Three Views of the Administrative State: Lessons from *Collins v. Yellen*

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Introduction

As I was preparing for oral argument in *Collins v. Yellen*,[1] the thought came to me that David Thompson—counsel for the plaintiffs—had a tough job. I had spent hundreds of hours on just the constitutional aspect of this enormous case. Thompson, however, had two additional issues to cover: a complex statutory argument and an important remedial argument. Thompson is a world-class lawyer and was able to handle each issue skillfully, but even so, it is challenging to argue essentially three cases at once. Yet to understand *Collins*—and, indeed, key aspects of the administrative state—one needs to view all three parts at the same time: the statutory debate, the constitutional question, and the remedy.

First, *Collins* concerns the "nationaliz[ation]"—Justice Stephen Breyer's word[2]—of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, better known as Fannie Mae and Freddie Mac or just Fannie and Freddie. Following the housing-market collapse in 2007 and 2008, Congress created the

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[1] 141 S. Ct. 1761 (2021).

[2] Transcript of Oral Argument at 12, Collins v. Yellen, 141 S. Ct. 1761 (2021) (Nos. 19-422, 19-563) ("[Y]ou could . . . view the shareholders' claim as saying we bought into this corporation, it was supposed to be private as well as having a public side, and then the government nationalized it. That's what they did. If you look at their giving the net worth to Treasury, it's nationalizing the company.").

Federal Housing Finance Agency (FHFA), which promptly placed Fannie and Freddie in conservatorships. As of 2021, those conservatorships remain in place. Since 2012, moreover, following what is called the "Third Amendment" (by the United States and the Supreme Court) or the "Net Worth Sweep" (by the *Collins* plaintiffs), most of Fannie's and Freddie's profits have gone to the U.S. Treasury rather than staying with the companies for the benefit of their private shareholders.[3] In *Collins*, the Court dealt a sharp blow to those private shareholders, unanimously concluding that the FHFA did not exceed its statutory authority as conservator when it adopted the Third Amendment.

Second, *Collins* may be the most pro-"unitary executive" decision in history.[4] In addition to their argument that the FHFA abused its conservatorship authority, the *Collins* plaintiffs also argued that the FHFA is unconstitutionally structured because the president can only remove the FHFA's director "for cause." On this point, the Court agreed with the plaintiffs. Building on—but significantly expanding—the holding in *Seila Law LLC v. CFPB*,[5] the Court held that the president has the constitutional power to remove the head of an agency regardless of how much authority the agency exercises. This reflects the vision of the unitary executive from *Myers v. United States*,[6] but with a twist: Whereas almost all of *Myers*'s broad language was *dicta*, in *Collins*, it's a *holding*.

And third, *Collins* is also a case about constitutional remedies. Despite prevailing—decisively—on the constitutional merits question, it is possible that the plaintiffs will never see a penny of relief; indeed, both Justices Clarence Thomas and Elena Kagan wrote

[3] See Collins, 141 S. Ct. at 1774.

[4] See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 544 (1994) ("The claim made by unitary executivists [is] that the Constitution creates only three branches of government and that the President must be able to control the execution of all federal laws. . . .").

[5] 140 S. Ct. 2183 (2020); see also Ilan Wurman, The Removal Power: A Critical Guide, 2019–2020 Cato Sup. Ct. Rev. 157 (2019) (explaining *Seila Law*).

[6] See Myers v. United States, 272 U.S. 52, 163–64 (1926) ("[A]rticle II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed. . . .").

separately to predict that very outcome.[7] Although agreeing with the *Collins* plaintiffs that Congress cannot restrict the president's ability to remove the head of the FHFA, the Court also held that the mere presence of an unconstitutional restriction on removal does not mean that the agency's actions are per se invalid. Instead, at least when seeking retrospective relief, a plaintiff must show that without the unconstitutional restriction, the agency would have behaved differently—which is no easy task, especially because the evidence necessary to make such a showing may not be publicly available. As a consequence, going forward, many plaintiffs may conclude that the trouble (and expense) of litigating removal issues just isn't worth the candle.

When these three aspects of *Collins* are considered at the same time, the true picture emerges: Federal power is ubiquitous in the housing sector, the White House has extensive control over that power, and the Supreme Court is reluctant to provide much relief to private plaintiffs.

I. Background

Collins is an important case. But it is also complicated. Accordingly, to understand what the Court decided, it is necessary to first appreciate the case's context, which is set forth below.

A. Fannie, Freddie, and the Collapse of the Housing Market

Collins is ultimately a case about Fannie and Freddie, two peculiar—yet consequential—companies. Congress chartered Fannie in 1938 to help "create[] liquidity in the mortgage market."[8] Originally, Fannie was a federal agency, but Congress later turned it "into a public-private, mixed ownership corporation" and then later into "a for-profit, shareholder-owned company."[9] In 1970, Congress chartered Freddie "to help thrifts manage the challenges associated with interest rate risk" and allowed both Fannie and Freddie to "to buy and sell mortgages not

[7] See Collins, 141 S. Ct. at 1795 (Thomas, J., concurring); *id.* at 1802 (Kagan, J., concurring in part and concurring in the judgment in part).

[8] Off. of Inspector General, FHFA, A Brief History of the Housing Government-Sponsored Enterprises 2, https://bit.ly/2TMbXiK.

[9] *Id.* at 2–3.

The CFPB's structure prompted years of litigation, including a lengthy *en banc* decision in the D.C. Circuit that upheld the CFPB's constitutionality over then-Judge Brett Kavanaugh's dissent.[56] After Justice Kavanaugh joined the Supreme Court, a 5-4 majority held in *Seila Law* that the CFPB's structure is unconstitutional because its director "wield[ed] significant executive power," yet was free to disagree with the president about how to use that power.[57] Writing separately, Justices Clarence Thomas and Neil Gorsuch urged the Court to overrule *Humphrey's Executor*, one of the most discussed separation-of-powers cases in the Court's history.[58] By contrast, Justice Kagan—joined by Justices Ruth Bader Ginsburg, Breyer, and Sonia Sotomayor—vigorously dissented from the constitutional holding.[59]

E. My Involvement

After deciding *Seila Law*, the Court granted both the United States's petition and the plaintiffs' petition. That's where I came into the picture. Because the Department of Justice chose not to defend the constitutionality of the FHFA's "for cause" provision, the Court appointed me to try to distinguish the FHFA from the CFPB. With the help of friends and a team of talented students, I identified several potential ways to do that, discussed below. Several months later, in one of the most surreal moments of my life, I found myself arguing constitutional issues with the justices on the telephone during the COVID-19 pandemic.

II. The Supreme Court's Three Answers

In *Collins*, the Court—per Justice Samuel Alito—addressed all three issues identified by the Fifth Circuit: The plaintiff's statutory claim, the plaintiff's constitutional claim, and the appropriate

[56] See *id.* at 77 ("We . . . hold that the . . . provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act shielding the Director of the CFPB from removal without cause is consistent with Article II.").

[57] Seila Law, 140 S. Ct. at 2192.

[58] See *id.* at 2211–12 (Thomas, J., concurring in part).

[59] See *id.* at 2225 ("The text of the Constitution allows these common for-cause removal limits. Nothing in it speaks of removal. And it grants Congress authority to organize all the institutions of American governance, provided only that those arrangements allow the President to perform his own constitutionally assigned duties.") (Kagan, J., dissenting in part).

constitutional remedy. The Court unanimously concluded that the plaintiffs' statutory claim was barred by the Recovery Act's anti-injunction clause; seven justices (all but Justices Breyer and Sotomayor) concluded that the FHFA's structure is unconstitutional, although Justice Kagan concurred only in the judgment; and eight justices (all but Justice Gorsuch) rejected the plaintiffs' argument that the constitutional remedy should be automatic *vacatur* of the Third Amendment.

A. The Scope of the FHFA's "Conservatorship" Authority

The scope of the FHFA's conservatorship authority divided the lower courts.[60] Yet the Supreme Court quickly and unanimously rejected the plaintiffs' statutory arguments. Justice Alito focused on the Recovery Act's unusual provision that allows the FHFA, as conservator or receiver, to act "in the best interests of the regulated entity or the Agency."[61] Suffice it to say, this is not how conservatorship normally works. According to the Court, the FHFA "may aim to rehabilitate the regulated entity in a way that, while not in the best interests of the regulated entity, is beneficial to the Agency and, by extension, the public it serves."[62] Thus, the Court determined that it does not matter "whether the FHFA made the best, or even a particularly good, business decision when it adopted the third amendment"; either way, the Recovery Act's broad anti-injunction clause bars judicial review.[63]

The plaintiffs protested that by precluding Fannie and Freddie from rebuilding capital reserves—and thus potentially dooming them to perpetual conservatorships—the Third Amendment was really a step towards liquidation, which should have triggered the FHFA's receivership rather than conservatorship authority. The Court

[60] In addition to Judge Willett's panel dissent in the Fifth Circuit, Judge Janice Rogers Brown dissented at length in the D.C. Circuit. See Perry, 864 F.3d at 635 ("[E]ven in a time of exigency, a nation governed by the rule of law cannot transfer broad and unreviewable power to a government entity to do whatsoever it wishes with the assets of these Companies.") (Brown, J., dissenting).

[61] 12 U.S.C. § 4617(b)(2)(J)(ii).

[62] Collins, 141 S. Ct. at 1776.

[63] *Id*. at 1778; see also *id*. (declining to opine whether the FHFA made a good decision).

disagreed, concluding that Fannie and Freddie continue to function "at full steam in the marketplace," despite the conservatorships.[64] At the same time, however, the Court did not deny that it may be "years" before Fannie and Freddie can "build up enough capital" to act as (more) ordinary companies.[65]

The Court's reliance on the anti-injunction clause was somewhat surprising—the Justice Department's lead argument concerned the Recovery Act's succession provision, which directs that when the FHFA acts as conservator, it succeeds to "all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity."[66] According to the solicitor general's brief to the Court, this provision barred shareholders from bringing a derivative claim regarding injuries allegedly suffered by Fannie and Freddie that only indirectly harmed shareholders. The plaintiffs countered, however, that their challenge to the Third Amendment was a direct claim. Because the Supreme Court rested its statutory decision on the anti-injunction clause, it did not resolve this issue.[67]

Notably, the plaintiffs raised a nondelegation objection to the Court's reading of the anti-injunction clause, observing that if the FHFA truly has discretion whether to conserve assets, the Recovery Act would not contain an "intelligible principle."[68] The Fifth Circuit agreed and relied on this point as a reason to read the Recovery Act narrowly.[69] The Supreme Court, however, did not address this argument—suggesting that it did not see any nondelegation concerns with the FHFA's broad authority.

[64] *Id.*

[65] *Id.* at 1774; see also *id.* (explaining that the solicitor general told the Court that this process "is expected to take years").

[66] 12 U.S.C. § 4617(b)(2)(A)(i).

[67] The Court did hold that the succession clause was not an obstacle to the plaintiffs' constitutional claim. See Collins, 141 S. Ct. at 1781 ("Here, the right asserted is not one that is distinctive to shareholders of Fannie Mae and Freddie Mac; it is a right shared by everyone in this country.").

[68] Brief for Petitioners at 43, Collins v. Yellen, 141 S. Ct. 1761 (2021) (Nos. 19-422, 19-563).

[69] Collins v. Mnuchin, 938 F.3d 553, 580 (5th Cir. 2019) (en banc).

B. The Continued Rise of the Unitary Executive

Justice Alito, for the Court, also addressed the constitutional question—and here, he authored arguably the strongest endorsement to date of the idea that the president has the constitutional authority to remove anyone in the executive branch. Even limits on removal recognized last year in *Seila Law*—most notably, that the president's removal power applies to those offices that exercise "significant executive power"— no longer apply.[70] The Court also concluded that an acting FHFA director is removable at will and, in so doing, reiterated that Congress must clearly state its intention if it wants removal restrictions.

This is my part of the story. As court-appointed amicus, my job was to defend the FHFA's structure despite *Seila Law*'s holding that the president must be able to remove agency heads. My lead argument focused on the fact that *Collins* concerned an acting director. In their complaint, the plaintiffs challenged the Third Amendment on the ground that it "was adopted by FHFA when it was headed by a single person who was not removable by the President at will."[71] Yet *Acting* Director DeMarco agreed to the Third Amendment, and nothing in the Recovery Act bars the president from firing an acting director for any reason. Even so, the *en banc* Fifth Circuit concluded that the director's removal provision also applies to an acting director because Congress declared that the FHFA is an "independent" agency. According to Judge Willett, allowing the president to remove an acting director at will would "override . . . FHFA's central character."[72] In dissent, Judge Costa objected that the court's conclusion that Congress implicitly gave an acting director protection from removal "is a stark departure from textualist principles."[73]

I put Judge Costa's analysis front and center in my brief. Indeed, I suspected that the Court would unanimously hold that an acting FHFA director is removable at will and that the Court would remand because the Fifth Circuit's constitutional holding rested on an

[70] Seila Law, 140 S. Ct. at 2192.

[71] Complaint ¶ 189, *supra* note 41.

[72] Collins, 938 F.3d at 589. In support, Judge Willett cited *Wiener v. United States*, a 1958 decision in which the Supreme Court inferred removal restrictions for a member of the War Claims Commission. 357 U.S. 349, 353 (1958).

[73] See Collins, 938 F.3d at 621 (Costa, J., dissenting in part).

erroneous premise. I was almost right about the first half of my prediction but very wrong about the second. Eight justices—everyone but Justice Sotomayor[74]—concluded that an acting FHFA director is removable at will.[75] The Court also rejected the suggestion that the term "independent" has a talismanic quality, given that some agencies labeled by Congress as "independent" have no removal restrictions at all, such as the Peace Corps, while other agencies do have removal restrictions but are not labeled "independent," such as the Federal Trade Commission.[76] Rather than remanding, however, the Court concluded that the plaintiffs' "harm is alleged to have continued after the Acting Director was replaced by a succession of confirmed Directors, and it appears that any one of those officers could have renegotiated the companies' dividend formula with Treasury."[77] The Fifth Circuit did not reach this issue, which is debatable. As far as I am aware, nothing suggests that the Treasury Department wanted to renegotiate the Third Amendment in a way beneficial to private shareholders but that the FHFA director stood in the way.

Nonetheless, the Court proceeded to address the constitutional merits of the FHFA director's "for cause" removal restriction. In *Seila Law*, the majority distinguished the FHFA from the CFPB on the ground that the FHFA "regulates primarily Government-sponsored enterprises, not purely private actors," and does "not involve regulatory or enforcement authority remotely comparable to that exercised by the CFPB."[78] Based on those distinctions in *Seila Law*, I offered a number of reasons why *Seila Law* should not control for the FHFA, but none of them succeeded.

First, the Court rejected my argument that an agency must exercise "significant executive power"[79] before the president's removal authority applies, explaining that "the nature and breadth

[74] It is unclear why Justice Sotomayor did not join this portion of the majority opinion; she did not explain herself, and Justice Breyer—who joined her dissent—*did* join this portion of the majority opinion.

[75] See Collins, 141 S. Ct. at 1782.

[76] See *id.* at 1782–83.

[77] *Id.* at 1781.

[78] Seila Law, 140 S. Ct. at 2202.

[79] *Id.* at 2192.

of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head."[80] This expansion of *Seila Law* prompted Justice Kagan to concur only in the judgment; although she believed that *Seila Law* required her to rule against the FHFA's structure, she did so because, in her view, the FHFA *does* exercise "significant executive power."[81] Yet she observed that "[w]ithout even mentioning *Seila Law*'s 'significant executive power' framing, the majority announces that, actually, 'the constitutionality of removal restrictions' does not 'hinge[]' on 'the nature and breadth of an agency's authority.'"[82] Justice Sotomayor (joined by Justice Breyer) dissented on this point, concluding that *Seila Law*'s observation that the FHFA's authority is nothing like the CFPB's means that the FHFA's structure should be upheld.[83]

Second, the Court disagreed that the FHFA's conservatorship function materially distinguishes it from the CFPB. After all, the Court explained, the FHFA does not always act as a conservator—it's a regulator, too.[84] And even as a conservator, "its authority stems from a special statute, not the laws that generally govern conservators and receivers," and "'[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law.'"[85] Furthermore, the Court reiterated that FHFA is not a typical conservator, explaining that "[i]t can subordinate the best

[80] Collins, 141 S. Ct. at 1784.

[81] See *id.* at 1800 ("[The FHFA] wields 'significant executive power,' much as the agency in *Seila Law* did.") (Kagan, J., concurring in part and concurring in the judgment in part).

[82] *Id.* at 1801. Justice Kagan also disputed the majority's "political theory." *Id.* Yet on this point, the majority simply repeated the reasoning from *Seila Law*.

[83] *Id.* at 1803 ("[T]he Court today holds that the FHFA and CFPB are comparable after all, and that any differences between the two are irrelevant to the constitutional separation of powers. That reasoning cannot be squared with this Court's precedents, least of all last Term's *Seila Law*.") (Sotomayor, J., concurring in part and dissenting in part).

[84] *Id.* at 1785.

[85] *Id.* (quoting Bowsher v. Synar, 478 U.S. 714, 733 (1986)). This line from *Bowsher* is puzzling. The Supreme Court also "interpret[s] a law enacted by Congress to implement the legislative mandate." See, e.g., 28 U.S.C. § 2072 ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence . . . [but shall not prescribe rules that] abridge, enlarge or modify any substantive right."). Yet no one says that involves *executive* power.

interests of the company to its own best interests" and its "decisions are protected from judicial review."[86]

Third, the Court disagreed that it is significant that the FHFA's authority is limited to a handful of government-sponsored enterprises (GSEs). In *Seila Law*, the Court observed that the FHFA does not regulate "purely private actors."[87] In *Collins*, however, the Court stressed that "the President's removal power serves important purposes regardless of whether the agency in question affects ordinary Americans by directly regulating them or by taking actions that have a profound but indirect effect on their lives."[88] The Court therefore implicitly rejected a distinction between public and private rights. The CFPB regulates private citizens and can prevent them from engaging in types of commerce that people have been doing for centuries. By contrast, no one must invest in Fannie and Freddie. In either situation, however, *Collins* holds that the president can remove the agency's head.

Fourth, the Court agreed with my argument that a "for cause" provision is much less restrictive on the president than other removal provisions and that the president can fire the FHFA director for not obeying his commands.[89] Even so read, however, the Court still concluded that the Recovery Act's "for cause" provision is unconstitutional because it prevents the White House from having "confidence" in the official.[90]

Last, the Court declined to say how far its decision goes. Instead, the majority opinion includes this footnote, which should not give much comfort to those who support removal restrictions:

> Amicus warns that if the Court holds that the Recovery Act's removal restriction violates the Constitution, the decision will "call into question many other aspects of the Federal Government."

[86] Collins, 141 S. Ct. at 1785. Why the fact that the FHFA's decisions as conservator "are protected from judicial review" makes its authority "clearly . . . executive," *id.* at 1786, is a mystery. Members of Congress are also protected from judicial review, see U.S. Const. art. I, § 6, cl. 1, yet do not exercise executive power.

[87] Seila Law, 140 S. Ct. at 2202.

[88] Collins, 141 S. Ct. at 1786.

[89] See *id.* ("We acknowledge that the Recovery Act's 'for cause' restriction appears to give the President more removal authority than other removal provisions reviewed by this Court.").

[90] *Id.* at 1786–87.

> Amicus points to the Social Security Administration, the Office of Special Counsel, the Comptroller, "multi-member agencies for which the chair is nominated by the President and confirmed by the Senate to a fixed term," and the Civil Service. None of these agencies is before us, and we do not comment on the constitutionality of any removal restriction that applies to their officers.[91]

The fact that the Court was unwilling to offer a limiting principle suggests that there may not be one. Granted, because of *stare decisis*, the Court may not be willing to overrule *Humphrey's Executor*—a case that the *Collins* majority essentially ignored, but that Justice Sotomayor's dissent repeatedly cited. Still, it seems safe to say that the Court will not extend the principle from *Humphrey's Executor* any further.

C. Constitutional Remedies

Finally, the Court addressed remedies. The *Collins* plaintiffs had opened their reply brief by warning that "[n]o one would bring a separation of powers lawsuit if the only remedy were a judicial declaration years after the fact that the Constitution was violated."[92] Yet it is possible that such a declaration will be the only remedy in *Collins*.

The *Collins* majority—here, everyone but Justice Gorsuch—rejected the argument that the Third Amendment should be set aside, reasoning that the Third Amendment was approved by Acting Director DeMarco, whom the president could remove at will.[93] The Court instead focused on whether subsequent actions taken by confirmed directors "to *implement* the third amendment during their tenures" merit a retrospective remedy.[94] Whereas cases like *Lucia v. SEC*[95] concern "a Government actor's exercise of power that the actor did not lawfully possess" (in *Lucia*, the administrative law judge's

[91] *Id.* at 1787 n.21.

[92] Reply Brief of Petitioners at 1, Collins v. Mnuchin, 141 S. Ct. 1761 (2021) (Nos. 19-422, 19-563).

[93] Collins, 141 S. Ct. at 1787.

[94] *Id*.

[95] 138 S. Ct. 2044 (2018) (holding that an administrative law judge was an officer of the United States for purposes of the Appointments Clause).

appointment violated the Appointments Clause), *Collins* holds that an unconstitutional restriction on removal does not automatically mean that an official "lack[s] the authority to carry out the functions of the office."[96] Thus, unless plaintiffs can demonstrate that the unconstitutional removal restriction caused them harm in the real world, a court should not provide a retrospective remedy. For example, if a court—after concluding there was no cause for dismissal—barred the president from removing the official, or if the president were to say that he would have removed the official but for the removal restriction, and then that official harmed a plaintiff, *vacatur* may be warranted.[97]

After announcing this standard, the Court remanded for the Fifth Circuit to determine whether in a world without the removal restriction, a president may "have replaced one of the confirmed Directors who supervised the implementation of the third amendment, or a confirmed Director might have altered his behavior in a way that would have benefited the shareholders."[98] It may be difficult for the *Collins* plaintiffs to make such a showing, though this issue is worth watching going forward. As Justice Kagan explained—and as the Haynes's majority opinion in the Fifth Circuit concluded—the president always could supervise the Third Amendment's implementation because the agreement was between the FHFA and the Treasury Department.[99] Justice Thomas—who wrote separately to address his view of the proper way to conceptualize the remedial question[100]—similarly observed that he "seriously doubt[s] that the shareholders

[96] Collins, 141 S. Ct. at 1788.

[97] *Id.* at 1788–89.

[98] *Id.* at 1789.

[99] *Id.* at 1802 ("[Judge Haynes's] reasoning seems sufficient to answer the question the Court kicks back, and nothing prevents the Fifth Circuit from reiterating its analysis. So I join the Court's opinion on the understanding that this litigation could speedily come to a close.") (Kagan, J., concurring in part).

[100] In particular, Justice Thomas emphasized that it is necessary to identify an unlawful action, not just a statute that conflicts with the Constitution. He observed that a misunderstanding of the law—including that a removal restriction is valid when, in reality, it conflicts with the Constitution—might render agency action arbitrary and capricious under the Administrative Procedure Act, but he did not pursue the issue because it was not raised. See *id.* at 1791–95 (Thomas, J., concurring).

can demonstrate that any relevant action by an FHFA Director violated the Constitution."[101]

Justice Gorsuch alone did not join the Court's remedial holding. He faulted his colleagues for distinguishing appointment from removal—a distinction that, in his view, defies "230 years of history"[102] and ignores the fact that removal may be more important than appointment in terms of the president's ability "to shape his administration and respond to the electoral will that propelled him to office."[103] Further, he warned that this distinction cannot be administered: "*[H]ow* are judges and lawyers supposed to construct the counterfactual history" required to determine what the President would have done without the removal restriction?[104] He thus would have invalidated the Third Amendment and left it to Congress to decide what should happen next.

III. What *Collins* Tells Us about the Administrative State

Collins is essentially three cases in one, each of which teaches a different lesson. Accordingly, to better understand the administrative state, it is helpful to view those three lessons together.

A. Agency Power Is Ubiquitous

The Court's curt and unanimous rejection of the *Collins* plaintiffs' statutory arguments demonstrates just how ubiquitous agency power is when it comes to the housing sector. The Court did not bat an eye at the idea that Congress allowed the FHFA as conservator to take over massive companies and to make decisions based on the FHFA's own interests. To be sure, the situation here is complicated by the fact that Fannie and Freddie have never been purely private. Those who invested in Fannie and Freddie before the housing

[101] *Id.* at 1795.

[102] *Id.* (Gorsuch, J., dissenting in part).

[103] *Id.* at 1796.

[104] *Id.* at 1798; see also *id.* at 1799 ("The Court declines to tangle with any of these questions. It's hard not to wonder whether that's because it intends for this speculative enterprise to go nowhere. Rather than intrude on often-privileged executive deliberations, the Court may calculate that the lower courts on remand in this suit will simply refuse retroactive relief.").

collapse presumably received returns beyond what they would have earned if the federal government had not been in the background. In fact, because "[m]ost purchasers of the GSEs' debt securities believe that this debt is implicitly backed by the U.S. government," the companies may have received an "implicit government subsidy" of "between $122 and $182 billion."[105]

Collins, however, confirms that the federal government now acts as more than just an implicit backstop. Under the FHFA's conservatorship authority, Fannie and Freddie can themselves be seen in a sense as de facto federal instruments. Because the FHFA is not required to act "in the best interest of" Fannie and Freddie but instead can act in ways "beneficial to the Agency and, by extension, the public it serves," the FHFA (largely) can do what it thinks best.[106] The Court's holding finds support in the Recovery Act's text, although the question is closer than the lopsided 9-0 vote may suggest. *Collins*, however, demonstrates that the Court is not going to stretch statutory law to constrain the FHFA's authority.

B. The Continued Rise of Presidentialism

The constitutional holding in *Collins* further confirms that this is the age of presidentialism. For decades, the White House has increasingly directed how agencies use their authority. As Professor Elena Kagan explained, for example, once it became clear that Congress would not enact the legislation that President Bill Clinton wanted, "Clinton and his White House staff turned to the bureaucracy to achieve, to the extent it could, the full panoply of his domestic policy goals."[107] This approach has been repeated by presidents of both parties, who seek to use "'an executive style of governing

[105] Wayne Passmore, The GSE Implicit Subsidy and the Value of Government Ambiguity, 33 Real Est. Econ. 465, 465–66 (2005); see also Jacobs v. Fed. Hous. Fin. Agency, 908 F.3d 884, 887 (3d Cir. 2018) ("Although Fannie and Freddie are privately owned and publicly traded companies, the public has long viewed their securities as implicitly backed by the federal government's credit. That perceived government guarantee has helped them to borrow money and to buy mortgages more cheaply than they otherwise could have.").

[106] Collins, 141 S. Ct. at 1776.

[107] Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2248 (2001).

that aims to sidestep Congress more often.'"[108] Cases like *Collins* and *Seila Law* make it easier for the White House rather than agency heads to direct policy.

The Court's strong embrace of the unitary-executive theory may strike some readers as strange because it enables more aggressive uses of agency power, which seems in tension with the view that the Court is concerned about regulatory overreach.[109] Here, for example, hours after the Court decided *Collins*, President Joe Biden fired Director Calabria and replaced him with an acting director who presumably will use the FHFA's authority more aggressively.[110] Relying on *Collins*, Biden also fired the head of the Social Security Administration several weeks later.[111] Yet the principle cuts both ways. After all, *Collins* also increases political accountability for how the FHFA exercises its authority and going forward may lead to less aggressive regulation in future administrations. The key point is that presidential elections are now even more important—an observation that may become more significant still if the Court takes *Collins* and *Seila Law* further and revisits *Humphrey's Executor.*

C. Narrow Remedies

Finally, *Collins* says something important about remedies. After years of litigation, the plaintiffs may end up recovering nothing. True, the president has more control over the executive branch, but that does not directly help the plaintiffs and may discourage

[108] Aaron L. Nielson, Deconstruction (Not Destruction), 150(3) Dædalus 143, 147 (2021) (quoting Scott Wilson, "Obama's Rough 2013 Prompts a New Blueprint," Wash. Post., Jan. 25, 2014).

[109] See, e.g., Christopher J. Walker, Attacking Auer & Chevron Deference: A Literature Review, 16 Geo. J.L. & Pub. Pol'y 103 (2018) (explaining the Court's wariness with deference). This point should not be overstated. The unitary-executive theory does not define the *breadth* of executive power but instead only identifies who wields *whatever* power exists. Accordingly, the Court may restrict agency-empowering tools like deference, for example, while still concluding that whatever power agencies have should be subject to the president's control.

[110] See, e.g., Katy O'Donnell, "Biden Removes FHFA Director after Supreme Court Ruling," Politico, Jun. 23, 2021, https://politi.co/3ly3N9p.

[111] See, e.g., Andrew Saul, "Biden Politicizes the Social Security Administration," Wall St. J., July 18, 2021 (op-ed from dismissed SSA Commissioner); Aaron L. Nielson, The Logic of Collins v. Yellen, Yale J. on Reg.: Notice & Comment (Jul. 9, 2021), https://bit.ly/3ly3Ull.

future litigation.[112] Justice Kagan made this point, arguing that although the SSA may be "next on the chopping block" because it too "has a single head with for-cause removal protection," most individual SSA decisions "would not need to be undone."[113] Thus, in her view, *Collins*'s remedial analysis should "prevent[] theories of formal presidential control from stymying the President's real-world ability to carry out his agenda."[114]

That prediction may prove accurate for suits by private parties seeking retrospective relief. That said, it is unclear whether *Collins* will prevent a party subject to ongoing agency action from seeking forward-looking injunctive relief. The majority did not resolve this issue, so we'll have to wait and see.[115] Regardless, however, *Collins* certainly limits the circumstances in which meaningful relief is available.

Conclusion

Collins is difficult to describe because, at bottom, it is three cases in one. We learn from the Court's statutory holding just how deeply embedded federal authority is in today's economy. We learn from the Court's constitutional holding that the White House can direct how that power is used. And we learn from the Court's remedial holding that the justices are not looking to tear everything down. When those three holdings are put together, what does it all mean? Well, it's probably best to avoid simple narratives about the Court's views on administrative law.

[112] The Court's standing analysis is noteworthy—a court can declare that a removal restriction is invalid, even though doing so may not benefit the plaintiff. In *Collins*, the Court was aware of this potential oddity, but concluded that "for 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." 141 S. Ct. at 1779 (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).

[113] Collins, 141 S. Ct. at 1802 (Kagan, J., concurring in part and concurring in the judgment in part).

[114] *Id.*

[115] See *id.* at 1780 (focusing only on "retrospective relief").