THE UNITARY EXECUTIVE ON THE RISE: *SEILA LAW* AND THE FUTURE OF AGENCY INDEPENDENCE

*MAXWELL C. DVORAK**

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INTRODUCTION

In the summer of 2020, the Supreme Court updated 85 years of judicial precedent and delivered a small but symbolically significant rollback of independent administrative agencies. In this Note, I argue that the Supreme Court's decision in *Seila Law* signals the strongest-yet endorsement of the "unitary executive theory" championed by the late Justice Antonin Scalia.

In *Seila Law v. Consumer Financial Protection Bureau*, the Court read key precedents very narrowly in order to declare tenure protections for the Consumer Financial Protection Bureau (CFPB) Director unconstitutional. The Court held that it is unconstitutional for an agency to have a single director with for-cause removal protection who also wields "significant executive power."[1] Then, in June 2021, *Collins v. Yellen* modified the *Seila Law* test by removing the "significant executive power" prong, such that tenure protection at *any* single-headed agency is now unconstitutional.[2] Meanwhile, agencies with multi-member leadership bodies and tenure protection are perfectly constitutional. I argue for a different test for the constitutionality of agency independence: tenure protections are appropriate for agencies that benefit from technical expertise and where political interference for a party's short-term benefit would greatly hurt the long-term goals of Congress in creating the agency, whether the agency is headed by a single director or a multi-member leadership body. These conditions apply particularly well to financial regulators.

1. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2201 (2020) ("The question instead is whether to extend those precedents to the 'new situation' before us, namely an independent agency led by a single Director and vested with significant executive power. We decline to do so. Such an agency has no basis in history and no place in our constitutional structure." (citing Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 466, 483 (2010))).

2. Collins v. Yellen, 141 S. Ct. 1761, 1784 (2021) ("[T]he nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head.").

Seila Law fits into a broader battle over the role and structure of the administrative state in the U.S. government. On one side are proponents of the unitary executive theory. Under this philosophy, administrative agencies must be directly controlled by and accountable to the president, since the president is the head of the executive branch and the only elected executive branch official.[3] Proponents of the unitary executive theory argue that Article II of the Constitution grants the president the power to hire and fire heads of agencies as she pleases in order to pursue the political agenda for which voters elected her.[4] In this way, the unitary executive theory promotes democratic accountability in the executive branch.[5]

On the other side of the debate are proponents of agency independence, i.e., independence from the president. Defenders of the independent agency model argue that under the Necessary and Proper Clause, Congress can create administrative agencies to perform specific tasks.[6] In order to fulfill these duties faithfully, agencies sometimes need to be insulated from the political whims of the president, especially those agencies whose functions are seen as technical rather than political in nature.[7] Supporters of this theory argue that political insulation allows regulators to pursue long-term goals rather than short-term political interests.[8] These two approaches represent a difficult trade-off. Each is a plausible reading of the Constitution and has its own benefits and drawbacks.

Seila Law should also be viewed in the context of partisan politics. While the two approaches to administrative agencies described above are not inherently political, Democrats and Republicans are generally aligned on opposing sides of the debate. In recent years, commentators have noted Democrats are more likely to support

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3. Elena Kagan, *Presidential Administration*, *in* FOUNDATIONS OF ADMINISTRATIVE LAW 270, 273–74 (Peter H. Schuck ed., 2d ed. 2006). Justice Kagan writes that proponents of the unitary executive think that Congress unconstitutionally deprived the president of plenary authority by creating independent agencies whose heads the president cannot remove at will. *Id.*

4. *Id.*

5. *See Seila Law LLC*, 140 S. Ct. at 2203 (emphasizing the importance of the president's political accountability in the structure of the executive branch).

6. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 515 (2010) (Breyer, J., dissenting) ("Thus the Necessary and Proper Clause affords Congress broad authority to 'create' governmental 'offices' and to structure those offices 'as it chooses.'" (quoting Buckley v. Valeo, 424 U.S. 1, 138 (1976))).

7. Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 612–14 (2010) (writing that short-term interests of the president can hurt long-term interests of regulatory policy).

8. *Id.* at 613–14.

agency independence, and Republicans are more likely to support the unitary executive theory.[9] The Democrats have generally been responsible for expanding the administrative state since the New Deal. Overall, the Democratic party tends to support a social safety net and business regulation, two of the main tasks of the administrative state.[10] Perhaps this policy alignment makes Democrats feel more comfortable entrusting agency leaders and staff to act independently.

Republicans, though, often have different feelings. Beginning around the 1980s, Justice Scalia began writing passionately in favor of the unitary executive approach.[11] Since then, most conservative jurists and Republican politicians have also supported a unitary executive.[12] Following the 2008 Financial Crisis, right-wing populists

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9. *See, e.g.*, Elizabeth Penava, *Threatening* Chevron *Deference Threatens Government as a Whole*, THE REG. REV. (Jan. 19, 2022), https://www.theregreview.org/2022/01/19/penava-threatening-chevron-deference-threatens-government/ [https://perma.cc/5CAY-7X2B] ("The Republican Party once championed the power of bureaucracy, but now, the party criticizes administrative agencies and seeks to repeal a landmark decision it once applauded, one legal expert argues."); *see also Dems Must Confront GOP Attacks on Independent Agencies*, CTR. FOR ECON. & POL'Y RSCH. (Nov. 12, 2019), https://cepr.net/dems-must-confront-gop-attacks-on-independent-agencies/ [https://perma.cc/7BJR-C2YK].

10. DEMOCRATIC NAT'L COMM., 2020 DEMOCRATIC PARTY PLATFORM (Aug. 18, 2020), https://democrats.org/where-we-stand/party-platform/ [https://perma.cc/W8Z3-8ZBN]. The Party Platform describes "ending poverty," "protecting consumer rights and privacy," and "curbing Wall Street abuses" as overarching policy goals. *Id.* at 23–25.

11. *See* Morrison v. Olson, 487 U.S. 654, 697–99 (1988) (Scalia, J., dissenting). In *Morrison v. Olson,* Justice Scalia wrote a lone dissent that would have held the Independent Counsel position within the Department of Justice to be unconstitutional because it deprived the president of his Article II powers. *Id.* Justice Scalia reasoned that the Founders chose to put *all* executive power into one person, and the unrestricted exercise of power by the president is essential to the separation of powers. *Id.*; *see also* Synar v. United States, 626 F. Supp. 1374, 1401–02 (D.D.C. 1986) (per curiam), *aff'd sub nom.* Bowsher v. Synar, 478 U.S. 714 (1986). In *Synar v. United States*, then-Judge Scalia supported the unitary executive theory even before his appointment to the Supreme Court, though his stance was not yet fully articulated. *See Synar*, 626 F. Supp. at 1401–02.

12. COMM. ON ARRANGEMENTS FOR THE 2016 REPUBLICAN NAT'L CONVENTION, REPUBLICAN PLATFORM 2016, at 10 (2016) [hereinafter 2016 REPUBLICAN PARTY PLATFORM], https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf, [https://perma.cc/N2GP-6VZU] ("Unelected bureaucrats in the Executive Branch now write countless rules with the force of law and arbitrarily punish individuals who disobey those rules. The Constitution makes clear that these powers were granted to Congress by the people and must therefore remain solely with the people's elected representatives."); *see also* Ronald Krotoszynski, *The Conservative Idea That Would Let Biden Seize Control of Washington*, POLITICO MAG. (Dec. 10, 2020), https://www.politico.com/news/magazine/2020/12/

brought even more vigor to the theory of universal presidential control over administrative agency officials.[13] The proponents of the unitary executive approach view it as a means of reining in independent agencies they believe are responsible for undemocratic overregulation of industry and daily life.[14] Ever since the CFPB's creation in 2010, conservatives have attacked the agency as the paradigm of undemocratic administrative overreach.[15] The CFPB's defeat in *Seila Law* marked a victory for this unitary executive movement.

This Note seeks to better understand the *Seila Law* decision and its implications for the American administrative state. My argument proceeds in five parts.

Part I argues in favor of the policy value of independent agencies, especially in the realm of financial regulation. I propose a new test for when agency independence is constitutional and desirable. I then outline case studies of agency independence through the Federal Reserve, Securities and Exchange Commission, and Federal Housing Finance Agency. I then address the *Seila Law* opinion and its context.

Part II explains the creation, structure, duties, and controversies of the CFPB as a means of setting the stage for the legal battles that followed.

Part III argues that the conservative majority on the Supreme Court misconstrued key precedents to create a legal distinction between the structure of the CFPB and those of other agencies previously found to be constitutional. Then, accepting that *Seila Law* is

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10/nathan-simington-christopher-waller-fcc-federal-reserve-appointments-unitary-executive-authority-444136 [https://perma.cc/J3UK-CRAY] (calling the unitary executive theory "a theory advanced by conservative judges and legal academics, and long championed by The Federalist Society").

13. Amy Fried & Douglas B. Harris, *The Strategic Promotion of Distrust in Government in the Tea Party Age*, 13(3) THE FORUM 417, 417 (2015) (discussing how Tea Party leaders fostered distrust in government "to develop groups and achieve coherence, try to influence primaries and win elections, argue for the constitutional powers of institutions they control, and seek to influence public policy").

14. *See* Press Release, Senator Mike Lee, Sens. Lee and Hawley Introduce the Take Care Act (June 5, 2019), https://www.lee.senate.gov/2019/6/sen-lee-introduces-the-take-care-act [https://perma.cc/Y7JM-XL7X] (calling the administrative state "an immense, headless fourth branch of government that is outside the President's control and thus totally unaccountable to the American People").

15. 2016 REPUBLICAN PARTY PLATFORM, *supra* note 12, at 3. Republican attacks on the CFPB became so persistent that the agency was even specifically mentioned in the Party's 2016 platform document. The Party described the CFPB as "deliberately designed to be a rogue agency" that "answers to neither Congress nor the executive." *Id.*

the law of the land for the foreseeable future, I address questions surrounding its long-term implications.

Part IV argues that even after *Seila Law*'s landmark decision, which was further modified by *Collins v. Yellen*, the correct test for agency removal protections remains unclear. This ambiguity creates different paths the Court could take in the future, depending on its ideological composition.

Part V argues that *Seila Law*'s main holding will likely be narrowly cabined in the future while accounting for the very real possibility that conservatives could expand upon *Seila Law* to attack the constitutionality of independent agencies more broadly.

I.
AGENCY INDEPENDENCE IS GOOD POLICY, ESPECIALLY WHEN IT COMES TO FINANCIAL REGULATORS

A. *Summary of Policy Arguments and History: Agency Fire-ability Is Now Part of the Republican Agenda*

The decision in *Seila Law* brings the question of the nation's commitment to the independent agency model to the forefront of American law and politics. In this section, I argue that the independent agency model is worth defending because it empowers qualified experts to oversee highly technical areas of regulatory policy.

The policy advantages of a unitary executive with absolute removal power over the independent agency model have been researched and discussed extensively by legal scholars.[16] I make no attempt to add to this vast reservoir of scholarship, but rather seek to apply it to today's issues in the context of the *Seila Law* decision. First, I will briefly attempt to summarize the policy arguments on either side. Proponents of the unitary executive theory argue that direct presidential removal power makes agencies more accountable to voters and thus legitimizes an agency's tough choices.[17] Greater presidential control over administrative agencies lets a president more effectively carry out the agenda for which the people elected her. On the other side, proponents of agency independence argue that tenure protections and other guarantees of inde-

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16. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2230 (2020) (Kagan, J., dissenting). In one sense, the debate over presidential removal power dates back to the "Decision of 1789," when Congress left the president free to fire the Secretary of Foreign Affairs. *Id.*

17. Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 CALIF. L. REV. 327, 327–28 (2013).

pendence promote agency expertise and inhibit short-term or narrow interests, such as securing a president's reelection or protecting an agency director from being fired.[18] The hope is that this independence helps regulators make difficult, long-term decisions. Some pro-agency independence scholars argue that democratic control of agencies does not lead to more accountability because voters do not vote based on administrative law. They only pay attention to general ideology, while the minutiae of agency rulemaking and enforcement go largely unnoticed.[19] However, this particular argument may be flawed, since voters would likely notice whether a president's agenda is effectively implemented by administrative agencies.

Until the 1970s, the debate around independent agencies seemed relatively settled, with the 1935 pro-agency independence case *Humphrey's Executor v. United States* being the undisputed law of the land.[20] In *Humphrey's Executor*, the Court held that Congress can bar a president from removing the head of an executive agency without cause if that agency exercises "quasi-legislative" or "quasi-judicial" powers.[21] Among judges and politicians, the New Deal vision of legislators delegating to regulatory experts sometimes granted tenure protection was generally accepted.[22] But beginning in the 1980s, many legal scholars, led by Justice Scalia, began to strongly endorse the unitary executive theory that independent agencies are constitutionally unfounded.[23] At the same time, conservative politicians also aligned themselves with the unitary executive theory. President Reagan's Attorney General Edwin Meese was

18. Bressman & Thompson, *supra* note 7, at 612–13.

19. Jerry Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, *in* FOUNDATIONS OF ADMINISTRATIVE LAW, *supra* note 3, at 198.

20. Cass R. Sunstein & Lawrence Lessig, *The President and the Administration*, 94 COLUM. L. REV. 1, 5 (1994).

21. Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) ("The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes . . . power . . . to forbid their removal except for cause in the meantime.").

22. Bressman & Thompson, *supra* note 7, at 612 ("Many [during the New Deal] thought that the social and economic problems confronting the nation could not be solved, and might be made worse, by politics. . . . [The] New Deal vision of expertise as sufficient to solve social and economic problems lost much of its appeal by the 1960s and 1970s.").

23. *See* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165–66 (1992) (strongly advocating for the unitary executive theory); Theodore B. Olson, *Separation of Powers Principle Is No Triviality*, LEGAL TIMES, July 21, 1986, at 1 (same).

a notable early advocate of a unitary executive.[24] Since the 1980s, in the words of one commentator, the unitary executive view has "captured the high ground of principle."[25] Now, most conservative judges seem to wholeheartedly endorse the unitary executive theory. Proponents include Justices Thomas and Gorsuch, who unequivocally condemned independent agencies in their *Seila Law* concurrence.[26] Dissenting in *PHH*, a separate case that also questioned the CFPB's independent, single-director structure, Republican appointees to the D.C. Circuit Henderson and Kavanaugh criticized independent agencies, writing "consent of the governed is a sham if an administrative agency, by design, does not meaningfully answer for its policies to either of the elected branches."[27]

Today, populist politicians, mostly on the right,[28] attack independent agencies with renewed vigor as bodies of elite technocrats, accountable to no one.[29] Some Republicans have introduced legislation to roll back agency independence. For example, Senator Mike Lee (R-UT) introduced a bill to completely eliminate all existing for-cause removal protections for principal officers who head administrative agencies.[30] Additionally, the "Audit the Fed" move-

24. *See* Alex Kotch, *Conservative Foundations Finance Push to Kill the CFPB*, PR WATCH (Feb. 13, 2020), https://www.prwatch.org/news/2020/02/13540/conservative-foundations-finance-push-kill-cfpb [https://perma.cc/AYK7-5W8Y].

25. Sunstein & Lessig, *supra* note 20, at 7.

26. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2211–24 (2020) (Thomas, J., concurring). Justice Thomas' concurrence emphasized the constitutional importance of plenary presidential power to hire and fire all executive officers. *Id.*

27. PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 137 (D.C. Cir. 2018) (en banc) (Henderson, J., dissenting).

28. While most criticism of independent agencies has been from Republicans, the extensive bank bailouts of the 2008 financial crisis did anger some Democrats. For example, Democratic Rep. Barney Frank told Ben Bernanke and Henry Paulsen that "[n]o one in a democracy unelected should have $800 billion to dispense as he sees fit." Bressman & Thompson, *supra* note 7, at 626.

29. *See, e.g.*, *President Donald J. Trump Is Combating Bureaucratic Abuse and Holding Federal Agencies Accountable*, THE WHITE HOUSE (Oct. 9, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-combating-bureaucratic-abuse-holding-federal-agencies-accountable/ [https://perma.cc/ABM6-6AKA]. President Trump alleged that under President Obama, "[a]gencies abused their power by imposing unlawful and secret interpretations of regulations, as well as by threatening families and businesses with unfair and unexpected penalties." *Id.* President Trump vowed that these agencies would be "held accountable." *Id.*

30. Take Care Act, S. 1753, 116th Cong. (2019). Based on the legislative record, this bill did not pass in either legislative chamber. Still, even if Senator Lee only introduced the bill as a political stunt, it sends a strong message in favor of the unitary executive theory.

ment, championed by many in the Republican party, calls for congressional review of the Federal Reserve's activities.[31] The movement aims to rein in what it views as undemocratic bureaucratic excess and economic control.[32] Republicans also broadly condemn the proliferation of "unaccountable bureaucracies" created by Dodd-Frank following the 2008 Financial Crisis.[33]

B. We Need Agency Independence in Financial Regulation

I argue that tenure protections are appropriate for agencies that benefit from technical expertise and where political interference for a party's short-term benefit would greatly hurt the long-term goals of Congress in creating the agency. I derive this position from the generally accepted view that independent agencies have two key benefits: high technical expertise and long-term policy orientation.[34]

I do not question the long-held wisdom that executive agencies carrying out inherently political functions need to be directly controlled by the president through removal power.[35] Even for the Department of the Treasury, perhaps the most important financial agency in the U.S. government, at-will removal by the president makes sense. The Treasury advises the president on economic and financial issues, encourages growth and stability, prints currency, and collects revenue, among other duties.[36] The role and operations of the Treasury are inherently political, as they are essential to

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31. Ben S. Bernanke, *"Audit the Fed" Is Not About Auditing the Fed*, BROOKINGS (Jan. 11, 2016), https://www.brookings.edu/blog/ben-bernanke/2016/01/11/audit-the-fed-is-not-about-auditing-the-fed/ [https://perma.cc/8T9L-9EQB] (explaining that in 2016, Republicans in the Senate failed to pass the Federal Reserve Transparency Act (also known as the "Audit the Fed" bill), which would have made the Fed's monetary policy decisions subject to congressional review); *see also* 2016 REPUBLICAN PARTY PLATFORM, *supra* note 12, at 7 (endorsing the principles of auditing the Federal Reserve).

32. Bernanke, *supra* note 31.

33. 2016 REPUBLICAN PARTY PLATFORM, *supra* note 12, at 3 ("Rather than address the cause of the crisis — the government's own housing policies — the new law extended government control over the economy by creating new unaccountable bureaucracies.").

34. Gadinis, *supra* note 17, at 337 (identifying these two key features of independent agencies).

35. Sunstein & Lessig, *supra* note 20, at 25–26. This power dates back to the Decision of 1789, making the Secretary of Foreign Affairs removable at will by the president.

36. *Role of the Treasury*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/about/general-information/role-of-the-treasury [https://perma.cc/DP3X-BJPG].

the president carrying out her policy agenda. However, even within the Treasury, certain apolitical roles have long been recognized as beyond the power of presidential removal. In the First Congress, Congress specified that the Comptroller of the Treasury's settlements of public accounts must be "final and conclusive," meaning his actions were not reviewable by the president.[37] Even James Madison and Thomas Jefferson recognized the importance of this role's independence in ensuring political actors did not manipulate national accounts.[38] The office of the Comptroller is an excellent example of a role where tenure protection is necessary to protect from political influence.

This same principle of independence applies to financial agencies carrying out highly technical and specialized roles. From the earliest days of the country, Congress and the courts have recognized the importance of independent financial entities, such as the Second Bank of the United States (a proto-central banking institution created in 1816) whose constitutionality was recognized in *McCulloch v. Maryland*.[39] Of the twenty-five directors of the Bank, "the President could appoint and remove only five."[40]

Expertise at financial regulatory agencies is vitally important. Financial regulation typically involves highly technical questions that generalist politicians, and voters, simply do not understand.[41] While presidents understand and base their election platforms on major questions of economic policy, taxation, and federal spending, questions of monetary policy and financial stability are much

37. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2230 (2020) (Kagan, J., dissenting) (quoting Act of Mar. 3, 1795, ch. 48, § 4, 1 Stat. 441–42).

38. *See id.* at 2230–31 ("But even James Madison . . . told Congress that 'there may be strong reasons why an officer of this kind should not hold his office at the pleasure' of the Secretary or President." (quoting 1 ANNALS OF CONG. 612 (1789))); *id.* at 2231 n.5 ("'I have no right to interfere' . . . [with the settlement of accounts] because the Comptroller of the Treasury 'is the sole & supreme judge for all claims of money against the US. and would no more receive a direction from me' than would 'one of the judges of the supreme court.'" (quoting Letter from Thomas Jefferson to Benjamin Latrobe (June 2, 1808), *in* THOMAS JEFFERSON AND THE NATIONAL CAPITAL 429, 431 (S. Padover ed., 1946))).

39. *Id.* at 2225 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819)).

40. *Id.* at 2231 (citing An Act to Incorporate the Subscribers to the Bank of the United States § 8, 3 Stat. 266, 269 (1816)).

41. *See, e.g.*, Gadinis, *supra* note 17, at 340 (arguing that financial regulation is a highly technical field in which experts should make the rules); Bressman & Thompson, *supra* note 7, at 654 (stating that the Federal Reserve is the paradigmatic example of an agency that requires insulation from politics).

more esoteric. For example, all politicians and voters would support long-term goals of low inflation, full employment, and prevention of financial crime. However, the methods of achieving those goals are not well understood by the public or politicians. The national government relies on economic and financial experts within independent agencies to carry out these missions. Further, while Congress is good at setting policy goals, it is not good at regularly updating regulations on various industries. For example, recognizing that it lacked the technical expertise and time to set railroad rates, Congress created the Interstate Commerce Commission in 1887.[42] Recognizing that it lacked the expertise to supervise financial markets and update regulations as situations changed, it created the Securities and Exchange Commission (SEC) with significant rulemaking discretion.[43]

It is essential to a well-functioning economy that financial regulatory agencies be able to pursue long-term goals. The long-term goals of financial agencies can be characterized as long-term economic growth, efficient capital markets, minimization of fraud and crime, and control of inflation.[44] An independent agency can make difficult but necessary decisions that politicians could not without losing office.[45] For example, in the 1980s, the Federal Reserve under Chairman Paul Volcker raised interest rates to unprecedented levels to fight inflation.[46] Elected leaders would have been unlikely to take this economically necessary step due to the high risk of creating a recession, becoming politically unpopular, and

42. Bressman & Thompson, *supra* note 7, at 612; *see* Interstate Commerce Act, Pub. L. No. 49-41 (1887).

43. Bressman & Thompson, *supra* note 7, at 612; *Securities and Exchange Commission (SEC)*, CFI (Jan. 31, 2023), https://corporatefinanceinstitute.com/resources/wealth-management/securities-and-exchange-commission-sec/ [https://perma.cc/S3RB-2J6H].

44. *About the Fed*, FED. RSRV. BD. (Jan. 30, 2023), https://www.federalreserve.gov/aboutthefed.htm [https://perma.cc/C9QJ-7XX8]. The Federal Reserve identifies its goals as "maximum employment, stable prices, and moderate long-term interest rates" in addition to "the stability of the financial system," the "safety and soundness of individual financial institutions," "consumer protection," and similar motivations. *Id.*

45. Bressman & Thompson, *supra* note 7, at 613.

46. William Poole, *President's Message: Volcker's Handling of the Great Inflation Taught Us Much*, FED. RSRV. BANK OF ST. LOUIS: REG'L ECONOMIST (Jan. 1, 2005), https://www.stlouisfed.org/publications/regional-economist/january-2005/volckers-handling-of-the-great-inflation-taught-us-much [https://perma.cc/Y8AS-AJYN]. To fight inflation that had surged to 14% by 1980, Fed Chairman Volcker raised the prime lending rate to 21% and pushed through a period of high unemployment to put the American economy back into good health. *Id.*

losing reelection.[47] Additionally, economic and financial stability are not as inherently political as functions of, for example, the State Department, the Department of Defense, or even the Department of the Treasury. All politicians generally support long-term economic growth, financial stability, and anti-fraud measures. Granted, Republicans and Democrats have some differences in policy objectives: Republicans may be more focused on low inflation and efficient capital markets whereas Democrats may emphasize full employment and financial crime enforcement.[48] However, for these relatively minor, low-stakes policy differences, presidential appointment power is an adequate control mechanism. For areas where policy differences are greater and stakes are higher (such as foreign affairs or federal budgeting), removal power is more necessary as a means of overseeing officers.

C. *Case Study in Independence: The Fed*

The Federal Reserve exemplifies the need for independent financial agencies. The duties of the Fed include the control of national monetary policy to promote full employment and control inflation, oversight of financial institutions, and maintenance of the stability of the overall financial system.[49] The Federal Open Market Committee (FOMC) sets monetary policy. The FOMC is composed of seven Governors, who are appointed by the president and confirmed by the Senate to 14-year staggered terms, the president of

47. *See id.* Under Chairman Volcker, the Federal Reserve raised interest rates to new heights in order to fight inflation. In doing so, the Fed caused a recession with unemployment above 10%. *Id.* At the time, Chairman Volcker was a very unpopular figure, vilified for "killing" so many small businesses. *Id.*

48. *See* J. Lawrence Broz, *The Federal Reserve's Coalition in Congress* (Feb. 20, 2015) (unpublished manuscript) (presented at the Financial Crisis Workshop, University of California, San Diego) (finding that Democratic Members of Congress are more supportive of the Fed when it is seeking full employment while Republican Members are more supportive of the Fed when it is seeking to lower inflation); Peter Rasmussen & Patty Tehrani, *Analysis: Four Spots Biden Is Likely to Reverse SEC Deregulation*, BLOOMBERG L. (Nov. 7, 2020), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-four-spots-biden-is-likely-to-reverse-sec-deregulation [https://perma.cc/PQQ7-XJXR] (observing that the SEC under President Trump had brought fewer enforcement actions than under President Obama, with President Biden likely to resume "more aggressive inspection and enforcement programs").

49. *About the Federal Reserve System*, FED. RSRV. BD. (Aug. 24, 2022), https://www.federalreserve.gov/aboutthefed/structure-federal-reserve-system.htm [https://perma.cc/G8L3-AUAD].

the Federal Reserve Bank of New York, and a rotating cast of four other Reserve Bank presidents.[50]

The independence of the FOMC is vital to the U.S. economy, as monetary policy is a very powerful economic tool. At times, presidents publicly oppose the Fed. Usually, the president pressures the FOMC to lower interest rates in order to boost economic growth, particularly before an election. Such was the case under President Trump[51] and President Nixon.[52] Lowering interest rates when the country is already at full employment and growing healthily can cause long-term harm. Namely, keeping interest rates too low can lead to inflation and distortions in financial markets.[53] A president seeking re-election to his second term may only have a one- or two-year time horizon in making this decision. A Federal Reserve Governor, on the other hand, thinks in terms of decades.

During the 2008 Financial Crisis, the Fed intervened in markets on an unprecedented scale.[54] Populists within the Republican party saw these bailout efforts as administrative overreach by unelected, unaccountable academics. This spawned a strong political movement to "audit the Fed" in order to "increase transparency and accountability" at the Federal Reserve.[55] After the Financial

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50. *Federal Open Market Committee*, FED. RSRV. BD. (Feb. 2, 2023), https://www.federalreserve.gov/aboutthefed/structure-federal-reserve-board.htm [https://perma.cc/34FA-RRKK].

51. Rebecca Ballhaus, Andrew Restuccia & Paul Kiernan, *Trump Calls for a Big Fed Rate Cut, Again Criticizes Central Bank Chairman*, WALL ST. J. (Aug. 19, 2019), https://www.wsj.com/articles/trump-calls-for-a-big-fed-rate-cut-again-criticizes-central-bank-chairman-11566230832 [https://perma.cc/YX7B-STN8]. President Trump called for 1-point interest rate cut and new bond buying program to stimulate the economy. *Id.*

52. Amity Shlaes, *Trump Isn't the First President to Make War on the Federal Reserve*, N.Y. TIMES (Nov. 16, 2019), https://www.nytimes.com/2019/11/16/opinion/sunday/federal-reserve-trump.html [https://perma.cc/3MTL-KGNE]. Fed Chairman Burns eventually relented to President Nixon's pressure to cut interest rates and gradually lowered rates in 1970-71. *Id.* Many blame the inflation of this decade partially on the Fed's unnecessary easy money policy. *See id.*

53. Kevin L. Kliesen, *Low Interest Rates Have Benefits . . . and Costs*, FED. RSRV. BANK OF ST. LOUIS: REG'L ECONOMIST (Oct. 1, 2010), https://www.stlouisfed.org/publications/regional-economist/october-2010/low-interest-rates-have-benefits—and-costs# [https://perma.cc/R33H-7DMC].

54. Lowell R. Ricketts, *Quantitative Easing Explained*, LIBER8 ECON. INFO. NEWSL., Apr. 2011 (discussing that in the aftermath of the 2008 Financial Crisis, the FOMC pushed the federal funds target rate close to zero and pursued a strategy of "quantitative easing" wherein the Fed bought hundreds of billions of dollars of assets such as mortgage-backed securities and Treasury securities to stabilize financial conditions).

55. 2016 REPUBLICAN PARTY PLATFORM, *supra* note 12, at 7.

Crisis, Republican attacks on the Fed approached the frequency and animosity of Republican criticism of the CFPB. The populist Tea Party wing of the party was especially vocal in criticizing the Fed.[56] Representative Ron Paul (R-TX) famously called for abolishing the Federal Reserve entirely.[57] This movement resonated with the public, as most Americans supported either increased transparency or outright abolition of the Fed in 2010.[58] Riding on this wave of partisan attack and hoping to boost his own re-election prospects, President Trump often publicly criticized the Fed and Chairman Jerome Powell (who Trump himself had appointed). In one instance, Trump railed against Powell's "horrendous lack of vision" and called for a rate cut of at least 1 percentage point.[59] That the FOMC stayed its course and disregarded President Trump's criticism is a testament to the power and importance of the Governors' tenure protections.

The holding of *Seila Law* poses a new threat to Fed independence. The Fed probably exercises the most power of any independent agency. As Justice Kagan noted, the Fed has a far more profound influence on economic life than does the CFPB.[60] While an argument could be made that the technical arrangement of monetary policy is not inherently "executive," the Court could certainly ignore this doctrinal issue. While the Fed would not receive the *Seila Law-Collins* test, since it has a multi-member commission, the Court could hold that the Fed fails the *Humphrey's Executor* test and thus that its tenure protection violates the separation of powers. Of course, if the Court eventually rules all tenure protections of superior officers unconstitutional, then the Fed would also lose its independence.

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56. Sewell Chan, *From Tea Party Advocates, Anger at the Federal Reserve*, N.Y. TIMES (Oct. 10, 2010), https://www.nytimes.com/2010/10/11/us/politics/11fed.html [https://perma.cc/3MTL-KGNE]. Senator Mike Lee (R-UT) accused the Fed of "trying to 'monetize the debt' by printing money to buy government bonds." *Id.* Many Republicans called for the Fed to end its support for the economy, likening it to a drug dealer supplying a "permanent addiction." *Id.*

57. *See generally* RON PAUL, END THE FED (2009).

58. Joshua Zumbrun, *More Than Half of U.S. Wants Fed Curbed or Abolished*, BLOOMBERG (Dec. 9, 2010, 1:40 PM), https://www.bloomberg.com/news/articles/2010-12-09/more-than-half-of-americans-want-fed-reined-in-or-abolished [https://perma.cc/4H7T-2B27].

59. Ballhaus, Restuccia & Kiernan, *supra* note 51 ("Such moves would typically be considered only when the economy faces serious peril, which Fed officials don't believe to be the case.").

60. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2239 (2020) (Kagan, J., dissenting).

Just as a populist, right-wing political movement against the CFPB presaged the Supreme Court's finding that the CFPB's structure was unconstitutional, populist attacks on the Federal Reserve could foreshadow the Supreme Court establishing direct political control of that agency as well.

D. Case Study in Independence: The SEC

Applying my test from Part I(B), I argue that the SEC's technical expertise and pursuit of long-term policy goals requires some amount of independence. Congress created the Securities and Exchange Commission to regulate financial markets and financial institutions in order to protect investors, facilitate capital formation, and maintain fair, orderly, and efficient markets.[61] To pursue these goals, Congress granted the SEC broad rule-making authority.[62] SEC rules govern how companies may raise funds and what disclosures they are required to make to investors.[63] The agency also prosecutes financial wrongdoers through its Division of Enforcement.[64] Congress structured the SEC as a commission of five Commissioners, with one designated Chairperson. The president appoints the Commissioners to five-year terms with the advice and consent of the Senate.[65] To ensure partisan balance, no more than three Commissioners may belong to the same political party. While the SEC founding statute was silent on removal of Commissioners, it is generally accepted today that they cannot be fired at will.[66]

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61. *See What We Do*, U.S. SEC. AND EXCH. COMM'N (last modified Nov. 22, 2021), https://www.sec.gov/about/what-we-do [https://perma.cc/F6MZ-HL2F].

62. Bressman & Thompson, *supra* note 7, at 614–15 (describing the broad and significant regulatory authority of the SEC).

63. *What We Do*, *supra* note 61.

64. *About the Division of Enforcement*, U.S. SEC. AND EXCH. COMM'N (last modified Aug. 2, 2007), https://www.sec.gov/enforce/Article/enforce-about.html [https://perma.cc/BTY7-K6SQ].

65. *Current SEC Commissioners*, U.S. SEC. AND EXCH. COMM'N (Dec. 29, 2020), https://www.sec.gov/Article/about-commissioners.html [https://perma.cc/428D-GLCR].

66. The question of whether SEC Commissioners can be fired at will or only for "good cause" is surprisingly nuanced in academic circles. Some have asserted that since the SEC founding statute is silent on removal and was passed at a time between *Myers* and *Humphrey's Executor*, when the president was viewed as having absolute ability to fire all agency heads, the Commissioners do not have removal protections. *See* Note, *The SEC Is Not an Independent Agency*, 126 HARV. L. REV. 781, 781–82 (2013). In his dissent in *Free Enterprise Fund*, Justice Breyer acknowledges that it is "not obvious" that SEC Commissioners have "for cause" removal protection; still, he says it is quite possible that they can only legally be removable for cause. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 546–48 (2010) (Breyer, J., dissenting). The mainstream view is that SEC Commissioners

The SEC touts its independence as vitally important to its mission. Removal protection allows the agency to take tough stances against powerful entities like investment banks, exchanges, and industry. These are positions that politicians may be loath to take due to political pressure from industry, lobbyists, and donors.[67] Former SEC Chairperson Mary Jo White boasted that independence allows the Commission to "make our decisions based on an impartial assessment of the law and the facts and what we believe will further our mission—and never in response to political pressure, lobbying, or even public clamor."[68]

Despite its nonpartisan design and aspirations, the SEC, like the Fed, came under intense political scrutiny following the 2008 Financial Crisis. Many felt the SEC failed in its oversight function before and during the Crisis, and also failed to catch high-profile fraudsters such as Bernie Madoff.[69] Thus, after the financial crisis, many politicians wanted to take power away from independent SEC regulators and put it into the hands of more accountable political appointees.[70] This general desire led to the creation of the more politically accountable Financial Stability Oversight Council (FSOC), which supervises nonbank financial institutions and decides whether to subject a nonbank financial company to prudential supervision by the Fed.[71] While drafting Dodd-Frank, legislators considered taking even more power away from the SEC by moving the regulation of mutual funds to a new agency.[72]

While the SEC's tenure protections seem somewhat safe from the Supreme Court, the structure may be overturned eventually.

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can only be fired for cause. This view was seemingly accepted by the Supreme Court in *Free Enterprise Fund* when it struck down removal protections for the Public Company Accounting Oversight Board (PCAOB) but, in dicta, acknowledged that SEC Commissioners cannot be fired at will. *Id.* at 495 (majority opinion). Even then-Circuit Judge Kavanaugh listed the SEC as an example of an independent agency in his *PHH* dissent. *See* PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 173 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting). Full discussion of this issue is outside of the scope of this Note.

67. Mary Jo White, Chair, U.S. Sec. and Exch. Comm'n, 14th Annual A.A. Sommer, Jr. Corporate Securities and Financial Law Lecture at Fordham Law School (Oct. 3, 2013), https://www.sec.gov/news/speech/spch100113mjw [https://perma.cc/Q872-8RZ3] ("This independence and the quality of its people allow the agency the freedom to do what it believes is right for investors and our markets, without the interference of politics or outside pressures.").

68. *Id.*

69. Gadinis, *supra* note 17, at 345.

70. *Id.* at 332.

71. *Id.* at 368–69.

72. White, *supra* note 67.

Though the Supreme Court did not explicitly uphold the SEC's independence in *Free Enterprise Fund,* it decided the case with the "understanding" that the Commissioners can only be removed for "inefficiency, neglect of duty, or malfeasance in office."[73] In that case, while invalidating tenure protection for the Public Company Accounting Oversight Board (PCAOB), the Court left in place the SEC Commissioners' tenure protections.[74] However, a future Court could hold that the SEC wields "substantial executive power," and thus is not protected by the *Humphrey's* "exception." This analysis is complicated because when it comes to "substantial" or "significant" executive power, we have two points of reference: the FTC (whose power is not "substantial" according to Chief Justice Roberts[75]) and the CFPB (whose executive power is "significant" according to Roberts).[76] The SEC likely wields even more executive power than the CFPB, which puts its independence at risk if the Court eventually abandons its flimsy distinction between single-member and multi-member agency leadership teams. The current Court has also shown it is quite willing to heavily revise key precedents on removal protection, so the relatively unsupported dictum of *Free Enterprise Fund* might not be enough to protect the SEC. And if the Court adopts a Thomas-like strict unitary executive approach, the SEC will of course lose its tenure protection along with all other federal agencies.

E. Case Study in Independence: FHFA

The Supreme Court struck down the Federal Housing Finance Agency (FHFA) Director's 'for cause' removal protection in *Collins v. Yellen.*[77] Days later, President Biden fired the Trump appointee

73. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 487 (2010) ("The parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphrey's Executor* standard of 'inefficiency, neglect of duty, or malfeasance in office,' and we decide the case with that understanding." (citations omitted) (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 620 (1935))).

74. *Id.*

75. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2199–200 (2020). Chief Justice Roberts describes the rule in *Humphrey's Executor* as a narrow exception allowing removal protection for multi-member expert agencies "that do not wield substantial executive power." *Id.* He says that the FTC fits into this exception, meaning it must not have substantial executive power. *Id.*

76. *Id.* at 2201 (stating that the CFPB Director is "vested with significant executive power").

77. 141 S. Ct. 1761, 1784 (2021).

leading the agency.[78] Here, I pose a more fundamental policy question: does the FHFA Director need tenure protection to properly do the job Congress assigned to him? I argue that he does. To determine when agency leadership tenure protections are appropriate, I suggest a test that asks two questions: (1) Does the agency exercise technical expertise beyond that of politicians and the general public? (2) Would political pressure force the agency to stray from its long-term policy goals in favor of short-term boosts to a president's popularity?

The answer to the first question is yes. Much of FHFA regulatory activity is highly technical and would be difficult for generalist politicians to understand and direct. Congress created the FHFA in 2008 to oversee the government-sponsored enterprises (GSEs) of Fannie Mae, Freddie Mac, and the eleven Federal Home Loan Banks.[79] Since September 2008, the FHFA has also acted as the conservator of the GSEs. This conservatorship means that the FHFA holds complete authority over the GSEs.[80] In governing the GSEs, the FHFA must make decisions such as appropriate capitalization levels, balancing support for the GSEs with fostering private capital, and adjusting to the global phase-out of the London Interbank Offering Rate (LIBOR) benchmark.[81] These regulatory and financial management responsibilities are quite complicated and technical, warranting independence from direct presidential control.

As to the second question, I believe the answer is also yes. Unrestricted presidential removal power, and the potential resulting pursuit of a partisan agenda, could endanger the FHFA's long-term policy goals. One major risk of a politicized FHFA would be a Republican administration pushing for a premature end to the GSEs' conservatorship. The Trump administration, for example, at-

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78. 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 [https://perma.cc/X9MS-F6M7].

79. *FHFA at a Glance*, FED. HOUS. FIN. AGENCY (last updated Jan. 19, 2023), https://www.fhfa.gov/AboutUs [https://perma.cc/T764-K29U].

80. Don Layton, *Three Decisions the Biden Administration Will Need to Make If the Supreme Court Eliminates FHFA's Independence*, JOINT CTR. FOR HOUS. STUD. OF HARV. U. (Apr. 21, 2021), https://www.jchs.harvard.edu/blog/three-decisions-biden-administration-will-need-make-if-supreme-court-eliminates-fhfas [https://perma.cc/F2EX-DJWR]. As conservator of Fannie Mae and Freddie Mac, the FHFA holds the power that would normally be held by a company's shareholders, board of directors, and management. *Id.*

81. FED. HOUS. FIN. AGENCY, DIV. OF CONSERVATORSHIP, THE 2019 STRATEGIC PLAN FOR THE CONSERVATORSHIPS OF FANNIE MAE AND FREDDIE MAC 12 (Oct. 2019) [hereinafter FHFA STRATEGIC PLAN 2019].

tempted to push the GSEs back into private hands.[82] In 2019, President Trump appointed libertarian economist Mark Calabria to the post of FHFA Director. Calabria entered office with the explicit goal of ending the conservatorship.[83] A strong argument could be made that leading up to the Financial Crisis, the for-profit structure of the GSEs worked against the public policy goal of a safe and stable housing finance market.[84] In their pursuit of profits, Fannie Mae and Freddie Mac lowered credit requirements and took on more high-risk loans without adequate capital cushion.[85]

An independent FHFA would be able to push back against politicians who want to advance a blanket free-market agenda at the expense of the soundness of the nation's housing finance market. During the early days of the Biden presidency, we had the opposite scenario as the start of the Trump administration: an FHFA Director who preferred to end the conservatorship (but who has admitted it was not yet possible),[86] and a president who likely wanted to prolong it.[87] Of course, independence is a double-edged sword. In

82. Andrew Ackerman & Kate Davidson, *Trump Administration Aims to Privatize Fannie Mae and Freddie Mac*, WALL ST. J. (Sept. 5, 2019, 5:00 PM), https://www.wsj.com/articles/trump-administration-aims-to-privatize-fannie-mae-and-freddie-mac-11567717213?mod=article_inline [https://perma.cc/CE27-R7J7] (discussing the Trump administration's goal of privatizing Fannie Mae and Freddie Mac, which was a policy shift from past plans to abolish the two mortgage giants).

83. Andrew Ackerman, *Fannie, Freddie Overseer Looks to End Federal Control Before Trump Leaves*, WALL ST. J. (Nov. 20, 2020), https://www.wsj.com/articles/fannie-freddie-overseer-seeks-to-end-federal-control-before-trump-leaves-11605873600?mod=article_inline [https://perma.cc/4GXE-TF6T].

84. *The Role of Fannie Mae and Freddie Mac in the Financial Crisis: Hearing Before the Comm. on Oversight and Gov't Reform*, 110th Cong. 2 (2008) (stating that in a confidential presentation, Fannie Mae executives "acknowledged that investing in subprime and alternative mortgages would mean higher credit losses and increased exposure to unknown risks, but the lure of additional profits proved to be too great").

85. Statement of James B. Lockhart III, Director, Federal Housing Finance Agency Before the House Committee on Financial Services (Sept. 25, 2008), https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-James-B-Lockhart-III-Director-FHFA-Before-the-US-House-Committee-on-Financial-Services.aspx [https://perma.cc/QG6H-38Y3] (describing how "the credit profile at both Enterprises followed the market down in 2006 and 2007" as Fannie Mae and Freddie Mac sought better returns).

86. *See* FHFA STRATEGIC PLAN 2019, *supra* note 81, at 15–16 (outlining a plan to privatize Fannie Mae and Freddie Mac after taking many steps to prepare both entities to leave the conservatorship).

87. Saleha Mohsin & Joe Light, *Biden's Team Explores Ways to Oust Fannie-Freddie Regulator*, BLOOMBERG (Jan. 11, 2021, 1:28 PM), https://www.bloomberg.com/news/articles/2021-01-11/biden-s-team-explores-ways-to-replace-fannie-freddie-regulator [https://perma.cc/VG9F-GAE6].

this instance, it would have worked against sound regulatory policy. However, just because Director Calabria advocated bad policy does not mean that independence is a problem. Actions by administrative agencies will never be perfect. With or without tenure protections, some agency officials will pursue unwise policies. Overall, under the two parameters I have identified in my proposed test, agency independence creates conditions most likely to lead to sound decision-making. Agency independence allows technocrats to pursue sound, long-term policy goals, even if there are aberrations from time to time.

II.
THE CONSUMER FINANCIAL PROTECTION BUREAU

This Note will now turn to the CFPB before analyzing the transformative decision of *Seila Law*. The CFPB's short but controversial history has been a prime example of the lively philosophical debate over the role of administrative agencies in American law and politics.

A. *The CFPB's Duties, Structure, and Controversy*

In 2007, then-Harvard Law Professor Elizabeth Warren called for a new regulatory body to protect consumers in financial transactions in the same way that the Consumer Product Safety Commission protects buyers of physical goods.[88] Professor Warren's scholarship catalyzed a popular movement calling for greater regulation of many aspects of the financial industry. This movement seized its moment during the post-Financial Crisis reform efforts. Ultimately, Congress created the Consumer Financial Protection Bureau (CFPB) in 2010 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[89] The CFPB consolidated the enforcement duties of existing consumer protection laws previously administered by seven different federal agencies.[90]

In Dodd-Frank, Congress tasked the CFPB with oversight of consumer financial products, including credit cards, mortgages,

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88. Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY: A J. OF IDEAS, Summer 2007, No. 5, https://democracyjournal.org/magazine/5/unsafe-at-any-rate/ [https://perma.cc./AC2E-W2B9].

89. Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5491–97.

90. *Id.*

and loans.[91] Landmark actions of the CFPB included regulation of and enforcement actions against the payday lending industry[92] and investigation of complaints against credit card companies.[93] Prior to the CFPB, consumer financial protection was seen as a regulatory "orphan mission."[94] It conflicted with, and was therefore subordinated to, the primary mission of the safety and soundness of financial institutions and markets assigned to federal regulators such as the Federal Reserve (Fed) and Securities & Exchange Commission (SEC).[95] Thus, no regulator developed expertise in the space and regulatory arbitrage fueled a "regulatory race-to-the-bottom" in terms of deregulation.[96]

In Dodd-Frank, Congress structured the CFPB as an independent agency within the Federal Reserve System.[97] The CFPB is led by a single Director with a five-year term removable by the president only for "inefficiency, neglect of duty, or malfeasance in office."[98] This language, known colloquially as "removal protection" or "tenure protection," mirrors the language used to protect directors in many other independent agencies such as the Federal Trade Commission (FTC).[99] As the CFPB is housed within the Federal Reserve System, it has access to independent funding. Instead of receiving

91. 12 U.S.C. § 5511; *see also* Megan Slack, *Consumer Financial Protection Bureau 101: Why We Need a Consumer Watchdog*, THE WHITE HOUSE BLOG (Jan. 4, 2012), https://obamawhitehouse.archives.gov/blog/2012/01/04/consumer-financial-protection-bureau-101-why-we-need-consumer-watchdog#What%20is%20CFPB [https://perma.cc/EZS9-FK5D].

92. Nicholas Confessore, *Mick Mulvaney's Master Class in Destroying a Bureaucracy from Within*, N.Y. TIMES MAG., Apr. 16, 2019. The CFPB investigated the payday lending industry, finding that 75% of the industry's revenue came from consumers stuck in a perpetual cycle of debt because they couldn't afford to pay off their loans. *See id.* This led to regulatory actions such as the proposed "ability-to-repay" rule that would have curtailed aggressive lending practices. *Id.*

93. *See, e.g.*, *CFPB Orders Bank of America to Pay $727 Million in Consumer Relief for Illegal Credit Card Practices*, CONSUMER FIN. PROT. BUREAU (Apr. 9, 2014), https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-bank-of-america-to-pay-727-million-in-consumer-relief-for-illegal-credit-card-practices/ [https://perma.cc/9JVC-A6W3].

94. Adam J. Levitin, *The Consumer Financial Protection Agency* 1 (Pew Fin. Reform Project, Working Paper No. 2, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1447082 [https://perma.cc/8NBR-YGAV].

95. *Id.*

96. *Id.*

97. 12 U.S.C. § 5491.

98. *Id.* § 5491(c).

99. Federal Trade Commission Act, 15 U.S.C. § 41 ("Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.").

funds from Congress through the typical appropriations process, the CFPB receives its budget from the Federal Reserve, which itself is outside of the appropriations process.[100]

Most financial regulatory agencies live a relatively quiet life. Their work is highly technical and does not often grab the attention of voters or the media. However, from its creation, the CFPB found itself at the heart of the partisan and intellectual fight over the role of the administrative state in the American economy and society. Many Republicans viewed the CFPB as the paradigm of administrative overreach and anti-business bias by progressives. Republicans criticized the CFPB in very harsh terms, calling it a "rogue agency" whose Director had "dictatorial powers unique in the American Republic."[101] One of the agency's fiercest critics, former House Financial Services Committee Chairman Jeb Hensarling, called the CFPB "the single most powerful and least accountable federal agency in all of Washington."[102] This assertion seems rather ridiculous when the powers of the CFPB are compared to other independent agencies such as the Fed or the FTC. Whereas the CFPB protects consumers from financial scams and fraud, the Fed is perhaps the most powerful institution in the global economy and the FTC has the power to virtually restructure industries. Prominent Republican Representative Mick Mulvaney called the CFPB a "joke" in "a sick, sad kind of way."[103] In 2017, President Trump appointed Mulvaney to the CFPB's Directorship with a mandate to essentially destroy the agency from within.[104] Mulvaney froze hiring, withdrew CFPB lawsuits against violators, and installed anti-regulation loyalists in key positions to neutralize career staffers.[105]

While one would hope that Justices would not be motivated by overtly political concerns, they are certainly affected by intellectual movements concerning the nature of law, politics, and government. At least through the lens of a legal realist, it seems possible that the

100. 12 U.S.C. § 5497 (providing that the Fed Governors will give the CFPB Director whatever amount of money the Director determines "to be reasonably necessary to carry out the authorities of the Bureau").

101. 2016 REPUBLICAN PARTY PLATFORM, *supra* note 12, at 3.

102. Michael Hiltzik, *Consumer Protection: Why Do Republicans Hate the CFPB So Much?*, L.A. TIMES (July 23, 2015), https://www.latimes.com/business/hiltzik/la-fi-mh-cfpb-republicans-20150723-column.html [https://perma.cc/ZS6G-RR5G].

103. Confessore, *supra* note 92.

104. *Id.*

105. *Id.* Under Acting Director Mulvaney, each associate director of the CFPB received an appointed "twin" called a policy associate director who reported to Mulvaney loyalist Brian Johnson, a former Rep. Hensarling aide openly hostile to the CFPB. *Id.*

intellectual shift toward plenary presidential control of executive agencies has influenced their thinking on the topic.[106]

B. The Legal Challenges Begin

Entities regulated by the CFPB, including banks, credit unions, and previously unregulated non-bank financial institutions, lobbied hard to lessen the CFPB's power.[107] Payday lenders, for example, lobbied against the CFPB's proposed "ability-to-repay" rule, which would have required payday lenders to examine whether customers could afford to repay a loan before lending to the consumer.[108] Payday lenders also donated extensively to reelection campaigns for Rep. Mulvaney, who had established himself as strongly opposed to regulation of payday lending while a South Carolina state legislator and then as a member of the House Financial Services Committee.[109]

Regulated entities also challenged the CFPB in court. The first lawsuit regarding the constitutionality of the CFPB to reach a federal appellate court was *PHH Corp. v. CFPB*.[110] PHH Corp., a mortgage lender, challenged the CFPB's constitutionality in 2015 after the CFPB charged the company with illegally referring consumers to specific mortgage insurance providers in exchange for kickbacks.[111] The D.C. Circuit, in an opinion by then-Judge Brett Kavanaugh, at first struck down the CFPB's leadership structure as unconstitutional.[112] However, the D.C. Circuit reheard the case en banc and reversed, holding that the CFPB's structure did not vio-

106. *See* OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881). Espousing an early form of legal realism, Holmes wrote the following about the nature of the law: "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." *Id.*

107. Slack, *supra* note 91; *see also Payday Lenders*, OPEN SECRETS (Mar. 22, 2021), https://www.opensecrets.org/industries/indus.php?cycle=2020&ind=F1420 [https://perma.cc/4BAV-K3NC] (showing that lobbying spending from payday lenders increased dramatically in 2009-2011, around the time that Dodd-Frank was passed in July 2010).

108. Confessore, *supra* note 92. The CFPB proposed the "ability-to-repay" rule under Director Cordray. *Id.*

109. *Id.* Mick Mulvaney received tens of thousands of dollars from payday lenders. *Id.*

110. PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 5 (D.C. Cir. 2016), *rev'd en banc*, 881 F.3d 75 (D.C. Cir. 2018).

111. *Id.* at 7.

112. *Id.* at 8.

late separation of powers.[113] Neither party sought review at the Supreme Court,[114] leaving the issue temporarily settled. However, other cases with identical claims were under review in other circuits.[115] One such case was *Seila Law LLC v. CFPB*, in which the plaintiff brought a nearly identical attack to that in *PHH*.[116] Echoing the D.C. Circuit's en banc decision, the Ninth Circuit upheld the constitutionality of the CFPB's leadership structure.[117] Then, the Supreme Court granted certiorari, and a newly solidified conservative majority heard the case.[118]

III. *SEILA LAW V. CFPB*: CONSERVATIVES BEND PRECEDENT TO PROMOTE UNITARY EXECUTIVE THEORY

A. *Introducing* Seila

In 2017, the CFPB issued a civil investigative demand to Seila Law LLC, a law firm providing debt-related services. Seila Law refused to comply with the demand on the grounds that the CFPB's leadership by a single director removable only for cause violated the separation of powers.[119] While this argument failed in the D.C. Circuit in *PHH*, Seila Law hoped the Supreme Court would be receptive to the innovative approach from then-Judge Kavanaugh's

113. PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 77–79 (D.C. Cir. 2018) (en banc). The majority applied the test from *Morrison v. Olsen* and found that the CFPB Director's tenure protection does not violate the president's power under the Take Care Clause. *Id.*

114. Barbara S. Mishkin, *No U.S. Supreme Court Review Sought in* PHH, CONSUMER FIN. MONITOR (May 4, 2018), https://www.consumerfinancemonitor.com/2018/05/04/no-u-s-supreme-court-review-sought-in-phh/ [https://perma.cc/7EB9-FX3W].

115. *See, e.g.*, Consumer Fin. Prot. Bureau v. Seila Law LLC, 923 F.3d 680, 682 (9th Cir. 2019), *vacated* 140 S. Ct. 2183 (2020) (Ninth Circuit); Consumer Fin. Prot. Bureau v. All Am. Check Cashing, 952 F.3d 591 (5th Cir. 2020) (Fifth Circuit).

116. *Seila Law LLC*, 923 F.3d at 682 ("Seila Law argues that the CFPB's structure violates the Constitution's separation of powers because the agency is headed by a single Director who exercises substantial executive power but can be removed by the President only for cause.").

117. *Id.* at 684.

118. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 427 (2019) (mem.). Ultimately, the majority in the case were Republican-appointed Justices: Alito, Thomas, Gorsuch, Kavanaugh, and the Chief Justice. All four Democratic-appointed Justices dissented. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2183 (2020).

119. *Seila Law LLC*, 140 S. Ct. at 2194.

PHH dissent:[120] tenure protections are constitutionally acceptable for agencies headed by multi-member commissions but not for those led by single directors. Seila Law's appeal paid off. In a majority opinion authored by Chief Justice Roberts, the five conservative justices struck down the for-cause removal protections for the CFPB's director, holding that the CFPB's leadership by a single individual removable for "inefficiency, neglect, or malfeasance" violated the separation of powers.[121]

In keeping with Roberts' tendency toward judicial minimalism,[122] he wrote the majority opinion in a very narrow fashion. Rather than overturning past precedents that upheld agency independence, the Chief Justice distinguished them, arguing that the case of the CFPB was entirely novel.[123] In this way, the Chief Justice's opinion creatively weaves and bends around doctrinal obstacles. This approach read key precedents, such as *Humphrey's Executor* and *Morrison*, in an extremely narrow way. Justice Kagan authored a strong dissent, which rightly recognized the awkward logic of finding independent multi-member bodies entirely permissible but independent single-headed bodies a gross violation of constitutional principles.[124]

My argument in favor of the dissent's protection of the CFPB's independent structure proceeds in three parts. First, I will argue that textual arguments regarding presidential removal power of executive officers are ambiguous. Second, I will argue that analysis of legislative history and originalist arguments is equally unhelpful in determining the scope of the president's removal powers. Third, given the ambiguity in the former two analyses, I will argue that

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120. *See* Brief for Petitioner, *Seila Law LLC*, 140 S. Ct. 2183 (2020) (No. 19-7) (citing Justice Kavanaugh's *PHH* dissent and Judge Henderson's *PHH* dissent (which Kavanaugh joined) many times, and, in certain places, essentially asking the Supreme Court to adopt the reasoning of the *PHH* dissent).

121. *Seila Law LLC*, 140 S. Ct. at 2191–92.

122. *See* Jonathan H. Adler, *Conservative Minimalism and the Consumer Financial Protection Bureau*, U. CHI. L. REV. ONLINE (Aug. 27, 2020), https://lawreviewblog.uchicago.edu/2020/08/27/seila-adler/ [https://perma.cc/6CXS-F782]. Adler asserts that Chief Justice Roberts' decisions often follow "conservative minimalism" whereby he prefers narrow rulings over sweeping judgments. *Id.* Chief Justice Roberts is also generally reluctant to overturn precedent or to declare federal laws unconstitutional. *Id.*

123. *Seila Law LLC*, 140 S. Ct. at 2192 (describing the CFPB structure as a "new configuration," distinguishable from those agencies in past tenure protection cases).

124. *Id.* at 2242 (Kagan, J., dissenting) ("[A] multimember commission may be harder to control than an individual director for a host of reasons unrelated to its plural character.").

political history and judicial precedent should have made the CFPB's structure perfectly constitutional. Overall, it seems the Chief Justice and those joining his opinion sought to walk a fine line: to show strong support for the unitary executive theory while not overturning key precedents. In doing so, the majority had to make certain dubious legal arguments.

B. The Text of the Constitution Provides No Guide on Removal

The Constitution provides no specific guide on the president's power to remove officers. While the Appointments Clause gives the president the power to appoint principal officers with the advice and consent of the Senate, it makes no mention of how those principal officers can be removed from office.[125] Given the lack of direction from the Appointments Clause, judges and scholars have looked elsewhere in the Constitution for indirect instructions regarding the scope of the president's removal power. The three most relevant provisions include the Take Care Clause, the Executive Vesting Clause, and the Necessary and Proper Clause. The Take Care Clause and the Executive Vesting Clause are particularly important, since proponents of the unitary executive theory point to them as a textual basis for a relatively strict separation of powers between the legislative and executive branches.[126]

First, I will address the Take Care Clause. The text of the clause is very vague, stating only that "[the president] shall take Care that the Laws be faithfully executed . . . ."[127] The Take Care Clause was critical in past removal cases, such as *Morrison* (1988), where the Court introduced a test for the constitutionality of principal officer removal protections that hinged on whether the officer's independence impedes the president's ability to "take Care that the Laws be

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125. U.S. CONST. art. II, § 2, cl. 2 ("[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . . .").

126. Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479, 1481 (2022) (explaining the Executive Vesting Clause is one of the "three originalist pillars" of unitary executive theory along with the Take Care Clause and the Decision of 1789).

127. U.S. CONST. art. II, § 3.

faithfully executed."[128] The Take Care Clause was also critical in *Free Enterprise Fund,* a 2010 case in the same line.[129]

Many proponents of the unitary executive theory interpret the Take Care Clause to require that all principal officers be removable at will by the president.[130] After all, how is a president to faithfully execute her duties if she cannot control her subordinates? This interpretation began with Justice Taft's opinion in *Myers v. United States*,[131] the first in a line of modern removal cases culminating in *Seila Law* and *Collins*. In *Myers*, the Court held that since the "selection of administrative officers is essential to the execution of the laws by [the president], so must be his power of removing those for whom he cannot continue to be responsible."[132] However, proponents of agency independence argue the Take Care Clause does not grant the president broad authority to remove executive officials. Justice Kagan asserts that the Take Care Clause is a grant of duty, not power.[133] Additionally, in the past, the Court found that "[a] for-cause standard gives [the president] 'ample authority to assure that [an official] is competently performing [his] statutory responsibilities in a manner that comports with the [relevant legislation's] provisions.'"[134] Like many arguments around vague text, both sides make good points without either side being entirely convincing.

Second, the meaning of the Executive Vesting Clause is also ambiguous and debated. Along with the Take Care Clause, the Vesting Clause is the main textual hook for a pro-executive powers doctrine.[135] The text of the Vesting Clause is simple: "[t]he executive Power shall be vested in a President of the United States of

128. Morrison v. Olson, 487 U.S. 654, 669 (1988) (quoting U.S. CONST. art. II, § 3).

129. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484 (2010) (holding that the existence of two layers of removal protection violates the president's duty to "take care the laws be faithfully executed").

130. *See* Joel S. Nolette, *The Take Care Act*, THE FEDERALIST SOC'Y (June 6, 2019), https://fedsoc.org/commentary/fedsoc-blog/the-take-care-act [https://perma.cc/G2KW-4B7X].

131. Myers v. United States, 272 U.S. 52 (1926).

132. *Id.* at 117.

133. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2228 (2020) (Kagan, J., dissenting) ("[T]he provision–'he shall take Care that the Laws be faithfully executed'–speaks of duty, not power." (quoting U.S. CONST. art. II, § 3)).

134. *Id.* (alterations in original) (quoting Morrison v. Olson, 487 U.S. 654, 692 (1988)).

135. Shugerman, *supra* note 126.

America."[136] Proponents of the unitary executive theory argue that the Executive Vesting Clause puts all executive power into the president. This formalistic view asserts that specific enumerated powers in Article II are not the only powers of the president, but rather outline limits on the president's power.[137] On the other hand, scholars in favor of agency independence argue the term "vest" is itself ambiguous.[138] Additionally, whereas the Legislative Vesting Clause specifies that "[*a*]*ll* Legislative powers" shall be vested in Congress,[139] the Executive Vesting Clause lacks the word "all."[140] This difference could imply that other branches may also exercise executive-like powers. Dissenting in *Seila Law*, Justice Kagan argues the majority went too far in asserting that the Vesting Clause gives the president unrestricted removal power over principal officers.[141] Kagan invokes the words of Justice Rehnquist from the majority opinion in *Morrison* (a 7-1 decision).[142] Rehnquist wrote that extrapolating absolute presidential removal power from the Executive Vesting Clause is "more than the text will bear."[143]

Third, even if, as proponents of the unitary executive argue, Article II grants the president broad removal power, the Necessary and Proper Clause seems to contradict this by granting Congress broad authority over the creation of agencies. The power to create agencies would seem to mean the power to structure those offices as it chooses.[144] How are scholars and judges to reconcile this broad Congressional power with the executive powers of Article II? Balancing the Necessary and Proper Clause with executive power has troubled jurists since the drafting of the Constitution.[145] The text of the Constitution itself does not provide a clear answer to this ques-

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136. U.S. CONST. art. II, § 1, cl. 1.

137. Ilan Wurman, *The Removal Power: A Critical Guide*, 2020 CATO SUP. CT. REV. 157, 158–59 (2020). Wurman calls this approach the "Residual Theory."

138. Shugerman, *supra* note 126 (concluding after an exhaustive study of the meaning of the term "vest" at the time of the founding that its most likely ordinary meaning was a simple grant of powers).

139. U.S. CONST. art. I, § 1, cl. 1 (emphasis added).

140. U.S. CONST. art. II, § 1, cl. 1.

141. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2227–28 (2020) (Kagan, J., dissenting).

142. *Id.* at 2228.

143. Morrison v. Olson, 487 U.S. 654, 690 n.29 (1988).

144. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 515 (2010) (Breyer, J., dissenting) (citing Buckley v. Valeo, 424 U.S. 1, 138 (1976)).

145. *See, e.g.*, THE FEDERALIST NO. 33 (Alexander Hamilton). The scope of the Necessary and Proper Clause was unclear at the time of the Constitution's writing. Anti-federalists worried that it would be so expansive as to include almost anything. Hamilton responded that giving Congress this power was the "unavoidable implica-

tion. Accordingly, both the Roberts majority and the Kagan dissent in *Seila Law* appealed to originalist sources of the legislative history of the Constitution to bolster their respective arguments on presidential removal power.

C. *Originalist Arguments Are Equally Unhelpful*

Both sides of the debate make originalist arguments drawing on historical sources that allegedly promote their interpretations of removal power. Supporters of the unitary executive theory of course highlight evidence that the Framers believed the Constitution granted the president plenary power of removal of officers. James Madison, perhaps the most authoritative source of Constitutional source material, seemed to believe that the president's power of removal would be unlimited. He wrote, "[t]he view that 'prevailed, as most consonant to the text of the Constitution' and 'to the requisite responsibility and harmony in the Executive Department,' was that the executive power included a power to oversee executive officers through removal."[146] Madison explained that "[t]hrough the President's oversight, 'the chain of dependence [is] preserved,' so that 'the lowest officers, the middle grade, and the highest' all 'depend, as they ought, on the President, and the President on the community.'"[147]

However, proponents of the independent agency model can point to their own originalist sources. In other writings from Madison, he assumed that Congress would decide on removal procedures for officers. Madison wrote, "[t]he tenure of the ministerial offices generally will be a subject of legal regulation, conformably to the reason of the case, and the example of the State Constitutions."[148] Additionally, Alexander Hamilton, in Federalist No. 77, assumed that "[t]he consent of [the Senate] would be necessary to displace as well as to appoint" officers.[149] Furthermore, an extensive review of period sources, including dictionaries contemporary with the founding period, finds the meaning of the Executive Vesting

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tion" of "constituting a federal government, and vesting it with certain specified powers." *Id.*

146. *Seila Law LLC*, 140 S. Ct. at 2197 (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), *in* 16 DOCUMENT HISTORY OF THE FIRST FEDERAL CONGRESS 893 (2004)).

147. *Id.* at 2203 (quoting 1 ANNALS OF CONG. 499 (1789)).

148. *Id.* at 2229 (Kagan, J., dissenting) (quoting THE FEDERALIST NO. 39 (James Madison)).

149. *Id.* (quoting THE FEDERALIST NO. 77 (Alexander Hamilton)).

Clause was either unclear or was meant to allow for legislative checks on presidential power.[150]

On the surface, the First Congress's "Decision of 1789" seems to support the view that the founding generation intended for the president to have unlimited removal power.[151] However, research into this event reveals it was not as decisive as some claim. The Decision of 1789 refers to Congress's decision regarding the removability of the Secretary of Foreign Affairs.[152] Taft's opinion in *Myers* is the clearest example of a strong pro-unitary executive interpretation of the Decision of 1789. After an exhaustive review of originalist sources, Taft concluded that the Constitution vested in the president alone the power to remove inferior and superior officers.[153] Chief Justice Roberts cited the Decision of 1789 as an important source of the president's generally absolute power of removal.[154] Diving into the source material, the bill's sponsor (Rep. Egbert Benson) explained the language of the bill was meant to express Congress's "sentiments upon the meaning of a Constitutional grant of power to the President."[155] Chief Justice John Marshall wrote that he believed the decision "has ever been considered as a full expression of the sense of the legislature" that the Constitution granted the executive removal authority.[156]

Proponents of agency independence do not accept this interpretation of the Decision of 1789. While the Decision of 1789 gave

150. Shugerman, *supra* note 126. Shugerman argues that pro-unitary executive interpretation of "vest" as granting exclusive power to the president is incorrect. *Id.* at 1481. Shugerman posits that this interpretation is a result of misapplication of the term's meaning in property rights and the concept of "vested rights" in the Marshall Court era. *Id.* at 1483. Additionally, contemporary dictionary definitions point to a non-exclusive ordinary meaning of "vest." *Id.* at 1527.

151. Myers v. United States, 272 U.S. 52, 111–14 (1926). After an exhaustive review of the legislative history of the Decision of 1789, Chief Justice Taft determined that "the vote was, and was intended to be, a legislative declaration that the power to remove officers appointed by the President and the Senate vested in the President alone." *Id.* at 114.

152. Wurman, *supra* note 137, at 172–73.

153. *Myers*, 272 U.S. at 111–14. Justice Taft's analysis of the legislative history of the Decision of 1789 is quite extensive. His analysis of historical sources found that "until the Johnson impeachment trial in 1868, [the Decision of 1789's] meaning was not doubted, even by those who questioned its soundness." *Id.* at 114.

154. *Seila Law LLC*, 140 S. Ct. at 2206 ("But text, first principles, the First Congress's decision in 1789, *Myers*, and *Free Enterprise Fund* all establish that the President's removal power is the rule, not the exception.").

155. Wurman, *supra* note 137, at 176 (quoting 1 ANNALS OF CONG. 505 (1789)).

156. *Myers*, 272 U.S. at 144 (quoting 5 JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 200 (1803)).

the president unilateral firing power over the Secretary of Foreign Affairs, its broader meaning may have been limited. The vote was narrow, and the legislators formed no consensus as to whether the grant of removal power to the president derived directly from the Constitution or from the act of Congress.[157] It seems likely that the "Yes" votes were split among these two views.[158] In her *Seila Law* dissent, Justice Kagan asserts that while Congress left the president free to fire the Secretary of Foreign Affairs at will, it did not answer the broader questions of the president's firing power and Congress's power to regulate removal authority in the future.[159] Kagan writes that the only view definitively rejected in the Decision of 1789 was Hamilton's view from Federalist No. 77 that removal required Senate consent. It left undecided whether the president had absolute removal power or Congress could limit that power.[160]

Overall, the amount of scholarship interpreting the Decision of 1789 and other Founding era sources is dizzying both in its quantity and in the diversity of conclusions. These conflicting sources have no obvious resolution. Pitting these sources against each other only leads to more uncertainty. For these reasons, originalist arguments are not helpful in determining the scope of presidential removal power.

D. Political History and Tradition Suggest Independent Agencies Are Acceptable

The political history of the creation and maintenance of independent agencies shows that the independent agency model is constitutionally valid. It is generally accepted that deeply embedded traditional ways of conducting government show us how to understand the Constitution.[161] Chief Justice Roberts acknowledges the importance of historical precedent in answering this constitutional question in his opinion in *Seila Law*.[162]

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157. Sunstein & Lessig, *supra* note 20, at 26. This vote only pertained to the president's ability to remove the Secretary of Foreign Affairs. It is not clear if it was meant to apply to all executive officers.

158. *Id.*

159. *Seila Law LLC*, 140 S. Ct. at 2225 (Kagan, J., dissenting).

160. *Id.* at 2230.

161. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

162. *Seila Law LLC*, 140 S. Ct. at 2201. In deciding that the structure of the CFPB was unconstitutional, the Chief Justice quoted *Free Enterprise Fund*: "'Perhaps the most telling indication of [a] severe constitutional problem' with an executive entity 'is [a] lack of historical precedent' to support it.'" *Id.* (alterations in original) (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 505

Congress created the first "independent agency," i.e., an agency whose leaders could only be removed by the president for good cause, in 1887: the Interstate Commerce Commission.[163] Other extremely powerful independent agencies followed, now totaling at least 28.[164] Notable examples include the Federal Reserve (1913), the Federal Trade Commission (1914), and the Federal Communications Commission (1934).[165]

Strong advocates of the unitary executive theory, such as Justices Thomas and Gorsuch, look at this history of independent agencies as irrelevant to the constitutional question of the president's removal power.[166] They believe the Constitution demands complete presidential control of the administrative state, making all independent agencies unconstitutional.[167] But most of today's Supreme Court disagrees with this view. Chief Justice Roberts, in what has been described as an "institutionalist approach,"[168] accepts that there is a long tradition of independent agencies, but he argues that there is no such tradition of independent agencies whose principal officers wield power *alone*.[169]

In *Seila Law*, Kagan and the other liberal justices countered with several examples of independent agencies with a single director: Office of the Special Counsel (OSC), Social Security Administration (SSA), and Federal Housing Finance Authority (FHFA).[170] On this point, I believe Chief Justice Roberts is correct that there is not a very strong historical precedent for single director agencies. They are all recent creations (FHFA in 2008,[171] OSC in 1978,[172]

(2010)). The Chief Justice wrote the CFPB's lack of historical precedents indicated that it is improper. *Id.*

163. *See* PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 17–18 (D.C. Cir. 2016), *rev'd en banc*, 881 F.3d 75 (D.C. Cir. 2018).

164. *Id.*

165. *Id.*

166. *Seila Law LLC*, 140 S. Ct. at 2212–15 (Thomas, J., concurring). Justice Thomas wrote: "Our tolerance of independent agencies in *Humphrey's Executor* is an unfortunate example of the Court's failure to apply the Constitution as written. That decision has paved the way for an ever-expanding encroachment on the power of the Executive, contrary to our constitutional design." *Id.* at 2212.

167. *Id.* at 2216.

168. Adler, *supra* note 122.

169. *Seila Law LLC*, 140 S. Ct. at 2202 ("The CFPB's single-Director structure is an innovation with no foothold in history or tradition.").

170. *Id.* at 2241 (Kagan, J., dissenting).

171. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, §§ 1101–02, 122 Stat. 2654, 2659–61.

172. Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111.

and SSA in 1994[173]). Furthermore, the constitutionality of the FHFA was being challenged at the time of *Seila Law* (in *Collins*),[174] and the constitutionality of the SSA had also been questioned.[175]

But does the lack of historical precedent for *single director* agencies matter? This question in turn hinges on whether the distinction between an agency headed by a single director and one with a multi-member governing body is a relevant one. As I will argue below, I find this distinction to be meaningless for the constitutionality of agency structure. The more important question to ask when evaluating the precedential value of past independent agencies is: what *subject matter* does the agency regulate? Financial regulators have been historically independent for over a century.[176] Thus, there is strong historical precedent for a financial regulatory agency such as the CFPB to be granted removal protection.

E. Judicial Precedent Establishes the CFPB's Constitutionality

The majority in *Seila Law* interpreted case law in a very narrow and, I argue, misguided fashion in order to avoid overturning key precedents and arrive at its holding that an independent agency wielding significant executive power and run by a single director removable only for cause was unconstitutional.[177] In summarizing the high court's tenure protection precedents, Chief Justice Roberts began with *Myers*, which asserted a general rule of absolute presidential removal power.[178] The majority was apparently not deterred by the fact that *Humphrey's Executor*, authored just nine years after *Myers*, expressly overturned almost all of *Myers* and cabined

173. Social Security Independence and Program Improvements Act of 1994, 42 U.S.C. § 902; *Social Security History*, SOC. SEC. ADMIN., https://www.ssa.gov/history/orghist.html [https://perma.cc/2ZR6-UNS9]. While founded in 1936, the SSA did not emerge in its current form as an independent agency led by a single director until legislation signed in 1994, which became effective in 1995. *Id.*

174. Collins v. Fed. Hous. Fin. Agency, 254 F. Supp. 3d 841 (S.D. Tex. 2017), *aff'd in part, rev'd in part sub nom.* Collins v. Mnuchin, 896 F.3d 640 (5th Cir. 2018), *aff'd in part, rev'd in part and remanded on reh'g en banc*, 938 F.3d 553 (5th Cir. 2019), *aff'd in part, vacated in part, rev'd in part sub nom.* Collins v. Yellen, 141 S. Ct. 1761 (2021) (challenging the constitutionality of the FHFA's independence).

175. *Seila Law LLC*, 140 S. Ct. at 2202 ("President Clinton questioned the constitutionality of the SSA's new single-Director structure upon signing it into law.").

176. *Id.* at 2232–33 (Kagan, J., dissenting).

177. *Id.* at 2192.

178. Myers v. United States, 272 U.S. 52, 115–16 (1926) ("Article II by vesting the executive power in the President was intended to grant to him the power of appointment and removal of executive officers except as thereafter expressly provided in that Article.").

Myers strictly to its facts.[179] In *Seila Law*, the Chief Justice interpreted *Humphrey's Executor* and the other key precedent of *Morrison* in an overly narrow way to conclude that the structure of the CFPB was unconstitutional.

The Chief Justice's main argument was as follows. *Myers* established a general rule of absolute presidential removal power.[180] After *Myers*, the Supreme Court established two narrow exceptions to this removal power: one for "multimember expert agencies that do not wield substantial executive power" (established in *Humphrey's Executor*)[181] and one for "inferior officers with limited duties and no policymaking or administrative authority" (established in *Morrison*).[182] Applying this rule scheme to the facts of the case, Chief Justice Roberts found the CFPB did not fit within the *Humphrey's Executor* exception (since it had a single director) or the *Morrison* exception (since its director was a superior officer).[183] As neither exception applied to the CFPB, its structure was unconstitutional.[184]

Chief Justice Roberts' reading of the tenure protection case law was misguided. The *Myers* holding of absolute presidential removal power was overturned by *Humphrey's Executor* only nine years later.[185] Ever since then, the general principle of *Humphrey's Executor* has been consistently upheld. *Humphrey's Executor* held that Congress can protect an officer from removal except for cause of "inefficiency, neglect of duty, or malfeasance in office" (the same language as in the CFPB's statute) when the officer has quasi-legislative or quasi-judicial powers.[186] In so holding, the Court cabined the holding of *Myers* to its facts, explaining "the narrow point actually decided [in *Myers*] was only that the President had power to

179. Humphrey's Ex'r v. United States, 295 U.S. 602, 626 (1935). In the actual *Humphrey's* opinion, Justice Sutherland makes clear that *Myers*' holding is being cabined to only postmasters and that, to the extent *Humphrey's* and *Myers* disagree, *Humphrey's* overturns *Myers*; Sutherland writes:

> [T]he narrow point actually decided [in *Myers*] was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress. . . . In so far as [*Myers* dicta] are out of harmony with the views here set forth, these expressions are disapproved.

Id.

180. *Seila Law LLC*, 140 S. Ct. at 2197–98.

181. *Id.* at 2199–200.

182. *Id.* at 2200.

183. *Id.*

184. *Id.* at 2201.

185. Humphrey's Ex'r v. United States, 295 U.S. 602, 626 (1935).

186. *Id.* at 622, 629.

remove a postmaster of the first class."[187] The Court added that to the extent *Myers* contradicts *Humphrey's Executor*, *Myers* was overruled.[188] The *Humphrey's Executor* "quasi-judicial" and "quasi-legislative" test replaced the *Myers* rule when determining the constitutionality of removal protections. In the following decades, the Court reaffirmed *Humphrey's Executor* in cases such as *Wiener v. United States* (1958), which upheld tenure protection for members of the War Claims Commission.[189]

Granted, the Chief Justice can hardly be blamed for being dismissive toward *Humphrey's Executor*. Its holding that removal protections are acceptable for officers exercising quasi-judicial or quasi-legislative powers was confusing and unhelpful to lower courts and practitioners. Whether a function is strictly executive in nature rather than "quasi-judicial" or "quasi-legislative" is often unclear. Still, prior to *Seila Law,* Chief Justice Taft's logic in *Myers* had been largely disregarded for the better part of a century.[190] Its exhumation is slightly miraculous.

In the 1988 case of *Morrison v. Olson*, the Court addressed the constitutionality of the Office of Independent Counsel.[191] In a 7-1 vote, the *Morrison* Court created a new "functionalist" test for removal protections.[192] Instead of the *Humphrey's Executor* purely executive versus "quasi-judicial" or "quasi-legislative" test, the Court held that a restriction on presidential removal is constitutional unless it deprives the president of control over an official to such a degree that it impedes the president in fulfilling his own constitutional responsibilities.[193] In 2009, *Free Enterprise Fund* appeared to affirm the Court's continued reliance on the *Morrison* test. The Supreme Court held that having two layers of officers with removal

187. *Id.* at 626.

188. *Id.* ("In so far as [*Myers* dicta] are out of harmony with the views here set forth, these expressions are disapproved.").

189. *Seila Law LLC*, 140 S. Ct. at 2234 (Kagan, J., dissenting) (citing Wiener v. United States, 357 U.S. 349 (1958)).

190. *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492–93 (2010). While the Roberts majority opinion cited to *Myers* for the general principle that a president can remove officers to carry out his or her Article II duties, it recognized that *Humphrey's Executor* and subsequent cases allowed "good-cause tenure on the principal officers of certain independent agencies." *Id.*

191. Morrison v. Olson, 487 U.S. 654 (1988).

192. *Id.* at 691.

193. *Id.* ("But the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.").

protection was unconstitutional.[194] Specifically, *Free Enterprise Fund* found that since the SEC Commissioners had tenure protection, the Public Company Accounting Oversight Board (PCAOB) Board Members, who oversee auditor quality and are appointed by the SEC Commissioners, could *not* have tenure protection.[195] The Court did not explicitly invoke a specific test but seemed to use the *Morrison* test in deciding that multilevel protection from removal by the president violates the Article II Vesting Clause—to "take care that the laws be faithfully executed."[196] *Free Enterprise Fund* was *not* an example of the general principle of unlimited presidential removal power, as Roberts' opinion[197] and Thomas' concurrence in *Seila Law* asserted.[198] Rather, that case upheld the tenure protections of the SEC Commissioners and simply set a new, and rather unimportant, boundary on Congress's ability to create two layers of tenure protections. The issue of two layers of tenure protection was unique and the case narrowly decided.

Chief Justice Roberts' rule in *Seila Law* relied on the dubious distinction between agencies headed by multi-member commissions as opposed to single directors. Roberts argued the single director structure of the CFPB was "almost wholly unprecedented" and generally egregious for putting significant power in the hands of a single individual, and that past "exceptions" to the general rule of absolute presidential removal power therefore did not apply.[199] Roberts contended that the *Humphrey's Executor* holding was only meant to apply to agencies with multi-member leadership bodies even though *Humphrey's Executor* did not contemplate this distinc-

194. *Free Enter. Fund*, 561 U.S. at 484. Although the majority does not cite to the *Morrison* functional test, it does appear to functionally examine whether PCAOB tenure protections unduly trammel on the president's duties under the Take Care Clause: "The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them. Here the President cannot remove an officer who enjoys more than one level of good-cause protection." *Id.* (quoting U.S. CONST. art. II, § 3).

195. *Id.* at 484–85.

196. *Id.* at 493.

197. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2191 (2020) (stating that *Free Enterprise Fund* stands for the proposition that "'as a general matter,' the Constitution gives the President 'the authority to remove those who assist him in carrying out his duties'" (quoting *Free Enter. Fund*, 561 U.S. at 513–14)).

198. *Id.* at 2217 (Thomas, J., concurring) ("[I]n *Free Enterprise Fund*, we returned to the principles set out in the 'landmark case of *Myers*.'" (quoting *Free Enter. Fund*, 561 U.S. at 492)).

199. *Id.* at 2201 (majority opinion).

tion.[200] Plus, the logic is strained.[201] Roberts complains that the CFPB's single director structure "contravenes" the system of concentrated executive power.[202] However, the same complaint could be made about a multi-member leadership body with for-cause removal protection.[203] Unitary executive proponents also argue that a single director structure diminishes presidential control.[204] However, as Justice Kagan argued in her *Seila Law* dissent, it intuitively seems easier for a president to exert influence on one director than on several, suggesting that the functionalist *Morrison* test would not privilege agencies headed by multi-member governing bodies over those headed by a single director.[205]

Chief Justice Roberts' assertion that the *Morrison* functionalist test only applies to inferior officers is plausible on the face of the *Morrison* decision. While Justice Kagan argues that *Morrison* only uses the term officer, rather than "inferior officer," in the opinion, the *Morrison* Court takes pains to identify that the independent counsel is an inferior officer position,[206] which may imply the test was specific to inferior officers. But *Morrison* broadly dismissed the *Humphrey's Executor* test, which may imply an outright overruling of *Humphrey's Executor* for both inferior and superior officers.[207] Fur-

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200. Humphrey's Ex'r v. United States, 295 U.S. 602, 625 (1935). While the *Humphrey's Executor* opinion does emphasize the importance of the commissioners being non-partisan experts, *see id.* (citing legislative history emphasizing "it was essential that the commission should not be open to the suspicion of partisan direction"), the opinion also references the five-member, partisan balanced structure of the Commission, *id.* at 624–25. However, the holding of the case turns not on the number of commissioners, but rather on the *type of duties* performed by the commissioners. *Id.* at 629 ("The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted.").

201. *Seila Law LLC*, 140 S. Ct. at 2243 (Kagan, J., dissenting) (writing that logic and experience tell us that multi-member agencies would be harder for a president to control than single director agencies).

202. *Id.* at 2203–04 (majority opinion).

203. Jack M. Beermann, Seila Law*: Is There a There There?*, U. CHI. L. REV. ONLINE (Aug. 27, 2020), https://lawreviewblog.uchicago.edu/2020/08/27/seila-beermann/ [https://perma.cc/SM4G-BNEX].

204. PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 167 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).

205. *Seila Law LLC*, 140 S. Ct. at 2242 (Kagan, J., dissenting).

206. Morrison v. Olson, 487 U.S. 654, 671–72 (1988). A substantial portion of the *Morrison* opinion is dedicated to finding that the Independent Counsel is an inferior officer rather than a principal officer.

207. *Id.* at 689–90 (stating that despite *Humphrey's Executor*, the ability to restrict the president's power to remove an official does not turn on whether or not the official is classified as "purely executive").

ther, *Free Enterprise Fund* appeared to apply the *Morrison* test to the SEC Commissioners, who are superior officers.[208] However, even if *Morrison* only applies to inferior officers, that would leave the unwieldy *Humphrey's Executor* test, not the *Myers* rule, as the governing test for superior officers.

F. However, the Court's Unitary Executive Bent Won Out

Then-Judge Kavanaugh's 2018 dissent in *PHH* supplied much of the intellectual framework adopted in the Chief Justice's *Seila Law* opinion.[209] Roberts' *Seila Law* opinion even cited Justice Kavanaugh's *PHH* dissent for *Seila Law*'s core finding that *Myers* created a general rule of plenary presidential removal power with two narrow exceptions.[210] In his *PHH* dissent, Judge Kavanaugh accepted PHH's argument that *Humphrey's Executor* only applied to multimember commissions because such bodies have their own internal checks to avoid arbitrary decision-making.[211] Kavanaugh argued the president can better exert control over multi-member commissions because, for example, the president can at least change who the chair is.[212] The *Seila Law* Court adopted this logic despite its lack of basis in precedent or historical practice.[213]

It appears that Justice Kavanaugh's *PHH* dissent was motivated largely by the unitary executive theory that independent agencies are an attack on individual liberty.[214] In *PHH*, Kavanaugh drew on

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208. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 493 (2010).

209. *Seila Law LLC*, 140 S. Ct. at 2199–200. The Chief Justice's opinion cites to Judge Kavanaugh's *PHH* dissent for the central proposition that the general rule for tenure protection is the *Myers* absolute executive power approach with "two exceptions—one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority." *Id.*

210. *Id.*

211. PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 166 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).

212. *Id.*

213. Beermann, *supra* note 203. The author argues that arguments in favor of multi-headed agencies over single-headed ones are not constitutional in nature. *Id.* For example, one could argue that multi-headed agencies reach more thoughtful decisions and are able to better share workloads, but there was not any constitutional importance put on the number of commissioners/directors until Judge Kavanaugh's opinion in *PHH*. *Id.*

214. *PHH Corp.*, 881 F.3d at 164 (Kavanaugh, J., dissenting) ("To prevent tyranny and protect individual liberty, the Framers of the Constitution separated the legislative, executive, and judicial powers of the new national government. To further safeguard liberty, the Framers insisted upon accountability for the exercise of executive power.").

the discussion of unitary executive theory in Justice Scalia's 1998 dissent in *Morrison*, which garnered only the vote of Justice Scalia himself.[215] Echoing language of Republican politicians, Kavanaugh wrote that independent agencies constitute "a headless fourth branch of the U.S. Government."[216] Senators Lee (R-UT) and Hawley (R-MO) used the phrase "headless fourth branch of government" in justifying their bill to eliminate all administrative officer tenure protections.[217] The phrase also mirrors the condemnation of "unaccountable bureaucracy" in the Republican Party's 2016 Platform.[218] Believing that the Constitution demands administrative accountability to the president is not inherently partisan. Yet, the unitary executive theory has become entwined with the political right.

The Supreme Court can always reverse itself if it so chooses, as Justices Thomas and Gorsuch voted to do in *Seila Law*.[219] In a concurring opinion, Justice Thomas called for the Court to overrule *Humphrey's Executor* outright and eliminate all tenure protections for officers.[220] Thomas argued that the Court has now undermined *Humphrey's Executor* in several major cases (*Morrison*, *Free Enterprise Fund*, and now *Seila Law*) such that the entire line of cases should be done away with.[221] Thomas's approach echoed that of Justice Scalia's *Morrison* dissent. It calls for a strict unitary approach to the executive branch. Thomas' approach had a much more coherent logic to it than that of Roberts, even if it is much more extreme in its practical implications for the federal government.

Even though the *Seila Law* decision was misguided, it is now the law of the land. This leaves three main questions to explore: (1) What is the current state of the law on tenure protections and independent agencies? (2) What will be the long-term implications of *Seila Law* on the administrative state? (3) In terms of broad policy

215. *Id.* at 183 ("The purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom." (quoting Morrison v. Olson, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting))).

216. *Id.* at 165.

217. Press Release, Senator Mike Lee, *supra* note 14 ("But following the Supreme Court's deeply flawed decision in *Humphrey's Executor*, Congress has, since the New Deal era, gradually created an immense, *headless fourth branch* of government that is outside the President's control and thus totally unaccountable to the American People." (emphasis added)).

218. 2016 REPUBLICAN PARTY PLATFORM, *supra* note 12, at 3.

219. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2211 (2020) (Thomas, J., concurring).

220. *Id.* at 2212.

221. *Id.* at 2217–18.

preferences and goals, what form should the administrative state take, and how much independence should certain agencies have? I will dive into these questions in the following sections.

IV.
AFTER *SEILA*, THE CORRECT TEST FOR PRESIDENTIAL REMOVAL RESTRICTION IS UNCLEAR

Prior to *Seila Law*, the judiciary appeared to have settled on the *Morrison* functional test as the governing test for the constitutionality of presidential removal restrictions.[222] The *Morrison* test asked if the officer's tenure protection impeded the president's ability to carry out his constitutional duties, namely his duty to "take Care that the Laws be faithfully executed."[223] Although the exact relationship between the *Morrison* test and the *Humphrey's Executor* test was not entirely clear, it seemed most likely that *Morrison* had replaced *Humphrey's Executor* entirely.[224] The *Morrison* Court explicitly rejected the *Humphrey's Executor* test, stating that the Court's updated view no longer relied on distinctions such as "purely executive" versus "quasi-legislative" or "quasi-judicial."[225] The Court subsequently appeared to use the *Morrison* test in *Free Enterprise Fund*.[226] Further evidence of the *Morrison* test's hold on the judiciary is that both the D.C. Circuit in *PHH* and the Ninth Circuit in *Seila Law* relied on it in finding the CFPB to be constitutional.[227]

222. *See supra* Part III.

223. Morrison v. Olson, 487 U.S. 654, 658, 691 (1988) (quoting U.S. CONST. art. II, § 3).

224. Bressman & Thompson, *supra* note 7, at 652 (discussing that *Morrison* recast the constitutional test for removal protection and put it into functionalist terms).

225. *Morrison*, 487 U.S. at 689.

226. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 495–96 (2010). Although Chief Justice Roberts does not clearly articulate a test in *Free Enterprise Fund*, the heart of his analysis seems to focus on the functional concern that two layers of tenure protection will lead the president to lose control of the executive branch. *Id.* at 496–97. This would mean that the president could not fulfill his or her constitutional duties. The Chief Justice writes that "[t]he President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired." *Id.*

227. PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 94 (D.C. Cir. 2018) (en banc) (observing that "[i]n analyzing where Congress may deploy such for-cause protection, the Supreme Court looks to 'the character of the office' and the 'proper functioning of the agency or official'" (quoting *Morrison*, 487 U.S. at 691 n.30)); Consumer Fin. Prot. Bureau v. Seila Law LLC, 923 F.3d 680, 684 (9th

The apparent replacement of *Humphrey's Executor* with *Morrison* was likely an improvement. The *Humphrey's* quasi-legislative and quasi-judicial test was rather unusual and difficult to apply. The *Morrison* functionalist test was itself quite flexible, as different judges could come to very different conclusions on what impedes the president's ability to carry out his duties under the Take Care Clause. However, the same complaint could be lodged against any functionalist judicial test.

Now, *Seila Law* seems to have replaced *Morrison*'s functional test, at least for superior officers. Also, strangely enough, *Seila Law* seems to have brought the unwieldy *Humphrey's Executor* test back from the dead for a certain subcategory of independent agencies.[228] In *Seila Law*, the Court created a new "significant executive power" test: "an independent agency that wields significant executive power and is run by a single individual" cannot have tenure protection for its director.[229] The new approach replaces *Morrison*'s functionalism with strict formalism. This represents a dramatic shift in the Court's approach to removal protections, as the *Morrison* functional test, authored by conservative stalwart Justice Rehnquist, earned seven votes just three decades ago.

Post-*Seila Law*, the Court leaves us with at least three different tests that apply to different situations. *Seila Law* holds that the *Humphrey's Executor* test applies to "multi-member expert agencies that do not wield substantial executive power."[230] The *Morrison* functionalist test governs removal protections for "inferior officers with limited duties and no policymaking or administrative authority."[231] And for an independent agency that "wields significant executive power and is run by a single individual" no tenure protection is allowed, according to the new *Seila Law* test.[232] This leaves two potentially important scenarios without a clear test: (1) multi-member executive agencies that *do* wield substantial executive power, and (2) an independent agency that *does not* wield significant exec-

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Cir. 2019), *rev'd*, 140 S. Ct. 2183 (2020) (applying the *Morrison* test and finding "[t]hose cases indicate that the for-cause removal restriction protecting the CFPB's Director does not 'impede the President's ability to perform his constitutional duty' to ensure that the laws are faithfully executed" (quoting *Morrison*, 487 U.S. at 691)).

228. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2198 (2020) (stating that the *Humphrey's* test applies to multi-member commissions).

229. *Id.* at 2192.

230. *Id.* at 2199–200.

231. *Id.*

232. *Id.* at 2192.

utive power. The Court addressed this second possibility in *Collins v. Yellen*,[233] but the first scenario remains an open question.

The proliferation of different tests, with unclear boundaries between them, leaves the Court with options to continue to change and reinterpret tests in the future while still claiming to be loyal to precedent. Proponents of a unitary executive may see this doctrinal confusion as an opportunity to argue that the *Morrison* and *Humphrey's Executor* tests are now dead and thus expand the categories of per se unconstitutionality of tenure protections. On the other hand, a more agency-friendly approach would be to treat *Seila Law* as an idiosyncratic one-off applying only to single-director agencies. This way, the *Morrison* functional test and *Humphrey's* "quasi-judicial" / "quasi-legislative" test would remain in force for the majority of cases.

V.
WHAT DOMINOS WILL *SEILA LAW* SET IN MOTION?

A. *The FHFA and SSA Directors Have Already Lost Tenure Protections*

The above analysis on the state of administrative removal protection law begs the question of what implications the *Seila Law* holding will have for other administrative agencies. Obviously, any agency with a single director removable only for cause is now vulnerable. Two agencies fit this bill very well: the Federal Housing Finance Agency (FHFA) and the Social Security Administration (SSA). The Court already struck down removal protections for the FHFA Director in *Collins v. Yellen*.[234] As of July 2021, the SSA Director's removal protections also appear defunct.[235]

The FHFA, created in 2008 to address the fallout of the Financial Crisis, oversees and regulates Fannie Mae, Freddie Mac, and the Federal Home Loan Bank System, among other aspects of the housing finance market.[236] Important for our purposes, the FHFA has only a single director at the helm with a five-year term.[237]

233. 141 S. Ct. 1761 (2021); *see infra* Part V.

234. Collins v. Yellen, 141 S. Ct. 1761 (2021).

235. *See* Jim Tankersley, *President Biden Fired the Head of the Social Security Administration*, N.Y. TIMES (July 9, 2021), https://www.nytimes.com/2021/07/09/us/politics/biden-social-security-andrew-saul-fired.html [https://perma.cc/SWE8-6E42].

236. *FHFA at a Glance*, *supra* note 79.

237. 12 U.S.C. § 4512.

Under the FHFA's organic statute, the president could only remove this director "for cause."[238]

Shortly after deciding *Seila Law*, the Supreme Court heard a challenge to the FHFA's constitutionality in *Collins v. Yellen*. In explaining the Court's decision in *Collins*, Justice Alito said simply, "[a] straightforward application of our reasoning in *Seila Law* dictates the result here."[239] Since *Seila Law* held that removal protections for single director agencies were unconstitutional, the FHFA Director's tenure protection "violates the separation of powers."[240] Essentially, Justice Alito said the result was a foregone conclusion.

Perhaps the best argument raised by the amicus curiae representing the FHFA was that the *Seila Law* holding only applied to agencies with "significant executive power," which the FHFA does *not* wield.[241] Note that in *Collins*, Professor Aaron Nielson of Brigham Young University Law School represented the FHFA as amicus curiae because the Trump Administration chose not to defend the FHFA.[242] Professor Nielson argued that while the CFPB wields broad power to regulate both businesses and consumers, the FHFA does not regulate ordinary private citizens. Rather, the FHFA only oversees a handful of federally chartered entities.[243] Professor Nielson attempted to further distinguish the two agencies by arguing that the CFPB has significantly broader rulemaking and enforcement authority than does the FHFA.[244] The argument that the FHFA lacks "significant executive power" and is therefore allowed tenure protection under the *Seila Law* test seems, on its face, to be legitimate. Justice Sotomayor accepted this logic in her dissent (joined by Justice Breyer) and contended that the FHFA director's removal protection should stand.[245] However, the majority strongly rejected the distinction between the authority of the CFPB and that of the FHFA. The majority found that the FHFA had considerable power because its "regulatory and enforcement authority over two companies that dominate the secondary mortgage market" has "an immediate impact on millions of private individuals and the econ-

238. *Id.*

239. *Collins*, 141 S. Ct. at 1784.

240. *Id.* at 1783–84.

241. Brief for Defendant at 2, Collins v. Yellen, 141 S. Ct. 1761 (2021) (No. 19-422).

242. *Collins*, 141 S. Ct. at 1769 (listing Aaron Nielson as having "argued the cause, as amicus curiae, by appointment of the Court.").

243. *Id.* at 1786.

244. *Id.* at 1784.

245. *Id.* at 1802–03 (Sotomayor, J., dissenting).

omy at large."[246] It is true that the actions and stability of Fannie Mae and Freddie Mac have a large influence on the economy. But by this reasoning, seemingly any federal agency would be deemed to have "significant executive power." If one examines the secondary and tertiary effects of an agency's actions in aggregate, they would often touch the lives of millions of Americans.

Collins suggests that the extent of an agency's authority may not even be relevant to the constitutionality of its director's removal protections. Writing for the majority, Justice Alito found that "the nature and breadth of an agency's authority is not dispositive" in determining whether removal protections are constitutional.[247] The majority opinion further asserted that courts are not good at such line-drawing and that "the constitutionality of removal restrictions" does not "hinge" on "the nature and breadth of any agency's authority."[248] Rather, Justice Alito said that the purposes of requiring at-will removal by the president "are implicated whenever an agency does *important work*."[249] According to this language, *Collins* seems to eliminate the "significant executive power" prong of the *Seila Law* test entirely. After *Collins*, there now appears to be a blanket rule that single director agencies that perform "important work" cannot have removal protections, essentially creating a per se rule that no single-director agencies can have removal protections.

This adjustment of the *Seila Law* test did not go unnoticed. In her concurring opinion, Justice Kagan took issue with the apparent removal of the "significant executive power" limiting principle from the *Seila Law* test. While she concurred in judgment on the basis that stare decisis compelled the striking down of the FHFA's removal protection,[250] Justice Kagan criticized the majority for failing to respect the precedent of *Seila Law*.[251]

Like the CFPB and the FHFA, the Social Security Administration also existed as an independent agency with a single leader re-

246. *Id.* at 1785 (majority opinion).

247. *Id.* at 1784 ("But the nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head.").

248. *Id.* at 1785.

249. *Id.* at 1784 (emphasis added).

250. *Id.* at 1799–1800 (Kagan, J., concurring) ("On the main constitutional question, though, I concur only in the judgment. *Stare decisis* compels the conclusion that the FHFA's for-cause removal provision violates the Constitution.").

251. *Id.* at 1800–01 (criticizing the majority's "gratuitous" broadening of *Seila Law* by eliminating the "significant executive power" prong from the analysis).

movable only for cause.[252] Following the *Collins* decision, President Biden's Office of Legal Counsel authored a memo arguing that given the precedents of *Seila Law* and *Collins*, the president has the power to fire the SSA Commissioner at will.[253] One day after the memo, President Biden fired SSA Commissioner Andrew Saul, whom former President Trump appointed to a six-year term in 2019.[254] Despite protests from Saul and from prominent Republican legislators, Biden replaced Saul with a more liberal acting Commissioner.[255] Saul did not challenge his removal in court. Thus, it seems accepted, even absent an explicit judicial ruling, that the SSA is no longer an independent agency. As an aside, the firing of Commissioner Saul is another example of how agency independence is not an inherently partisan issue. Even though agency independence is more likely to be supported by Democrats than Republicans,[256] a party's stance on the issue can vary depending on control of the White House.

If the issue of Saul's removal were litigated, the Court might show more leniency to the SSA than it has to the CFPB or the FHFA, since Chief Justice Roberts noted that, unlike the CFPB, the head of the SSA lacks authority to bring enforcement actions against private parties.[257] The agency's role is largely limited to adjudicating claims for Social Security benefits.[258] But despite this difference from the CFPB in terms of authority, the Court would still likely declare the Commissioner's tenure protection unconstitutional. Unilateral enforcement power was not a vital element of the

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252. Social Security Independence and Program Improvements Act of 1994, 42 U.S.C. § 902; *see* Rita L. DiSimone, *Social Security Administration Created as an Independent Agency: Public Law 103-296*, 58 SOCIAL SEC. BULL. 57 (1995) (stating that through the Social Security Independence and Program Improvements Act of 1994, Congress changed the leadership structure of the SSA to a single commissioner in 1994).

253. Constitutionality of the Commissioner of Social Security's Tenure Protection, 45 Op. O.L.C. (2021).

254. *See* Tankersley, *supra* note 235.

255. *See* Erich Wagner, *Republicans Demand Answers on Ouster of Social Security Commissioner*, GOV'T EXEC. (Aug. 25, 2021), https://www.govexec.com/management/2021/08/republicans-demand-answers-saul-ouster-social-security/184860/ [https://perma.cc/LGY4-QK8R].

256. *See, e.g.*, Kotch, *supra* note 24 (describing how conservative political groups and Republican politicians sided with the petitioners in *Seila Law*, while Democrats generally supported the CFPB's independence and rejected the unitary executive theory).

257. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2202 (2020).

258. *Id.*

Seila Law test.[259] It was simply one component of a long list of constitutional issues.[260] Additionally, the apparent elimination of the "significant executive power" limiting principle in *Collins* would not do the SSA any favors. After *Collins*, it seems all single-headed agencies whose directors have tenure protection are unconstitutional.[261] The *Collins* decision also lacked the deference to the SSA shown in *Seila Law*.[262] Instead, the majority explicitly avoided making any statement on the SSA's constitutionality.[263] In her *Collins* concurrence, Justice Kagan mused that "a betting person might wager that the [SSA's] removal provision is next on the chopping block."[264] The longer President Biden's removal of the SSA Commissioner goes unchallenged, the less likely judicial reversal becomes.

In *Seila Law* and *Collins*, the immediate impacts of striking down tenure protections were relatively limited. In *Seila Law*, the Court held that tenure protection for the CFPB Director was severable from the rest of the agency's statutes and decisions.[265] The finding of severability means that the agency's past actions were not invalidated simply because an unconstitutional Director enacted them. In *Collins*, the majority held that since all officers who headed the FHFA were properly appointed, they had authority to carry out the functions of the office and their actions were valid.[266] It seems likely that a future case striking down the SSA Director's removal protections would follow a similar pattern. In fact, the Justices seem keen to avoid any outcome where past actions of the SSA

259. *Id.* at 2203–04.

260. *Id.* In listing the problems with the single director structure, Chief Justice Roberts said: "[T]he Director may *unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties. . . . [T]he Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans." *Id.*

261. Collins v. Yellen, 141 S. Ct. 1761, 1783–84 (2021).

262. *See Seila Law LLC*, 140 S. Ct. at 2202 (stating that "the SSA lacks the authority to bring enforcement actions against private parties" and implying that it lacks the "significant executive power" wielded by the CFPB and thus its Director's tenure protection might be constitutionally acceptable).

263. *Collins*, 141 S. Ct. at 1787 n.21 (regarding the SSA, the Office of Special Counsel, and the Comptroller, Justice Alito writes "[n]one of these agencies is before us, and we do not comment on the constitutionality of any removal restriction that applies to their officers.").

264. *Id.* at 1802 (Kagan, J., concurring).

265. *Seila Law LLC*, 140 S. Ct. at 2192.

266. *Collins*, 141 S. Ct. at 1787–88 (rejecting the plaintiffs' request that the Court find that certain actions of past Directors to pay dividends to the U.S. Treasury were void).

would be deemed invalid.[267] While the conservative majority on the Court reined in the independence of regulators from the president, they fortunately did not tear down the entire administrative state as they did so.

B. *The Broader Impact of* Seila Law *Depends on the Path Taken by the Supreme Court*

Outside of these two agencies, the broader question is whether *Seila Law* will be cabined without significant precedential value, or be used as a stepping-stone toward further erosion of the independent agency model. In considering the Court's future direction on this issue, I see three possible paths: (1) an institutionalist path of cabining *Seila Law* and *Collins*, (2) a light unitary executive approach of chipping away at agency independence, and (3) a strong unitary executive approach of declaring all agency leadership tenure protections unconstitutional.

First, on the institutionalist path, the Court would cabin the *Seila Law* and *Collins* holdings to only single director agencies. This would leave the SSA vulnerable, as described above, but tenure protections would remain intact at all other administrative agencies. Although *Seila Law* nominally revived the *Myers* doctrine of plenary presidential removal power, Roberts' two "exceptions" to this general rule are actually so broad as to almost completely swallow *Myers*.[268] Under the current formulation, all inferior officers receive the *Morrison* test, and all multi-member agencies receive the *Humphrey's Executor* test.[269]

Second, what I dub the "light unitary executive" approach would continue the Court's gradual walk of eroding agency independence. In *Seila Law*, Chief Justice Roberts read the rule of *Humphrey's Executor* very narrowly. The Court held that the *Humphrey's Executor* test only applied to "[m]ultimember expert agencies that *do not wield substantial executive power*."[270] It is possible that in future cases, the court could interpret this extremely narrow interpretation of *Humphrey's Executor* to mean that certain multimember agencies that *do* "wield substantial executive power" can-

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267. Transcript of Oral Argument at 78, 84, *Collins*, 141. S. Ct. 1761 (No. 19–422) (Justices Alito and Kagan both questioned Seila Law's attorney about the potential implications of a favorable ruling on the vast number of past SSA decisions).

268. *Seila Law LLC*, 140 S. Ct. at 2198–99 (describing Chief Justice Roberts' "general rule" of presidential removal power with "two exceptions").

269. *Id.*

270. *Id.* at 2199–200 (emphasis added).

not have tenure protection for their directors or commissioners. Ultimately, this result would turn on how the Court defines "substantial executive power." In *Seila Law*, the Court decided that the CFPB wields "significant" executive authority,[271] which seems to be used here as a synonym for substantial. If the CFPB's power is significant or substantial, then it seems to follow that the powers of agencies like the Federal Reserve and Securities and Exchange Commission certainly would also be significant or substantial. On this path, the court could follow a slippery slope down to a world with almost no agency leadership tenure protections whatsoever.

I label a third potential path as the "strong unitary executive" approach. In this scenario, the Court would follow Justice Thomas' reasoning in his *Seila Law* concurrence to directly overturn *Humphrey's Executor* and *Morrison* and declare all tenure protections for superior officers of administrative agencies per se unconstitutional. Justice Thomas makes a coherent unitary executive argument for declaring all tenure protections to be unconstitutional as violations of the Executive Vesting Clause and Take Care Clause. Justice Thomas asserted that the court has chipped away at *Humphrey's Executor* for decades such that the foundations of *Humphrey's Executor* are now "nonexistent."[272] I disagree: *Seila Law* expressly endorsed both *Humphrey's Executor* and *Morrison* as being applicable in certain circumstances.[273] Still, Thomas's roadmap would be an appealing means for pro-unitary executive parties to advance their agenda. Additionally, pro-unitary executive Justices on the Supreme Court could use one of the liberals' arguments against them. In her *Seila Law* dissent, Justice Kagan made a compelling case that multi-member agencies are actually *harder* for a president to control than single director agencies.[274] Kagan made a strong intuitive argument that it is easier to convince one person to do something than to convince a group. Plus, if something goes wrong in a single director agency, it is clearer who is to blame.[275] It is possible that pro-unitary executive Justices could cite Kagan's arguments for the proposition that multi-member agencies are *even more* in need of executive oversight than single-headed agencies.[276]

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271. *Id.* at 2192.

272. *Id.* at 2217 (Thomas, J., concurring).

273. *Id.* at 2199–200 (majority opinion).

274. *Id.* at 2243 (Kagan, J., dissenting) ("It's easier to get one person to do what you want than a gaggle. So too, you know exactly whom to blame when an individual—but not when a group—does a job badly. The same is true in bureaucracies.").

275. *Id.*

276. Beermann, *supra* note 203.

Interestingly, litigants have already started to cite Thomas' *Seila Law* dissent in federal appellate briefs,[277] so the Court will have plenty of opportunities to endorse Thomas' view in the future if it so chooses.

What path is the future Court most likely to choose? While such speculation is always fraught with uncertainty, I believe the most likely outcome to be the institutionalist path of cabining *Seila Law*. On the current court, it seems there are only two or three votes for the strict unitary executive approach (Justices Thomas, Gorsuch, and possibly Barrett).[278] I find it unlikely that Chief Justice Roberts will endorse the strict unitary executive view. In *Seila Law*, Roberts endorsed the intellectual validity of the unitary executive theory.[279] However, in casting his votes on the Court, Roberts is also a conservative minimalist and an institutionalist.[280] Accordingly, Roberts prefers narrow rulings over broad dispositions.[281] Considering these motivations, it is unlikely that Roberts would be willing to directly overturn decades of precedent such as *Humphrey's Executor* and *Morrison*. The careful weaving around precedents in his *Seila Law* opinion tells us as much. While it is possible that the five remaining Republican-appointed Justices could form a majority for a full return to *Myers*, this would be the narrowest of majorities and even one defection would sink the initiative.

CONCLUSION

This Note argues that the Chief Justice's *Seila Law* opinion is premised on an overly narrow reading of the high court's precedents.[282] However, it is now the law of the land. Over the past forty years, the unitary executive theory has taken increasing hold of the

277. *See, e.g.*, Brief of Patrick J. Collins, et al. at 60, *Collins*, 141 S. Ct. 1761 (No. 19–422).

278. *Seila Law LLC*, 140 S. Ct. at 2211 (Thomas, J., concurring). Only Justice Gorsuch joined Thomas' *Seila Law* concurrence calling for the abolition of agency-head tenure protections in all agencies. Justice Barrett's stance on this issue is not yet known.

279. *Id.* at 2197 (majority opinion). Chief Justice Roberts endorsed James Madison's broad unitary executive pronouncements, like that "the executive power included a power to oversee executive officers through removal." *Id.* (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), *in* 16 DOCUMENT HISTORY OF THE FIRST FEDERAL CONGRESS 893 (2004)).

280. Adler, *supra* note 122 ("While his jurisprudential orientation remains quite conservative, he prefers narrow rulings over sweeping judgments. . . . At the same time, Chief Justice Roberts is reluctant to overturn Supreme Court precedent or declare federal laws to be unconstitutional.").

281. *Id.*

282. *See supra* Part III.

American judiciary and certain (mostly conservative) politicians.[283] It remains to be seen what path the Supreme Court will take on agency independence after *Seila Law* and *Collins*. Given the lack of Constitutional guidance on the removal process, I argue that judges and legislators should strongly consider policy and tradition in deciding when a grant of tenure protection is appropriate.[284] When two key factors are met, agency independence is appropriate. First, the agency exercises technical expertise beyond the ken of legislators and the public. Second, without independence, political pressure would force the agency to stray from Congress's long-term policy goals. When these two elements are present, removal protections are warranted and constitutionally permissible.[285] This case is particularly strong for sophisticated financial regulators.[286] While the battle was lost for the CFPB and FHFA, there is reason to hope other financial regulators will remain safe from political interference.

The debate between the unitary executive theory and independent administrative agencies involves difficult questions of constitutional interpretation and the structure of the American government. Should we strive to have a bureaucracy of independent technical experts performing tasks assigned by Congress? Or is it better that all bureaucratic leaders be completely accountable to the president, and through her, to the American voters? The American administrative state embraces a hybrid system: most agency heads are immediately accountable to the president but some can only be fired for cause. This Note makes the case on both constitutional and policy grounds for maintaining the independence of certain agencies.

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283. *See supra* Introduction and Part I(A). Beginning with the writings of Justice Scalia and other prominent conservative jurists in the 1980s, many conservatives endorsed the unitary executive theory. The stance has also become popular among conservative politicians, with the Republican Party's most recent official platform condemning the power of "unaccountable bureaucracies." *See* 2016 REPUBLICAN PARTY PLATFORM, *supra* note 12, at 3.

284. *See supra* Part III(D).

285. *See supra* Part I(B).

286. *Id.*