135 HARV. L. REV. 1, 116 (2021).

<sup>37</sup>Meazell, *supra* note 4, at 1778.

<sup>38</sup>*See* Manners & Menand, *supra* note 5, at 75–76 (observing that directors of Securities and Exchange Commission, U.S. International Trade Commission, and Marine Mammal Commission have removal protection); Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623, *reprinted in* 5 U.S.C. app. at 1 (1970), and *in* 84 Stat. 2086 (1983) (making the Environmental Protection Agency an independent agency).

<sup>39</sup>Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 19 (2010).

<sup>40</sup>*E.g.*, *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020); *Collins v. Yellen*, 141 S. Ct. 1761, 1783 (2021).

constitutional defect. What the plaintiff typically seeks is an unwinding or invalidation of the agency action. When the constitutional defect is in the method of officer's appointment, the remedy is sweeping. This was the case in *Lucia v. SEC*, where an Administrative Law Judge (ALJ) was not properly appointed, and the remedy was to invalidate the hearing and conduct a new hearing before a properly appointed ALJ.<sup>41</sup> However, when the defect is structural, as is the case with removal issues because they pertain to separation of powers principles, the remedy is virtually nonexistent. *Collins v. Yellen* creates an extremely narrow remedy for plaintiffs complaining of insulated director(s) actions, and other doctrines further diminish the availability of remedies.<sup>42</sup>

### B. Constitutional Defects in Appointment

Courts typically declare an agency action void when that agency's director or leader was unconstitutionally appointed.<sup>43</sup> A constitutional defect in appointment arises because many agency leaders are "officers of the United States" contemplated by the Constitution and, thus, governed by the Appointments Clause.<sup>44</sup> The Appointments Clause dictates that the President must appoint officers with the advice and consent of the Senate.<sup>45</sup> When the President does not appoint an officer this way, that is a constitutional violation—the kind of violation that affects the validity of the officer's actions.<sup>46</sup>

For example, in *Lucia v. SEC*, the plaintiff challenged a Securities and Exchange Commission administrative proceeding before an Administrative Law Judge.<sup>47</sup> ALJs are officers of the United States according to the Constitution and, thus, are subject to the Appointments Clause.<sup>48</sup> The ALJ in *Lucia* was not appointed in the method required by the Appointments Clause,

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<sup>41</sup> See 138 S. Ct. 2044, 2055 (2018).

<sup>42</sup> See 141 S. Ct. at 1788–89.

<sup>43</sup> See, e.g., *Lucia*, 138 S. Ct. at 2055 (requiring a new hearing before a properly appointed official). See *Bowsher v. Synar*, 478 U.S. 714, 727–36 (1986) (holding that the Comptroller General was not an executive officer and could not exercise executive power granted to him by statute).

<sup>44</sup> U.S. CONST. art. II, § 2.

<sup>45</sup> *Id.*

<sup>46</sup> *Freytag v. Comm'r*, 501 U.S. 868, 877–84 (1991).

<sup>47</sup> See 138 S. Ct. 2044, 2050–55 (2018) (first citing *United States v. Germaine*, 99 U.S. 508, 510 (1879); and then citing *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)).

<sup>48</sup> *Lucia*, 138 S. Ct. at 2054 (citing *Freytag*, 501 U.S. at 882).

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so the ALJ arrived at his position unconstitutionally.<sup>49</sup> In effect, the ALJ was unconstitutionally wielding a “significant authority” of the United States.<sup>50</sup> The remedy in *Lucia* was to void the decision issued by the ALJ and give the plaintiff a new hearing before a properly appointed ALJ.<sup>51</sup> Because an officer cannot wield executive power without authority, the attempt to do so was void.

### C. Constitutional Defects in Structure

When the agency’s structure has a constitutional defect, as opposed to an issue regarding the appointment of its officers, the constitutional issue and remedy are quite different. An agency director may be appointed constitutionally and thus rightfully in a position to wield a “significant authority” of the United States, but the director’s independence from the President can still trigger a constitutional defect.<sup>52</sup> The issue when the director exercises executive power is whether the director’s insulation undermines the President’s ability to exercise his constitutionally vested duty to control the executive branch.

#### 1. *Seila Law v. CFPB*

The Supreme Court’s decision in *Seila Law* demonstrates its discomfort with independent agencies and comfort in defying its own precedent.<sup>53</sup> In *Seila Law*, the Consumer Financial Protection Bureau (CFPB) issued a civil investigative demand (CID) to Seila Law, requiring the firm to produce documents and answer interrogatories.<sup>54</sup> Seila Law refused to comply.<sup>55</sup> The CFPB filed a petition to enforce the investigative demand, and Seila Law argued that the structure of the CFPB was unconstitutional, making the demand an invalid, unenforceable action.<sup>56</sup> The Court agreed that the CFPB’s

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<sup>49</sup> *Lucia*, 138 S. Ct. at 2049 (noting that SEC staff members appointed the ALJ).

<sup>50</sup> *Id.* at 2052–53.

<sup>51</sup> *Id.* at 2055.

<sup>52</sup> See *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2189 (2020).

<sup>53</sup> *Id.* at 2226 (Kagan, J., concurring in part) (“The text of the Constitution, the history of the country, the precedents of this Court, and the need for sound and adaptable governance—all stand against the majority’s opinion.”).

<sup>54</sup> *Id.* at 2194 (majority opinion).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*



structure was constitutional, but did not decide whether to enforce the CID.<sup>57</sup> The Court held that the statute establishing the CFPB violated separation of powers by placing leadership of the Agency in the hands of a single director who the President could remove only for cause.<sup>58</sup>

This holding departed from the Court's long-standing precedent. The removal protection provision used for the CFPB was identical to the one the Court upheld in *Humphrey's Executor*.<sup>59</sup> The difference, the majority stated, is that a single director led the CFPB, unlike the FTC's multimember board at issue in *Humphrey's Executor*.<sup>60</sup> The majority found this "novel"<sup>61</sup> formulation constitutionally offensive, but as Justice Kagan points out, the formulation had a "fair bit of precedent behind it."<sup>62</sup> Justice Kagan points to examples of single-director independent agencies such as the Comptroller of the Currency, the Office of Special Counsel, the Social Security Administration (SSA), the Comptroller of the Treasury, and the Federal Housing Finance Agency.<sup>63</sup> The constitutionality of these agencies was not seriously questioned until recently, so lawyers and scholars widely assumed their constitutionality.<sup>64</sup> The Court described conflicting precedent as "exceptions" to the President's removal power rather than foundational case law, as scholars and courts previously assumed.<sup>65</sup> The *Seila Law* decision on the merits made a splash in the administrative law world.<sup>66</sup> The immediate

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 2197.

<sup>59</sup> *Id.* at 2239 (Kagan, J., concurring in part).

<sup>60</sup> *Id.* at 2197, 2204 (majority opinion) (holding that the CFPB's organization violates the Constitution because it vests power in a "single individual" who is "insulated from Presidential control").

<sup>61</sup> *Id.* at 2192.

<sup>62</sup> *Id.* at 2241 (Kagan, J., concurring in part).

<sup>63</sup> *Id.* After *Seila*, the Supreme Court extended its holding to the FHFA and declared its structure unconstitutional. See *Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2021); Also, the SSA declared its removal protection provision unconstitutional and severed it shortly after the *Collins* decision. See *Constitutionality of the Commissioner of Social Security's Tenure Protection*, 45 Op. O.L.C. \_\_\_, slip op. 10 (July 8, 2021), <https://www.justice.gov/olc/file/1410736/download>.

<sup>64</sup> See, e.g., Brian Frazelle, *Text, History, and Precedent Leave No Doubt that the CFPB Is Constitutional*, ADMIN. & REGUL. L. NEWS, Winter 2020, at 4; Manners & Menand, *supra* note 5, at 69.

<sup>65</sup> *Seila Law*, 140 S. Ct. at 2192 ("Our precedents have recognized only two exceptions to the President's unrestricted removal power.").

<sup>66</sup> E.g., Howard Schweber, *The Roberts Court's Theory of Agency Accountability: A Step in the Wrong Direction*, 8 BELMONT L. REV. 460 (2021); Markham S. Chenoweth & Michael P. DeGrandis, *Out of the Separation-of-Powers Frying Pan and into the Nondelegation Fire: How the*

consequence, the remedy, has been slightly overlooked in the scholarship, however.

Seila Law proffered two arguments for its ideal remedy: voiding the CFPB's demand. First, that the entire Agency was unconstitutional and powerless to act.<sup>67</sup> Second, that Congress would not have wanted a "dependent" CFPB, so severing the removal protection from the other provisions would prove futile.<sup>68</sup> The Court rejected both arguments.<sup>69</sup> First, the Court declined to declare the entire Agency unworkable.<sup>70</sup> The Court declined to "eliminate" the CFPB, attempting to avoid "trigger[ing] a major regulatory disruption."<sup>71</sup> As for the second argument, the Court held that the removal protection provision was severable from the other statutory provisions that define the CFPB's authority.<sup>72</sup> The Court explained, "[i]t has long been settled that 'one section of a statute may be repugnant to the Constitution without rendering the whole act void.'"<sup>73</sup> On that principle, the Court severed the Director's removal protection provision from the rest of the CFPB's enabling statute.<sup>74</sup>

After the Court addressed those arguments, the Court punted on the ultimate remedial question. The Court remanded the case and instructed the lower court to decide whether the Acting Director (whom the President *could* fire at will) had ratified the board's issuance of an investigative demand.<sup>75</sup> The Ninth Circuit later held that the Acting Director had validly ratified the CID.<sup>76</sup> That ratification by a director under presidential control remedied any

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*Court's Decision in Seila Law Makes CFPB's Unlawful Structure Even Worse*, 2020 U. CHI. L. REV. ONLINE, Aug. 27, 2020, at 55; Edward Cantu, *Seila Law As Separation-of-Powers Posturing*, 110 GEO. L.J. ONLINE 38 (2021); Jack M. Beermann, *Seila Law: Is There A There There?*, 2020 U. CHI. L. REV. ONLINE, Aug. 27, 2020, at 87; Cochran v. U.S. Sec. and Exch. Comm'n, 20 F.4th 194 (5th Cir. 2021), *cert. granted* 20 F.4th 194 (2022) (asserting that the SEC ALJs enjoy multiple layers of "for cause" removal protection, unconstitutionally insulating them from the President's removal power).

<sup>67</sup> See *Seila Law*, 140 S. Ct. at 2208–10.

<sup>68</sup> See *id.*

<sup>69</sup> *Id.* at 2209.

<sup>70</sup> *Id.* at 2210–11.

<sup>71</sup> *Id.* at 2210.

<sup>72</sup> *Id.* at 2211.

<sup>73</sup> *Id.* at 2208 (quoting *Loeb v. Columbia Twp. Trs.*, 179 U.S. 472, 490 (1900)).

<sup>74</sup> *Id.* at 2211.

<sup>75</sup> *Id.* at 2211.

<sup>76</sup> *Consumer Fin. Prot. Bureau v. Seila L. LLC*, 997 F.3d 837, 846 (9th Cir. 2021) ("We conclude that the CID was validly ratified . . .").

constitutional injury *Seila Law* may have suffered due to the CFPB's original structure.<sup>77</sup> So, after years of litigation, *Seila Law* was left with no remedy, and the CFPB enforced the demand.<sup>78</sup>

*Seila Law* was a split decision on both the merits and the remedy. Justice Kagan argued that the "Constitution and history demand" that the CFPB's independence survive.<sup>79</sup> Justice Thomas agreed with the majority on the impropriety of the CFPB's independence but argued against severability.<sup>80</sup> Thomas also opined that any ratification by an acting director was irrelevant.<sup>81</sup> The possibility of ratification will be further discussed *infra*, in Part II. In *Collins v. Yellen*, discussed below, the Court expanded its holding and answered questions regarding remedies it punted in *Seila*.

## 2. *Collins v. Yellen*

In *Collins v. Yellen*, the Supreme Court shed more light on remedies for structural constitutional defects, but it still looks dark for plaintiffs. In *Collins*, the Supreme Court held that the Federal Housing Finance Agency (FHFA), like the CFPB in *Seila*, had a structural constitutional defect.<sup>82</sup> Following its holding in *Seila Law*, the Court found that because a single director led the FHFA, the removal restriction was unconstitutional.<sup>83</sup> The Court noted that because of the FHFA Director's constitutional appointment, the Agency's actions were not automatically void.<sup>84</sup>

With this holding, the Court rejected one possible remedy: *per se* voiding the Agency's actions when a structural constitutional defect exists. Instead, the Court held that the unconstitutional removal provision was severable from the rest of the governing law.<sup>85</sup> As it did in *Seila*, the Court remanded

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Seila Law*, 140 S. Ct. at 2225 (Kagan, J., concurring in part).

<sup>80</sup> *Id.* at 2220 (Thomas, J., concurring in part).

<sup>81</sup> *Id.* ("Regardless of whether the CFPB's ratification theory is valid, the Court of Appeals on remand must reach the same outcome: The CFPB's civil investigative demand cannot be enforced against *Seila*.").

<sup>82</sup> 141 S. Ct. 1761, 1783 (2021).

<sup>83</sup> *Id.* at 1784 ("A straightforward application of our reasoning in *Seila Law* dictates the result here.").

<sup>84</sup> *Id.* at 1787 ("[T]here was no constitutional defect in the statutorily prescribed method of appointment to that office. As a result, there is no reason to regard any of the actions taken by the FHFA in relation to the third amendment as void.").

<sup>85</sup> *Id.* at 1788.

the remedy question.<sup>86</sup> But this time, the Court made a few new suggestions. First, the Court notes that its holding “does not necessarily mean . . . that [plaintiffs] have no entitlement to retrospective relief.”<sup>87</sup> The Court suggests plaintiffs will have a chance at meaningful relief if the removal restriction is causally connected to their complained of injury.<sup>88</sup> In other words, would the President have fired the director if he could have? Second, the Court gave examples of when retrospective relief would be available: “[if] the President had made a public statement expressing displeasure with actions taken by a Director and had asserted that he would remove the Director if the statute did not stand in the way.”<sup>89</sup> Or, if “the President had attempted to remove a Director but was prevented from doing so by a lower court decision holding that he did not have ‘cause’ for removal.”<sup>90</sup> Essentially, the Court asks lower courts to base a remedy on retrospective speculation: would the President have removed the director who supervised the complained-of action?<sup>91</sup> If so, perhaps plaintiffs would have an argument that the Agency action would have never occurred.

Again, not all Justices were on the same page about the remedy. Justice Gorsuch noted in his concurrence how rarely removal protection would play a causal role in the plaintiff’s harm.<sup>92</sup> Gorsuch criticized the remedy announced in *Collins*, calling it a “novel and feeble substitute” for traditional remedies or “remedial science fiction.”<sup>93</sup> Gorsuch proposed a more straightforward remedy:

[R]ather than carve out some suit-specific, removal-only, money-in-the-bank exception to our normal rules for Article II violations, I would take a simpler and more familiar path. Whether unconstitutionally installed or improperly unsupervised, officials cannot wield executive power except as Article II provides. Attempts to do so are void; speculation about alternate universes is neither necessary nor appropriate. In the world we inhabit, where individuals are

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<sup>86</sup> *Id.* at 1789.

<sup>87</sup> *Id.* at 1788.

<sup>88</sup> *See id.* at 1788–89.

<sup>89</sup> *Id.* at 1789.

<sup>90</sup> *Id.*

<sup>91</sup> *See id.* at 1788.

<sup>92</sup> *Id.* at 1797 (Gorsuch, J., concurring in part).

<sup>93</sup> *Id.*

burdened by unconstitutional executive action, they are “entitled to relief.”<sup>94</sup>

Gorsuch noted that the majority in *Collins* might have known, or even intended, that lower courts would simply refuse retroactive relief in future cases.<sup>95</sup> “But if this is what the Court intends, why not just admit it and put these parties out of their misery?”<sup>96</sup>

On the opposing side, Justice Kagan, who vehemently dissented in *Seila Law* and would have dissented in *Collins* if not for stare decisis, was on board with this complicated remedy.<sup>97</sup> To Kagan, the remedy the Court adopted in *Collins* softens the blow of the Court’s recent jurisprudence on independent agencies.<sup>98</sup> She also supported its logic: “[g]ranted relief in any other case would, contrary to usual remedial principles, put the plaintiffs ‘in a better position’ than if no constitutional violation had occurred. . . . [The] holding ensures that actions the President supports—which would have gone forward whatever his removal power—will remain in place.”<sup>99</sup>

## II. REMEDIES AFTER *SEILA* AND *COLLINS*

Because a constitutional defect regarding removal protection concerns the separation of powers, the remedy proposed in *Collins* is appropriately narrow.<sup>100</sup> Furthermore, remedies involving agency actions have always been limited. Even before *Collins*, courts allowed various defense doctrines such as laches, ratification, and the de facto officer doctrine to preclude plaintiffs from securing a remedy for a constitutional violation.<sup>101</sup> With the addition of *Collins*, it will be nearly impossible for plaintiffs to secure a remedy when complaining of unconstitutional agency actions. However, as this paper

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<sup>94</sup> *Id.* at 1799.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *See id.* at 1799–1800 (Kagan, J., concurring in part).

<sup>98</sup> *Id.* at 1801 (“The majority’s remedial holding limits the damage of the Court’s removal jurisprudence.”).

<sup>99</sup> *Id.* at 1801–02.

<sup>100</sup> *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 508–09 (2010) (noting that it is not the existence of the board that violates the separation of powers, but the substantive removal restrictions).

<sup>101</sup> *E.g.*, *Bureau of Consumer Fin. Prot. v. Citizens Bank, N.A.*, 504 F. Supp. 3d 39, 50 (D.R.I. 2020); *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 804 (8th Cir. 1979); *Waite v. City of Santa Cruz*, 184 U.S. 302, 322 (1902).

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discusses in Part III, plaintiffs are rarely entitled to remedies in these cases because separation of powers violations are seldom remotely related to—let alone a cause of—the plaintiffs’ harm.

*A. Ratification*

The ratification doctrine that the Court applied in *Seila* stems from agency law (as in principal-agent, not federal agencies).<sup>102</sup> The ratification doctrine encompasses the idea that a legitimate agent can ratify a decision made previously by an improper agent on behalf of the principal.<sup>103</sup> When a legitimate agent validly ratifies an act, the effect relates back: the validity of the decision dates back to the time the original agent improperly acted.<sup>104</sup>

Ratification must meet three basic requirements to have a retroactive effect.<sup>105</sup> First, the ratifier must have the authority to take the action it attempts to ratify at the time of ratification.<sup>106</sup> Second, the ratifier must have full knowledge of the decision it attempts to ratify.<sup>107</sup> And “[t]hird, the ratifier must make a detached and considered affirmation of the earlier decision.”<sup>108</sup>

The Ninth Circuit applied the ratification doctrine when it dealt with the remand of *Seila Law*, holding that the Acting Director of the CFPB validly ratified the CID at issue.<sup>109</sup> After the Supreme Court held in *Seila Law* that the CFPB’s structure violated the separation of powers, the Commission restructured itself, and its current Director, Kathleen Kraninger, expressly ratified the Agency’s earlier decision to issue the civil investigative demand to *Seila Law*.<sup>110</sup> When Kraninger ratified the CFPB’s decision, she knew that the President could remove her with or without cause.<sup>111</sup> The Ninth Circuit noted that the CFPB, as an agency, had the authority to issue the CID both at the time of the action and when Kraninger ratified it, thus meeting the first

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<sup>102</sup> *Bureau of Consumer Fin. Prot.*, 504 F. Supp. 3d at 50.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 602 (3d Cir. 2016); *FEC v. NRA Pol. Victory Fund*, 513 U.S. 88, 98 (1994) (citation omitted) (“[I]t is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made.”).

<sup>107</sup> *Bureau of Consumer Fin. Prot.*, 504 F. Supp. 3d at 50.

<sup>108</sup> *Id.* (quoting *Advanced Disposal Servs. E., Inc.*, 820 F.3d at 602).

<sup>109</sup> 997 F.3d 837, 846 (9th Cir. 2021).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

prong of the ratification doctrine.<sup>112</sup> The fact that Director Kraninger knew that the President could remove her without cause and still ratified the issuance of the CID satisfied the second and third prongs of the ratification doctrine.<sup>113</sup> The Ninth Circuit was satisfied that Kraninger's ratification remedied any constitutional injury that *Seila Law* may have suffered due to the CFPB's original structure.<sup>114</sup> Accordingly, the Ninth Circuit reaffirmed the district court's order granting the CFPB's petition to enforce the CID.<sup>115</sup>

The Ninth Circuit opined that "ratification is available to cure both Appointments Clause defects and structural, separation-of-powers defects."<sup>116</sup> However, after *Collins*, the ratification doctrine likely only applies to cure Appointments Clause defects. In *Collins*, the Supreme Court essentially declared ratification unnecessary. Rejecting the plaintiffs' argument that the director's actions would be void if not ratified, the Court held that structural constitutional defects do not necessarily render agency actions void and thus do not always require ratification.<sup>117</sup> The *Collins* remand is still pending in the U.S. District Court for the Southern District of Texas.<sup>118</sup>

Plaintiffs have criticized the ratification doctrine for allowing agencies "unlimited mulligans," discouraging valid constitutional challenges, and rewarding agencies for constitutional intransigence and Congress for its overreach.<sup>119</sup> As one litigant argued in a petition for certiorari, "[i]f ratification can cure a structural violation of the Constitution, that means that the proper remedy for the underlying constitutional violation is effectively no remedy at all. 'Permitting ratification doesn't cure the constitutional injury, it exacerbates it.'"<sup>120</sup>

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 848.

<sup>116</sup> *Id.* at 847.

<sup>117</sup> *Collins v. Yellen*, 141 S. Ct. 1761, 1788 (2021) ("The [plaintiffs] argue that [the *Seila Law* remand] implicitly meant that the Director's action would be void unless lawfully ratified, but we said no such thing. The [*Seila Law*] remand did not resolve any issue concerning ratification, including whether ratification was necessary.").

<sup>118</sup> 27 F.4th 1068 (5th Cir. 2022).

<sup>119</sup> Petition for Writ of Certiorari at 18, *Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC*, 828 Fed. App'x 69 (2d Cir. 2020) (No. 20-1758).

<sup>120</sup> *Id.* at 17.

However, this criticism loses sight of the nature of the constitutional violation. Structural flaws in agency design relate to the separation of powers, specifically implicating the control of the executive branch. As this article discusses *infra*, separation of powers designs the overall structure of the U.S. government without directly affecting individual liberties.<sup>121</sup> Separation of powers operates at a systemic level, detached from individuals.<sup>122</sup> Because of this, plaintiffs rarely experience any injury connected to structural constitutional issues.

### B. Laches

The doctrine of laches provides federal agencies with another way to defend their actions under an unconstitutional structure. The *Collins* Court noted this possibility when it directed the lower court to consider whether the Federal Agency's argument regarding laches precludes any relief.<sup>123</sup>

Courts originally developed the doctrine of laches as an equitable doctrine before statutes of limitation were widely in place.<sup>124</sup> Defendants utilize laches as an affirmative defense to bar a plaintiff's claim when the plaintiff has unreasonably or inexcusably delayed the lawsuit, causing the defendant prejudice.<sup>125</sup> Courts still apply it, albeit rarely, because the statute of limitations generally dictates whether the plaintiff has taken too long to bring their suit.<sup>126</sup> The doctrine of laches enables courts to consider whether the plaintiff took too long by "examin[ing] all aspects of the equities affecting each case," even when the plaintiff brought the suit within the statute of limitations.<sup>127</sup>

In *Collins*, three of Fannie Mae's and Freddie Mac's shareholders complained of an amendment to a stock purchase agreement between the Treasury and Fannie Mae and Freddie Mac, under which the Treasury was to buy out shareholders after the housing market crash of 2008.<sup>128</sup> In addition to

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<sup>121</sup> See *infra* Part III and note 167.

<sup>122</sup> See *infra* Part III and note 167.

<sup>123</sup> 141 S. Ct. 1761, 1789 n.26 (2021).

<sup>124</sup> *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 805 (8th Cir. 1979) ("The doctrine of laches is premised upon the same principles that underlie statutes of limitation . . .").

<sup>125</sup> *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265, 277 (8th Cir. 2004).

<sup>126</sup> *Reynolds v. Heartland Transp.*, 849 F.2d 1074, 1075–76 (8th Cir. 1988) (explaining that the "statute of limitation is a rough rule of thumb in considering the question of laches, and constitutes a pertinent factor in evaluating the equities").

<sup>127</sup> *Goodman*, 606 F.2d at 806.

<sup>128</sup> 141 S. Ct. at 1772, 1775.



complaining about the amendment, the shareholders disputed the constitutionality of the FHFA, which was tasked with supervising the agreement between the Treasury and Fannie Mae and Fannie Mac.<sup>129</sup> The FHFA tried to defend the first claim by utilizing laches, alleging that the shareholders' delay in filing suit prejudiced the Treasury because, for some time after the FHFA enacted the amendment, the shareholders had a chance of benefitting from the amendment.<sup>130</sup> The FHFA alleged that the shareholders waited to file suit until it became apparent that the amendment would not benefit them.<sup>131</sup> The shareholders responded that laches did not apply because they filed their complaint within the statute of limitations period and did not cause prejudice to the Treasury.<sup>132</sup> The Court declined to decide the fact issue but directed the lower court to address the possibility of applying laches.<sup>133</sup>

Courts rarely apply the doctrine of laches, but it is yet another way for federal agencies to defend their actions under unconstitutional structures. So, even if plaintiffs can fit into the narrow boundaries of the *Collins* remedy, laches could block them from successfully obtaining the remedy.

### C. *De Facto Officer Doctrine*

Another ancient tool of equity, the de facto officer doctrine, can constitute another potential roadblock for plaintiffs seeking remedies against agencies with constitutional defects. The doctrine arose in fifteenth-century England.<sup>134</sup> Courts created it to confer validity upon acts performed by a person who acted under the color of official title, even though plaintiffs later discovered that the person did not legally hold office.<sup>135</sup> A “de facto officer” is “one whose title is not good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the

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<sup>129</sup> *Id.* at 1775.

<sup>130</sup> *Id.* at 1789 n.26.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* (“The lower courts may also consider all issues related to the federal parties’ argument that the doctrine of laches precludes any relief.”).

<sup>134</sup> Note, *The De Facto Officer Doctrine*, 63 COLUM. L. REV. 909, 909 n.1 (1963) (“The first reported case to discuss the concept of de facto authority was The Abbe of Fountaine, 9 Hen. VI, at 32(3) (1431).”).

<sup>135</sup> *Ryder v. United States*, 515 U.S. 177, 180 (1995).

appearance of being an intruder or usurper.”<sup>136</sup> The D.C. Circuit described the doctrine as “protect[ing] citizens’ reliance on past government actions and the government’s ability to take effective and final action.”<sup>137</sup>

How the de facto officer doctrine applies to agency leaders remains unclear. In *Aurelius Investment v. Puerto Rico*, a group of corporations challenged the action taken by the Financial Oversight and Management Board of Puerto Rico.<sup>138</sup> The Board had instituted debt adjustment proceedings, and a group of corporations challenged the debt proceedings on two bases: (1) the Board was appointed in violation of the Appointments Clause, and (2) the Board’s independence from the President violated of separation of powers.<sup>139</sup> The First Circuit held that the members of the Board were “officers of the United States” whom the President must appoint following the Appointments Clause.<sup>140</sup> However, the de facto officer doctrine applied and required dismissal of the challenges.<sup>141</sup>

The First Circuit reasoned that the Board members acted with the color of authority, and the Board members’ titles to office were never in question until that lawsuit.<sup>142</sup> Additionally, the First Circuit feared that awarding the corporations the full extent of the relief they requested would have “negative consequences for the many, if not thousands, of innocent third parties who have relied on the Board’s actions until now.”<sup>143</sup> Finally, the court worried about nullifying the Board’s years of work and canceling the Agency’s progress.<sup>144</sup> Thus, the de facto officer doctrine applied and mandated the dismissal of the petition, leaving the corporations with no relief.<sup>145</sup>

The challengers in *Aurelius* petitioned for certiorari, which the Supreme Court granted, and eventually determined that no constitutional error existed in the Board’s appointment.<sup>146</sup> Because of the Court’s holding on the constitutional issue, the Court did not reach the discussion of the de facto

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<sup>136</sup> *Waite v. City of Santa Cruz*, 184 U.S. 302, 323 (1902).

<sup>137</sup> *Andrade v. Lauer*, 729 F.2d 1475, 1499 (D.C. Cir. 1984).

<sup>138</sup> 915 F.3d 838, 848 (1st Cir. 2019), *rev’d and remanded sub nom.* *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 859–60.

<sup>141</sup> *Id.* at 862.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> 140 S. Ct. 1649, 1665 (2020).

officer doctrine.<sup>147</sup> Similar to laches and ratification, the de facto officer doctrine presents an additional defense that agencies can potentially utilize to defend their actions and bar plaintiffs from a remedy.

#### D. *The Effect of the Collins Remedy*

The *Collins* standard will likely negate the availability of a remedy on remand and has already affected plaintiffs' standing. In *Lujan v. Defenders of Wildlife*, the Supreme Court held that to satisfy Article III standing, a plaintiff must show it has suffered an injury that is "fairly traceable" to the defendant's conduct and would likely be redressed by a decision in its favor.<sup>148</sup> For plaintiffs seeking retrospective relief based on a removal restriction, Article III requires them to demonstrate a nexus between the removal restriction and compensable harm.<sup>149</sup> Since *Collins*, district courts have shut down plaintiffs' challenges because they cannot demonstrate this nexus.<sup>150</sup>

Several plaintiffs have brought claims challenging denials of social security benefits, possibly because Justice Kagan pointed out in *Collins* that the SSA was "next on the chopping block."<sup>151</sup> This turned out to be true. As discussed *supra*, the Office of Legal Counsel soon acknowledged in a slip opinion that the Social Security Administration's removal restriction was

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<sup>147</sup> *Id.* ("Neither, since we hold the appointment method valid, need we consider the application of the *de facto* officer doctrine.").

<sup>148</sup> 504 U.S. 555, 560 (1992).

<sup>149</sup> *Standifird v. Kijakazi*, No. 3:20CV1630-JO-BLM, 2022 WL 970741, at \*3 (S.D. Cal. Mar. 31, 2022) (citing *Collins v. Yellen*, 141 S. Ct. 1761, 1789 (2021)).

<sup>150</sup> *E.g.*, *Lisa Y. v. Comm'r of Soc. Sec.*, 570 F. Supp. 3d 993, 1003 (W.D. Wash. 2021) ("[T]here is nothing showing the Commissioner or the SSA implemented new and relevant agency action that may have turned upon the President's inability to remove the Commissioner."); *Amanda B. v. Comm'r, Soc. Sec. Admin.*, No. 3:20-CV-00434-BR, 2021 WL 4993944, at \*9 (D. Or. Oct. 26, 2021) ("Plaintiff here . . . does not allege 'the SSA Commissioner took any action that is in any way related to the ALJ's decision' or the decision by the Appeals Council."); *Jordan v. Comm'r of Soc. Sec. Admin.*, No. CV-21-08022-PCT-DGC, 2022 WL 842902, at \*3 (D. Ariz. Mar. 22, 2022) (finding no apparent connection between an ALJ denying the plaintiff's claims and the removal provision of the Social Security Act); *Bruce v. Comm'r of Soc. Sec.*, No. 1:21-CV-35, 2022 WL 1555402, at \*10 (N.D. Ohio May 17, 2022) (interpreting *Collins* to say that an unconstitutional removal provision does not necessarily make agency action unlawful, and plaintiff lacked standing without tracing harm to an unlawful action).

<sup>151</sup> 141 S. Ct. at 1802 (Kagan, J., concurring in part).

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unconstitutional.<sup>152</sup> For example, in *Boger v. Kijakazi*, an ALJ of the Social Security Administration denied a plaintiff disability benefits after finding the plaintiff not disabled within the meaning of the Social Security Act.<sup>153</sup> An ALJ's decision functions as the Commissioner's final decision, so the plaintiff requested judicial review.<sup>154</sup> The plaintiff in *Boger* brought up the constitutional challenge to the Commissioner's removal restriction, arguing that all actions taken by the Commissioner (and his appointed ALJs) were void.<sup>155</sup> However, the district court rejected this constitutional challenge because the plaintiff failed to provide any evidence of a nexus between the removal restriction and the denial of benefits.<sup>156</sup>

Similarly, in *Rebecca, C. v. Kijakazi*, the plaintiff sought judicial review of her denial of disability benefits under the SSA and brought a constitutional challenge for the removal restriction.<sup>157</sup> This plaintiff produced some evidence attempting to establish a nexus between the removal restriction and her denial of benefits.<sup>158</sup> She argued that President Biden would have removed Commissioner Saul sooner but for the removal provision, pointing to reasons the President later removed Commissioner Saul.<sup>159</sup> However, the district court denied her challenge because Acting Commissioner Berryhill (*not* Commissioner Saul), whom the President could remove at will, had appointed the ALJ, who denied her benefits.<sup>160</sup> Although unsuccessful, *Rebecca C. v. Kijakazi* provides an example of the type of arguments plaintiffs need to make at the district court level to have any chance of retrospective relief.

Perhaps the ultimate impact of *Collins* is that only the President himself has Article III standing to complain of an unconstitutional removal restriction. Insulation of executive agencies injures the President's ability to carry out his constitutional duties and further his policy goals. Executive

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<sup>152</sup> Constitutionality of the Commissioner of Social Security's Tenure Protection, *supra* note 63, at 10.

<sup>153</sup> No. 1:20-CV-00331-KDB, 2021 WL 5023141, at \*1 (W.D.N.C. Oct. 28, 2021).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at \*3.

<sup>156</sup> *Id.*

<sup>157</sup> No. 2:20-CV-2026-SI, 2022 WL 843215, at \*1 (D. Or. Mar. 22, 2022).

<sup>158</sup> *Id.* at \*3.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at \*3–4.

privilege, for example, is a claim that only the President has, and it also derives from the separation of powers principles.<sup>161</sup>

The Constitution does not expressly define the President's right to confidential communications.<sup>162</sup> Instead, the privilege derives from the supremacy of the executive branch.<sup>163</sup> The confidentiality of Presidential conversations is meant to protect the President's ability to have full and unfettered discussions with advisors, liberated from the veil of confidentiality.<sup>164</sup> "The privilege belongs to the Government and must be asserted by [the government]; it can neither be claimed nor waived by a private party."<sup>165</sup> However, the exclusivity of this claim does not mean that executive privilege only affects the President. The executive privilege exists for the benefit of the people, not any individual.<sup>166</sup> Separation of powers is not only about protecting presidential authority; it is ultimately designed to secure the freedom of the individual.<sup>167</sup> Despite this relation to individual freedoms, private parties cannot bring claims asserting harm from executive privilege. Although executive privilege and separation of powers overall are designed to benefit individuals, they both operate at abstract, systemic levels. They thus do not lend themselves to directly harming private persons. As this article will discuss *infra*, removal protection provisions operate similarly.

### III. CONSTITUTIONAL VIOLATIONS WITH NO REMEDY

The plaintiffs in *Collins* opened their reply brief with a warning: "[n]o one would bring a separation of powers lawsuit if the only remedy were a judicial declaration years after the fact that the Constitution was violated."<sup>168</sup> The Court's remedial holding certainly defies that warning. However, in the larger scheme of constitutional violations, the *Collins* remedy is not so unique.

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<sup>161</sup> *United States v. Nixon*, 418 U.S. 683, 708 (1974) ("The [executive] privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.").

<sup>162</sup> *Trump v. Thompson*, 20 F.4th 10, 26 (D.C. Cir. 2021), *cert. denied*, 142 S. Ct. 1350 (2022) (mem. op.).

<sup>163</sup> *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 447 (1977).

<sup>164</sup> *Nixon*, 418 U.S. at 708.

<sup>165</sup> *United States v. Reynolds*, 345 U.S. 1, 7 (1953) (footnotes omitted).

<sup>166</sup> *Trump*, 20 F.4th at 26 (citing *Nixon*, 433 U.S. at 447–49).

<sup>167</sup> *Bond v. United States*, 564 U.S. 211, 221 (2011).

<sup>168</sup> Reply Brief of Petitioners at 1, *Collins v. Mnuchin*, 141 S. Ct. 1761 (2021) (Nos. 19-422, 19-563).

Although many constitutional violations are acknowledged, they do not necessarily result in substantial remedies.<sup>169</sup> But perhaps the most meaningful relief *is* the declaration of unconstitutionality.<sup>170</sup> In the Court’s 2021 ruling in *Uzuegbunam v. Preczewski*, it held that a plaintiff could bring an action for infringement of free speech rights even without a claim of monetary harm; a request of nominal damages will suffice.<sup>171</sup> Similarly, a Fifth Amendment physical taking case, *Loretto v. Teleprompter Manhattan CATV Corp.*, involved only nominal damages on remand.<sup>172</sup> In a way, nominal damages can provide prospective relief.<sup>173</sup> An award of nominal damages recognizes a legal wrong, providing a form of declaratory relief.<sup>174</sup> When a plaintiff has not suffered actual damages or imminent future injury to support an injunction, nominal relief can vindicate the plaintiff’s legal injury.<sup>175</sup>

The idea that declaratory-like relief can vindicate a constitutional violation makes the *Collins* remedy seem more reasonable. The *Collins* remedy allows more than declaratory relief if a plaintiff can prove that a removal restriction indeed caused the plaintiff harm.<sup>176</sup> However, when they cannot, the relief will be limited to a holding declaring the unconstitutionality of an agency’s structure. As courts have recognized in other constitutional violations, declaratory-like relief can redress injuries.<sup>177</sup> The *Collins* remedy

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<sup>169</sup>David Zaring, *Toward Separation of Powers Realism*, 37 YALE J. ON REG. 708, 728 (2020) (“In those rare cases where courts decide to reward a separation of powers claimant with a decision on the merits, they award no relief to the plaintiff.”).

<sup>170</sup>*See, e.g.*, Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 GEO. L.J. 1263, 1326 (2021) (noting how “symbolic” relief expresses respect for the plaintiff’s injury); Ralph M. Stockton, Jr., Comment, *Constitutional Law—Declaratory Judgment—Remedy in Federal Constitutional Cases*, 27 N.C. L. REV. 353, 354 (1949); Allison Cohn, Comment, *Can \$1 Buy Constitutionality?: The Effect of Nominal and Punitive Damages on the Prison Litigation Reform Act’s Physical Injury Requirement*, 8 U. PA. J. CONST. L. 299, 299 (2006) (“[A] declaration that one’s constitutional rights have been violated is valuable in and of itself. . .”).

<sup>171</sup>141 S. Ct. 792, 801 (2021) (“[N]ominal damages are redress, not a byproduct.”).

<sup>172</sup>458 U.S. 419, 441 (1982) (holding there was a physical taking under the Fifth Amendment Takings Clause but remanding the issue of whether one dollar was “just compensation”); *Loretto v. Teleprompter Manhattan CATV Corp.*, 446 N.E.2d 428, 434–35 (1983) (finding on remand that plaintiffs will receive “just compensation” for the takings in the amount of one dollar).

<sup>173</sup>*Uzuegbunam*, 141 S. Ct. at 798; *Article III-Standing-Nominal Damages-Uzuegbunam v. Preczewski*, 135 HARV. L. REV. 323, 326 (2021).

<sup>174</sup>*Uzuegbunam*, 141 S. Ct. at 798.

<sup>175</sup>*See id.* at 800.

<sup>176</sup>141 S. Ct. 1761, 1765 (2021).

<sup>177</sup>*See supra*, note 170.

adequately addresses claims because the remedy is narrowly tailored to the unique violation of the separation of powers.<sup>178</sup>

Separation of powers is not an individual liberty like the First Amendment, so an individual will seldom suffer legal injury because of a separation of powers violation.<sup>179</sup> The Framers deliberately separated the governmental powers between the executive, legislative, and judicial to create a powerful government—but one not powerful enough to threaten individual liberties.<sup>180</sup> Separation of powers is one way the structural design of the U.S. government effectively protects individual liberty.<sup>181</sup> Because separation of powers operates to protect individuals at a systemic level, threats to individual liberty do not present as dramatically as Bill of Rights violations.<sup>182</sup>

*Collins* presents an example of how the systemic nature of the separation of powers can make violations too remote from the individual to actually cause the individual harm. Removal restrictions on agency directors often would not make a difference in the actions that agencies take. The severability scheme that the Court has adopted in cases like *Collins*, where the removal protection does not affect the validity of agency actions, requires a causal link between constitutional defects and individual harm before issuing retroactive relief. Without that link, it makes sense to limit the impact of declaring a constitutional defect to the structure itself: the agency must fix the constitutional defect by prospectively removing the “for cause” protection, but the agency’s actions are not invalid.

Although the remedial scheme in *Collins* presents practical difficulties, this note argues that it ultimately is the proper remedy and avoids causing great disruption to the administrative state. The remedy is appropriately

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<sup>178</sup>Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 508 (2010) (“[W]hen 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.”) (internal quotation marks omitted); see also John Doe Co. v. Consumer Fin. Prot. Bureau, 849 F.3d 1129, 1133 (D.C. Cir. 2017) (stating that “traditional constraints on separation-of-powers remedies” refuted the plaintiffs’ position that a removal-restrictions claim could invalidate a CFPB action against them).

<sup>179</sup>See Peter Shane, *Two Cheers for Recess Appointments*, REGUL. REV. (June 26, 2014), <https://www.theregreview.org/2014/06/26/26-shane-two-cheers-recess-appointments> (noting that a separation of powers triumph would almost certainly not “change the outcome of the [regulated party’s] case.”).

<sup>180</sup>Dennis G. LaGory, Comment, *Federalism, Separation of Powers, and Individual Liberties*, 40 VAND. L. REV. 1353, 1354–55 (1987).

<sup>181</sup>*Id.* at 1355.

<sup>182</sup>See *id.* at 1363.

limited for the unique violation of separation of powers, which often does not directly impact individuals.<sup>183</sup> If an individual cannot prove that an unconstitutional removal restriction caused them harm in the real world, retrospective relief is inappropriate.<sup>184</sup> Additionally, the remedy's limitations curb extensive costs that would come with undoing years of agency action.<sup>185</sup>

Justice Gorsuch points out some of the remedy's practical difficulties in his concurrence, particularly the speculative nature of the inquiry and discovery.<sup>186</sup> How are lower courts to have any certainty on whether the President would have fired the agency director? When it comes to what the President would have done in an alternate universe, what evidence could lower courts look at? Perhaps only publicly available materials like press conferences, speeches, and comments—but the most probative evidence may be the most sensitive.<sup>187</sup> To truly ascertain the President's state of mind, testimony from the President's staff or even the President himself might be necessary.<sup>188</sup> These evidentiary issues will only arise when plaintiffs seek retroactive relief. Going forward, Presidents will likely take action upon learning they suddenly have removal power. President Biden has exemplified this by quickly reacting to the holdings of *Collins* and *Seila*.

On President Biden's first day in office, he asked Peter Robb, the NLRB General Counsel, to resign.<sup>189</sup> *Seila Law* made this request possible by declaring the NLRB unconstitutionally insulated from presidential control.<sup>190</sup> When Robb did not resign by 5:00 p.m. that day, President Biden fired him.<sup>191</sup> Then, six months into Biden's presidency, the *Collins* decision came out.

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<sup>183</sup> See Zaring, *supra* note 169, at 728 (“Eliminating entire agencies or channels for policymaking because of a technical structural problem looks like overreaction; the plaintiff's complaint about an organizational-chart problem in the agency that is persecuting her often loses luster when compared to the substance of her conduct.”).

<sup>184</sup> Aaron L. Nielson, *Three Views of the Administrative State: Lessons from Collins v. Yellen*, 2020–2021 CATO SUP. CT. REV. 141, 159 (2021).

<sup>185</sup> *Collins v. Yellen*, 141 S. Ct. 1761, 1799 (2021) (Gorsuch, J., concurring in part) (noting how the alternative, traditional remedy would involve unwinding or disgorging hundreds of millions of dollars that have already changed hands).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Eli Rosenberg & Reis Thebault, *Biden Fires Trump-Appointed Labor Board General Counsel and Deputy Who Refused to Resign*, WASH. POST (Jan. 21, 2021, 7:05 PM), <https://www.washingtonpost.com/business/2021/01/20/biden-fires-nlrp-peter-robb/>.

<sup>190</sup> *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2202 (2020).

<sup>191</sup> Rosenberg & Thebault, *supra* note 189.



Within hours of the decision, President Biden removed the Trump-appointed Director of the FHFA and replaced him.<sup>192</sup> Within weeks of *Collins*, the Office of Legal Counsel issued an opinion concluding that the Social Security Administration's for-cause removal restriction was unenforceable.<sup>193</sup> After that, President Biden fired the Administrator of the Social Security Administration and replaced him.<sup>194</sup> President Biden's replacements could potentially serve as evidence to support plaintiffs' attempts to establish a nexus between the restriction and the harm. The swift replacements demonstrate that the President likely would have fired the officers sooner but for the removal restriction.

Despite these lingering questions, the *Collins* remedy is logically accurate, and as Justice Kagan noted, it does soften the blow of the Court's recent holdings affecting the validity of independent agencies.<sup>195</sup> The *Collins* remedy requires a causal link between the constitutional violation and the injury, and when none exists, it allows agency actions to stand. This saves the government, and ultimately the taxpayer, the money, time, and resources it would take to unwind thousands of agency actions.

#### CONCLUSION

The Roberts Court's pragmatic streak against independent agencies in the administrative state is directly advancing the ability of political officials to shape decision-making in areas that used to be relatively insulated from politics.<sup>196</sup> This shift in the administrative state will be felt, but plaintiffs will have limited abilities to pursue meaningful retroactive relief in cases in the future. Along with the discovery and pleading issues after *Collins*, doctrines such as ratification, laches, and the de facto officer doctrine may block plaintiffs from having any relief. Although the separation of powers protects individual liberties, because separation of powers provides systemic

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<sup>192</sup>Matthew Goldstein, Adam Liptak & Jim Tankersley, *Biden Removes Chief of Housing Agency After Supreme Court Ruling*, N.Y. TIMES (June 23, 2021), <https://www.nytimes.com/2021/06/23/us/biden-housing-agency-supreme-court.html>.

<sup>193</sup>See Rodríguez, *supra* note 36, at 117; Constitutionality of the Commissioner of Social Security's Tenure Protection, *supra* note 63, at 10.

<sup>194</sup>Lisa Rein, *Biden Fires Head of Social Security Administration, a Trump Holdover Who Drew the Ire of Democrats*, WASH. POST (July 11, 2021, 7:20 PM), [https://www.washingtonpost.com/politics/andrew-saul-social-security-/2021/07/09/c18a34fa-df99-11eb-a501-0e69b5d012e5\\_story.html](https://www.washingtonpost.com/politics/andrew-saul-social-security-/2021/07/09/c18a34fa-df99-11eb-a501-0e69b5d012e5_story.html).

<sup>195</sup>See *Collins v. Yellen*, 141 S. Ct. 1761, 1801 (2021) (Kagan, J., concurring in part).

<sup>196</sup>See Rodríguez, *supra* note 36, at 122.

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protection, violations often are too remote to have a tangible impact on individuals. Thus, the remedy for actions taken by an agency with a structural defect is fittingly narrow.