

Seila Law v. CFPB

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Andrew Arculin

Partner | 202.344.4588 | raarculin@Venable.com

Allyson Baker

Partner and Co-Chair | 202.344.4708 | abaker@Venable.com

Peter Frechette

Associate | 202.344.4616 | psfrechette@Venable.com

Jonathan Pompan

Partner and Co-Chair | 202.344.4383 | jlpompan@Venable.com

Gerald (Gerry) Sachs

Partner | 202.344.4269 | gsachs@Venable.com

Daniel Lynch

Associate | 202.344.4009 | ddlynch@Venable.com

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Presenters



Andrew Arculin

Partner, Consumer Financial Services
202.344.4588
raarculin@Venable.com



Allyson Baker

Partner and Co-Chair, Consumer Financial Services
202.344.4708
abaker@Venable.com



Jonathan Pompan

Partner and Co-Chair, Consumer Financial Services
202.344.4383
jlpompan@Venable.com



Gerry Sachs

Partner, Consumer Financial Services
202.344.4269
gsachs@Venable.com



Peter Frechette

Associate, Consumer Financial Services
202.344.4616
psfrechette@Venable.com



Materials Coordinator

Daniel Lynch

Associate, Consumer Financial Services
202.344.4009
ddlynch@Venable.com

Today's Topics

- Brief Background on *Seila Law LLC v. CFPB*
- Overview of the Supreme Court's Decision
- Constitutional Remedy and Next Steps
 - *Seila Law* on remand and the issue of ratification
 - Paths forward for the CFPB
- Effects of the Court's Decision on:
 - CFPB enforcement actions
 - Supervisory activity
 - Rulemaking activity
- Effect of the Court's Decision on Other Agencies
- Considerations for Parties Facing the CFPB



Introduction and Overview

Background of the CFPB

- Independent agency created by Congress in 2010 through the Dodd-Frank Wall Street Reform and Consumer Protection Act (Title X: Consumer Financial Protection Act).
- The CFPB was created to regulate the offering and provision of consumer financial products and services under federal consumer financial laws.
- The CFPB is designed to ensure that the federal consumer financial laws are enforced consistently, so that consumers may access markets for financial products, and so that these markets are fair, transparent, and competitive.
- The CFPB has exclusive authority to enforce federal consumer financial laws against non-depository covered persons (“non-banks”) and has exclusive federal consumer law supervisory authority and primary enforcement authority over insured depository institutions with over \$10 billion in assets.

Structure of the CFPB

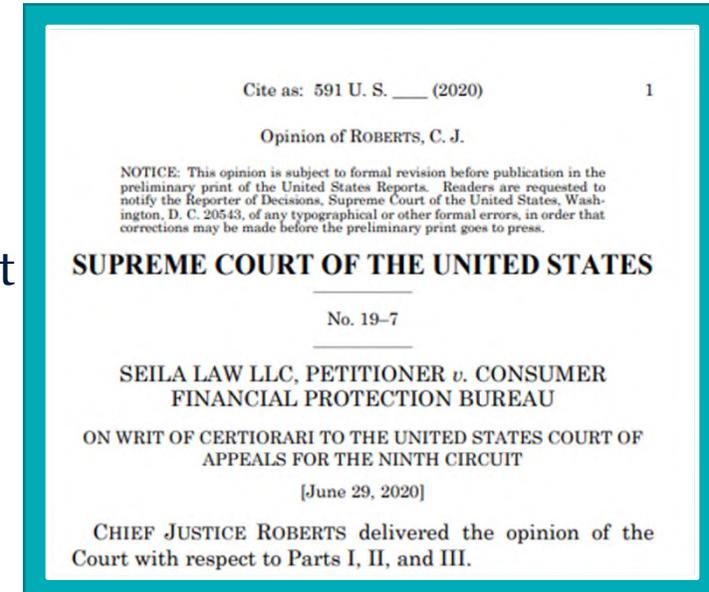
- **CFPB Established:** “There is established in the Federal Reserve System, an independent bureau to be known as the ‘Bureau of Consumer Financial Protection’, which shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws. The Bureau shall be considered an Executive agency, as defined in section 105 of Title 5.”
- **Officer of the United States:** A single Director serves as the “head of the Bureau.”
- **Appointment:** The Director is appointed by the President, by and with the advice and consent of the Senate and serves a 5-year term. The Director may continue to serve until the expiration of the term of appointment, until a successor has been appointed and qualified.
- **Removal:** “The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.” (the “For-Cause Removal” Provision)

Seila Law LLC v. CFPB

A Challenge to the Constitutionality of the CFPB

Seila Law LLC v. CFPB

- In 2017, Seila Law LLC refused a CFPB civil investigative demand (CID) and filed a petition for the CFPB to set aside the demand.
- Then Director Richard Cordray denied the request, and Seila Law submitted partial responses, reiterated its objections, and declined to provide further information or documents.
- The CFPB filed a petition to enforce the CID in federal district court and prevailed.
- Seila Law appealed to the Ninth Circuit, which affirmed based primarily on the majority opinion from the D.C. Circuit en banc decision *PHH Corp. v. CFPB*, and then Seila Law filed its petition for certiorari.
- The Supreme Court granted the petition on October 18, 2019.
- The Supreme Court heard oral argument on March 4, 2020.
- The Supreme Court issued its decision on June 29, 2020.



Constitutional Argument

- Article II, Section 1 – Vesting executive power with the President of the United States.
- Article II, Section 3 – Requiring the President to “take Care that the Laws be faithfully executed.”
- **The Argument:** The independence of the Director of the CFPB prevents the President from fulfilling the duty to “take Care that the Laws be faithfully executed.” The statutory restriction on the President’s authority to remove the Director of the CFPB violates the constitutional separation of powers.
- **The Precedent:** The Supreme Court has upheld certain “for-cause removal” provisions in other agencies, but only in the context of an agency led by a multi-member panel or commission (as opposed to a single person).
- **Circuit Split:** The Ninth Circuit and the D.C. Circuit have held that the CFPA’s appointment provision does not violate separation of powers doctrine, but the en banc Fifth Circuit has held that the nearly identical structure of the Federal Housing Finance Agency is unconstitutional.

The Supreme Court's Decision

“We therefore hold that the structure of the CFPB violates the separation of powers. We go on to hold that the CFPB Director’s removal protection is severable from the other statutory provisions bearing on the CFPB’s authority. The agency may therefore continue to operate, but its Director, in light of our decision, must be removable by the President at will.”

- No further structural challenges? *“The only constitutional defect we have identified in the CFPB’s structure is the Director’s insulation from removal.”*
- Two exceptions to a broad presidential removal power:
 - “multimember expert agencies that do not wield substantial executive power”
 - “inferior officers with limited duties and no policymaking or administrative authority”



Breaking Down the Opinion of the Court

- Opinion of the Court as to Parts I, II, III (CJ Roberts, Thomas, Alito, Gorsuch, Kavanaugh)
 - Part I: Background and Amicus Curiae appointment
 - Part II: Amicus arguments rejected (traceability argument re: standing, no contested removal so not ripe, no adverseness)
 - Part III: CFPB's leadership structure violates the separation of powers
 - Part IV: Remedy – severability (CJ Roberts, Alito, Kavanaugh, and dissent with concurrence in severability Kagan, Ginsburg, Breyer, Sotomayor)

Effect of an Unconstitutional CFPB and the Constitutional Remedy

Constitutional Remedy and Next Steps

- The Supreme Court severed the “for-cause removal” provision of the CFPA and remanded the case to the lower court.
- Difficult questions surround constitutional violations and remedies
 - Ratification
 - “*we must instead remand for the Government to press its ratification arguments in further proceedings.*”
 - Blanket ratifications have been used by the NLRB and CFPB (post-*Noel Canning*)
 - However, other cases indicate that ratification is case and fact specific
 - Limited immediate practical effects, but continued arguments
 - Unlikely to affect settled cases or decisions

The Paths Forward for the CFPB

- The CFPB moving forward:
 - Director tied to the current President
 - Conversion to a commission
 - *“Our severability analysis does not foreclose Congress from pursuing alternative responses to the problem—for example, converting the CFPB into a multimember agency.”*
- Effect on CFPB goals, policies, and approaches?
- Effect on markets (example: GSE “QM patch” proposals)

Effect on Past and Present CFPB Activities

- Enforcement Actions and Litigation
- Investigations and CIDs
- Supervisory Examinations
- Rulemaking Activities
 - Proposed Rules:
 - Payday Rule
 - Debt Collection Practices Rulemaking
 - GSE “QM Patch” Proposals
- Regulatory Guidance and No Action Letters (NALs)

Effect on Other Agencies

- What does *Seila Law* mean for a future challenge to the FTC, SEC, and other multi-member agencies/commissions?
- Opinion of the Court
 - “Congress’s ability to impose such removal restrictions ‘will depend upon the character of the office.’”
 - “Rightly or wrongly, the Court viewed the FTC (as it existed in 1935) as exercising ‘no part of the executive power.’ *Id.*, at 628. Instead, it was “an administrative body” that performed ‘specified duties as a legislative or as a judicial aid.’”
- Concurring Opinion of Justice Thomas and Gorsuch
 - “Court takes a step in the right direction by limiting Humphrey’s Executor to ‘multimember expert agencies that do not wield substantial executive power,’ ante, at 16 (emphasis added). . . .”
 - On *Morrison*: “The Court also rejected Humphrey’s Executor’s conclusion that the FTC did not exercise executive power, stating that ‘the powers of the FTC at the time of Humphrey’s Executor would at the present time be considered “executive.””
 - “In light of these decisions, it is not clear what is left of Humphrey’s Executor’s rationale.”
 - “Today, the Court does enough to resolve this case, but in the future, we should reconsider Humphrey’s Executor *in toto*.”

Considerations for Parties Facing the CFPB

- Intersection of CFPB constitutionality and CFPB authority “in the field”:
 - Investigations and CIDs
 - Notice and Opportunity to Respond and Advise (NORA) Letters
 - Potential Action and Request for Response (PARR) Letters
 - Consent Order negotiations
- Accelerate toward a resolution or stay the course?
- Considerations for tomorrow
- Considerations for next year

Questions

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Thought Leadership

CARES Act PPP Funds and Government Investigations: What You Need to Know

🕒 12min

June 30, 2020

UPDATE: Doing Business Via the Internet with Hong Kong or Elsewhere in Asia is Getting Harder

🕒 5min

June 30, 2020

Supreme Court Severs For-Cause Removal Provision, but CFPB Remains

🕒 3min

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- "Compliance University" resented by Online Lenders Alliance
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