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# Form Over Function: How *Collins v. Yellen* Signals a Threat to the Independence of Multimember Financial Regulatory Agencies

Adam C. Gillette

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## I. Introduction

Independent agencies of the federal government, long-established and well-studied,[1] are purposed by Congress[2] to mediate the "competing political forces" of the legislative and executive branches.[3] In the realm of financial regulation, this statutory independence is critical: "[o]ften, Congress has granted financial regulators such independence in order to bolster public confidence that financial policy is guided by long-term thinking, not short-term political expediency."[4] This Note highlights the consequences of the U.S. Supreme Court's 2021 decision in *Collins v. Yellen* for the independence of multimember agencies—those independent agencies headed and run by several commissioners.[5]

Agencies of the executive branch are subject to the "principle that Article II [of the U.S. Constitution] confers on the President 'the general administrative control of those executing the laws.'"[6] In other words, the head of the executive branch enjoys broad authority to determine who helps to *run* the executive branch.[7] But that authority—including the

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1. *See* Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 37 DUKE L.J. 257, 257 (1988) ("The independent agency has been around for 100 years now . . . .").

2. *See* Marshall J. Breger & Gary J. Edles, INDEPENDENT AGENCIES IN THE UNITED STATES: LAW, STRUCTURE, AND POLITICS 6 (2006) ("When Congress chooses to use the phrase 'independent agency in the executive branch,' or other some such, when it creates an agency or commission, that phrase certainly suggests congressional desire that the agency be independent of the president, but it has no legal effect.").

3. Verkuil, *supra* note 1, at 257 ("[The] popularity [of the independent agency] as an organizational mechanism is more a function of competing political forces within the legislative and executive branches than of any systematic analysis of its effectiveness.").

4. Collins v. Yellen, 141 S. Ct. 1761, 1803–04 (2021) (Sotomayor, J., concurring).

5. *See id.* at 1770 (majority decision) (holding that the structure of the Federal Housing Finance Agency, which was led by a single

Director who was not fireable at will, was unconstitutional as a violation of the separation of powers).

6. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 130 S. Ct. 3138, 3152 (2009) ("The landmark case of *Myers v. United States* reaffirmed the principle that Article II confers on the President 'the general administrative control of those executing the laws.'" (quoting Myers v. United States, 272 U. S. 52, 264 (1926)).

7. *See id.* (noting the President's control over the executive branch).

President's removal power—is subject to limitations, especially when aimed at those "independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause."[8]

As the name suggests, independent agencies are best distinguished from other agencies of the executive branch by the fact of their independence.[9] This independence is promoted through statutory schemes—e.g., requirements of bipartisan appointments, fixed terms of service, and protections against removal—that are "designed to isolate those decisionmakers [at independent agencies] from politics."[10] The bipartisan appointment requirement—that independent agencies be led in part by officials from a party that is not in power at the White House—provides a check on sheer partisanship and power imbalances in decision making.[11] A term of years requirement for appointment staggers the appointment of agency members across presidential terms.[12] And, critically, the removal protections serve to guard against an agency member's removal for purely political reasons.[13]

Independence is key to the success of financial regulators, who make and enforce rules and regulatory law in their supervision of financial institutions.[14] Accordingly, many financial regulatory agencies are independent agencies, including the Consumer Financial Protection Bureau ("CFPB"), the Commodity Futures Trading Commission ("CFTC"), the Federal Deposit Insurance Corporation ("FDIC"), the Federal Reserve ("Fed"), the Federal Housing Finance Agency (FHFA), and the Securities and Exchange Commission ("SEC"). These agencies

8. *Id.* at 3146 (citing Humphrey's Ex'r v. United States, 295 U.S. 602 (1935)).

9. Verkuil, *supra* note 1, at 259 ("The quality that most distinguishes independent agencies from the executive variety is the notion of independence itself.").

10. *Id.* at 259-60; *see also* Henry B. Hogue, Marc Labonte, & Baird Webel, CONG. RSCH. SERV., R43391, INDEPENDENCE OF FEDERAL FINANCIAL REGULATORS: STRUCTURE, FUNDING, AND OTHER ISSUES (2017), https://sgp.fas.org/crs/misc/R43391.pdf [https://perma.cc/7CWM-6TKE] (noting funding source and balance between Congressional and executive oversight as other distinguishing features of an independent agency's independence).

11. Verkuil, *supra* note 1, at 259-60.

12. *Id.* at 260.

13. *Id.*

14. *See* Hogue et al., *supra* note 10, at 3 (noting that "less responsiveness to constituents and other political actors may be inevitable—or even desirable—when the goal is to insulate an agency," like financial regulatory agencies, from political pressures).

are organized around the common characteristics of independent agencies that insulate such agencies from political interference.[15]

One such characteristic is leadership structure.[16] Namely, a single director heads some independent agencies, like the CFPB and the FHFA, which are critical to the regulation of the financial markets.[17] In contrast, multimember agencies or commissions, like the Federal Reserve's Board of Governors, the SEC, the CFTC, and the FDIC, are comprised of several members and are headed by a chair.[18] Through what *Collins* and certain predecessor decisions say about single director agencies, they may bear on multimember agencies.[19]

The *Collins* decision underscores that any *single director* of an independent agency, including those regulating the financial markets, must be removable by the President at will.[20] But herein lies the issue: how will the Court that decided *Collins* and its closely-related predecessor case, *Seila Law v. CFPB*,[21] view the so-called

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15. *Id.*

16. *See, e.g.*, Verkuil, *supra* note 1, at 259-60 (discussing removal protections as a key factor of independence) and 265-66 (noting the increase in policymaking power held by independent agency chairs over the years since such agencies' conception).

17. *See, e.g.*, 12 U.S.C. § 5491(b)(1) (establishing a single Director of the CFPB); 12 U.S.C. § 4512(a), (b)(1) (establishing single Director of FHFA).

18. *See, e.g,* 15 U.S.C. § 78d (establishing the SEC "to be composed of five commissioners to be appointed by the President by and with the advice and consent of the Senate"); 5 U.S.C. app. Reorg. Plan No. 10 of 1950 § 1(a), 64 Stat. 1265 (establishing the Chairman of the SEC); 7 U.S.C. § 2 (establishing "as an independent agency of the United States Government, a Commodity Futures Trading Commission" and providing for the selection, by the President, of a chair); 12 U.S.C. § 1812(a) ("The management of the [Federal Deposit Insurance] Corporation shall be vested in a Board of Directors consisting of 5 members."); 12 U.S.C. §1812(b) (providing that the President, with the "advice and consent of the Senate," shall select a member of the FDIC's board to serve as "Chairperson of the Board of Directors for a term of 5 years").

19. Collins v. Yellen, 141 S. Ct. 1761, 1761 (2021) ("The Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer" (citing *Seila Law*, 140 S. Ct. at 2205)); *see also* Joseph A. Smith, Jr., *A Tale of Two Agencies: The Travails of The CFPB and FHFA – Chapter 4: The Supreme Court Decision in Collins v. Yellen (nee Mnuchin)*, DUKE FIN. REG. BLOG (June 25, 2021), https://sites.law.duke.edu/thefinregblog/2021/06/25/a-tale-of-two-agencies-the-travails-of-the-cfpb-and-fhfa-chapter-4-the-supreme-court-decision-in-collins-v-yellen-nee-mnuchin/ [https://perma.cc/7DCF-E5K2] (observing that the decisions in Collins and its predecessor case, *CFPB v. Seila Law, "*require[e] that single agency heads be removable by the President at will").

20. *See, e.g.*, Smith, Jr., *supra* note 19 ("*Seila Law* and *Collins* establish a judicially legislated Constitutional framework for the structure of agencies formed to address future crises: requiring that single agency heads be removable by the President at will and possibly allowing the creation of independent multi-member commissions. Whether this framework will serve the public interest remains to be seen.").

21. 140 S. Ct. 2183 (2020).

"independence" of independent *multimember* agencies that have previously enjoyed some level of protection from presidential removal of its members?[22]

For nearly 100 years, since *Humphrey's Executor v. Federal Trade Commission*,[23] the President's ability to remove members (including heads) of independent multimember agencies has been determined by whether the agency wields "quasi-judicial" or "quasi-legislative" powers.[24] "Quasi-judicial" or "quasi-legislative" powers are those judicial or legislative powers exercised not by a court or a legislative body, but rather by an executive agency.[25] In *Humphrey's Executor*, the Court explained this distinction using the Federal Trade Commission ("FTC") as an example.[26] The FTC was "created by Congress to carry into effect legislative policies embodied in the [FTC Act of 1914] in accordance with the legislative standard therein prescribed."[27] The FTC could also "perform other specified duties as a legislative or as a judicial aid."[28] To the Court, the FTC could not "in any proper sense be characterized as an arm or an eye of the executive" because it performed its duties without the approval or direction of the President.[29] The FTC acted "in part quasi[-]legislatively and in part quasi[-]judicially" in executing on the "details" of the "general standard" of preventing unfair trade practices.[30] As the agency's function wasn't

22. *See* Smith, Jr., *supra* note 19 (noting *Seila Law's* implications on agency independence); Bernard W. Bell, *The Appointment and Removal Litigation Ecosystem*, REG. REV. (July 27, 2021) https://www.theregreview.org/2021/07/27/bell-appointment-and-removal-litigation-ecosystem/ [https://perma.cc/N5PG-P4C5].

23. 295 U.S. 602 (1935).

24. *Id.* at 629 ("The authority of Congress, in creating quasi[-]legislative or quasi[-]judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime.").

25. *See id.* at 628 (noting that "The Federal Trade Commission is an administrative body . . . [which] acts in part quasi[-] legislatively and in part quasi[-]judicially . . . [t]o the extent that it exercises any executive function . . . .").

26. *See id.* (explaining the concepts of quasi-judical and quasi-legislative powers).

27. *Id.* at 628.

28. *Id.*

29. *Id.* ("Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control.").

30. *Id.*

fully "executive," in the Court's judgment, the President could not remove its head at will.[31]

The same is true for any independent agency, in which an agency's members work together to exercise their collective expertise, what the Supreme Court called "the trained judgment of a body of experts."[32] Accordingly, the President is restrained from firing the members at will and is only constitutionally permitted to remove members for cause, as defined in the agency's applicable enabling statute.[33] This protection ensures the "coercive" political influence of a President with at-will removal powers over the members of an independent commission or agency does not "threaten[] [its] independence."[34]

But the decision in *Collins,* in comparison to the *Seila Law* decision, evinces a willingness to rethink the longstanding principle set out in *Humphrey's Executor*. In fact, the "language and logic" of these cases suggests that "the agency decisional independence" in *Humphrey's* may be "skating on melting ice."[35] In meaningful part, *Seila Law* struck down removal protections for the single director of the CFPB because that Director exercised "significant executive power."[36] *Collins*, in striking down removal protections for the single Director of the FHFA, dispensed with the limiting principle of whether the agency exercised "significant executive power."[37] Instead, the Court used an even broader blade to cut the removal protections Congress had afforded the Director

31. *Id.* at 630 ("The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.").

32. *Id.* at 624.

33. *See id.* at 629 ("The authority of Congress, in creating quasi[-]legislative or quasi[-]judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes . . . power to . . . forbid their removal except for cause . . . .").

34. *Id.* at 630.

35. Richard W. Murphy, *The DIY Unitary Executive*, 63 ARIZ. L. REV. 439, 446, 468–69 (2021).

36. Seila Law v. CFPB, 140 S. Ct. 2183, 2192 (2020) ("We are now asked to extend [removal power precedents protecting independent agencies] to a new configuration: an independent agency that wields significant executive power and is run by a single individual who cannot be removed by the President unless certain statutory criteria are met. We decline to take that step.").

37. Collins v. Yellen, 141 S. Ct. 1761, 1801 (2021) (Kagan, J., concurring).

of the FHFA.[38] As Justice Kagan noted in her concurrence,[39] after *Collins,* any agency led by a single director, "no matter how much executive power it wields, now becomes subject to the requirement of at-will removal."[40] Indeed, as the majority put it directly, after *Collins,* "the nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head."[41]

Ultimately, making sense of this case law requires answering one question: what consequences are threatened for independent, multimember agencies that regulate the financial markets by the expansive rationale the Court employed in *Collins*? Put another way, after *Collins*, what remains of the quasi-judicial/quasi-legislative test in *Humphrey's Executor*? This Note answers that question in six parts. Part II recaps the *Seila Law* decision as setting the stage for *Collins*.[42] Part III discusses the Court's decision in *Collins*, with a particular emphasis on the question that case presented on the President's removal power.[43] Part IV compares the reasoning of *Humphrey's Executor* with that employed by the Court in *Collins* and *Seila Law* and also draws on the relevant reasoning employed in lower court decisions by the current Supreme Court Justices.[44] Part V, followed by a brief conclusion, applies the reasoning of *Seila Law* and *Collins* to the statutory schemes of four key financial regulatory agencies who each wield enforcement powers within the structure of an independent agency—the Federal Reserve's Board of Governors, the SEC, the CFTC, and the FDIC—to show how future challenges to these agencies' structures, spurred by the reasoning of *Collins* and its kin, may threaten the stability and independence of these agencies, impacting regulators and financial professionals.[45]

## II. *SEILA LAW* SETS THE STAGE

38. *Id.* at 1800-01 (noting her "objection . . . to the majority's extension of *Seila Law*'s holding").

39. *Id.* (disagreeing with the substance of the majority' reasoning, but joining the decision for purposes of stare decisis).

40. *Id.* at 1801.

41. *Id.* at 1784.

42. *See infra* Part II.

43. *See infra* Part III. This Note, in its limited scope, does not discuss the questions of statutory authority and remedies raised in *Collins*.

44. *See infra* Part IV.

45. *See infra* Part V.

*A. The Background of* Seila Law

*Collins,* decided in 2021, was the second case in as many years challenging the constitutionality of a single agency head of an independent agency.[46] Before *Collins*, the Supreme Court had ruled in 2020's *Seila Law v. CFPB* that the CFPB's leadership by a single director removable only for cause—that is, "inefficiency, neglect, or malfeasance"—was a violation of the separation of powers doctrine.[47] Key to the Court's ruling was its view that the CFPB was an "independent agency that wields *significant executive power*."[48] The CFPB was given that power from its inception.[49]

In the wake of the Global Financial Crisis of 2008, Congress created the CFPB as part of the landmark Dodd-Frank Wall Street Reform and Consumer Protection Act.[50] The CFPB was charged with implementing and enforcing consumer financial protection laws to "ensur[e] that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[51]

To execute this mission, the CFPB was given broad powers to make rules, enforce those rules and other regulations, and conduct adjudicatory and administrative proceedings.[52] Indeed, the CFPB has "the authority to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, and prosecute civil actions in federal court."[53] Through its administrative proceedings, the CFPB can "ensure or enforce compliance with" the

46. *Cf.* Seila Law v. CFPB, 140 S. Ct. 2183 (2020).

47. *Id.* at 2197 (quoting 12 USC § 5491(c)(3)).

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

49. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) of 2010 § 1011, 12 U.S.C. § 5491(c)(3) (creating CFPB and vesting the agency with powers).

50. *Id.*; *see also Wall Street Reform: The Dodd-Frank Act,* THE OBAMA WHITE HOUSE ARCHIVES (Oct. 17, 2021), https://obamawhitehouse.archives.gov/economy/middle-class/dodd-frank-wall-street-reform [https://perma.cc/4PWP-BE9B] (describing Dodd-Frank as "the most far reaching Wall Street reform in history" and aimed at "prevent[ing] the excessive risk-taking that led to the [Global Financial Crisis]").

51. 12 U.S.C. § 5511(a); *see also Seila Law*, 140 S. Ct. at 2193 ("As an initial matter, at its creation, the CFPB was charged with administering eighteen existing federal statutes, including the Air Credit Reporting Act, the Fair Debt Collection Practices Act, and the Truth in Lending Act." (citing 12 U.S.C. §§ 5512(a), 5481(12), (14))).

52. *See, e.g.*, 12 U.S.C. § 5563(a) (generally describing the CFPB's authority to hold adjudicatory proceedings).

53. *Seila Law*, 140 S. Ct. at 2193 (citing 12 U.S.C. §§ 5562, 5564(a), (f)).

statutes and regulations it is charged to administer.[54] The agency has the "jurisdiction to grant any appropriate legal or equitable relief," and the power, through officers of the agency to "issue subpoenas, order depositions, and resolve any motions filed by the parties."[55] These enforcement powers would become the subject of the *Seila Law* proceedings.

### *B. The* Seila Law *Litigation*

In 2017, the CFPB issued a civil investigative demand (i.e., a subpoena) to Seila Law, a California-based law firm that provides debt-related legal services,[56] to determine whether Seila Law had "engag[ed] in unlawful acts or practices in the advertising, marketing, or sale of debt relief services."[57] Seila Law refused to comply with the demand, "objecting that the agency's leadership by a single Director removable only for cause violated the separation of powers."[58] The district court disagreed and enforced the demand, and the Ninth Circuit affirmed that ruling.[59]

The Supreme Court reversed, holding that "the CFPB's leadership by a single individual removable only for inefficiency, neglect, or malfeasance violate[d] the separation of powers."[60] The cornerstone of the Court's ruling was the degree to which the "Director's enforcement authority" was "a quintessentially executive power" beyond what the members of independent agencies with removal protections should possess.[61]

The Court detailed what it viewed as the significant scope and strength of the powers that the CFPB possessed.[62] As evidence of the CFPB's "potent enforcement powers," the Court noted that "[s]ince its inception, the CFPB has obtained over $11 billion in relief for over 25 million consumers, including a $1 billion penalty against a single bank in

54. 12 U.S.C. § 5563(a).
55. *Seila Law,* 140 S. Ct. at 2193 (citing 12 U.S.C. § 5565(a)(1) and 12 C.F.R. § 1081.104(b)(9)).
56. *Id.* at 2194.
57. CFPB v. Seila Law, 2017 WL 6536586, at *1 (C.D. Cal. Aug. 25, 2017).
58. *Seila Law*, 140 S. Ct. at 2194.
59. CFPB v. Seila Law, 923 F.3d 680 (9th Cir. 2019), *vacated and remanded*, 140 S. Ct. 2183 (2020).
60. *Seila Law,* 140 S. Ct. at 2197.
61. *Id.* at 2200.
62. *Id.* at 2193-94.

2018."[63] Considering these powers and the CFPB's success in wielding them, the Court reasoned that "the CFPB Director is hardly a mere legislative or judicial aid" as the members of an independent agency might be.[64] Instead, the Court reasoned that the CFPB Director "possesses the authority to promulgate binding rules fleshing out 19 federal statutes," including a broad prohibition on unfair and deceptive practices in a major segment of the U.S. economy.[65]

While the fact of the CFPB's single Director, unchecked by other commissioners, loomed large in the Court's reasoning, the *Seila Law* ruling presumably established a new conjunctive test for whether the members or chairs of an independent agency could receive removal protections: "*Humphrey's Executor* permitted Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions *and was said not to exercise any executive power*."[66] In sum, the protections extend to independent agencies that meet four criteria: (1) a multimember body of experts, (2) balanced along partisan lines, (3) performing legislative and judicial functions, and (4) *not* exercising any executive power in the "constitutional sense" (that is, exercising the executive's power to enforce the laws).[67] *Seila Law* propped open the door for a new conception of independent agency removal powers to walk through.

Justice Kagan's concurrence helps to articulate this new conception of removal power, one that to her was "wrong in every respect."[68] To her, the issue was not about single directors or multimember agencies: "[i]f a removal provision violates the separation of powers, it is because the measure so deprives the President of control over an official as to impede his own constitutional functions."[69] The majority's decision, dragging the CFPB's leadership structure into a net of unconstitutionality, abrogated the authority of Congress to "enact[]

63. *Id.* at 2193 (citing 2015 CFPB FIN. REP. 3; Press Release, Consumer Fin. Prot. Bureau, Bureau of Consumer Financial Protection Announces Settlement with Wells Fargo for Auto-Loan Administration and Mortgage Practices (Apr. 20, 2018), https://www.consumerfinance.gov/about-us/newsroom/bureau-consumer-financial-protection-announces-settlement-wells-fargo-auto-loan-administration-and-mortgage-practices/).

64. *Id.* at 2200.

65. *Id.*

66. *Id.* at 2199.

67. *Id.* at 2198 (quoting Humphrey's Ex'r v. FTC, 295 U.S. 602, 628 (1935)).

68. *Id.* at 2255 (Kagan, J., concurring).

69. *Id.*

measures to create spheres of administration—especially of financial affairs—detached from direct presidential control."[70] The next year, the majority decision in *Collins* would widen that net.

## III. *COLLINS* CREATES BROADER REMOVAL POWERS FOR THE PRESIDENT

### *A. The Creation of the FHFA*

In 2021, the Court again considered whether a single agency Director, removable only "for cause," violated the separation of powers between Congress and the President.[71] Drawing on the *Seila Law* decision, which was "all but dispositive" of the issue, the Court in *Collins* held that the Housing and Economy Recovery Act of 2008's "for-cause restriction" on the President's authority to remove the Director of the FHFA "violate[d] the separation of powers."[72]

Congress created the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") in the mid-twentieth century to bolster the health of the United States' home mortgage market.[73] These companies are for-profit corporations and are owned by private shareholders.[74] By purchasing mortgages and pooling them into mortgage-backed securities which are sold to investors, the companies "relieve mortgage lenders of the risk of default and free up their capital to make more loans."[75] This freer-flowing capital "increases the liquidity and stability of America's home lending market" and "promotes access" to credit for homebuyers.[76] Over time, this proved a successful strategy: in 2007, on the cusp of the Global Financial Crisis of 2008, Fannie Mae and Freddie Mac had combined portfolios valued at $5 trillion, which represented nearly half of the country's mortgage market.[77] However, that portfolio was hit hard as the

70. *Id.* at 2225.
71. Collins v. Yellen, 141 S. Ct. 1761, 1770 (2021).
72. *Id.* at 1783.
73. *See id.* at 1771 (citing National Housing Act Amendments of 1938, ch. 13, 52 Stat. 8, 23, 12 U.S.C. § 1717(a)(1) (creating Fannie Mae); Federal Home Loan Mortgage Corporation Act, Pub. L. No. 91-351, § 303, 84 Stat. 450, 451 (1970), 12 U.S.C. § 1452(a)(1) (creating Freddie Mac)).
74. *See* Housing and Urban Development Act of 1968 § 801, 82 Stat. 536, 12 U.S.C. § 1716b ("[The] Federal National Mortgage Association[] will be a . . . private corporation . . . ."); 12 U.S.C. § 1452(a)(1) (establishing Freddie Mac as a private corporation).
75. Jacobs v. FHFA, 908 F.3d 884, 887 (3d Cir. 2018).
76. *Collins,* 141 S. Ct. at 1771.
77. *Id.* at 1771.

crisis unfolded: in 2008, the companies *lost* more than they had *earned* in the prior 27 years.[78]

Congress responded to this 2008 crisis to protect the future of America's housing market.[79] Through the Housing and Economic Recovery Act of 2008 ("HERA"),[80] Congress gave the Treasury the power to purchase stock at any time from Fannie Mae and Freddie Mac to benefit the financial and housing markets.[81] But perhaps more consequentially, Congress also created the FHFA,[82] which was empowered to take a broad set of actions to regulate Fannie Mae and Freddie Mac.[83] The products of Congress' response were disputed in *Collins* more than a decade later.[84]

### *B. FHFA's Enforcement Power and Conservatorships*

Under HERA, the FHFA was to be led by a single Director, appointed by the President and confirmed by the Senate.[85] That Director would serve a five-year term, but he or she could be removed by the President "for cause."[86] As the *Collins* Court put it, the FHFA, under the Director's leadership, was "tasked with supervising nearly every aspect of the companies' management and operations."[87] The scope of that supervision was broad, encompassing powers to control transfers to the companies and the offloading of the companies' assets, mandate

78. FED. HOUS. FIN. AGENCY, OFF. OF INSPECTOR GEN., WPR-2013-002, ANALYSIS OF THE 2012 AMENDMENTS TO THE SENIOR PREFERRED STOCK PURCHASE AGREEMENTS 5 (2013), https://www.fhfaoig.gov/Content/Files/WPR-2013-002_2.pdf [https://perma.cc/3GED-9QVC] ("In 2008, Fannie Mae lost $58.7 billion and Freddie Mac lost $50.1 billion. To put these losses in perspective, over the 37-year period from 1971 to mid-year 2008, Fannie Mae and Freddie Mac together earned $95 billion, less than they lost in 2008 alone.").

79. *See* Housing and Economic Recovery Act (HERA) of 2008, Pub. L. No. 110–289, 122 Stat. 2654 (addressing the fallout from the Global Recession).

80. *Id.*

81. 12 U.S.C. §§ 1455(l)(1), 1719(g)(1).

82. 12 U.S.C. § 4511(b) (establishing the FHFA).

83. 12 U.S.C. § 4502(20) (defining which entities would be regulated by FHFA and including Fannie Mae and Freddie Mac in that definition). The FHFA replaced The Office of Federal Housing Enterprise Oversight ("OFHEO"), the regulatory body that previously oversaw Fannie Mae and Freddie Mac. *See FHFA Timeline*, FED. HOUS. FIN. AGENCY, https://www.fhfa.gov/AboutUs/Timeline [https://perma.cc/3FQW-8SRH].

84. *See* Collins v. Yellen, 141 S. Ct. 1761, 1771 (2021).

85. 12 U.S.C. § 4512(a), (b)(1).

86. 12 U.S.C. § 4512(b)(2).

87. *Collins*, 141 S. Ct. at 1771.

reporting, conduct on-site inspections, and hire additional third-party firms to perform further reviews.[88]

Furthermore, that oversight and regulatory authority included the power to serve as the companies' conservator and take all actions "necessary to put [either of the companies] regulated entity in a sound and solvent condition."[89] Under the conservatorship, the FHFA would be charged with controlling and directing the operations of the companies, keeping them in "safe and solvent financial condition."[90] As conservator, the FHFA could: (1) "take over the assets of and operate [the companies] with all the powers of the shareholders, the directors, and the officers of the [companies] and conduct all [the companies'] business;" (2) "collect all obligations and money due to the [companies];" (3) "perform all functions of the [companies] which are consistent with the Conservator's appointment;" (4) "preserve and conserve the assets and property of the [companies];" and (5) "contract for assistance in fulfilling any function, activity, action or duty of the Conservator."[91]

The FHFA put Fannie Mae and Freddie Mac into conservatorship in September of 2008, less than two months after HERA was enacted and in the midst of a global financial meltdown.[92] Immediately, FHFA and the Treasury went to work flexing the powers that HERA had given them: the FHFA entered into purchase agreements with the Treasury, which

88. *Id.* at 1771-72 ("For example, the Agency must approve any new products that the companies would like to offer. [12 U.S.C.] § 4541(a). It may reject acquisitions and certain transfers of interests the companies seek to execute. § 4513(a)(2)(A). It establishes criteria governing the companies' portfolio holdings. § 4624(a). It may order the companies to dispose of or acquire any asset. § 4624(c). It may impose caps on how much the companies compensate their executives and prohibit or limit golden parachute and indemnification payments. § 4518. It may require the companies to submit regular reports on their condition or 'any other relevant topics.' § 4514(a)(2). And it must conduct one on-site examination of the companies each year and may, on any terms the Director deems appropriate, hire outside firms to perform additional reviews. §§ 4517(a)–(b), 4519.").

89. 12 U.S.C § 4617(b)(2)(D) (giving the Director of the FHFA the authority to put a regulated entity, including Fannie Mae and/or Freddie Mac, into conservatorship). When acting as a conservator, the FHFA can "take control of a regulated entity's assets and operations, conduct business on its behalf, and transfer or sell any of its assets or liabilities." *Collins,* 141 S. Ct. at 1776.

90. *Questions and Answers on Conservatorship,* FED. HOUS. FIN. AGENCY, 1 (Sept. 15, 2020), https://www.treasury.gov/press-center/press-releases/Documents/fhfa_consrv_faq_090708hp1128.pdf [https://perma.cc/NJP4-BXFJ].

91. *Id.* at 2.

92. *Collins,* 141 S. Ct. at 1772.

exercised its authority to buy the companies' stock.[93] Pursuant to these agreements, the Treasury would provide Fannie Mae and Freddie Mac each with up to $100 billion in capital, a kind of cash reserve on which the companies could draw in any quarter "in which its liabilities exceeded its assets."[94] In return, the Treasury received one million shares of senior preferred stock in each company, specially created to help facilitate this deal.[95]

As holder of those shares, the Treasury had four key entitlements, each of which stood to enrich the Treasury or protect its investments in the companies.[96] First, the Treasury received a senior liquidation preference equal to $1 billion in each company, with a dollar-for-dollar increase every time the company drew on the capital commitment. In other words, in the event the FHFA liquidated Fannie Mae or Freddie Mac, the Treasury would have the right to be paid back $1 billion, as well as whatever amount the company had already drawn from the capital commitment, before any other investors or shareholders could seek repayment.[97] Second, the Treasury was given warrants, or long-term options, to purchase up to 79.9% of the companies' common stock at a nominal price.[98] Third, the Treasury became entitled to a quarterly periodic commitment fee, which the companies would pay to compensate the Treasury for the support provided by the ongoing access to capital.[99] Finally, the companies were obligated to pay the Treasury quarterly cash dividends at an annualized rate equal to 10% of the Treasury's outstanding liquidation preference.[100]

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93. *See* Amended and Restated Senior Preferred Stock Purchase Agreement Between the United States Department of the Treasury and the Federal National Mortgage Association FED. HOUS. FIN. AUTH. (Sept. 26, 2008), https://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/FNM/SPSPA-amends/FNM-Amend-and-Restated-SPSPA_09-26-2008.pdf [https://perma.cc/K6GQ-7YM9]; Amended and Restated Senior Preferred Stock Purchase Agreement Between the United States Department of the Treasury and the Federal Home Loan Mortgage Corporation, U.S. DEPT. OF THE TREASURY (Sept. 26, 2008), https://www.treasury.gov/press-center/press-releases/Documents/seniorpreferredstock purchaseagreementfrea.pdf [https://perma.cc/KX4S-US4Z].

94. *Collins,* 141 S. Ct. at 1771-72.

95. *Id.* at 1773.

96. *See id.* (listing the Treasury's entitlements and explaining how each would return funds to the government).

97. *Id.*

98. *Id.*

99. *Id.*

100. *See id.* (explaining how the money the companies drew from Treasury would be owed back, leading to more borrowing).

As they entered financial recovery, these companies drew more money from the Treasury in the years that followed. Because they paid the Treasury a fixed-rate dividend, a vicious cycle began.[101] The more money the companies drew from Treasury, the more they owed back, to the point that they would draw money from Treasury just to pay back a previous year's dividend.[102]

Seeking to end this cycle, the FHFA and Treasury amended the stock purchase agreement a final time in 2012.[103] This amendment created the "Net Worth Sweep": if, at the end of a quarter, the net worth of either of the companies exceeded its capital reserve, the company would be required to pay that surplus back to the Treasury, sweeping the excess net worth back to the Treasury.[104] "But if a company's net worth at the end of a quarter did not exceed the reserve or if it lost money during a quarter, the amendment did not require the company to pay anything."[105] After this amendment, the companies' financial health improved.[106] The agreement was amended one last time in January of 2021 to the terms currently in effect.[107] This most recent change "suspends the companies' quarterly dividend payments until they build up enough capital to meet certain specified thresholds," which could take several years."[108]

In 2016, shareholders of the companies brought suit seeking various forms of relief and return of dividend payments, further alleging that the FHFA had exceeded its statutory authority by enacting the Net Worth Sweep.[109] The shareholders also alleged a more fundamental flaw: that the leadership structure of the FHFA was unconstitutional.[110]

### C. *The* Collins *Litigation*

101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 1774.
106. *Id.*
107. *Id.* (citing Letters from S. Mnuchin, Secretary of Treasury, to M. Calabria, Director of the FHFA (Jan. 14, 2021)).
108. *Id.* at 1775.
109. *See id.* at 1775 (describing shareholders' cause of action).
110. *Id.* ("[Petitioners] asked for various forms of equitable relief, including a declaration that the third amendment [enacting the Net Worth Sweep] violated the Recovery Act and that the FHFA's structure is unconstitutional.").

As many predicted, given the similarity between the leadership structure of the FHFA and that of the CFPB challenged in *Seila Law,* and under the force of the bright-line ruling in *Seila Law,*[111] the Court in *Collins* held that the single Director structure of the FHFA was an unconstitutional encroachment on the President's authority in violation of the separation of powers.[112] Indeed, to the Court, "[a] straightforward application of *Seila Law*'s reasoning dictate[d] the result . . . ."[113]

But critically, the Court seemed to expand its ruling from *Seila Law*: nowhere was there mention of the "significant executive power" that had been the fatal flaw in the structure of CFPB.[114] Instead, the Court reasoned that "the nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head."[115] *Collins* took a sharper approach: because the "removal power helps the President maintain a degree of control over the subordinates he needs to carry out his duties as the head of the Executive Branch, and it works to ensure that these subordinates serve the people effectively and in accordance with the policies that the people presumably elected the President to promote," removal power is "essential to subject Executive Branch actions to a degree of electoral accountability."[116] Simply, as the Court put it, "the Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer," and so the removal protections for the Director of the FHFA were struck down as unconstitutional.[117]

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111. *See, e.g.*, Jackson S. Freeman, *Removal for Cause: Seila Law and the Future of the CFPB and FHFA*, 25 N.C. BANKING INST. 367 (2021) (predicting that the holding in *Seila Law* likely meant the Court would find the FHFA's single Director unconstitutional when taking up the issue in *Collins*).

112. *See Collins*, 141 S. Ct. at 1784 (announcing holding).

113. *Id.*

114. *Cf.* Seila Law v. CFPB, 140 S. Ct. 2183, 2192 (2020) (declining to extend removal protections to the Director of the CFPB and noting that the CFPB "wields significant executive power").

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

116. *Id.*

117. *Id.* at 1787 (quoting *Seila Law*, 140 S. Ct. at 2205). If the *Collins* majority decision picked up where *Seila Law*'s left off, so did Justice Kagan's concurrence. Justice Kagan noted that the majority decision "careen[ed] right past" the "boundary line" of "significant executive power" that had been so crucial to the *Seila Law* decision. *Collins*, 141 S. Ct. at 1801 (Kagan, J., concurring). "Without even mentioning *Seila Law*'s significant executive power framing," Justice Kagan alleged, the majority "announce[d] . . . that the constitutionality of removal restrictions does not hinge on the nature and breadth of an agency's authority. *Id*. To be sure, the majority took care to hang its ruling on the fact that the FHFA was led by a *single* agency Director. *See id.* at 1784 (majority opinion). But something more underpinned the decision,

## IV. THE *COLLINS* DECISION CALLS INTO QUESTION THE LEADERSHIP STRUCTURE OF MULTIMEMBER AGENCIES

Under *Collins*, a single director of an independent agency can be fired at will despite a statutory provision providing removal only for cause.[118] The question then is: how might the Supreme Court rule on removal only for cause of independent multimember agency members?

### A. *The Removal Ecosystem*

*Humphrey's Executor*[119] exists within what scholars have dubbed "the removal litigation ecosystem" of Supreme Court precedent concerning independent agencies.[120] Ten years prior to the decision in *Humphrey's Executor*, *Myers v. United States*[121] provided that as a general proposition, the President may remove executive branch officials that he or she nominates and the Senate confirms—in that case, a Postmaster in Oregon—without the consent of the legislature.[122] This ruling undergirded the later decision in *Humphrey's* that created the quasi-judicial and quasi-legislative exceptions to this power.[123] Where *Myers* provided an outer bound of the President's absolute power, a 1957 case, *Wiener v. United States,*[124] set an absolute *restriction* on that power.[125] In that case, the Court held that President Eisenhower could *not* remove a member of the War Claims Commission because of the commission's "intrinsic judicial character."[126] In sum, it is this "ecosystem" of cases that *Seila Law* and *Collins* may disrupt, and members of the Court have expressed openness to spurring that disruption.[127]

too—the majority's view that "[a]t-will removal ensures that the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." *Id*. at 1784.

118. *See id.* at 1770 (concluding that "the FHFA's structure [of a single Director fireable only for cause] violates the separation of powers").

119. *See also supra* Part I (laying out basic principles of removal power derived from *Humphrey's Executor*).

120. Bell, *supra* note 22.

121. 272 U.S. 52 (1926).

122. *Id.* at 121-22.

123. Humphrey's Ex'r v. United States, 295 U.S. 602, 629-30 (1935).

124. 357 U.S. 349 (1958).

125. *Id.* at 353-54.

126. *Id.* at 355.

127. Bell, *supra* note 22; *see also* discussion *infra* Sections IV.B-D. (noting the jurisprudence of current Justices of the Supreme Court).

### B. *Justice Thomas's Hardline View*

As an initial matter, some Justices seem fully willing to overturn any removal protections for independent agencies.[128] In his concurrence in *Seila Law*, Justice Thomas wrote that the "decision in *Humphrey's Executor* poses a direct threat to our constitutional structure, and, as a result, the liberty of the American people."[129] Noting that the *Seila Law* decision "repudiated almost every aspect of *Humphrey's Executor*," Justice Thomas offered that he would "repudiate what is left of this erroneous precedent" when given a future opportunity.[130] He did so with his vote in *Collins*, joining the majority decision in full.[131]

### C. *Justices Gorsuch and Kavanaugh—Agencies as Encroachment on Liberty*

The Gorsuch concurrence in *Collins* evinces a similar distrust for the removal protections of independent agencies.[132] To Justice Gorsuch, "removal restrictions may be a greater constitutional evil than appointment defects, [because] new Presidents always inherit thousands of Executive Branch officials whom they did not select."[133] Accordingly, at-will removal power "allows a new President to shape his administration and respond to the electoral will that propelled him to office."[134] This is because, in his view, "[f]ew things could be more perilous to liberty than some 'fourth branch' that does not answer even to the one executive official who is accountable to the body politic"[135] In examining how a future Court may rule on the removal protections of independent agencies, it is difficult to read this as anything but a signal that the Court is willing to reconsider the protections insulating multimember agency directors from at-will firing.

Then-Judge Kavanaugh's emphatic dissent in the D.C. Circuit's *PHH Corp. v. CFPB* also reflects his serious doubts about for-cause

128. *See* Seila Law v. CFPB, 140 S. Ct. 2183, 2212 (2020) (Thomas, J., concurring) (writing that he would "repudiate what is left" of *Humphrey's Executor*).

129. *Id.* at 2211.

130. *Id.* at 2212.

131. *See* Collins v. Yellen, 141 S. Ct. 1761, 1789 (Thomas, J., concurring).

132. *See id.* at 1796-97 (Gorsuch, J., concurring) (expressing concerns over what he views as improper removal restrictions).

133. *Id* at 1796.

134. *Id.*

135. *Id.* at 1797.

removal structures for agency heads, even for those commissioners who together collectively lead multimember agencies.[136] As he expressed in the dissent:

> The independent agencies collectively constitute, in effect, a headless fourth branch of the U.S. Government. They hold enormous power over the economic and social life of the United States. Because of their massive power and the absence of Presidential supervision and direction, independent agencies pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances.[137]

Judge Kavanaugh did note that multimember "independent agencies do not concentrate all power in one unaccountable individual, but instead divide and disperse power across multiple commissioners or board members."[138] However, he was also clear in his view that those agencies "such as the Federal Trade Commission, the Federal Communications Commission, the Securities and Exchange Commission, the National Labor Relations Board, and the Federal Energy Regulatory Commission . . . exercise[e] substantial executive authority"—the same level of executive authority that proved fatal to removal protections in *Seila Law.*[139]

### *D. What This Might Mean for the Court's Jurisprudence on Removal Powers Moving Forward*

There are three current Justices of the Supreme Court on record with their severe doubts as to the constitutionality of removal protections for heads of independent agencies.[140] Adding Chief Justice Roberts, who wrote for the majority in *Seila Law*, and Justice Alito, who wrote for the majority in *Collins,* provides a possible five votes before even counting

136. *See* PHH Corp. v. CFPB, 881 F.3d 75, 164 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting), *abrogated by* Seila Law v. CFPB, 140 S. Ct. 2183 (2020) (taking aim at the "headless fourth branch" of government).

137. *Id.* at 165.

138. *Id.*

139. *Id.* at 164.

140. *See supra* Sections IV.B-C.

Justice Barrett, who joined the Court's decision in *Collins*[141] but whose fuller views on the topic are less well known.[142] This shift in the Court's thinking, as reflected in the views of its members, may indeed have implications for all independent agencies, including the financial regulatory agencies.

## V. SYNTHESIZING THE PRINCIPLES FROM *COLLINS* TO PREDICT HOW THE SUPREME COURT MIGHT RULE ON MULTIMEMBER AGENCIES IN THE FUTURE

Three key independent financial regulatory agencies may be severely disrupted by this trend in the Court's jurisprudence.[143] As noted previously, independent agencies vested with powers of financial regulation are meant to give the public confidence that financial policy is not subject to the whims of "political expediency."[144] This may no longer be the case.

### *A. Impact on the Federal Reserve's Board of Governors ("BOG")*

The Fed's BOG structure bears the hallmarks of an independent agency. For example, the seven-member BOG is comprised of members, or governors, who are nominated by the President and confirmed by the Senate to staggered fourteen-year terms.[145] Consideration is given to the

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

142. *See President Trump Nominates Judge Amy Coney Barrett: Initial Observations*, CONG. RSCH. SERV. 2 (Sept. 28, 2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10540 [https://perma.cc/4T7Y-4ZWL] ("Because she became a judge in 2017, she has written fewer decisions, concurrences, and dissents compared to other recent nominees who served on the bench for several additional years. And although her scholarly publications expound theories of constitutional and statutory interpretation, her engagement with these topics from an academic standpoint does not necessarily predict whether she would adopt any particular methodology as a Supreme Court Justice.").

143. *See* Brief of Court-Appointed Amicus Curiae at 3, *Collins*, 141 S. Ct. 1781 (No. 19-422) ("If the Court were to hold that the FHFA's structure violates the Constitution, moreover, the repercussions would extend far beyond this case. Other features of the Federal Government— including the Federal Reserve and the Civil Service— would also be vulnerable to attack.").

144. *Collins,* 141 S. Ct. at 1803–04 (Sotomayor, J., concurring).

145. 12 U.S.C. § 241 ("The Board of Governors of the Federal Reserve System . . . shall be composed of seven members, to be appointed by the President, by and with the advice and consent of the Senate, after August 23, 1935, for terms of fourteen years except as hereinafter provided.").

geographic distribution and professional experience of the governors.[146] The Chair and Vice-Chair are appointed to four-year terms, serving concurrently with their terms as governors.[147]

But within this structure of an independent agency, the BOG wields severe enforcement power. For example, through its Section 19 Letters (named after section 19 of the Federal Deposit Insurance Act),[148] the BOG publicizes individuals who have been "convicted of any criminal offense involving dishonesty or a breach of trust or money laundering, or ha[ve] agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such offense," and, pending prior regulatory or judicial approval, prohibits those individuals from "participat[ing], directly or indirectly, in the conduct of the affairs of any insured depository institution."[149] Moreover, the BOG, through the Federal Reserve's enforcement actions, can issue civil money penalties to violative entities, including banks and other institutions but also individuals.[150] Standing against the rather modest enforcement powers of the FHFA, a future Court might see the BOG as a body of an independent agency wielding executive power and thus find removal protections for its members unconstitutional, as it did in *Collins*.[151]

### *B. Impact on the SEC*

The SEC is comprised of five Commissioners, appointed by the President with the advice and consent of the Senate, from which a chair

146. *Id.*
147. *Id.* § 242.
148. *Id.* § 1829.
149. *Id.* (describing the Federal Reserve's enforcement powers against individuals); *see also Enforcement Actions*, BD. GOVERNORS FED. RSRV. SYS. (June 2, 2021), https://www.federalreserve.gov/supervisionreg/enforcement-actions-about.htm [https://perma.cc/F7EJ-D6NB] ("Generally, the Federal Reserve takes formal enforcement actions against the above entities and individuals for violations of laws, rules, or regulations, unsafe or unsound practices, breaches of fiduciary duty, and violations of final orders.").
150. *See, e.g.*, 12 U.S.C. § 504 (providing for the assessment of civil money penalties for violative institutions and individuals).
151. *Cf.* Collins v. Yellen, 141 S. Ct. 1761, 1776, 1784 (noting that a "straightforward" application of *Seila Law* required striking down removal protections, as "removal power helps the President maintain a degree of control over the subordinates he needs to carry out his duties as the head of the Executive Branch, and it works to ensure that these subordinates serve the people effectively and in accordance with the policies that the people presumably elected the President to promote").

is selected.[152] The President is free to name a new chair from the members at any time.[153] But the Court has also reasoned that "[t]he Commission's powers . . . are generally vested in the Commissioners jointly, not the Chairman alone," and "[a]s a constitutional matter," has noted that a multimember body can *itself* be the head of a "department that it governs."[154] If the President must have the ability to remove agency members to "maintain a degree of control over the subordinates he needs to carry out his duties as the head of the Executive Branch,"[155] then it may follow that under *Collins*, the Commission members, each comprising a part of the collective "department head," must be removable at-will and not protected by the statutory term of years for which they are appointed.[156]

Furthermore, the SEC has enforcement powers through formal investigations like those of the CFPB, highlighted by the Court in *Seila Law*.[157] Commission staff members, including lawyers, accountants, analysts, and investigators, can all be designated "officers of the Commission" to conduct a formal investigation.[158] The SEC can enforce its subpoenas through court order, and noncompliant witnesses can be held in contempt.[159] Both in informal and formal SEC investigations, witnesses have the right to be represented by counsel and invoke their Fifth Amendment rights.[160]

If all SEC Commissioners are functionally "heads" of the Commission, and if the Commission has major enforcement powers, those heads seem to be exercising the "significant executive power" that was so crucial in *Seila Law*.[161] It is hard to see how the protections once

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152. *See, e.g.*, 15 U.S.C. § 78d(a) (establishing the SEC "to be composed of five commissioners to be appointed by the President by and with the advice and consent of the Senate"); 5 U.S.C. app. Reorg. Plan No. 10 of 1950 §1(a), 64 Stat. 1265 (establishing the Chairman of the SEC).

153. *Id*.

154. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 130 S. Ct. 3138, 3163 (2010).

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

156. *See* 15 U.S.C. § 78d(a) (noting that each member is collectively part of the head).

157. *See Seila Law,* 140 S. Ct. at 2193 ("Congress . . . vested the CFPB with potent enforcement powers.").

158. *Id.*

159. *Id.*

160. *Enforcement Manual*, SEC DIV. OF ENF'T (Nov. 28, 2017), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf [https://perma.cc/JN8S-73K6].

161. *Compare* 5 U.S.C. § 78d, *and* 5 U.S.C. app. Reorg. Plan No. 10 of 1950 §1(b)(1), 64 Stat. 1265 (describing the powers of the SEC at its inception) *with* Seila Law v. CFPB, 140

enforced under *Humphrey's Executor* apply in light of the SEC's structure, authority, and the holding in *Collins*. The enforcement powers of the SEC run directly into the teeth of the jurisprudence of the Justices willing to strip members of multimember agencies of removal protections.[162]

### *B. Impact on the Commodity Futures Trading Commission ("CFTC")*

The CFTC has a structure like that of the SEC and commensurate enforcement powers.[163] In fact, the results of the *Seila Law* and *Collins* line of decisions likely bear out for the CFTC almost exactly like they do for the SEC.[164]

But even *those* restrictions may fall under the new *Seila Law-Collins* conception of removal power. Simply put, if a President must be able to remove the members of multimember agencies that wield significant executive power through enforcement tools like those of the SEC or Federal Reserve's BOG, it follows that the term of years protection—which provides that a Commissioner has a fixed term—would be feckless against that prerogative.[165] Though the partisan balance requirements may be even more important than the term of years protections,[166] those, too, would encroach upon the President's ability to remove agency members at will. Perhaps the President could remove a Commissioner notwithstanding a statutory term of years, but the next nominee would need to comply with partisan balance requirements. At bottom, if the President must be able to fire at will, his or her *will* would

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S. Ct. 2183, 2191 (2020) (describing the powers given to the CFPB by odd-Frank Wall Street Reform and Consumer Protection Act).

162. *Compare* discussion *infra* Sections IV.B-D. (noting the jurisprudence of current Justices of the Supreme Court) *with Seila Law*, 140 S. Ct. at 2191 (2020) (describing the powers given to the CFPB by odd-Frank Wall Street Reform and Consumer Protection Act).

163. *See* 7 U.S.C. § 2(a)(2)(A) (establishing the CFTC as an independent agency, providing for the selection of its chair by the President, of a chair, restricting the Commission's partisan composition, and describing the five-year term limit for Commissioners).

164. *Compare* 15 U.S.C. § 78 *with* 7 U.S.C. § 2.

165. *See, e.g.*, 12 U.S.C. §1812(b) (providing that the President, with the "advice and consent of the Senate," shall select a member of the FDIC's board to serve as "Chairperson of the Board of Directors for a term of 5 years").

166. For a discussion of the exact importance of partisan balance within independent agencies, *see generally* Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9 (2018).

be the only removal protection.[167] A President may be able to shape these regulatory agencies to his or her will in a way not previously seen, introducing unpredictability—and perhaps even uncertainty—into a regulatory environment that relies on consistency and expertise.[168]

### C. *Impact on the FDIC*

The FDIC has a five-member board of directors. Of the five members, two are the CFPB Director and Comptroller of the Currency.[169] The remaining three members, including the Chairman, are appointed by the president and serve six-year terms.[170] There is a partisan balance requirement; no more than three of the five Board members may be from the same political party.[171]

The FDIC would be disrupted both by the effects on its own statutory structure and the second-hand effects from the changes that have already come to the removal protections (or lack thereof) for the CFPB and FHFA.[172] This is because the FDIC's membership is determined in part by that of other agencies, with director seats reserved for other agency heads, including the CFPB Director.[173]

## VI. WHAT MIGHT MITIGATE THE CONSEQUENCES *SEILA LAW* AND *COLLINS* HAVE FOR REMOVAL POWERS?

167. But for countervailing forces, *see infra* Part V.

168. *See* Collins v. Yellen, 141 S. Ct. 1761, 1804 (2021) (Sotomayor, J., concurring in part and dissenting in part) ("Congress has granted financial regulators such independence in order to bolster public confidence that financial policy is guided by long-term thinking, not short-term political expediency.").

169. 12 U.S.C. § 1812(a)(1).

170. *Id.*

171. Todd Phillips, *The Impacts of* Seila Law *Beyond Consumer Finance*, DUKE FIN. REG. BLOG (Sept. 30, 2020) (citing 12 U.S.C. § 1812(a)(2)), https://sites.law.duke.edu/thefinregblog/2020/07/09/the-impacts-of-seila-law-beyond-consumer-finance/ [https://perma.cc/Q8CD-4QD9].

172. 12 U.S.C. § 1812(a)-(b) (vesting the FDIC's management in a five-member Board of Directors, with one member selected by the President to serve as "Chairperson of the Board of Directors for a term of 5 years").

173. *See* 12 U.S.C. § 1812. In full, two are the CFPB Director and OCC Comptroller of the Currency, respectively. The remaining three members, including the Chairman, are appointed by the president and serve six-year terms. There is a partisan balance requirement; no more than three of the five Board members may be from the same political party.

Where the President flexes new-found power, Congress may act in response.[174] Scholars have noted that while "statutory restrictions on presidential removal may not be long for this world," Congress's "anti-removal power" would allow for some agency independence.[175] The source of that anti-removal power—that is, the power of Congress to push back against a President's imprudent removal of an independent agency's director—is in the Constitutional scheme that gives Congress a check on the President's appointments.[176]

One source of that power is the Appointments Clause, which allows the Senate to influence presidential appointments by requiring Senate confirmation for certain executive branch officers nominated by the President.[177] Because the Senate must confirm a President's nominee to a position requiring such approval, the Senate wields influence over appointments. But this has second order effects, too: the President may think twice—"rationally hesitate before firing the incumbent in the first place."[178] And it is not just the Senate that holds this power—impeachment is another removal power held by the House, and indeed, even James Madison recognized that "the anti-removal power belongs to Congress as a whole."[179]

Appropriately, some scholars argue that "grounding [agency] independence in Congress's anti-removal power would further political accountability."[180] It seems fitting that this flex of power by Congress would achieve the same goals which animate the reasoning of the Supreme Court Justices who wish to do away with agency independence—creating "political consequences" for how the President and Congress exercise their powers in the realm of appointments and

174. *See* Aaron Nielson & Christopher J. Walker, *Congress's Anti-Removal Power* 1 (Ohio St. Legal Stud. Rsch., Working Paper No. 662, 2021) https://ssrn.com/abstract=3941605 [https://perma.cc/5AGA-AGUL].

175. *Id.* at 4.

176. *Id.*

177. *Id.* at 11 (citing U.S. Const. art. III, § 1).

178. *Id.* at 4 ("This dynamic effect was known to the framers; indeed, Alexander Hamilton identified it in the Federalist as one of the Appointments Clause's great—albeit "silent"—benefits.").

179. *Id.* at 5; *see also* 1 ANNALS OF CONGRESS 517-18 (Joseph Gales ed., 1834) (quoting remarks of James Madison, June 17, 1789) ("[T]he president can displace from office a man whose merits require that he should be continued in it. What will be the motives which the president can feel for such abuse of his power, and the restraints that operate to prevent it? In the first place, he will be impeachable by this house, before the senate, for such an act of maladministration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust.").

180. Nielson & Walker, *supra* note 174, at 9.

removal.[181] In that way, "Congress's anti-removal power . . . provides a political solution to a political problem."[182]

## VII. CONCLUSION

The *Collins* decision has foreclosed any independent agency being headed by a single Director who may be removed only for cause. But one can follow that reasoning to a conclusion that may disturb what had been settled law about the independence and removal protections of multimember agencies: there is enough "smoke" around the Court's thinking concerning the removal power of the President to think that there might be a "fire." Indeed, even the heads of those independent agencies, appointed for terms and allegedly "independent" from the executive, could also be removed by the President at will before the expiration of their statutory term.

*Seila Law* set the table for the *Collins* decision that sounded the final death knell for a single agency director removable only for-cause. Now, all single directors must be removable at will. This leaves an open question about whether heads of multimember independent agencies must also be removable at will or whether they will enjoy their position for the term specified by statute, perhaps serving under the President from a different party than the President who appointed them. Previously, the Court seemed concerned with the *function* of the agency – e.g., *Humphrey's Executor* and the quasi-legislative/quasi-judicial divide.

Now, however, the Court seems concerned with the *form* – is it an independent agency, and if so, does that agency hold enforcement powers? If the President has some control over this agency with enforcement powers, says one reading of the Court's thinking, he or she should have *all* control, and that means directors who may be removed at will.

Statutory changes could also help to introduce more certainty into the regulatory environment around independent agencies. The statutes establishing the SEC, CFTC, and FDIC are silent on removal protections,[183] so it is possible, perhaps even likely, that the Court will interpret them to suggest for-cause removal. In turn, those statutes will

181. *Id.*

182. *Id.*

183. Because there is a term of years provision in the statute, the assumption is that a board member would serve out his or her term absent removal for cause. *See* Verkuil, *supra* note 1, at 260.

be held to the *Seila Law*-*Collins* framework that seems primed to fire off future decisions granting the President the power to remove at-will members of multimember agencies which exercise serious enforcement powers. Any difference between independent agencies and true executive agencies may be nominal.

Such removal power, animated by the unpredictability of politics, would threaten the predictability that financial markets—and the professionals who comprise them—so highly value.[184] At bottom, financial professionals should know that the independent agencies of the last century may be less independent moving forward, but Congress can push back through impeachment, refusal to confirm nominees, or otherwise frustrating a President's agenda in an effort to guard against this expansion of the President's removal powers.

ADAM C. GILLETTE*

184. *See, e.g.*, Charles W. Tyler & E. Donald Elliott, *Administrative Severability Clauses,* 124 YALE L.J. 2286, 2306 (2015) ("Predictability benefits both agencies and regulated entities by encouraging efficient investment."); CPR BLOG (Mar. 2, 2016) http://progressivereform.org/cpr-blog/senate-republicans-flip-flop-on-the-white-house-and-independent-agencies/ [https://perma.cc/489W-JPXP] ("Those who follow the U.S. regulatory system know that White House interference in agency regulatory decision-making is a common and undesirable feature of the rulemaking process."). *But see generally* Dan Awrey & Kathryn Judge, *Why Financial Regulation Keeps Falling Short*, 61 B.C. L. REV. 2295 (2020) (arguing that "the procedural checks on lawmaking meant to promote accountability and legitimacy often fail to further either end" and why [t]he mismatch between the nature of finance and how finance is regulated helps to explain why financial regulation has failed in the past and why it will likely fail again").

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