

## Insights

### US Supreme Court Rules Structure of the CFPB Unconstitutional, Preserves Bureau's Authority to Operate

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On June 29, 2020, the United States Supreme Court ruled on *Seila Law v. Consumer Financial Protection Bureau*.<sup>1</sup> The Court held that the Consumer Financial Protection Bureau's ("CFPB") leadership by a single director removable only for "inefficiency, neglect of duty, or malfeasance in office" violates the separation of powers,<sup>2</sup> but stopped short of invalidating the entire agency by holding that the unconstitutional removal provision is severable from the rest of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). As a result, the CFPB will remain fully operational, but the President will be able to remove the CFPB director "at will" and without cause. Notably, the Court's decision did not impact the independent funding received by the CFPB from the Federal Reserve, thus preserving some of the CFPB's independence from the political process.

#### Background

In 2010, Congress created the CFPB as part of Dodd-Frank to regulate consumer financial products in the wake of the 2008 financial crisis. Congress gave the CFPB authority over 18 existing federal statutes, including the Fair Credit Reporting Act and Truth in Lending Act. To carry out its mission, Congress provided the CFPB with the authority to make rules, adjudicate individual claims, and issue subpoenas and civil investigative demands.

Additionally, Congress provided the CFPB's funding through the Federal Reserve instead of Congress' annual appropriations process.

Notably, Congress established a single director with a five-year term to lead the CFPB, removable by the President only for "inefficiency, neglect of duty, or malfeasance."<sup>3</sup> Such removal limitations contrast sharply with other cabinet level positions, like the Secretary of the Treasury, which are removable "at will" by the President. The only other agency led by a single director subject to the same heightened removal standard is the Federal Housing Finance Authority ("FHFA"). A similar challenge to the constitutionality of that agency structure is the subject of a pending petition for Certiorari to the court in *Collins v. Mnuchin*.<sup>4</sup>

In 2017, the CFPB issued a civil investigative demand (a type of subpoena) to Seila Law LLC, a California law firm that provides debt-relief services to its clients. The CFPB's demand sought information regarding Seila's business practices. Seila Law challenged the CFPB's action, claiming the CFPB's leadership by a single director removable for

cause violated the separation of powers provisions of the U.S. Constitution. The U.S. District Court ruled against Seila Law and the Ninth Circuit Court of Appeals affirmed the district court's decision. In 2019, Seila Law successfully petitioned for review by the Court.

### **The Court's Decision**

Writing for the 5-4 majority, Chief Justice John Roberts agreed with Seila Law and found that the CFPB's leadership by a single individual removable only for cause violates the separation of powers. In doing so, the Court rejected arguments to extend its previous decisions in *Humphrey's Executor v. United States*<sup>5</sup> and *Morrison v. Olson*<sup>6</sup> to the CFPB's leadership structure. In *Humphrey's Executor*, the Court permitted for-cause removal protections granted to members of the board of experts in charge of the Federal Trade Commission ("FTC"), because the FTC functioned as a "quasi-judicial" and "quasi-legislative" agency and wielded no meaningful executive power. *Morrison* allowed "for-cause" removal protections for an inferior officer (the independent counsel), which had no policymaking or administrative authority.

The Court cited the vast authority provided to the CFPB director and the independent nature of the agency as factors distinguishing the CFPB from the FTC and independent counsel in *Humphrey's Executor* and *Morrison*. According to the Court, Dodd-Frank's language limiting the director's removal along with the authority granted her created an agency structure that frustrated the separation of powers principles imbedded in the Constitution, which vests sole authority over the executive branch in the President.

The Court's rejection of the CFPB's leadership structure required it to determine whether the unconstitutional removal provision in Dodd-Frank could be "severed" from the rest of the statute or whether the entire statutory framework governing the CFPB must be struck down as well. If severable, the unconstitutional removal provisions would be removed from the statute and the CFPB would remain fully operational, with the remaining provisions of the Dodd-Frank still in effect. Ultimately, the Court found that Congress intended for the removal provision to be severable from other portions of Dodd-Frank that established the CFPB, stating that "Congress would prefer that we use a scalpel rather than a bulldozer in curing the constitutional defect we identify today."<sup>7</sup>

Accordingly, the Court vacated the Ninth Circuit's decision and remanded it to the Court of Appeals to determine other issues outstanding in the case but not addressed by the Supreme Court.

### **Moving Forward**

As an immediate consequence of the Court's decision, the CFPB director is now removable "at will" by the President. What impact this may have on the direction of the CFPB in the future remains unclear. While the CFPB's day-to-day operations are unlikely to change in the short-term, previous bipartisan congressional efforts to create an oversight board for the CFPB are likely to be reintroduced and gain new found support. Further, with the re-election prospects of President Trump uncertain at this time, CFPB Director Kranninger may choose to accelerate some pending rulemaking efforts to ensure their completion before any potential change in agency leadership.

Finally, while the Court's decision in this case does not speak directly to the constitutionality of the structure of the FHFA, it appears likely that the Court (assuming it grants the pending petition for cert. in *Collins, Id.*) will reach a similar conclusion with respect to the housing finance agency led by Director Calabria.



Krieg DeVault LLP will continue to monitor the impact of the Court's decision in *Seila* and will keep clients aware of any changes at the CFPB resulting from this opinion.

[1] 591 U.S. \_\_ (2020).

[2] 12 U.S.C. §§ 5491(c)(1), (3).

[3] *Id.*

[4] *Collins v. Mnuchin*, 938 F.3d 553 (5th Cir. 2019). Petition for Certiorari Filed, Sep. 25, 2019.

[5] *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611

[6] *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569.

[7] 591 U.S. \_\_, \_\_ (2020) (*slip op.*, at 35).