

# Supreme Court Holds Federal Housing Finance Agency's Structure Unconstitutional; Remands For Further Proceedings On Appropriate Remedy

Client Alert | June 23, 2021

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Decided June 23, 2021

***Collins v. Yellen*, No. 19-422**  
***Yellen v. Collins*, No. 19-563**

**Today, the Supreme Court held 6-3 that the structure of the Federal Housing Finance Agency—led by a single Director, removable only “for cause”—violates the Constitution’s separation of powers, but ruled 8-1 that a remand is necessary to determine the proper scope of relief.**

## **Background:**

Congress created the Federal National Mortgage Association (“Fannie Mae”) and the Federal Home Loan Mortgage Corporation (“Freddie Mac”) to provide liquidity and stability to the national mortgage market. In the Housing and Economic Recovery Act of 2008, Congress created the Federal Housing Finance Agency (“FHFA”) to regulate these enterprises. FHFA is headed by a single Director who serves a five-year term and is removable by the President only “for cause.”

In 2008, FHFA placed Fannie Mae and Freddie Mac into conservatorship and secured financing from the Treasury Department—which agreed to infuse hundreds of billions of dollars into the enterprises in exchange for preferred stock, dividends, fees, and the like—to keep them afloat.

In 2012, FHFA (led at the time by an Acting Director) and Treasury amended their financing agreements to require Fannie Mae and Freddie Mac to pay Treasury a quarterly dividend equal to nearly all of their net worth, rather than a dividend tied to Treasury’s capital investment.

Three shareholders challenged the amendment on statutory and constitutional grounds, arguing that FHFA’s single-Director structure independent-agency structure violates the Constitution’s separation of powers. The en banc Fifth Circuit held that FHFA’s structure violated the constitution but that the unconstitutionality could be cured by severing the Director’s “for cause” removal restriction. The Fifth Circuit also held that the Recovery Act forecloses the statutory claims against Treasury but not FHFA.

In January 2021, FHFA and Treasury amended the agreements for a fourth time to eliminate the net-worth-based dividend formula that caused the shareholders’ injuries.

## **Issues:**

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- (1) Whether FHFA's structure violates the separation of powers;
- (2) If so, whether the fourth amendment (2021) moots the shareholders' claims;
- (3) If FHFA's structure violates the separation of powers, whether the proper retrospective remedy is to set aside all actions taken by the unconstitutionally structured FHFA (including the 2012 amendment at issue); and
- (4) Whether the Recovery Act forecloses the shareholders' statutory claim.

## **Court's Holding:**

- (1) Yes. FHFA's structure as an "independent" federal agency headed by a single Director removable by the President only "for cause" violates the Constitution's separation of powers.
- (2) Yes, in part. Shareholders' claims for prospective relief were rendered moot by the adoption of the fourth amendment in 2021. The retrospective claims were not mooted by the fourth amendment.
- (3) No. There is no reason to set aside the third amendment because it was (i) adopted by an Acting Director who was removable at will and (ii) subsequently implemented by confirmed Directors who were *appointed* in a manner consistent with the constitution and thus possessed lawful executive power (only the statute's *removal* provision was unconstitutional). The Court remanded for further proceedings to determine the retrospective relief, if any, to which the shareholders are entitled.
- (4) The Recovery Act's anti-injunction provision bars shareholders' statutory claim.

## **What It Means:**

- In step with the Court's decision last term in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), today's decision again recognizes the significant limitation on Congress's ability to insulate agencies from presidential control. Agencies that execute federal law and are headed by a single Director, including financial regulators, cannot be "independent" of the President, but instead must be subject to the President's constitutional duty to control the federal officers who assist the President in executing federal law.
- The Court's holding that a federal agency headed by a single Director removable by the President only "for cause" is unconstitutional could have ripple effects. For example, the validity of the Social Security Administration's leadership structure, which has been led by a single commissioner since 1994, may be called into question.
- The Court's decision that all of FHFA's actions while unconstitutionally structured need not be set aside could impact other litigation challenging actions that the Consumer Financial Protection Bureau took when it was unconstitutionally structured. But as the Court made clear, plaintiffs are entitled to retrospective relief so long as they can show that the unconstitutional removal provision inflicted compensable harm.
- The Court's 8-1 decision on standing reiterated that, for traceability purposes, the relevant inquiry turns on whether the injury can be traced to the defendant's allegedly unlawful conduct—not the provision of law being challenged.

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The Court's opinion is available [here](#).

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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