



THE FREE STATE FOUNDATION

A Free Market Think Tank for Maryland.....Because Ideas Matter

Perspectives from FSF Scholars
October 21, 2021
Vol. 16, No. 57

**The Supreme Court's Recent Separation of Powers Decisions and Their
Implications for the FCC**

by

Christopher J. Walker*

I. Introduction and Summary

During its October Term 2020, the Supreme Court decided two major cases that involve separation of powers and the role of political accountability at federal agencies. In *Collins v. Yellen*, the Court extended its holding from *Seila Law v. CFPB* that it violates the Constitution's separation of powers for an agency to be headed by a single director who is not removable at will by the president. In *United States v. Arthrex*, the Court held that it violates the separation of powers to give inferior-officer agency adjudicators, who are not subject to Senate advice and consent, final decisionmaking authority.

These cases did not involve the Federal Communications Commission – instead, the Federal Housing Finance Agency (FHFA) and the U.S. Patent and Trademark Office (USPTO), respectively. But the opinions suggest the Supreme Court is inching closer to reconsidering its landmark precedent *Humphrey's Executor* in which the Court held that, given statutory removal limitations in the Federal Trade Commission Act and the structure of the multi-member agency, President Franklin Roosevelt could not constitutionally remove a sitting FTC Commissioner at will. Like the FTC, the FCC is a similarly structured multi-member commission with five

The Free State Foundation
P.O. Box 60680, Potomac, MD 20859
info@freestatefoundation.org
www.freestatefoundation.org

commissioners serving staggered fixed terms and with no more than three commissioners from the same political party. While *Humphrey's Executor* generally has been understood to protect FCC commissioners from "at will" removal by the president – just like FTC Commissioner Humphrey who President Roosevelt wanted to remove – there is one statutory difference that is at least worthy of note. The FTC Act provides that the president may remove a commissioner "for cause," but the Federal Communications Act is silent regarding removal of commissioners by the president.

In any event, as discussed subsequently, it is at least possible that the Court might hold, in a properly presented case, that the president may possess the authority to remove "at will," without violating the Constitution's separations of powers strictures, an FCC commissioner, or members of other multi-member agencies. Were this to be the case, certainly the so-called "independent" agencies would lose a meaningful measure of their supposed independence.

This FSF *Perspectives* essay explores these two separation of powers cases from the Court's October 2020 Term, and it then concludes by discussing their implications for independent agencies like the FCC.

II. *Collins v. Yellen* and Statutory Removal Restrictions¹

In *Collins v. Yellen*, the Supreme Court considered a constitutional challenge to the single-head leadership structure of the FHFA.² This was a follow-on case to the Court's decision the prior year in *Seila Law v. CFPB*, in which the Court held that the CFPB's leadership by a single director removable only for certain causes ("inefficiency, neglect or malfeasance") violates the separation of powers.³ Like the CFPB Director, the FHFA Director, by statute, has a type of for-cause removal protection, such that the president cannot remove the FHFA Director at will.

In a fractured decision, the Court held that the FHFA single-head structure is unconstitutional and that the president must be able to remove that director at will. The Court remanded the case to the lower courts to sort out the remedy. The remedial issues are messy. The agency action at issue is the Third Amendment to the existing agreements between the FHFA and the Department of Treasury for the FHFA to serve as conservator of Fannie Mae and Freddie Mac. Because of the Third Amendment, Fannie Mae and Freddie Mac paid "at least \$124 billion more than the companies would have had to pay during those four years under the fixed-rate dividend formula that previously applied."⁴ *Collins* and his co-plaintiffs sued to undo this Third Amendment in its entirety – something the Court refused to do.

¹ Part II draws substantially from Christopher J. Walker, *What Collins v. Yellen Means for Administrative Law: More Sweeping Standard Than Seila Law, But Watered-Down Remedy*, YALE J. ON REG.: NOTICE & COMMENT (June 23, 2021), <https://www.yalejreg.com/nc/what-collins-v-yellen-means-for-administrative-law-more-sweeping-standard-than-seila-law-but-watered-down-remedy/>.

² 141 S. Ct. 1761 (2021).

³ 140 S. Ct. 2183, 2197 (2020).

⁴ *Collins*, 141 S. Ct. at 1774.

I will focus on the merits and then the remedy, in turn, before turning to the decision's implications.⁵ At the outset, I should note that the Court appointed my frequent collaborator Aaron Nielson as amicus curiae to defend the FHFA's constitutionality. I assisted Professor Nielson in this role, and will refer to our court-appointed amicus brief throughout the discussion.⁶

A. The Merits

On the merits, Justice Alito wrote the opinion for the Court, holding (Part III.B) that the single-head structure of the FHFA violates the separation of powers, largely for the same reasons the CFPB's leadership structure was deemed unconstitutional in *Seila Law*.

The Court rejected our amicus brief's attempts to distinguish the FHFA from the CFPB, including that the FHFA exercises less (i.e., "not significant") executive power, that the FHFA largely acts as a conservator (not a regulator), and that the FHFA Director has more modest tenure protections. In footnote 21, the Court also refused to engage with the parade of horrors that would ensue if the Court does not cabin *Seila Law* to distinguish between the CFPB and FHFA, including its implications for the Social Security Administration, the Office of the Special Counsel, the Comptroller of the Currency, multi-member independent commissions (and their chairs), and even certain members of the federal civil service. Indeed, the Court seems to reject any line-drawing in its standard, as Justice Kagan observed in her separate opinion.

Six Justices joined this constitutional merits decision in full (Part III.B): Alito, Roberts, Thomas, Gorsuch, Kavanaugh, and Barrett. Justice Kagan wrote separately on the merits to say that *Seila Law* and stare decisis control the outcome in this case (despite her trenchant dissent in *Seila Law*). She explained that she normally joins a majority opinion where stare decisis controls, but could not here for two reasons: (1) the majority's "electoral accountability" political theory is deeply flawed as a historically accurate one would leave government structure decisions to the political branches, not the courts; and (2) the majority removed *Seila Law*'s limiting principle of "significant executive authority."

Justice Sotomayor, joined by Justice Breyer, dissented on the merits, finding a constitutionally significant difference between the CFPB and the FHFA, even under *Seila Law*'s precedent. She concluded: "To recap, the FHFA does not wield significant executive power, the executive power it does wield is exercised over Government affiliates, and its independence is supported by historical tradition. All considerations weigh in favor of recognizing Congress' power to make the FHFA Director removable only for cause."

An interesting wrinkle in this case is that the agency action (the Third Amendment) was adopted by an *acting* FHFA Director. Court-appointed amicus argued that an acting director is removable at will under the statute, and thus the agency action was accomplished by a constitutionally removable officer. The Court agreed that an acting FHFA director under this statute is removable

⁵ I will not endeavor to discuss the statutory holding, which is unanimous and discussed in Part II of the Court's opinion.

⁶ Our court-appointed amicus brief is available here: <https://ssrn.com/abstract=3760016>.

at will (because Congress didn't impose any removal restrictions), but it held that the agency action was ongoing such that the subsequent Senate-confirmed FHFA directors also acted.⁷

This holding (Part III.A) appears to garner eight votes: the six who joined the merits decision (Part III.B) and Justices Breyer and Kagan. Although the reasons are unclear from Sotomayor's separate opinion, Sotomayor did not join this part of the opinion. Importantly, though, the Court's holding that the acting FHFA Director's action was not unconstitutional has the potential to significantly limit the remedy on remand (which is probably one reason why Justice Kagan joined).

B. The Remedy

Turning to the remedy, all the Justices but Justice Gorsuch joined Justice Alito's remedy opinion (Part III.C). And the remedy at this point is merely retrospective, as the FHFA and Treasury have subsequently amended the agreement to eliminate the offending provisions. Importantly and as hinted above, the Court rejected the request to void the Third Amendment because the FHFA had a constitutionally permissible, at-will removable acting director at that time. But that does not necessarily leave the plaintiffs without remedy. The Court remanded for the lower courts to figure out whether there was any harm from actions by the subsequent, unconstitutional Senate-confirmed FHFA directors.

Justice Gorsuch disagreed sharply with the Court's remedial approach, arguing that the actions taken by the unconstitutional Senate-confirmed FHFA Directors regarding the Third Amendment should be set aside as void. On the flipside, Justice Kagan (joined by Justices Breyer and Sotomayor) praised (and joined) the Court's remedial approach (Part III.C) as limiting the damage of the Court's merits holding – and limiting the parade of horrors the court-appointed amicus raised. Citing her seminal *Harvard Law Review* article that celebrates its twentieth anniversary this year, Kagan explained:

The majority's remedial holding limits the damage of the Court's removal jurisprudence. As the majority explains, its holding ensures that actions the President supports—which would have gone forward whatever his removal power—will remain in place. In refusing to rewind those presidentially favored decisions, the majority prevents theories of formal presidential control from stymying the President's real-world ability to carry out his agenda. Similarly, the majority's approach should help protect agency decisions that would never have risen to the President's notice. Consider the hundreds of thousands of decisions that the Social Security Administration (SSA) makes each year. The SSA has a single head with for-cause removal protection; so a betting person might wager that the agency's removal provision is next on the chopping block. But given the majority's remedial analysis, I doubt the mass of SSA decisions—which would not concern the President at all—would need to be undone. That makes sense. "[P]residential control [does] not show itself in all, or even all important, regulation." Kagan, Presidential

⁷ The idea that an agency action is a continuing or renewed agency action when a new director does not withdraw it is hard to square with traditional administrative law principles concerning final agency action, but I will leave that question for another day.

Administration, 114 Harv. L. Rev. 2245, 2250 (2001). When an agency decision would not capture a President's attention, his removal authority could not make a difference—and so no injunction should issue.

(Internal citations omitted.) Indeed, Justice Kagan suggested that the Fifth Circuit had already determined there should be no remedy (as there was no harm).

One final note on the remedy merits a brief mention. Justice Thomas joined Justice Alito's opinion in full, but he also suggested everyone may have overlooked a key issue that goes to the merits (and thus the remedy): "The Government does not necessarily act unlawfully even if a removal restriction is unlawful in the abstract." At the end of the first footnote of Justice Sotomayor's separate opinion, she expressed interest in further exploring Thomas's theory in the appropriate case.⁸

C. The Implications

In *Collins v. Yellen*, the Supreme Court concluded that *Seila Law* controls the outcome here. Just like at the CFPB in *Seila Law*, it violates the separation of powers for Congress to impose removal restrictions on the single-head FHFA Director. But, unlike in *Seila Law*, the FHFA Director who took the first, major action here was an *acting* director, who the Court held the President could remove at will under the statute. This holding substantially limits the remedy on remand. So does the Court's watered-down approach to determining harm under its new remedial standard, as Gorsuch criticized in his separate opinion. Indeed, Justice Kagan asserted that the Fifth Circuit, under the Court's remedial approach, had already determined plaintiffs are entitled to no relief. It will be interesting to see what the lower courts do on remand.

The bottom line, as Justice Kagan observed, is that *Collins* expands the *Seila Law* prohibition on removal restrictions, at least at single-director independent agencies (and maybe beyond). The next frontiers after *Collins* concern the agencies and officials court-appointed amicus raised in the brief and Justice Alito ignored in footnote 21 of his opinion: the Social Security Administration, the Office of Special Counsel, the Comptroller of the Currency, even multi-member agencies like the FCC, and perhaps the civil service.

At the same time, however, the *Collins* Court watered down the remedy, at least when it comes to retrospective relief. In particular, plaintiffs must show compensable harm from the constitutional violation. To meet that standard, the Court suggested, plaintiffs must demonstrate that, but for the statutory removal protection, the President would have removed the officer to prevent her from finalizing the agency action. Good luck finding that smoking gun in disputes predating *Collins*. But perhaps future presidents will make such declarations (or even firings) in response to *Collins* to further control the administrative state.

⁸ Breyer joined Sotomayor's separate opinion, but he does not seem to have joined this footnote and expression of interest. Earlier in the footnote it makes clear that Sotomayor didn't join the acting director part of Alito's opinion (Part III.A), yet Breyer is listed in the syllabus as joining it.

III. *United States v. Arthrex* and the Centrality of Agency-Head Review⁹

In *United States v. Arthrex*, the Supreme Court considered an Appointments Clause challenge to administrative patent judges on the United States Patent and Trademark Office's Patent Trial and Appeal Board.¹⁰ In a 5-4 decision on the merits, the Court held that administrative patent judges violate the Appointments Clause because they issue final decisions not subject to agency-head review. A distinct 7-2 majority then remedied that constitutional defect by striking down the statutory prohibition on USPTO Director final decisionmaking authority. *Arthrex* was a deeply fractured decision, with different majorities for the merits and the remedy. I'll discuss each in turn, and conclude with a brief note on the decision's implications for administrative adjudication.

A. The Merits

On the merits, the decision was fractured 5-4, with Chief Justice Roberts penning the opinion for Court (Parts I and II). Similar to the Federal Circuit's decision below,¹¹ the Supreme Court engaged in a formalist interpretation of the Appointments Clause. Under the statutory provisions of the Patent Act (as added by the America Invents Act), the agency head has a significant level of supervision and oversight of USPTO administrative patent judges. But the agency head does not have the power to review and reverse their decisions and can remove the administrative patent judges "only for such cause as will promote the efficiency of the service."

The Supreme Court held, however, that as a constitutional matter "[o]nly an officer properly appointed to a principal office may issue a final decision binding the Executive Branch in the proceeding before us." Because administrative patent judges issue the final decisions yet are not appointed by the president and confirmed by the Senate as required for principal officers under the Appointments Clause, that is a constitutional violation. There were five votes for that holding: Justices Roberts, Alito, Gorsuch, Kavanaugh, and Barrett.

Unsurprisingly, Justice Breyer, joined by Justices Sotomayor and Kagan, dissented on the merits to advance a more functionalist (as distinct from formalist) approach to determining officer status, finding administrative patent judges to be inferior officers. Perhaps more surprisingly, the three dissenters also joined Parts I and II of Justice Thomas's separate dissent, which argued as a matter of precedent and the Constitution's original understanding that administrative patent judges are inferior officers. Thomas explained:

For the very first time, this Court holds that Congress violated the Constitution by vesting the appointment of a federal officer in the head of a department. Just who are these "principal" officers that Congress unsuccessfully sought to smuggle into the Executive

⁹ Part III draws substantially from Christopher J. Walker, *What Arthrex Means for the Future of Administrative Adjudication: Reaffirming the Centrality of Agency-Head Review*, YALE J. ON REG.: NOTICE & COMMENT (June 21, 2021), <https://www.yalejreg.com/nc/what-arthrex-means-for-the-future-of-administrative-adjudication-reaffirming-the-centrality-of-agency-head-review/>.

¹⁰ 141 S. Ct. 1970 (2021).

¹¹ See *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated and remanded sub nom.*, 141 S. Ct. 1970 (2021).

Branch without Senate confirmation? About 250 administrative patent judges who sit at the bottom of an organizational chart, nestled under at least two levels of authority. Neither our precedent nor the original understanding of the Appointments Clause requires Senate confirmation of officers inferior to not one, but two officers below the President.

In the final part of his opinion (Part IV), Justice Thomas encouraged the Court to reconsider the "functionalist element" in its Appointments Clause precedents to "align[] with the text, history, and structure of the Constitution."

B. The Remedy

As I predicted when the Court granted certiorari review in *Arthrex*, if the Court were to find a constitutional violation here (and I predicted it would), the judicial remedy would be a mess.¹² It was.

The Federal Circuit had sought to remedy the constitutional violation by excising removal protections for administrative patent judges, such that the agency head could remove administrative patent judges at will. That remedy, however, is awful as a policy matter. That is because it increases constitutional tensions in agency adjudication between the decisional independence of administrative judges and the political control of agency adjudication,¹³ such that one may fear that an agency adjudicator would decide a case not based on the law and facts, but out of fear of job security and politics. It is no surprise that the American Bar Association urged Congress to address these concerns with a statutory fix.¹⁴

In Part III of his opinion (joined only by Justices Alito, Kavanaugh, and Barrett), Roberts did not adopt the Federal Circuit's approach. To be sure, he did not say the Federal Circuit's approach was insufficient. Nor did he mention the policy concerns of at-will removal for agency adjudicators. Instead, he decided to refashion the statutory review structure to give the agency head (the USPTO Director) final decisionmaking authority.

For what it's worth, Melissa Wasserman and I had previously agreed with this fix as the most direct route.¹⁵ But we envisioned Congress providing that fix. I did not think a court could judicially restructure the statutory internal agency review scheme to grant agency-head review – something that seems contrary to pretty clear congressional intent. And yet that's what the Supreme Court's plurality did here.

¹² Christopher J. Walker, *The Supreme Court Decides to Hear Arthrex Case to Consider Appointments Clause Challenge to Administrative Patent Judges*, YALE J. ON REG.: NOTICE & COMMENT (Oct. 13, 2020), <https://www.yalejreg.com/nc/the-supreme-court-decides-to-hear-arthrex-case-to-consider-appointments-clause-challenge-to-administrative-patent-judges/>.

¹³ See generally Christopher J. Walker, *Constitutional Tensions in Agency Adjudication*, 104 IOWA L. REV. 2679 (2019).

¹⁴ ABA Resolution 108a (Aug. 2020), <https://americanbar.org/content/dam/aba/directories/policy/annual-2020/108a-annual-2020.pdf>.

¹⁵ Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 188 (2019).

With the four dissenters on the merits, where did the fifth vote for the remedy come from? Not Justice Gorsuch. He would not sever the unconstitutional provision but, instead, would set aside the decision of the Patent Trial and Appeal Board (PTAB) decision and remand to the agency. Justice Thomas similarly argued that *if* there were a constitutional violation, the proper remedy would be to vacate the agency's decision and remand for a new hearing before properly appointed officers.

Instead, the fifth (and sixth and seventh) vote for the Chief Justice's creative remedy comes from Part II of Breyer's dissent (and concurrence in the judgment):

For purposes of determining a remedy, . . . I recognize that a majority of the Court has reached a contrary conclusion. On this score, I believe that any remedy should be tailored to the constitutional violation. Under the Court's new test, the current statutory scheme is defective only because the [administrative patent judges'] decisions are not reviewable by the Director alone. The Court's remedy addresses that specific problem, and for that reason I agree with its remedial holding.

C. The Implications

Many viewed *Arthrex* as a potential blockbuster for administrative law – similar to the 2018 decision in *Lucia v. SEC*, which held that administrative law judges are at least inferior officers under the Appointments Clause,¹⁶ and last year's *Seila Law* decision, which held that the CFPB's single-director for-cause removal structure violates the separation of powers.¹⁷ In other words, *Arthrex*, some argued, had the potential to further advance political control of the administrative state and perhaps even lead to a reconsideration of *Humphrey's Executor's* protection against "at will" removal by the president for commissioners of multi-member agencies. After all, the conventional understanding is that this removal protection gives these agencies, like the FCC, their independence.

As Melissa Wasserman and I explore in *The New World of Agency Adjudication*, however, the Patent Trial and Appeal Board adjudication is an outlier.¹⁸ This constitutional challenge is narrow and only affects administrative adjudication systems where the agency head lacks final decisionmaking authority – a very small subset of adjudicative systems. And the *Arthrex* remedy is narrow, as the Court severs the unconstitutional part of the statute (as opposed to striking down the whole adjudication scheme as unconstitutional) and does not eliminate tenure protections for agency adjudicators (as the Federal Circuit had done). The Court just conforms PTAB adjudication to the standard model for federal administrative adjudication where there is at least the opportunity for agency-head review.

On the other hand, the Court's decision in *Arthrex* has the potential to be a pretty big deal for patent adjudication. It sends a strong message that patent adjudication is not special in the administrative state. Just like the vast majority of adjudicative decisions from the FCC and other

¹⁶ 138 S. Ct. 2044, 2049 (2018).

¹⁷ 140 S. Ct. 2183, 2197 (2020).

¹⁸ See Walker & Wasserman, *supra* note 15, at 162–73.

agencies, the presidentially appointed, Senate-confirmed head of the agency now has the final say in patent adjudication. In that sense, patent adjudication, like almost all other federal agency adjudications, is subject to political accountability. In administrative law, that is par for the course. But it is understandable why patent scholars and practitioners might shudder.

There are, however, compelling policy rationales in federal administrative adjudication for granting the agency head final decisionmaking authority. In *The New World of Agency Adjudication*, Melissa Wasserman and I identify three main policy reasons: (1) to ensure agency heads control the regulatory structure they supervise; (2) to help ensure consistency in adjudicative outcomes; (3) to help the agency head gain greater awareness of how a regulatory system is functioning."¹⁹ In other words, once Congress decides to subject disputes to agency adjudication, there are policy reasons for providing agency-head review – even for patent adjudication.

Many of us just thought that such a remedy would require Congress to act to amend the Patent Act. In *Arthrex*, however, the Supreme Court did that legislative work itself. So the *Arthrex* decision strikes me as the right policy outcome, made by the wrong branch of government.

IV. Conclusion: Reading the Tea Leaves (or Neon Signs) About the Future Agency Independence at the FCC and Elsewhere

The Supreme Court decided two important separation of powers cases last Term. Although *Arthrex* will have no effect on the FCC – or any other agency where the agency head has final decisionmaking authority – *Collins* could have broad implications for statutory removal restrictions on agency officials, including at the FCC. After *Seila Law* and *Collins*, it is not unreasonable to worry that the Court's 1935 decision in *Humphrey's Executor*²⁰ – and with it the idea that Congress can impose statutory restrictions on the president's power to fire agency officials – may be living on borrowed time.

Indeed, we may not even need to wait for the Supreme Court to grant review in a case that presents the question whether to overrule or further limit *Humphrey's Executor*. The president can also act. Indeed, the Biden Administration quickly seized on the Court's analysis in *Collins*, firing the FHFA Director the day *Collins* was decided and the head of the Social Security Administration less month a month later. Both of these agency heads had been nominated by President Trump and confirmed by a Republican-controlled Senate.²¹

¹⁹ *Id.* at 175–78.

²⁰ *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

²¹ See Rachel Siegel, Tyler Pager & Robert Barnes, *White House Replaces Regulator Overseeing U.S. Mortgage Giants Following Supreme Court Ruling*, WASH. POST (June 23, 2021), <https://www.washingtonpost.com/us-policy/2021/06/23/biden-fannie-freddie-fhfa-supreme-court/>; Lisa Rein, *Biden Fires Head of Social Security Administration, a Trump Holdover Who Drew the Ire of Democrats*, WASH. POST (July 11, 2021), https://www.washingtonpost.com/politics/andrew-saul-social-security-/2021/07/09/c18a34fa-df99-11eb-a501-0e69b5d012e5_story.html.

Could the FCC be next? I doubt it. Other challenges to statutory removal restrictions outside of multi-member commission context will no doubt precede that. What does seem to be clear, however, is that the logic of *Collins* and *Seila Law* suggest that removal restrictions for multi-headed agencies like the FCC will likely only survive – if at all – because of the *stare decisis* effect of *Humphrey's Executor*.²²

* Christopher J. Walker is the John W. Bricker Professor of Law at The Ohio State University Moritz College of Law and a member of the Free State Foundation's Board of Academic Advisors. The Free State Foundation is an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland. The views expressed in this *Perspectives* do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it.

²² In a new draft paper, Aaron Nielson and I argue that, even without statutory removal restrictions, Congress has many tools within its “anti-removal power” toolkit to create some measure of agency independence. See Aaron Nielson & Christopher J. Walker, *Congress’s Anti-Removal Power* (working draft as of Oct. 13, 2021), available at <https://ssrn.com/abstract=3941605>.