

A CASE FOR THE EXTENSION OF THE DE FACTO OFFICER DOCTRINE

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INTRODUCTION

On June 29, 2020, the United States Supreme Court published its opinion for *Seila Law v. CFPB*, where it held that the Consumer Financial Protection Bureau’s (“CFPB”) “for-cause” removal restriction of its director violated the Constitution’s separation of powers doctrine.¹ The opinion sparked questions concerning the validity of the CFPB’s rules, regulations, and enforcement actions taken prior to *Seila Law*.² Former CFPB Director Kathleen Kraninger attempted to ratify the CFPB’s actions.³ Similarly, former CFPB Director Richard Cordray was unconstitutionally appointed to the position in 2013, and he issued a ratification for all of his actions taken prior to his valid reappointment.⁴ However, Directors Kraninger and Cordray’s ratifications differed in one important aspect. Regarding former Director Cordray, his agency authority was unconstitutional⁵, whereas Director Kraninger’s principal, the CFPB, lacked authority.⁶

If the ratification is held to be insufficient, the Administrative Procedure Act (“APA”) would require all previous rules that the CFPB has promulgated to go through the required notice-and-comment procedure once more.⁷ Lower courts have addressed the issue inconsistently.⁸ The Ninth Circuit heard the *Seila Law* ratification argument on remand and held that the ratification was sufficient, although the decision lacked a thorough analysis.⁹ The Fifth Circuit vacated a recent decision, holding that the CFPB’s structure was unconstitutional, and will be rehearing the issue en banc.¹⁰ The Second Circuit will be hearing the CFPB’s

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

2. Rachel Rodman et al., *INSIGHT: Supreme Court Ruling Does Not End the Fight Over the CFPB*, BLOOMBERG L. (July 30, 2020, 4:01 AM), <https://news.bloomberglaw.com/us-law-week/insight-supreme-court-ruling-does-not-end-the-fight-over-the-cfpb> [perma.cc/RC3M-YRRC].

3. *Consumer Financial Protection Bureau Ratifies Prior Regulatory Actions*, CONSUMER FIN. PROT. BUREAU (July 7, 2020), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-ratifies-prior-regulatory-actions> [perma.cc/2T84-TC5Y].

4. Notice of Ratification, 78 Fed. Reg. 53,734-02 (Aug. 30, 2013).

5. *See* *Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179 (9th Cir. 2016).

6. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2192 (2020).

7. *See* TODD GARVEY, CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 1 (2017).

8. *See* *Consumer Fin. Prot. Bureau v. RD Legal Funding*, No. 828 F. App’x 69 (2nd Cir. Oct. 30, 2020) (summary order remanding the case for further proceedings); *Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc.*, 953 F.3d 591 (5th Cir. 2020).

9. *Consumer Fin. Prot. Bureau v. Seila Law LLC*, 984 F.3d 715, 717 (9th Cir. 2020).

10. *Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc.*, 953 F.3d 381, 382 (5th Cir.

appeal to a district court decision, focusing on Director Kraninger's ratification.¹¹ The Supreme Court decided a case similar to *Seila Law*, regarding the Federal Housing Finance Agency's "for-cause" removal restriction for its director.¹²

A proposed solution for *Seila Law*'s fallout is an altered version of the de facto officer doctrine—the de facto administrative agency doctrine. The de facto doctrine allows actions taken by public officials with defective title to be valid.¹³ If Director Kraninger's ratification is held invalid, the legitimacy of all the CFPB's rules would be in jeopardy. The de facto officer doctrine has been sparsely used by the Supreme Court,¹⁴ and has not been employed recently. In those instances where the Supreme Court has used the doctrine, it only covered officers with defective title, not in cases where the entity is defective.¹⁵ The proposed de facto administrative agency doctrine could come in to save the day. The doctrine would give de facto validity to the actions of a previously unconstitutional administrative agency if certain elements are met.

Part I of this Note discusses the CFPB's creation in the wake of the 2008 financial crisis, early challenges to the CFPB's structure, and the *Seila Law* decision. Part II explains the situations surrounding former Director Cordray's ratification and former Director Kraninger's July 7, 2020, ratification. Part III compares Director Kraninger's ratification with former Director Cordray's ratification and explains why Director Kraninger's ratification is invalid. Part III also includes an introduction and discussion of the APA and explains why Director Kraninger's ratification fails to satisfy the requirements of the APA. Finally, Part IV introduces the proposed de facto administrative agency doctrine and argues why the doctrine needs to be used to prevent the potential mayhem stemming from *Seila Law* and other future separation of powers issues.

I. THE CONSUMER FINANCIAL PROTECTION BUREAU & *SEILA LAW* DECISION

A. *Dodd-Frank Wall Street Reform & Consumer Protection Act*

The CFPB's creation stemmed from the 2008 financial crisis,¹⁶ but the idea of the CFPB was first proposed by then Harvard Professor, now U.S. Senator from Massachusetts, Elizabeth Warren.¹⁷ Professor Warren signaled that the

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11. *Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC*, 825 F. App'x 69 (2d Cir. 2020).

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

13. Kathryn A. Clokey, *The de Facto Officer Doctrine: The Case for Continued Application*, 85 COLUM. L. REV. 1121, 1121 (1985).

14. *See Buckley v. Valeo*, 424 U.S. 1 (1976); *Ryder v. United States*, 515 U.S. 177 (1995).

15. *Ryder*, 515 U.S. at 180.

16. Justin Schardin & John Soroushian, *Don't Lose Sight of Why CFPB Was Created*, BIPARTISAN POL'Y CTR. (Dec. 12, 2017), <https://bipartisanpolicy.org/blog/dont-lose-sight-of-why-cfpb-was-created/> [<https://perma.cc/XT5F-MJJ2>].

17. Elizabeth Warren, *Unsafe at Any Rate: If it's good enough for microwaves, it's good enough for mortgages. Why we Need a Financial Product Safety Commission*, DEMOCRACY

financial markets were too unregulated concerning consumer financial products.¹⁸ She compared the probability of losing a home due to a fire caused by a microwave with the probability of losing a home due to mortgage default.¹⁹ She notes that it is much easier to lose a home because of mortgage default than to a microwave fire because of the already established U.S. Consumer Product Safety Commission, which “protect[s] the American public from risks of injury and death from products used in the home, school, and recreation.”²⁰ The goal of Professor Warren’s idea was to regulate financial products—just as the Consumer Product Safety Commission regulates tangible consumer products—such as credit cards and mortgages, allowing consumers to be more informed when making purchasing decisions.²¹

The CFPB was officially established in 2010 through the Dodd-Frank Act.²² The CFPB is an independent executive agency with the purpose of “regulat[ing] the offering and provision of consumer financial products or services under the Federal consumer financial laws.”²³ Most importantly, for the purposes of this Note, the Dodd-Frank Act required a single director to be the head of the CFPB, and the President could only remove the director for “inefficiency, neglect of duty, or malfeasance in office.”²⁴ This is more commonly known as a “for-cause” provision.

The constitutionality of the Dodd-Frank Act was challenged early in its lifetime, beginning with *State Nat’l Bank of Big Spring v. Lew*, which was filed on June 21, 2012.²⁵ The decision was ultimately appealed to the D.C. Circuit and remanded, and the Dodd-Frank Act was held to be constitutional.²⁶ Another early challenge to the “for-cause” removal restriction was *Morgan Drexen, Inc. v. Consumer Fin. Protec. Bureau*, which was filed on July 22, 2013.²⁷ That decision, holding that a preliminary injunction enjoining the CFPB from pursuing enforcement action against Morgan Drexen, Inc. was unwarranted, was appealed

(Summer 2007), <https://democracyjournal.org/magazine/5/unsafe-at-any-rate/> [perma.cc/H9AL-N6TD].

18. *Id.*

19. *Id.* (“It is impossible to buy a toaster that has a one-in-five chance of bursting into flames and burning down your house. But it is possible to refinance an existing home with a mortgage that has the same one-in-five chance of putting the family out on the street—and the mortgage won’t even carry a disclosure of that fact to the homeowner.”).

20. *Id.*

21. *Id.*

22. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, July 21, 2010, 124 Stat. 1376.

23. 12 U.S.C. § 5491(a) (2010).

24. *Id.* § 5491(c)(3).

25. *State Nat’l Bank of Big Spring v. Lew*, 958 F. Supp. 2d 127 (D.D.C. 2013).

26. *State Nat’l Bank of Big Spring v. Lew*, 197 F. Supp. 3d 177 (D.D.C. 2016).

27. *Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau*, 979 F. Supp. 2d 104 (D.D.C. 2013).

and affirmed.²⁸ However, the challenges to the CFPB's constitutionality did not stop, leading to a challenge from Seila Law LLC.

B. Seila Law Holding & Ratification Omission

In 2017, the CFPB issued a civil investigative demand (“CID”)—“a request for records and information issued by the U.S. government in connection with a federal [False Claims Act] investigation”²⁹—to Seila Law LLC in California.³⁰ Seila Law LLC opposed the demand and asked the CFPB to set it aside.³¹ The CFPB denied Seila Law LLC's request and filed suit in the U.S. District Court for the Central District of California.³² Seila Law LLC argued that the CFPB's “for-cause” removal restriction for the director violated the Constitution's separation of powers doctrine.³³ The district court ruled in favor of the CFPB, and the U.S. Court of Appeals for the Ninth Circuit affirmed.³⁴ On October 18, 2019, the Supreme Court granted Seila Law's certiorari petition.³⁵

The Supreme Court issued its decision on June 29, 2020, and held that the “for-cause” removal restriction violated the separation of powers doctrine because it prevented the President from removing the director without cause.³⁶ The Court distinguished this case from *Humphrey's Executor v. United States* and *Morrison v. Olson*.³⁷ In *Humphrey's Executor*, the Supreme Court considered whether a “for-cause” removal restriction for a commissioner of the Federal Trade Commission (“FTC”) was constitutional.³⁸ The Court held that the restriction was constitutional, noting that the FTC is headed by a multimember commission with quasi-legislative and quasi-judicial—not executive—functions.³⁹ Therefore, the members of the commission can be insulated from the President's control and removal. In *Morrison*, the Supreme Court decided that a “for-cause” removal restriction for an independent counsel, who investigated high-ranking government officials for violations of federal criminal law, was also constitutional.⁴⁰ The *Morrison* Court determined that the independent counsel was an inferior officer,

28. *Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau*, 785 F.3d 684 (D.C. Cir. 2015).

29. Nina G. Beck et al., *Civil Investigative Demands In False Claims Act Investigations: What They Are And Strategies For Response*, NAT'L L. REV. (Feb 18, 2020), <https://www.natlawreview.com/article/civil-investigative-demands-false-claims-act-investigations-what-they-are-and> [<https://perma.cc/BZ6A-DPJU>].

30. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2194 (2020).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 2188.

35. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 427 (2019).

36. *Seila Law LLC*, 140 S. Ct. at 2197.

37. *Id.* at 2200.

38. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 621 (1935).

39. *Id.* at 629.

40. *Morrison v. Olson*, 487 U.S. 654, 693 (1988).

had limited executive power, and could ultimately be given protection against removal by the President.⁴¹

The Court, in *Seila Law*, noted that the holdings from *Humphrey's Executor* and *Morrison* could not be extended to keep the CFPB's "for-cause" removal restriction intact with the rest of the Dodd-Frank Act.⁴² The CFPB is not headed by a multimember body like the FTC, and the CFPB's director exercises purely executive authority. *Humphrey's Executor's* narrow exception to the separation of powers did not apply to the CFPB.⁴³ Additionally, the CFPB's director is not an inferior officer, and the director has much more power than an independent counsel tasked with investigating government officials.⁴⁴ The CFPB's "for-cause" removal restriction could not be saved by the *Morrison* exception, and the Court held that the restriction was unconstitutional because it violated the separation of powers.⁴⁵ However, the Court allowed the restriction to be severed from the statute without destroying the CFPB.⁴⁶ Interestingly, the Court did not address the merits of the CFPB's ratification argument and remanded the issue to the Ninth Circuit.⁴⁷ The reaction to *Seila Law* was generally confusion concerning the CFPB's actions prior to the decision⁴⁸ because the Court "left open the question of what effect the decision had on actions taken by the CFPB while it was headed by a constitutionally defective director."⁴⁹ The Supreme Court's failure to address the effect of its decision leaves the door open for more challenges to the CFPB's authority, including Director Kraninger's post-*Seila Law* ratification.

II. RATIFICATION OVERVIEW

A. Director Kraninger's Admission of Unconstitutionality & Ratification

On September 17, 2019, before the Supreme Court's *Seila Law* decision, CFPB Director Kathleen Kraninger sent a letter to House Speaker Nancy Pelosi concerning the CFPB's constitutionality.⁵⁰ In the letter, Director Kraninger agreed with the Trump Administration's stance that her position as director was

41. *Id.*

42. *Seila Law LLC*, 140 S. Ct. at 2200.

43. *Id.*

44. *Id.*

45. *Id.* at 2207.

46. *Id.* at 2211.

47. *Id.* at 2208.

48. See William P. Heller et al., *Impact of Supreme Court's Decision in Seila Law, LLC v. CFPB*, AKERMAN (July 14, 2020), <https://www.akerman.com/en/perspectives/impact-of-supreme-courts-decision-in-seila-law-llc-v-consumer-financial-protection-bureau-cfpb.html> [perma.cc/RVM8-RVXR].

49. Rodman et al., *supra* note 2.

50. Letter from Kathleen Kraninger, CFPB Director, to Nancy Pelosi, Speaker, U.S. House of Representatives, p. 1 (Sept. 17, 2019).

unconstitutionally insulated from the President's removal authority.⁵¹ Kraninger encouraged the Supreme Court to review the "for-cause" provision in *Seila Law v. CFPB*.⁵² She believed that it was "in the [CFPB]'s interests to obtain a final resolution on [the] issue as soon as possible," likely because a final decision would ultimately help the CFPB continue its work.⁵³ Although she admitted that the CFPB's structure was unconstitutional, she asserted that it would not have any effect on her ability to fulfill the CFPB's mission.⁵⁴ She would "continue to carry out the [CFPB]'s duties under the [Dodd-Frank Act] and to defend the [CFPB]'s actions."⁵⁵ Director Kraninger did not address the validity of subsequent ratification if the CFPB's structure were to be found unconstitutional.

On July 7, 2020, after the *Seila Law* decision, Director Kraninger announced that the CFPB was ratifying most of its regulatory actions taken between January 4, 2012, through June 30, 2020.⁵⁶ The CFPB clarified that the ratification was not an admission that the CFPB's pre-*Seila Law* actions are invalid, rather, the CFPB was making the ratification "out of an abundance of caution."⁵⁷ Interestingly, Director Kraninger decided to issue a ratification even though she felt so strongly that the *Seila Law* decision had no effect on the CFPB's prior actions. Former CFPB Director Richard Cordray also issued a ratification in a similar, albeit noticeably different, situation.⁵⁸ The ratification statement goes on to make arguments concerning the validity of the CFPB's pre-*Seila Law* actions.⁵⁹ The statement mentions the satisfaction of the Administrative Procedure Act's notice-and-comment procedures and how, even if the ratification did not satisfy them, the invalidation of the CFPB's rules would be impracticable.⁶⁰ Director Kraninger's ratification is similar to former Director Cordray's 2013 ratification.

B. Director Cordray's Ratification

Former CFPB Director Richard Cordray similarly issued a ratification of his actions on August 30, 2013, after his recess appointment by President Obama was held to be unconstitutional.⁶¹ Former Director Cordray "believe[ed] that the actions [he] took during the period [he] was serving as a recess appointee were legally authorized and entirely proper."⁶² His statement, like Director Kraninger's, seems to assert that his ratification was unnecessary and was only

51. *Id.* at 2.

52. *Id.*

53. *Id.*

54. *Id.* at 3.

55. *Id.* at 2.

56. Ratification from Kathleen Kraninger, CFPB Director, p. 2 (July 7, 2020).

57. *Id.*

58. 78 Fed. Reg. 53,734-02 (Aug. 30, 2013).

59. Kraninger, *supra* note 56, at 6.

60. *Id.* at 7.

61. 78 Fed. Reg. 53,734-02 (Aug. 30, 2013).

62. *Id.*

done out of an abundance of caution. The key difference between Director Kraninger’s ratification and former Director Cordray’s ratification is that Director Kraninger issued her ratification in response to the Supreme Court’s decision that the CFPB director position was unconstitutionally insulated from removal by the President, whereas former Director Cordray’s ratification was in response to his appointment to the director position being held unconstitutional. The Ninth Circuit determined, on April 14, 2016, that former Director Cordray’s ratification was effective “[b]ecause *the CFPB* had the authority to bring the action at the time the [defendant] was charged.”⁶³ The Ninth Circuit relied on basic agency law principles in concluding that the principal, the CFPB, always had the authority to charge the defendant, even though the agent, former Director Cordray, did not.⁶⁴ The Ninth Circuit’s reasoning mirrors its subsequent December 29, 2020, decision on remand from the Supreme Court in *Seila Law*.⁶⁵ To analyze Director Kraninger’s and Director Cordray’s ratifications, Supreme Court precedent related to ratification must be explained.

C. *Cook v. Tullis & Federal Election Commission v. NRA Political Victory Fund*

Two Supreme Court cases involving ratification are *Cook v. Tullis*⁶⁶ and *Federal Election Commission v. NRA Political Victory Fund*.⁶⁷ In *Cook*, a case from 1874, the Court established the general agency law principle that “it is essential that the party ratifying should not merely be able to do the act ratified *at the time the act was done*, but also *at the time the ratification was made*.”⁶⁸ The subsequent ratification cannot defeat the rights of intervening third parties,⁶⁹ such as a statute of limitations. In other words, the principal needs to have the authority to do the act (1) at the time the agent made the act, and (2) at the time the principal ratified the act.⁷⁰ In *NRA Political Victory Fund*, a 1994 case, the Supreme Court reiterated *Cook*’s third-party rights qualification to ratified actions.⁷¹ The Court held that the Solicitor General’s ratification of an unauthorized FEC filing was not valid, since the statute of limitations for making that filing had passed when the Solicitor General attempted to ratify it.⁷² Both *Cook* and *NRA Political Victory Fund* are important to the validity and fallout of

63. *Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1192 (9th Cir. 2016) (emphasis added).

64. *Id.* at 1191.

65. *Consumer Fin. Prot. Bureau v. Seila Law LLC*, 984 F.3d 715, 718 (9th Cir. 2020).

66. *Cook v. Tullis*, 85 U.S. 332 (1873).

67. *Fed. Election Comm’n v. Political Victory Fund*, 513 U.S. 88 (1994).

68. *Cook*, 85 U.S. at 338 (emphasis added).

69. *Id.*

70. *See id.*

71. *Fed. Election Comm’n*, 513 U.S. at 88.

72. *Id.* at 99.

Director Kraninger's and Director Cordray's ratifications.

III. RATIFICATION VALIDITY

A. Cordray & Kraninger Ratification Comparison

The ratifications from both former CFPB director Richard Cordray and former CFPB director Kathleen Kraninger were used to cure constitutional defects relating to the authority to take actions as director. However, the specific constitutional defects for each are different in an important way. Former Director Cordray's ratification stemmed from an improper appointment to the director position,⁷³ while Director Kraninger's ratification stemmed from the director position being unconstitutionally insulated from the President's removal authority.⁷⁴

After the decision in *Consumer Financial Protection Bureau v. Gordon*—that former Director Cordray's ratification was valid—the CFPB's structure had not been ruled to be unconstitutional. The core holding that the principal, the CFPB, always had the authority to charge the defendant was a valid conclusion. All former Director Cordray had to do was ratify his prior actions once he was validly reappointed to the position by President Obama.⁷⁵ The crucial issue in *Gordon* was that the *appointment* of the *agent* was invalid, meaning that the agent never had the proper authority.⁷⁶

Regarding Director Kraninger's ratification, and the issue in *Seila Law*, the actual director *position*—along with the CFPB's structure as a whole—was unconstitutional prior to the Supreme Court's *Seila Law* decision.⁷⁷ The principal, the CFPB, was an unconstitutional entity because it was beyond the President's control, and therefore, did not have the power to promulgate or enforce rules and regulations.⁷⁸ The *Gordon* holding cannot extend to Director Kraninger's ratification, since the principal, the CFPB, did not have the power “to do the act ratified *at the time the act was done*.”⁷⁹ Even if the CFPB had the power to act originally, some of Director Kraninger's enforcement of the rules and regulations cannot be ratified.⁸⁰ The *FEC* holding required Director Kraninger to ratify the actions before the statute of limitations ran on the improper actions by the third parties that the CFPB sought to pursue.⁸¹ The CFPB must bring its action no more than three years “after the date of discovery of the violation to which an action

73. 78 Fed. Reg. 53734-02 (Aug. 30, 2013).

74. Rodman et al., *supra* note 2.

75. *See* *Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179 (9th Cir. 2016).

76. *Id.*

77. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2196-97 (2020).

78. *See id.* at 2200.

79. *Cook v. Tullis*, 85 U.S. 332, 338 (1873) (emphasis added).

80. *See* *Fed. Election Comm'n v. Political Victory Fund*, 513 U.S. 88, 98 (1994).

81. *Id.*

relates.”⁸² If the statute of limitations ran before Director Kraninger’s ratification, the CFPB cannot pursue those claims.

Another distinction between former Director Cordray’s ratification and former Director Kraninger’s ratification is that Director Kraninger admitted that her position, and the CFPB’s structure as a whole, was unconstitutional but continued to promulgate and enforce rules and regulations.⁸³ It seems odd that someone who admits that she does not have the proper authority to do something continues to do the act which she believes she cannot legally do. Not only did she admit that the CFPB’s structure was unconstitutional, but Director Kraninger also encouraged the Supreme Court to rule against the CFPB in *Seila Law*.⁸⁴ Trying to argue that her ratification is effective seems to be diminished by her admission of unconstitutionality. On top of the agency law analysis, Director Kraninger’s ratification should be assessed in light of the APA’s procedural requirements for rulemaking.

B. Administrative Procedure Act & Rulemaking Process

An extremely important aspect to the power that administrative agencies possess relates to the APA. The APA governs the process by which agencies promulgate rules.⁸⁵ The APA requires agencies to “provide the public with adequate notice of a proposed rule followed by a meaningful opportunity to comment on the rule’s content[s].”⁸⁶ After the notice period ends, the comment period begins—requiring the agency to provide “interested persons with a meaningful opportunity to comment on the proposed rule through the submission of written ‘data, views, or arguments.’”⁸⁷ After the comment period, the agency is required to consider the significant recommendations from the comment period and possibly incorporate the recommendations into the rule.⁸⁸ The final rule is then published in the Federal Register at least 30 days before the final rule’s effective date.⁸⁹

The APA presents another hurdle for the CFPB to jump over. Director Kraninger directly addressed this concern in her ratification statement, stating that courts have held that an agency does not need to redo the notice-and-comment

82. 12 U.S.C. § 5564(g)(1) (2010).

83. *SDNY Judge Recognizes CFPB Acted Unconstitutionally, But Still Enforces CID Against NCLA Client*, NEW CIVIL LIBERTIES ALL. (Aug. 18, 2020), <https://nclalegal.org/2020/08/sdny-judge-recognizes-cfpb-acted-unconstitutionally-but-still-enforces-cid-against-ncla-client/> [perma.cc/469C-PUEQ].

84. Kraninger, *supra* note 50, at 2.

85. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. § 500).

86. GARVEY, *supra* note 7, at 2.

87. *Id.* (quoting 5 U.S.C. § 553(c)).

88. *Id.* at 3.

89. *Id.*

procedures for ratified rules.⁹⁰ However, the authority that Director Kraninger cites does not address the APA's rulemaking requirements regarding ratification, rather, it only addresses the *enforcement* of rules.⁹¹ Her statement is misleading and seems to undercut the goal of the APA.

The APA was created in response to the “rapid increase in the number of powerful federal agencies” during President Franklin D. Roosevelt's administration.⁹² Several of the basic purposes of the APA include “requir[ing] agencies to keep the public currently informed of their organization, procedures and rules,” and “provid[ing] for public participation in the rule making process.”⁹³ The APA has historically been the center of another separation of powers issue—giving the executive branch the power to create rules and regulations that have the same legal authority as statutes passed by Congress.⁹⁴

The APA allows the executive branch to exercise authority that is typically only exercised by Congress.⁹⁵ At first glance, this seems to clearly be a separation of powers violation. In 1825, Chief Justice John Marshall stated that Congress cannot “delegate . . . powers which are strictly and exclusively legislative.”⁹⁶ However, Chief Justice Marshall clarified that “Congress may certainly delegate . . . powers which the legislature may rightfully exercise itself.”⁹⁷ The Supreme Court has further explained that “in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”⁹⁸ The broad general directives that Congress gives must “sufficiently mark[] the field within which the [executive agency] is to act so that it may be known whether [it] has kept within it in compliance with the legislative will.”⁹⁹ The APA's notice-and-comment requirement prevents the executive branch from exceeding its authority given to it by Congress.¹⁰⁰

Rulemaking by administrative agencies is already a tricky issue, and adding another separation of powers issue on top of that—a director insulated from presidential control—makes the equation even harder to solve. As a general

90. 85 Fed. Reg. 41,330-01 (July 10, 2020).

91. Fed. Election Comm'n v. Legi-Tech, Inc., 75 F.3d 704, 707 (D.C. Cir. 1996).

92. Cynthia Scheopner, *Administrative Procedure Act*, ENCYCLOPEDIA BRITANNICA (Oct. 27, 2016), <https://www.britannica.com/topic/Administrative-Procedures-Act> [perma.cc/YW4E-U28B].

93. Dep't of Justice, Attorney General's Manual on the Administrative Procedures Act 9 (1947).

94. Ariel Bendor & Sharon Yadin, *Regulation and the Separation of Powers*, 28 S. CAL. INTERDISC. L.J. 357, 363 (2019).

95. *Id.*

96. *Wayman v. Southard*, 23 U.S. 1, 42 (1825).

97. *Id.* at 43.

98. *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

99. *Yakus v. United States*, 321 U.S. 414, 425 (1944).

100. See *Administrative Law and Procedure*, JRANK, <https://law.jrank.org/pages/4077/Administrative-Law-Procedure.html> [perma.cc/4P49-GJSA].

principle, “[r]atification has an immediate effect on legal relations between the principal [the CFPB] and agent [the CFPB director], the principal [the CFPB] and the third party [those affected by the CFPB’s rules], and the agent [the CFPB director] and the third party [those affected by the CFPB’s rules].”¹⁰¹ The legal impact caused by the ratification relates back “to the time the agent acted.”¹⁰² The main problem with Director Kraninger’s ratification is that principal, the CFPB, did not have the authority to act before the Supreme Court’s *Seila Law* decision.¹⁰³ The CFPB was essentially non-existent because it was outside the control—and outside the scope of authority—of the President. Agency law requires that an entity be in existence at the time the act was done.¹⁰⁴ Director Kraninger could adopt what was done prior to the CFPB’s existence, but “[u]nlike ratification, adoption does not have a relation-back effect.”¹⁰⁵ Therefore, the APA’s notice-and-comment requirement cannot be met by Director Kraninger’s adoption.

The notice period gives the public notice of rules that can affect a wide range of activities.¹⁰⁶ Director Kraninger’s ratification does not satisfy the APA’s goal of giving the public time to adjust their conduct according to the proposed rule or regulation. Director Kraninger’s ratification would make the otherwise invalid rules and regulations immediately effective.¹⁰⁷ Additionally, a ratification would not allow the public an opportunity to voice their opinion about the proposal, as the APA’s comment period requires.¹⁰⁸ Allowing the ratification to make the prior rules immediately effective would also undermine the last step of the promulgation process—publication in the Federal Register. The APA requires the final rule to be published *at least* 30 days before the final rule’s effective date.¹⁰⁹

Proponents of ratification will argue that the previous notice and comment periods for the rules satisfy the APA’s requirements after Director Kraninger’s ratification. However, that argument fails for the same reason why Director Kraninger’s ratification was not valid in the first place. The CFPB never had the proper authority to initiate the APA’s procedures.¹¹⁰ Allowing an executive agency to create legally enforceable rules and regulations without satisfying the APA’s requirements would be unconstitutional. Lower courts seem to not only disregard the APA in their decisions. They also misinterpret the Supreme Court’s *Seila Law* decision regarding the CFPB’s authority as a principal.

101. RESTATEMENT (THIRD) OF AGENCY § 4.02 (AM. LAW INST. 2006).

102. *Id.*

103. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020).

104. RESTATEMENT (THIRD) OF AGENCY § 4.04 (AM. LAW INST. 2006).

105. *Id.*

106. GARVEY, *supra* note 7, at 2.

107. Kraninger, *supra* note 56, at 2.

108. GARVEY, *supra* note 7, at 2 (quoting 5 U.S.C. § 553(c)).

109. *Id.* at 3.

110. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2200 (2020).

C. Lower Court Interpretation of Seila Law

Seila Law LLC was not the first, or last, challenger to the CFPB's enforcement actions. There have been several lower court rulings related to the issue in *Seila Law*, and some even had to vacate decisions once the Supreme Court published the *Seila Law* opinion. Regarding the Supreme Court's decision in *Seila Law*, the Ninth Circuit addressed, on remand, the ratification problem related to the civil investigative demand issued to Seila Law LLC from the CFPB.¹¹¹ The CFPB urged the Ninth Circuit to hold that Director Kraninger's ratification is valid, pointing to the chaos that would be created if held otherwise.¹¹² The Ninth Circuit's decision is addressed in the section below.

On March 3, 2020, the Fifth Circuit held that the CFPB's structure was constitutional;¹¹³ however, on March 20, 2020, while awaiting the Supreme Court's *Seila Law* decision, the Fifth Circuit vacated the March 3, 2020, decision.¹¹⁴ On June 30, 2020, one day after the *Seila Law* decision, the Fifth Circuit scheduled a rehearing en banc to consider whether the enforcement action against the appellants should be dismissed.¹¹⁵

The Second Circuit has had a lot of activity involving the CFPB and the fallout from the *Seila Law* decision. The CFPB sought the appeal of a September 2018 ruling that dismissed a CFPB enforcement action, which was issued to RD Legal Funding after having determined that the CFPB was unconstitutionally structured.¹¹⁶ The CFPB's appeal focused on Director Kraninger's post-*Seila Law* ratification, arguing that the ratification retroactively makes the enforcement action against RD Legal Funding valid.¹¹⁷ The U.S. District Court for the Southern District of New York noted that the CFPB's ratification argument did "not address accurately the constitutional issue raised in [the] case, which concern[ed] the *structure* and *authority* of the *CFPB itself*, not the authority of an *agent* to make decisions on the CFPB's behalf."¹¹⁸ The Southern District of New

111. *Id.* at 2211.

112. See Supplemental Brief of Appellee, *Consumer Fin. Prot. Bureau v. Seila Law LLC*, No. 17-56324 (9th Cir. Nov. 19, 2020).

113. *Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc.*, 952 F.3d 591, 594 (5th Cir. 2020).

114. *Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc.*, 953 F.3d 381, 382 (5th Cir. 2020).

115. Alan S. Kaplinsky, *All American Check Cashing Files Supplemental En Banc Brief With Fifth Circuit*, BALLARD SPAHR LLP (Aug. 4, 2020), <https://www.consumerfinancemonitor.com/2020/08/04/all-american-check-cashing-files-supplemental-en-banc-brief-with-fifth-circuit/> [perma.cc/MW2E-QDNN].

116. Notice of Appeal, *Consumer Fin. Prot. Bureau v. RD Legal Funding LLC*, 332 F. Supp. 3d 729 (S.D.N.Y. 2020) (No. 1:17-cv-00890-LAP).

117. See Opening Brief of the Consumer Financial Protection Bureau, *Consumer Fin. Prot. Bureau v. RD Legal Funding LLC*, No. 18-2743 (2nd Cir. Oct. 30, 2020).

118. *Consumer Fin. Prot. Bureau v. RD Legal Funding LLC*, 332 F. Supp. 3d 729, 785

York's decision is contrary to what the Ninth Circuit decided in *Seila Law* on remand.¹¹⁹

The argument cited by the Southern District of New York is the main difference between Director Kraninger's ratification and former Director Cordray's ratification. Director Cordray's ratification involved the authority of the agent,¹²⁰ which is why the *Gordon* decision is logical. At the time of former Director Cordray's initial actions, the principal, the CFPB, always had the authority to promulgate rules and regulations and to enforce those rules and regulations. However, the *Seila Law* decision did not involve the authority of an agent, it involved the authority of the principal – the CFPB as a whole.¹²¹ Ultimately, the Second Circuit in *CFPB v. RD Legal Funding*, considering the *Seila Law* decision, affirmed in part the district court's decision but remanded the case for further proceedings.¹²² The Second Circuit remanded the case back to the district court to consider “the validity of Director Kraninger's ratification of [the] enforcement action.”¹²³ Another case from the Southern District of New York, *CFPB v. Moroney* was decided in favor of the CFPB.¹²⁴ The CFPB filed suit to enforce a civil investigative demand against the Moroney law firm before the *Seila Law* decision.¹²⁵ Director Kraninger reissued the civil investigative demand after her July 2, 2020, ratification, and Judge Kenneth M. Karas ultimately granted the CFPB's petition.¹²⁶ Judge Karas noted that Director Kraninger's ratification was valid, meaning that her ratification was necessary for the prior action to be enforceable.¹²⁷

An interesting conclusion stemming from *Moroney* is that the Southern District of New York became the first court to “grant ratification where the ratifier knew what she was doing was unconstitutional in the first instance.”¹²⁸ As mentioned above, Director Kraninger admitted that the CFPB's structure violated the separation of powers nearly a year before the *Seila Law* decision.¹²⁹ Judge

(S.D.N.Y. 2018) (emphasis added).

119. *See* Consumer Fin. Prot. Bureau v. *Seila Law* LLC, 984 F.3d 715, 715 (9th Cir. 2020).

120. Consumer Fin. Prot. Bureau v. *Gordon*, 819 F.3d 1179, 1192 (9th Cir. 2016).

121. *See* *Seila Law* LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197 (2020).

122. Consumer Fin. Prot. Bureau v. *RD Legal Funding* LLC, No. 18-2743-cv (2nd Cir. Oct. 30, 2020) (summary order remanding the case for further proceedings).

123. *Id.* at 4.

124. Alan S. Kaplinsky, *NY Federal District Court Grants CFPB Petition to Enforce CID Ratified By Director Kraninger*, BALLARD SPAHR LLP (Aug. 21, 2020), <https://www.consumerfinancemonitor.com/2020/08/20/ny-federal-district-court-grants-cfpb-petition-to-enforce-cid-ratified-by-director-kraninger/> / [perma.cc/2V5S-6WWP] (the ruling was made orally from the bench).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. Kraninger, *supra* note 50, at 2.

Karas's ruling failed to mention the impact, if any, Director Kraninger's September 17, 2019, admission to Congress had on the validity of the CFPB's actions between the date of the admission and the *Seila Law* decision. It begs the question, did Judge Karas simply forget to consider Director Kraninger's admission? The Ninth Circuit also seemed to omit an analysis on Director Kraninger's admission.

D. Ninth Circuit's Seila Law Decision on Remand

On December 29, 2020, exactly six months after the Supreme Court's *Seila Law* decision, the United States Court of Appeals for the Ninth Circuit published its long awaited *Seila Law* opinion on remand from the Supreme Court.¹³⁰ The Ninth Circuit held that Director Kraninger's July 9, 2020, ratification validly ratified the CID that was issued to Seila Law LLC.¹³¹ Interestingly, the court explicitly stated that it did not want to decide "whether [the ratification] occurred through the actions of Acting Director Mulvaney."¹³² The court reasoned that the constitutional defect from the Supreme Court's decision, although not expressly stated in the Supreme Court's decision, was that the CFPB always had the authority to act.¹³³

The court attempted to analogize the issue from *Gordon* with the issue on remand in *Seila Law*.¹³⁴ *Gordon* related to Director Cordray's appointment,¹³⁵ whereas *Seila Law* relates to the CFPB's structure as a whole.¹³⁶ The Ninth Circuit cited the Supreme Court's *Seila Law* decision in saying that "the constitutional infirmity relates to the Director alone, not to the legality of the agency itself,"¹³⁷ but the citation is misleading. The Supreme Court only supported this argument when analyzing severability, not constitutionality.¹³⁸ The Ninth Circuit even admitted that "[n]othing in the Court's decision suggests that it believed this defect rendered all of the agency's prior actions void."¹³⁹ That statement is true because the Supreme Court explicitly chose to omit a ratification analysis.¹⁴⁰ The Ninth Circuit is putting words in the Supreme Court's mouth. The court also cited to its *FEC v. Legi-Tech* decision—where the FEC brought an enforcement action while two members were unconstitutionally serving as commissioners¹⁴¹—to determine that the CFPB as a whole was not

130. *Consumer Fin. Prot. Bureau v. Seila Law LLC*, 984 F.3d 715, 715 (9th Cir. 2020).

131. *Id.*

132. *Id.* at 718.

133. *Id.* at 719.

134. *Id.*

135. *Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1192 (9th Cir. 2016).

136. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020).

137. *Consumer Fin. Prot. Bureau*, 984 F.3d at 719.

138. *Seila Law LLC*, 140 S. Ct. at 2209.

139. *Consumer Fin. Prot. Bureau*, 984 F.3d at 719.

140. *Seila Law LLC*, 140 S. Ct. at 2208.

141. *Fed. Election Comm'n v. Legi-Tech, Inc.*, 75 F.3d 704, 704 (D.C. Cir. 1996).

unconstitutional.¹⁴²

The Ninth Circuit also shot-down Seila Law LLC's argument that Director Kraninger's ratification was invalid because it was done after the statute of limitations had run.¹⁴³ The court determined that a CID is not an enforcement action, rather a CID was used "to assist the agency in determining *whether* Seila Law [had] engaged in violations that could justify bringing an enforcement action."¹⁴⁴ This calls into question whether actual enforcement actions taken by the CFPB more than three years before July 9, 2020, are valid. This leaves the door open for other lawsuits against the CFPB regarding actual enforcement actions.

In the Fourth Circuit, on November 30, 2020, the United States District Court for the District of Maryland came to the same conclusion as the Ninth Circuit before the Ninth Circuit issued its opinion on December 29, 2020.¹⁴⁵ The District of Maryland also focused on whether the Supreme Court's *Seila Law* decision meant that the CFPB always had the authority to act, making Director Kraninger's ratification effective.¹⁴⁶ In the District of Maryland's view, appointment defects and structural defects are one in the same.¹⁴⁷

The decisions from the Ninth Circuit and the District of Maryland are logically incorrect and will likely lead to another battle for the CFPB in the Supreme Court. Both the Ninth Circuit and the District of Maryland confuse the Supreme Court's *Seila Law* holding. They both use analysis from the Supreme Court's severability argument to determine that the CFPB always held proper executive authority,¹⁴⁸ which seems irrational since the CFPB was outside the control of the president due to the "for-cause" removal restriction for its director.

E. Collins v. Yellen

On July 9, 2020, ten days after the *Seila Law* decision, the Supreme Court granted certiorari for a case concerning the Federal Housing Finance Agency's structure—*Collins v. Yellen*.¹⁴⁹ In *Seila Law*, the Supreme Court "declined to make a substantial distinction between the CFPB and other similarly structured agencies, suggesting that the ruling could also apply to the FHFA."¹⁵⁰ The facts

142. *Consumer Fin. Prot. Bureau*, 984 F.3d at 719.

143. *Id.* at 719-20.

144. *Id.* at 719 (emphasis in original).

145. *Bureau Consumer Fin. Prot. v. Fair Collections & Outsourcing, Inc.*, No. 19-2817, 2020 WL 7043847, at *1 (D. Md. Nov. 30, 2020).

146. *Id.* at *5.

147. *Id.*

148. *Id.* at *6; *Consumer Fin. Prot. Bureau*, 984 F. 3d at 718.

149. *Collins v. Mnuchin*, 141 S. Ct. 193 (2020) (mem.) (the case name was changed after the appointment of Janet Yellen as Treasury Secretary).

150. Hannah Lang, *FHFA's Challenge: Convincing Supreme Court It's Not CFPB*, AM. BANKER (July 14, 2020, 9:00 PM), <https://www.americanbanker.com/news/fhfas-challenge->

of *Collins v. Yellen* are tremendously similar to *Seila Law v. CFPB*. In 2008, President Bush passed the Housing and Economic Recovery Act, which created the FHFA.¹⁵¹ The FHFA's purpose was to oversee the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation after the 2008 financial crisis.¹⁵² The FHFA, along with the CFPB, originally had a removal restriction, which stated that “[t]he Director shall be appointed for a term of 5 years, *unless* removed before the end of such term *for cause* by the President.”¹⁵³ On June 23, 2021, the Supreme Court held, as in *Seila Law v. CFPB*, that the “for-cause” removal provision violated the separation of powers.¹⁵⁴ *Collins v. Yellen* is yet another case that shows the need for a new judicial doctrine that will cure any deficiencies stemming from the acts of unconstitutional administrative agencies.

IV. *DE FACTO* OFFICER AND *DE FACTO* ADMINISTRATIVE AGENCY DOCTRINES

A. *The De Facto Officer Doctrine in the Supreme Court*

Regardless of any subsequent outcome related to Director Kraninger's ratification, there is a potential solution to situations similar to *Seila Law* and *Collins*—an archaic legal theory called the de facto officer doctrine. As with most Latin named legal theories, the de facto officer doctrine has its roots in common law as a result of public policy.¹⁵⁵ The phrase “de facto” means “exercising power as if legally constituted.”¹⁵⁶ The doctrine is used “to protect the interests of the public and individuals involved in the official acts of persons exercising the duty of an officer without actually being one in strict point of law.”¹⁵⁷ The doctrine seemingly covers the actions taken by any CFPB director prior to *Seila Law*. It covers actions taken by public officials under color of title where that person's “appointment or election to office is deficient.”¹⁵⁸ So, does the de facto officer doctrine actually cover Director Kraninger?

The de facto officer doctrine has been seldom used by the Supreme Court, and when it has been used, the Court applied it narrowly.¹⁵⁹ A case in which the Supreme Court implicitly used the de facto officer doctrine was *Buckley v.*

convincing-supreme-court-its-not-cfpb [perma.cc/E7R7-HKMX].

151. Housing and Economic Recovery Act, PL 110-289, 122 Stat. 1376 (2008).

152. *FHFA At-a-Glance*, FEDERAL HOUSING FINANCE AGENCY (Oct. 5, 2020), <https://www.fhfa.gov/AboutUs> [perma.cc/Q2DA-ZYFU].

153. 12 U.S.C. § 4512(b)(2) (2008) (emphasis added).

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

155. 63C AM. JUR. 2D *Public Officers and Employees* § 23 (2020).

156. *De facto*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/de%20facto#:~:text=1%20%3A%20actual%20especiall%20%3A%20being%20such,the%20moveme%20nt's%20de%20facto%20spokesperson> [perma.cc/3P36-L9TM].

157. 63C AM. JUR. 2D *Public Officers and Employees* § 23 (2020).

158. *Id.*

159. *See Ryder v. United States*, 515 U.S. 177, 184 (1995).

Valeo.¹⁶⁰ In that case, the Federal Election Commission was newly created, and, by statute, four of the commissioners were to be appointed by the President pro tempore of the Senate and by the Speaker of the House.¹⁶¹ The Court held that the appointment of the commissioners who were not appointed by the President violated the Appointments Clause of the Constitution.¹⁶² However, the Court noted that the unconstitutionally appointed commissioners could still perform functions that were “investigative and informative [in] nature.”¹⁶³ The opinion does not mention the de facto officer doctrine explicitly, but it does mention “de facto validity.”¹⁶⁴ The Court allowed the commission “to function de facto” to prevent disrupting the commission’s ability to enforce certain provisions related to federal election law.¹⁶⁵ That conclusion points to the policy argument surrounding the de facto officer doctrine, which is “to protect the public’s reliance on an officer’s authority and to ensure the orderly administration of government by preventing technical challenges to an officer’s authority.”¹⁶⁶ The Supreme Court has shown in *Buckley v. Valeo* that it considers the public’s reliance interest when assessing an unconstitutional agency and will use all of its powers to protect those reliance interests.¹⁶⁷

Another Supreme Court case involving the de facto officer doctrine was *Ryder v. United States*, where the Court narrowed the doctrine’s use.¹⁶⁸ In *Ryder*, a United States Coast Guard member appealed a United States Court of Military Appeals decision.¹⁶⁹ The issue before the Court was whether the unconstitutionally appointed civilian judges, who served on the Court of Military review, should have been given de facto validity.¹⁷⁰ The Court referred to *Buckley* but decided not to apply it to the current case.¹⁷¹ It pointed out that *Buckley* did not “explicitly rel[y] on the de facto officer doctrine” even though the *Buckley* Court “validated the past acts of public officials.”¹⁷² *Ryder* is a clear expression of the Supreme Court’s hesitancy to use the de facto officer doctrine.

The de facto officer doctrine, as the Supreme Court has used it, validates “acts performed by a person acting under the color of title even though it is later discovered that the legality of that person’s *appointment* or *election to office* is

160. *Buckley v. Valeo*, 424 U.S. 1 (1976).

161. *Id.* at 2.

162. *Id.* at 143.

163. *Id.* at 137.

164. *Id.* at 142.

165. *Id.* at 143.

166. 63C AM. JUR. 2D *Public Officers and Employees* § 23 (2020).

167. *Buckley*, 424 U.S. at 143.

168. *Ryder v. United States*, 515 U.S. 177, 188 (1995).

169. *Id.* at 179.

170. *Id.*

171. *Id.* at 184.

172. *Id.* at 183.

deficient.”¹⁷³ So, does the de facto officer doctrine cover the CFPB post-*Seila Law*? There is reason to believe that it does not. In *Seila Law*, the Supreme Court focused on the CFPB’s structure, not Kraninger’s appointment as director.¹⁷⁴ The Court emphasizes that “[s]uch an *agency* lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control.”¹⁷⁵ The Chief Justice fails to mention any deficiencies in Kraninger’s title as director, rather he concentrates on the CFPB’s structure as a whole.¹⁷⁶ The de facto officer doctrine, as it has previously been used, cannot save the CFPB’s actions prior to *Seila Law*. There was no issue concerning Kraninger’s title as director. The *Seila Law* Court instead decided that the “*structure* of the CFPB violat[ed] the separation of powers.”¹⁷⁷ Also, *Seila Law* involved an Article II concern—Director Kraninger’s insulation from removal by the President.¹⁷⁸ Historically, the de facto officer doctrine’s limits fell short of protecting Article III deficiencies, and there is reason to believe that Article I and II deficiencies would also not be protected by the doctrine.¹⁷⁹ Last, *Ryder* showed how hesitant the Supreme Court is to use the de facto officer doctrine. The Court would be equally hesitant to use it to validate the CFPB’s acts prior to *Seila Law*. However, desperate times call for desperate measure, and the validation of the CFPB’s acts should ultimately be covered by the de facto officer doctrine.

B. De Facto Officer Doctrine Extension

The CFPB has promulgated many regulations that affect a wide variety of areas within consumer finance.¹⁸⁰ Invalidating the CFPB’s rules, regulations, and enforcement actions would create chaos. The CFPB’s enforcement actions “have risen to their highest level in five years[.]”¹⁸¹ Invalidating those actions would mean a nullification of any action taken against a person or business from the CFPB’s creation until the *Seila Law* decision—a span of nearly a decade. Also, the offending provision at issue in *Seila Law* was only one sentence.¹⁸² It simply stated that “[t]he President may remove the Director for inefficiency, neglect of

173. *Id.* at 180 (citing *Norton v. Shelby Cnty.*, 118 U.S. 425, 440 (1886) (emphasis added)).

174. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2187 (2020).

175. *Id.* at 2192 (emphasis added).

176. *Id.*

177. *Id.* (emphasis added).

178. *Id.* at 2197.

179. Clokey, *supra* note 13, at 1137-38.

180. *See Interactive Bureau Regulations*, CFPB, <https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/> [perma.cc/S9XK-2BYZ].

181. Bryce Spivey, *CFPB Enforcement Actions Rise to Highest Level in 5 Years*, REVERSE

MORTGAGEDAILY (Oct. 15, 2020), <https://reversemortgagedaily.com/2020/10/15/cfpb-enforcement-actions-rise-to-highest-level-in-5-years/> [perma.cc/V7MC-CDX5].

182. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2187 (2020).

duty, or malfeasance in office.”¹⁸³ Congress did not create the CFPB to overthrow the executive branch, it created it merely to regulate the consumer finance industry.¹⁸⁴ Even if Director Kraninger’s ratification is subsequently held to be valid, the extension of the de facto officer doctrine is warranted to cover similar situations to *Seila Law v. CFPB*.

A single sentence should not prohibit the de facto officer doctrine’s saving grace in this situation or in similar situations. Even more so, the *Seila Law* Court held that “the Director’s removal protection [was] severable” from the rest of the statute.¹⁸⁵ The Court could have decided to invalidate the entire Dodd-Frank Act as being unconstitutional¹⁸⁶ but instead focused only on the unconstitutional provision.¹⁸⁷ The Court believed that “Congress would prefer that [it] use a scalpel rather than a bulldozer in curing the constitutional defect[.]”¹⁸⁸ This shows the majority’s preference to remedy the situation as easily as possible. The Court did not believe that Congress was acting in bad faith when it created the CFPB—or by adding the “for-cause” removal provision to the director. The de facto officer doctrine—maybe better to be called the de facto administrative agency doctrine—should be extended to cover situations similar to *Seila Law* and *Collins*. The Court decided to remand the former Acting Director Mick Mulvaney ratification issue to the Ninth Circuit,¹⁸⁹ suggesting that it expected the Ninth Circuit to make a decision that would not need to be presented before the Supreme Court. Furthermore, Director Kraninger’s ratification occurred after the *Seila Law* decision was published,¹⁹⁰ so the Supreme Court could not have anticipated that the Ninth Circuit would address that issue as well. The Supreme Court could develop a new doctrine to cover situations related to *Seila Law*.

C. A Case for the De Facto Administrative Agency Doctrine

A new doctrine—I suggest calling it the de facto administrative agency doctrine—should be used to cure constitutional defects related to executive agencies. I will reiterate that this doctrine should be narrowly used for constitutional defects, not statutory defects or defects in position or title. There are many types of de facto doctrines that are widely accepted and used, such as de facto corporation,¹⁹¹ de facto merger,¹⁹² and de facto custodian.¹⁹³ The de facto

183. 12 U.S.C. § 5491(c)(3) (2010).

184. *Id.* § 5491(a).

185. *Seila Law LLC*, 140 S. Ct. at 2211.

186. *Id.* at 2207.

187. *Id.* at 2211.

188. *Id.* at 2210-11.

189. *Id.* at 2211.

190. Kraninger, *supra* note 56, at 2.

191. *Cantor v. Sunshine Greenery, Inc.*, 398 A.2d 571, 573 (N.J. Super. Ct. App. Div. 1979).

192. *Sorenson v. Allied Prod. Corp.*, 706 N.E. 2d 1097, 1100 (Ind. 1999).

193. IND. CODE § 31-17-2-8.5 (2020).

corporation doctrine is quite similar to my proposal.

Generally, “a de facto corporation exists when, from some irregularity or *defect* in its *organization* or constitution, or from some failure to comply with the conditions precedent, a de jure corporation is not created.”¹⁹⁴ The elements required for a de facto corporation are (1) a valid law under which the corporation might have been formed, (2) a bona fide attempt to incorporate under that law, and (3) an actual exercise of corporate powers.¹⁹⁵ A de facto corporation has the same “status and powers of a de jure corporation.”¹⁹⁶ Additionally, the de facto corporation doctrine was created for public policy reasons.¹⁹⁷ Individuals who have done business with a de facto corporation have no recourse against them for being de facto, only the State in which it was attempted to be created in can “question the lawfulness of its organization.”¹⁹⁸ The de facto officer doctrine remedies situations where an officer’s title is defective,¹⁹⁹ whereas the de facto corporation doctrine remedies situations where an entity’s formation—in this case a corporation—is defective.²⁰⁰

As its name suggests, the de facto corporation doctrine does not extend to administrative agencies that have a constitutional defect. However, a de facto administrative agency doctrine should be created based on the factors from the de facto corporation doctrine. A corporation and an administrative agency are similar in certain aspects. The President or Congress must satisfy certain formalities to create an administrative agency,²⁰¹ and, in most states, an individual must file articles of incorporation with that state’s secretary of state.²⁰² They both are stand-alone entities that have the authority to act.²⁰³ An altered de facto corporation doctrine can bridge the gap between the de facto officer doctrine and an issue stemming from the removal provision in *Seila Law*.

Now, clearly there are some differences between a corporation and an administrative agency, and my proposed elements to the de facto administrative agency doctrine cover that. A corporation cannot create rules and regulations like an administrative agency.²⁰⁴ A corporation can only exercise “the rights and powers given to it by the statutory authority that created it” —the states corporation statute.²⁰⁵ However, this should not prohibit the creation of the de

194. 18A AM. JUR. 2D *Corporations* § 184 (2020) (emphasis added).

195. *Cantor*, 398 A.2d at 573.

196. 18A AM. JUR. 2D *Corporations* § 186 (2020).

197. *Id.* at § 184.

198. *Id.*

199. 63C AM. JUR. 2D *Public Officers and Employees* § 23 (2020).

200. 18A AM. JUR. 2D *Corporations* § 184 (2020).

201. *Administrative Law*, JUSTIA, <https://www.justia.com/administrative-law/> [perma.cc/6FV6-SVQ6].

202. *See* IND. CODE § 23-1-21-2 (2020).

203. *See* 18A AM. JUR. 2D *Corporations* § 2 (2020); 2 AM. JUR. 2D *Administrative Law* § 47 (2020).

204. Bendor & Yadin, *supra* note 94, at 363.

205. 18A AM. JUR. 2D *Corporations* § 2 (2020).

facto administrative agency doctrine, which will have an extremely narrow application to separation of powers issues with administrative agencies, similar to *Seila Law* and *Collins*. My proposed elements are as follows: (1) Congress must have made a bona fide attempt to pass a bill that creates a constitutional administrative agency, (2) there must have been an actual exercise of administrative power by the agency, (3) the offending provision must be severable from the act that created the agency, or there must have been some other action taken to remove the unconstitutional defect, and (4) if the constitutional deficiency is a deficiency where a director is insulated from Presidential control, the President must not have attempted to remove the director.

1. First Element: Genuine Attempt.—My proposed elements are similar to those found in the de facto corporation doctrine.²⁰⁶ The first element requires Congress to have made a genuine attempt create an administrative agency that is constitutional, similar to the de facto corporation doctrine’s first requirement. The reason for this element is to show that Congress was not simply trying to abuse its powers by creating an agency with more power than it can constitutionally possess. As stated above, administrative agencies, which are controlled by the executive branch, already are given power that is traditionally only exercised by Congress—creating rules and regulations that have the same legal authority as statutes.²⁰⁷ This first element requires Congress to have acted in good faith, which must be determined by a judge hearing a case involving an alleged unconstitutional administrative agency.

2. Second Element: Taking Action.—The second element is much easier to satisfy. The element requires the administrative agency to have taken an action in accordance with the powers given to it by Congress. For example, it must have promulgated a rule or regulation which led to an enforcement proceeding. This is consistent with the Ninth Circuit’s holding that the CFPB’s statute of limitations only applies to actual enforcement actions, rather than the enforcement of a CID.²⁰⁸ This element requires that there must have been a tangible action taken by the administrative agency. Absent a tangible action, there would be no need to use the de facto administrative agency doctrine.

3. Third Element: Severability.—The third element requires that the offending provisions in the act that created the agency be severable from the rest of the act. The main reason for this element is to make sure that the constitutional defect, while although it exists, is immaterial. The judge hearing the case must determine that the offending provision can be removed from the act without destroying the entire administrative agency. If the offending provision is simply one sentence within a subsection of the act, the administrative agency should still be accorded de facto validity even though a constitutional defect is present. The provision in *Seila Law* is a perfect example. There, as stated before, the constitutional defect related to the “for-cause” removal provision for the

206. See *Cantor v. Sunshine Greenery, Inc.*, 398 A.2d 571, 573 (N.J. Super. Ct. App. Div. 1979).

207. Bendor & Yadin, *supra* note 94, at 363.

208. *Consumer Fin. Prot. Bureau v. Seila Law LLC*, 984 F.3d 715, 719-20 (9th Cir. 2020).

director.²⁰⁹ The Supreme Court determined that the defect was so small and inessential to the Dodd-Frank Act that the provision could be severed from the Act without destroying the CFPB.²¹⁰ In a situation where the provision cannot be severed, the administrative agency should not be given de facto validity because the proposed de facto administrative agency doctrine seeks to remedy a situation, not to allow Congress to over-step its constitutional boundaries. Going forward, the unconstitutional provision must be severed for the agency to continue to operate. The proposed de facto administrative agency doctrine's purpose is to hold valid the agency's actions taken prior to the severance of the unconstitutional provision.

4. *Fourth Element: Removal Attempt.*—The fourth element, which is only applicable in certain circumstances, requires that the President, or Congress, did not attempt to remove a director who was insulated from removal by an unconstitutional provision. The reason for this element comes from the de facto corporation doctrine. The de facto corporation doctrine allows the state, where the corporation was supposedly incorporated, to challenge the existence of the corporation.²¹¹ This element is similar to the third element because it requires there to have been no material effect caused by the unconstitutional provision. The issue with the CFPB in *Seila Law* would satisfy this element because President Trump never attempted to remove former Director Cordray or former Director Kraninger.²¹²

5. *Consistency with Past Decisions.*—The proposed de facto administrative agency doctrine, and its elements, are consistent with how courts have analyzed constitutional issues related to administrative agencies in the past, particularly with the separation of powers.²¹³ More importantly, the proposed doctrine would have remedied the issues in *Seila Law*, *Collins*, and *FEC v. Legi-Tech*. In *FEC*, Congress created the FEC to “administer, seek to obtain compliance with, and formulate policy with respect to” federal election law,²¹⁴ the agency exercised administrative power,²¹⁵ and the FEC reconstituted itself to remedy the constitutional defect.²¹⁶ The issue did not relate to a director insulated from presidential removal,²¹⁷ so the fourth element did not apply. Using the proposed de facto administrative agency doctrine would have been useful tool for the D.C. Circuit when considering whether the FEC's ratification was valid. The Fifth

209. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020).

210. *Id.* at 2209.

211. 18A AM. JUR. 2D *Corporations* § 184 (2020).

212. See Jackie Wattles, *Cordray Resignation Sets Off Scramble Over Consumer Financial Protection Bureau*, CNNMONEY (Nov. 25, 2017, 10:02 AM), <https://money.cnn.com/2017/11/24/news/cfpb-richard-cordray-resignation/index.html> [perma.cc/2F75-XL8U].

213. See *Seila Law LLC*, 140 S. Ct. at 2197; *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010); *Bowsher v. Synar*, 478 U.S. 714, 726 (1986).

214. 52 U.S.C. § 30106(b)(1) (2018).

215. *Fed. Election Comm'n v. Legi-Tech, Inc.*, 75 F.3d 705, 707 (D.C. Cir. 1996).

216. *Id.* at 706.

217. *Id.* at 704.

Circuit could have also used the proposed doctrine in *Collins v. Yellen*. The FHFA was created by Congress, it exercised administrative power²¹⁸, and the offending provision could have easily been severed from the statute. Additionally, since this involves a director insulated from presidential removal, the President never attempted to remove the director.²¹⁹ All elements would have been met in *Collins*, and the Fifth Circuit could have settled the issue without the need for Supreme Court review.

The proposed de facto administrative agency doctrine is similar to both the de facto officer doctrine because it cures defects related to an individual's position within an administrative agency, and it is similar to the de facto corporation doctrine because it validates acts that a corporation took, even though that corporation did not legally exist. The proposed doctrine would be a conglomeration of two already well-established de facto doctrines. The proposed doctrine could have helped decide issues in the future to those similar to *Seila Law*, *Collins*, and *FEC*. The doctrine would eliminate any need for a court to analyze a subsequent ratification because the prior acts would be given de facto validity, such as those taken by a de facto corporation.

CONCLUSION

The *Seila Law* fallout has the potential to throw the consumer financial market into disarray. Former Director Kathleen Kraninger's ratification could possibly remedy the defect concerning the CFPB's rules and enforcement actions it has taken since its creation.²²⁰ However, the distinction between former Director Cordray's valid ratification and Director Kraninger's July 7, 2020, ratification involves where the defective authority lies. One with the *agent* and the other with the *principal*. This distinction has left the door open for many new lawsuits against the CFPB.²²¹

218. *Collins v. Mnuchin*, 938 F.3d 553, 563 (5th Cir. 2019) (the case named was changed after the appointment of Janet Yellen as Treasury Secretary).

219. See Jann Swanson, *FHFA's DeMarco to be Replaced Early Next Year*: WSJ, MORTGAGE NEWS DAILY (Dec. 10, 2012, 3:03 PM), http://www.mortgagenewsdaily.com/12102012_gse_conservatorship.asp [perma.cc/ET7V-A7S2]; *President Trump Names Joseph M. Otting Acting Director of the Federal Housing Finance Agency*, OFF. COMPTROLLER CURRENCY (Dec. 21, 2018), <https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-140.html> [perma.cc/6JMB-XLTA]; Katy O'Donnell, *Senate Confirms Calabria to Lead Housing Finance Overhaul*, POLITICO (Apr. 5, 2019, 3:28 PM), <https://www.politico.com/story/2019/04/04/senate-confirms-calabria-starting-clock-on-housing-finance-overhaul-1322955> [perma.cc/5GGM-H4XP].

220. Alan S. Kaplinsky, *CPF B Ratifies Most Pre-Seila Law Regulatory Actions*, BALLARD SPAHR LLP (July 10, 2020), <https://www.consumerfinancemonitor.com/2020/07/10/cfpb-ratifies-most-pre-seila-law-regulatory-actions/> [perma.cc/B8JH-UUHE].

221. See *Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc.*, 953 F.3d 591, 594 (5th Cir. 2020); *Consumer Fin. Prot. Bureau v. RD Legal Funding*, 828 F. App'x 69 (2nd Cir. 2020) (summary order remanding the case for further proceedings).

This Note examined the *Seila Law* decision and the Supreme Court's failure to address the ratification issue. It explained the ratification process, including a look back at former Director Cordray's, now uncertain, ratification. This Note showed the deficiencies related to Director Kraninger's ratification by applying agency law principles. Director Kraninger's ratification is defective because the CFPB never had valid constitutional authority to exercise Article II powers.

Many lower courts have inconsistently decided the same issue.²²² These cases will ultimately lead to another CFPB fight in the Supreme Court. The Supreme Court had the opportunity to provide relief to the CFPB in *Collins v. Yellen*; however, the Court has shown that it prefers to narrowly tailor executive agency related decisions and failed to address the issue of actions taken by unconstitutional administrative agencies.²²³

This Note concludes that the proposed de facto administrative agency doctrine is the simplest way to prevent the potential chaos from *Seila Law*. The de facto officer doctrine—the de facto administrative agency doctrine's predecessor—has been sparsely applied to constitutional deficiencies related to executive agencies, and the Supreme Court has shown that it disfavors extending de facto officer doctrine cases beyond their facts.²²⁴ The Supreme Court would benefit from using the proposed doctrine, not only with the situation revolving *Seila Law* and *Collins v. Yellen*, but also in future cases related to unconstitutional administrative agencies. Extending the de facto officer doctrine into the de facto administrative agency doctrine is a necessary evil to keep the CFPB's pre-*Seila Law* rules and enforcement actions valid.

222. See, e.g., *Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729 (S.D.N.Y. 2018).

223. See *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2200 (2020); *Collins v. Yellen*, 141 S. Ct. 1761, 1787-89 (2021).

224. See *Ryder v. United States*, 515 U.S. 177, 184 (1995).