Overview

A divided Supreme Court has just ruled in *Seila Law L.L.C. v. Consumer Financial Protection Bureau* [1], 2020 WL 3492641 (U.S. June 29, 2020), that the limitations on the President’s authority to remove the director of the Consumer Financial Protection Bureau (CFPB) are unconstitutional.

However, the Court also held that the offending provision can be severed, thus saving the Bureau and the remainder of Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which created the Bureau and details its powers. Thus, the most important takeaway is that the CFPB’s powers are intact. In the decision’s wake, CFPB Director Kathy Kraninger has also ratified most of the CFPB’s prior rulemaking and other activities [2] other than the now repealed ability-to-repay provisions of the payday loan rule and the arbitration rule that Congress overturned.

However, the decision may have consequences for the independence of other single-director agencies such as the Federal Housing Finance Agency (FHFA). The decision may also signal the Court’s openness to reconsidering the independence of multi-member independent agencies such as the Federal Trade Commission, the Federal Communications Commission, the Federal Reserve Board, the Federal Deposit Insurance Commission, and the National Credit Union Administration.

The Ruling

Chief Justice Roberts, in writing the majority opinion in *Seila Law*, finds that it is an unconstitutional infringement on executive branch powers to limit the President to removing the CFPB Director only for cause (“inefficiency, neglect of duty, or malfeasance in office”), rather than at the President’s will. The opinion focuses on the fact that, unlike almost all other independent agencies, the CFPB is headed up by only one individual. The Court also emphasized that the CFPB exercises broad executive power. The decision explicitly avoids discussing the constitutionality of limitations on the President’s removal authority as to heads of other independent agencies, both those led by single individuals and those led by multiple individuals.

Seven justices saved the CFPB’s continued existence by severing the offending provision limiting the President’s removal authority, leaving intact the rest of the CFPB’s authority. The only change is that the President can now remove the CFPB Director at will.

From a practical view, this means that present Director Kathy Kraninger, appointed by President Trump for a five-year term ending in December 2023, can instead be fired at will by the current President or by the winner of this year’s election. It also means that the CFPB Director is no longer fully independent, as she serves at will and can be influenced by the President’s wishes. For a discussion of the CFPB and its authority, with a focus on its authority as to unfair, deceptive and particularly abusive practices, see NCLC’s *Federal Deception Law Chapter 3* [3].

As described below, the Court’s decision in *Seila Law* certainly raises questions about the independence of the heads of the FHFA, and it may also invite challenges to the constitutionality of other independent agencies.

Next Steps in the *Seila Law* Case

The CFPB under its first Director, Richard Cordray, issued a civil investigative demand (CID) to Seila Law. When Seila Law refused to comply with the CID, the CFPB sought court enforcement, and Seila Law argued as a defense that the CFPB’s structure violated the separation of powers. The Supreme Court now agrees with Seila Law.

But the CFPB’s enforcement action against Seila Law continues. Rather than quash the CID, the Court remanded the case to the Ninth Circuit to see if the CFPB had later ratified the CID under Acting Director Mulvaney, who took office on December 10, 2017. As an acting director, Mulvaney was subject to removal at the President’s will, so the Court implies that there is no constitutional infirmity in Acting Director Mulvaney’s actions during his term ending December 13, 2018. Whether the CID was previously ratified, or whether it even needs to be ratified, may be a question on remand before the Ninth Circuit. But the question is largely moot, as Director Kraninger can ratify the CID against Seila Law if she wishes to enforce it or withdraw it if she does not.
CFPB Director Kraninger’s Post-Seila Law Ratifications

The week after the Seila Law decision was issued, on July 10th, the CFPB through its Director, published in the Federal Register a notice ratifying a number of previous actions by the Bureau [2]. See 85 Fed. Reg. 41330 (July 10, 2020) [4]. This includes the large majority of the Bureau’s existing regulations, as well as certain other actions.

The notice states that the Bureau “is issuing this ratification out of an abundance of caution, and this ratification is not a statement that the Ratified Actions would have been invalid absent this ratification.” Indeed, there are a number of reasons why ratification may not be necessary, including the de facto officer doctrine. See Ryder v. United States [5], 515 U.S. 177 (1995).

The Bureau, through its Director, affirmed and ratified actions from January 4, 2012 to June 30, 2020, as listed below. See 85 Fed. Reg. 41330 (July 10, 2020) [4].

1. Each document published by the Bureau in the “Rules and Regulations” category of the Federal Register, except the July 2017 arbitration rule and the November 2017 payday loan rule. The CFPB separately ratified the payment provisions of the payday loan rule [6]. Aside from exempting those two rules, the Bureau noted that the ratification “includes but is not limited to all amendments to the Bureau’s regulations in 12 CFR chapter X, as well as the Bureau’s actions in issuing joint regulations with other agencies.”
6. The Bureau’s concurrences with respect to the April 2018 and October 2019 rules by the three federal banking agencies and the July 2019 and April 2020 rules by the National Credit Union Administration, each titled “Real Estate Appraisals.” See 83 Fed. Reg. 15,019 (Apr. 9, 2018); 84 Fed. Reg. 55,525 (July 24, 2019); 84 Fed. Reg. 53,579 (Oct. 8, 2019); 85 Fed. Reg. 23,909 (Apr. 30, 2020).

In a section of the ratification notice on actions outside the scope of the ratification, the CFPB identified only the now overturned arbitration rule and the November 2017 payday loan rule but noted the separate ratification of the payment provisions of the payday loan rule.

The constitutionality of the CFPB Director has been raised in the ongoing challenge to the CFPB’s payday loan rule, but on the same day that the CFPB issued the ratification notice, July 7, 2020, it also finalized the repeal of the ability-to-repay provisions of the payday loan rule [7] while ratifying the remaining provisions of the rule governing bounced payments. Thus, Seila Law should not have any immediate impact on the payday loan rule. But if the CFPB’s repeal of the ability-to-repay provisions is challenged, the CFPB or payday lenders may try to use Seila Law in an attempt to defeat revival of those provisions.

The CFPB’s ratification of other rulemakings should help defeat challenges based on Seila Law to other rulemakings, though some in industry are already raising questions about whether the ratification was effective.

In the ratification notice, the Bureau also stated that it “is considering whether ratifications of certain other legally significant actions by the Bureau, such as certain pending enforcement actions, are appropriate. Where that is the case, the Bureau is making such ratifications separately.” However, the Bureau noted that “the Bureau does not believe that it is necessary for this ratification to include various previous Bureau actions that have no legal consequences for the public, or enforcement actions that have been finally resolved.”

Implications for FHFA and Other Single-Director Agencies
The FHFA is an independent federal agency overseeing Fannie Mae and Freddie Mac, which play a major role in the mortgage securitization market. Like the CFPB, the FHFA has one Director, removable by the President only for cause. The FHFA does not have the broad authority of the CFPB, which, the Supreme Court in \textit{Seila Law} noted, “possesses the authority to promulgate binding rules fleshing out 19 federal statutes, including a broad prohibition on unfair and deceptive practices in a major segment of the U. S. economy,” and “brings the coercive power of the state to bear on millions of private citizens and businesses, imposing potentially billion-dollar penalties through administrative adjudications and civil actions.”

Nonetheless, the FHFA wields significant power in the mortgage market, and even before \textit{Seila Law}, the Fifth Circuit, sitting en banc, had found the limitation on removal of the FHFA Director to be unconstitutional. See \textit{Collins v. Mnuchin} \cite{9}, 938 F.3d 553, 587–588 (5th Cir. 2019). Like the Supreme Court, the Fifth Circuit found the for-cause removal provision severable.

The Supreme Court has just granted a certiorari petition in \textit{Collins} and will hear the case next term. To see the petition, briefs, and status, click here \cite{9}.

The Office of the Comptroller of the Currency, which regulates national banks and federal savings associations, is also headed by a single director. But the limitations on the President’s authority to remove the Comptroller—merely requiring that the President provide “reasons” to the Senate—are not as specific as were those governing the CFPB Director. \textit{Seila Law} may influence how that limit is interpreted.

The Social Security Administration is headed by a single director, but its powers are not as sweeping. It remains to be seen whether it is at risk.

\textbf{Implications for FTC, FCC, FRB, FDIC, NCUA, Other Independent Agencies}

The \textit{Seila Law} decision produced three remarkable opinions. The Chief Justice’s majority opinion expressly avoids the question as to the constitutionality of other independent federal agencies, such as the FTC, FCC, FRB, FDIC, and NCUA, that are headed by multiple commissioners or members, who are not subject to removal at the will of the President.

Much of the opinion focused on the extent of power vested in a single person. In creating the CFPB, “Congress deviated from the structure of nearly every other independent administrative agency in our history.” Congress did not place “the agency under the leadership of a board with multiple members,” and “[t]he CFPB Director has no boss, peers, or voters to report to.” The Court did not revisit past Supreme Court precedent upholding the independence of the FTC but found “compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director.”

But lurking in Chief Justice Roberts’ opinion are hints that he questions the constitutionality of other independent agencies as well. His opinion in \textit{Seila Law} refuses to expand \textit{Humphrey’s Executor v. United States} \cite{10}, 295 U.S. 602, 55 S. Ct. 869, 79 L. Ed. 1611 (1935), whereby the Court upheld the FTC’s independence, despite limits on the President’s ability to remove a FTC Commissioner. According to the Chief Justice, the Court did so because “[r]ightly or wrongly, the Court viewed the FTC (as it existed in 1935) as exercising ‘no part of the executive power,’ performing instead only quasi-legislative and quasi-judicial functions. The Court indicated that the FTC filled in details embodied in the FTC Act’s general standard and recommended dispositions in court cases, much as a special master does. Those powers were juxtaposed with the CFPB’s much broader executive authority.

The Court noted the CFPB’s “vast rulemaking” powers and, while refusing to revisit \textit{Humphrey’s Executor}, indicated in a footnote: “Perhaps the FTC possessed broader rulemaking, enforcement, and adjudicatory powers than the \textit{Humphrey’s Executor} Court appreciated. Perhaps not.” Is the Chief Justice hinting that he might be willing to question the constitutionality of modern versions of independent agencies?

Justice Thomas’s opinion concurring in part and dissenting in part, joined by Justice Gorsuch, was not so indirect. It argued that continued reliance on \textit{Humphrey’s Executor} to justify the existence of independent agencies “creates a serious, ongoing threat to our Government’s design.”

Justice Kagan, joined by Justices Breyer, Sotomayor, and Ginsburg, was in sharp opposition. She defended the constitutionality of both the CFPB and other independent agencies, arguing among other things that the President and Congress could create government bodies responsive to current government needs, and that unelected judges should not second-guess the needs of government as determined jointly by the elected officials of the Executive and Legislative branches of government.
As with many Supreme Court decisions, the Court’s narrow decision has few immediate ramifications for other agencies. Whether Seila Law will be used by those seeking to challenge the constitutionality of the FTC, FCC, FRB, FDIC, NCUA, and other independent agencies as a way to challenge enforcement actions or regulations by those agencies and to undermine their work—and whether courts will go beyond the Seila Law decision—remains to be seen.

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**About Author:** Lauren Saunders is Associate Director at the National Consumer Law Center and manages the Washington, DC office, where she directs NCLC’s federal legislative and regulatory work. Lauren is a recognized expert in various areas, including small dollar loans, fintech, prepaid cards, credit cards, bank accounts, and consumer protection regulation. She is the lead author of Consumer Banking and Payments Law [11], contributes to Consumer Credit Regulation [12], and has authored several reports and white papers. She previously directed the Federal Rights Project of the National Senior Citizens Law Center; was Deputy Director of Litigation at Bet Tzedek Legal Services; and was an associate at Hall & Phillips. She graduated magna cum laude from Harvard Law School and was an Executive Editor of the Harvard Law Review, and holds a Masters in Public Policy from Harvard’s Kennedy School of Government and a B.A., Phi Beta Kappa, from Stanford University.

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