Supreme Court's Seila Law Decision Brings Clarity to the CFPB (for Now)

By **Mark Rooney** - July 27, 2020

In June, the Supreme Court struck down the leadership structure of the CFPB as unconstitutional. (The case is Seila Law LLC v. CFPB, No. 19-7 (June 29, 2020), and the decision is here.) The case resolves a long-simmering question over the CFPB's viability but the Court's other holding — that the offending provision limiting the President's ability to remove the director can simply be severed from the rest of the statute — ensures that the agency will continue to operate.

Going forward, the director of the CFPB is now considered an "at will" appointee, meaning the President can remove her at any time, for any reason. The current director, Kathy Kraninger, has said all along that she considers herself to serve at the pleasure of the President, suggesting that the Supreme Court's decision will have little practical impact. Nonetheless, important questions remain over whether actions taken by the Bureau prior the Supreme Court's decision are still valid. Since the decision, Director Kraninger issued a statement purporting to "ratify" some of the Bureau's prior rulemaking. Whether that will be enough to insulate the Bureau from further legal challenges remains to be seen.

Background

Seila Law LLC is a law firm in California that provides debt relief services (among other things). It received a Civil Investigative Demand (CID) from the CFPB in February 2017. The firm petitioned to set aside the CID, which the CFPB denied. The firm then provided some documents and information responsive to the CID but did not fully comply with it, which prompted the CFPB to file a petition in the U.S. District Court for the Central District of California to enforce the CID.

Seila Law made various arguments why the CID should not be enforced, most notably that the Bureau's leadership structure violates the U.S. Constitution. The Bureau's single director is appointed by the President for a five-year term and can only be removed for "inefficiency, neglect of duty, or malfeasance in office"—language that is commonly understood to require some "cause" for removal.

The District Court rejected the challenge and ordered Seila Law to comply with the CID, with some modest limitations. Seila Law appealed, and the Ninth Circuit affirmed the lower court decision in 2019. When the Supreme Court agreed to hear the case, it sought briefing on two issues: (1) whether

the leadership structure of the CFPB violates the separation of powers; and (2) if so, whether the for-cause removal provision can be severed from the rest of the Consumer Financial Protection Act.

The court's decision

The Supreme Court held that the structure—that is, where you have an independent agency, with a single director, wielding "substantial executive authority"— violates the U.S. Constitution. The Court stressed that there is no precedent for this type of agency arrangement. It discussed at length two earlier cases where the Supreme Court upheld non-traditional agency structures. But, it distinguished those cases on their respective facts. In Humphrey's Executor v. U.S., 295 U.S. 602 (1935), the Court upheld the multi-member commission model of the Federal Trade Commission (FTC), at a time when the FTC did not wield executive power. In Morrison v. Olson, 487 U.S. 654 (1988), the Court upheld the creation of a politically-insulated special prosecutor, an inferior officer within the U.S. Department of Justice with limited authority.

Neither case provided the rule of decision here, the Court concluded. The CFPB presents a "new situation" (Op. at 18) of an independent agency, headed by a single director, who cannot be removed at will be the President. That "wholly unprecedented" arrangement (id.) violates the separation of powers by divesting executive authority from Presidential control, it held.

The Court also held that the for-cause removal provision can be severed from the rest of the statute. This means that the CFPB director is essentially transformed now into an "at will" appointee, and the rest of the Consumer Financial Protection Act (the portion of the Dodd-Frank Act that created the CFPB) remains intact. The severability issue turns on what Congress would have wanted if a specific portion of a law is deemed unconstitutional. In this case, the Court had little trouble concluding that Congress would have preferred to keep the CFPB intact, with a removable director, rather than to have no CFPB at all. An express severability clause in the larger Dodd-Frank Act assured that outcome.

The impact of the case

A critical issue that the Supreme Court declined to decide, and instead left for lower courts to wrestle with, is whether the Bureau "ratified" the CID to Seila Law. Ratification is a process where an executive agency re-asserts or re-executes a decision or an action that was initially made or taken in circumstances of questionable validity. In this case, the CFPB argued that when President Trump installed Mick Mulvaney as an acting director of the CFPB—and acting directors are removable "at will" by the President—Mulvaney's continued prosecution of the CID enforcement action constituted ratification of the initial issuance of the CID by a prior director (whose leadership we now know was unconstitutional). It is far from clear whether this will suffice and, if so, how many other CFPB actions could be deemed ratified during Mulvaney's "at will" tenure.

Subsequent developments

On July 7—eight days after the Supreme Court's decision—Director Kraninger issued a formal statement purporting to ratify the Bureau's existing rules and certain other prior actions. In doing so, the director implicitly acknowledged the constitutional infirmity, in light of the Seila Law decision, of any Bureau action taken under a director not removable at will. The ratification statement applies to all prior rulemaking (except the Bureau's abandoned 2017 small-dollar loan rule, and the arbitration rule which Congress invalidated) and to certain consumer information publications, fair credit disclosure notices, and other determinations and statements. The ratification notably makes no reference to prior or pending CIDs or enforcement actions.

Conclusion

Just after the Supreme Court's ruling, Director Kraninger tweeted that the decision "finally brings certainty to the operations of the Bureau." This is true in one respect—she remains in her job, albeit as an "at will" Presidential appointee and without the "for cause" statutory restrictions on her

removal. Likewise, the Bureau's ratification statement counsels that it "provides the public with certainty" by resolving any constitutional defects (perceived or actual) in the Bureau's work.

But while the present work of the Bureau may move forward—and notwithstanding the Bureau's confident assertions of "certainty"— thorny issues of ratification appear likely to plague the Bureau for some time. The July 7 ratification statement is primarily directed at the rulemaking process which, of all the Bureau's powers, may be least conducive to a blanket ratification statement because rulemaking typically requires years of input and a formal notice and comment period. If CFPB regulations were not validly made in the first instance, is a unilateral ratification statement by the director today enough to cure the constitutional defect? Separately, the fate of prior and pending investigations and enforcement actions, which have not been ratified in any formal way, remains unclear and susceptible to challenge. In the end, while the Seila Law decision brings needed clarity to the Bureau's legitimacy going forward, you can bet that the effectiveness and scope of the Bureau's ratification efforts will continue to be litigated.

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