

*Seila Law LLC v. Consumer Financial Protection Bureau: A Decision That Raises New  
Questions About the Constitutionality of Independent Agencies*

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INTRODUCTION

In 2020, the Supreme Court of the United States was tasked with determining whether an administrative agency can be headed by a single director who is not removable by the president in the landmark case *Seila Law LLC v. Consumer Financial Protection Bureau*. It held that they cannot in an opinion that had the effect of increasing the scope of the judicial and executive powers while limiting the independence of agencies. The Court’s decision sharply limited the independence of the Consumer Financial Protection Bureau (“CFPB”) and called into question the independence of the Federal Trade Commission (“FTC”). The Court’s holding decreased the stability of these consumer protection regulators, subjected them to new policy directives each time a new President entered office, and limited these agencies’ ability to assist consumers.

In Part I of this article, we will discuss the factual background leading up to the commencement of this case. Part II provides an in-depth discussion of the majority opinion written by Chief Justice John Roberts, while Part III breaks down the dissenting opinions, written by Justices Clarence Thomas and Elena Kagan. Finally, Part IV addresses the lingering questions raised by this case but left unanswered.

## I. FACTS

The CFPB was created after the 2008 financial crisis.<sup>1</sup> In the years preceding the 2008 financial crisis, banks and financial institutions specifically reached out to communities of color with risky mortgages.<sup>2</sup> Those families had a higher mortgage than their white counterparts or were guided to expensive subprime loan, even if they were qualified for better ones.<sup>3</sup> The CFPB was put in place to protect consumers and create consumer-protection law ensuring that consumer debt products were safe and transparent, to avoid another financial crisis.<sup>4</sup> When President Trump was elected, he began to disassemble the CFPB.<sup>5</sup>

The CFPB was created by transferring existing federal statutes to the CFPB.<sup>6</sup> The existing federal statutes that were transferred to the CFPB were the Fair Credit Reporting Act, Fair Debt Collection Practices Act, Truth Lending Act.<sup>7</sup> In addition Congress enacted new prohibition on unfair and deceptive practices in the consumer-financial space.<sup>8</sup> Through the agency, and since the CFPB was enacted, there has been over \$11 billion in relief for more than 25 million consumers.<sup>9</sup>

The structure of the CFPB starts with a singular director.<sup>10</sup> The director is appointed by the President with the consent of the Senate.<sup>11</sup> The director has a 5-year term, outlasting a

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<sup>1</sup> *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2187 (2020).

<sup>2</sup> Ganesh Siaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 352 (2020).

<sup>3</sup> *Id.*

<sup>4</sup> *Seila Law LLC*, 140 S. Ct. at 2187.

<sup>5</sup> Ganesh, *supra* note 2, at 353.

<sup>6</sup> *Seila Law LLC*, 140 S. Ct. at 2187.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

Presidential term.<sup>12</sup> The director can only be removed by the President for cause.<sup>13</sup> The cause may be “inefficiency, neglect of duty, or malfeasance in office.”<sup>14</sup> The CFPB is funded by the Federal Reserve, rather than annual appropriations laws that fund most other governmental agencies.<sup>15</sup>

In 2017, the CFPB issued Seila Law an investigative demand to produce any potential evidence related to illegal business practices.<sup>16</sup> Seila Law was a firm that provided debt-relief services in California.<sup>17</sup> Seila Law refused the demand from the CFPB saying that the CFPB did not have the authority to issue orders because the structure of the agency violated the separations of power under the United States Constitution.<sup>18</sup>

This case reached the Supreme Court on appeal from the Ninth Circuit where the court ruled that the structure of the CFPB was valid.<sup>19</sup> The District Court also agreed that the structure of the CFPB was valid under the Constitution and ordered Seila Law to comply with the demand.<sup>20</sup> The issues before the court include Article II of the Constitution. Specifically, the portion of Article II where it “vests the executive power in a President of the United States” and it requires the President to “Take Care that the laws” be faithfully executed.<sup>21</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Barry Sullivan, *Reforming the Office of Legal Counsel*, 35 NOTRE DAME J.L. ETHICS & PUB. POL’Y 723, at 747.

<sup>15</sup> *Seila Law LLC*, 140 S. Ct. at 2187.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

## II. MAJORITY OPINION

The majority opinion was written by Chief Justice John Roberts, joined by Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh.<sup>22</sup> The Court issued its decision on June 29, 2020, with a 5-4 decision which ruled that the CFPB structure, with a sole director that could only be terminated for cause, was unconstitutional as it violated the separation of powers.<sup>23</sup> The Court began its analysis by highlighting the two exemptions to the President's power to remove principal officers at-will which were created in the *Humphrey's Executor* case and the *Morrison* and *Perkins* cases.<sup>24</sup>

### **The At-Will Exemptions**

The Court held that Article II of the Constitution provides the President with the power to remove principal officers at will except for two exceptions that have been recognized under case law.<sup>25</sup> The first exception was founded under the *Humphrey's Executor v. United States* case from 1935.<sup>26</sup>

The Court in this case held that Congress could create expert agencies led by a group of principal officers that are removable by the President only for good cause.<sup>27</sup> Chief Justice Roberts construed *Humphrey's Executor* to stand for the idea that the President's removal power is constrained by Congress if the officer being removed was a member of an agency that has multiple principal officers.<sup>28</sup> The Court made the distinction that in *Humphrey's Executor*, the approved for-cause removal protection applied to the Commissioners of the Federal Trade

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<sup>22</sup> *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020).

<sup>23</sup> *Id.* at 2202.

<sup>24</sup> *Id.* at 2192.

<sup>25</sup> *Id.* at 2192.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 2194.

Commission (FTC), distinguishing that the CFPB wields “substantially more executive power than the FTC did back in 1935” and that the CFPB’s leadership by a single Director presented a structural difference.<sup>29</sup> In summation, *Humphrey’s Executor* permitted Congress to give for-cause removal protections to a multimember body of experts and the Court here determined that the difference between the FTC Commissioners and the CFPB single-director left “a field of doubt” in which it could not apply to *Humphrey’s Executor* exception for at-will removal by the President.<sup>30</sup>

The second exception to the President’s at-will removal power came from the *Morrison v. Olson* case and the *United States v. Perkins* case.<sup>31</sup> The Court in these cases held that Congress could provide tenure protections to certain inferior officers with narrowly defined duties.<sup>32</sup> The *Perkins* case upheld tenure protections for naval cadet-engineers and the *Morrison* case upheld a provision granting good-cause tenure protection to an independent counsel appointed to investigate and prosecute particular alleged crimes by high-ranking Government officials.<sup>33</sup> The overall decision by the Court for not allowing this exception was that the CFPB director was not an inferior officer, and that removal protections in *Perkins* and *Morrison* did not unduly interfere with the functioning of the Executive Branch due to the officers in question being inferior officers.<sup>34</sup> The CFPB Director does not have a limited jurisdiction and does have policymaking and significant administrative authority, thus making the Director a principal officer and not an inferior officer.<sup>35</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 2199.

<sup>31</sup> *Id.* at 2192.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 2199.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

The Court was asked to extend the previously mentioned precedents to the CFPB, which is an independent agency that wields significant executive power and is run by a single individual who cannot be removed by the President unless certain statutory criteria are met.<sup>36</sup> Chief Justice Roberts emphasized that the Court did not want to take this step, and that there are compelling reasons as to why these precedents should not be extended to the novel context of an independent agency led by a single director.<sup>37</sup> The Chief Justice stated that “such an agency lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control.”<sup>38</sup> To further the determination that the CFPB violates the separation of powers, the Court continued by explaining how the CFPB’s structure is almost wholly unprecedented.<sup>39</sup>

### **Comparison of Agency Structures**

There have only been 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.<sup>40</sup> The four examples of agency structures that were highlighted by the Court of Appeals, parties, and *amici* are the Comptroller of Currency, the Office of the Special Counsel (OSC), the Social Security Administration (SSA), and lastly the Federal Housing Finance Agency (FHFA).<sup>41</sup>

First, the Comptroller of the Currency received removal protection for one year during the Civil War.<sup>42</sup> The Court here stated that this was an “aberration” because this decision was

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<sup>36</sup> *Id.* at 2192.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 2201.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 2201–02.

<sup>42</sup> *Id.* at 2201.

made during the Civil War without approval and was abandoned before it could be “tested by executive or judicial inquiry”.<sup>43</sup> Second, the Office of the Special Counsel, which has been headed by a single officer since 1978, drew a “contemporaneous constitutional objection” from the Office of Legal Counsel under President Carter.<sup>44</sup> The Office of the Special Counsel exercises only limited jurisdiction to enforce certain rules governing Federal Government employers and employees, but it does not bind private parties at all or wield regulatory authority comparable to the CFPB.<sup>45</sup> Third, the Social Security Administration has also been run by a single administrator since 1994, but this example is controversial.<sup>46</sup> The constitutionality of the SSA’s structure was questioned by President Clinton upon signing it into law, and unlike the CFPB, the SSA lacks the authority to bring enforcement actions against private parties.<sup>47</sup> Lastly, the Federal Housing Finance Agency, created in 2008, is essentially a companion of the CFPB, established in response to the same financial crisis.<sup>48</sup> The FHFA regulates primarily Government-sponsored enterprises and not purely private actors and the single-Director structure is a source of ongoing controversy and was recently held unconstitutional by the Fifth Circuit.<sup>49</sup>

By analyzing each of these single-Director agencies that enjoy removal protection, the Court pointed out reasons as to which they are either controversial or anomalies in the agency space and should not dictate the decision regarding the CFPB’s structure.<sup>50</sup> These examples do involve the regulatory or enforcement authority that was exercised by the CFPB, thus leading to

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 2202.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

the Court’s conclusion that the CFPB’s single-Director structure is an innovation with no background in history or tradition.<sup>51</sup>

Further, Chief Justice Roberts explained that the single-Director structure is incompatible with our constitutional structure.<sup>52</sup> The Constitution has a sole exception in the role of the President for concentrating power in the hands of any single individual, and that this structural protection was critical for preventing the abuse of power and preserving liberty.<sup>53</sup> The President was given power within a single individual so that they will be directly accountable to the people through regular elections.<sup>54</sup> The constitutional strategy of the separation of powers was to divide power everywhere except the Presidency and that individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President.<sup>55</sup> Overall, the CFPB’s single-Director structure defies the established system of vesting a large amount of governmental power in the hands of a single individual that is not accountable to anyone.<sup>56</sup> Next in the opinion, Chief Justice Roberts analyzed the three principal arguments in the agency’s defense which is laid out by Amicus.<sup>57</sup>

### **Amici Arguments**

The first argument made by Amicus was to question the textual and historical bases for the removal power and they highlight statements made by Madison, Hamilton, and Chief Justice Marshall.<sup>58</sup> The Court here believed that those concerns are “misplaced”, although there is no removal clause in the Constitution, there is also no separation of powers clause or federalism

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 2203.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 2204.

<sup>58</sup> *Id.* at 2205.



clause.<sup>59</sup> These are foundational doctrines that are evident in the Constitution’s vesting of powers but is not directly stated.<sup>60</sup> The President’s removal power stems from Article II’s vesting of the “executive power” in the President.<sup>61</sup> Additionally, the Court mentioned that Madison, Hamilton, and Chief Justice Marshall’s “heterodox” views on the basis for removal power have been discounted in the light of their context, their initial impressions were later abandoned by Hamilton, and their subsequent rejection of the notion was ill-considered dicta.<sup>62</sup>

The second argument by Amicus was that *Humphrey’s Executor* and *Morrison* establish a general rule that Congress may impose “modest” restrictions on the President’s removal power, with only these two limited exceptions.<sup>63</sup> Amicus furthered this by arguing that Congress is generally free to constrain the President’s removal power.<sup>64</sup> The Court argued that cases such as *Myers* and *Free Enterprise Fund* all establish that the President’s removal power is the rule and not the exception thus the Court refused to elevate this matter for Congress to impose additional restrictions on the President’s removal authority.<sup>65</sup>

Lastly, Amicus argued that if we identify a constitutional problem with the CFPB’s structure, we should avoid it by broadly construing the statutory grounds for removing the CFPB Director from office.<sup>66</sup> The Court responded to this by stating the *Humphrey’s Executor* implicitly rejected an interpretation that would leave the President free to remove an officer based on disagreements about agency policy.<sup>67</sup> Additionally, the Court pointed out that both

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 2206.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 2206.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

Amicus and the House of Representatives have failed to advance a workable standard derived from statutory language that would cure the constitutional issue at hand.<sup>68</sup> Amicus contended that a proper standard may allow for removals based on general policy disagreements, but not specific ones, but this standard is not rooted in statutory text and so the Court rejected that standard.<sup>69</sup>

Overall, the Amicus arguments were not deemed valid by the Court in this case thus furthering the Court's decisions that the CFPB's single-Director structure violates the separation of powers by shielding the Director from the President's removal power.<sup>70</sup>

### **Continued Operation of the CFPB**

The last item addressed by the majority opinion was that the CFPB Director's removal protection is severable from the other statutory provisions bearing the CFPB's authority, thus allowing the agency to continue to operate while assuring that the Director must be removable by the President at will.<sup>71</sup> In Petitioner's view, the statutory provision insulating the CFPB Director from removal cannot be severed from the other statutory provisions that define the CFPB's authority thus rendering the entire agency as unconstitutional and powerless to act.<sup>72</sup> Chief Justice Roberts stated that the only question we have the authority to decide is whether Congress would have preferred a dependent CFPB to no agency at all.<sup>73</sup> The Court explained that if we eliminate the CFPB, regulatory and enforcement authority over the statutes it administers would revert back to the handful of independent agencies previously responsible for them but that shift would trigger a major regulatory disruption and would leave appreciable damage to Congress's

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 2208.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

work in the consumer-finance area.<sup>74</sup> Given these consequences, the Court determined that Congress would have preferred a CFPB led by a Director removable at will by the President rather than no CFPB at all.<sup>75</sup>

### III. DISSENTING OPINIONS

#### Justice Clarence Thomas' Partial Dissent

Justice Clarence Thomas, joined by Justice Neil Gorsuch, wrote an opinion concurring with Parts I, II, and III of the majority opinion, but dissenting as to the majority's severability analysis because, he argues, it should not be addressed in this case.<sup>76</sup> The concurring opinion is separated into two parts: Part I argues that the majority merely limited *Humphrey's Executor* when it should have overruled it entirely, and Part II asserts that the majority took an aggressive approach on severability by severing the removal restriction in 12 U.S.C. §5491(c)(3) when concurring Justices would have instead denied enforcement power.<sup>77</sup>

#### *OVERRULING HUMPHREY'S EXECUTOR*

Eighty-four years prior to the case at bar, the Court decided on *Humphrey's Executor v. United States*, holding that (a) the FTC Act does limit the executive power to for-cause removal, and (b) notwithstanding Article II of the Constitution, this restriction on the President's authority to remove Commissioners is constitutional.<sup>78</sup> The *Humphrey's Executor* Court reasoned that FTC Commissioners are not "purely executive officers," but rather "quasi-legislative actors."<sup>79</sup> This is due to the fact that FTC acts like a legislative agency when making investigations and

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2211 (2020) (Thomas, J., concurring).

<sup>77</sup> *Id.* at 2211, 2219.

<sup>78</sup> *Id.* at 2215.

<sup>79</sup> *Id.*

reports for Congress, and a judiciary agent when performing its role as “master in chancery.”<sup>80</sup> Thus, while under *Myers v. United States* the President has exclusive, unrestricted power to remove “purely executive officers,” “quasi-legislative” and “quasi-judicial” officers are not subject to removal except for cause.<sup>81</sup>

Although the majority rules that *Humphrey’s Executor* is unconstitutional, it opts to limit the holding which concurring Justices do not believe is enough; rather, Justice Thomas wants to overrule this case completely.<sup>82</sup> Article II of the Constitution, which vests executive power in the President, gives the President the power to “take Care that the Laws be faithfully executed;” however, there are far too many executive responsibilities for one person to handle, so the President must elect officers to act on his behalf.<sup>83</sup> These officers work for various independent agencies which together form a *de facto* “fourth branch of government.”<sup>84</sup> Although independent agencies carry out executive functions, they are not part of the executive branch, and are thus not accountable to the President or the people.<sup>85</sup> By not overruling *Humphrey’s Executor*, Justice Thomas argues, independent agencies are able to continue exercising these executive powers unchecked, disrupting the delicate balance of power created by the Constitution.<sup>86</sup> Further, there are no Constitutional provisions permitting the creation of such “quasi-legislative” or “quasi-judicial” officers; they simply do not exist.<sup>87</sup>

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 2211-12.

<sup>83</sup> *Id.* at 2212.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 2216.

This case is the latest in a series of cases that have sought to overturn *Humphrey's Executor*, Justice Thomas explains.<sup>88</sup> First, Justice Thomas cites *Morrison v. Olson*, explaining that each Justice on the Court rejected the “core rationale” of *Humphrey's Executor*. Specifically, the majority in *Morrison* rejected *Humphrey's Executor's* holding that the FTC lacked executive power, arguing that the FTC's powers would in fact be considered executive. Further, the dissent noted that the Court had “rightfully ‘swept’ *Humphrey's Executor* ‘into the dustbin of repudiated constitutional principles.’”<sup>89</sup> Next, *Free Enterprise Fund v. Public Company Accounting Oversight Bd.* held that the two-layer for-cause removal restrictions violated the constitution because the President cannot be held accountable for exercising executive power without removal powers.<sup>90</sup> Finally, in the case at bar, the Court holds that all executive power resides in the President alone, so he must have the power to remove, and thus supervise, those wielding executive power on his behalf.<sup>91</sup> Thus, *Humphrey's Executor* must be limited to multimember expert agencies that “do not wield substantial executive power.”<sup>92</sup> Due to these opinions, the Court has a responsibility to put an end to the possibility of any future reliance on *Humphrey's Executor* because doing otherwise leaves the law “impaired” and destroys the American Constitutional system as we know it.<sup>93</sup>

### *Severability*

After explaining why *Humphrey's Executor* must be overruled rather than merely limited, Justice Thomas argues that the majority erred in deciding to sever the removal restrictions in 12

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<sup>88</sup> *Id.* at 2217.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 2217-18.

<sup>91</sup> *Id.* at 2218.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 2219.

U.S.C. §5491(c)(3).<sup>94</sup> Rather than severing this provision, Justice Thomas argues that the Court should instead deny the Consumer Financial Protection Bureau’s (“CFPB”) petition to enforce the civil investigative demand.<sup>95</sup>

In the early years of America, courts didn’t have a severability doctrine, rather, if a statute was held unconstitutional the court would decline to enforce the entirety of the statute.<sup>96</sup> In contrast, modern severability precedents require courts to remove portions of the unconstitutional statute to “remedy” the constitutional problem.<sup>97</sup> Justice Thomas argues that the judiciary lacks the power to sever statutes this way because, while courts may issue remedies for specific parties (such as injunctions or damages), they cannot remedy abstract legal rules.<sup>98</sup> Consequently, Justice Thomas would deny the CFPB’s petition to enforce the civil investigative demand that it issued to Seila Law, rather than sever it.<sup>99</sup> Enforcement of a civil investigative demand by an official with unconstitutional removal protection would injure Seila, as the majority acknowledges, so Justice Thomas would deny the CFPB’s petition for an order of enforcement and nothing more, as this would resolve the dispute without requiring the Court to address severability.<sup>100</sup>

The majority’s severability analysis begins with the severability clause in the Dodd-Frank Act which permits keeping an unconstitutional statute intact by removing the problematic provisions while leaving the remainder of the statute alone.<sup>101</sup> Thus, the majority holds that the removal clause should be severed because if a director were removable at will by the President,

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 2220.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 2222.

the constitutional violation would disappear.<sup>102</sup> Justice Thomas disagrees with this premise for several reasons. First, he believes the majority was not merely enforcing the language of the severability clause because they didn't actually analyze the statutory language, and because their analysis involved an open-ended inquiry into what Congress might have wanted when they wrote the statute.<sup>103</sup> Justice Thomas also argues that the severability clause cannot justify severance of the removal provision alone because the constitutional violation results from a combination of the removal provision, 12 U.S.C. §5491(c)(3), and §5562(e)(1) (the provision allowing the CFPB to seek enforcement of a civil investigative demand), and it offers no guidance as to which statute should be severed.<sup>104</sup>

Without support from the severability clause, the majority turns to the Court's questionable precedents.<sup>105</sup> First the majority looks at *United States v. Booker* in which the Court, ignoring numerous cases where mandatory Sentencing Guidelines would not have posed any constitutional problems, decided to sever the provision requiring them anyway, creating a new sentencing scheme based on what it believed Congress had intended.<sup>106</sup> Second, the majority looked at *Free Enterprise Fund v. Public Company Accounting Oversight Bd.* where the Court severed the Board's removal restriction because this remedy involved less drifting from the letter of the law than alternative remedies; however, it did not explain why this was the case.<sup>107</sup> Justice Thomas argues that the majority fails to resolve any of the questions these cases left unanswered; it doesn't even recognize that it made a choice between provisions when it

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 2223.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 2223-24.

chose to sever the removal restriction.<sup>108</sup> The majority merely held, Justice Thomas argues, that giving the President the power to remove the Director at will would eliminate the constitutional issue.<sup>109</sup>

Whether or not they were aware of it, the majority holds that when multiple provisions of law together create a constitutional injury, the Court may decide which provision to sever.<sup>110</sup> Justice Thomas dissents because neither the severability clause nor Court precedent aides to guide that decision, leaving the Court with the daunting task of speculating as to what Congress would have chosen.<sup>111</sup> The result of this improper ruling will have a great impact on the governing statutory scheme, so it is the responsibility of the Court to take a close look at precedents to ensure that the Court is not exceeding the scope of its judicial power.<sup>112</sup>

### **Justice Elena Kagan's Partial Dissent**

Justice Kagan wrote a part dissenting and part concurring opinion with whom Justice Ginsburg, Justice Breyer and Justice Sotomayor joined.<sup>113</sup> Justice Kagan's opinion argues that the CFPB's structure does not violate the separations of powers but allows for protection from the interference from other branches.<sup>114</sup> Further, she argues that the current structure of the CFPB, with a singular director only removable for cause, isolates the agency from political pressure.<sup>115</sup>

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<sup>108</sup> *Id.* at 2224.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*



Justice Kagan argued that there was nothing neutral about the majority’s reasoning. “Constitutional text, history, and precedent invalidate[] the majority’s thesis.”<sup>116</sup> Additionally, she states this case was another case on the list that is ruled based on political power.<sup>117</sup> Under the majority’s opinion, President Trump can appoint a new CFPB director, then Biden can appoint a new director.<sup>118</sup> Due to the structure of the CFPB, a President can use their unitary power of removal to change the ideology of the CFPB director to their liking.<sup>119</sup> “It’s easier to get one person to do what you want than a gaggle.<sup>120</sup>” With a multimember structure, there is a reduction in accountability to the President because it is harder for them to oversee and to influence, such as to remove.<sup>121</sup> Justice Kagan concludes this argument by stating this case is about five unelected judges rejecting the result of that democratic process.<sup>122</sup>

Justice Kagan goes into a discussion of the Constitutional power the majority relies upon. Justice Kagan concludes that executive power does not include the power to remove in such instances as this.<sup>123</sup> Additionally, Justice Kagan argues that the Take Care Clause is framed as a duty, rather than a power.<sup>124</sup> However, with the majority’s ruling today, the duty is now framed as a power, not a duty.<sup>125</sup> This framework is at direct odds with what the Framers had intended the Take Care Clause to provide. “The Framers took pains to craft a document that would allow

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<sup>116</sup> *Id.* at 2240.

<sup>117</sup> Ganesh, *supra* note 2, at 354.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 355.

<sup>120</sup> *Seila Law LLC*, 140 S. Ct. at 2243.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 2228.

<sup>124</sup> Ganesh, *supra* note 2, at 384.

<sup>125</sup> *Id.*

the structures of governance to change, as times and needs change. The Constitution says only a few words about administration.<sup>126</sup>

Finally, the majority opinion relies on the history of the Court's ruling. However, Justice Kagan says that there is no precedent for this ruling.<sup>127</sup> Justice Kagan notes that this Court has all but overturned *Myers* when the majority relies on *Myers* ruling.<sup>128</sup> Therefore, she dissents because the majority should have deferred to Congress on the agency design but the majority here took it upon themselves.<sup>129</sup>

#### IV. IMPACT

The *Seila Law* case has led to many arguments regarding the removal powers of the President and questions and interpretations for the future of separation of powers decisions. Out of all the interpretations and questions, three primary questions have surfaced in the wake of the case: Whether *Myers* and *Humphrey's Executor* still stand for the proposition that Congress can impose limitations on the President's removal authority for agency heads as long as it does not retain a role for itself; Is there really a conceptually relevant difference between agencies with one head and those with multiple heads; and if *Humphrey's Executor* and *Morrison v. Olson* are exceptions to the view that Congress cannot impose limitations on the President's removal authority, what is the scope of these exceptions now?<sup>130</sup> Overall, this decision now lets the structure of the agency determine the degree of Presidential control over its principal officer, but further conversation is required regarding each of the mentioned questions.

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<sup>126</sup> *Seila Law LLC*, 140 S. Ct. at 2245.

<sup>127</sup> Ganesh, *supra* note 2, at 384.

<sup>128</sup> *Id.* at 386.

<sup>129</sup> *Seila Law LLC*, 140 S. Ct. at 2245.

<sup>130</sup> Duncheon, Timothy & Revesz, Richard, *Seila Law as an Ex Post, Static Conceptions of Separation of Powers*, THE UNIV. CHICAGO L. R. ONLINE (Aug. 27, 2020), <https://lawreviewblog.uchicago.edu/2020/08/27/seila-duncheon-revesz/>.

Regarding whether *Myers* and *Humphrey's Executor* still stand for the proposition that Congress can impose limitations on the President's removal authority for agency heads as long as it does not retain a role for itself, this standard has been altered.<sup>131</sup> It has been understood that Congress is allowed to impose restrictions on the president's power to remove principal officers appointed to positions created by Congress, but due to the decision in *Seila Law*, Congress's power to restrict removal does not extend to single-headed agencies because that would be too large of a restriction on the president's ability to fulfill their role and responsibilities.<sup>132</sup> It appears now that both *Myers* and *Humphrey's Executor* are now both limited and have thus limited Congress's ability to impose limitations on the President's removal authority for agency heads.<sup>133</sup> This power is now limited to the exceptions of whether it is a multi-headed agency, as in the interpretation of *Humphrey's Executor*, and *Myers* now only applying to inferior officers that have limited duties and no policymaking or administrative authority.<sup>134</sup>

The second question as to whether there is a conceptually relevant difference between agencies with one head and those with two heads still requires further examination.<sup>135</sup> The majority's decision favoring multi-member agencies over single-headed agencies boils down to an understanding that group decision-making is more favorable than decision-making by a single director because "the necessity of persuading others reduces the possibility of harmful mistakes."<sup>136</sup> Although this is a valid argument, this reasoning does not have an implication for

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<sup>131</sup> Jack Beermann, *Seila Law: Is There a There There?*, THE UNIV. CHICAGO L. R. ONLINE (Aug. 27, 2020), <https://lawreviewblog.uchicago.edu/2020/08/27/seila-beermann/>.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Duncheon, Timothy & Revesz, Richard, *Seila Law as an Ex Post, Static Conceptions of Separation of Powers*, THE UNIV. CHICAGO L. R. ONLINE (Aug. 27, 2020), <https://lawreviewblog.uchicago.edu/2020/08/27/seila-duncheon-revesz/>.

<sup>136</sup> Jack Beermann, *Seila Law: Is There a There There*, THE UNIV. CHICAGO L. R. ONLINE (Aug. 27, 2020), <https://lawreviewblog.uchicago.edu/2020/08/27/seila-beermann/>.

presidential control except for the notion that a President who appoints a head of a single-headed agency is likely to have more influence over that body than a multi-headed agency.<sup>137</sup> There needs to be future analysis as to whether the distinction between multi-member and single-headed agencies truly presents opportunities for President's to influence independent agencies and whether removal power should be designated solely for multi-member agencies in which the President is unable to influence the only director.

Lastly, in terms of the questions if *Humphrey's Executor* and *Morrison v. Olson* are exceptions to the view that Congress cannot impose limitations on the President's removal authority, what is the scope of these exceptions now, it appears that the *Seila Law* case has changed this standard.<sup>138</sup> The Court in *Seila Law* described the President's removal power as "unrestricted", thus rejecting the view that *Humphrey's Executor* and *Morrison* establish a general rule that Congress can impose "modest" restrictions on the President's removal power.<sup>139</sup> The decision now makes the President's removal power the rule and not the exception.<sup>140</sup> *Humphrey's Executor's* exception from the rule requiring removability is not limited to for-cause removal protections for "multi-member body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power."<sup>141</sup> Additionally, *Morrison's* exception to the President's removal power is limited to at least some removal protections for inferior officers, if those officers have "limited duties and no policymaking or administrative authority."<sup>142</sup> The decision in *Seila Law* has now narrowly

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<sup>137</sup> *Id.*

<sup>138</sup> *Removing Officers: Current Doctrine*, LEGAL INFORMATION INSTITUTE (last viewed Mar. 16, 2023), <https://www.law.cornell.edu/constitution-conan/article-2/section-2/clause-2/removing-officers-current-doctrine>.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

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defined both the exceptions that have been utilized to limit the President's removal power, and it needs to be seen whether these exceptions will be utilized again in less narrow terms.

Although these questions are good starting points for determining the effects of the ruling in *Seila Law*, only time will tell how the Court will rule regarding the President's removal powers as applied to multi-headed agencies in the future.