United States Supreme Court Provides Little Guidance to Remedy an Unconstitutional CFPB

By Joann Needleman, Ann E. Lemmo, Alexander R. Green / Jun 30, 2020

The Consumer Financial Protection Bureau (CFPB or Bureau) has been a federal agency like no other. Born out of the last financial crisis, the Dodd-Frank Act envisioned the CFPB to be an independent agency, free of “political influence.” Congress thus authorized the CFPB to be led by a single director – rather than a board of multiple members - who would possess significant rulemaking and enforcement over 19 consumer protection statutes as well as unfair, deceptive, and abusive acts and practices. Its single director structure – only removable for “inefficiency, neglect of duty or malfeasance” – as well as its funding outside the appropriation process – provoked strong opinions from industry and advocates alike.

The Underlying Case

After years of political wrangling, the United States Supreme Court issued its long-awaited decision in the case of Seila Law, LLC v. CFPB. Seila involved a law firm from California that provided debt relief services to consumers. The CFPB served a civil investigation demand (CID) upon the law firm. When the law firm failed to respond to the CID, the CFPB filed a Petition to Enforce the CID in the Federal District Court in California. Seila argued that the CFPB did not have authority to issue the CID because the structure of the CFPB of a single director, who can only be fired for cause by the President, was unconstitutional and violated the separation of powers.

The District Court granted the CFPB’s Petition and rejected Seila’s constitutional argument. Seila appealed to the Ninth Circuit Court of Appeals, which affirmed the lower court’s decision. The CFPB defended its structure in the Ninth Circuit case. Seila then petitioned the Supreme Court to review the decision. While this petition was pending, the CFPB changed its longstanding legal position and agreed with the Trump Administration’s Department of Justice (DOJ) that its own structure violated the separation of powers. Due to the change in the CFPB’s position, the underlying parties were no longer adverse and the CFPB appointed outside counsel as amicus curiae.

The questions presented by the Court were twofold:

1. Whether the vesting of substantial executive authority in the CFPB, an independent agency led by a single director, violates the separation of powers; and
2. If the CFPB is found unconstitutional on the basis of the separation of powers, can 12 U.S.C. § 5491(c)(3) be severed from the Dodd-Frank Act?

Roberts’ Opinion

Chief Justice John Roberts wrote for the majority who was joined by Justices Alito, Thomas, Gorsuch, and Kavanagh. In answering the first question, the majority concluded that the current structure of the CFPB was a violation of the separation of powers and “lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control.” Article II of the United States Constitution allows the President unrestrictive removal power for members of the executive branch, including cabinet members and most agency heads. The cases of Humphrey’s Executor v. United States, 295 U.S. 602 (1935) and Morrison v. Olson, 484 U.S. 654 (1988) found that Congress in very limited circumstances could limit the President’s removal power. In Humphrey’s, the Supreme Court found that FTC Commissioners could be removed for cause because they were multimember bodies with quasi-judicial or quasi-legislative functions. The Commissioners were not and did not exercise any executive power. In Morrison, the Court recognized for-cause removal for an independent counsel appointed to investigate and prosecute crimes against government officials. This for-cause exception rested upon the fact that an independent counsel was an inferior officer with limited duties and more policy making or administrative authority. The majority found that the CFPB did not fit into either exception.

Turning to the second question, the Dodd-Frank Act states that if “any provision of this Act... is held to be unconstitutional, the remainder of this Act... shall not be affected thereby”. 12 USC § 5302. Despite its constitutional defect, the court did not strike down the agency. However, the Court did remand the case back to the Ninth Circuit to determine whether the CFPB can still be enforced because it was ratified by then Acting Director, Mick Mulvaney.

Concurrence and Dissent as to Severability

Justices Thomas and Gorsuch concurred that a Humphrey’s Executor interpretation should be limited to allowing multimember expert agencies that do not wield substantial executive power.

However, Thomas believes Roberts could have gone further and completely left Humphrey’s Executor in the history books because the Constitution does state that Congress can delegate legislative power or authorize judicial power outside of Article III. While Thomas believes Roberts could have stamped Humphrey’s Executor as completely irrelevant, he still believes the opinion today effectively curtails the unaccountability of the agencies and hopes that in the future the court will be able to reconsider Humphrey’s Executor in toto.

Thomas dissents from Roberts’ opinion regarding severability and ratification. Where Roberts leaves readers wondering about the future of the case, Thomas provides a clear solution. Thomas puts forth that the issue of this case could have been simply solved without remand. Thomas argues that ratification and severability are irrelevant when focusing on the constitutional injury of the case – enforcement of a CID by an insulated Director – and
attempts to resolve it.

Thomas believes determining ratification is unnecessary.

**Dissent and Concurrence as to Severability**

Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, dissented from the majority’s opinion, indicating that they would have upheld the structure of the CFPB to maintain the agency's independence. In the dissent, the Supreme Court’s block of more-liberal justices explained their belief that Congress is generally free to constrain the President’s power to remove officers in the Executive Branch. While dissenting from the majority’s opinion, the Supreme Court’s block of more-liberal justices concurred in the judgment as it relates to the issue of severability. As explained in the dissent, “[t]he outcome today will not shut down the CFPB: A different majority of this Court, including all those who join this opinion, believes that if the agency’s removal provision is unconstitutional, it should be severed.”

**The Future of the CFPB**

The legal saga of the CFPB can now best be described as a long road to nowhere. A determination by the Supreme Court of constitutionality is usually a pivotal event in American jurisprudence. The Supreme Court’s holding here was not that moment in history, nor did it put to rest future legal challenges to the Bureau’s authority from all sides. Parties who have current enforcement matters before the Bureau may argue that ratification cannot be the magic wand that can cure a constitutional defect, especially in instances when the Director lacked the authority to act at the time it was initially done. Those financial institutions that agreed to significant consent orders are probably feeling buyer’s remorse. Finally, expect additional legal challenges, beyond what is afforded in the Administrative Procedures Act, for pending rulemakings this year.

Clark Hill’s Consumer Financial Services Regulatory and Compliance Practice Group will continue to analyze the impact of the Seila decision upon our clients who are subject to the CFPB’s jurisdiction. For more information please contact Joann Needleman (jneedleman@clarkhill.com).