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Legal Sidebar

Supreme Court Rules CFPB Structure Unconstitutional: Implications for Congress

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On June 29, 2020, in the case *Seila Law v. Consumer Financial Protection Bureau (CFPB)*, the Supreme Court held in a five-to-four decision that the statutory provision limiting the President's authority to remove the director of the CFPB violated the Constitution by infringing on the President's powers to execute the laws. The opinion provides guidance on Congress's authority to insulate agencies from presidential influence by explaining that, under current precedent, Congress may shield executive branch officials from removal by the President only in two limited circumstances: (1) when so-called inferior officers have limited duties and no policymaking or administrative authority, and (2) when a multi-member body of experts does not wield substantial executive power. In the view of the majority, the CFPB's leadership structure, which included a sole director wielding substantial power, did not fit within either exception and was therefore unconstitutional. Despite this determination, the Court held that the restriction limiting the President's ability to remove the CFPB Director is severable from the rest of the statute, which means the agency may otherwise continue to exercise the powers assigned by Congress with a Director who is removable at the President's discretion.

This Sidebar explains the Court's holding in *Seila Law*, summarizes two partially concurring and dissenting opinions, and previews considerations for Congress.

Background

In the wake of the 2008 financial crisis, Congress created the CFPB in 2010 to serve as a new, independent financial regulator. The agency is charged with administering 18 preexisting federal consumer protection statutes, and it is empowered to conduct investigations, issue subpoenas, initiate administrative adjudications, conduct administrative proceedings, and prosecute civil actions in federal court. To ensure the CFPB could execute its pro-consumer mission without undue political influence, Congress exempted the agency from the usual appropriations process and provided that the agency would be led by a single director appointed by the President to a five-year term, removable by the President only for "inefficiency, neglect of duty, or malfeasance in office."

As part of an investigation into whether California law firm Seila Law LLC violated telemarketing laws, in 2017 the CFPB demanded Seila Law produce information and documents related to its business practices. Seila Law asserted that the demand was invalid because the CFPB's leadership structure

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violated the separation of powers. The dispute resulted in a Ninth Circuit decision affirming the constitutionality of the CFPB's design, largely relying on an en banc D.C. Circuit opinion from 2018 that reached a similar conclusion. The Supreme Court granted certiorari and reversed the Ninth Circuit decision.

Supreme Court Decision

In a majority opinion authored by Chief Justice Roberts and joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh, the Court held that the CFPB's single director structure violated an essential feature of the system of separated powers prescribed by the Constitution. Chief Justice Roberts, joined by Justices Alito and Kavanaugh, further determined that the unconstitutional removal provision was severable from the rest of the statute creating the CFPB, such that the agency could continue to operate headed by a Director that is removable by the President at will. Justice Thomas, joined by Justice Gorsuch, issued an opinion dissenting from the severability analysis. Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, concurred in the judgment with regard to severability but dissented from the constitutional analysis.

Majority Opinion

Executive Power

Article II of the Constitution provides that the "executive Power shall be vested in a President." Because this clause assigns all of the executive power to the President, the Court concluded that it necessarily follows that the President may ordinarily control officials who exercise executive authority on his behalf, including by removing them at his discretion. According to the majority, if agency leaders could exercise executive authority according to their independent policy priorities, the executive power would no longer be consolidated in the President as the Constitution demands, and the agency would operate free of the democratic accountability that the Framers deemed essential to safeguard liberty.

While the Supreme Court has previously upheld limitations on the President's authority to remove certain officials, the majority opinion explained that those limitations are exceptions to the general rule that the President has relatively unfettered removal authority. In *Humphrey's Executor v. United States*, a 1935 case, the Supreme Court upheld statutory restrictions on the President's authority to remove commissioners of the Federal Trade Commission (FTC). And in *Morrison v. Olson*, a 1988 decision, the Court held that Congress could insulate from presidential removal an independent counsel tasked with a narrow jurisdiction of investigating and prosecuting certain government officials. Reviewing the CFPB's organizational features, the majority of the Court concluded that it did not qualify for a similar exemption. Unlike the 1935 FTC, which the Court viewed as not having authority to promulgate binding rules or issue final decisions, the Court observed that the CFPB exercises substantial executive authority and is not led by a multimember body of experts appointed to staggered terms and balanced along partisan lines. And unlike the independent counsel statute reviewed in *Morrison*, the Court said the CFPB Director exercises extensive policymaking and administrative authority with no oversight.

According to the majority, endorsing Congress's efforts to augment the independence of a powerful executive agency by insulating its sole director from presidential removal would be a stark historical departure. Only four other agencies have shared this design: the Comptroller of the Currency, the Office of Special Counsel, the Social Security Administration, and the Federal Housing Finance Agency. While not formally holding that these analogs are constitutionally infirm, the Court dismissed the Comptroller of the Currency as a one-year aberration after the Civil War, and cautioned that the other three are recent, contested innovations. In any event, the Court concluded none of these agencies have been vested with authority analogous to that wielded by the CFPB. More broadly, the *Seila Law* Court concluded that the insulated single-Director configuration was incompatible with the general constitutional structure, which provides that the President, who is directly accountable to the people, is the sole exception to the constitutional design that "scrupulously avoid[ed] concentrating power in the hands of any single individual."

Responding to other arguments offered in favor of Congress's authority to insulate executive branch officials from presidential removal, the majority opinion concluded that the statutory text at issue here—the Director is removable only for "inefficiency, neglect of duty, or malfeasance in office"—is not susceptible to an interpretation consistent with the kind of control the Constitution assigns to the President. And while Justice Kagan's dissent touted the benefits of pragmatic, flexible accommodation of agreements reached by the political branches, the majority opinion maintained that the Constitution evinces other priorities.

Severability

Having determined that the CFPB's leadership by a single independent Director is unconstitutional, the Court held that the Director's removal protection is severable from other provisions of the Dodd-Frank Act that establish the CFPB. In his plurality opinion, the Chief Justice concluded "there is nothing in the text or history of the Dodd-Frank Act that demonstrates Congress would have preferred *no* CFPB to a CFPB supervised by the President." To the contrary, he recognized the Dodd-Frank Act contains an express severability clause instructing that the remainder of the Act shall not be affected if any provision is held to be unconstitutional. Anticipating the "major regulatory disruption" that would ensue if the CFPB were voided in its entirety, the plurality opinion concluded it is "clear that Congress would prefer that we use a scalpel rather than a bulldozer in curing the constitutional defect we identify today." As a consequence, the current CFPB Director may continue her term and exercise all of the powers of her office, but she is now subject to removal at the President's discretion. The Supreme Court vacated the judgment of the Ninth Circuit and remanded the case for the lower courts to determine in the first instance whether the CFPB, under its revised structure, may continue the enforcement action against Seila Law that was initiated by a Director who was insulated from presidential removal.

Justice Thomas's Opinion

Justice Thomas authored a separate opinion, joined by Justice Gorsuch, concurring in part and dissenting in part. Justice Thomas agreed with the majority that the CFPB's leadership structure unconstitutionally infringes the President's executive power. But while the majority limited Congress's authority to restrict presidential removal under *Humphrey's Executor* to instances where multimember expert agencies do not wield substantial executive power, Justice Thomas would go further and overrule *Humphrey's Executor* altogether. As he saw it, all independent agencies create "a serious, ongoing threat to our Government's design," and he argued that in a future case the Court should make clear that all executive agencies must bend to presidential control.

Unlike Chief Justice Roberts's opinion, which concluded that the removal restriction is severable from the Dodd-Frank Act and remanded for the lower courts to determine whether the investigation of Seila Law may proceed, Justice Thomas would have resolved the case by holding that the CFPB does not have authority to compel Seila Law to produce the requested documents. For Justice Thomas, the constitutional defect recognized by the majority opinion could be cured by a number of statutory edits—for example, the Court could sever the Director's removal protections, as it did, or it could sever the Director's authority to conduct civil investigations. With no guidance from Congress on which result it would prefer, Justice Thomas would award Seila Law the relief it requested—terminating the demand for documents—and leave any statutory changes to Congress.

Justice Kagan's Opinion

Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, issued an opinion concurring in the judgment with respect to severability but dissenting from the determination that the CFPB Director's removal protections violate the separation of powers. The majority's rule that agency directors must be removable at will by the President unless they fall within two narrow exemptions, she said, has no basis in the Constitution. By micromanaging and second-guessing innovations agreed to by the legislative and executive branches, Justice Kagan argued that the Court "commits the Nation to a static version of governance, incapable of responding to new conditions and challenges." Justice Kagan also observed that while the Constitution prescribes how executive branch officials may be appointed, it is silent about how they may be removed. Rather than extract from this silence a strong presumption in favor of at-will removal by the President, Justice Kagan would have held that a removal provision violates the separation of powers only if "the measure so deprives the President of control over an official as to impede his own constitutional functions."

Considerations for Congress

The Court's decision has important implications for the CFPB, other agencies structured similarly to the CFPB, and Congress's ability to create independent agencies going forward. In sum, executive branch officials must be removable by the President unless they serve on a multimember commission analogous to the FTC model upheld in *Humphrey's Executor*, or if they are an inferior officer exercising limited authority within a confined jurisdiction analogous to the independent counsel upheld in *Morrison*. The full scope of these exceptions, however, remains unresolved. It is not clear which features of a multimember body, such as staggered terms and partisan balance requirements, the Court might deem required by the Constitution, nor did the Court provide further guidance on how much power an independent executive official may exercise. Wherever the limits to these exceptions may lie, *Seila Law* suggests for-cause removal restrictions for executive branch officials violate the Constitution unless their roles and responsibilities can be analogized to those upheld in *Humphrey's Executor* or *Morrison*.

With these uncertainties in mind, there are a variety of ways the statute creating the CFPB might be amended to bring it in line with the Constitution's requirements, and Congress is not beholden to the Court's remedy of severing the Director's removal protections. If Congress would prefer the CFPB not be led by a Director removable at will by the President, the Court might permit Congress to replace the single director model with a multi-member commission. Alternatively, Congress could ameliorate some of the Court's concerns by subjecting the CFPB's Director to increased supervision, confining the CFPB's jurisdiction, and removing some of its powers.

The majority opinion identified three other agencies led by single directors protected from presidential removal: the Office of the Special Counsel, the Social Security Administration, and the Federal Housing Finance Agency. The Court described these agencies as "modern and contested," suggesting they may be subject to similar judicial scrutiny in future cases, though the Court also noted that these three agencies "do not involve regulatory or enforcement authority remotely comparable to that exercised by the CFPB." The fate of these agencies remains unclear and may be the subject of further litigation.

By pronouncing the default presumption that executive agency leaders must be removable by the President, the Court signals that future efforts to create independent agencies—particularly along models that lack a historical analog—will be reviewed with some suspicion. Although the decision in *Seila Law* focused on removal restrictions, that scrutiny in future decisions may extend to other indicia of agency independence. Any effort to shelter executive agencies from presidential control must be consistent with the interpretation of Article II that the Court offers in this opinion.

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