
Remedies and Incentives in Presidential Removal Cases

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ABSTRACT. In *Separation-of-Powers Avoidance*, Z. Payvand Ahdout points out how courts frequently avoid compelling high-level coordinate-branch officials to act. Yet Ahdout cites *Seila Law LLC v. Consumer Financial Protection Bureau* as an example of how—in cases involving private plaintiffs—courts relax standing rules to incentivize challenges. In fact, *Seila Law*'s progeny tell a more complicated story. Still, Ahdout's avoidance thesis might help explain recent doctrinal developments in cases that turn on an executive official's purportedly unconstitutional insulation from at-will presidential removal. The Supreme Court has moved beyond *Seila Law*'s apparent encouragement of suits by private plaintiffs that challenge actions by such officials. Taking the Court's cue, lower courts have set the evidentiary burden quite high for litigants in these cases to show "compensable harm" from an unconstitutional statutory removal protection. The development of this doctrine has had both a formalist component and a separation-of-powers avoidance component. Whatever the reasons, the high evidentiary burden will likely encourage litigants to pursue different avenues of relief in administrative-law cases. But to understand the development of this doctrine, Ahdout's ideas are quite relevant.

INTRODUCTION

In *Separation-of-Powers Avoidance*, Z. Payvand Ahdout reconceptualizes a bevy of separation-of-powers cases as standing for an important principle: federal courts are reluctant to tell the other branches what to do.¹ Ahdout's excellent new article is a timely examination of separation-of-powers doctrine in the wake of an extraordinary era for the presidency. Her article enters the scholarly fold on the heels of groundbreaking clashes among the three branches, much of which centered on the U.S. House of Representatives's multiple impeachments of President Donald J. Trump. Analyzing various judicial precedents, both new and old, Ahdout notices a trend. She contends that, when engaging in dispute resolution involving coordinate branches, courts "interpret doctrines to avoid

1. Z. Payvand Ahdout, *Separation-of-Powers Avoidance*, 132 YALE L.J. 2360 (2023).

subjecting a coordinate branch to judicial coercion.”² Yet one of the counterexamples that Ahdout offers to illuminate her thesis — *Seila Law LLC v. Consumer Financial Protection Bureau* — is a curious fit.³ Indeed, *Seila Law*’s progeny might actually serve as an example of separation-of-powers avoidance in an unsuspected context: cases involving private litigants. In these cases, courts’ remedial stinginess — possibly fortified by a desire to avoid a tricky subset of separation-of-powers conflicts — may incentivize litigants to pursue other avenues of relief in cases challenging administrative agency actions.

Seila Law appears in Ahdout’s discussion of the “fortified” model of separation-of-powers avoidance — the third of three categories that Ahdout describes. The article lays out three types of separation-of-powers avoidance: the embedded model, the process model, and the fortified model.⁴ In the fortified-model cases, in Ahdout’s words, “courts appeal to the idea of separation of powers to strengthen existing jurisdictional rules and thereby avoid embroiling themselves in a separation-of-powers conflict. The fortified model asks us to rethink familiar jurisdictional doctrines — namely, congressional standing — in the language of avoidance.”⁵ In her discussion, Ahdout articulates a *narrow* fortification principle: courts fortify jurisdictional doctrines when the case before the court “would require the Court to mediate between members of two other branches and formally choose sides between the two *as parties*.”⁶ But follow-on cases to *Seila Law* have come to embody the *general* fortification principle that Ahdout articulates, despite the fact that the cases in question involve private parties. Indeed, although Ahdout acknowledges the general “tension between” the fact that “federal courts avoid compelling coordinate-branch officials to act” and the fact that “federal courts actively take on separation-of-powers cases” involving private litigants,⁷ cases like *Seila Law* (in which a private litigant pointed to the presidential removal power when bringing a constitutional challenge to agency action) have proven to be something of an outlier.

To get a sense of Ahdout’s specific idea in the fortified cases, consider the congressional standing doctrine, which Ahdout writes is “[t]he clearest example” of her argument.⁸ Her leading case is *Raines v. Byrd*, in which members of Congress brought a constitutional challenge to the Line Item Veto Act.⁹ The

2. *Id.* at 2367.

3. 140 S. Ct. 2183 (2020).

4. See Ahdout, *supra* note 1, at 2377.

5. *Id.*

6. *Id.* at 2397.

7. *Id.* at 2369.

8. *Id.* at 2395.

9. 521 U.S. 811 (1997).

Court dismissed the case for lack of standing, noting that the Court’s “standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.”¹⁰ Ahdout conceives of this statement as “a jurisdictional manifestation of the constitutional-avoidance interpretive principle.”¹¹

According to Ahdout, two cases go in the other direction. One of them—*Clinton v. City of New York*—was a nearly identical case whose only difference was the parties before the Court.¹² In *Clinton*, private citizens and a municipality lodged a similar constitutional challenge, yet the Court adjudicated the merits of the dispute instead of dismissing for lack of standing.¹³ In the other—*Seila Law*, which is a case about the President’s power to remove executive branch officials at will—the Court also adjudicated the merits of the parties’ claims.¹⁴ Like in *Clinton*, *Seila Law* involved a private party facing off against the executive branch (or, properly understood, a component of the executive branch that Congress had attempted to make independent). And like in *Clinton*, standing did not serve as an obstacle to adjudication on the merits. Citing *Seila Law*, Ahdout writes that “[f]ar from being ‘especially rigorous,’ the standing analysis is especially forgiving in removal-power cases because it invites private plaintiffs to bring separation-of-powers challenges.”¹⁵

But *Seila Law* is not like *Clinton* in an important respect: the remedy. In *Clinton*, the Court stopped the President from canceling certain expenditures.¹⁶ Yet in *Seila Law*, the litigant won at the Supreme Court on the constitutional issue but—after a remand—still found itself subject to the enforcement action in question.¹⁷ Undoubtedly, the available remedy impacts a litigant’s incentive to bring a case. In *Seila Law*, the Consumer Financial Protection Bureau (CFPB) had issued a civil investigative demand to a law firm that provided debt relief services.¹⁸ The law firm responded by challenging the constitutionality of the CFPB—in particular, the part of the statute that insulated the Director of the CFPB from at-will presidential removal.¹⁹ The Court agreed with the law firm,

10. *Id.* at 819-20.

11. Ahdout, *supra* note 1, at 2396.

12. 524 U.S. 417 (1998).

13. *See id.* at 449.

14. 140 S. Ct. 2183 (2020).

15. Ahdout, *supra* note 1, at 2398.

16. *See Clinton*, 524 U.S. at 449.

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

18. *See Seila L.*, 140 S. Ct. at 2194.

19. *See id.*

concluding that Congress could not protect the CFPB Director from at-will presidential removal.²⁰ Yet, after severing the unconstitutional removal provision from the statute, the Court remanded the case for consideration of whether the agency's demand could be enforced because an executive official accountable to the President ratified it.²¹ And on remand, the Ninth Circuit determined that *Seila Law* was entitled to no remedy because ratification had occurred.²² Here, the alleged conflict was not exactly between the President and Congress; rather, it was an *intra*branch dispute between the President and an independent director.

Today, remedies are difficult to attain in cases like *Seila Law*. The year after *Seila Law*, in *Collins v. Yellen*,²³ the Court articulated a high evidentiary burden for private litigants seeking remedies in cases concerning the presidential removal power. The Court distinguished between two types of remedial postures, explaining that the correct remedial inquiry for actions taken by improperly appointed executive officials is different from the inquiry for actions taken by properly appointed executive officials to whom Congress purported to grant unconstitutional protection from presidential removal.²⁴ For actions taken by the latter subset, the Court required a showing that the removal protection inflicted compensable harm – a tough thing to demonstrate in such cases – to warrant relief from actions that executive officials took while enjoying purportedly unconstitutional removal protections.²⁵ In a partial concurrence, Justice Gorsuch criticized the *Collins* majority on this exact point.²⁶

In Section III.C of its opinion, *Collins* gave a few examples of what might constitute a concrete showing that the removal protection had itself inflicted compensable harm (giving rise to the potential for a remedy). If “the President had attempted to remove a Director but was prevented from doing so by a lower court decision holding that he did not have ‘cause’ for removal” or “the President had made a public statement expressing displeasure with actions taken by a Director and had asserted that he would remove the Director if the statute did not stand in the way,” *Collins* suggests that a party could make a showing that the removal provision inflicted compensable harm.²⁷ These examples are not so easy

20. *See id.* at 2197.

21. *See id.* at 2211.

22. *See Seila L.*, 984 F.3d at 718.

23. 141 S. Ct. 1761 (2021).

24. *See id.* at 1787–88.

25. *Id.* at 1788–89.

26. *See id.* at 1795 (Gorsuch, J., concurring in part). Justice Gorsuch joined the entirety of the majority opinion except for Section III.C, which dealt with the remedy.

27. *Id.* at 1789 (majority opinion).

to come by. To be sure, the Court did not state that these scenarios would be the *only* ways that a party could demonstrate harm. But as Justice Gorsuch pointed out in his partial concurrence, “the most probative evidence may be the most sensitive,” potentially requiring depositions of the President or senior White House staff.²⁸ The lower courts have taken *Collins* and run with it, disincentivizing challenges while invoking the separation of powers. And just last Term, in *Calcutt v. FDIC*, the Court glossed over the remedial issue despite extensive briefing asking for further guidance on the question in light of *Collins*.

The high bar for obtaining relief in the removal cases means that courts are generally able to avoid these separation-of-powers disputes. Even though private parties are raising these challenges, the practical results in these cases are a lot more like that of *Raines* than they are like that of *Clinton*. That is in tension with Ahdout’s use of *Seila Law* as a counterexample in her fortified-model section, and it shows that the removal cases are enigmatic in the separation-of-powers corpus. Nevertheless, the lower-court removal cases—follow-on cases to *Seila Law* and *Collins*—have a separation-of-powers avoidance streak of their own. While they involve private plaintiffs, some of these cases feature opinions that would fit right into Ahdout’s article and vindicate her thesis in an unsuspected context.

Moreover, developments in the removal cases could have a significant impact on the practice of administrative law. If grounding a challenge in the presidential removal power is a dead end for litigants seeking remedies, savvy challengers will shift gears. Fortunately for those litigating against administrative agencies, various other doctrines and theories could support claims for relief. These include the major questions doctrine, the nondelegation doctrine, and an emerging idea that an independent agency’s exercise of an unconstitutionally conferred litigating power is invalid. *Collins*’s skepticism about the litigant’s entitlement to a remedy incentivizes litigants to pursue these other doctrinal paths.

This Response looks at the removal-power cases through the separation-of-powers avoidance lens. *Seila Law* is a tenuous fit as a counterexample in the fortified model, and its progeny actually represents something of an outlier in separation-of-powers cases. Here, courts are denying relief to private litigants with meritorious constitutional arguments. Yet Ahdout’s avoidance thesis might, in fact, shed light on lower courts’ reluctance to grant relief to private litigants in removal-power cases after *Seila Law*. Although the Supreme Court has articulated a robust view of the presidential removal power, it has repeatedly expressed reluctance to accord meaningful relief in these cases. Part I of this Response discusses how both formalism and Ahdout’s separation-of-powers avoidance idea appear in the removal cases, with the upshot being the denial of relief to litigants.

28. *Id.* at 1799 (Gorsuch, J., concurring in part).

Part II evaluates how the story of a recent summary reversal at the Supreme Court—*Calcutt v. FDIC*—highlights important fault lines in this area of the doctrine. Finally, Part III contemplates the implications of *Calcutt* and other recent cases, from litigation incentives to remedies. The removal cases set a high evidentiary threshold for obtaining relief; if the Court leaves that threshold alone, the litigation incentives will shift toward pressing other separation-of-powers theories in challenges to agency action.

I. FORMALISM, AVOIDANCE, AND REMEDIES IN REMOVAL CASES

In *Seila Law LLC v. CFPB*, the Supreme Court took a stand for the presidential removal power—a shift from the “weakly unitary position” that many of the Court’s prior removal-power decisions took.²⁹ The Court explained that “[i]n our constitutional system, the executive power belongs to the President, and that power generally includes the ability to supervise *and remove* the agents who wield executive power in his stead.”³⁰ This understanding of presidential power comports with what some describe as the unitary executive theory: the idea that “[u]nder our Constitution, the ‘executive Power’—all of it—is ‘vested in a President,’ who must ‘take Care that the Laws be faithfully executed.’”³¹ Toward that end, the theory goes, Article II of the Constitution vests the President with plenary power to remove executive officials at will.

Now, suppose that you are the subject of an enforcement action taken by the executive branch. Suppose further that the initiator of the enforcement action is an executive official who enjoys statutory protection from presidential removal. You might read *Seila Law*—in addition to *Myers v. United States*,³² *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,³³ and some recent scholarship on the question³⁴—and conclude that this statutory protection contravenes the

29. Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 99 (2021).

30. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2211 (2020) (emphasis added).

31. *Id.* at 2191 (quoting U.S. CONST. art. II, § 1, 3).

32. 272 U.S. 52 (1926).

33. 561 U.S. 477 (2010).

34. See, e.g., Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756 (2023) (defending the view that “the ‘executive power’ encompassed authority to remove executive officials at pleasure”); Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006) (arguing that the Decision of 1789 “presumed that the Constitution granted the President a removal power”). *But see* Andrea Scoseria Katz & Noah A. Rosenblum, *Removal Rehashed*, 136 HARV. L. REV. F. 404 (2023) (contesting the

Constitution. You therefore defend against the enforcement action by arguing that the enforcement action is invalid because the initiating official enjoys an unconstitutional protection from presidential removal. Easy case?

Not quite. The unitary executive theory prescribes a method of allocating power between the President and the executive officials enjoying statutory protection from presidential removal. But recent precedents suggest that even a strong understanding of the presidential removal power might not offer much refuge for individual litigants who are the subjects of enforcement actions by those “independent” executive officials. Indeed, in *Seila Law*, the law firm obtained no relief on remand—the Ninth Circuit determined that after the Supreme Court’s decision came down, the CFPB Director (who, at that point, “knew that the President could remove her with or without cause”) validly ratified the demand on the firm; the Ninth Circuit therefore affirmed an order granting the CFPB’s petition to enforce the demand.³⁵ And when *Collins* returned to the lower courts, the Southern District of Texas concluded that the litigants could not “plausibly demonstrate compensable harm or the Court’s ability to provide the requested relief.”³⁶ In both cases, the lower courts denied relief despite the Court *agreeing* with the litigants in these cases that the removal protections in question were unconstitutional. Various lower-court removal cases have come out the same way, acknowledging at least the possibility of an unconstitutional removal protection while simultaneously denying relief.

Ahdout writes that when private parties are involved, “federal courts actively take on separation-of-powers cases” despite their general aversion to “compelling coordinate-branch officials to act.”³⁷ And she cites the standing analysis in *Seila Law* as one such example—a counterexample to the separation-of-powers avoidance “fortified model” cases, which involve coordinate branches of the government on both sides.³⁸ But while the private party in *Seila Law* may have had “standing” in a formal sense to challenge the agency’s action against it, the practical upshot of *Seila Law* and follow-on cases concerning presidential removal power is that remedies are almost never available to private parties in these disputes. In that way, courts are “avoiding” these separation-of-powers cases all the same, even though private parties are involved. Notably, however, the opinions in the lower courts use some of the language of separation-of-powers avoidance.

“unitary executive” account of the presidential removal power presented in Bamzai & Prakash, *supra*).

35. See *Consumer Fin. Prot. Bureau v. Seila L. LLC*, 984 F.3d 715, 718-20 (9th Cir. 2020).

36. *Collins v. Lew*, 642 F. Supp. 3d 577, 584 (S.D. Tex. 2022).

37. Ahdout, *supra* note 1, at 2369.

38. *Id.* at 2398.

Formalism—a belief in bright-line rules based on the structure of the Constitution³⁹—has driven the results in these cases at the Supreme Court. Naturally, the holdings in *Seila Law* and *Collins* have impacted other litigation. Yet in these subsequent cases, lower courts have relied partially on grounds other than formalism to turn away challenges similar to those in *Seila Law* and *Collins*. This Part compares the reasoning of the Supreme Court and the lower courts in removal challenges, contending that *Seila Law* is a difficult fit as a counterexample to the fortified-model cases and that the separation-of-powers avoidance thesis helps clarify what is going on in the lower courts in the removal cases.

A. A Formalist Analysis at the Supreme Court

Collins's infliction-of-compensable-harm analysis rested on a formalist understanding of the interaction between statutes and the Constitution. To explain its infliction-of-compensable-harm requirement, the Court distinguished its decisions “involv[ing] a Government actor’s exercise of power that the actor did not lawfully possess”—for example, Appointments Clause violations.⁴⁰ Those cases differ from ones in which the agency official—as in *Collins*—possesses the formal “authority to carry out the functions of the office.”⁴¹ In Appointments Clause cases, courts afford meaningful relief to challengers: everything from (preliminary) injunctions against rules⁴² to new hearings before agencies.⁴³ That is because the official never should have been in the office in the first place, so everything that the official does in that office flows directly from a contravention of the Constitution.

39. See Thomas A. Koenig & Benjamin R. Pontz, *The Roberts Court’s Functionalist Turn in Administrative Law*, 46 HARV. J.L. & PUB. POL’Y 221, 223-24 (2023); cf. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25 (1997) (“The rule of law is about form . . . Long live formalism. It is what makes a government a government of laws and not of men.”). An example of separation-of-powers formalism at the Supreme Court can be found in *Bowsher v. Synar*, in which the Court prohibited Congress from vesting certain executive powers in the Comptroller General—over whom Congress had retained removal power. See 478 U.S. 714, 726 (1986) (“Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment. To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.”).

40. *Collins v. Yellen*, 141 S. Ct. 1761, 1788 (2021).

41. *Id.*

42. See *Casa de Md., Inc. v. Wolf*, 486 F. Supp. 3d 928, 974 (D. Md. 2020).

43. See *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018).

By contrast, the officials in the removal-power cases do *hold* their offices validly—they were appointed in a manner consistent with the Appointments Clause. So their actions are not per se invalid. Instead, the question for courts in these cases is whether the litigants can nevertheless demonstrate a connection between the official’s unconstitutional insulation from presidential removal and the harm that the litigant has suffered. In this context, the Supreme Court has accepted that “[a]lthough an unconstitutional provision is never really part of the body of governing law (because the Constitution automatically displaces any conflicting statutory provision from the moment of the provision’s enactment), it is still possible for an unconstitutional provision to inflict compensable harm.”⁴⁴ In explaining what might constitute an infliction of compensable harm, the Court gave the two examples discussed above: an adverse lower-court decision blocking removal or a public statement from the President.⁴⁵

Taking an even more formalist view of the question, Justice Thomas wrote in a concurrence that even though the protection-from-removal “provision *does* conflict with the Constitution, the Constitution has always displaced it and the President has always had the power to fire the Director for any reason.”⁴⁶ Thus, Thomas continued, “regardless of whether the removal restriction was lawful or not, the President always had the legal power to remove the Director in a manner consistent with the Constitution.”⁴⁷ Therefore, given that “no Director [had] ever purported to occupy the office and exercise its powers despite a Presidential attempt at removal,” Thomas did not believe that a remedy was appropriate.⁴⁸ Thomas might disagree that a mere public statement by a president (or deposition testimony after the fact) would be sufficient to justify a remedy. Perhaps the inquiry should be limited to the question of whether the President has made an actual “attempt at removal.”⁴⁹ Still, Thomas joined the majority’s opinion in full in *Collins*, so we cannot know for sure.

44. *Collins*, 141 S. Ct. at 1788-89.

45. *Id.* at 1789.

46. *Id.* at 1793 (Thomas, J., concurring).

47. *Id.* at 1793.

48. *Id.*

49. *Id.*; see also *id.* at 1794 (“The Constitution does not transform unfamiliarity with the Vesting Clause into a legal violation when an executive officer acts with authority.”); cf. Jack Ferguson, Note, *Severability and Standing Puzzles in the Law of Removal Power*, 98 NOTRE DAME L. REV. 1731, 1747-49 (2023) (analogizing “[t]he executive branch relationship conceived of by unitary theorists” to “a tenancy at will” and applying property-law principles to argue in favor of Justice Thomas’s view of the remedial issue); William Baude, *Severability First Principles*, 109 VA. L. REV. 1, 37-41 (2023) (discussing the different approaches of Justices Thomas and Gorsuch on this point).

The existence of unconstitutional removal protections, however, can undoubtedly have effects short of an unsuccessful attempt at removal. These effects sometimes require – as Justice Gorsuch explained – “testimony from [the President] or his closest staff” to be understood.⁵⁰ Certainly, the President might conclude that a given official has gone rogue and should thus be removed. Yet the President might (wrongly) conclude that a statutory removal protection binds his hands and neither say nor do anything publicly about the issue.⁵¹ Moreover, the official enjoying the unconstitutional removal protection could believe – without saying a word about it publicly – that removal is not a threat and therefore feel freer to pursue a more (or less) aggressive enforcement posture than the President would want.⁵²

The subject of an enforcement action, however, faces an uphill climb to prove these sorts of things to a court. And counseling against the propriety of such an inquiry is a foundational administrative-law case and arguable separation-of-powers avoidance precedent: *Morgan v. United States*.⁵³ In *Morgan*, the Supreme Court explained that the function of courts was usually not “to probe the mental processes” of administrators.⁵⁴ Given *Collins*’s high evidentiary burden and the likely concomitant requirement of high-level depositions to vindicate many of these removal-based claims, litigants in the usual cases probably cannot obtain relief when bringing these kinds of challenges.

The fact that a litigant might have standing to bring one of these suits is therefore cold comfort to the subject of an agency enforcement action. The litigant will almost certainly lose after a remand, if the reviewing court does not just itself end the proceedings. The Supreme Court has articulated formalist

50. *Collins*, 141 S. Ct. at 1799 (Gorsuch, J., concurring in part).

51. See William C. Eisenhauer, Note, *A Responsive Remedy for Unconstitutional Removal Restrictions*, 97 NOTRE DAME L. REV. 2195, 2211 (2022) (“Politically, a President will likely hesitate to risk an acrimonious confrontation by firing a purportedly tenure-protected official without a court-issued judgment in hand.”); cf. Eli Nachmany, Note, *The Senate vs. the Law: Challenging Qualification Statutes Through Senate Confirmation*, 43 HARV. J.L. & PUB. POL’Y 575, 576-77 (2020) (describing the President’s perhaps-mistaken belief – informed by a potentially unconstitutional statute – that he was unable to appoint Greg Sheehan to be the Director of the U.S. Fish and Wildlife Service).

52. See Eisenhauer, *supra* note 51, at 2210-11 (“Executive officials, themselves political actors, are incentivized not to question their tenure protections’ constitutionality: who doesn’t want job security? Accordingly, that official will behave as if his tenure protection is fully effective, despite the fact that perhaps as a constitutional matter it has no effect at all.”).

53. 304 U.S. 1 (1938).

54. *Id.* at 18. *Morgan* is an example of the Court embedding a separation-of-powers consideration into the analysis of whether a deposition would be appropriate. Under *Morgan*, courts generally presume that a high-ranking department official should not be ordered to give testimony in agency litigation, calling to mind the “embedded model” that Ahdout discusses in her article. See Ahdout, *supra* note 1, at 2377.

rationales for this state of affairs: the unconstitutional removal protection did not inflict compensable harm. But for the litigant, the result is the same as if the court dismissed the case on standing grounds. In denying relief, the court has avoided the separation-of-powers controversy. For that reason, *Seila Law* is a curious counterexample for the fortified model. Despite involving private parties, the removal cases do not necessarily yield meaningful outcomes for those parties.

B. Separation-of-Powers Avoidance in the Lower Courts

Collins—especially Justice Thomas’s concurrence—took a formalist view of the remedial question in removal cases. Yet some lower courts have articulated separation-of-powers avoidance-type reasoning in follow-on cases. This Section looks at several of those decisions through the lens of Ahdout’s article. Whatever the formal justifications for applying *Collins*’s reasoning, some lower courts also seem to be concerned about the impacts that remedies in these cases would have.

Ahdout’s article sees separation-of-powers avoidance as spanning a wide range of rationales. As Ahdout puts it, the motivations for separation-of-powers avoidance include “Article III, prudential considerations, capacity constraints, [and] broader structural concerns.”⁵⁵ Some of these themes appear in lower-court removal-case opinions, and their appearance in those opinions indicates that some courts are thinking about separation-of-powers avoidance when adjudicating these disputes. Courts contemplating these themes will often implement their consideration of competing interests “in the way of a balancing test that asks: When should courts deploy judicial capital? When is it worth compelling a coordinate branch officer to act?”⁵⁶ In the removal cases, these considerations are fraught with unique separation-of-powers calculations—given the structural conflict between presidents and independent agency heads or between current and former presidents—and prudential concerns about the consequences of invalidating agency action.

A pair of Ninth Circuit decisions offer support to Ahdout’s theory that “[c]ourts deploy avoidance . . . not as a limit on their jurisdiction but as a prudential measure.”⁵⁷ In *Kaufmann v. Kijakazi*, the Ninth Circuit declined to invalidate the Social Security Administration’s determination as to a particular woman’s eligibility for benefits, despite the fact that the Administrator enjoyed unconstitutional protection from removal.⁵⁸ In addition to citing *Collins*, the court expressed concern that “if we agreed [with the claimant], then it would

55. Ahdout, *supra* note 1, at 2400 (footnotes omitted).

56. *Id.* at 2402.

57. *Id.*

58. 32 F.4th 843, 846 (9th Cir. 2022).

require us to undo *all* disability decisions made by the Social Security Administration while the removal provision was operative.”⁵⁹ Moreover, in *Decker Coal Co. v. Pehringer*, the Ninth Circuit noted (in addition to the formal justification of *Collins*) that accepting the litigant’s argument for relief “would have potentially catastrophic effects on numerous past and ongoing claim adjudications under various benefits programs administered throughout the federal government.”⁶⁰ Ultimately, the court concluded that “[n]otwithstanding the practical consequences—but not to diminish them either— . . . there is no link between the [Administrative Law Judge’s] decision awarding benefits and the allegedly unconstitutional removal provisions.”⁶¹ In *Collins* itself, Justice Gorsuch speculated that the Court’s remedial holding was “prompted by the prospect that affording a more traditional remedy here could mean unwinding or disgorging hundreds of millions of dollars that have already changed hands.”⁶² These courts did not base their holdings formally on the practical consequences of the requested remedies. In each case, however, the court avoided adjudicating a (potentially imagined) conflict between the President and an insulated officer against a projected backdrop of major upheaval.

Bhatti v. Federal Housing Finance Agency—a district court case—further demonstrates Ahdout’s thesis.⁶³ In *Bhatti*, a litigant challenging certain Federal Housing Finance Agency (FHFA) actions produced a November 2021 letter from former President Trump to Senator Rand H. Paul. In that letter, President Trump stated that “had I controlled the FHFA from the beginning of my Administration, as the Constitution required, . . . I would have fired former Democrat Congressman and political hack Mel Watt from his position as Director and would have ordered FHFA to release [Fannie Mae and Freddie Mac] from conservatorship.”⁶⁴ Chief Judge Schiltz determined that this letter was not enough to entitle the litigant to relief for two reasons. First, although the Supreme Court in *Collins* “identified two examples of circumstances in which the removal provision would ‘clearly cause harm,’” Schiltz took the view that the “Court did not state that these circumstances *would* render the agency’s actions unconstitutional.”⁶⁵ Second, and more relevant to separation-of-powers

59. *Id.* at 850.

60. 8 F.4th 1123, 1137 (9th Cir. 2021).

61. *Id.* at 1138.

62. *Collins v. Yellen*, 141 S. Ct. 1761, 1799 (2021) (Gorsuch, J., concurring in part).

63. No. 17-cv-2185, 2022 WL 17741246, at *6 (D. Minn. Dec. 16, 2022).

64. Letter from Donald J. Trump, former U.S. President, to Rand Paul, U.S. Senator (Nov. 11, 2021) https://assets.realclear.com/files/2021/11/1921_trump_letter_to_rand_paul.pdf [<https://perma.cc/76A8-GRKT>].

65. *Bhatti*, 2022 WL 17741246, at *6 (emphasis added).

avoidance, Schiltz distinguished between a current president’s “contemporaneous expression of displeasure” with the official and “a *former* President—motivated perhaps by a desire to harm a political rival or force a new administration to implement his preferred policies— . . . [making] after-the-fact assertions about what he would have done if he had only known he had the authority.”⁶⁶

Chief Judge Schiltz’s discomfort with mediating between the prior President’s view of his authority at the time and the current administration’s present view of the Director’s actions betrays a desire to avoid the controversy entirely. The court would have been stepping into a live political battle between President Biden and former President Trump about the executive branch’s housing policy. Both men have at least some legitimate claim to the propriety of relief in the case. President Trump might say that because the actions in question took place during his presidency, his view controls. President Biden could respond that allowing a former president to wield that kind of power over the current executive branch invites political mischief. In adopting the anti-mischief position, Chief Judge Schiltz was able to avoid adjudicating a controversy between Presidents Trump and Biden.

In the lower courts, separation-of-powers avoidance is animating removal doctrine—at least to an extent, within the confines of the Court’s formalist analysis. Ahdout cited *Seila Law* for the proposition that “the Court’s standing rules are relaxed in the removal context, where an ultimate merits decision would result in holding that a congressionally created agency is at least in part unconstitutional”—a contrast from the rule of standing applied to the members of Congress’s suit in *Raines*.⁶⁷ Her position flows from the idea that something is unique about cases in which the parties are Congress on one side and the President on the other. Yet the lower courts’ application of *Collins* (and the practical upshot of entertaining these cases) seems to signal that—beyond the case’s formalist reasoning—courts are leery about getting involved in separation-of-powers disputes when doing so would require mediating between an insulated official and the President (at least on a private party’s behalf) or between a former and a current president. In this way, the removal cases are different from ordinary separation-of-powers disputes in which private litigants often obtain remedies. And

66. *Id.* at *7; see also *Collins v. Lew*, 642 F. Supp. 3d 577, 585 (S.D. Tex. 2022) (“President Trump’s post hoc letter—written after the *Collins* decision was released—should not be given significant weight. At no point during Director Watt’s tenure did President Trump criticize or attempt to remove Director Watt.”); *Rop v. Fed. Hous. Fin. Agency*, 50 F.4th 562, 576 (6th Cir. 2022) (noting, in reference to the letter from President Trump to Senator Paul, that “it is speculative whether President Trump—regardless of what he has claimed publicly since then—would have actually removed FHFA Director Watt in January 2017 and whether his replacement would have, at the time, asked Treasury to either reduce its liquidation preference or convert its preferred stock to common stock”).

67. Ahdout, *supra* note 1, at 2398.

in building on *Collins*'s rule of decision, the lower courts are avoiding a particular kind of separation-of-powers controversy, even while simultaneously declaring removal protections unconstitutional.

II. AN ILLUSTRATION OF THE ISSUE: *CALCUTT V. FDIC*'S JOURNEY TO THE SUPREME COURT

The Supreme Court's recent opinion in *Calcutt v. FDIC* was brief. In a seven-page per curiam opinion, the Court summarily reversed the Sixth Circuit's approval of an administrative agency's enforcement action.⁶⁸ The decision reaffirmed administrative law's longstanding *Chenery I* doctrine – as a general matter, courts can only uphold agency actions based on the agency's own reasoning.⁶⁹ But a key question about administrative-law remedies – left unanswered in *Calcutt* – continues to loom: is presidential-removal-power litigation worth the hassle for litigants?

For now, the answer is likely no. *Calcutt* came up to the Supreme Court on review from the Sixth Circuit. In the lower court, the outcome of the case rested in part on the Sixth Circuit's understanding of *Collins*'s holding with respect to remedies. Yet despite extensive briefing on the issue, the Supreme Court did not address the Sixth Circuit's discussion of *Collins* when it summarily reversed the lower court's decision. In declining to elaborate on *Collins*'s standard for obtaining a remedy, the Court has given litigants and lower courts little reason to believe that remedies are appropriate in the mine-run of removal cases. The briefing in *Calcutt* is just as important as what *Calcutt* did not say; amici spelled out the stakes of the Court's removal doctrine and offered a few possible elaborations that are worth considering.

A. *Calcutt at the Sixth Circuit*

The *Calcutt* case concerned a Federal Deposit Insurance Corporation (FDIC) enforcement action against a Michigan bank CEO for certain missteps coming

68. 143 S. Ct. 1317, 1321 (2023).

69. See SEC v. *Chenery Corp.* (*Chenery I*), 318 U.S. 80, 95 (1943) (“[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.”). In its summary reversal, the Court cited its restatement of this principle from the later *Chenery II* case. See *Calcutt*, 143 S. Ct. at 1318 (“It is ‘a simple but fundamental rule of administrative law’ that reviewing courts ‘must judge the propriety of [agency] action solely by the grounds invoked by the agency.’” (quoting SEC v. *Chenery Corp.* (*Chenery II*), 332 U.S. 194, 196 (1947))); *Calcutt*, 143 S. Ct. at 1321 (“[T]he court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.” (quoting *Chenery II*, 332 U.S. at 196)).

out of the “Great Recession” of 2007-2009.⁷⁰ The subject of the enforcement action – Harry C. Calcutt III – petitioned the Sixth Circuit for review of the FDIC’s order against him.⁷¹ Calcutt raised both substantive challenges to the FDIC’s resolution of his case in particular and separation-of-powers challenges to the agency proceedings in general.⁷² The Sixth Circuit ruled against him.⁷³

Addressing the substantive challenge, the Sixth Circuit acknowledged that the agency got the legal standard wrong: the statute at issue provides for a proximate-causation standard when measuring losses caused by misconduct, but the FDIC instead applied a reasonable-foreseeability standard.⁷⁴ The Sixth Circuit also agreed with Calcutt both that he did not proximately cause certain of the bank’s losses and that some of the bank’s expenses did not qualify as harms to the bank.⁷⁵ Still, the court upheld the FDIC’s order because – in its view – substantial evidence nevertheless supported the FDIC Board’s overall conclusions.⁷⁶ Citing *Chenery I*, Judge Murphy dissented on this point.⁷⁷

Meanwhile, Calcutt’s separation-of-powers challenges implicated not only a purported Appointments Clause issue with Calcutt’s hearing but also the removal protections enjoyed by both the FDIC Board and the FDIC’s administrative-law judges (ALJs).⁷⁸ The Sixth Circuit, however, disagreed with Calcutt’s constitutional arguments.

To frame the Appointments Clause issue, Calcutt originally received a hearing before an improperly appointed ALJ. After the Supreme Court said as much in *Lucia v. SEC*,⁷⁹ the FDIC Board properly appointed a new ALJ and conducted a new hearing.⁸⁰ The problem, in Calcutt’s telling, was that his “new” hearing continued to bear the taint of his old hearing for two reasons: (1) the new (properly appointed) ALJ admitted “stipulations and transcripts from the [earlier] proceedings,” and (2) the procedural rulings in the earlier proceedings “narrowed the scope of discovery in a manner that impacted the [later]

70. See *Calcutt*, 143 S. Ct. at 1318.

71. See *id.*

72. See generally *Calcutt v. FDIC*, 37 F.4th 293 (6th Cir. 2022) (describing Calcutt’s challenges), *rev’d*, 598 U.S. 623 (2023).

73. See *id.* at 301.

74. See *id.* at 329-30.

75. See *id.* at 331-32.

76. See *id.* at 334-35.

77. See *id.* at 361 (Murphy, J., dissenting).

78. See *id.* at 310, 320 (majority opinion).

79. 138 S. Ct. 2044, 2049 (2018) (holding that SEC administrative-law judges are officers, not employees, and must be appointed as prescribed by the Appointments Clause).

80. See *Calcutt*, 37 F.4th at 308.

proceedings.”⁸¹ The Sixth Circuit determined that these issues did not “taint” the proceedings before the new ALJ and that Calcutt’s new hearing did not need to start “from scratch.”⁸²

But perhaps the most significant aspect of the Sixth Circuit’s opinion came in its resolution of Calcutt’s removal argument. Calcutt pointed to precedents like *Seila Law* and *Free Enterprise Fund* in making two claims. First, he contended that the FDIC Board members were unconstitutionally shielded from removal under *Seila Law*.⁸³ Second, he submitted that the FDIC ALJs possessed the sort of multiple-layer for-cause removal protection that the Court declared unconstitutional in *Free Enterprise Fund*.⁸⁴

The Sixth Circuit concluded that the *Free Enterprise Fund* argument was unpersuasive.⁸⁵ But the court’s response to Calcutt’s *Seila Law* claim about the FDIC Board exposed a major fault line in administrative law: whether and when relief is appropriate for a litigant aggrieved by an action that an unconstitutionally insulated-from-removal executive official has taken. Determining that it “need not delve deeply into the *Seila Law* inquiry in this case,” the court took the view that “*Collins* instructs that relief from agency proceedings is predicated on a showing of harm, a requirement that forecloses Calcutt from receiving the relief he seeks.”⁸⁶ The court concluded that Calcutt had not shown that the presence of the removal restriction inflicted a harm on him because, per the Sixth Circuit’s understanding of *Collins*, the Supreme Court requires a concrete showing that “an unconstitutional removal protection specifically caused an agency action.”⁸⁷ The court declined to analyze the constitutionality of the removal protection because the litigant had not demonstrated his entitlement to a remedy.⁸⁸

The problem with lowering the evidentiary standard, as the Sixth Circuit pointed out in its opinion, is that a litigant “could always assert a possibility that an agency with different personnel might have acted differently.”⁸⁹ Watering down the showing necessary to support that assertion could therefore open the floodgates of relief for private plaintiffs—something that *Collins* demonstrated that the Supreme Court is “reluctant” to do in cases turning on removal

81. *Id.* at 320.

82. *Id.* at 321-23.

83. *See id.* at 310.

84. *See id.*

85. *See id.* at 319.

86. *Id.* at 314.

87. *Id.* at 315-16.

88. *See id.* at 314-17.

89. *Id.* at 317.

protections.⁹⁰ The practical consequence, as Judge Don R. Willett and Aaron Gordon lament, is that the rule of *Collins* (especially as the lower courts are understanding it) “consigns structural constitutional provisions to an inferior rank”; the two make the point that “the Court would not, for instance, require someone convicted by a materially interested adjudicator to prove, in order to obtain reversal, that an impartial adjudicator would have acquitted him or her.”⁹¹ Yet when removal protections are at issue, *Collins* demands more than a showing of unconstitutionality in the abstract. And, as noted above, allowing a litigant to make that showing could thrust a court into a particular kind of separation-of-powers thicket.

B. *Calcutt at the Supreme Court*

Calcutt’s path to the Supreme Court garnered attention, generating amicus briefs that described the problem of litigation incentives in the removal cases while offering the Court some solutions. When Calcutt appealed the Sixth Circuit’s decision to the Supreme Court, his petition for a writ of certiorari presented two questions for the Court’s consideration: (1) whether the *Chenery I* doctrine required remand, and (2) whether *Collins* requires “concrete proof of prejudice as a prerequisite to courts resolving separation-of-powers challenges to removal restrictions on the merits.”⁹²

Various organizations filed amicus briefs in Calcutt’s support, arguing that the Sixth Circuit’s understanding of *Collins* would seriously disincentivize litigants from challenging the actions of executive officials operating under unconstitutional removal protections. The New Civil Liberties Alliance’s brief contended that the lower-court opinion “signals to would-be challengers of unlawful tenure protections that courts won’t even decide the merits of their challenges absent pre-existing proof of particularized harm that will almost never exist, much less provide a remedy if the challenge is meritorious.”⁹³ As the

90. Aaron Nielson, *Three Views of the Administrative State: Lessons from Collins v. Yellen*, 2020–2021 CATO SUP. CT. REV. 141, 143 (2021); see also *id.* at 162 (“*Collins* says something important about remedies. After years of litigation, the plaintiffs may end up recovering nothing.”); Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. REV. 481, 485 (2014) (describing the remedy in a similar case as “inconsequential”); cf. Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 263 (2017) (describing the high costs of strong remedies in administrative law).

91. Don R. Willett & Aaron Gordon, *Rights, Structure, and Remediation*, 131 YALE L.J.F. 2126, 2150 n.124 (2022) (reviewing AZIZ Z. HUQ, *THE COLLAPSE OF CONSTITUTIONAL REMEDIES* (2021)).

92. Petition for a Writ of Certiorari, *Calcutt v. FDIC*, 143 S. Ct. 1317 (2023) (No. 22-714), 2023 WL 1475313, at *i.

93. Brief of the New Civil Liberties Alliance as Amicus Curiae in Support of Petitioner at 12, *Calcutt v. FDIC*, 143 S. Ct. 1317 (2023) (No. 22-714), 2023 WL 2436320.

brief put it: “The decision thus removes all incentive for individual citizens to invest the time, effort, and resources required to raise such challenges. Why bother?”⁹⁴

Jennifer Mascott and Trent McCotter filed a brief on behalf of Scalia Law School’s Separation of Powers Clinic, arguing that “[w]hen relief is effectively foreclosed by an evidentiary threshold rarely satisfied, and where the court even refuses to remand the matter to the agency to develop the record (as here), parties will presumably stop bringing such challenges.”⁹⁵ The brief noted the lower-court decision’s inconsistency with the Supreme Court’s admonition in *Lucia* that “Appointments Clause remedies are designed not only to advance [the Clause’s structural] purposes directly, but also to create incentives to raise Appointments Clause challenges.”⁹⁶ And the U.S. Chamber of Commerce submitted that the Sixth Circuit’s decision would “effectively eliminate any incentive for parties to assert these separation-of-powers challenges and any need for courts to decide them.”⁹⁷

Declining to address the *Collins* issue, however, the Supreme Court limited its grant of Calcutt’s cert petition to the first question presented.⁹⁸ Indeed, the Solicitor General (representing the FDIC) *agreed* with Calcutt that *Chenery I* warranted remand.⁹⁹ So, despite the fact that the case presented an opportunity to clarify *Collins*’s evidentiary burden, the Court reversed the Sixth Circuit without saying a word about remedies in removal-power cases.¹⁰⁰ But after reading the lower court’s opinion, Calcutt’s cert petition, and the amicus briefs filed in the case, one is left with a keen awareness of what *Calcutt* did not say.

Calcutt’s experience at the Sixth Circuit demonstrates that *Seila Law*’s clear statement about the presidential removal power does not necessarily have a payout for private litigants. Staring down the barrel of a potential separation-of-powers dispute, the Sixth Circuit declined to afford a remedy to the litigant who brought the dispute before the court. Refusing even to remand to the agency for further record development on the issue, the court avoided the controversy

94. *Id.*

95. Brief of Separation of Powers Clinic as Amicus Curiae in Support of Petitioner at 9, *Calcutt v. FDIC*, 143 S. Ct. 1317 (2023) (No. 22-714), 2023 WL 2381068 [hereinafter *Scalia Law School Brief*].

96. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018) (internal quotation marks and alterations omitted).

97. Brief for the Chamber of Commerce of the United States as *Amicus Curiae* Supporting Petitioner at 3, *Calcutt v. FDIC*, 143 S. Ct. 1317 (2023) (No. 22-714), 2023 WL 2436307 [hereinafter *Chamber of Commerce Brief*].

98. *Calcutt*, 143 S. Ct. at 1321.

99. *Id.*

100. *See generally id.* (criticizing the Sixth Circuit’s decision without mentioning removal power).

entirely. While *Seila Law* was a counterexample in Ahdout’s section on the fortified-model cases – particularly given the fact that a private litigant brought the challenge – its follow-on cases do appear to demonstrate some avoidance of a certain kind of separation-of-powers disputes.

III. THINKING CRITICALLY ABOUT REMEDIES IN PRESIDENTIAL REMOVAL CASES

The remedial issue is not going away. Litigants have little reason to go through the trouble of raising these claims if doing so will fail to yield a remedy.¹⁰¹ And as amici in *Calcutt* noted, the Sixth Circuit’s interpretation of *Collins* disincentivizes litigants from challenging agency actions taken by officials whom Congress has unconstitutionally insulated from removal. Ahdout’s avoidance theory sheds some light on why courts might be reluctant to incentivize these claims – prudential concerns, reluctance to enter the political fray, and structural considerations, among other motivations. But what comes next?

This Part suggests that litigants will start to move away from removal challenges and gravitate toward other doctrinal paths when challenging agency action. The removal cases are not the first to present the question of what will happen when remedies become practically unavailable to litigants who “prevail” in constitutional challenges. The Court’s recognition of – and experience with – the Fourth Amendment’s good-faith exception provides a worthwhile case study on this front. The similarities between *Collins*’s rule and the plausibility-pleading standard of federal civil procedure are also worth studying, as they suggest that *Collins* is better understood as creating an evidentiary burden than a rule about remedies. From there, this Part considers the implications of *Calcutt*’s lack of guidance on the meaning of *Collins*, which is likely to send litigants back to the realm of separation-of-powers challenges in which courts are less inclined to employ separation-of-powers avoidance.

A. A Fourth Amendment Analogy

Collins is not the first time that the Supreme Court has decoupled relief from success in constitutional challenges. The issue of incentives also crops up in Fourth Amendment cases – in particular, when courts apply the good-faith exception to the Fourth Amendment’s warrant requirement. The Fourth

¹⁰¹ See Richard J. Pierce, Jr., *The Remedies for Constitutional Flaws Have Major Flaws*, 18 DUKE J. CONST. L. & PUB. POL’Y 105, 117 (2023) (“No one has any incentive to challenge the constitutionality of a characteristic of an agency’s structure if they know that they are not likely to obtain any remedy if they prevail.”).

Amendment protects against unreasonable searches and seizures.¹⁰² Warrantless searches and seizures are presumptively unreasonable,¹⁰³ but various exceptions exist to the warrant requirement.¹⁰⁴ When the government obtains evidence through an unlawful search or seizure of a person and then seeks to use the evidence in that person's criminal trial, the person can raise a Fourth Amendment challenge and seek to have the evidence excluded from use at the trial pursuant to the aptly named "exclusionary rule."¹⁰⁵ Still, under what the Supreme Court has called the good-faith exception to the exclusionary rule, courts permit the government to use that evidence when—even if the government's conduct amounted to a Fourth Amendment violation—a search was "conducted in objectively reasonable reliance on binding appellate precedent."¹⁰⁶

Novel theories of the Fourth Amendment—particularly in the digital age—have had their day at the Supreme Court in recent years, such as the recognition in *Carpenter v. United States*¹⁰⁷ that warrantless collection of cell-site location information can violate the Fourth Amendment.¹⁰⁸ But as Orin Kerr has pointed out in tweet¹⁰⁹ after tweet¹¹⁰ after tweet¹¹¹ after tweet,¹¹² nearly "every defendant

102. See U.S. CONST. amend. IV.

103. See *United States v. Karo*, 468 U.S. 705, 717 (1984).

104. See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 768–69 (1994) (discussing a few of the exceptions).

105. See Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1563 (1972) ("Under the exclusionary rule a court attempts to maintain the status quo that would have prevailed if the constitutional requirement had been obeyed."). "[T]he exclusion of evidence . . . will only be ordered if the trial court finds that exclusion would deter future police misconduct." Michael D. Cicchini, *An Economics Perspective on the Exclusionary Rule and Deterrence*, 75 MO. L. REV. 459, 462 (2010). Michael D. Cicchini has contended that "by proclaiming that the exclusion of illegally obtained evidence is not an individual right, the Court has effectively turned the Fourth Amendment into a right without a remedy." Cicchini, *supra*, at 462. Meanwhile, in the presidential removal cases, even if a litigant can point to a structural error in the statutory scheme that created the agency that is taking enforcement action against her, *Collins* makes obtaining a meaningful remedy difficult.

106. *Davis v. United States*, 564 U.S. 229, 232 (2011).

107. 138 S. Ct. 2206 (2018).

108. See *id.* at 2217.

109. See Orin Kerr (@OrinKerr), TWITTER (June 11, 2019, 3:39 PM), <https://twitter.com/OrinKerr/status/1138531125306023938> [<https://perma.cc/HCT4-BHEJ>] [hereinafter *Carpenter* Tweet].

110. See Orin Kerr (@OrinKerr), TWITTER (Apr. 17, 2019, 12:26 AM), <https://twitter.com/OrinKerr/status/1118370233964814336> [<https://perma.cc/7JKQ-BY9P>].

111. See Orin Kerr (@OrinKerr), TWITTER (Aug. 8, 2018, 5:53 PM), <https://twitter.com/OrinKerr/status/1027311791653629952> [<https://perma.cc/2E76-Q5JS>].

112. See Orin Kerr (@OrinKerr), TWITTER (Dec. 20, 2021, 11:41 PM), <https://twitter.com/OrinKerr/status/1473151667159769090> [<https://perma.cc/7TUT-VNMD>].

who wins a groundbreaking 4th Amendment victory in the U.S. Supreme Court quietly loses on remand under the good faith exception a year later.”¹¹³ The worry is that the good-faith exception’s buzzsaw might disincentivize the pursuit of creative (and perhaps correct) Fourth Amendment arguments. Still, Kerr has noted, this state of affairs has not appeared to discourage the zealous litigation of Fourth Amendment issues at the Court.¹¹⁴

The Supreme Court addressed the incentives argument in *United States v. Leon*.¹¹⁵ It stated in a footnote that “[t]he argument that defendants will lose their incentive to litigate meritorious Fourth Amendment claims as a result of the good-faith exception we adopt today is unpersuasive.”¹¹⁶ Further, the Court said, “[a]lthough the exception might discourage presentation of insubstantial suppression motions, the magnitude of the benefit conferred on defendants by a successful motion makes it unlikely that litigation of colorable claims will be substantially diminished.”¹¹⁷ As in Fourth Amendment cases, successful pursuit of the removal issue would have massively positive results for a litigant; it could scuttle an enforcement action altogether.

From an institutional perspective, however, a key difference is that courts in Fourth Amendment cases will often analyze the constitutional issue *before* concluding (sometimes in a different court on remand) that the good-faith exception bars exclusion of evidence. By contrast, the Sixth Circuit in *Calcutt* opted not to analyze the removal issue before concluding that relief was unwarranted. At least in the Fourth Amendment cases, courts set forth guidance for the future—even if their opinions are functionally advisory in the cases in which they issue that guidance.

For example, even though Timothy Carpenter of *Carpenter v. United States* lost on remand under the good-faith exception,¹¹⁸ the government will think twice before again obtaining cell-site location information without a warrant. Yet the Sixth Circuit’s opinion in *Calcutt* gives precious little direction to future presidents (and FDIC board members)—to whom the constitutionality of the

113. *Carpenter* Tweet, *supra* note 109.

114. See Orin Kerr (@OrinKerr), TWITTER (Dec. 20, 2021, 11:47 PM), <https://twitter.com/OrinKerr/status/1473153028974809091> [<https://perma.cc/S2YC-9YVW>].

115. 468 U.S. 897 (1984).

116. *Id.* at 924 n.25; see also *Illinois v. Krull*, 480 U.S. 340, 354 (1987) (“In an effort to suppress evidence, a defendant has no reason not to argue that a police officer’s reliance on a warrant or statute was not objectively reasonable and therefore cannot be considered to have been in good faith.”).

117. *Leon*, 468 U.S. at 924 n.25.

118. *United States v. Carpenter*, 926 F.3d 313 (6th Cir. 2019). The Sixth Circuit applied the good-faith exception to the government’s reasonable reliance on the Stored Communications Act. See *id.* at 314.

removal provisions at issue might make a difference—about their statutory obligations and protections with respect to the removal question. To be sure, the Supreme Court in *Collins* analyzed the removal issue, concluding that the removal provision was unconstitutional before expressing skepticism about the litigant’s entitlement to a remedy and remanding for further findings on the point. But in cases in which remand for further findings on the removal issue is not necessary because the answer to the remedial question is clear, a court’s decision procedure may look more like that of the Sixth Circuit’s in *Calcutt*. Whether and how addressing the merits of those removal claims would comport with application of the last-resort rule of constitutional avoidance—a concept related to separation-of-powers avoidance¹¹⁹—are open questions.¹²⁰

Nevertheless, the incentive issue remains. Even if the benefit would be great for victorious litigants, the prevailing framework will discourage the bringing of most claims. Of course, an objection to that state of play presupposes that incentives *should* figure into the Supreme Court’s calculus in setting an evidentiary standard. Perhaps they should not. One might also counter that the Court—in cases like *Lucia* and *Ryder v. United States*¹²¹—has at least articulated that remedies in Appointments Clause cases are designed not only to advance the structural purposes of the Clause but also to create incentives to raise such challenges.¹²² But the Court distinguished in *Collins* between Appointments Clause challenges and removal-protection challenges, raising the possibility that incentives may not be relevant in removal-protection cases.

119. See Ahdout, *supra* note 1, at 2370.

120. The last-resort rule is “a largely prudential rule which . . . dictates that, even if all other jurisdictional and justiciability obstacles are surmounted, federal courts still must avoid a constitutional issue if there is *any* other ground upon which to render a final judgment.” Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1025 (1994). The rule is closely related to the canon of constitutional avoidance—part of a doctrine of shying away from exercising judicial review except when absolutely necessary, given “the ‘counter-majoritarian difficulty,’ or the inherent democratic tension presented when unelected judges strike down laws enacted by politically accountable legislators.” Aaron Tang, *Reverse Political Process Theory*, 70 VAND. L. REV. 1427, 1429 (2017) (quoting ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962)). Employing the avoidance canon, courts interpret statutes in such a way as to avoid declaring statutes unconstitutional when possible. See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 139 (2010). As then-Professor Amy Coney Barrett has noted, “the avoidance canon developed alongside the power of judicial review. As courts solidified this power, they gave assurances that they would exercise it only when they had no alternative.” Barrett, *supra*, at 139. In this way, the Sixth Circuit’s decision to sequence its review of the remedial question ahead of the statutory question—given the court’s view on the remedy—would seem to follow from the jurisprudential tradition of avoidance.

121. 515 U.S. 177 (1995).

122. See Chamber of Commerce Brief, *supra* note 97, at 6 (citing the relevant precedents).

B. The Removal Cases as Plausibility Pleading

The framing of the Fourth Amendment analogy presupposes that *Collins* is a rule about remedies. Yet that is not totally accurate. *Collins* acknowledges that a remedy may be available. It just sets a high bar for those seeking to obtain that remedy. Maybe the cases are about standing; indeed, Ahdout’s mention of *Seila Law* came in the context of standing doctrine. But an even better analogy is to plausibility pleading in federal civil procedure. The plausibility-pleading doctrine establishes a requirement for a plaintiff seeking to vindicate a claim: the plaintiff’s complaint must state facts establishing a claim’s plausibility. Similarly, *Collins* requires the pleading of a certain set of facts before relief is considered to be on the table. In the end, *Collins*’s rule is an evidentiary burden, not a statement about entitlement to a remedy.

At first blush, the removal cases have a “standing” kind of feel to them – just because the Constitution is violated does not mean that a party can receive a remedy. Consider the view of Will Baude, who said on a podcast episode – in the context of his views on Article III standing doctrine – that he does not “think that every time the executive branch violates a statute that . . . the little red light should go on and the Supreme Court should . . . immediately need to ride in.”¹²³ Indeed, the executive officials in the removal-power cases are not even necessarily violating the statutes at issue. Like in the standing cases, courts in the removal cases acknowledge that some law (here, the Constitution) may have been violated in the abstract but that the legal violation does not necessarily entitle a litigant to relief.

Still, removal-protection challenges are distinguishable from the ordinary standing inquiry.¹²⁴ In the removal cases, even though an official was not necessarily acting in excess of particular statutory authority, the official has always taken the action while operating against the (allegedly unlawful) backdrop of statutory unaccountability to the legitimately elected head of the executive branch. That backdrop of unaccountability may impact how the official views his freedom to pursue his own agenda.¹²⁵ As Justice Gorsuch’s *Collins* concurrence notes: “In the case of a removal defect, a wholly unaccountable government

123. *Least Incorrect*, DIVIDED ARGUMENT, at 53:48 (July 10, 2022), <https://www.dividedargument.com/episodes/least-incorrect> [<https://perma.cc/JC4P-DKC7>].

124. Compare Ahdout, *supra* note 1, at 2398 (“[T]he Court’s standing rules are relaxed in the removal context, where an ultimate merits decision would result in holding that a congressionally created agency is at least in part unconstitutional.”), with Ferguson, *supra* note 49, at 1751 (“Since the Constitution displaces removal restrictions such that they never have force, it is unclear how private parties have standing to bring these types of suits.”).

125. See *Allen v. Wright*, 468 U.S. 737, 751 (1984) (describing the “fairly traceable” element of standing doctrine).

agent asserts the power to make decisions affecting individual lives, liberty, and property. The chain of dependence between those who govern and those who endow them with power is broken.”¹²⁶ While the executive officials in these cases may not be occupying their offices or carrying out the functions of those offices in violation of the law, they act against the backdrop of a scheme of unconstitutional insulation from presidential removal. That might have an impact on the official’s conduct. Yet for a majority of the Court, this simple fact is just not enough to entitle a plaintiff to a remedy.

Standing doctrine is therefore a bit of an awkward fit here. To establish standing under Article III of the Constitution, “[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.”¹²⁷ No one doubts that the litigant in a removal case has suffered an injury when he is the subject of an enforcement action. A favorable judicial decision would redress that injury. And the injury is fairly traceable to the enforcement official’s allegedly unlawful conduct. That is true even though the *reason* for the conduct’s alleged unlawfulness is due to a background assumption pursuant to which the official and the President were operating, as opposed to the action flowing directly from a particular, unconstitutional statutory provision or a Constitution-contravening process of appointment.¹²⁸ In the end, standing doctrine is about whether a case or controversy fits within the meaning of Article III. By contrast, *Collins* is about what a litigant needs to demonstrate if she wants a remedy.

Plausibility-pleading doctrine provides a better comparison. In *Bell Atlantic Corp. v. Twombly*¹²⁹ and *Ashcroft v. Iqbal*,¹³⁰ the Supreme Court heightened the pleading standard for civil actions filed in federal court. In so doing, the Court “decidedly tightened (if not discarded) [an older, more liberal pleading standard] in favor of a stricter standard requiring the pleading of facts painting a ‘plausible’ picture of liability.”¹³¹ Like in the plausibility-pleading cases, *Collins* lays out a strict standard for those seeking relief. If the litigant meets the standard, relief is presumably available. To be sure, on the question of incentives, a 2017 article by William H. J. Hubbard reported that the author could find

126. *Collins v. Yellen*, 141 S. Ct. 1761, 1797 (2021) (Gorsuch, J., concurring in part).

127. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

128. See *Collins*, 141 S. Ct. at 1779 (majority opinion) (“[F]or purposes of traceability, the relevant inquiry is whether the plaintiffs’ injury can be traced to ‘allegedly unlawful conduct’ of the defendant, not to the provision of law that is challenged.”).

129. 550 U.S. 544 (2007).

130. 556 U.S. 662 (2009).

131. A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431-32 (2008).

“virtually no evidence that *Twombly* or *Iqbal* precipitated a major change in dismissals with prejudice, settlement patterns, or filing rates in cases involving represented plaintiffs.”¹³² Like *Leon* asserted regarding the good-faith exception, Hubbard hypothesizes that “the economic incentives of litigants may be sufficiently powerful that some aspects of legal doctrine do not affect case outcomes because they do not impose binding constraints on behavior.”¹³³

Perhaps the same will be true for private litigants in removal cases, particularly those staring down the barrel of enforcement actions. Because the possibility of a remedy remains on the table, *Collins* might not end up dissuading litigants from making the removal argument, given its potential benefit. The impacts of *Collins* remain to be seen. Yet perhaps Section III.C of *Collins* is best understood not as a section about remedies but as a section about evidentiary burdens. The question in *Collins*, as in *Twombly* and *Iqbal*, was not what the remedy should be; rather, the dispositive issue was what these litigants had to *show* to obtain the remedy in question. That is different from the standing inquiry, which defines who has suffered a cognizable injury at all. *Collins* sets a high—yet not insurmountable, at least in theory—standard for obtaining a remedy in a removal-grounded challenge. Future cases offer the Court an opportunity to clarify the exact particulars of the standard.

C. Implications and “What’s Next”

Given some of the confusion in the lower courts about how to show concrete harm, the Supreme Court should at least—as an intermediate step—give further guidance on the nature of the evidentiary burden. As noted above, the Court in *Collins* gave two examples of when a litigant might be able to satisfy that burden: an adverse lower-court decision against a president or a public statement by a president noting that he would remove an officer. The Court has several other options if it chooses to elaborate on when the evidentiary burden would be met in these cases. Would the Court be comfortable with creating a presumption in favor of a remedy when an official enjoying an unconstitutional removal protection was appointed by a prior president? What if a litigant could produce an unsworn, post-hoc letter from the President of the United States “asserting that he would have fired” the official?¹³⁴ How about if the official’s other conduct is,

132. William H. J. Hubbard, *The Effects of Twombly and Iqbal*, 14 J. EMPIRICAL LEGAL STUDS. 474, 477-78 (2017).

133. *Id.* at 511.

134. *Bhatti v. Fed. Hous. Fin. Agency*, No. 17-CV-2185, 2022 WL 17741246, at *6 (D. Minn. Dec. 16, 2022).

as a general matter, out of step with the President’s policy priorities?¹³⁵ Might the Court adopt the argument—set forth in the Scalia Law School Separation of Powers Clinic brief—that *Collins* admits of “a distinction between officials who had taken a firsthand role in ‘adopt[ing]’ the challenged action, and those subsequent officials who merely ‘supervised the implementation’ of the challenged action,” given “that removal powers are more likely to play a role where an official initiates an action”?¹³⁶ And will the Court lay out some principles for when—if ever—a deposition of an executive official in these sorts of cases would be appropriate?

Justice Thomas might take issue with a liberalizing of the evidentiary standard, given his narrower view of the circumstances in which relief is appropriate. And given that Thomas’s vote was decisive on this point in Section III.C of *Collins*, the Court might be reluctant to say more on the point. Nevertheless, these questions are likely to frame the removal jurisprudence of tomorrow. Given the Court’s strong statements about the presidential removal power, entitlement to a remedy is one of the last remaining hurdles for litigants impacted by actions that insulated officials take.

In the meantime, however, litigants should prefer to pursue more surefire routes to relief. Indeed, they already are, with mixed success—these challenges could stymie agency regulatory efforts while revitalizing a more formalist conception of the separation of powers. One such avenue would have the litigant attack the very power of the agency itself to take a particular action. For an example of this phenomenon, look at a motion to dismiss that Walmart recently filed in a lawsuit against the Federal Trade Commission.¹³⁷ There, Walmart contended that the Commission “lacks constitutionally valid authority to initiate litigation seeking monetary or injunctive relief.”¹³⁸ A district judge denied this

135. See, e.g., *Collins v. Lew*, 642 F. Supp. 3d 577, 585 (S.D. Tex. 2022) (“Plaintiffs point to no specific action by Director Watt to obstruct the policy goals of the Trump Administration.”).

136. Scalia Law School Brief, *supra* note 95, at 8 (emphasis omitted).

137. See Memorandum of Law in Support of Walmart Inc.’s Motion to Dismiss, *FTC v. Walmart Inc.*, No. 1:22-cv-03372, 2023 WL 2646741 (N.D. Ill. Aug. 29, 2022), ECF No. 24.

138. *Id.* at 8 (capitalization adapted); see also Eli Nachmany, *Walmart Threads the Needle on Separation-of-Powers Remedies*, REGUL. REV. (Oct. 3, 2022), <https://www.theregreview.org/2022/10/03/nachmany-walmart-threads-the-needle-on-separation-of-powers-remedies> [<https://perma.cc/PGH2-BURV>] (“In recent years, the usual strategy in cases like this one has been to ask that a court declare that a certain executive official’s removal protections are unconstitutional. But in this filing, Walmart does not challenge—at least for now—*Humphrey’s Executor’s* finding that the [Federal Trade Commission (FTC)] removal protections pass constitutional muster. Rather, the company argues that . . . new [litigation] powers that Congress has granted the FTC in the intervening years since *Humphrey’s Executor* violate Article II.”).

aspect of Walmart’s motion,¹³⁹ but the retail giant’s argument could be of interest to the Supreme Court eventually.¹⁴⁰ Other doctrines, like the major questions doctrine and the nondelegation doctrine, provide the possibility of a judicial declaration that an agency never had the *power* to do something that it did to a particular party.¹⁴¹ That is a consequential stepping stone toward a remedy. And even in *Collins*, the Court appeared to acknowledge that meaningful remedies are appropriate in cases “involv[ing] a Government actor’s exercise of power that the actor did not lawfully possess.”¹⁴²

Finally, the *Collins* remedy issue might just fix itself. From *Seila Law* to *Collins*, the Supreme Court is marching its way through the independent agencies and reasserting the President’s removal power. The era of presidents unaware of their removal power (and independent agency heads feeling free to pursue their own agendas) may be coming to an end. If the Court takes a few more of these

139. See *FTC v. Walmart Inc.*, No. 1:22-cv-03372, 2023 WL 2646741, at *26 (N.D. Ill. Mar. 27, 2023).

140. The case could give the Court an opportunity to clarify the limited ongoing vitality of *Humphrey’s Executor*. In *Seila Law*, the Court declined to overrule its precedent in *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935)—a case in which the Court determined that a statute restricting the presidential power to remove FTC commissioners was constitutional because, as of 1935, “the commission act[ed] in part quasi-legislatively and in part quasi-judicially.” *Humphrey’s Ex’r*, 295 U.S. at 628. The Court in *Humphrey’s Executor* noted, in arriving at this conclusion, that “[i]n making investigations and reports thereon for the information of Congress . . . in aid of the legislative power, [the FTC] acts as a legislative agency [T]he commission [is also authorized] to act as a master in chancery under rules prescribed by [a] court,” and in this capacity “it act[ed] as an agency of the judiciary.” 295 U.S. 602, 628. The *Humphrey’s Executor* Court saw something of a principal-agent relationship between the agency and the other branches of the government—that understanding seems to have been the basis of the Court’s use of the terms “quasi-legislative” and “quasi-judicial.” The Court in *Seila Law* distinguished the way the Court viewed the 1935 FTC from the actual powers of the modern Consumer Financial Protection Bureau, stating that “[r]ightly or wrongly, the Court viewed the FTC (as it existed in 1935) as exercising ‘no part of the executive power.’” 140 S. Ct. 2183, 2198 (2020). How the Court would view the powers of the modern FTC, however, could be different in a legally significant way, given the newly conferred litigation powers that Walmart challenges.

141. The major questions doctrine—which the Supreme Court recognized in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022)—is a canon of statutory interpretation that requires “administrative agencies [to] point to ‘clear congressional authorization’ before issuing regulations of ‘economic and political significance.’” Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 194 (2023) (quoting *West Virginia*, 142 S. Ct. at 2609). If the agency lacked power under the statute in question, the action at issue would be in excess of statutory authority. At the same time, courts have employed the nondelegation doctrine to declare statutes unconstitutional when Congress has delegated legislative power to the executive branch, therefore preventing agencies from enforcing regulations promulgated pursuant to those statutes. See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935).

142. *Collins v. Yellen*, 141 S. Ct. 1761, 1788 (2021).

challenges and asserts that, under Article II, very few – or no – modern agencies are independent, it could cut off the problem at the source: regardless of what the statute says, no one would question that the President knows that he could fire an insulated official consistent with the Constitution.

CONCLUSION

Ahdout's article is an important contribution to separation-of-powers law – a field that is in flux after the prior presidential administration. In laying out her models of separation-of-powers avoidance, Ahdout cited *Seila Law LLC v. CFPB* as an example of a case that proves the Supreme Court's heightened solicitousness of separation-of-powers challenges when they are brought by private parties. Yet recent experience demonstrates that the federal courts have not been so encouraging of the kind of separation-of-powers challenge that was actually on the table in *Seila Law*: seeking relief for an action taken by an executive official enjoying unconstitutional statutory protection from removal. Nevertheless, Ahdout's separation-of-powers avoidance framing helps to explain doctrinal developments in *Seila Law*'s aftermath.

As one commentator remarked as far back as 1898: “One of the most interesting questions arising under the Constitution of the United States, is that in relation to the power of removal from office of the civil officers of the Federal Government.”¹⁴³ Indeed, contemplating whether Congress violated our founding charter by vesting unconstitutional protection from presidential removal in an executive-branch official is a heady, intellectually stimulating exercise. But these issues matter in more than the abstract. On the other end of many of these suits is a litigant who claims that the government wronged him in some way. These litigants are playing administrative law for keeps – the outcomes of these cases have meaningful, direct impacts on their lives, livelihoods, and liberty. The remedial question, in turn, makes a big difference. In light of *Collins* and a lack of further guidance in *Calcutt*, expect litigants to order their conduct in a way that will maximize their chances of obtaining relief.

143. James W. Stillman, *The Power of Removal from Federal Offices*, 10 GREEN BAG 164, 164 (1898).