New
Civil Liberties
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U.S. Supreme Court Agrees with NCLA that CFPB Director's Protection from Removal Violates President's Article II Duty

Seila Law LLC v. Consumer Financial Protection Bureau

Washington, DC (June 29, 2020) – Today the U.S. Supreme Court agreed with the points argued by the New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group in its *amicus* brief filed in *Seila Law LLC v. Consumer Financial Protection Bureau* last December. Accordingly, the Court struck down the Consumer Financial Protection Bureau (CFPB) Director's protection from Presidential removal as unconstitutional. NCLA supported petitioner Seila Law and argued that the President must have the power to remove any principal federal officer who exercises executive power. Article II of the U.S. Constitution requires the President to "take Care that the Laws be faithfully executed."

In the majority ruling written by Chief Justice John Roberts, the Court explained that the "entire 'executive Power' belongs to the President alone" and the director of the agency therefore could be removed by the President of the United States "at will." The 5-4 ruling on the constitutional question overturns a federal district court ruling and appellate court decision that had rejected the law firm's arguments. The Court ruled 7-2 that severing the Director's for-cause removal protection was a sufficient remedy to address this litigant's objection to the agency.

"The CFPB's single-Director structure … vest[s] significant governmental power in the hands of a single individual accountable to no one. The Director is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is. The Director does not even depend on Congress for annual appropriations," said Roberts. In other words, though the Director "wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U.S. economy [,]" the Director is not answerable to the President, so the President cannot direct CFPB policies or priorities.

In the wake of the 2008 financial crisis, Congress established the CFPB. as "an independent regulatory agency tasked with ensuring that consumer debt products are safe and transparent." But in organizing CFPB, Congress "deviated from the structure of nearly every other independent administrative agency in our history." Instead of an independent agency with a multi-member bipartisan board, like the Federal Communications Commission or the Consumer Product Safety Commission, Congress decided to have the CFPB led by a single Director, removable only for inefficiency, neglect, or malfeasance.

"The CFPB Director's insulation from removal by an accountable President is enough to render the agency's structure unconstitutional." But there are at least two other problems. While the President nominates the head of CFPB, the Director has a five-year term. In fact, it's entirely possible that the President elected in 2028 "may *never* appoint one."

Further, "The CFPB's receipt of funds outside the appropriations process further aggravates the agency's threat to Presidential control. The President normally has the opportunity to recommend or veto spending bills that affect the operation of administrative agencies." Not here. The Director gets over $500 million per year directly from the Federal Reserve. The Court, however, severed the unconstitutional for-cause removal provision from the rest of the statute, leaving the rest of CFPB's enabling statute intact.

In separate litigation, NCLA has objected to CFPB's structure on behalf of its client in *Law Offices of Crystal Moroney, P.C. v. CFPB et al*. Moroney, like Seila Law, offers debt-related legal services to clients. NCLA asserted constitutional and due process claims on behalf of Moroney. While the Supreme Court's *Seila Law* decision means that Crystal Moroney has won her structural constitutional argument against CFPB, another issue lurks. Does CFPB's method of funding violate Article I, Section 1 of the U.S. Constitution, which vests all legislative power in Congress (i.e., the nondelegation doctrine)? If CFPB is unconstitutionally funded, that might well be a harder problem to disentangle from the rest of the enabling statute.

NCLA released the following statements:

"The unelected and unaccountable CFPB Director has been described as the '2nd most powerful person in Washington, DC,' a situation created when Congress decided to insulate this particular agency head from any oversight by our elected officials. Fortunately, the Supreme Court understood that this structure violates the very foundation of our Republic, ruling that it is the President who is the head of the executive branch, and all executive branch officials are answerable to him. Today's ruling is a win for Constitutional order."

—Harriet Hageman, NCLA Senior Litigation Counsel

"Because the Court mistakenly left the rest of the statute intact, it has created an entirely new problem that may be even more constitutionally pernicious than the first. The President now has total control over an agency with a direct pipeline to Federal Reserve funds, without any appropriations control from Congress. This unconstitutional setup should be struck down at the Court's first opportunity."

—Michael P. DeGrandis, NCLA Senior Litigation Counsel

ABOUT NCLA

NCLA is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar Philip Hamburger to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.

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