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Legal Sidebar

Supreme Court to Review Constitutionality of the CFPB

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Last month the Supreme Court agreed to hear a constitutional challenge to one of the signature agencies Congress created in response to the 2008 financial collapse: the Consumer Financial Protection Bureau (CFPB). In *Seila Law LLC v. CFPB*, the Court is to review whether it is permissible for that agency to be led by a single director protected from at-will removal by the President, and if not, whether the Court may correct any error by severing the director's removal protections. This Sidebar identifies some of the CFPB's key attributes that the Court is likely to scrutinize. CRS products in preparation discuss other issues raised by this case, including possible remedies the Court may order if the CFPB's organizational structure is held unconstitutional.

Background

The CFPB is tasked with administering 18 preexisting federal consumer protection statutes that are intended to ensure consumers have access to financial products, services, and markets that are "fair, transparent, and competitive." The agency is led by a single director nominated by the President and confirmed by the Senate. Its director may issue rules and regulations, conduct investigations, file lawsuits in federal court, and impose civil penalties for violations of consumer finance law. Rather than participate in the annual congressional appropriations process, the director is authorized to request funding directly from the Federal Reserve. And perhaps most important for the present challenge, the director serves a five-year term and is removable by the President only for "inefficiency, neglect of duty, or malfeasance in office," commonly referred to as a "for-cause removal protection." While such protections are a regular feature of so-called independent agencies, most leaders of executive branch agencies may be removed by the President at will (i.e., at his discretion).

The Supreme Court is to hear an appeal from Seila Law LLC, a law firm that the CFPB began investigating for potential violations of telemarketing rules. Seila Law refused to comply with the CFPB's demand to produce documents related to the investigation, arguing that Congress violated the separation of powers by vesting substantial executive authority in an independent agency led by a single director. Therefore, Seila Law contends, all of the CFPB's enforcement actions are unlawful. The Ninth Circuit disagreed. The court recognized that the "arguments for and against that view have been thoroughly canvassed" by the D.C. Circuit's 2018 decision in *PHH Corporation v. Consumer Financial Protection*

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Bureau, where a divided en banc court upheld the CFPB's structure in response to a similar challenge. Seeing "no need to re-plow the same ground here," the Ninth Circuit briefly explained its view that the relevant characteristics of CFPB's structure are similar to those of other independent agencies and offices that the Supreme Court has approved. The Fifth Circuit, however, recently came out the other way in a related case, holding that the Federal Housing Finance Agency (FHFA), which like the CFPB is led by a single director with for-cause removal protections, is unconstitutional. Under that court's reading of Supreme Court precedent, Congress may limit the President's removal power only for independent agencies that are led by multimember bodies of experts.

Four principal areas of debate have emerged from these opinions, which are discussed below. Two issues present higher level questions, relating to Congress's general ability to create independent agencies and innovate with their design. Another two issues are specific to the CFPB, requiring an analysis of its particular powers and structure.

How Will the Court Reconcile its Precedents?

The Constitution provides explicit instructions about how federal officers are appointed, but none about how they may be removed. When Congress's decision to shield officials from at-will removal by the President has been challenged, courts have derived the governing limits on the President's removal power from the Constitution's broad pronouncement that "[t]he executive Power shall be vested" in the President, who "shall take Care that the Laws be faithfully executed." These clauses have launched a long-running debate over how to reconcile the desire to shield certain sensitive agency actions from political pressure with the need to maintain presidential accountability for executive branch actions.

Six Supreme Court cases have addressed this tension in contexts that advocates have analogized to the CFPB. In three cases, the Court struck down Congress's attempts to limit the President's removal power. In *Myers v. United States*, a 1926 case, and again sixty years later in *Bowsher v. Synar*, the Court held that Congress may not reserve for itself a role in the removal of executive officers. In 2010 the Court held in *Free Enterprise Fund v. Public Company Accounting Oversight Board* that Congress could not protect members of a regulatory board from at-will removal by their superiors at the Securities and Exchange Commission (SEC), when SEC commissioners are themselves protected from at-will removal by the President. While the CFPB case does not involve any of the specific infirmities that the Court recognized in these three cases, *Myers* and *Free Enterprise Fund* provide the earliest and most recent clues about the Supreme Court's understanding of separation-of-powers principles in this area.

Another three cases have upheld Congress's authority to cabin the President's ability to remove certain executive branch officials at will. In 1935, the Court held in *Humphrey's Executor v. United States* that Congress could protect members of the Federal Trade Commission (FTC) from presidential interference with a for-cause removal restriction. And in *Wiener v. United States*, the Court held that the President was restricted from removing members of the War Claims Commission, an agency created to process claims for losses arising out of World War II. In a third case, *Morrison v. Olson*, the Court decided that the Independent Counsel tasked with leading a limited criminal investigation aimed at other executive branch employees could be protected from at-will removal by her direct superior, the Attorney General.

Arguments in the CFPB dispute are likely to focus on analogies and distinctions drawn from these six precedents, but two of the cases—*Humphrey's Executor* and *Morrison*—have received influential criticism. In the D.C. Circuit challenge to the CFPB, for example, multiple judges—including then-Judge Brett Kavanaugh—maintained that *Humphrey's Executor* and *Morrison* were decided inconsistently with Article II and prior Supreme Court precedents, based on their view that the leadership of every executive branch agency must answer to the President's policy priorities. If the Court finds these criticisms persuasive it may choose to narrowly interpret or even overrule portions of its prior holdings, which in turn could shape how it views the other issues this case raises.

How Much Does Novelty Matter?

A second question concerns the recurring debate over how much Congress's creativity in structuring an agency tells us about its likely constitutionality. Because independent agencies, like the SEC and Equal Employment Opportunity Commission, are commonly led by multi-member commissions, the CFPB is somewhat unusual in being led by a single individual who is protected from at-will removal. There appear to be three independent agencies led by a single director: the Social Security Administration, the Office of Special Counsel, and the FHFA. In *Free Enterprise Fund*, the Supreme Court suggested that the novelty of an agency's structure matters, explaining, "Perhaps the most telling indication of the severe constitutional problem with the [government agency at issue] is the lack of historical precedent for this entity." In his *PHH Corporation* dissent, then-Judge Kavanaugh catalogued Supreme Court decisions dating back to *McCulloch v. Maryland* in 1819 where the Court has recognized the relevance of historical practice in helping to define the constitutional limits on the legislative and executive branches.

Other cases have cautioned against this view. "Our constitutional principles of separated powers are not violated," the Supreme Court said in 1989, "by mere anomaly or innovation." The D.C. Circuit's majority opinion in *PHH Corporation* echoed this view and warned against reading too much into Congress's innovation with the CFPB. The court noted, "The judiciary patrols constitutional boundaries, but it does not use the Constitution merely to enforce old ways." Recognizing that "[o]ur political representatives sometimes confront new problems calling for tailored solutions," the court suggested the gravity of the 2008 financial crisis could reasonably have led Congress to exercise its preexisting powers in new ways to create the CFPB. The Court's decision on this matter may signal just how much discretion it will allow Congress to depart from conventional models when designing new agencies.

Examining the CFPB's Power & Authority

Turning to debates specific to the CFPB, one set of questions asks whether the CFPB's statutory authority is of the kind that compels a heightened level of presidential oversight. Courts and advocates debating the CFPB have flagged four characteristics, among others, that might be relevant to this inquiry.

First, an agency director responsible for core executive functions may be more likely to require presidential control than an agency director whose duties are better described as legislative or judicial. In *Wiener*, the case involving the War Claims Commission, the Supreme Court said "the most reliable factor drawing an inference regarding the President's power of removal . . . is the nature of the function that Congress vested" in the agency. Where an agency's authority is "quasi-legislative"—such as promulgating rules and regulations—or "quasi-judicial"—such as adjudicating disputes—courts have allowed some degree of agency independence. But where an agency is vested with executive authority to bring enforcement actions and impose penalties, presidential oversight is more important. Because the CFPB director exercises authority in each area, judges and litigants are left to debate which category of the CFPB's authority deserves emphasis. In *Morrison*, however, the Court recognized that while these categories may provide guidance, they are not always determinative. The analysis, the Court explained, should ultimately focus on "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."

Second, an agency director wielding authority that is broad in scope may be more likely to require presidential control than an agency director with a limited jurisdiction, tenure, and portfolio. The CFPB's defenders highlight that the agency's authority is restricted to enforcing antifraud rules in the context of consumer finance, unlike the FTC—whose independence was upheld in *Humphrey's Executor*—which has authority over commerce generally. Opponents, meanwhile, contrast the CFPB, a permanent agency with the power to punish private parties for violating a broad range of laws, with the Independent Counsel Act at issue in *Morrison*. That Act allowed for the temporary appointment of an independent counsel to investigate and prosecute public officials.

Third, Congress has historically granted financial regulators a greater degree of independence than agencies tasked with regulating other subject matters. For example, Congress has protected the leadership at the Federal Reserve, FTC, Federal Deposit Insurance Corporation (FDIC), and Commodity Futures Trading Commission from at-will removal by the President because of the perceived need to prevent political actors from self-dealing or manipulating the economy for short-term advantage. The CFPB regulates in a similar area. But not all financial regulators are protected—the Secretary of the Treasury, for example, is removable by the President at will.

Fourth, principal officers, who do not answer to any other government official in their agency or department, may be susceptible to a greater degree of presidential control relative to inferior officers. As Judge Kavanaugh argued in *PHH Corporation*, "The more important the officer's assignments, the more directly his actions implicate the President's responsibility to faithfully execute the laws." The contrary argument holds that while the Constitution distinguishes principal and inferior officers in setting forth rules for their *appointment* to office, this distinction is not relevant to removal. That is because "[t]he degree of removal constraint effected by a single layer of for-cause protection is the same whether that protection shields a principal or inferior officer. In either case, the President—or a principal officer acting as the President's agent—may not fire the independent officer except for cause."

Examining the CFPB's Structure & Design

As the Supreme Court decides the extent to which Congress may buffer an agency like the CFPB from presidential interference, it would be asked to decide whether Congress went too far in the organizational features it chose to insulate the agency and its leadership.

First, and perhaps most prominently, Congress designed the CFPB to be led by a single director rather than by a multimember panel. The parties seem to be in general agreement about the kinds of tradeoffs Congress contemplates when it vests agency leadership in a single authority rather than in a multimember commission. Namely, scholars and courts have agreed that a single director design enables an agency to act with initiative and decisiveness in response to fast-changing circumstances, and to become fully operational soon after enactment. A multimember leadership, in contrast, allows for more deliberate decision-making informed by diverse perspectives, and provides a built-in monitoring system by which a minority faction can direct public and presidential attention to controversial actions by the majority. Where the two sides in this dispute disagree is, first, whether Congress's choice between these two models is constitutionally compelled, and, further, whether agencies led by a multimember panel are in fact any more likely to be accountable to the President.

Second, the CFPB director's removal protections may be analyzed in the context of her five-year statutory tenure. Not only is the President restricted from removing the CFPB director, he may also be prevented from ever appointing a director during his four-year term. The CFPB's defenders dispute whether this is anomalous, pointing out that the President is similarly unable to appoint a majority of, for example, the Federal Reserve's Board of Governors. But for many independent agencies, including the FTC, SEC, National Labor Relations Board, and Federal Communications Commission, the President is able to designate the agency's chair at the beginning of his term.

A third feature of the CFPB's independence is its exemption from the regular appropriations process, much like other financial agencies such as the Federal Reserve, FDIC, and National Credit Union Administration. The CFPB receives funding instead by drawing a statutorily capped amount from the Federal Reserve. Whether this form of independence exacerbates the accountability issues arising from the director's for-cause removal protections, or should be understood entirely distinct from matters of presidential control, remains a subject of debate.

Considerations for Congress

The Court's decision in this case could have significant ramifications beyond the CFPB, potentially affecting every independent agency from the Federal Election Commission to the National Credit Union Administration. Under a strictly formalist view of separation of powers, the Court could hold that the full leadership of *every* executive branch agency must be removable at will by the President. Alternatively, the Court could adopt the reasoning of then-Judge Kavanaugh in *PHH Corp.* and distinguish between agencies led by a multimember commission, like the FTC and SEC, where removal protections may be permissible, and agencies led by a single director, like the CFPB and FHFA, where they are not. The Court also may uphold the CFPB's organization structure, echoing the more functionalist opinions of the Ninth and D.C. Circuits, and allow Congress to limit the President's removal authority whenever an agency's mission requires some degree of policy independence. The case is to be argued on March 3, 2020, with an opinion expected by the end of June.

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