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Removal for Cause: *Seila Law* and the Future of the CFPB and FHFA

I. INTRODUCTION

On June 29, 2020, the Supreme Court severed the provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank")\(^1\) granting the Director of the Consumer Financial Protection Bureau ("CFPB" or the "Bureau") for-cause removal protection.\(^2\) The decision, *Seila Law LLC v. CFPB*\(^3\)—billed as the "Constitutional Case of the Year" by the Wall Street Journal\(^4\)—largely settles the debate over the constitutionality of restrictions on the President’s ability to remove single officers that head executive agencies in favor of at-will removal power.\(^5\) However, other questions remain.

*Seila Law* has significant implications for other financial regulatory agencies that merit serious consideration.\(^6\) In a case pending in its upcoming Term, the Court will likely uphold a lower court’s decision that Director of the Federal Housing Finance Authority ("FHFA") is similarly removable at will.\(^7\) *Seila Law* has also given the President greater control over not only the CFPB, but also U.S. financial regulatory policy generally, as the decision also heightens the President’s

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2. Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2211 (2020) ("[W]e find the Director’s removal protection severable from the other provisions of the Dodd-Frank that establish the CFPB . . .").
5. Seila Law, 140 S. Ct. at 2211.
influence over the Federal Deposit Insurance Corporation (“FDIC”) and the Financial Stability Oversight Council (“FSOC”).

This Note argues that while Seila Law alters the CFPB’s structure, the decision leaves the Bureau’s rulemaking and enforcement powers intact and will trigger a similar fate for the Federal Housing Finance Agency (“FHFA”). This Note proceeds in seven parts. Part II describes the CFPB’s creation, structure, and powers. Part III examines the controversy around the CFPB Director’s for-cause removal protection and explores the early legal challenges to the Bureau’s structure that ultimately laid the groundwork for the Supreme Court in Seila Law. Part IV scrutinizes the Supreme Court’s reasoning in Seila Law. Part V argues that while Seila Law will not impact the CFPB’s current and future regulatory powers, the decision will likely facilitate a major shift in the Bureau’s activities under the Biden administration. Part VI analyzes the decision’s effects on the FHFA and the other federal financial regulatory agencies. Finally, Part VII concludes the Note and looks to the CFPB’s future as an agency led by a Director removable by the President at will.

II. BACKGROUND: THE CFPB’S CREATION, STRUCTURE, AND POWERS

The CFPB was created by Dodd-Frank in response to calls for an overhaul of the federal consumer protection laws following the 2008 financial crisis. Congress designed the CFPB as an independent

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9. See infra Part II.
10. See infra Part III.
11. See infra Part IV.
12. See infra Part V.
13. See infra Part VI.
14. See infra Part VII.
16. Senator Elizabeth Warren—at the time, a Harvard Law School Professor—was a prominent voice in support of the creation of a consumer protection agency. See BARACK OBAMA, A PROMISED LAND 552 (2020) (describing Warren’s advocacy for “a new consumer
executive agency housed within the Federal Reserve System (“Federal Reserve”). The Bureau receives its funding from a percentage of the Federal Reserve’s annual operating expenses rather than through Congressional appropriation. Congress tasked the CFPB with “ensuring that . . . markets for consumer financial products and services are fair, transparent, and competitive.” The CFPB was delegated the authority to administer eighteen existing federal consumer finance statutes, and was also given enforcement authority over Dodd-Frank’s

finance protection agency meant to bolster the pathwork of spottily enforced state and federal regulations already in place and to shield consumers from questionable financial products . . .”). Her famous 2007 article “Unsafe at Any Rate” called for the agency’s creation to improve the “regulatory jumble” of federal consumer financial protection laws. Elizabeth Warren, Unsafe at Any Rate, DEMOCRACY J. (Summer 2007), https://democracyjournal.org/magazine/5/unsafe-at-any-rate/ [https://perma.cc/87C5-28XR]; see also Oren Bar-Gill & Elizabeth Warren, Making Credit Safer, 152 U. PENN. L. REV. 1, 98 (2008) (“We propose the creation of a single federal regulator—a new Financial Product Safety Commission or a new consumer credit division within an existing agency (most likely the [Federal Reserve Board] or FTC)—that will be put in charge of consumer credit products.”). The Obama administration advocated for a similar solution. See DEPT. OF TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION 55–75 (2009), https://www.treasury.gov/initiatives/wsr/Documents/FinalReport_web.pdf [https://perma.cc/6UCC-JFPF] (proposing “the creation of a single federal agency . . . dedicated to protecting consumers in the financial products and services markets” and to be granted rulemaking, enforcement, and supervisory authority).

17. Dodd-Frank § 1011, 12 U.S.C. § 5491(a) (“There is established in the Federal Reserve System, an independent bureau to be known as the ‘Bureau of Consumer Financial Protection’ . . . . The Bureau shall be considered an Executive agency . . . .”); see also Adam J. Levitin, The Consumer Financial Protection Bureau: An Introduction, 32 REV. BANKING & FIN. L. 321, 337 (2013) (“The CFPB was deliberately designed to be a highly independent agency.”).

18. Dodd-Frank § 1017, 12 U.S.C. § 5497(a)(2)(A)(iii) (“[T]he amount that shall be transferred to the Bureau in each fiscal year shall not exceed a fixed percentage of the total operating expenses of the Federal Reserve System . . . equal to . . . 12 percent of such expenses in fiscal year 2013, and in each year thereafter.”). For a general discussion of the CFPB’s funding arrangement, see Lampe & Richardson, supra note 15, at 92–93 (“By virtue of its position within the Federal Reserve System, the Bureau is guaranteed an operating budget.”).

19. Dodd-Frank § 1021, 12 U.S.C. § 5511(a); see also RICHARD CORDRAY, WATCHDOG: HOW PROTECTING CONSUMERS CAN SAVE OUR FAMILIES, OUR ECONOMY, AND OUR DEMOCRACY 29 (2020) (“The idea was to create a government agency with a singular mission: to stand on the side of consumers and ensure they are treated fairly in the financial marketplace.”).

new prohibition on “any unfair, deceptive, or abusive acts and practices” (“UDAAP”).

The CFPB is led by a single Director, appointed to a five-year term by the President and confirmed by the Senate. Congress granted the Director for-cause removal protection by allowing the President to remove the Director only “for inefficiency, neglect of duty, or malfeasance in office.” The Director is required to appoint a Deputy Director and has discretion to employ personnel “deemed necessary to conduct the business of the Bureau.”

The CFPB possesses substantial rulemaking powers over the consumer financial services market. Dodd-Frank vests the Bureau with the authority “to administer, enforce, and otherwise implement . . . federal consumer financial law.” The Bureau—under the Director’s command—promulgates rules affecting “covered persons” and “service providers.” “Covered persons” broadly includes “any person that engages in offering or providing a consumer financial product or service”, and Dodd-Frank defines “consumer financial product or

21. Dodd-Frank § 1036, 12 U.S.C. § 5536(a)(1)(B) (“It shall be unlawful for . . . any covered person or service provider . . . to engage in any unfair deceptive, or abusive act or practice . . .”)
25. Dodd-Frank § 1013, 12 U.S.C. § 5493(a)(1)(A)–(B) (“The Director may fix the number or, and appoint and direct, all employees of the Bureau and “is authorized to employ attorneys, compliance examiners, compliance supervision analysts, economists, statisticians, and other employees as may be deemed necessary to conduct the business of the Bureau.”).
26. See Dodd-Frank § 1012, 12 U.S.C. § 5492 (“Executive and Administrative Powers.”); see also Lampe & Richardson, supra note 15, at 95 (“The Dodd-Frank Act vests the CFPB, a single entity, with broad rulemaking, supervision, and enforcement powers over significant segments of the consumer financial services market.”).
28. Dodd-Frank § 1031, 12 U.S.C. § 5531(b) (“The Bureau may prescribe rules applicable to a covered person or service provider identify as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.”).
service” in further detail.30 “Service provider” is defined as “any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service.”31 These broad statutory definitions facilitate the CFPB’s issuance of rules prohibiting UDAAP,32 as well as rules requiring certain individuals and entities to register with the agency,33 or requiring disclosure of certain information to consumers.34 In short, the CFPB is vested with rulemaking authority over vast swaths of the American consumer finance landscape.35

The Bureau’s regulatory power is subject to only a few limitations.36 The FSOC37 may stay or set aside, at the request of any of

30. A product is only considered a “consumer financial product or service” if listed as a “financial product or service” in the statute and if it is “offered or provided for use by consumers primarily for personal, family, or household purposes.” Id. § 5481(5)(A).

31. “Financial product or service” is itself defined at length in the statute. Id. § 5481(15). For a helpful summary of this rather cumbersome definition, see Levitin, supra note 17, at 346 (noting “financial product or service” includes “extensions, servicing, brokerage, and sales of credit”; “real estate settlement services other than appraisals and insurance”; “deposit taking”; “check cashing, collection, and guarantee services”; “financial advisory services”; and “debt collection,” among others). “Financial product or service” does not include insurance activities or “electronic conduit services.” Dodd-Frank § 1002, § 5481(15)(C).

32. See Dodd-Frank § 1022, 12 U.S.C. § 5512(b)(2) (authorizing the CFPB to “exercise its authorities with respect to UDAAP”).

33. See Dodd-Frank § 1022, 12 U.S.C. § 5512(c)(7) (“The Bureau may prescribe rules regarding registration requirements applicable to a covered person, other than an insured depository institution, insured credit union, or related person.”).

34. See Dodd-Frank § 1033, 12 U.S.C. § 5533(a) (requiring a “covered person” to disclose information “concerning the consumer financial product or service that the consumer obtained from such covered person”).

35. See Lampe & Richardson, supra note 15, at 102 (“The agency’s organic rulemaking powers enable the CFPB to prescribe rules, for purposes set forth in Title X [of Dodd-Frank], that govern nearly all segments of the consumer financial services market.”).

36. See infra nn.36–41.

37. Another creation of Dodd-Frank, the FSOC is tasked with “identify[ing] risks to the financial stability of the United States caused by the “financial distress or failure, or ongoing activities, of large, interconnected bank holding companies or nonbank financial companies, or that could arise outside the financial services marketplace”; “promot[ing] market discipline” to eliminate the belief that the federal government will rescue entities deemed too
its member agencies and after a two-thirds majority vote, any CFPB rulemaking that the FSOC determines would jeopardize bank “safety and soundness” or the “stability of the financial system of the United States” generally.\(^3\) CFPB rulemaking is also subject to procedural limitations, such as the notice-and-comment requirements of the Administrative Procedure Act (“APA”),\(^3\) the cost-benefit analysis requirements of the Office of Management and Budget (“OMB”),\(^4\) and the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”).\(^4\) Finally, as with any administrative agency, the CFPB can only promulgate rules under the framework of its enabling statutes;\(^4\) Congress is free to alter the boundaries of the Bureau’s regulatory authority via legislation.\(^4\)

The CFPB also possesses supervisory, enforcement, and adjudicatory powers.\(^4\) The Bureau has exclusive authority to supervise, examine, and enforce regulatory compliance of banks, credit unions, and big to fail; and “respond[ing] to emerging threats to the stability of the United States financial system.” Dodd-Frank § 112, 12 U.S.C. § 5322(a)(1).

38. Dodd-Frank § 1022, 12 U.S.C. § 5513(a)–(c). A decision by the FSOC to set aside a CFPB regulation is subject to judicial review. Id. § 5513(c)(8).

39. Administrative Procedure Act (“APA”) § 553, 5 U.S.C. § 553 (2018). Like other federal government agencies, the CFPB must publish a notice of proposed rulemaking in the Federal Register and hear public comments before issuing a final rule. Id.

40. Dodd-Frank § 1022, 12 U.S.C. § 5512(b)(2)(A)(i) (“In prescribing a rule under the Federal consumer financial laws, the Bureau shall consider the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule.”).

41. Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, 110 Stat. 847 (1996). Prior to publishing a notice of proposed rulemaking, the CFPB must convene a review panel (“SBREFA Panel”) consisting of representatives from the CFPB, the Small Business Administration (“SBA”), and the White House Office of Information and Regulatory Affairs (“OIRA”). 5 U.S.C. § 609(b)(3). The SBREFA Panel is required to hear testimony from representatives of relevant small business communities about the potential costs of the CFPB’s proposed rule to such small business communities, then summarize its findings in a report. Id. § 609(b)(4)–(5). The CFPB must consider this report and discuss any response in the agency’s notice of proposed rulemaking. Id. § 609(b)(6). The CFPB, the Environmental Protection Agency (“EPA”), and the Occupational Safety and Health Administration (“OSHA”) are the only three federal agencies subject to this requirement. Id. § 609(d).

42. See Whitman v. American Trucking Ass’ns, Inc., 531 U.S. 457, 475 (2001) (“[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.”).


their affiliates with total assets of more than $10 billion.\footnote{45} The Bureau also possesses supervisory and enforcement powers over nonbank entities such as residential mortgage lenders and brokers, payday lenders, and providers of private education loans.\footnote{46} To ensure compliance with its rules and federal consumer protection laws generally, the CFPB may issue subpoenas\footnote{47} and civil investigative demands (“CIDs”),\footnote{48} conduct administrative proceedings,\footnote{49} and prosecute violations of its directives in federal court.\footnote{50}

\footnote{45. See Dodd-Frank § 1025, 12 U.S.C. § 5515(a)–(b) (“The Bureau shall have exclusive authority to require reports and conduct examinations on a periodic basis . . . for purposes of (A) assessing compliance with the requirements of Federal consumer financial laws; (B) obtaining information about the activities subject to such laws and the associated compliance systems or procedures of such persons; and (C) detecting and assessing associated risks to consumers and to markets for consumer financial products and services.”). Banks, credit unions, and their affiliates with total assets under $10 billion are subject to supervision, examination, and enforcement by their federal prudential regulator, be it the Federal Reserve Board of Governors, the Office of the Comptroller of the Currency, or the National Credit Union Administration. Dodd-Frank § 1026, 12 U.S.C. § 5516.}

\footnote{46. Dodd-Frank § 1024, 12 U.S.C. § 5514. However, the CFPB has no authority “over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both,” unless such a dealer is also involved in consumer services “related to residential or commercial mortgages of self-financing transactions involving real property” or, in some circumstances, “extends retail credit or leases involving motor vehicles.” Dodd-Frank § 1029, 12 U.S.C. § 5519(a)–(b).}

\footnote{47. Dodd-Frank § 1052, 12 U.S.C. § 5562(b).}

\footnote{48. Dodd-Frank § 1052, 12 U.S.C. § 5562(c). The CFPB may issue CIDs to any person “the Bureau has reason to believe . . . may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to a violation” of federal consumer financial law. \textit{Id.} Through such CIDs, the Bureau may require production of documents or “tangible things,” written reports or answers, or oral testimony. \textit{Id.}}

\footnote{49. Dodd-Frank § 1053, 12 U.S.C. § 5563(a). A CFPB “hearing officer” presides over these proceedings and issues a “recommended decision,” which is then presented to the Director who “issue[s] a final decision and order.” Authority of the hearing officer, 12 C.F.R. § 1081.104(b) (2018); Recommended decision of the hearing officer, 12 C.F.R. § 1081.400(d) (2018).}

\footnote{50. Dodd-Frank § 1054, 12 U.S.C. § 5564(a). Through either a court action or administrative proceeding, the CFPB may seek or award a variety of remedies including “rescission or reformation of contracts”; “refund of moneys or return of real property”; “disgorgement or compensation for unjust enrichment”; “limits on the activities or functions of the person”; and civil money penalties, damage awards, or other monetary relief. Dodd-Frank § 1055, 12 U.S.C. § 5565(a).}
The CFPB’s structure was controversial from its earliest days.\textsuperscript{51} The Bureau’s architects argued political independence was necessary to ensure adequate enforcement of consumer protection laws\textsuperscript{52} in the face of an existing failed regulatory structure and well-financed industry opposition to increased regulatory oversight.\textsuperscript{53} On the other hand, many congressional Republicans argued Congress had granted the Bureau too much regulatory power to be wielded by a single director removable only “for inefficiency, neglect of duty, or malfeasance in office.”\textsuperscript{54} Critics also pointed to the fact that most of the existing independent federal financial regulators—including the Federal Reserve, the Federal Deposit Insurance Corporation (“FDIC”), the Commodity Futures Trading Commission (“CFTC”), and the Securities and Exchange Commission (“SEC”)—are overseen by multi-member boards or commissions, and argued the CFPB Director’s removal protection was excessive insulation of a powerful executive branch agency.\textsuperscript{55} That insulation, however, was a deliberate

\textsuperscript{51} See Levitin, supra note 17, at 336 (“The CFPB was one of the most controversial and hard-fought parts of the legislation that became the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010.”).

\textsuperscript{52} See id. at 329 (“The pre-CFPB consumer financial protection regime had four major structural flaws: (1) consumer protection was an ‘orphan’ mission that had no regulatory ‘home’ in any single agency; (2) consumer protection was often subordinated to regulatory concerns about bank profitability; (3) there was a lack of regulatory expertise in consumer financial issues; and (4) the diffusion of regulatory responsibility created regulatory arbitrage opportunities that fueled a race to the bottom.”); see also Rachel E. Barkow, Insulating Agencies: Avoiding Capture Through Institutional Design, 89 Tex. L. Rev. 15, 18 (2010) (“What policy makers who seek insulation want to avoid are particular pitfalls of politicization, such as pressures that prioritize narrow short-term interests at the expense of long-term public welfare.”).


\textsuperscript{54} Dodd-Frank § 1017, 12 U.S.C. § 5491(c)(3). For example, Senator Richard Shelby (R-AL), then-Chair of the Senate Banking Committee, condemned the CFPB as “the most powerful yet unaccountable bureaucracy in the federal government” and called for (1) replacing the single Director with a board of directors; (2) subjecting the Bureau to the congressional appropriations process; and (3) subjecting Bureau action to oversight by the Fed, FDIC, and OCC. Richard Shelby, The Danger of an Unaccountable “Consumer-Protection” Czar, WALL ST. J. (July 21, 2011), https://www.wsj.com/articles/SB1000142405311190355490576457931310814462 [https://perma.cc/N3HZ-2N7H].

\textsuperscript{55} See id. (“Another myth is that the [CFPB] is already more accountable than any other financial regulator. This is nonsense. The [SEC] is subject to congressional appropriations and is led by a multi-member panel, as is the [CFTC]. The Federal Reserve and the [FDIC] are also led by boards.”).
legislative choice intended to shield the Bureau from partisan control or industry capture, as well as to deny the President the ability to remove the Director over policy disagreement.\textsuperscript{56}

After Dodd-Frank was passed on a largely party-line vote\textsuperscript{57} and the CFPB began carrying out its statutory mandate, the debate over the agency’s constitutionality continued throughout the remainder of the Obama administration and into the 2016 general election.\textsuperscript{58} Republicans regained House majority status alongside President Donald Trump’s inauguration in 2017 and initiated attempts to reform the CFPB\textsuperscript{59} and Dodd-Frank generally, including the proposed Financial CHOICE Act of 2017 (“CHOICE Act”)\textsuperscript{60} and the Economic Growth, Regulatory Relief,
and Consumer Protection Act of 2018 (“EGRRCPA”). EGRCPA was signed into law in May 2018, and while it largely addressed other provisions of Dodd-Frank and did not reform the CFPB’s structure or its Director’s removal protection, EGRRCPA did amend the Home Mortgage Disclosure Act (“HDMA”) to exempt certain institutions from CFPB mortgage lending reporting requirements.

This political sparring over the Bureau’s constitutionality has been reflected in notable personnel turnover in the CFPB Directorship in recent years. When the CFPB’s first Director, Richard Cordray, resigned in order to run for Governor of Ohio, President Trump appointed Mick Mulvaney, then-Director of the Office of Management and Budget (“OMB”), as “Acting Director” of the Bureau. After an unsuccessful legal challenge by CFPB Deputy Director Leandra English seeking to prevent Mulvaney from assuming leadership of the Bureau, Acting Director Mulvaney ushered in a new era for the CFPB marked by a

examination, and enforcement powers, and would have altered the agency’s leadership and funding structures. Id. §§ 711–37. The House passed the CHOICE Act in June 2017, but the Senate declined to act on the bill. See Eric J. Spitler, The Long Game: The Decade-Long Effort to Dismantle the Dodd-Frank Act, 24 N.C. BANKING INST. 1, 46–69 (2020) (“[T]he CHOICE Act would have repealed or amended almost every section of the Dodd-Frank Act had it been enacted into law. . . Without a sixty-vote margin the Senate, and with strong opposition to the bill by the Democrats in the Senate, there was never any real prospect that the Senate would take it up.”).


66. Id.

67. See English v. Trump, 279 F. Supp. 3d. 307, 311–12 (D.D.C. 2018) (denying Deputy Director English’s request for a temporary restraining order to prevent the President from designating Mulvaney to serve as acting Director of the CFPB).
notably less aggressive approach to the agency’s regulatory mandate. After Mulvaney left his position as Acting Director to become President Trump’s Acting Chief of Staff in December 2018, Trump appointed Kathleen Kraninger to be the CFPB’s second Director. Director Kraninger led the Bureau for the remainder of Trump’s term until she was asked to resign by President Biden on his first day in office.

In addition to political sparring over the CFPB’s independence, the Bureau faced many legal challenges to its Director’s for-cause removal protection before the Supreme Court finally condemned the structure in Seila Law. Parties facing enforcement actions or penalties levied by the CFPB often sought relief in federal court, arguing the CFPB was unconstitutionally structured and thus had no authority to impose fines or enforce consumer protection laws. However, no plaintiff had

68. See Cordray, supra note 19, at 206 (“Mulvaney ultimately stayed about a year, mainly focusing on public relations stunts. But during his time, he adopted a philosophy of government inaction to slow the pace of enforcement and regulation, declaring that the bureau would no longer ‘push the envelope’ to protect consumers.”). Cordray also asserts that after Mulvaney assumed leadership of the CFPB, “several existing investigations were closed, and some cases were dropped. Id. Others were completed but produced what appeared to be more lenient results and less money back for consumers, which some observers dubbed the ‘Mulvaney discount.’” Id. See also Nicholas Confessore, Mick Mulvaney’s Master Class in Destroying a Bureaucracy from Within, N.Y. TIMES MAG. (Apr. 16, 2019), https://www.nytimes.com/2019/04/16/magazine/consumer-financial-protection-bureau-trump.html [https://perma.cc/2M9C-EYPU] (chronicling the dramatically less-rigorous enforcement of consumer protection regulations under Mulvaney’s leadership than under Director Cordray).


72. See infra n.73.

succeeded on such a claim until 2016 in *PHH Corp. v. CFPB*. In that case, PHH Corporation (“PHH”), a large home mortgage lender, was ordered to disgorge $6.5 million in profits after a CFPB administrative law judge determined PHH had violated the Real Estate Settlement Procedures Act (“RESPA”) by accepting kickbacks from mortgage insurers. However, then-CFPB Director Richard Cordray overturned the administrative judge’s determination on statutory interpretation grounds and increased PHH’s disgorgement to $109 million. In a majority opinion written by then-Judge Kavanaugh, the D.C. Circuit found the Director’s for-cause removal protection an unconstitutional separation-of-powers violation and severed the provision from Dodd-Frank. However, the D.C. Circuit later reviewed the case en banc and reversed, holding the Director’s for-cause removal protection was constitutional; the reversal elicited a strong dissent from Judge Kavanaugh that foreshadowed his vote in the Supreme Court’s *Seila Law* decision.

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75. *PHH Corp.*, 839 F.3d at 11–12.
76. Id.; see also CORDRAY, supra note 19, at 182 (referring to *PHH Corp.* as “an usually complex case with a tortured history” and to the disputed statutory interpretation issues as a “constellation of uncertainties [that] created a perfect storm of controversy surrounding the case”).
77. *PHH Corp.*, 839 F.3d at 39.
79. See id. at 165–66, (Kavanaugh, J., dissenting) (“No independent agency exercising substantial executive authority has ever been headed by a single person. Until now. . . . Because the CFPB is an independent agency headed by a single Director and not by a multi-member commission, the Director of the CFPB possesses more unilateral authority—that is, authority to take action on one’s own, subject to no check—than any single commissioner or board member in any other independent agency in the U.S. government. Indeed, other than the President, the Director enjoys more unilateral authority than any other official in any of the three branches of government. That combination—power that is massive in scope, concentrated in a single person, and unaccountable to the President—triggers the important constitutional question at issue in this case.”). Some federal courts subsequently agreed with Judge Kavanaugh and rejected the en banc D.C. Circuit’s reasoning in *PHH Corp.* See, e.g., CFPB v. RD Legal Funding, LLC, 332 F. Supp. 3d 729, 784 (S.D.N.Y. 2018) (holding the CFPB’s single-director structure unconstitutional). But see CFPB v. All Am. Check Cashing, No. 3:16-cv-356-WHB-JCG, 2018 WL 9812125, at *2 (S.D. Miss. March 21, 2018) (“For the same reasons stated in *PHH Corp.*, this Court . . . finds that the Bureau is not unconstitutional based on its single-director structure.”).
IV. SEILA LAW v. CFPB

A. Facts and Procedural History

Seila Law, LLC (“Seila Law”) is a law firm located near Los Angeles, California, that operates a debt services practice. On February 27, 2017, the CFPB issued a Civil Investigative Demand (“CID” or the “Demand”) to Seila Law to determine whether the firm was “engaging in unlawful acts or practices in the advertising, marketing, or sale of debt relief services or products.” The Demand ordered Seila Law to provide the CFPB with documents and information related to its debt relief business practices. After the CFPB rejected a request by Seila Law to set aside this Demand, Seila Law refused to comply, and the CFPB filed a district court petition seeking the assistance of the court in enforcing the Demand. The District Court rejected Seila Law’s argument that the CFPB Director’s removal protection was unconstitutional and ordered the firm to produce the requested documents and information. The Ninth Circuit affirmed the demand was enforceable, agreeing with the lower court—and the en banc D.C. Circuit in PHH Corp.—that the CFPB Director’s removal protection did not violate the constitution.

After the Ninth Circuit’s decision, Director Kraninger notified


81. The CFPB is authorized to issue CIDs to persons who “may have any information[] relevant to a violation” of any law within the CFPB’s enforcement purview. Dodd-Frank § 1052, 12 U.S.C. § 5562(c)(1).


83. Id.


86. CFPB v. Seila Law LLC, 923 F.3d 680, 682–84 (9th Cir. 2019), aff’d 2017 WL 6536586 (C.D. Cal. Aug. 25, 2017), rev’d 140 S. Ct. 2183 (2020). The Ninth Circuit noted “[t]he arguments for and against [the constitutionality of the CFPB Director’s for-cause removal protection] have been thoroughly canvassed in the majority, concurring, and dissenting opinions in [the D.C. Circuit’s PHH Corp. decision],” and saw “no need to re-play the same ground here.” Id. at 682 (internal citations omitted). The Court also found Humphrey’s Executor and Morrison “controlling,” noting that “[t]he Supreme Court is of course free to revisit those precedents, but we are not.” Id. at 684.
congressional leaders that the CFPB now viewed the Director’s for-cause removal protection as unconstitutional, a reversal from its position in the lower courts. Thus, after the Supreme Court granted certiorari, the Solicitor General argued on the Bureau’s behalf against the constitutionality of the CFPB Director’s removal protection. The Court, in turn, appointed Paul D. Clement as amicus curiae to represent the Director’s for-cause removal protection and the Ninth Circuit’s holding before the Court.

B. \textit{Holding and Majority’s Reasoning}

The Supreme Court reversed the Ninth Circuit’s decision, holding “the CFPB’s leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers.” Furthermore, the Court found this unconstitutional provision severable from the rest of Dodd-Frank. Chief Justice Roberts wrote for the majority, joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh, with regards to the unconstitutionality of the CFPB Director’s for-cause removal protection. However, Justice Thomas also filed a concurrence, joined by Justice Gorsuch, that dissented from the Chief Justice’s


88. See Brief of Appellee CFPB at 11, CFPB v. Seila Law LLC, 923 F.3d 680 (9th Cir. 2019) (No. 17-56324), 2018 WL 1511440, at *21 (“The [CFPB Director’s] limited removal restriction that Seila Law challenges is constitutional under controlling Supreme Court precedent because it does not impede the President’s ability to take care that the laws are faithfully executed.”).

89. See Brief for Respondent Supporting Vacatur at 8, Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020) (No. 19-7), 2019 WL 6727094, at *18 (“Because the statutory restriction on the President’s authority to remove the Bureau’s Director is unconstitutional, it should be invalidated.”).


92. Id. at 2211.

93. See id. at 2191–2211 (majority opinion).

After accepting that “lesser executive officers” are necessary to assist the President in faithfully executing his or her Article II powers, Roberts asserted that such officers “must remain accountable to the President, whose authority they wield.”

Echoing a long line of precedent from Myers v. United States through Free Enterprise Fund v. Public Company Accounting Oversight Board, the Chief Justice reasoned that the President’s removal power—although not explicitly granted by the Constitution—is necessary to ensure this accountability.

After Seila Law, only two exceptions to the general rule that the President possesses unrestricted removal power remain—“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.” The first exception flows from Humphrey’s Executor v. United States, where the Court upheld a statutory removal protection for FTC Commissioners that allowed the

94. See id. at 2211–24 (Thomas, J., concurring) (arguing the Court should deny the CFPB’s petition to enforce the CID rather than reach the severability issue).
95. See id. at 2224–45 (Kagan, J., dissenting) (arguing the Director’s for-cause removal protection was not a violation of separation-of-powers doctrine but concurring in the Court’s judgment with respect to severability).
96. Id. at 2197.
97. See Myers v. United States, 272 U.S. 52, 163–64 (1926) (holding the Constitution grants the President “general administrative control of those executing the laws, including the power of appointment and removal of executive officers”).
98. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010). Congress created the Public Company Accounting Oversight Board (“PCAOB”) via the Sarbanes-Oxley Act of 2002 in response to “celebrated accounting debacles” such as the Enron accounting scandal. Id. at 486. The PCAOB is vested with regulatory and enforcement powers over the accounting industry, with this authority “subject to . . . approval and alteration” by the Securities and Exchange Commission (“SEC” or “Commission”). Id. at 485. As initially designed, the PCAOB was led by a board composed of five members, each appointed to staggered 5-year terms by the SEC. Id. However, the SEC could only remove a PCAOB member “for good cause shown.” Id. The Court held that “the dual for-cause limitations on the removal of Board members contravene the Constitution’s separation of powers.” Id. at 492. In a majority opinion written by Justice Roberts, the Court reasoned: “Without a layer of insulation between the Commission and the Board, the Commission could remove a Board member at any time, and therefore would be fully responsible for what the Board does. The President could then hold the Commission to account for its supervision of the Board, to the same extent that he may hold the Commission to account everything else it does.” Id. at 495–96.
100. Id. at 2199–2200.
President to remove a Commissioner only for “inefficiency, neglect of
duty, or malfeasance in office”—a removal protection identical to Dodd-
Frank’s for-cause removal protection for the CFPB Director. While
reaffirming the President’s removal power over executive officers, the
Humphrey’s Executor Court found that the nature of the FTC
Commissioners’ duties made those officers non-executive and thus
outside the scope of the President’s unfettered removal authority. The
second exception applies to inferior executive officers and stems from
Morrison v. Olson where the Court upheld for-cause removal
protection for an independent counsel appointed by the Attorney General,
reasoning that such a restriction on the President’s power to remove
inferior executive officers did not “impede the President’s ability to
perform his constitutional duty.”

According to Roberts, the CFPB Director’s for-cause removal
protection did not fall under either of the two exceptions to unrestricted
Presidential removal power. Unlike the FTC in Humphrey’s Executor, the
CFPB is led not by a multi-member, non-partisan board, but rather by
a single Director who is “hardly a mere legislative or judicial aid.” The

102. Id. at 620; see also Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 1017, 12 U.S.C. § 5491(c)(3) (“The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.”).
103. Humphrey’s Ex’r, 295 U.S. at 632. However, the Humphrey’s Executor Court admitted the decision left “for future consideration” a “field of doubt” as to the precise line between a purely-executive and non-executive officer. Id. Justice Roberts summarized the decision as follows: “Humphrey’s Executor permitted Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power.” Seila Law, 140 S. Ct. at 2199.
104. Seila Law, 140 S. Ct. at 2199. Article II distinguishes between principal officers—required to be appointed by the President and confirmed by the Senate—and inferior officers “whose appointment Congress may vest in the President, courts, or heads of Departments.” Id. at 2199, n.3 (citing U.S. CONST. art. II. § 2, cl. 2).
106. Id. at 691. In a lone dissent that somewhat foreshadows the Court’s reasoning in Free Enterprise Fund and Seila Law, Justice Scalia rejected the Morrison majority’s holding that Congress can prevent the President from removing an inferior executive officer. Id. at 735 (Scalia, J., dissenting) (“Today’s decision on the basic issue of fragmentation of executive power is ungoverned by rule, and hence ungoverned by law. . . . [I]t fails to explain why it is not true that—as the text of the Constitution seems to require, and as our past cases have uniformly assumed—all purely executive power must be under the control of the President.” (citation omitted)).
107. Seila Law, 140 S. Ct. at 2200–01.
108. Id. at 2200. Justice Roberts described the CFPB Director as follows: “Instead of making reports and recommendations to Congress, as the 1935 FTC did, the Director possesses the authority to promulgate binding rules fleshing out 19 federal statutes, including
CFPB Director is outside the scope of the *Morrison* exception as well because Dodd-Frank mandates that the Director be appointed by the President and confirmed by the Senate,\(^\text{109}\) making the Director a principal—not inferior—executive officer.\(^\text{110}\) Therefore, the Court determined the CFPB Director’s for-cause removal protection was “incompatible with our constitutional structure.”\(^\text{111}\)

After determining that neither exception to the President’s unrestricted removal power applied, the Court explained that the CFPB’s single-director structure violated the Constitution’s separation of powers “by vesting significant governmental power in the hands of a single individual accountable to no one.”\(^\text{112}\) Roberts explained further:

> The Director is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is. The Director does not even depend on Congress for annual appropriations. . . . Yet the 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. With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans.\(^\text{113}\)

Because the Director is appointed to a five-year term, it was possible that a single-term President would be denied any opportunity to appoint a

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\(^{110}\) *Seila Law*, 140 S. Ct. at 2200.

\(^{111}\) *Id.* at 2201.

\(^{112}\) *Id.* at 2203.

\(^{113}\) *Id.* at 2204.
CFPB Director under the original provision. The Court found this problem was exacerbated by the CFPB’s funding arrangement. The President can normally exert at least some measure of control over independent agencies via checks on the congressional appropriations process such as the veto power. However, the President was deprived of this control over the CFPB because the Bureau is funded by the Federal Reserve, which is itself not funded via congressional appropriation. Thus, the CFPB’s “financial freedom makes it even more likely that the agency will ‘slip from the Executive’s control, and thus from that of the people.’”

After finding the CFPB Director’s for-cause removal protection unconstitutional, the Court determined the provision was severable from Dodd-Frank. However, the Court remanded to the Ninth Circuit to decide the question of whether the CFPB’s civil investigative demand issued to Seila Law while the Bureau was unconstitutionally structured was sufficiently ratified to be legally enforceable.

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114. Id. Roberts offered this hypothetical: “A President elected in 2020 would likely not appoint a CFPB Director until 2023, and a President elected in 2028 may never appoint one. That means an unlucky President might get elected on a consumer-protection platform and enter office only to find herself saddled with a holdover Director from a competing political party who is dead set against that agenda. To make matters worse, the agency’s single-Director structure means the President will not have the opportunity to appoint any other leaders—such as a chair or fellow members of a Commission or Board—who can serve as a check on the Director’s authority and help bring the agency in line with the President’s preferred policies.” Id.

115. Id.
116. Id.
117. Id.
119. Id. at 2207–11. Dodd-Frank’s express severability clause states: “If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby.” Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 3, 12 U.S.C. § 5302.
120. Seila Law, 140 S. Ct. at 2211.
V. IMPLICATIONS FOR THE CFPB GOING FORWARD

A. Seila Law Affirms the Constitutionality of the CFPB

The Court’s holding in Seila Law was certainly a victory for the CFPB’s critics who have argued since the agency’s creation that the Director’s for-cause removal protection was unconstitutional. However, rather than deliver a fatal blow to the agency, the decision actually validates the constitutionality of the Bureau’s existence and its regulatory powers generally. Indeed, the Court specifically held that the Bureau “may continue to exist and operate notwithstanding Congress’ unconstitutional attempt to insulate the agency’s Director from removal by the President.”

Supporters of the CFPB pointed to this language immediately after the Court’s decision was issued as support for the notion that constitutional attacks to the CFPB’s statutory mandate and existence generally are now foreclosed.

B. CFPB Ratification

The Court remanded to the Ninth Circuit to determine the ratification issue; however, the CFPB’s rules and regulations issued while the Bureau was unconstitutionally structured remain in full effect. Shortly after the Court issued its Seila Law decision, Director Kraninger

121. See, e.g., Brief Amici Curiae of Twenty-Seven Members of the U.S. House of Representatives in Support of Petitioner, Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020) (No. 19-7), 2019 WL 6875540 (Republican members of Congress including Kevin McCarthy, Patrick McHenry, and Stephen Scalise argued the Director’s for-cause removal protection was unconstitutional.); see also Amicus Brief of U.S. Senators Mike Lee et al. Supporting Petitioner, Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020) (No. 19-7), 2019 WL 7168613 (Republican Senators Mike Lee, James Lankford, and M. Michael Rounds also argued against the constitutionality of the CFPB Director’s for-cause removal protection.).

122. Seila Law, 140 S. Ct. at 2209 (“The only constitutional defect we have identified in the CFPB’s structure is the Director’s insulation from removal. If the Director were removable at will by the President, the constitutional violation would disappear.”).

123. Id. at 2207–08.

124. See Elizabeth Warren (@SenWarren), TWITTER (June 29, 2020, 11:05 AM), https://twitter.com/SenWarren/status/1277619172042846208 [https://perma.cc/PW2A-D4V9] (“Let’s not lose sight of the bigger picture: after years of industry attacks and GOP opposition, a conservative Supreme Court recognized what we all knew: the @CFPB itself and the law that created it is constitutional. The CFPB is here to stay.”); see also Richard Cordray, Why the CFPB’s Loss at the Supreme Court Is Really a Win, WASH. POST (June 29, 2020, 6:20 PM), https://www.washingtonpost.com/opinions/2020/06/29/why-cfpbs-loss-supreme-court-is-really-win/ [https://perma.cc/XQ47-AYUW] (describing the decision as “a sheep that comes in wolf’s clothing”).

125. Seila Law, 140 S. Ct. at 2211.
issued a “Ratification of Bureau Actions” (“Ratification Notice”) purporting to ratify nearly all regulatory actions the CFPB took from January 4, 2012 to June 30, 2020. This Ratification Notice was an attempt to protect “existing reliance interests by avoiding doubt as to the validity of the actions following the Court’s decision in Seila Law” and predictably succeeded in that goal based on the Ninth Circuit’s previous ruling on a similar CFPB ratification issue in CFPB v. Gordon. That case arose after President Obama installed Richard Cordray as the first CFPB Director via recess appointment in January 2012, and the Supreme Court determined in NLRB v. Noel Canning that such a recess appointment was unconstitutional. Director Cordray was reappointed by the President and confirmed by the Senate in July 2013, then issued a “Notice of Ratification” (“Cordray Ratification”) that purported to ratify all actions taken while Cordray was Director but before he had been approved by the Senate. Afterwards, an attorney subject to a Bureau enforcement action challenged the action on grounds that it had not been validly ratified, but the Ninth Circuit held the Cordray Ratification adequately validated all of the Bureau’s regulatory actions while Cordray

126. Ratification of Bureau Actions, 85 Fed. Reg. 41330 (July 7, 2020). All CFPB rules and regulations published in the Federal Register covered by this ratification, with only two exceptions: Arbitration Agreements, 82 Fed. Reg. 33210 (July 19, 2017), and Payday, Vehicle, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54472 (Nov. 17, 2017). The first exception—Arbitration Agreements—was invalidated by a joint resolution of Congress and the President prior to the rule’s compliance date. Pub. L. No. 115–74, 131 Stat. 1243 (2017). The validity of the second excepted rule—Payday, Vehicle, and Certain High-Cost Installment Loans—is currently being litigated and its compliance date has been stayed. Order, Cmty. Fin. Servs. Ass’n of Am., Ltd. v. CFPB, No. 1:18-cv-00295 (W.D. Tex. Nov. 6, 2018). The CFPB “has revoked the mandatory underwriting provisions” and “separately ratified the payment provisions” of that rule. 85 Fed. Reg. 41331. The Ratification Notice contains a severability clause: “In the event that the Bureau’s ratifying of any individual Ratified Action or the application of this ratification to any person or circumstance is held to be invalid for any reason, the remainder of this ratification is severable and shall continue in force.” 85 Fed. Reg. 41330.

127. Director Kraninger’s decision to ratify was “reinforced by the fact that, based on the Bureau’s experience as a regulator of markets for consumer financial products and services, the Director is acutely aware that many of the Ratified Actions have engendered significant reliance interests. Consumers, the business community, State and local governments, and other individuals and entities have all relied upon the validity of the Ratified Actions in organizing their activities.” Ratification of Bureau Actions, 85 Fed. Reg. at 41330.

128. CFPB v. Gordon, 819 F.3d 1179, 1198 (9th Cir. 2016) (holding the CFPB Director validly ratified all actions taken before being confirmed to the position by the Senate).


130. Id. at 519.

was unconstitutionally seated.\textsuperscript{132} Given that \textit{Seila Law} was remanded to the Ninth Circuit to decide a similar ratification issue—and that the Ninth Circuit sitting en banc originally found no issue with the CFPB Director’s for-cause removal protection—it was highly likely that the CFPB’s regulations would remain fully intact.\textsuperscript{133} As expected, the Ninth Circuit found that the Ratification Notice issued by Director Kraninger in the wake of the \textit{Seila Law} decision sufficiently ratified all covered Bureau actions, allowing all existing CFPB rules and regulations to remain in force.\textsuperscript{134}

The Ninth Circuit was also tasked with determining “whether the civil investigative demand was validly ratified” and thus enforceable against Seila Law LLC.\textsuperscript{135} The CFPB’s Ratification Notice did not explicitly ratify pending enforcement actions; the Bureau instead chose to “mak[e] such ratifications separately” as appropriate\textsuperscript{136} and argued it had already done so twice for the CID issued to Seila Law LLC.\textsuperscript{137} Although the CID was originally issued by Director Cordray in early 2017—while Director Cordray was unconstitutionally insulated from Presidential removal—Acting Director Mick Mulvaney issued a “Decision Memorandum” (“Mulvaney Ratification”) on March 16, 2018, formally ratifying the Bureau’s enforcement action against Seila Law LLC.\textsuperscript{138} Director Kraninger issued a similar ratification (“Kraninger

\textsuperscript{132} \textit{Gordon}, 819 F.3d at 1192 (“Because the CFPB had the authority to bring the action at the time Gordon was charged, Cordray’s August 2013 Ratification, done after he was properly appointed as Director, resolved any Appointments Clause deficiencies.”).

\textsuperscript{133} See \textit{CFPB v. Seila Law LLC}, 923 F.3d 680, 682–84 (9th Cir. 2019) (holding the CFPB Director’s for-cause removal did not violate the separation of powers).

\textsuperscript{134} See \textit{CFPB v. Seila Law LLC}, 984 F.3d 715, 719 (9th Cir. 2020) (holding the CID was validly ratified and thus enforceable against Seila Law because “[j]ust as in \textit{Gordon}, the constitutional infirmity relates to the Director alone, not to the legality of the agency itself”).

\textsuperscript{135} \textit{Seila Law LLC v. CFPB}, 140 S. Ct. 2183, 2211 (2020). The Court declined to address the ratification issue because “[t]hat debate turns on case-specific factual and legal questions not addressed below and not briefed here.” \textit{Id.} at 2208.


\textsuperscript{137} Supplemental Brief of Appellee Consumer Fin. Prot. Bureau at 12, \textit{CFPB v. Seila Law, LLC}, 984 F.3d 715 (9th Cir. 2020) (“Seila Law has received exactly what it claimed was lacking, and received it twice: Two officials who were indisputably accountable to the President have confirmed that this case should proceed.”).

\textsuperscript{138} Appellee Consumer Fin. Prot. Bureau Correspondence Regarding Ratification at 8, \textit{CFPB v. Seila Law LLC}, 984 F.3d 715 (9th Cir. 2020). The Mulvaney Ratification states: “I ratify the Bureau’s earlier decisions to issue the February 27, 2017, civil investigate demand (CID) to Seila Law, LLC; to deny Seila Law’s request to set aside the CID in an order dated April 10, 2017; and to file a petition on June 22, 2017 requesting the district court enforce the CID.” \textit{Id.}
Ratification”) on July 9, 2020, shortly after Seila Law was decided.\textsuperscript{139} The Mulvaney and Kraninger Ratifications were issued while both Mulvaney (as an Acting Director) and Kraninger (as a post-Seila Law Director) were removable by the President at will.\textsuperscript{140} Thus, because the issuance of the CID was within the CFPB’s enumerated powers and because it was ratified twice by Directors removable by the President at will, the Ninth Circuit found Seila Law had no effect on pending CFPB enforcement actions after they were found to be validly ratified by Director Kraninger.\textsuperscript{141}

C. \textit{CFPB Director Under the Biden Administration}

In a swift exercise of the President’s new unrestricted power to remove the CFPB Director at will, even for political reasons alone,\textsuperscript{142} President Joseph Biden removed Director Kraninger within hours of his inauguration on January 20, 2021.\textsuperscript{143} Biden then named David Ueijo, formerly the CFPB’s Chief Strategy Officer, as Acting Director of the Bureau,\textsuperscript{144} and is expected to nominate FTC Commissioner Rohit Chopra to serve as Director Kraninger’s permanent replacement.\textsuperscript{145} While these

\textsuperscript{139} Id. at 7. Director Kraninger’s ratification states: “I hereby ratify the decisions to issue the civil investigative demand to Seila Law, to deny Seila Law’s request to modify or set aside the CID, and to file a petition requesting that the district court enforce the CID.” \textit{Id.}

\textsuperscript{140} Supplemental Brief of Appellee Consumer Fin. Prot. Bureau at 14, CFPB v. Seila Law LLC, 984 F.3d 715 (9th Cir. 2020); Supplemental Brief of Respondent-Appellant Seila Law, LLC at 8, CFPB v. Seila Law LLC, 984 F.3d 715 (9th Cir. 2020).

\textsuperscript{141} CFPB v. Seila Law LLC, 984 F.3d 715, 720 (9th Cir. 2020).

\textsuperscript{142} Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2211 (2020).

\textsuperscript{143} See Hamilton, supra note 71 (reporting that Director Kraninger resigned from her position “according to the wishes of President Joe Biden”); see also Kathleen Kraninger (@CFPBKraninger), \textit{Twitter} (Jan. 20, 2021, 12:46 PM), https://twitter.com/CFPBKraninger/status/1351949184883163138?s=20 [https://perma.cc/H5XU-MEW7] (“As requested by the Biden administration, today I resigned as Director of the CFPB.”).

\textsuperscript{144} See Kate Berry, \textit{Former Cordray Aide Selected for Interim CFPB Post}, \textit{AM. BANKER} (Jan. 22, 2021, 2:18 PM), https://www.americanbanker.com/news/former-cordray-aide-selected-for-interim-cfpb-post [https://perma.cc/7S4T-UCN4] (noting Ueijo “worked for five years as chief strategy officer and briefly as chief of staff to former CFPB Director Richard Cordray”).

moves were not unexpected, the speed with which President Biden acted in depoising Director Kraninger is a stark illustration of the unfettered removal authority sanctioned by the Court in *Seila Law*.

The Obama and Trump administrations differed greatly in their approaches towards the CFPB’s regulatory and enforcement activities, and the Biden administration could alter the Bureau’s activities yet again. For example, the CFPB announced fifty-five public law enforcement actions in 2015, compared to just eleven in 2018 and twenty-two in 2019. Moreover, the Bureau awarded an average of $59.6 million in relief per case under Director Cordray, compared to an average of $2.4 million per case under Director Kraninger—a decline of approximately 96% in average monetary relief awarded per enforcement action. Levels of CFPB enforcement of regulations relating to mortgage lending, student loans, and deceptive or abusive practices all

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151. PETERSON, *supra* note 149, at 2.
sharply declined during the Trump Administration. Many have predicted that a Biden-appointed CFPB Director will not only reverse these trends, but also could increase attention to fair-lending issues in an effort to combat discrimination and promote racial equity causes, and could enact stricter rules surrounding account overdraft fees, which generated over $17 billion in revenue for banks in 2019.

VI. IMPLICATIONS FOR OTHER FINANCIAL REGULATORY AGENCIES

A. FHFA Director

The Seila Law majority denounced the CFPB’s structure as “almost wholly unprecedented” and “an innovation with no foothold in history or tradition.” According to Chief Justice Roberts, “[a]fter years of litigating the agency’s constitutionality,” only four examples of for-cause removal protection granted “to principal officers who wield power alone rather than as members of a board or commission” could be identified. The Court distinguished those agency leadership positions

152. Id. at 2–3.
153. See Kate Berry, Acting CFPB Chief Signals Tougher Stance Against Redlining, AM. BANKER (Feb. 3, 2021, 9:00 PM), https://www.americanbanker.com/news/acting-cfpb-chief-signals-tougher-stance-against-redlining [https://perma.cc/7W3P-3XH4] (“Banking attorneys are bracing for an immediate sea change in the [CFPB’s] approach to fair-lending cases even before the Biden administration’s nominee to run the agency is confirmed.”).
156. Id. at 2202.
157. Id. at 2201. First, the Comptroller of the Currency was protected by a for-cause removal limitation “for one year during the Civil War. That example has rightly been dismissed as an aberration.” Id. Today, the Comptroller serves a five-year term “unless sooner removed by the President, upon reasons to be communicated by him to the Senate.” 12 U.S.C. § 2. After Seila Law, it is clear that under the OCC’s current structure, any President “in a firing mood” may remove the comptroller at will. Seila Law, 140 S. Ct. at 2232 (Kagan, J., dissenting). Second, the Office of the Special Counsel (“OSC”), a government entity.
from the CFPB Director as “not involv[ing] regulatory or enforcement authority remotely comparable to that exercised by the CFPB.” However, one of those four examples, in particular—the Director of the Federal Housing Finance Agency (“FHFA”)—deserves a closer look in the new post-*Seila Law* constitutional order.  

The FHFA was created by the Housing and Economic Recovery Act (“HERA”) in response to the 2008 financial crisis. An independent executive agency, the FHFA regulates the Federal National Mortgage Association (“Fannie Mae”) and the Federal Home Loan Mortgage Corporation (“Freddie Mac”), government-sponsored entities (“GSEs”) specifically enumerated by statute. Like the CFPB, the FHFA is led by a single director who is appointed to a five-year term by the President, subject to Senate confirmation, and can only be removed by the President “for cause.” Also similar to the CFPB, the FHFA is not funded via congressional appropriation, but through “annual assessments” collected from Fannie Mae and Freddie Mac in the course

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159. Id.
162. HERA § 1101, 12 U.S.C. § 4511(a) (“There is established the Federal Housing Finance Agency, which shall be an independent agency of the Federal Government.”); see also 44 U.S.C. § 3502(5) (including the FHFA in a list of “independent regulatory agenc[ies]”).
163. HERA § 1101, 12 U.S.C. § 4511(b)(1)–(2). Fannie Mae and Freddie Mac are classified as “regulated entit[ies]” subject to the FHFA Director’s “general regulatory authority” as set forth in the HERA. Id.
164. Id. § 4512(b)(1)–(2). The statutory language of the FHFA Director’s for-cause removal protection is less specific than was the CFPB Director’s removal protection. Compare id. § 4512(b)(2) (“The [FHFA] Director shall be appointed for a term of 5 years, unless removed before the end of such term for cause by the President.”), with Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 1011, 12 U.S.C. § 5491(c)(3) (allowing the President to remove the CFPB Director only “for inefficiency, neglect of duty, or malfeasance in office”).
of the agency’s supervisory activities. The FHFA is “advise[d]” by the Federal Housing Finance Oversight Board, composed of the FHFA Director, the Secretary of the Treasury, the Secretary of Housing and Urban Development, and the SEC Chairman. This Board is distinguishable from the multimember commissions that lead the Federal Reserve, the SEC, and other agencies, as the Board has no binding authority over the FHFA or its Director.

The FHFA Director also possesses regulatory and enforcement powers. The FHFA Director is instructed to “issue any regulations, guidelines, or orders necessary” to ensure the safety and soundness of Fannie Mae and Freddie Mac. The Director may bring enforcement actions against “a regulated entity or any entity-affiliated party” for any “unsafe or unsound practice” or violations of law. The FHFA Director may issue subpoenas and cease-and-desist orders, require Fannie Mae or Freddie Mac to take remedial action, and impose civil penalties on regulated entities of up to $2 million per day for each day that a violation continues. However, unlike the CFPB, the FHFA may only regulate the GSEs specifically enumerated in the HERA; the agency has no authority over private parties or the housing and mortgage markets.

The Fifth Circuit, sitting en banc, ruled in 2019 in Collins v. Mnuchin that the FHFA Director’s for-cause removal protection was

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166. HERA § 1103, 12 U.S.C. § 4513a(a), (c).
167. See id. § 4513a(b) (the Board “may not exercise any executive authority, and the Director may not delegate to the Board any of the functions, powers, or duties of the Director”); see also Collins v. Mnuchin, 938 F.3d 553, 565 (5th Cir. 2019) (en banc) (describing the Board’s power as “Lilliputian”).
168. See infra nn. 169–74.
169. HERA § 1107, 12 U.S.C. § 4526(a); see also HERA § 1103 § 4513(a)(1)(A)–(B) (“The principal duties of the Director shall be (A) to oversee the prudential operations of each regulated entity; and (B) to ensure that each regulated entity operates in a safe and sound manner” and that “the operations and activities of each regulated entity foster liquid, efficient, competitive, and resilient national housing finance markets . . .”).
170. HERA § 1151, 12 U.S.C. § 4631(a)(1). The FHFA Director may bring charges for “unsafe or unsound practice” if either Fannie Mae or Freddie Mac “receives . . . a less-than-satisfactory rating for asset quality, management, earnings or liquidity.” Id. at § 4631(b).
175. Collins v. Mnuchin, 938 F.3d 553 (5th Cir. 2019) (en banc).
unconstitutional. That suit was brought by three Fannie Mae and Freddie Mac shareholders challenging the FHFA’s 2012 financing agreement (referred to as the “Net Worth Sweep”) as unconstitutional in part because the agreement was adopted by a Director not removable by the President at will—an argument accepted by the Fifth Circuit. The Fifth Circuit also found the Director’s removal protection provision severable from HERA, noting that while the statute does not contain an express severability clause, “nothing in the statutory scheme suggests that Congress would prefer a complete unwind of actions taken by the FHFA to an FHFA director removable at will.”

The Supreme Court granted certiorari on July 9, 2020, and will hear the case in the 2020-21 term. In Seila Law, Roberts appeared to set the table for a similar ruling on the FHFA’s structure as the Court delivered to the CFPB. The Chief Justice described the FHFA as “essentially a companion of the CFPB, established in response to the same financial crisis,” and, citing the Fifth Circuit’s Collins ruling, noted that the FHFA’s structure is a “source of ongoing controversy.” While Roberts did concede that the FHFA “regulates primarily Government-sponsored enterprises, not purely private actors [as does the CFPB],” the Court will likely set aside this difference and agree with the Fifth Circuit’s reasoning because the fundamental constitutional defect—a

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176. Id. at 563.
177. Id. at 567–68. The Net Worth Sweep “replaced the quarterly 10% dividend [paid to Fannie and Freddie shareholders] with variable dividends equal to the GSEs’ entire net worth except a capital reserve.” Id. at 567. This arrangement “transferred a fortune from Fannie and Freddie to Treasury. When this suit was filed, the GSEs had paid $195 billion in dividends under the net worth sweep.” Id. at 568.
178. Id. at 591 (“Agencies with removal-protected principal officers were a unique, but recognized, blend of legislative, executive, and judicial powers long before the FHFA. Their unique position has also been relatively static, until recently. The removal-protected FHFA Director is a new innovation and falls outside the lines that Humphrey’s Executor recognized. Granting both removal protection and full agency leadership to a single FHFA Director stretches the independent-agency pattern beyond what the Constitution allows.”).
179. Id. at 592 (“When addressing the partial unconstitutionality of a statute such as this one, we seek to honor Congress’ intent while fixing the problematic aspects of the statute. Thus, in this case, the appropriate—and most judicially conservative—remedy is to sever the ‘for cause’ restriction on removal of the FHFA director from the statute.” (citations omitted)).
182. Id.
183. Id.
Director of an independent executive agency insulated from the President’s at-will removal power—is the same defect that was removed from the CFPB’s structure in *Seila Law*.  

However, the Court’s decision to hear *Collins* in light of these similarities between the CFPB and FHFA Directorships begs the question of why the Court granted certiorari and did not simply endorse the Fifth Circuit’s holding as to the unconstitutionality of the FHFA Director’s removal protection. At oral argument, Justice Sotomayor explored the idea that the FHFA could be distinguished from the CFPB on grounds related to the FHFA’s conservatorship powers, which she argued have “historically been considered an adjunct to the judicial power,” rather than an executive power that may only be exercised by a Director removable at will by the President in light of *Seila Law*. However, Justices Alito and Kagan appeared to reject this idea, agreeing with the government’s position that the FHFA Director’s authority to place Fannie and Freddie under conservatorship is an executive power and noting that those GSEs have a “profound effect” on the nation’s housing market.

Additionally, several Justices expressed significant hesitancy towards the shareholders’ argument that if the FHFA Director is indeed unconstitutionally insulated from the President’s removal power, the Court should in turn invalidate the FHFA’s Net Worth Sweep. This hesitancy seems grounded in the fact that the FHFA and Treasury Department’s Net Worth Sweep resulted in an “astonishing windfall of $124 billion” in profit for the federal government. At oral argument, several Justices questioned whether the Court should even reach the constitutional issue of the FHFA Director’s removal protection, focusing instead on the fact that the Net Worth Sweep at issue was first enacted by an acting director removable at will, as well as underlying corporate law issues at play. Given the nature of the Justices’ questions and the sheer

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184. *Id.*

185. *Id.*


187. *Id.* at 42:21.

188. *Id.* at 01:03:27.


190. Oral Argument at 5:30, Collins v. Mnuchin, Nos. 19-422 & 19-563 (U.S. argued Dec. 9, 2020) https://www.oyez.org/cases/2020/19-422 [https://perma.cc/LCE4-4KLA] (Justice Thomas questioning counsel for the FHFA on the merits of the government’s business judgement arguments and the issue of whether the plaintiffs’ claims were derivate or direct);
magnitude of the final agency action at issue, the Court will perhaps use Collins to address the thorny issues surrounding an acting director’s actions as the leader of an independent executive agency, as well as an independent agency’s ratification of an unconstitutionally-insulated director’s actions.\textsuperscript{191}

B. Financial Regulatory Agencies Led by Multimember Boards or Commissions

While the CFPB and FHFA are each led by a single director that must be removable at will after Seila Law, the other federal financial regulators do not suffer from the same constitutional defect. The Federal Reserve,\textsuperscript{192} FDIC,\textsuperscript{193} SEC,\textsuperscript{194} CFTC,\textsuperscript{195} and the National Credit Union

\begin{footnotesize}
\textsuperscript{191} See Hannah Lang, Supreme Court Hints FHFA’s Calabria Could Keep Job After All, AM. BANKER (Dec. 9, 2020, 4:48 PM), https://www.americanbanker.com/news/supreme-court-hints-fhfas-calabria-could-keep-job-after-all [https://perma.cc/YC3N-WVYK] (noting that the Court “appeared much more focused on the legality of the net worth sweep than the constitutionality of the [FHFA’s] structure,” but appeared divided on “whether they should apply the Seila Law ruling about the CFPB equally to the FHFA case”); see also Amy Howe, Argument Analysis: “Very Hard Questions” in Dispute Over Fannie Mae, Freddie Mac Shareholder Suit, SCOTUSBLOG (Dec. 9, 2020, 7:05 PM), https://www.scotusblog.com/2020/12/argument-analysis-very-hard-questions-in-dispute-over-fannie-mae-freddie-mac-shareholder-suit/ [https://perma.cc/T83N-TNK2] (“If the justices do conclude that the restrictions on the removal of the FHFA director violate the Constitution, they will have to decide what remedy, if any, should be available for that violation. . . . Some justices were clearly concerned that striking down the removal restrictions could have significant and undesirable ripple effects—calling into question, for example, the validity of the Social Security Administration’s leadership structure.”).

\textsuperscript{192} The Board of Governors of the Federal Reserve System (“Federal Reserve Board”) is composed of seven members, appointed by the President and confirmed by the Senate, that serve fourteen-year terms. 12 U.S.C. § 241. The Chairman is selected by the President from the Federal Reserve Board and is nominated (subject to Senate confirmation) to serve a four-year term. \textit{Id.} § 242.

\textsuperscript{193} The FDIC is led by a five-member board, which includes the CFPB Director and the Comptroller of the Currency; each member of the board is appointed by the President and confirmed by the Senate to a six-year term. 12 U.S.C. § 1812(a)(1), (c)(1). The FDIC Chairperson is selected from that group by the President and confirmed by the Senate to a five-year term. \textit{Id.} § 1812(b)(1).

\textsuperscript{194} The SEC is led by five Commissioners appointed by the President and confirmed by the Senate to five-year terms. 15 U.S.C. § 78d(a). The SEC Chairman is selected by the President from the five Commissioners. \textit{Id.}

\textsuperscript{195} The CFTC is also led by five Commissioners appointed by the President and confirmed by the Senate to five-year terms. 7 U.S.C. § 2(a)(2)(A). The CFTC Chairman is appointed by the President from the five Commissioners; the appointment is subject to Senate confirmation. \textit{Id.} § 2(a)(2)(B).
\end{footnotesize}
Association ("NCUA") are all led by multimember boards or commissions headed by a chair. With the exception of the Federal Reserve, all of those agencies’ leadership committees are required by statute to be composed of members of both political parties. The Federal Reserve is also exceptional in that Federal Reserve Board members serve their terms "unless sooner removed for cause by the President." The statutes that delegate authority to the FDIC, the SEC, the CFTC, and the NCUA are silent on whether the President possesses at will removal power over the Commissioners or Board members of those agencies.

Although the Seila Law Court was not specifically asked to reach the issue of whether the members of such multimember commissions can continue to enjoy for-cause removal protections, Chief Justice Roberts, writing for the separate majority with respect to the severability issue, indicated that such protections are distinguishable from the CFPB’s single-Director structure and are thus constitutional. According to Roberts, the Court’s decision to remove the CFPB Director’s for-cause removal protection “does not foreclose Congress from pursuing alternative responses to the problem—for example, converting the CFPB into a multimember agency.”

The Court apparently believes that a multimember commission with for-cause removal protection is permissible because a multimember structure diffuses authority, rather

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196. The NCUA is led by a three-member Board; each Board member is appointed by the President to a six-year term, subject to Senate confirmation. 12 U.S.C. § 1752a(b), (c). The President designates the Chairman of the Board. Id. § 1752a(b).


198. HOGUE ET AL., supra note 168, at 1. No more than three members of the five-member FDIC Board of Directors may be of the same political party. 12 U.S.C. § 1812(a)(2). The same is true of the SEC Commissioners, 15 U.S.C. § 78d(a), and CFTC Commissioners, 7 U.S.C. § 2(a)(2)(A). No more than two members of the NCUA Board may be of the same party affiliation. 12 U.S.C. § 1752a(b)(1).


201. Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2207–11 (2020). Of the Justices comprising the other sections of the Seila Law majority opinion, only Justices Alito and Kavanaugh joined Chief Justice Roberts’ severability analysis; Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, also concurred in the judgement with respect to the severability issue. Id.

202. Id. at 2209.

203. Id. at 2211.
than concentrate it in a single director, thus making it more difficult for that authority to be abused and less likely that an independent agency will “slip” from the President’s control and impinge the “liberty” of the American people.\textsuperscript{204} However, the Court provided no further support for that argument beyond denouncing the CFPB Director’s lack of “colleagues to persuade,”\textsuperscript{205} an omission with which the dissent found particularly troubling.\textsuperscript{206} Regardless of the merits of the Court’s reasoning, it is clear that at least for now, multimember commissions that lead independent agencies can continue to be insulated from the President’s at-will removal power.

C. \textit{FDIC, FSOC, and Legislative Reforms}

\textit{Seila Law} also increases the President’s control over the FDIC and the FSOC.\textsuperscript{207} The FDIC’s five-member board includes the CFPB Director, the Comptroller of the Currency, and three other members appointed by the President.\textsuperscript{208} After \textit{Seila Law}, the President will no longer have to wait for the natural expiration of an inherited CFPB Director’s term before selecting a new Director; the President could exert greater influence over FDIC policy by installing a CFPB Director who shares the President’s policy goals, and by removing the Director at any time if he or she deviates from those goals.\textsuperscript{209} Similarly, the President

\textsuperscript{204} Id. \textit{passim}.

\textsuperscript{205} Id. at 2204.

\textsuperscript{206} According to Justice Kagan, “[t]he purported constitutional problem here is that an official has ‘slip[ped]’ from the Executive’s control and ‘supervision’—that he has been unaccountable to the President. . . . So to make sense on the majority’s own terms, the distinction between singular and plural agency heads must rest on a theory about why the former more easily ‘slip’ from the President’s grasp. But the majority has nothing to offer. . . . If the Court is going to invalidate statutes based on empirical assertions like this one, it should offer some empirical support. It should not pretend that its assessment that the CFPB wields more power more dangerously than the SEC comes from someplace in the Constitution. But today the majority fails to accord even that minimal respect to Congress.” \textit{Id.} at 2242–44 (Kagan, J., dissenting) (internal citations omitted). Justice Kagan asserted instead that “[m]ore powerful control mechanisms are needed (if anything) for commissions. Holding everything else equal, those are the agencies more likely to ‘slip from the Executive’s control.’ . . . A multimember structure reduces accountability to the President because it’s harder for him to oversee, to influence—or to remove, if necessary—a group of five or more commissioners than a single director. Indeed, that is why Congress so often resorts to hydra-headed agencies.” \textit{Id.} at 2243 (Kagan, J., dissenting) (internal citations omitted).

\textsuperscript{207} See Phillips, supra note 7 (“After \textit{Seila Law}, a majority of FDIC board members will always be of the president’s party.”).

\textsuperscript{208} 12 U.S.C. § 1812(a)(1).

\textsuperscript{209} \textit{Seila Law}, 140 S. Ct. at 2209.
now possesses at-will removal power over nine of the ten voting members of the FSOC—which includes both the CFPB and FHFA Directors—the exception being the Chairman of the Federal Reserve. This could also potentially provide the President increased control over the FSOC’s decision-making.

Finally, it is worth noting several bills have recently been introduced to Congress in attempts to reform the CFPB, FHFA, and other regulatory agencies. In June 2019, Republican Senators Mike Lee and Josh Hawley introduced the “Take Care Act” to eliminate all for-cause removal protections for federal executive branch officers. While Seila Law has now made the CFPB Director removable at will, Congress could potentially eliminate all for-cause removal protections for executive officers via legislation like the proposed “Take Care Act.” In September 2020, in another effort to limit the power of the CFPB and FHFA Directors, Representatives Brenda Lawrence and Jody Hice introduced the “GAO Mandates Revision Act” that would somewhat curtail the independence of the CFPB’s and FHFA’s funding arrangements by subjecting the CFPB and FHFA to annual audits by Congress and the Director of the Office of Management and Budget.

210. The ten voting members of the FSOC are the Secretary of the Treasury, who serves as the Chairperson of the FSOC; the Chairman of the Federal Reserve Board; the Comptroller of the Currency; the CFPB Director; the SEC Chairman; the FDIC Chairperson; the CFTC Chairperson; the FHFA Director; the Chairman of the NCUA Board; and “an independent member appointed by the President, by and with the advice and consent of the Senate, having insurance expertise.” Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 111, 12 U.S.C. § 5321(b)(1).

211. Id.


213. Take Care Act, S. 1753, 116th Cong. (2019). The bill’s stated purpose is “[t]o promote accountability and effective administration in the execution of laws by restoring the original understanding of the President’s constitutional power to remove subordinates from office.” Id.

214. Senator Lee remarked: “President Trump was famous for many things even before he was elected. One of those things was the catch-phrase ‘You’re fired,’ which he popularized on his reality TV show ‘The Apprentice.’ . . . the head of an organization must always have hanging in reserve, sort of like an employer Damoclean sword—the absolute right to terminate a subordinate. . . . The bill would restore the unitary executive envisioned by the Founders and, in fact, required by the Constitution by stripping away all existing for-cause removal protections from the so-called independent agencies.” 165 CONG. REC. S3259–60 (daily ed. June 5, 2019) (statement of Sen. Mike Lee).


216. The CFPB is currently subject annually to both an independent external audit and a Government Accountability Office (“GAO”) audit conducted by the Comptroller General. Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 1017, 12 U.S.C. § 5496a. The GAO Mandates Revision Act would remove the GAO audit
VII. CONCLUSION

After years of litigation and political quarrelling, the CFPB Director’s for-cause removal protection was finally severed from the Dodd Frank Act in *Seila Law*, and the case will likely cement the same outcome for the FHFA.\(^{217}\) However, the Court’s decision also affirms the constitutionality of the Bureau’s existence and leaves its regulatory powers, enforcement actions, and funding arrangement untouched.\(^{218}\) *Seila Law* ultimately increases the President’s control over the CFPB and the federal financial regulatory framework generally, but the decision will have little impact on the CFPB’s past and pending operations.\(^{219}\) As for the agency’s future operations, President Biden will likely wield this new removal authority to nominate a CFPB Director who will return the Bureau to the levels of regulatory and enforcement activities seen under President Obama and Director Cordray.\(^{220}\) Despite Congress’ attempt to insulate the CFPB from volatile political winds, *Seila Law* has pushed the Bureau further into the storm of Presidential politics.

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