Featured Article

Power, Politics or Precedent? Supreme Court Backs Presidential Power to Hire or Fire CFPB Director

By Spencer P. Scheer, Esq., Scheer Law Group

The beauty of our Constitution is often revealed by the separation of powers between Congress, The President and the Courts. While many long for one powerful person to "set things right", it is often the grant or limitations of specific powers to one branch of our government that keeps us from sliding into tyranny. The recent holding in *Seila Law LLC v. Consumer Financial Protection Bureau* (2020) 140 S.Ct. 2183, 2187 [207 L.Ed.2d 494], gives insight into this delicate balance of power and why the President should be allowed the power to hire or fire the Director of one of the largest regulatory agencies in the Country at will.

Background: In 2008, in response to the "mortgage meltdown" and financial crises, Congress created the Consumer Finance Protection Bureau ("CFPB"). The mandate was for the CFPB to monitor and safeguard consumer debt products under the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank), 124 Stat. 1376.

Congress transferred the administration of 18 existing federal statues to the CFPB and created a new prohibition on unfair and deceptive business practices (under 12 U. S. C. § 5536(a)(1)(B)). Included in this massive transfer of power was regulatory oversight over *the Fair Credit Reporting Act*, *Truth in Lending Act* and *Fair Debt Collection Practices Act.* One power granted to the CFPB to carry out its regulatory and enforcement powers is the right to issue investigative demands (similar to a subpoena) to obtain information.

Unlike most other independent agencies, which are governed by multimember boards or commissions, Congress appointed a single Director who is appointed by the President for a five-year term with Senate approval. The Director can only be removed by the President for inefficiency, neglect of duty or malfeasance (12 USC §5491 (c)(1)(3). Accordingly, under this provision. the President cannot just fire a Presidential appointee at will. The President must show cause to remove the Director. As discussed below, this could be an impermissible restraint under the Constitution.

> "*…the case reaffirms that the CFPB is in fact constitutional and that Constitutional separation of powers mandates makes the Director subject to Presidential dismissal with or without cause.*"

Issues and Holding: Seila Law, LLC ("Seila") is a California law firm providing debt related services to its clients. The CFPB investigated Seila's business practices and issued an investigative demand to Seila. Seila asked the CFPB to withdraw the investigative demand on the grounds that the CFPB's organizational structure (Requiring that the President have to show cause to remove the Director), violated the separation of powers provisions in the Constitution, which grants the President the unilateral right to remove an appointed official without showing cause. The CFPB refused to withdraw the investigative demand. Seila still would not comply and the CFPB petitioned the District Court for an order compelling Seila to comply.

The District court and Ninth Circuit upheld the CFPB's authority to issue the investigative demand under its existing structure. The Supreme Court overturned the lower courts' rulings, but did not "throw out the {CFPB} baby with the bathwater." Instead, while the Court held that the structure of the CFPB does violates the separation of powers by limiting the rights of the President to fire the Director at will, it held that the unlawful removal restrictions could be separated from the rest of the CFPB mandate so that the agency could continue to operate, thereby preserving the historical right of the President to remove appointees at will.

Examining separation of powers concepts dating back to 1789, the Court in the Seila Law Case confirmed that the President's executive power generally includes the power to supervise—and, if necessary, remove—those who exercise the President's authority on his behalf. Then, the Court examined two prior judicial decisions, which supported congressional authority to require that "cause" be shown to override a President's exclusive right to exercise removal power over an executive appointment. The Court also examined recent history to determine if restrictions on Presidential power to remove principal officers of administrative agencies has been enforced.

While finding that exceptions to the President's rights to hire and fire at will existed, the Court declined to expand the exceptions limiting the right of a President to dismiss without cause, to the CFPB in this case[1]. In essence, the unique nature of the cases requiring "cause" and congressional oversight over removal, were not expanded to apply to the Director of the CFPB The Director is subject to removal without cause by the President. *Seila Law LLC v. Consumer Financial Protection Bureau* (2020), *supra* at 2187, 2200-2201.

The constitutional logic of the decision is best summed up by the Court's reliance on James Madison:

> "The resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections. In that scheme, individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President. Through the President's oversight, "the chain of dependence [is] preserved," so that "the lowest officers, the middle grade, and the highest" all "depend, as they ought, on the President, and the President on the community." 1 Annals of Cong. 499 (J. Madison).

Seila Law LLC v. Consumer Financial Protection Bureau (2020) 140 S.Ct. 2183, 2203 .

However, political considerations clearly played a part:

> "Because the CFPB is headed by a single Director with a five-year term, some Presidents may not have any opportunity to shape its leadership and thereby influence its activities. A President elected in 2020 would likely not appoint a CFPB Director until 2023, and a President elected in 2028 may *never* appoint one. That means an unlucky President might get elected on a consumer-protection platform and enter office only to find herself saddled with a holdover Director from a competing political party who is dead set *against* that agenda. To make matters worse, the agency's single-Director structure means the President will not have the opportunity to appoint any other leaders—such as a chair or fellow members of a Commission or Board—who can serve as a check on the Director's authority and help bring the agency in line with the President's preferred policies."

Seila Law LLC v. Consumer Financial Protection Bureau, supra at 2204.

The court went on to hold that the unconstitutional removal restriction provisions in the Dodd Frank Act could be separated from the rest of the statute, to save it. Bottom line is that the CFPB lives to fight another day and unless President Trump overturns the election, Joe Biden will have a chance to appoint a new Director who will be responsible to him and him alone.

Why you should care about this case: Practically, the case reaffirms that the CFPB is in fact constitutional and that Constitutional separation of powers mandates makes the Director subject to Presidential dismissal with or without cause.

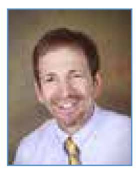
Bigger picture: The centralization and expansion of governmental power to regulate consumer debt products and debtor/creditor relations should be considered. The CFPB, while diminished in its role under the current administration will likely see a much expanded role in the future under a Democratic administration. Centralized regulation appears to be a trend embraced by states, with policy originating from the CFPB, and echoed by state regulations.

Similar to what happened in 2008 via implementation of Dodd Frank, there has been a massive transfer of power to centralize and regulate consumer debt products throughout the nation. California has joined that trend with abandon in 2020 via enactment of AB 1864 (creation of the Department of Financial Protection and Innovation), and SB 908 (New regulatory oversight of Debt Collectors and Debt Buyers). Whether the Court acted solely in Seila to preserve Constitutional separation of powers or had an eye on the political ramifications of its decision, may never be known. However, it is clear that the court acted to preserve the legitimacy of the CFPB despite its constitutional deficiencies. The result is that the CFPB and its state law corollaries will likely impose increasing regulatory power and restrictions on consumer debt products and debtor-creditor relations for years to come.

1. There were two noted exceptions;

   First: When the removal for cause was from a body of expert agencies created by Congress (FTC) and led by principal officers that could be removed by the President only for cause; citing Humphrey's Ex'r v. U.S. (1935) 295 U.S. 602 [55 S.Ct. 869, 79 L.Ed. 1611], and Second: when enforcing tenure protections for an inferior officer (independent counsel) who had limited duties and no policymaking or administrative authority, citing Morrison v. Olson (1988) 487 U.S. 654 [108 S.Ct. 2597, 101 L.Ed.2d 569].

   The Court also found scant authority to justify removal of principal officers of an agency for cause holding that: "After years of litigating the agency's constitutionality, the Courts of Appeals, parties, and *amici* have identified "only a handful of isolated" incidents in which Congress has provided good-cause tenure to principal officers who wield power alone rather than as members of a board or commission… four to be exact—shed little light.". *Seila Law LLC v. Consumer Financial Protection Bureau, supra* at 2201.



Mr. Scheer is a principal of SLG. He is an effective and successful litigator and has handled over 200 jury and non-jury trials in State and Federal courts, focusing on creditor and real estate litigation matters. He can be reached at sscheer@scheerlawgroup.com.