

Supreme Court Holds That Consumer Financial Protection Bureau's Structure Is Unconstitutional

Client Alert | June 29, 2020

Decided June 29, 2020

Seila Law LLC v. Consumer Financial Protection Bureau, No. 19-7

Today, the Supreme Court held 5-4 that the single-Director structure of the Consumer Financial Protection Bureau violates the Constitution's separation of powers, but ruled 7-2 that the proper remedy is to sever the Director's statutory for cause removal restriction, thereby making the Director removable by the President at will.

Background:

The Consumer Financial Protection Bureau ("CFPB") was created as an independent federal agency by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The CFPB enforces 19 federal consumer-protection statutes and is headed by a single Director who is removable by the President only "for cause," not "at will" for mere policy disagreements with the President. The CFPB served a civil investigative demand on petitioner, a law firm that provides debt-collection services, and later sought to enforce that demand in federal court. Petitioner argued that the demand was invalid because the CFPB's structure violated the Constitution's separation of powers by vesting too much executive power in a single Director who does not answer to the President. The district court and the U.S. Court of Appeals for the Ninth Circuit both rejected the challenge, concluding that the CFPB is constitutionally structured.

Petitioner then sought and obtained Supreme Court review, supported by the United States and the CFPB itself, both of which agreed that the agency's structure unconstitutionally limited the President's removal authority. The parties disagreed, however, on whether the proper remedy for the constitutional violation was to sever the Director's statutory "for cause" removal restriction, thereby making the Director answerable to the President, or instead to invalidate the entire statute creating the CFPB. The Supreme Court appointed amicus curiae counsel to defend the constitutionality of the CFPB's structure, as the United States declined to do so.

Issue:

Whether the CFPB's structure as a powerful agency headed by a single Director removable by the President only "for cause" violates the Constitution's separation of powers, and, if so, whether severing the statute's "for cause" removal restriction to make the Director removable "at will" by the President cures the unconstitutionality.

Court's Holding:

The CFPB's structure as a powerful federal agency headed by a single Director removable by the President only "for cause" violates the Constitution's separation of powers. The violation is cured by severing the "for cause" removal restriction and making

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the Director answerable to the President.

"[A]n independent agency led by a single Director . . . lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control."

Chief Justice Roberts, writing for the Court

Gibson Dunn submitted an *amicus* brief on behalf of the Center for the Rule of Law in support of petitioner: *Seila Law LLC*

What It Means:

- The Court's decision recognizes a significant limitation on Congress's ability to create so-called "independent" agencies. Agencies that execute federal law and are headed by a single Director, including financial regulators, now cannot be "independent" of the President, but instead must be subject to the President's constitutional duty to control the federal officers who assist the President in executing federal law. The reasoning of *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), which provides the constitutional rationale for "independent" agencies, is limited to "multimember expert agencies that do not wield substantial executive power," such as the Federal Trade Commission as it existed in 1935.
- Because the CFPB's Director is now answerable to the President, the CFPB's regulatory and enforcement activities now should more closely align with the President's policy objectives. The Court's decision gives the President greater power to execute federal consumer-protection law, and makes the President accountable for the CFPB's performance.
- The Court's prospective remedy of severing the statutory provision that limited removal of the CFPB Director "for cause" may mean that the agency can continue to operate without significant disruptions.
- The Court did not address whether a civil investigative demand issued by a Director unconstitutionally insulated from removal but later purportedly ratified by an Acting Director who was accountable to the President is enforceable. The Court remanded the case for the lower courts to decide the ratification issue in the first instance.
- Justice Thomas, joined by Justice Gorsuch, concurred in part in the Court's constitutional holding and dissented in part from the Court's severability holding. Justice Thomas and Justice Gorsuch argued that the Court should "reconsider *Humphrey's Executor in toto*" in a future case. As he has done previously, Justice Thomas also questioned the Supreme Court's modern severability precedents and argued that the Court need not have addressed the severability question in this case.
- Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, dissented in part and would not have found a constitutional violation. The four dissenters argued that the Constitution allows for for-cause removal limits and says nothing about the President's removal power, that financial regulators historically have had a degree of independence from Presidential oversight, and that the Court's precedents have sustained other independent agencies. But the dissenters agreed that the Director's statutory removal restrictions were severable.
- The Court's decision caps nearly a decade of litigation over the constitutionality of the CFPB's structure. Gibson Dunn pioneered this litigation and handled the first constitutional challenge to the CFPB's structure that produced a major separation of powers decision and ultimately resulted in the vacatur of a \$109 million penalty imposed by the unconstitutionally structured agency. See *PHH Corp. v. CFPB*, 839 F.3d 1 (2016) (Kavanaugh, J.), *on reh'g en banc*, 881 F.3d 75 (D.C. Cir. 2018) (en banc). Gibson Dunn is also handling an en banc Fifth Circuit appeal that will further

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test the important issue of ratification that the Supreme Court expressly left open. See *CFPB v. All American Check Cashing, Inc.*, No. 18-60302 (5th Cir.).

The Court's opinion is available [here](#).

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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