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Supreme Court Holds That CFPB's Structure Is Unconstitutional

On June 29, 2020, the Supreme Court held in ***Seila Law* v. *Consumer Financial Protection Bureau*** that the single-director, independent-agency structure of the CFPB violates the constitutional separation of powers. One of the most important separation-of-powers cases in recent memory, the decision in *Seila Law* will have significant effects for federally regulated parties both in the near and long term. Paul, Weiss represented the prevailing party at the Supreme Court.

Background

Congress created the CFPB in 2010 to regulate the market for consumer financial products and services. The law creating the CFPB—a single title of the blockbuster Dodd-Frank Act—structured the agency as an "independent bureau" headed by a single director. The statute also included a for-cause removal provision, protecting the director from removal by the President except for "inefficiency, neglect of duty, or malfeasance in office."

In 2017, the CFPB issued a civil investigative demand to Seila Law, a California-based law firm, as part of an investigation into whether the firm violated federal consumer-protection law. Seila Law objected to the demand on the ground that the CFPB's leadership by a single director removable only for cause violated the constitutional separation of powers. The CFPB petitioned a federal district court for enforcement, and the court granted the petition. The Ninth Circuit affirmed.

Seila Law petitioned the Supreme Court for review. Before the Court, the CFPB changed positions, agreeing that the for-cause removal restriction on the President's ability to remove the agency's director violated the separation of powers. The Supreme Court granted review and appointed an amicus curiae to defend the CFPB's constitutionality.

The Supreme Court's Decision

In a fractured decision written by Chief Justice Roberts, the Supreme Court held that the for-cause removal restriction on the CFPB director violated the separation of powers but that the violation did not require the Court to strike down the agency in its entirety.

In a unanimous portion of the decision, the Court held that the case was justiciable. The Court rejected the court-appointed amicus's arguments that Seila Law lacked Article III standing, that the CFPB's change in position destroyed adversity between the parties, and that the constitutionality of a removal restriction can only be assessed in the context of the actual removal of an officer.

In a 5-4 portion of the decision, the Court held that Congress had infringed on the President's constitutional authority by structuring the CFPB as headed by a single director removable only for cause. The Court began with the general principle that Article II of the Constitution gives the President unfettered power to remove officers who exercise power on the President's behalf, as famously stated in the Court's 1926 decision *Myers* v. *United States*. The Court noted that it had recognized "only two exceptions" to that general rule. First, in the 1935 decision *Humphrey's Executor* v. *United States*, the Court permitted a restriction on the removal of members of a nonpartisan, multimember commission that it viewed as exercising no executive power. Second, in the 1988 decision *Morrison* v. *Olson*, the Court permitted a restriction on the removal of certain inferior officers whose duties were narrowly defined.

The Court concluded that, while it need not revisit those exceptions in *Seila Law*, it would not "extend" them to the "novel context" of a single-director independent agency exercising substantial executive power. That structure is unique, the Court reasoned, because it "lacks a foundation in historical practice" and impermissibly "concentrat[es] power in a unilateral actor insulated from Presidential control." Because no relevant exception to the general principle of at-will presidential removal applied, the Court held that the for-cause removal restriction on the CFPB director was unconstitutional.

In a 7-2 portion of the decision, the Court held that the removal restriction was severable from the remainder of the Dodd-Frank Act, thereby permitting the CFPB to continue in existence. The Court relied primarily on Dodd-Frank's general severability provision, which stated that "the remainder of th[e] Act" should "not be affected" if any other provision is "held to be unconstitutional." While the Court acknowledged that the language was "boilerplate," it noted that Congress frequently employs similar severability language because it "ensure[s] a precise and predicable result."

Justice Thomas, joined by Justice Gorsuch, concurred in part and dissented in part. While Justice Thomas agreed that the CFPB was unconstitutionally structured, he would have gone further than the majority and overruled *Humphrey's Executor*. In his view, *Humphrey's Executor* was incorrectly decided, had been undermined by subsequent case law, and, through its approval of independent agencies, "creat[ed] a serious, ongoing threat to our Government's design." Separately, Justice Thomas noted that he would not have addressed the question of severability; in his view, the proper remedy was simply to order the dismissal of the CFPB's petition to enforce the civil investigative demand issued to Seila Law.

Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, also concurred in part and dissented in part. Justice Kagan agreed with the majority's decision to sever the for-cause removal restriction, but she disagreed that the restriction was unconstitutional. In her view, courts should take a "deferential approach" to questions of agency structure, allowing "Congress and the President [to] figure out what blend of independence and political control will best enable an agency to perform its intended functions." Because she concluded that for-cause removal restrictions "do not impede the President's ability to perform his own constitutional duties," Justice Kagan would have upheld the CFPB's structure.

Implications

Seila Law is a major separation-of-powers decision that will have a number of foreseeable implications for federally regulated entities.

As an initial matter, the Court's decision raises questions about whether the CFPB can ratify prior actions taken before the severance of the for-cause removal provision—including the promulgation of substantive regulations. In *Seila Law*, the government raised a ratification argument before the court of appeals, and the Supreme Court sent the case back to the court of appeals to consider that issue.

The decision in *Seila Law* will also affect agencies other than the CFPB. Most obviously, the Federal Housing Finance Authority bears a similar structure to the CFPB, and the Fifth Circuit recently held in *Collins* v. *Mnuchin* that FHFA's structure was unconstitutional. While the majority decision in *Seila Law* notes that FHFA differs from the CFPB in certain ways, it seems unlikely that FHFA's structure will stand.

More broadly, the majority opinion calls into question the constitutionality of a number of independent agencies headed by multimember commissions. Historically, the Supreme Court's decision in *Humphrey's Executor* was understood to authorize that structure. But in *Seila Law*, the majority limited *Humphrey's Executor* to permitting only "multimember expert agencies that *do not wield substantial executive power*" (emphasis added). At the same time, the Court questioned the conclusion in *Humphrey's Executor* that the 1935 Federal Trade Commission exercised no executive power, even suggesting that all "activities of administrative agencies . . . are exercises of . . . the 'executive Power.'" Based on those views, it is unclear whether *Humphrey's Executor* can continue to shield from challenge the structure of multimember independent agencies that exercise enforcement power, such as the Securities and Exchange Commission, the Federal Trade Commission, and the Federal Communications Commission. What is more, Justices Thomas and Gorsuch expressly called for the Court to reconsider *Humphrey's Executor* altogether. Accordingly, entities regulated by federal independent agencies will need to consider seriously whether to challenge their regulator's structure under appropriate circumstances.

In addition, when viewed in light of the Court's recent decision in *Financial Oversight & Management Board for Puerto Rico* v. *Aurelius Investment, LLC*, the decision in *Seila Law* further illustrates that, when it comes to questions about the appointment or removal of officers, the Court is focused on the nature of the power that particular officers wield. In *Aurelius*, the Court held that the Appointments Clause did not apply to officers that exercised *local* power, rather than federal power. In *Seila Law*, the Court focused on the fact that the CFPB director exercised substantial executive power, rather than "quasi-legislative" or "quasi-judicial" power as in *Humphrey's Executor*.

Finally, the Court's holding on severability bolsters the force of boilerplate severability provisions that Congress often includes in new enactments. In *Seila Law*, the applicable severability provision was at the beginning of the 848-page Dodd-Frank Act, coming almost 600 pages before the for-cause removal restriction held to be unconstitutional. Still, the Court gave the provision near-dispositive force, stating that Congress was not required to "insert duplicative severability clauses" in an Act to make each provision severable from every other. In light of that reasoning, the only viable argument for avoiding a statutory severability provision may be that the invalidation of the challenged provision renders some or all of the relevant act nonfunctional.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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