

# Insulated No More: The *Seila* Decision and the End of the Independent CFPB Director

June 30, 2020

## INTRODUCTION

On June 29, 2020, the Supreme Court issued its decision in *Seila Law LLC v. Consumer Financial Protection Bureau*, finding unconstitutional the Consumer Financial Protection Bureau's (the "CFPB" or "Bureau") leadership structure in which a single director is removable by the President only for cause. This "for cause" limitation on the President's removal powers by the authors of Dodd-Frank made the CFPB leader more independent than the leaders of other executive agencies. In addition, given the CFPB Director's five year term, a CFPB Director appointed by one President could remain in office well into the tenure of the next.

The Supreme Court's decision in *Seila* eliminates this "for cause" protection, ending the CFPB's insulated political status and opening up the CFPB to leadership change when a new President takes office. This decision will have a narrow immediate impact, since the CFPB is currently headed by an appointee of President Trump, but will have greater meaning if former Vice President Joe Biden wins the presidency in the fall. More generally, the decision will lead to a CFPB that is more closely aligned with the political priorities of whichever administration is in power.

## BACKGROUND

### The CFPB's Independent Status

Unlike other federal agencies, Congress deliberately designed the CFPB to be insulated from changes in presidential administrations by establishing restrictions on the Director's removal. As a result, unlike most agencies whose rulemaking and enforcement priorities can radically change with presidential transitions, the CFPB was intended to maintain the agenda of its Director regardless of the outcome of a presidential election. As then-D.C. Circuit Judge Brett Kavanaugh noted in *PHH v. CFPB*, even if Senator Elizabeth Warren, who originally proposed the idea of the CFPB, were to

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assume the presidency in 2021, she would be unable to replace the Trump-appointed CFPB Director until the end of the Director's term in 2023.<sup>1</sup>

The CFPB Director's protected status has been challenged since the agency's inception. Critics have described the CFPB Director as Washington's "second most powerful person," given her lack of accountability.<sup>2</sup> In *PHH v. CFPB*, the plaintiff challenged the constitutionality of the entire Bureau, arguing that a single CFPB Director removable only for cause violated the separation of powers by limiting the President's power of appointment. The D.C. Circuit found, in an *en banc* decision, that the CFPB was constitutional.<sup>3</sup> PHH did not pursue an appeal.

### The *Seila* Case

The *Seila* case began in 2017, when the CFPB issued a Civil Investigative Demand ("CID") to Seila Law LLC, a law firm providing debt-related legal services. The firm rejected the CID, arguing that the CFPB leadership structure was unconstitutional. Relying on *PHH*, both the District Court and the Ninth Circuit ruled against Seila, finding that the CFPB structure was constitutional.<sup>4</sup> After the Ninth Circuit's decision, the CFPB (led by Trump appointee Kathy Kraninger) announced that it agreed with Seila Law and believed that its own leadership structure was unconstitutional. In response, the Supreme Court appointed Paul Clement to argue in support of the CFPB's structure.<sup>5</sup>

## THE *SEILA* DECISION

On June 29, 2020, Chief Justice Roberts, joined in part by Justices Thomas, Alito, Gorsuch, and Kavanaugh, declared unconstitutional the agency's leadership by a single individual removable only for cause, defined by statute as "inefficiency, neglect of duty or malfeasance."<sup>6</sup> Finding that the structure violates the separation of powers, the Court stated that the agency "lacks a foundation in historical practice and clashes with

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<sup>1</sup> *PHH Corporation v. CFPB*, Court Listener (Apr. 12, 2016), <https://www.courtlistener.com/audio/15816/phh-corporation-v-cfpb/>. See generally *PHH v. CFPB*, 839 F.3d 1 (D.C. Cir 2017).

<sup>2</sup> Corbind Barthold, *If It Takes History Seriously, The Supreme Court Will Strike Down the CFPB*, FORBES (Oct. 31, 2019), <https://www.forbes.com/sites/wlf/2019/10/31/if-it-takes-history-seriously-the-supreme-court-will-strike-down-the-cfpb/#282695d2413d>.

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

<sup>4</sup> *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. \_\_\_, 2020 WL 3492641 at \*7 (June 29, 2020).

<sup>5</sup> Mike Scarcella, *How Paul Clement Is Defending Obama's Consumer Protection Bureau*, NATIONAL LAW J. (Jan. 15, 2020), <https://www.law.com/nationallawjournal/2020/01/15/how-paul-clement-is-defending-obamas-consumer-protection-bureau/>.

<sup>6</sup> *Seila*, 2020 WL 3492641 at \*9.

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constitutional structure by concentrating power in a unilateral actor insulated from Presidential control.”<sup>7</sup> As the plurality reasoned, the Executive’s recognized authority to appoint executive officials must carry with it the power to remove those officials.<sup>8</sup>

However, by a 7-2 vote, the Court declined to extend this finding to render the CFPB unconstitutional as a whole, holding that the CFPB Director removability provision is sufficiently severable from the other provisions of the Dodd-Frank Act establishing the CFPB, such that the agency may continue to exercise its authority constitutionally. “The agency may therefore continue to operate, but its Director, in light of our decision, must be removable by the President at will.”<sup>9</sup>

## IMPACTS OF THE *SEILA* DECISION

### Immediate Ramifications

The *Seila* decision’s immediate impact will likely be minimal. Kathy Kraninger, the current CFPB Director, was appointed by Donald Trump in 2018, and the Bureau under her leadership has been pursuing rulemaking and enforcement initiatives that are closely aligned with the White House’s policy priorities, meaning that Director Kraninger likely will not be removed by the current President. However, to the extent Director Kraninger were considering Bureau initiatives inconsistent with the President’s priorities, the *Seila* decision makes it unlikely that such initiatives could now be pursued without the threatened assertion of the President’s removal power.

The decision will have a much larger impact if former Vice President Biden wins the presidency in November and replaces Kraninger with his own choice of Director. Prior to *Seila*, Kraninger would have remained at the helm of the CFPB until 2023, now she would be subject to immediate replacement in a Democratic administration. Such a replacement would potentially lead to a much more active and aggressive CFPB. Just as the CFPB took an aggressive enforcement stance coming out of the 2008 Financial Crisis, the Bureau could also be very active coming out of the COVID-19 pandemic and the current economic dislocation.

### Long-Term Impacts

The end of “for cause” protection for CFPB Directors will weaken the independence of the agency as it was originally envisioned, and has the effect of politicizing the Bureau’s policy objectives by bringing them more closely into alignment with each presidential

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<sup>7</sup> *Id.* at \*5.

<sup>8</sup> *Id.* at \*9-12.

<sup>9</sup> *Id.* at \*5.

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administration's priorities. This outcome may benefit some regulated companies and financial institutions by giving them additional avenues for indirect appeal within the executive branch in response to aggressive enforcement actions. But companies with high-profile errors or those that are unpopular politically may find themselves increasingly targeted by an agency now more subject to political pressures.

### **End of Constitutional Challenges to the CFPB's Existence**

None of the Justices stated outright that he or she would eliminate the CFPB in its entirety due to these leadership structure issues. As a result, the almost decade-long battle over whether the CFPB as an institution is constitutional may have come to a close. Unless eradicated by law, the CFPB will likely continue its role in financial institution oversight.

### **Ratification of CFPB Actions**

One open question is whether the CFPB will need to ratify its past rulemaking and enforcement actions. While the Court found that the CFPB Director's past removability protection was unconstitutional, it did not make clear whether the CFPB's past actions could therefore be challenged for failure to be ratified by a Director accountable to the President. The Court remanded this question to the Ninth Circuit. Companies facing pending CFPB investigations or enforcement actions may wish to consider whether to demand ratification of the action by Director Kraninger, prior to the investigation moving forward, now that she is removable at will.

## **CONCLUSION**

The *Seila* decision ushers in the end of the CFPB's relative independence from changes in presidential administrations. What was originally designed to be a consumer watchdog immune to political influence will now become another federal agency whose leadership changes with the occupant of the White House. While this decision will have a limited immediate impact, companies should be cognizant that, if there is a Democratic victory in the fall, it will likely lead to a resurgent CFPB with broader enforcement and regulatory priorities, more swiftly than would have occurred absent the *Seila* decision.

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Please do not hesitate to contact us with any questions.

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**NEW YORK**



Courtney M. Dankworth  
cmdankworth@debevoise.com



Mary Beth Hogan  
mbhogan@debevoise.com



Gregory J. Lyons  
gjlyons@debevoise.com



Erol Gulay  
egulay@debevoise.com



David Imamura  
dimamura@debevoise.com



Alexandra N. Mogul  
anmogul@debevoise.com



Victoria L. Recalde  
vlrecald@debevoise.com