July 10, 2020

Separation of Powers, or is it Delegation of Powers, is Alive and Well

In *Seila Law LLC vs. Consumer Financial Protection Bureau,* 2020 U.S. LEXIS 3515 (June 29, 2020) Chief Justice Roberts delivered the opinion of the Court with respect to Parts I, II, and III. He addressed the infrequently crossed Rubicon concerning separation of powers. This decision is almost a delegation of powers issue as well. In view of the astronomical expansion of the fourth branch of Government, the Administrative, the federal courts are wisely looking at both the separation of powers and the delegation of powers, both governed by the delicate instrumentation contained within the Great Compromise, known as the United States Constitution of 1789. The Founders deliberately created a seesaw. There were three seats on their seesaw, but the Founders clearly understood the ease of creating an imbalance. Jefferson was suspicious of the expansionist Federalists and the Federalists were fearful of the uncontrolled unwashed masses. This opinion continues the unending debate about where control in our tripartite exists. In reality, and for the everyday American, the Government is controlled by the Administrative branch; that aspect of Government which promulgates the rules and regulations governing daily life.

In the wake of the 2008 financial crisis, Congress established the Consumer Financial Protection Bureau (CFPB), an independent regulatory agency tasked with ensuring that consumer debt products are safe and transparent. In organizing the CFPB, "Congress deviated from the structure of nearly every other independent administrative agency in our history." Instead of placing the agency under the leadership of a board with multiple members, Congress provided that the CFPB would be led by a single Director, who serves for a longer term than the President and cannot be removed by the President except for inefficiency, neglect, or malfeasance. The CFPB Director has no boss, peers, or voters to report to. The Director wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U.S. economy. The question which the Court faced was whether this arrangement violates the Constitution's separation of powers.

Under our Constitution, the "executive Power" – all of it – is "vested in a President," who must "take Care that the Laws be faithfully executed." Art. II, §1. cl. 1; *id*, §3. In view of the fact that no single person fulfill that responsibility alone, the Farmers expected that the President would rely on subordinate officers for assistance. Ten years ago, in *Free Enterprise Fund vs. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 130 S. Ct. 3138, 188 L. Ed. 2d 706 (2010), the Court reiterated that, "as a general matter," the Constitution gives the President "the authority to remove those who assist him carrying out his duties." *id*, at 513-514, 130 S. Ct. 3138, 177 L. Ed. 2d 706. "Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Id.,* at 514, 130 S. Ct. 3138, 177 L. Ed. 2d 706.

The President's power to remove – and thus supervise – those who wield executive power on his behalf follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision *Myers vs. United States*, 272 U.S.

52, 47 S. Ct. 21, 71 L. Ed. 190 (1926). The Court's precedent has recognized only two exceptions to the President's unrestricted removal power. In *Humphrey's Executor vs. United States*, 295 U.S. 602, 55 S. Ct. 869, 79 L. Ed. 1611 (1935), the Court held that Congress could create expert agencies led by a *group* of principal officers removable by the President only for good cause. In *United States vs. Perkins*, 116 U.S. 483, 6 S. Ct. 449, 29 L. Ed. 700, 21 Ct. Cl. 499 (1986), and *Morrison vs. Olson*, 487 U.S. 654, 108 S. Ct. 2597, 101 L. Ed. 2d 569 (1988). The United States Supreme Court held that Congress could provide tenure protections to certain *inferior* officers with narrowly defined duties.

Once upon time and long ago in the past, I represented a United States Marshal, who was the Chief for his district, dismissed by Ronald Reagan. US Marshals have four-year terms and it seemed to me that this was a replay of *Marbury vs Madison,* 5 U.S. (1 Cranch) 137 (1803)! Finding a federal judge was difficult and finally the matter was assigned to a Republican judge nominated by Lynden Johnson. In spite of my appeal to the court concerning the protections afforded Presidential appointees, E. Mac Troutman, threw my case out.

The Supreme Court in *Seila Law, LLC.* was asked to extend prior precedents to a new configuration; 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. The Court stated that it would decline to take that step. While the Court would not revisit its prior decisions allowing certain limitations on the President's removal power, it held that there are compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director. In other words, the Court thought that it was slipping on the slippery slope that it had created. Such an agency, as described, said the Court, lacks a foundation in historical practice and "clashes with Constitutional structure by concentrating power in a unilateral actor insulated from Presidential control."

The Court therefore held that the structure of the CFPB violated the separation of powers. The Court went on to hold that the CFPB Director's removal protection is severable from the other statutory provisions which relate to the CFPB's authority. The agency, in a Solomon-like swish of the sword, permitted the agency to operate, but the Director may be removed by the President at will. The ghost of E. Mac Troutman struck down the Director.

CAR/srb