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Legal Sidebar

Supreme Court: Structure of Federal Housing Finance Agency Violates Constitution

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On June 23, the Supreme Court in *Collins v. Yellen* ruled 7-2 that the structure of the Federal Housing Finance Agency (FHFA) violates the Constitution's separation of powers. The FHFA is headed by a single Director who, under the statute establishing the agency, can only be removed by the President for cause, rather than at will. The single-headed structure of the FHFA contrasts with the multimember structure of most other agencies headed by officials that are similarly insulated from presidential control through for-cause removal protections. The Court's ruling, which comes on the heels of a decision last year invalidating the similarly structured Consumer Financial Protection Bureau (CFPB), will have important implications for Congress's ability to configure agencies in the executive branch with relative independence from the President. The decision also appears to have had immediate practical effect, as President Biden removed the FHFA Director from office the next day.

Background

The dispute in *Collins* arose from a financing arrangement the FHFA, acting as a conservator for the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), reached with the Treasury Department. Fannie Mae and Freddie Mac are government-sponsored enterprises (GSEs) that provide liquidity to banks and credit unions to help support the home mortgage market. The Housing and Economic Recovery Act of 2008 (Recovery Act), among other things, established the FHFA to oversee Fannie Mae and Freddie Mac and authorized the FHFA to act as a conservator for them in certain situations. Not long after the FHFA was established, the agency did so and negotiated agreements for Fannie Mae and Freddie Mac with the Treasury Department. Subsequently, the agencies agreed to a series of amendments, the third of which (Third Amendment) led to this litigation. A group of shareholders challenged the Third Amendment on statutory and constitutional grounds. Because the government agreed that the statutory provision restricting the President's removal power was unconstitutional, the Court appointed an *amicus curiae* to defend the statute.

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In an opinion by Justice Alito, the Supreme Court ultimately held that the statutory restriction on the President's power to remove the FHFA Director was unconstitutional, although it rejected the statutory challenge to the FHFA's action. The Court explained that application of its reasoning from last year's decision in *Seila Law LLC v. CFPB* essentially decided the constitutional question.

Seila Law LLC v. CFPB

In *Seila Law*, the Court ruled that a statutory provision insulating the Director of the CFPB from removal by the President except for "inefficiency, neglect of duty, or malfeasance" was unconstitutional. The Court explained in that case that, while it had on occasion upheld legislative restrictions on the President's power to remove executive officers under Article II of the Constitution, those restrictions were permissible only because they fell within two narrow exceptions to the President's otherwise "unrestricted removal power": "one for multimember expert agencies that do not wield substantial executive power," and the other for inferior officers—nonprincipal officers who are not constitutionally required to be Senate-confirmed—"with limited duties and no policymaking or administrative authority." The Court characterized these exceptions as constituting the "outermost constitutional limits" on Congress's authority to restrict the President's removal power. *Seila Law* declined to "extend these precedents" to the context of the CFPB, an independent agency led by a single director with "significant executive power." The Court in that case concluded that the CFPB's novel structure "lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control."

Arguments to Distinguish the CFPB from the FHFA

The majority opinion in *Collins* ruled that application of *Seila Law*'s reasoning compels the conclusion that the structure of the FHFA is also unconstitutional. The FHFA, like the CFPB, is an agency with a single Director, and the statute establishing the FHFA, like the law establishing the CFPB, restricts the President's removal power. The Court rejected various arguments raised by the *amicus* to distinguish the two agencies.

First, Justice Alito's majority opinion rejected the argument that Congress should have more flexibility to insulate the FHFA Director from the President because the agency exercises less authority than the CFPB Director. The majority opinion explained that the "nature and breadth" of an agency's power is not determinative in assessing whether Congress may restrict the President's removal power. That authority is essential for the President to exercise some control over the executive branch in accordance with the policies the President was elected to advance. As the people elect the President, but not agency officials, the removal power maintains electoral accountability for executive branch actions. In addition, the majority opinion noted the "severe practical problems" attendant to establishing a workable standard to distinguish those agency heads whose authority is substantial enough to require presidential control from those whose power is not; while the CFPB might wield more authority than the FHFA in some ways, the situation might be reversed in others. For instance, while the CFPB has regulatory authority over various private interests, the FHFA oversees entities that "dominate the secondary mortgage market and have the power to reshape the housing sector."

The *amicus* also argued that when the FHFA steps into the shoes of an entity as a conservator, it assumes the status of a private entity and does not wield executive power. The Court disagreed, explaining that the FHFA does not always act in that capacity, and even when it does so, its authority stems from a specific federal statute, the Recovery Act, not the background laws that govern conservatorships. The majority opinion stressed that the FHFA's task—interpreting a law passed by Congress and implementing a legislative mandate—is the essence of exercising executive power.

Justice Alito's majority opinion also disposed of the argument that because of the nature of the entities the FHFA regulates, there was no separation-of-powers violation. The Court-appointed *amicus* argued that because the FHFA regulates GSEs, rather than private parties, the individual liberty interests protected by separation-of-powers principles are not implicated. The majority opinion disagreed, contending that the President's removal power is crucial regardless of whether the relevant agency regulates the public directly or takes actions that have important indirect effects.

Last, the Court dismissed the argument that the removal protection for the FHFA Director only offered a modest tenure protection that did not create a constitutional problem. The *amicus* argued that the for-cause standard would be satisfied, thereby permitting the President to remove the Director, if the Director refused to follow an order from the President. This feature, contended *amicus*, preserved presidential control over the Director. The majority opinion acknowledged that the Recovery Act's for-cause provision likely gave the President more discretion to remove the Director than other statutory provisions insulating officials from removal, such as the standard of "inefficiency, neglect of duty, or malfeasance" that applied to the CFPB Director. Even so, the Court ruled that "the Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer."

Separate Opinions on the Constitutional Question

Justice Kagan wrote separately, joining the majority opinion in most aspects but concurring only in the judgment on the constitutional question. (Justice Kagan had dissented from the majority opinion in *Seila Law*, but concluded that principles of *stare decisis* compelled application of its reasoning here as the FHFA was not legally distinguishable from the CFPB.) First, she disputed the majority's assertion that because at-will presidential removal is crucial to ensure that the executive branch is subject to a degree of electoral accountability, "courts should grant the President that power in cases like this one." Instead, she argued, the correct method of achieving accountability is to let decisions about the government's structure rest with the branches that are accountable to the people, such as Congress. Second, she objected to what she characterized as the majority's extension of *Seila Law*'s holding. That case, Justice Kagan wrote, emphasized that its rule was limited to barring a single-director agency that exercises "significant executive power." However, the majority opinion in *Collins*, she remarked, ignored that limitation on *Seila Law*'s reasoning to conclude that the constitutionality of a removal restriction does not turn on "the nature and breadth of an agency's authority."

Justice Sotomayor, in an opinion joined by Justice Breyer, dissented from the Court's decision on this constitutional question. Echoing the point raised by Justice Kagan, she argued that *Seila Law* limited its holding to a single-director agency entrusted with "significant executive power." For Justice Sotomayor, the FHFA's authority over GSEs does not rise to this level. In addition, one of the exceptions in which the Court has approved removal protections—that of an independent counsel—was justified in *Seila Law* as not violating separation-of-powers principles because the officer's authority was "trained inward" to high-level government officials identified by others. Likewise, Justice Sotomayor wrote, the FHFA's power is "trained inward" toward GSEs. Finally, she argued that independence for the FHFA was supported by historical tradition, pointing to the examples of single-director agencies with limited executive power, such as the Office of Special Counsel and Social Security Administration, as well as the independence enjoyed by other federal financial regulators.

Remedy

Majority Opinion

While the shareholders succeeded in their challenge to the removal restriction on the FHFA Director, the Court took a different view for the remedy sought. The Court first observed that the Third Amendment should not be undone in its entirety (which would result in funds being returned to Fannie and Freddie) because an Acting Director of the FHFA—and not a Senate-confirmed Director—completed the agreement. An Acting FHFA Director, the Court ruled, was not protected from removal as a Senate-confirmed FHFA Director would be. Therefore, there was no constitutional violation that harmed shareholders when the agreement was adopted. The Court thus ruled that it would only consider a remedy for actions taken by subsequent Senate-confirmed FHFA Directors to implement the agreement.

The Court noted another wrinkle in the claim for relief—while the *removal* restriction protecting a FHFA Director was unconstitutional, the FHFA Directors that followed the Acting Director and implemented the Third Amendment were *appointed* consistent with the Constitution. Because there was no constitutional defect with their manner of appointment, there was no reason to void automatically their actions simply because the statute included an improper removal restriction. Instead, the shareholders needed to show that the unconstitutional provision—the removal protection—itself inflicted a harm on them. For instance, the Court offered, if the President stated publicly that he disagreed with a decision of the Director and would have removed him were it not for the for-cause protection, that statement might show that the unconstitutional provision caused harm. The Court decided that whether such a harm occurred here was unclear and remanded the matter to the lower courts to resolve.

Separate Opinions on the Issue of Remedy

The majority's remedy sparked three separate opinions by other Justices. Justice Kagan wrote separately to reflect her agreement with the majority's approach on this point, noting that it made sense to grant injunctive relief "only when the President's inability to fire an agency head affected" an agency's decision. She argued that this line of reasoning, if applied in future cases, could also prevent the unnecessary upheaval of an agency's past decisions by shielding various routine agency actions that "would never have risen to the President's notice."

Justice Thomas, though joining the majority opinion in full, also wrote separately to address an issue he thought was glossed over—that "[t]he government does not necessarily act unlawfully even if a removal restriction is unlawful in the abstract." Here, he wrote, for a court to grant relief, it must conclude that either the implementation or adoption of the Third Amendment was unlawful. The parties here had assumed that "the lawfulness of agency action turns on the lawfulness of the removal restriction." In future cases, Justice Thomas encouraged the Court to question that premise and "ensure not only that a provision is unlawful but also that unlawful *action* was taken." As the parties did not raise these issues, Justice Thomas concluded that the majority opinion correctly resolved the questions presented, but he expressed serious skepticism that, on remand, the shareholders could show an unlawful act by the FHFA Director.

By contrast, Justice Gorsuch, who otherwise joined the rest of the majority opinion, was the only Justice who departed from the remedy aspect of the Court's decision. He argued that the task assigned on remand to the lower courts was indeterminate, questioning "how … judges and lawyers [are] supposed to construct the counterfactual history[.]"

Takeaways

Collins represents yet another development in the Court's separation-of-powers jurisprudence that recently has tended to look with skepticism at statutory restrictions on the removal of agency officials. Given the logic of *Seila Law* and *Collins*, Congress's future ability to shield an executive branch agency headed by a single Director from presidential control seems likely foreclosed, at least so long as those entities wield "significant executive power." Whether the few existing agencies—such as the Office of Special Counsel and the Social Security Administration—with a single head protected by a for-cause removal protection are acceptable to the Court remains to be seen. Also, how the principles of these cases apply to other agency officials with removal protections will likely be the subject of future litigation. As discussed above, Justice Kagan and Justice Sotomayor both criticized the majority opinion in *Collins* for what they viewed as an improper expansion of *Seila Law*'s holding.

That said, while the Court's recent decisions in cases challenging removal restrictions identify important limits on Congress's power to shape the executive branch, Congress still has a wide assortment of tools to shape and influence executive branch activities. The Court's approach to crafting a remedy for the plaintiffs in *Collins* suggests that the immediate practical effects of litigation challenging the structure of an agency may be somewhat tempered from what a potential challenger to a statute might otherwise expect. As explained above, the Court remanded the case to the lower courts to determine whether the shareholders suffered harm as a result of the unconstitutional removal restriction. Limiting the remedy in this way, as Justice Kagan observed, will likely curb the potential impact of an adverse judicial decision on an agency's previous actions, at least for those that would not "capture a President's attention." As an example, Justice Kagan indicated that even if in a future case the Court were to find the removal protection for the head of the Social Security Administration to be unconstitutional, applying this remedial approach would not necessitate overturning the "mass" of decisions that agency had made in the past because most such decisions would have escaped the President's notice.

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