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# Three Important Decisions the Administration Needs to Make If the Supreme Court Eliminates the FHFA Director's Independence

Including History, Analysis, and Recommendations

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## **Introduction**

The Federal Housing Finance Agency (FHFA), the regulator of the two government-sponsored enterprises (GSEs) Freddie Mac and Fannie Mae (as well as the eleven Federal Home Loan Banks), has also been the conservator of the two GSEs since September 2008. As the GSEs' conservator, the FHFA has total authority over their operations – i.e., it has all the authority that would normally be held, for each GSE, by their shareholders *and* by their board of directors *and* also by their management. This is extraordinary power to direct the affairs of the GSEs, far beyond what any conventional regulator would have. Given that the two GSEs currently own just about half of all the single-family and multifamily mortgages in America, the FHFA, while it acts as conservator, has the ability to directly and materially impact the housing finance system of the entire country.

The FHFA was established in mid-2008, when the financial crisis was gaining speed, because its main predecessor lost the confidence of Congress (see below for more on this topic).<sup>1</sup> Congress created a single position, titled “director,” to run the agency. In line with the tradition for independent regulatory bodies, that director, once nominated by the president and confirmed by the Senate, has a fixed term (in this case for five years), and can be dismissed by the President only for “cause.”<sup>2</sup>

Since the expectation back in 2008 was that any conservatorship would be relatively short-lived, I do not think that policymakers at the time really fully thought through the wisdom of having the FHFA as conservator playing such a pivotal role in housing finance for many years and yet being run by a single person who enjoys “independence.”<sup>3</sup> This one individual – the FHFA director – therefore has unprecedented and almost unaccountable power over the GSEs and, through them, over the country's housing finance system; I have heard the director referred to as being like a “mini-President,” but without any accountability to voters.

Interestingly, there is a lawsuit now before the US Supreme Court (*Collins v. Mnuchin*) that addresses, among other things, the issue of the independence of the FHFA director: the case asks the court to decide whether it is constitutionally acceptable for the FHFA to be run by a single director with

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<sup>1</sup> The FHFA's main predecessor was the Office of Federal Housing Enterprise Oversight (OFHEO), which regulated the two GSEs. The FHFA also took in the activities of the Federal Housing Finance Board (which regulated the Federal Home Loan Banks) and a small unit from the Department of Housing and Urban Development (HUD).

<sup>2</sup> There is no definition of what “cause” means in the legislation establishing the FHFA. For other independent agencies, the wording can be more specific. For example, in the case of the Consumer Financial Protection Bureau, “cause” is defined as “inefficiency, neglect of duty or malfeasance in office.”

<sup>3</sup> The secretary of the Treasury in 2008, Henry Paulson, famously referred to conservatorship as a “time-out” in line with this thinking (see: “Statement by Secretary Henry M. Paulson, Jr.,” <https://www.treasury.gov/press-center/press-releases/pages/hp1129.aspx>). We are now in the thirteenth year of conservatorship, which began in September 2008.

“cause”-based independence. The case has already been argued, and a decision is expected near the end of the court’s current term, most likely by the end of this June – just a few months away. In a similar case last year, concerning the same issue about the Consumer Finance Protection Bureau (CFPB), the court ruled that it was indeed unconstitutional for a single director to have the protection of independence in that manner, and that the president could fire the incumbent at will (as is the case for cabinet secretaries or any other appointed position in the executive branch of the government).<sup>4</sup> While the situations at the two financial regulatory agencies are not exactly the same in every detail, the predominant expectation in the housing finance industry and policy community is that the Supreme Court ruling will reach the same conclusion for the FHFA as it did for the CFPB. In that eventuality, President Biden would then be able to fire – at will, without being required to specify any “cause” – the Republican-appointed director, Mark Calabria, whose term would otherwise extend to 2024.

The ability of the president to fire at will the head of the FHFA, while sounding limited in scope, would in practical terms deprive the FHFA in its entirety, including all its activities, of its independence; as much as any cabinet department, the FHFA would come under the direct control of the White House. It behooves the administration, then, to think through ahead of time what it would do with this newfound authority, especially all the power to impact housing finance through the FHFA while it remains the conservator of the GSEs.

My analysis is that the Biden administration, if this all comes to pass, has three important decisions to make that could be very consequential, for better or worse, in their impact on housing finance. First is a major policy decision: how much of the independence lost via the Supreme Court decision should the administration, by policy, cede back to the FHFA, as the White House need not keep it all? The history of the regulation of specialty housing finance institutions, like the GSEs, as described in

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<sup>4</sup> The logic, as I (a non-lawyer) understand it and simplifying somewhat, is that the Constitution specifies three branches of government: the executive under the president, who is accountable to the people via elections; the legislature (i.e., Congress), which is also accountable to the people via elections; and the judiciary. In this mix, where would an independent regulatory agency fit? This issue was addressed during the New Deal era of Franklin Roosevelt, when the Supreme Court – seemingly being pragmatic – found an independent regulatory commission (specifically, the Federal Trade Commission, in the 1933 case *Humphrey’s Executor v. United States*) to be constitutional. (The decision was also based in part upon what specific powers the FTC had and the timing and length of the commissioners’ terms.) In the CFPB-related case last year (*Seila Law v. CFPB*), the court ruled 5-4 that the CFPB’s single individual agency head (as opposed to the FTC’s multimember commission) did not fit the *Humphrey’s Executor* precedent, and thus was unconstitutional as too much unaccountable power was in the hands of a single individual. The remedy was that the president could fire the head of the CFPB at will (i.e., without any restriction due to “cause”) making that person just like any regular executive branch official who serves at the pleasure of the president. I note that Congress could restore the CFPB’s independence simply by turning its single directorship into, for example, a five-member bipartisan commission, as the Securities and Exchange Commission and the Commodity Futures Trading Commission have long had.

some detail below, makes it crystal clear that this is a very important thing to get right. Second and third are two related personnel decisions: whom should the administration appoint as the acting director of the FHFA, and whom should it nominate for Senate confirmation as the permanent director? Because the FHFA director gets to have such power over housing finance while the two GSEs are in conservatorship, I make the argument that the choices should be people with significant actual financial regulatory and/or mortgage industry experience, all in order to minimize their learning curves and increase the likelihood of fast, accurate decision-making in a field known for its complexity.

### **How Much Independence to Cede Back to the FHFA?**

The FHFA is first and foremost a regulatory agency. It has long been considered best practice in Washington to have federal regulators enjoy independence, as described above, to insulate them as much as possible from political influence.<sup>5</sup> For financial regulators, this best practice applies to the Federal Reserve System, the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), and more. It was also intended to apply to the FHFA and CFPB. But because Congress vested leadership of the latter two agencies in a single director, rather than a commission or board, that independence has already been lost by the CFPB and, for the purpose of this article, is assumed will be similarly lost by the FHFA with the upcoming Supreme Court decision.<sup>6</sup>

In fact, in the case of the federal regulation of specialized housing finance institutions (HFIs), the history – while not well known – is very clear: inadequate regulatory independence has directly led to lax regulation, which in turn has led to material financial system problems, sometimes spectacularly so.

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<sup>5</sup> For a comprehensive but not overly-long article on the history and logic of such independent agencies, see Henry B. Hogue, Marc Labonte, and Baird Webel, “Independence of Federal Financial Regulators: Structure, Funding, and Other Issues” (Washington, DC: Congressional Research Service, 2017), <https://fas.org/sgp/crs/misc/R43391.pdf>. Of course, what is already well known and observed through the recent decades is that the level of independence is hardly absolute, with elected officials and interest groups still trying to influence regulatory outcomes – and sometimes being partially or wholly successful.

<sup>6</sup> Worth mentioning is the unusual circumstance of one particular major financial regulator – the Office of the Comptroller of the Currency (OCC), the regulator of national banks, which is run by a single individual titled “comptroller of the currency.” The OCC long predates all the other financial regulators, going back to Civil War days as a necessary component of the federal government’s financing of the war by issuing a national currency (“greenbacks”). It is located within the Treasury Department, and thus subject to the purview of the secretary of the Treasury. But legislation limits this purview to deliver, in practical terms, a significant degree of independence. (I also understand that an additional mechanism to secure the comptroller’s independence requires the president, if he or she should fire the incumbent comptroller, to publicly explain why.) The legislation governing the comptroller does not apparently create the constitutional problem that exists for CFPB or FHFA, but it also represents an approach that Congress in more modern times evidently did not believe was adequate for the level of independence it sought for financial regulators, and so it exists today as a one-off.

## **A Short History of the Troubled Regulation of Housing Finance Institutions**

*Federal regulation of financial institutions is best known to the public via government organizations such as the Federal Reserve (founded 1913), the Securities and Exchange Commission (founded 1934), and perhaps the Office of the Comptroller of the Currency (founded 1863), among others. While they have had their share of regulatory failures over the decades, they nevertheless kept the fundamental confidence of Congress and thus have continued as primary financial regulators for long periods of time – the youngest of these three is almost ninety years old.*

*However, at the beginning of the Great Depression, the federal government intervened in financial markets to create a series of specialized housing finance institutions. It did so in reaction to the pre-Great Depression failure of the mainstream banking system to provide mortgages with reasonable terms, a failure exacerbated by the near-collapse of the banking system and the economy in the early years of the Great Depression. The result was the creation, over many years, of a “parallel” banking system dedicated to residential mortgages and other related real estate assets.<sup>7</sup> These HFIs included savings & loan associations (which were the largest providers of single-family mortgages in the 1950s and 1960s), the twelve (now eleven) federal home loan banks, Fannie Mae, later Freddie Mac, the Federal Savings and Loan Insurance Corporation (FSLIC), and more.<sup>8</sup>*

*To regulate these specialized HFIs, the federal government did not place them under then-existing, established mainstream regulators like the Federal Reserve or OCC; instead, it created a series of specialized financial regulators. Unlike the mainstream regulators listed above that have been in place for, at a minimum, almost ninety years, the special HFI regulators have had a very troubled history and much shorter lifespans. They have failed so badly in the eyes of Congress that they were abolished and replaced – sometimes repeatedly. Some highlights of that unfortunate and somewhat convoluted history are as follows:*

- 1. The Federal Home Loan Bank Board (FHLBB). Created in 1932, this was the first modern specialty federal regulator for HFIs; it regulated the Federal Home Loan Banks (FHLBs), savings and loan associations, FSLIC and, much later, Freddie Mac.<sup>9</sup> The savings and loan crisis of 1989, which was then the largest financial crisis since World War II, was primarily attributed to several major causes, of which one was the very lax regulation by, and regulatory capture of, the FHLBB.<sup>10</sup> The result was that the FHLBB was abolished by Congress in 1989 (when it was fifty-seven years old), with its component activities all reorganized and relocated in some fashion: FSLIC was consolidated into the mainstream Federal Deposit Insurance Corporation; S&L regulation was transferred to a newly created Office of Thrift Supervision; FHLB regulation was transferred to a*

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<sup>7</sup> This parallel system does modestly overlap with the more mainstream financial system of commercial banks and securities firms.

<sup>8</sup> This original Fannie Mae was later broken up, creating the two government agencies FHA and Ginnie Mae, plus the shareholder-owned corporation that kept the Fannie Mae name.

<sup>9</sup> One can argue the FHLBB didn't regulate FSLIC so much as just directly manage it.

<sup>10</sup> As an active participant in the financial markets at that time, I can personally attest that its lax regulation and capture by its regulated entities was well known. For a more official source, see the hard-to-find report of the National Commission on Financial Institution Reform, Recovery and Enforcement, *Origins and Causes of the S&L Debacle: A Blueprint for Reform* (Washington, DC: 1993), <https://babel.hathitrust.org/cgi/pt?id=pur1.32754063100741&view=1up&seq=16>. The report's up-front summary is sobering.

*newly created Federal Housing Finance Board; and Freddie Mac's regulation transferred to HUD, where Fannie Mae had been regulated since its privatization in 1968.*

2. *Office of Thrift Supervision (OTS). The newly created OTS, which took over regulation of the S&Ls and certain other types of thrifts, lasted only twenty-two years, to 2011. While it started off in the shadow of the S&L crisis with a reputation as an aggressive regulator, after the financial crisis of 2008 it was judged to have later become another poor regulator, too much a promoter of its regulated entities, much like the FHLBB had become.<sup>11</sup> Under the Dodd-Frank Act of 2010, its core regulatory responsibilities were transferred to the mainstream regulator of national banks, the OCC.*
3. *HUD's regulation of Fannie Mae and Freddie Mac. In line with the thinking, referenced above, that financial regulation should be independent, this function of HUD was transferred in 1992 to a newly created, independent regulator, the Office of Federal Housing Enterprise Oversight.<sup>12</sup> HUD had regulated Fannie Mae since 1968 (twenty-four years) and Freddie Mac since 1989 (only three years).*
4. *Office of Federal Housing Enterprise Oversight (OFHEO). After the Financial Crisis of 2008, OFHEO was similarly judged to have been a weak regulator, with Congress arguably not having given it the level of independence and the powers held by other major financial regulators. It was thus unable to stand up to the lobbying on behalf of its regulated entities. It was abolished in 2008, just sixteen years after it was created, and replaced by the FHFA, which also took in the FHLB-regulatory activities of the Federal Housing Finance Board.*

*Thus, the specialized HFI regulators had an embarrassingly consistent track record of poor results. Some of their functions (i.e., S&L regulation, FSLIC) have been moved into the mainstream banking regulators, regarded by Congress as substantially more independent and capable organizations. The rest have been moved, over time and via intermediate steps, into the FHFA, which was designed to be more independent and capable, with regulatory authorities similar to those found at other major regulatory agencies, unlike its poorly performing predecessors (primarily OFHEO and the FHLBB). It is just coming up on its thirteenth birthday.*

*I should note that while Congress serially lost confidence in the specialized HFI regulators, it was also Congress that, in my opinion (and that of others in the field of housing finance), created the lack of true independence that was a (and maybe even "the") root cause of this unfortunate track record. This lack of independence was caused by, for example, Congress's retaining budget control of the agencies, or setting unduly low capital requirements itself, or not giving the HFI regulators the full authorities and tools held by other financial regulators. And, of course, individual members of Congress and the White House pressuring regulatory agencies for political reasons is standard operating procedure in Washington, including in housing finance.<sup>13</sup>*

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<sup>11</sup> A reasonable description of this evolution is found in the Wikipedia article on the Office of Thrift Supervision: [https://en.wikipedia.org/wiki/Office\\_of\\_Thrift\\_Supervision](https://en.wikipedia.org/wiki/Office_of_Thrift_Supervision).

<sup>12</sup> OFHEO was nominally housed in HUD, despite its independence. S&L crisis-related legislation (i.e., FIRREA, the Financial Institutions Reform, Recovery, and Enforcement Act) required various government studies of the risks of the GSEs to taxpayers, and the creation of the independent OFHEO can be considered a direct outcome of those studies.

<sup>13</sup> This congressional culpability may explain why, when Congress abolished the agencies listed above, it was unclear how much of the change was optics versus substance. The practical impact was that much of the staff and operations of an abolished agency remained in place, albeit with a new name – and an opportunity to start fresh, leaving a poor past behind and hopefully doing a better job in the future. For example, the first head of FHFA was

It is thus fair to conclude, first, that a primary cause of the two greatest financial crises since World War II up until the current global pandemic – the S&L Crisis of 1989 and the financial crisis of 2008 – was lax regulation by the specialized HFI regulators; and, second, that a lack of true regulatory independence was a primary cause of that lax regulation.<sup>14</sup> So, when the Biden administration contemplates whether to cede back any level of independence to the FHFA, it is going to be playing with regulatory fire, whether it knows that or not.

What would a loss of independence by the FHFA look like in practical terms, and what would be its consequences? Without independence, the FHFA could be treated just like any cabinet department or other non-independent agency directly under the authority and control of the president. When it comes to major policy decisions, that means the White House will often make such decisions itself, with whatever input from the FHFA it decides to take. These decisions will reflect the usual mix of policy and political considerations found in all White House decisions. So, for example, as the FHFA is the conservator of the GSEs and not just their regulator, the White House could order an across-the-board lowering of GSE guarantee fees (G-fees), or an expansion of the credit box of the GSEs. But White House directions to different arms of the administration don't just reflect pure and unconflicted policy concerns; there are everyday politics that are important as well. For example, the White House could order the FHFA to have the GSEs expedite approval of active multifamily loan purchase applications in a certain city because the president plans to visit there soon – a relatively benign example. Obviously, such orders can also be considerably less benign.<sup>15</sup>

So, strictly from a good government perspective, and especially in light of the unfortunate history of HFI regulatory failures and their role as primary causes of financial crises in 1989 and 2008, the Biden administration should, in my view, ideally say to the new head of the FHFA whom it would nominate for Senate confirmation: “We get to pick you at this time because of the *Collins v. Mnuchin* Supreme Court decision. However, to ensure that the FHFA can be a quality regulator of the GSEs and FHLBs, we will by policy treat the FHFA as a fully independent regulatory agency, as contemplated in the

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the last head of OFHEO. Thus, the idea that an agency's being abolished was truly a “death sentence” has to be taken with a grain of salt.

<sup>14</sup> Such lax HFI regulation was certainly not the only cause of these crises. Regulation of commercial banks and securities firms, for example, was also significantly lax in terms of mortgage-related and other risks. Ratings agencies, while of course not regulators, also got things quite wrong with respect to many mortgage risk-related credit ratings.

<sup>15</sup> White House micromanagement of a department under its control became unusually public in 2014 with respect to the Department of Defense; the issue spanned two administrations. For an example of just one article on the issue, see NBC News, “Hagel's Predecessors Decried White House ‘Micromanaging,’” November 24, 2014, <https://www.nbcnews.com/politics/first-read/hagels-predecessors-decried-white-house-micromanaging-n255231>.

legislation that established it and understood by all to be a best practice. This means no one from the White House or claiming to speak for the White House is authorized to ever call you up and tell you what to do.” Since the Biden administration will presumably nominate a new FHFA head whose policy views are aligned with its own, treating the FHFA as independent in this manner should hopefully be acceptable to the White House.<sup>16</sup>

I do note, however, that the FHFA is not just a regulator at this time, but also the conservator of the two GSEs. That role gives it so much power to impact housing finance that it would be a giant leap for the Biden administration to voluntarily give up any and all say over conservatorship decisions. So, perhaps a reasonable good-government compromise would be to qualify the regulatory independence promised above such that, *with respect to conservatorship matters only*, a single designated official (e.g., the secretary of the Treasury or perhaps the head of the National Economic Council) and no one else would be authorized to call up the FHFA director from time to time and give direction.<sup>17</sup>

It will take a lot of courage and backbone – and, to use an old-fashioned word, statesmanship – on the part of the White House to propose and stick to this suggested good-government policy choice, even with the limited conservatorship exception described above. Members of Congress, housing advocates and industry special interest groups would, I predict, generally push for the exact opposite: they will want to maximize their ability to lobby, through the White House’s ability to direct and even micromanage the FHFA’s operations, to get what they want from the FHFA. Hopefully, the administration will indeed have the needed courage and backbone to resist such efforts.<sup>18</sup> If not, the history suggests strongly that a future of lax housing finance regulation (and, in this case, conservatorship) will once again be upon us, with long-term consequences that could be quite problematic.<sup>19</sup>

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<sup>16</sup> This does not mean the White House will like everything their chosen FHFA director will do. But it should like most things done, and when it does not, the root cause, in my view, is likely to be due to the difference between regulatory and political views of an issue.

<sup>17</sup> The Treasury is very involved in FHFA matters because it provides the financial support agreement to the two GSEs that enable them to operate as needed; that support agreement also gives Treasury certain approval rights over GSE matters.

<sup>18</sup> If the Biden administration does not make a firm decision to protect and enforce the independence of the FHFA, it is the nature of such things that the White House staff will, in the resulting policy vacuum, likely begin to intervene in FHFA activities.

<sup>19</sup> It would be a true act of statesmanship and support for good government by the Biden administration to actually propose to Congress that it re-establishes the independence of the FHFA and CFPB by turning them into commissions. At this time, I have not heard any information leading me to believe that such a proposal is in the works.



## **Two Key Personnel Decisions**

There is a longstanding saying in Washington: “personnel is policy.” In other words, picking someone with certain views will drive a lot of the policy decisions he or she would make. That saying is exactly on point as the White House has not just one but *two* personnel decisions to make if, as expected, the Supreme Court soon gives it the authority to terminate Director Calabria without cause.

### **Picking an Acting Director**

While the industry media is focusing on who might be selected by the Biden administration as the next FHFA director, in fact the first decision, given that it takes on average three to six months to get a nominated agency head confirmed, is to select an acting director.<sup>20</sup> There are, in fact, two different legal routes by which the Biden administration can pick an acting director.

The first legal route is to look at the language specific to the FHFA as contained in its founding legislation. This allows the president to select an acting director from one of the incumbents of the three FHFA deputy director positions specified in that legislation; such positions are usually held by long-time senior civil servants.

The second route is to look to the Federal Vacancies Act, which allows the president to name an acting director from among existing Senate-confirmed incumbents from anywhere in the government. This means those individuals would most likely (based upon recent history) be “double hatted” – they would keep their existing position while being responsible for the FHFA at the same time. (As an example, in early 2019, between the directorships of Mel Watt and Mark Calabria, Joseph Otting – then the incumbent comptroller of the currency – served as acting director of the FHFA under this provision while still running his own agency.) Additionally, there is a time limit on how long such an individual can serve as such an acting director: 300 days, with some exceptions. At this time, however, so early in the Biden administration, the number of such already-confirmed officials is not large.

In fact, the choice between the two routes is quite meaningful. The reality is that a double-hatted official from elsewhere in the government is likely not going to be an expert on the very complicated mortgage system of the country, much less have specific knowledge about the FHFA and

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<sup>20</sup> Upon the departure of the FHFA’s first director, James Lockhart, in August 2009, Edward DeMarco (then a senior civil servant at the agency) was appointed acting director. He then served as acting director for the unusually long period of *over four years* until Mel Watt took office as a Senate-confirmed director in early January 2014. (It was long for several reasons, but a key one was that a nomination for a permanent director failed to win Senate confirmation.) The unexpected length of DeMarco’s term is indicative of how much care should be used in selecting an acting director.

conservatorship, and also of course will not spend full time as the acting director. When Joseph Otting was acting director, he made it very clear to me he was mainly running a holding operation, making as few key decisions as possible so as not to pre-empt the permanent director then in the process of confirmation (which happened less than four months after Watt's departure).

Such a holding operation, however, would be problematic for the Biden administration. In its view (and in the view of Democratic Party-aligned think tanks and affordable housing advocates close to the administration), the tenure of Director Calabria has been rather negative: his policies have restricted the availability of mortgage credit in various ways, and his rhetoric and actions have indicated an overriding objective to shrink the footprint of the GSEs. These actions include making many specific cutbacks in the credit box, putting in place a regulatory capital requirement regarded as excessive and also inexplicably biased against CRT, and adopting in the last days of the Trump administration a revised Preferred Stock Purchase Agreement (the agreement by which Treasury financially supports the two companies) with all sorts of new constraints on how the GSEs can engage in their historic range of activities, and more.

If the acting director is a double-hatted official trusted by the administration but not steeped in America's complicated mortgage markets and also FHFA details, then a holding operation is likely, and these Calabria-era policies and decisions will mainly stay in place for as long as it takes to get a new director nominated and confirmed (again, that's a three- to six-month average, but the delay can be much longer, as it was with Acting Director DeMarco). However, if the acting director is chosen as the most qualified from among the three existing FHFA deputy directors who can be named to the position, then there is no delay for a learning curve to be climbed: the Biden administration gets a full-time individual highly knowledgeable about "where the bodies are buried" and who would be expected to start – immediately, with no delay, on a full-time basis – to revise many of the Calabria policies and actions that are objectionable to it, as well as competently and knowledgeably handle all the issues that will arise in the ordinary course.

Thus, if Biden White House officials can get comfortable with one of the three individuals from the FHFA, my recommendation would be to choose that alternative.

The result will be to not lose almost all of 2021 before changes are made, as a permanent director is not likely to be confirmed until at least the fall, and then would take time to get up to speed. The choice of an acting director from among the existing officials at the FHFA would allow the administration to make changes to FHFA policy starting in June, on the order of a full half-year earlier.

For a presidential administration that lasts four years, an extra half a year is material to its ability to deliver results.

### **Picking a Permanent Director**

As we have seen recently, with a new presidential administration having entered office, all sorts of interest groups will push one of their own for appointed positions in government. When it comes to a possible FHFA director, I am aware through various public and private sources that housing policy groups on the left are pushing one or two names of their own, affordable housing groups are pushing one or two of their own, and so on. This is totally business as usual in Washington.

But in reality, beyond the political optics of picking someone with good Democratic Party credentials from some interest group of importance to the administration, what should the Biden White House be looking for in a new permanent FHFA director? The decision is especially consequential because, unlike other regulators, the FHFA director will also be the GSEs' conservator, making her or him a super-CEO of both Freddie Mac and Fannie Mae with the power to significantly impact American housing finance. I see three key questions that should guide this decision:

1. Should the administration want an FHFA director with significant actual financial regulatory experience?
2. Should the administration want an FHFA director with significant actual mortgage industry experience?
3. Should the administration want an FHFA director who is oriented towards advocacy or politics and engages in very visible position-taking, or one who is more technocratic, inclined to be on top of the details to make sure policies are well constructed and implemented effectively?<sup>21</sup>

These questions seem important in light of my own experience in housing finance. I have found everyone who gets into the mortgage industry and its regulation, or who has detailed exposure to the activities of the GSEs, always comments about how incredibly complex it all is and how steep the learning curve is. I faced a reasonably steep learning curve myself upon arrival at Freddie Mac in 2012, even though I came into the CEO job with an in-depth financial markets and financial institutions management background, which included significant mortgage-related experience.

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<sup>21</sup> Based upon recent confirmation hearings, a modern measure of how much someone is oriented towards advocacy and politics would seem to be how much that person engages in extensive tweeting, especially of the "zingy" variety.

In line with my good-government orientation, it is obvious that I believe the Biden administration should seek someone with significant experience as a financial regulator and/or in the mortgage industry (and ideally, with both); it should avoid someone who is more of an advocate or political actor.<sup>22</sup> And given how much power the FHFA director has during conservatorship over not just the GSEs but the entire housing finance system of the country, it would be the best possible outcome if the chosen nominee were someone with as much practical, dirt-under-the-fingernails experience with mortgages and the FHFA as possible – so that their learning curve is minimized and the odds greatly increase of decisions being made, and policies implemented, quickly and accurately.<sup>23</sup>

## **Conclusion**

The likely decision by the Supreme Court to allow a president to fire the director of the FHFA “at will” is seemingly a narrow, under-the-radar change in how our government works. However, given that lax regulation of housing financial institutions has been a primary cause of the two greatest financial crises in modern times, it is anything but. Fundamental issues of good government are very much at stake, as is – since the FHFA as conservator impacts the country’s housing finance system so meaningfully – whether that system works well or poorly for years to come.

Specifically, this article has outlined three important and potentially high-impact questions the Biden administration needs to address if the Supreme Court rules as expected:

- How much independence should it cede back to the FHFA? I suggest almost all.
- Whom should it pick as acting director: an existing non-political FHFA official who can immediately begin to implement changes desired by the Biden administration, or someone from elsewhere in the government who will, by necessity, mostly maintain the status quo until a permanent director is confirmed? I believe the former is a far better solution.
- Whom should it nominate for Senate confirmation as the next permanent director? I suggest someone more technocratic in orientation and specifically knowledgeable, with in-depth

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<sup>22</sup> Many candidate names floated recently include individuals with primarily or exclusively “policy” experience as analysts who write articles, give speeches, and provide Congressional testimony on housing finance topics, almost always advocating for a position convenient to the political ideology or economic interest of their sponsor. In my seven years as Freddie Mac CEO, and since, it is clear the knowledge base of such individuals is absolutely not comparable to that of people with specific experience in the industry or in financial regulation. Such policy specialists would not escape the majority of the steep learning curve to be an effective conservator. Interestingly, the director from early 2014 to early 2019 was ex-Congressman Mel Watt; he defied expectations by recruiting highly skilled deputies and then intentionally oriented decision-making away from being overly political.

<sup>23</sup> Ideally, significant GSE experience would be helpful as well. However, I do recognize that such experience might appear to create a conflict of interest, unless the GSE experience were in the distant past.

expertise about financial regulation and/or the mortgage industry, rather than an individual oriented mainly to advocacy or politics, all in order to get the most competent decision-making done the fastest.

I certainly hope the administration takes the more technocratic and less political route in all its choices. The history of the politicization of housing finance regulators is so awful that we should not be risking such bad results again.