Justices to Decide Fate of Consumer Watchdog Agency

Tim Ryan

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WASHINGTON (CN) — In a case that raises fundamental questions about the scope of executive power, the Supreme Court will hear arguments Tuesday on whether the structure of the Consumer Financial Protection Bureau is constitutional.

At base, Tuesday's case concerns the constitutionality of the requirement that the director of the Consumer Financial Protection Bureau can only be removed for cause, but the roots of the dispute extend into the New Deal and as far back as the country's founding itself.

The case comes from Seila Law, a debt relief law firm based in California that is challenging the CFPB's attempts to investigate whether it broke telemarketing rules. The firm raised its constitutional challenges to the agency after the CFPB went to court to enforce a request for documents the firm initially bucked.

Originally the brainchild of then-Harvard Law professor Elizabeth Warren, Congress created the CFPB as part of the Dodd-Frank Act in response to the 2008 financial crisis. The agency is tasked with regulating financial products like mortgages and student loans and has jurisdiction over banks, debt collectors and other financial institutions.

The CFPB is an independent agency that operates within the Federal Reserve system and draws its funding primarily from the Federal Reserve's earnings rather than the typical appropriations process in Congress.

The agency is also somewhat unique in that it is led by a single director who serves five-year terms and can only be removed "for inefficiency, neglect of duty, or malfeasance in office." This type of for-cause removal provision is common in independent agencies and is meant to insulate decision makers from political influence.

While independent agencies are found throughout the government — the Federal Communications Commission, Federal Election Commission and the Securities and Exchange

Commission are all examples — they most often are led by multiple members, rather than by one director.

By giving them a stronger protection from removal than other agency heads, Congress intends these agencies to operate based on their independent judgment and expertise, rather than to advance the political goals of the president.

Sai Prakash, a professor at the University of Virginia School of Law, explained the for-cause removal provision limits the president's control over the agency by removing a key power to dispense with an agency head not following the president's vision.

"These statutes make it harder for the president to remove and implicitly prohibit him from directing them," Prakash said in an interview. "Of course, what does it meant to direct someone if you can't remove them except for cause? No one thinks that, or at least most people don't think that, you can remove someone for not following your instructions when the whole idea behind the statute is to create an independent agency."

The Constitution does not contain any guidance on the president's ability to remove executive branch officials and Congress has for most of the history of the republic created agencies meant to operate above the political fray.

One of the first cases to address the constitutionality of such an arrangement was the Supreme Court's 1926 decision in *Myers v. United States*. In that case, a postmaster first class challenged his removal from office under an 1876 law that required the Senate's consent before the president could fire a host of government officials.

The court struck down that law, saying the president alone could remove executive officers. Then-Chief Justice William Howard Taft wrote that without the removal authority, the president "does not discharge his own constitutional duty of seeing that the laws be faithfully executed."

Less than a decade later, President Franklin Delano Roosevelt fired Federal Trade Commission member William Humphrey, appointed to the independent commission by President Calvin Coolidge. Much like the director of the CFPB, FTC members could only be fired for "inefficiency, neglect of duty, or malfeasance in office," but Roosevelt fired Humphrey solely because he did not think he was supporting the New Deal.

Humphrey challenged his firing and won, with the Supreme Court ruling in 1936 that Congress could impose limits on the president's ability to remove executive branch officers. The court in that case, known as Humphrey's Executor because Humphrey's estate took over the litigation after he died in 1934, ruled the case was different than the Myers decision because the FTC performed functions that were part judicial and part legislative.

William Yeatman, a research fellow at the Cato Institute, said there was clear tension between Myers and Humphrey's Executor that the court at the time did not address head-on.

"It did an about-face, but the jurisprudence of the matter never really addressed that it had done an about-face," Yeatman said in an interview. "So it sort of left in the air this unresolved tension

on this removal question — the extent to which Congress could insulate these principle officers or inferior officers from presidential management."

Yeatman, whose think tank has filed a friend of the court brief in the case arguing the CFPB is unconstitutionally structured, said the court then "paper[ed] over" that tension in the 1988 case *Morrison v. Olson*, in which the court upheld the removal provisions of a special counsel statute over a dissent from the late Justice Antonin Scalia.

Another case that could bear on the CFPB's fate is the court's 2010 decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*. In that case, the court struck down a removal provision that allowed officers on the Public Company Accounting Oversight Board only to be removed "for good cause" by members of the Securities and Exchange Commission, who themselves could only be removed for "inefficiency, neglect of duty, or malfeasance in office."

The court, which critically still included Justices Anthony Kennedy and Scalia, both of whom are no longer on the bench, ruled that dual layer of protection violated the Constitution's separation of powers.

In the case now before the court, the parties take essentially three lines of argument on how the dispute should be resolved, each of which would have different implications for the administrative state.

Seila Law's position is the most sweeping, arguing the CFPB's structure violates the Constitution's principles of separation of powers and that the court should strike down both the statute that created the agency and Humphrey's Executor itself, which it calls "badly reasoned and wrongly decided."

The firm argues that by vesting regulatory authority in a single director who is not subject to firing by the president, the CFPB wields weighty power without the fundamental check of facing the voters.

"The basic constitutional threat posed by independent agencies is that they exercise executive power unchecked by the president — and therefore unaccountable to the people," the law firm's brief states.

The Trump administration has declined to defend the CFPB and agrees the agency's structure is unconstitutional. But instead of urging the court to dump more than 80 years of precedent and strike down the agency as a whole, the administration argues the court should simply sever the for-cause removal requirement and leave the rest of the law in place.

The arguments bring up a contested legal theory known as unitary executive theory, which holds the president is in control of the entire function of the executive branch. The theory has traction with conservative legal scholars and was a point of liberal opposition early on in the nomination of Justice Brett Kavanaugh, who has seemed to endorse the theory in the past.

"At its core, the unitary executive is a claim that executive officers have to be subordinate to the president because they are executing the law and the president is by virtue of the Constitution the

constitutional executor of the laws, as Hamilton put it when he was in the Washington administration," Prakash said.

The professor noted the argument against the CFPB is coming from two fronts: a financial industry loathe to submit to the agency's regulatory power and academics, whose interests are less in what the agency does than in their understanding of the proper constitutional structure.

Without the Trump administration's support, the Supreme Court has called on Paul Clement, who served as solicitor general from 2005 to 2008, to act as a friend of the court in support of the CFPB.

Clement, whom the court recently commended for arguing his 100th case, argues "text, first principles, and precedent" all support Congress' ability to structure independent agencies like the CFPB.

"The absence of a clause committing removal to the executive or any consensus view among the framers does not provide a promising foundation for invalidating an act of Congress," Clement's brief states. "But the burden on the challengers here is greater still because, while the Constitution is silent on removal authority, it makes clear that Congress has substantial discretion to structure and organize executive-branch departments and agencies."

The Kirkland and Ellis partner further argues Seila Law has not given a good reason to overturn Humphrey's Executor, a longstanding precedent that serves as "the cornerstone of the constitutionality of roughly a third of our modern federal government."

Clement appears to face a difficult path with the court's conservative majority, especially with Kavanaugh having already found the CFPB's structure unconstitutional in 2016 while a member of the D.C. Circuit. An en banc panel reversed that decision in 2018, prompting a dissent from President Donald Trump's latest appointee to the Supreme Court.

Which path the court chooses if it does find the CFPB unconstitutionally structured will determine how far-reaching the impacts of the case will be.

On one hand, a narrow opinion striking down the for-cause removal provision based on the CFPB's relatively unique structure but leaving the agency in place would have a more limited reach because it would not extend to multi-member commissions or agencies significantly different in form from the CFPB.

Prakash also noted the court could simply read the for-cause removal provision broadly so as to allow the president to remove the head more easily for policy reasons.

But if the court takes Seila Law's invitation and strikes down Humphrey's Executor, it would have major implications for how much political influence a president can exert on federal agencies and potentially call into question the constitutionality of a host of independent agencies with important regulatory authority, leaving behind a more powerful president and a federal bureaucracy more subject to changing political climates.

"If the Supreme Court comes out there and says Humphry's Executor, we made a huge mistake, we're going to do as the petitioners ask and we're going to overturn this case, then yes, that is going to have a profound ramification upon a very important element of the administrative state and that element is the extent to which Congress can compete with the president for the management of administrative state personnel," Yeatman, with the Cato Institute, said.