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PERSPECTIVE

Tea leaves and the CFPB

By Anne Voigts and Matt Noller

The U.S. Supreme Court's recent decision in *Seila Law v. Consumer Financial Protection Bureau*, 2020 DJDAR 6423, is notable for what it does, but also for what it doesn't do. It held that the fact that the Consumer Financial Protection Bureau is led by a single director removable only for inefficiency, neglect or malfeasance violates separation of powers. But it also held that the CFPB could nonetheless continue to operate, albeit with the director removable at will by the president.

The CFPB

Congress established the CFPB, an independent regulatory agency tasked with ensuring the safety and transparency of consumer debt products, as a response to the 2008 financial crisis. Responsible for 18 preexisting federal statutes, including the Truth in Lending Act, as well as new statutory provisions covering unfair and deceptive practices in the consumer-finance sector, the CFPB has extensive rulemaking, enforcement, and adjudicatory powers. Those powers include the authority to conduct investigations, issue subpoenas and civil investigative demands (CIDs), initiate administrative adjudications, prosecute civil actions in federal court, and issue binding decisions in administrative proceedings. The CFPB also has a broad array of remedies at its disposal, including restitution, disgorgement, injunctive relief, and significant civil penalties.

The structure of the CFPB, which is funded outside of the annual appropriations process, makes it somewhat unique — a sort of administrative law platypus. While traditional independent agencies are headed by multimember boards or commissions, the CFPB is led by a single director, appointed by the president and confirmed by the Senate for a five-year term. During that term, the statute creating the CFPB limits the president's ability to remove the director. Under the statute, the director may only be removed for "inefficiency, neglect of duty, or malfeasance in office."

How This Case Arose

In 2017, the CFPB issued a CID to Seila Law LLC, a California-based law firm providing debt-related legal services, seeking information and documents related to the firm's business practices. Seila Law asked the CFPB to set aside the demand because having a single director removable only for cause violated the separation of powers. The director, Seila Law argued, had to be removable "at will" — that is, for good cause, bad cause, or no cause at all. After the CFPB unsurprisingly declined and Seila Law stood on its refusal to comply, the CFPB filed an enforcement petition in the district court. That court rejected Seila Law's separation of powers argument and ordered it to comply with the demand.

After Seila Law appealed, the 9th U.S. Circuit Court of Appeals affirmed, concluding that Seila's challenge was foreclosed by *Humphrey's Executor v. United States*, 295 U. S. 602, and *Morrison v. Olson*, 487 U. S. 654. *Humphrey's Executor* is a 1935 decision in which the court rejected the argument that the structure of the Federal Trade Commission, with five members who could only be removed for cause, violated Article II of the Constitution. *Morrison* is a 1988 decision in which the court approved for-cause restrictions on the president's ability to fire an independent counsel appointed by the attorney general.

The Supreme Court

The third time was the proverbial charm for Seila Law. They got an unexpected assist when the CFPB agreed with Seila that the removal restrictions were unconstitutional. As a result, the court appointed Paul Clement, a former U.S. solicitor general, to defend the 9th Circuit's decision. Nevertheless, after 105 pages of opinions and the sort of fractured breakdown that only an LSAT question writer could love, the court vacated and remanded in an opinion authored by Chief Justice John Roberts, holding that the removal restrictions were unconstitutional.

Roberts reasoned, in a part of the opinion joined by Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh, that Article II vests the entire executive power in the president, providing that he or she shall "take care that the laws be faithfully executed." And while the Constitution presumes that lesser executive officers will help the president carry out his duties, that executive power historically included the power to supervise and to remove those officers. Both history and precedent, Roberts wrote, confirm that those powers include the unrestricted power to remove executive officials. *See, e.g.*, *Myers v. United States, 272 U.S. 52; Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477.

Roberts recognized two limited exceptions to this principle: first, under *Humphrey's Executor*, for a "multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to

exercise any executive power"; and second, under *Morrison*, for "inferior officers" with limited duties and no policymaking or administrative authority. The CFPB's director, however, fell into neither category: unlike Federal Trade Commission members, the director can issue binding rules and final decisions and seek "daunting monetary penalties" against private parties. And unlike inferior officers, the CFPB's director "has the authority to bring the coercive power of the state to bear on millions of private citizens and businesses."

The "almost wholly unprecedented" single-director structure of the CFPB, Roberts found, was "an innovation with no foothold in history or tradition." Accordingly, Roberts concluded, such an agency "has no basis in history and no place in our constitutional structure." It was "incompatible with our constitutional structure" because it concentrated power in the hands of a single, unelected individual who could not be meaningfully controlled by anyone, including the president.

In a separate portion of the opinion, joined by Justices Alito and Kavanaugh, Roberts concluded that the removal provision could be severed from the rest of the statute creating the CFPB. Accordingly, the fact that the removal provision was unconstitutional did not mean that the CFPB as a whole had to fall. As the plurality held, "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." Indeed, the act contained a severability provision and the remainder of the act could function without the removal provision.

Justice Thomas filed a separate opinion concurring in part and dissenting in part, in which Justice Gorsuch joined. Thomas dissented on severability because he would not have addressed the issue in this case. He nonetheless signaled his "growing discomfort" with the court's "current severability precedents," and questioned the continuing validity of *Humphrey's Executor*. Thomas and Gorsuch, it seems, doubt the constitutionality of any restrictions on the president's ability to remove agency heads.

Justice Elena Kagan, joined by Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor, concurred in part and dissented in part. She agreed that the CFPB should survive, but would have found the removal restrictions constitutional. A contrary approach would strip Congress of the "wide latitude" it should enjoy to create independent agencies. Moreover, she strongly disputed Roberts' account of history and the court's precedents, arguing that the CFPB's powers and single-director structure were historically unremarkable and constitutional under the court's cases. The majority's contrary decision by "five unelected judges" effectively rejected the result of democratic processes, sending Congress "back to the drawing board" for no good reason.

Reading the Tea Leaves

The end result was one that left few wholly satisfied. Those who thought the CFPB an unconstitutional upstart got only partial relief — the director can now be removed at will, but the agency survives. And those who thought that the CFPB's restrictions on removal were an essential protection against improper influence or self-dealing saw the agency survive, but without a key element designed to ensure its political independence. Moreover, the severability analysis raises questions as to whether, in future cases, the Supreme Court will similarly cabin the impact of fairly drastic constitutional rulings by finding unconstitutional provisions severable — allowing the whole to survive, but in a substantially modified form. ■

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