

July 1, 2020

Seila Law v. CFPB — U.S. Supreme Court Removes Limitations on President's Ability to Remove CFPB Director, but Leaves CFPB Otherwise Intact

Court's Decision Leaves Open Questions of the Validity of Prior CFPB Actions and the Structure of Other Federal Agencies

SUMMARY

On June 29, 2020, the U.S. Supreme Court struck down limitations Congress placed on the President's ability to remove the Director of the Consumer Financial Protection Bureau (CFPB). The Court determined that various aspects of the Director's tenure and powers—including that the Director is the sole decision-maker for the CFPB, has a five-year term, and is removable by the President only for cause—made the Director unique among other federal agency heads in the Director's isolation from presidential oversight. This isolation, the Court held, violates the President's authority under Article II of the U.S. Constitution to control the Executive Branch. The Court declined, however, to strike down the rest of the statute creating the CFPB, holding instead that the for-cause removal provision could be severed from the rest of the legislation, leaving the agency otherwise intact.

The decision has several important consequences. First, by enabling Presidents to remove the CFPB Director without cause, the decision will allow Presidents to more easily bring about shifts in agency leadership, policy goals, and enforcement priorities (though Presidents' nominees for Director are still subject to Senate confirmation). Second, although the Court emphasized the unique structure of the CFPB, the decision may encourage challenges to the structure of other federal agencies on the grounds that they are unduly independent from the President. Third, the Court specifically asked the lower courts to consider

whether certain prior CFPB actions taken under the old, removal-for-cause regime are valid and, if not, whether and how the CFPB can make those prior actions valid.

BACKGROUND

When Congress created the CFPB as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), it gave the agency a “unique” structure.¹ Unlike other financial regulators headed by multimember boards,² the CFPB has a single director who serves a five-year term and could be removed by the President only for “inefficiency, neglect of duty, or malfeasance in office.”³ In effect, this removal provision prevented a President from dismissing the CFPB Director at will and meant that a President could serve an entire four-year term without the opportunity to nominate a new Director.

Among the Director’s “potent” powers are the authority to “promulgate binding rules fleshing out 19 federal statutes,” investigate violations and prosecute civil actions, and “unilaterally issue final decisions” in administrative adjudications.⁴ The Director also sets the agency’s annual budget, which is funded directly by the Federal Reserve, outside the Congressional appropriations process and a presidential veto.⁵

In 2017, the CFPB’s structure became the central issue in a dispute between the agency and Seila Law LLC, a California law firm that provides debt-related legal services. Under then-Director Richard Cordray, the CFPB issued a civil investigative demand to Seila Law, seeking information about unlawful debt-relief practices. Cordray later resigned, and Mick Mulvaney, then serving as Acting Director, purported to ratify the investigation.⁶ When the CFPB sued to enforce the demand, Seila Law argued that the demand was invalid because the agency’s structure is unconstitutional.⁷ The district court disagreed,⁸ and the Ninth Circuit affirmed.⁹ The Supreme Court granted *certiorari* to decide whether the for-cause removal provision violates the Constitution’s separation of powers and—if so—whether that provision can be severed from the rest of Dodd-Frank.¹⁰

DECISION

The two questions were resolved by different majorities of Justices.

Removal Provision. In a 5-4 opinion by Chief Justice Roberts,¹¹ the Court held that the CFPB’s “leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers.”¹² The Court began its analysis with the “general rule”¹³ rooted in the text of Article II¹⁴ that a President enjoys “unrestricted removal power” over “those who wield executive power on his behalf.”¹⁵ The Court noted that it had previously recognized “only two exceptions”¹⁶ to this rule, such that Congress may restrict the President’s removal power over “multimember expert agencies that do not wield substantial executive power” and “inferior officers with limited duties and no policymaking or administrative authority.”¹⁷ But the Court concluded that neither of those exceptions covers the CFPB Director—a single individual who exercises “significant governmental power” yet is unaccountable to voters, the President, or Congress.¹⁸ In

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the Court's view, this arrangement is not only a "historical anomaly" but also "incompatible with our constitutional structure."¹⁹ The Director's "insulation from removal by an accountable President," the Court explained, "render[s] the agency's structure unconstitutional."²⁰

In an opinion for four Justices, Justice Kagan dissented from the Court's holding on the ground that the Constitution says "nothing at all" about presidential removal power and that the Court's general rule about Executive Power and its exceptions "do[] not exist."²¹ Instead, the dissent urged, Congress has "broad discretion" under the Necessary and Proper Clause to "enact for-cause protections in pursuit of good governance."²² The dissent also disagreed with the Court's distinction between single-director and multimember agencies,²³ arguing that the President "has at least as much control over an individual as over a commission—and possibly more."²⁴

Severability. In an opinion with which six other Justices agreed, Chief Justice Roberts upheld the constitutionality of the CFPB by concluding that the for-cause removal provision was severable from the rest of Dodd-Frank. Noting that the statute contained an express severability clause,²⁵ the Court found it "clear that Congress would prefer that we use a scalpel rather than a bulldozer in curing the constitutional defect" in the removal provision.²⁶ Hence, the Court explained, while the CFPB Director "must be removable by the President at will," the agency "may . . . continue to operate."²⁷ The court did not address the validity of prior CFPB actions taken by Directors who functioned under the for-cause removal provision, leaving the Ninth Circuit to consider on remand whether subsequent "ratifi[cation] by an Acting Director accountable to the President" cured the constitutional error in the civil investigative demand issued to *Seila Law*.²⁸

Justice Thomas, joined by Justice Gorsuch, dissented from the severability holding, arguing that the Court's "modern severability precedents [are in] tension with . . . historic practice."²⁹ Instead of addressing the issue of severability, Justice Thomas explained, he would "simply deny the CFPB's petition for an order of enforcement."³⁰

IMPLICATIONS

Although the Court's decision did not strike down the CFPB as an agency, the decision still has several important ramifications for entities regulated by the CFPB specifically, and by federal agencies in general.

First, because a President is now free to remove the CFPB Director, presidential elections will have a more significant effect on the agency's leadership, policy goals, and enforcement priorities. Regulated entities should thus prepare for the possibility of such shifts (subject to Senate confirmation) should the presidency change hands.

Second, some questions remain about the validity of the civil investigative demand issued to *Selia Law*—and, by extension, other CFPB actions taken while the Director was unconstitutionally insulated from presidential removal. Thus, regulated entities may be able to challenge the validity of CFPB investigative

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or enforcement actions proceeding (or concluded) against them. A similar situation arose after the Court's 2018 decision in *Lucia v. SEC*, which held that Securities and Exchange Commission administrative law judges are subject to the Constitution's Appointments Clause.³¹ After *Lucia*, parties to proceedings before the SEC and other agencies used that case to challenge the validity of decisions made by unconstitutionally appointed agency officials. In response, the Solicitor General issued guidance that agencies should seek voluntary remands "in all cases in which a timely Appointments Clause challenge was raised" but contest such arguments on forfeiture grounds "where a challenger had failed to properly raise and preserve an Appointments Clause challenge."³² Some courts have dismissed post-*Lucia* Appointments Clause challenges as forfeited,³³ so parties seeking to challenge the validity of CFPB action under *Seila Law* should ensure that their arguments are properly raised and preserved.

Third, the Court's decision might encourage challenges to protections from presidential removal given to other agencies' leadership, especially those that are headed by single directors. For example, the Court noted that the Federal Housing Finance Agency is also led by a single director, removable only for cause³⁴—the same structure that *Seila Law* invalidated. A recent decision by the full U.S. Court of Appeals for the Fifth Circuit held that structure unconstitutional,³⁵ and the FHFA's petition for *certiorari* has been distributed for the Court's July 1 conference.³⁶ The Court also identified two other independent agencies—the Office of the Special Counsel and the Social Security Administration—with similar structures.³⁷ Going forward, parties may attempt to use aspects of the Court's reasoning in *Seila Law* to challenge for-cause removal provisions applicable to the heads of these and other independent agencies.

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ENDNOTES

- 1 *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. ____ (2020), No. 19-7, slip op. at 23 (June 29, 2020).
- 2 *Id.* at 5.
- 3 12 U.S.C. § 5491(b)(1); *id.* § 5491(c)(1); *id.* § 5491(c)(3).
- 4 *Seila Law*, slip op. at 4, 17.
- 5 *See id.* at 24.
- 6 *See* Br. of Appellee at 6-10, *Consumer Fin. Prot. Bureau v. Seila Law LLC*, No. 17-56324 (9th Cir. Mar. 19, 2018), 2018 WL 1511440.
- 7 *See* Opp’n at 3-7, *Consumer Fin. Prot. Bureau v. Seila Law LLC*, No. 8:17-cv-01081 (C.D. Cal. July 21, 2017), ECF No. 20.
- 8 *See Consumer Fin. Prot. Bureau v. Seila Law LLC*, No. 8:17-cv-01081, 2017 WL 6536586, at *2 (C.D. Cal. Aug. 25, 2017).
- 9 *See Consumer Fin. Prot. Bureau v. Seila Law LLC*, 923 F.3d 680, 684 (9th Cir. 2019).
- 10 Because the United States agreed with *Seila Law* that the for-cause removal provision is unconstitutional, the Court appointed an amicus curiae to defend the Ninth Circuit’s judgment.
- 11 Justices Thomas, Alito, Gorsuch, and Kavanaugh joined Chief Justice Roberts’s opinion for the Court as to constitutionality.
- 12 *Seila Law*, slip op. at 11. Before reaching the merits, the Court considered and rejected several jurisdictional arguments offered by the appointed amicus. *See id.* at 8-11.
- 13 *Id.* at 13.
- 14 *See* U.S. const. art. II, §1, cl. 1 (“The executive power shall be vested in a President”); *id.* § 3 (President “shall take care that the laws be faithfully executed”).
- 15 *Seila Law*, slip op. at 2.
- 16 *Id.*
- 17 *Id.* at 16.
- 18 *Id.* at 18, 23.
- 19 *Id.* at 21.
- 20 *Id.* at 23.
- 21 *Seila Law*, slip op. at 3 (Kagan, J., concurring in judgment as to severability and dissenting in part).
- 22 *Id.* at 22, 26.
- 23 *See id.* at 30.
- 24 *Id.* at 3.
- 25 12 U.S.C. § 5302 (If “any provision of this Act” is “held to be unconstitutional,” “the remainder of this Act” should “not be affected.”).
- 26 *Seila Law*, slip op. at 35.
- 27 *Id.* at 3.
- 28 *Id.* at 30-31.
- 29 *Seila Law*, slip op. at 15 (Thomas, J., concurring in part and dissenting in part).

ENDNOTES (CONTINUED)

- ³⁰ *Id.* at 17.
- ³¹ *See Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018).
- ³² Mem. from the Solicitor General, U.S. Dep't of Justice, to Agency Gen. Counsels, Guidance on Administrative Law Judges After *Lucia v. SEC* (S. Ct.) 6 (July 2018).
- ³³ *See, e.g., Malouf v. SEC*, 933 F.3d 1248, 1255-56 (10th Cir. 2019).
- ³⁴ *See Seila Law*, slip op. at 20.
- ³⁵ *See Collins v. Mnuchin*, 938 F. 3d 553, 587-588 (2019).
- ³⁶ *See Collins v. Mnuchin*, No. 19-422 (U.S.).
- ³⁷ *See Seila Law*, slip op. at 19-20.

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