



U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

July 9, 2021

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: Constitutionality of the Social Security Administration's for-cause removal provision, 42 U.S.C. 902(a)(3)

Dear Madam Speaker:

Consistent with 28 U.S.C. 530D, I write to advise you that the Department of Justice has determined that the for-cause removal provision protecting the Commissioner of Social Security, 42 U.S.C. 902(a)(3), is unconstitutional and that the Department will not defend the constitutionality of that provision in litigation.

Congress established the current structure of the Social Security Administration in the Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 104-121, 108 Stat. 1464. Congress provided that the Social Security Administration would be headed by a single Commissioner, appointed by the President, with the advice and consent of the Senate, for a term of six years. 42 U.S.C. 902(a)(1) and (3). Congress further provided that “[a]n individual serving in the office of Commissioner may be removed from office only pursuant to a finding by the President of neglect of duty or malfeasance in office.” 42 U.S.C. 902(a)(3). Litigants in numerous pending cases have challenged the constitutionality of that restriction.

In *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020), the Supreme Court held that a similar for-cause removal provision for the single Director of the Consumer Financial Protection Bureau violates the separation of powers. The Court articulated a “general rule” that the President possesses “unrestricted removal power” with respect to Officers of the United States. *Id.* at 2197-2198. The Court acknowledged “two exceptions” to that general rule: “one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority.” *Id.* at 2199-2200. The Court “decline[d]” to “extend those [exceptions] to the ‘new situation’ before [it], namely an independent agency led by a single Director and vested with significant executive power.” *Id.* at 2201.

In *Collins v. Yellen*, 141 S. Ct. 1761 (2021), the Supreme Court held that a similar for-cause removal provision for the single Director of the Federal Housing Finance Agency violates the separation of powers. The Court stated that a “straightforward application of [the] reasoning in *Seila Law* dictate[d] th[at] result.” *Id.* at 1784. The Court explained that, in *Seila Law*, it “did

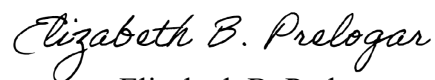
‘not revisit [its] prior decisions allowing certain limitations on the President’s removal power,’ but “found ‘compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director.’” *Id.* at 1783 (citation omitted). The Court emphasized that such an agency “lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control.” *Id.* at 1783-1784 (citation omitted). The Court also clarified that, notwithstanding *Seila Law*’s reference to “significant executive power,” *Seila Law*, 140 S. Ct. at 2201, “the nature and breadth of an agency’s authority is not dispositive in determining whether Congress may limit the President’s power to remove its head,” *Collins*, 141 S. Ct. at 1784. The Court observed that “[t]he President’s removal power serves vital purposes even when the officer subject to removal is not the head of one of the largest and most powerful agencies,” and that “[c]ourts are not well-suited to weigh the relative importance of the regulatory and enforcement authority of disparate agencies.” *Id.* at 1785.

The Department has concluded that, under the Supreme Court’s decisions in *Seila Law* and *Collins* and for the reasons given in those decisions, the restriction on the President’s constitutional authority to remove the Commissioner of Social Security likewise is unconstitutional. Indeed, the Department’s brief in *Collins* took the position that, under *Seila Law*, the restriction on removal of the Commissioner of Social Security is unconstitutional just as the restriction in *Collins* is unconstitutional. Following the Court’s decision in *Collins*, the Office of Legal Counsel concluded that the “best reading” of *Collins* and *Seila Law* “compels the conclusion that the statutory restriction on removing the Commissioner [of Social Security] is unconstitutional.” *Constitutionality of the Commissioner of Social Security’s Tenure Protection*, 45 Op. O.L.C. ___, slip op. 10 (July 8, 2021), <https://www.justice.gov/olc/file/1410736/download>.

We do not anticipate that this concession will have a significant practical effect on the validity of actions taken by the Social Security Administration. Under the Supreme Court’s precedents, an unconstitutional removal provision generally is severable from the remainder of the statute and does not render an agency’s actions void. See *Collins*, 141 S. Ct. at 1787; *Seila Law*, 140 S. Ct. at 2207-2211 (opinion of Roberts, C.J.); *id.* at 2245 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part); *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 508-509 (2010). We believe that the same principles apply to the actions of the Social Security Administration notwithstanding the unconstitutionality of the restriction on removal of the Commissioner.

Please let me know if we can be of further assistance in this matter.

Sincerely,



Elizabeth B. Prelogar
Acting Solicitor General