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CFPB Constitutionality at the Supreme Court: A Case Study on Agency Independence in a Pandemic

It feels like only yesterday that we were discussing the seminal 2018 DC Circuit case, *PHH Corp. v. CFPB*, the first decision to uphold the constitutionality of the Consumer Financial Protection Bureau (CFPB or Bureau). The true test of the Bureau's constitutionality is upon us, as the Bureau awaits its fate in a long-awaited, now-pending Supreme Court ruling in *Seila Law LLC v. Consumer Financial Protection Bureau* (*Seila Law v. CFPB* or case).

As the federal government responds to serious challenges ranging from the current COVID-19 crisis and the aftermath of whistleblower complaints, each day presents new questions regarding the proper functions and role of government and the independence of agencies. Against this backdrop, the Bureau's present constitutional crisis is but one example in the larger bifurcated federal government trajectory aimed at a strong unitary executive.

I. The Origin of *Seila Law v. CFPB*: One Petitioner's Journey to the Supreme Court

In February 2017, the Bureau issued a Civil Investigative Demand (CID)[1] to *Seila Law*, a California-based law firm that offers debt relief services, seeking information concerning suspected violations of the Telemarketing Sales Rule (*Seila Law* investigation). Rather than comply with the CID, *Seila Law* alleged, in part, that the Bureau lacked the authority to issue the CID in the first instance because the combination of its expansive enforcement powers and leadership structure of a single Director, removable only for

1 Federal agencies with investigative powers issue CIDs to parties suspected of wrongdoing, who are required to provide responses and produce relevant documents for the agency's inspection.

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cause, is unconstitutional.[2] Subsequently, the Bureau filed an enforcement action in the US District Court for the Central District of California (Central District) to compel compliance. The Central District rejected *Seila Law's* constitutional argument and ordered it to comply with the CID.

Seila Law appealed, and the US Court of Appeals for the Ninth Circuit unanimously rejected *Seila Law's* constitutionality argument, holding that the CID was valid. *Seila Law* subsequently filed a writ of *certiorari* (*cert.*) with the United States Supreme Court (Court). On October 18, 2019, the Court granted *cert.*, setting the stage for a final answer on whether the President's inability to remove the Bureau's Director except "for cause," as set forth by Congress in the Bureau's enabling statute, is unconstitutional. The Court ultimately granted *cert.* on the following two questions of law:

- Whether the vesting of substantial executive authority in the Consumer Financial Protection Bureau, an independent agency led by a single director, violates the separation of powers?
- If the Consumer Financial Protection Bureau is found unconstitutional on the basis of the separation of powers, can 12 USC. §5491(c)(3) be severed from the Dodd-Frank Act?

II. Key Contentions in the Procedural Posture of *Seila Law*, the Trump Administration, and the *Amicus Curiae*

The case is noteworthy for several reasons:

First, the basis for *Seila Law's* challenge is that the CID is invalid because the Bureau's single-director structure and its enabling statute's only-for-cause removal provision are unconstitutional (*i.e.*, they violate the Constitution's separation-of-powers mandate). The Bureau's enabling statute provides that:

1. A single Director, appointed by the President and confirmed by the

2 Notably, *Seila Law's* argument adopted some, but not all aspects, of the viewpoint of then-Judge Brett Kavanaugh, who, writing for the panel majority while sitting on the US Court of Appeals for the DC Circuit (DC Circuit), held that the Bureau's structure was unconstitutional in *PHH Corp. v. Consumer Fin. Protection Bureau*. While the panel held the Bureau's single-Director structure to be unconstitutional, the DC Circuit stopped there, ruling that the Bureau's enforcement action that precipitated the case could proceed on remand, after certain errors identified in the Bureau's interpretation of the Real Estate Settlement Procedures Act were corrected. After rehearing the case *en banc*, the full DC Circuit vacated Judge Kavanaugh's panel opinion and held that the Bureau's structure is constitutional. *PHH Corp. v. CFPB*, 839 F.3d 1, 55 (D.C. Cir. 2016), *reh'g en banc granted, order vacated* (Feb. 16, 2017), *on reh'g en banc,* 881 F.3d 75 (D.C. Cir. 2018)

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Senate, shall lead the Bureau for a five-year term,[3]

2. Once the Director assumes office, the President may only remove her for cause (*i.e.*, "for inefficiency, neglect of duty, or malfeasance in office" (for-cause removal provision).[4]

This limitation is seen by some, including *Seila Law*, as a direct restriction on Article II of the Constitution, which vests in the President the obligation to "take Care that the Laws be faithfully executed."[5]

Seila Law argues that the Article II language empowers the President to hold principal executive branch officers accountable by removing them at will, rendering invalid any for-cause removal provision. Specifically, *Seila Law* believes that the Constitution permits the President to "hold principal officers accountable by removing them based on a disagreement on policies or priorities, a lack of trust in the officer, or the simple desire to install someone of the [p]resident's own choosing."[6] Thus, *Seila Law's* challenge to the CID was not based on undue burden or the scope of any particular interrogatory or document request, but rather directly attacked the architecture of the Bureau itself, as set forth by Congress in its enabling statute.

Second, as the case progressed, the Bureau changed its position on its own constitutionality mid-stream (while *cert*. was pending). When the *Seila Law* investigation commenced under the Obama administration, the Bureau asserted that its leadership structure and Director's for-cause removal provision were constitutional. After President Trump appointed Mick Mulvaney as Acting Director in 2017, however, the Bureau changed course and Solicitor General Noel Francisco (SG Francisco) argued in subsequent briefing and at oral argument that the Bureau's structure is unconstitutional. Leaving the Bureau without an advocate, the Court invited Paul Clement, Solicitor General in the George W. Bush administration, to argue in support of the Bureau's structure as an *amicus curiae* (*amicus*).[7]

Third, the *amicus* argued that, in accordance with prior Court precedent, Article II does not require the Court to strike down the for-cause removal provision. Eighty-five years ago, in *Humphrey's Executor v. United States*, the

3 12 U.S.C. §§ 5491(b), (c)(1).

4 *Id.* § 5491(c)(3).

5 U.S. Const. art. II, §§ 1, cl. 1; 3, cl. 1.

6 Reply Brief for Petitioner, at 18, *Seila Law LLC v. Consumer Fin. Prot. Bureau* (No. 19-7).

7 While such a mercurial shift is by no means a normal occurrence, the Obama administration acted similarly in refusing to defend the Defense of Marriage Act in *United States v. Windsor*, 570 U.S. 744 (2013).

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Court held that a similar provision did not intrude on President Roosevelt's Article II power to oversee the Federal Trade Commission (FTC), thereby rejecting Roosevelt's assertion that Article II entitled him to his "own selection" of FTC commissioners, free from any fetters on his removal authority.[8] While that case involved the multi-member leadership structure of the FTC, the *amicus* listed several other examples demonstrating the necessity for for-cause removal at single-director agencies, including the Office of Special Counsel and the directors of the Social Security Administration and the Federal Housing Finance Agency, given the respective agencies' fundamental policy goals of insulating certain executive branch functions from direct presidential control.[9] (*Seila Law* argued that *Humphrey's Executor* should be overturned.)

Fourth, and most interestingly, the Trump administration took a legal position that is more supportive of the Bureau's activities and less favorable to the industry than originally anticipated. In the Bureau's April 2018 Semi-Annual Report to Congress, then-acting Director Mick Mulvaney excoriated the Bureau's expansive authorities (to act as judge, jury, and executioner), bemoaning that in undertaking these functions, the Bureau was able to ignore due process, run afoul of constitutional separation of powers, and run a regulatory machine akin to "the very definition of tyranny." Approximately two years later, however, the administration's position had simmered down.

By February 2020, the Trump administration argued to the Court that, while the Bureau's structure should be amended by deleting the "Removal for Cause" provision from its enabling statute, the petitioner, *Seila Law*, was wrong to assert that the CID (let alone the Bureau as a whole) should be invalidated. By contrast, *Seila Law* believes that the separation-of-powers conflict "infects every [Bureau] action an unconstitutionally structured [Bureau] takes," including the Bureau's issuance of the CID and subsequent enforcement action.[10] SG Francisco advocated for a different outcome, asking the Court only to sever on constitutional grounds the "for-cause" removal provision, thereby leaving the remainder of the Bureau's enabling statute intact (despite its alleged facilitation of "tyranny") and permitting the Bureau's overall monitoring, investigative, and oversight activities to continue.[11] Indeed, the severability argument is built into the very text of

8 295 U.S. 602, 618–20, 625 (1935).

9 Brief for *Amicus Curiae*, at 41–42, *Seila Law LLC v. Consumer Fin. Prot. Bureau* (No. 19-7). Congress created the Office of Special Counsel in 1978 to address whistleblower complaints in the executive branch following the Watergate scandal.

10 Reply Brief for Petitioner, at 6, *Seila Law LLC v. Consumer Fin. Prot. Bureau* (No. 19-7).

11 Reply Brief for Respondent, at 1, 3, *Seila Law LLC v. Consumer Fin. Prot. Bureau* (No. 19-7).

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the enabling statute.[12]

IV. Oral Arguments Hint at the Court's Inclination to Uphold the Unitary Executive Theory

Jurisdictional Issues. Justice Ginsburg opened the Justices' questioning during the March 3, 2020 oral arguments on jurisdictional grounds, raising mootness concerns and suggesting to *Seila Law's* counsel that no controversy existed before the Court because the CID in question "was ratified by an *acting* head," then acting-Director Mick Mulvaney, who the President could have removed at will.[13] Thus, in Justice Ginsburg's view, *Seila Law* lacks standing such that the Court could dismiss the case without reaching the constitutional question of the Bureau's single-Director structure. Justice Sotomayor concurred with Justice Ginsburg, observing that "[g]iven that your client is not the President, it seems to me that the person who should be complaining is the President, not your client."[14] Justice Sotomayor further suggested that the Court could sever the single-Director provision of the Bureau's enabling statute, leaving the remainder of the statute and the Bureau itself intact without needing to address the alleged harm.

The Merits. A majority of the justices expressed concern with Congress's restriction of the President's authority to remove federal agency heads, whether they be multiple-member commissions and or lone directors.[15] A common thread woven throughout the justices' comments was a rejection of the notion that certain government functions ought to be insulated from direct presidential control. This theme manifested itself in several ways:

- In questions directed to the *amicus*, Justice Gorsuch expressed concern that the Court's upholding of the Bureau's for-cause removal provision would imply that similar restrictions should be in place for other federal executive agency heads, including cabinet secretaries. Justice Gorsuch reasoned that, because cabinet

12 Specifically, the Dodd-Frank Act provides that where "any provision of this Act . . . is held to be unconstitutional, the remainder of this Act . . . shall not be affected thereby." 12 U.S.C. § 5302.

13 Hr'g Tr. 6:13–15, *available at*: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/19-7_3e04.pdf.

14 *Id.* 9:3–17; 10:11–14.

15 The Court previously ruled in *Humphrey's Executor v. United States* that the President cannot remove executive officials with quasi-legislative and quasi-judicial duties without cause, for purely political reasons, though it remains an open question whether this precept applies only to agencies like the FTC, which are led by a multi-member panel, or also extends to single-head agencies like the CFPB. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628–29, 632 (1935).

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secretaries should be removable at will, there ought to be no difference with respect to the Bureau's Director.[16]

- Justice Kavanaugh, who previously held in *PHH Corp.* that the for-cause removal restriction is unconstitutional (but that the Bureau could nevertheless endure) illustrated his point by expressing sympathy toward the challenges that any Democratic President might face if the Court does not strike down the for-cause removal provision. Justice Kavanaugh noted that "the next President," assuming that President Trump loses the 2020 general election, will "face the issue[ ] because" current Bureau Director Kraninger's five-year term "will go at least three or four years into the next President's term, and the next President might have a completely different conception of consumer financial regulatory issues yet will be able to do nothing about it" if the Court affirms the Ninth Circuit's decision.[17]
- The justices further discussed upholding the Bureau's constitutionality and leaving the for-cause removal provision intact, essentially accepting a watered-down interpretation of "for-cause" removal. This raised the question of whether the Court could create new precedent in a "middle-ground" standard (requiring more than "removable at will" but allowing removal for something less than "inefficiency, neglect of duty, or malfeasance"), which could complicate future decisions involving agency heads with similar removal designations. Chief Justice Roberts seemed unwilling to burden courts with the additional oversight embedded in such a decision, stating that he didn't "know that the courts would be terribly [well] suited to second-guess that judgment [of the President]" in firing any given agency head.[18] The Chief Justice later doubled down in rejecting the proposal, suggesting that it would lead to a solely executive "dispute that's going to be presented to the courts, which would be the worst of all possible worlds."[19]

Overall, the conservative justices' questioning in *Seila Law* aligned with the Court's recent inclination toward a strong unitary executive theory. None of the justices even entertained whether circumstances could arise in which an agency ought to be free genuinely to act independently from the will of the President. Instead, many of the conservative justices' questions were premised on hypothetical scenarios involving bad policy outcomes that could arise if the President is unable to fire an agency head "at will,"

16 Hr'g Tr. 47:1–5.

17 Ironically, a decision tracking the Trump administration's position would enable his Democratic successor to remove Director Kraninger, President Trump's appointee. *Id.* 53:20–25, 54:1–2.

18 *Id.* 15:2–4.

19 *Id.* 60:15–17.

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and assumed as true the notion that the President must always have full exercise of his power to reign in any federal official.

Despite the Court's efforts and his claims to the contrary, President Trump is often seen as acting in contravention of a unitary executive. What gets lost in this push-and-pull is the problematic nature of the political whiplash that occurs in the transition between administrations, not to mention the ramp-up period in the first year or so of new administrations and the lack of cohesion during the final year of outgoing second-term administrations. Inflicting a similar ebb-and-flow cycle, in addition to recurrent partisan shifts in policy, on the Bureau will decrease its effectiveness and complicate its relationships with the entities it regulates, which crave the continuity and predictability needed to map and implement their compliance regimes.

Identical Arguments Feature in Pending Fifth Circuit Case. On March 3, 2020, the same day that the Supreme Court heard oral arguments in *Seila Law*, the US Court of Appeals for the Fifth Circuit (Fifth Circuit) issued a relatively short split decision in *CFPB v. All American Check Cashing*, holding that the Bureau's single-Director structure is constitutional.[20] Similar to *Seila Law*, All American Check Cashing (All American), a check-cashing and payday-lending company, challenged an enforcement action the Bureau filed against it, arguing that it was invalid because of the Bureau's unconstitutional single-Director structure.[21] The Fifth Circuit panel's majority rejected this position, relying heavily on *Humphrey's Executor* and holding that the Bureau's current structure, and therefore the underlying CID and subsequent enforcement action, is constitutional.[22]

On March 20, 2020, the Fifth Circuit granted All American's request to rehear the case *en banc* thereby vacating the panel's decision.[23] With nearly

20 *Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc.*, No. 18-60302, 2020 WL 1026927, at *1 (5th Cir. Mar. 3, 2020), *reh'g en banc granted,* No. 18-60302, 2020 WL 1465910 (5th Cir. Mar. 20, 2020).

21 Interestingly, and like the CID in *Seila Law*, then-acting Bureau Director Mulvaney ratified the underlying CID that preceded the enforcement action in *All American*. *Id*. at *3.

22 The majority concurrence went so far as to state that "the FTC and CFPB are constitutional siblings in all constitutionally relevant respects: They are both consumer-protection financial regulators with quasi-legislative, quasi-judicial, and some executive powers, whose leaders enjoy identical and limited for-cause protection." *Id*. at *5.

23 *All Am. Check Cashing, Inc.*, No. 18-60302, 2020 WL 1465910, at *1 (5th Cir. Mar. 20, 2020).

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all courts, with the lone exception of the Supreme Court,[24] impacted by the current delays arising from the COVID-19 crisis, it remains an open question as to whether the Fifth Circuit will rehear *All American Check Cashing en banc* before the Supreme Court issues a decision that could render the rehearing moot.

VI. Four Key Takeaways from *Seila Law* for Bureau-Regulated Businesses

Given the Court's general preference to make ripples rather than waves in deciding constitutional questions, it appears unlikely that the Court will hold that the Bureau itself is unconstitutional. This point is further underlined by the black hole the Bureau's demise would create in the financial services industry, especially in light of the likely arrival of the Court's decision in the midst of the first glimmer of the country's recovery from the current COVID-19 crisis.[25] Nonetheless, regulated entities should be aware of the following four key takeaways.

First, while the longevity of for-cause removal provisions and the authority of *Humphrey's Executor* remains to be seen, at the heart *Seila Law* is a fundamental tension between two competing policy goals—each of which appears valid on its face. Key to a functioning market are government agencies that align with both: (i) independent agencies' necessary ability to fulfill their intended mandates without political interference, and (ii) Article II's delegation to the President of the duty to properly oversee agencies' faithful execution of federal law.

During oral argument, the *amicus* invoked the current COVID-19 crisis to illustrate the criticality of agency independence. Mr. Clement highlighted the importance (and appropriateness) of an apolitical Bureau, stating that "Congress has the power to say . . . we also want [a role] somewhat insulated from politics," separate from the President's power, and cited COVID-19

24 While the Court postponed oral arguments for most of March and all of April, the Justices continue to hold their Friday Conferences and publish opinions for cases heard earlier in the current Term.

25 The CFPB accumulated the consumer financial protection oversight and functions that previously resided with seven different agencies. Further, an invalidation of the Bureau itself would call into question the enforceability of outstanding settlements or consent decrees and whether such agreements could be unwound or, in effect, annulled, not to mention how a party subject to such a settlement or consent decree would go about accomplishing this. This further begs the question of whether it makes sense to retroactively invalidate the decisions of a Director made during the presidency of his or her appointer, and further whether it comports with even an invalidated Bureau's intent to protect consumers to terminate a settlement or other agreement that compensated or at least benefitted injured consumers.

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as an example of why Congress might choose to make the "head of [the] CDC be protected by for-cause removal because that'll make sure people get good advice and it doesn't become political."[26] In our view, the Bureau falls in the same category of agencies with special mandates, such that their independence is essential for the proper function of free markets. Unfortunately, by not doubling down on its constitutional position and advocating for conversion of the Bureau's leadership structure into that of a commission, the Bureau, representing the position of the Trump administration, missed a rare opportunity to inject lasting structural reform that would have made the Bureau as apolitical as possible.

Second (and on the other hand), while much ink has been spilled since the Bureau's inception in discussing its controversial structure, its claimed "tyrannical" enforcement authority, and the alleged unconstitutionality of its Director's only-for-cause removal, the nuances of the Bureau's enabling statute continue to be informative. After all, the Dodd-Frank Act contains lesser-known mechanisms for tamping down the Bureau's powers and allowing the President to exert greater control. For instance, the Bureau, unlike the FTC, lacks the authority to initiate litigation without the Department of Justice's authorization. This check on the Bureau's power alone provides a practical mechanism for presidential control, albeit through the independent action of the Attorney General. Similarly, the President can overrule and somewhat control the Bureau through the Financial Stability Oversight Council (FSOC), to which the President appoints a supermajority of its members. The FSOC is empowered to veto any Bureau-promulgated regulation that threatens the safety or soundness of the financial system or the United States generally. The President has no such intervening ability for the FTC, despite its engagement in consumer protection activities similar to those of the Bureau.

Third, despite years-long legal challenges to its constitutional authority, the Bureau has persisted in continuing to conduct investigations and file enforcement actions, rejecting repeated petitions to set aside or modify civil investigative demands or invalidate enforcement actions on constitutional grounds, including petition denials on December 26, 2019, and January 26, February 10, and February 26, 2020. Any Supreme Court decision that leaves the Bureau intact to continue its important public work, even one in which its Director is found to be removable at the will of the President, will no doubt provide an intellectual sense of finality moving forward, but will not necessarily alter the Bureau's currently active path.

Fourth, current Bureau leadership, and most revealingly, the Trump administration, are in harmonious lockstep in their support of the Bureau's mission. Whereas Director Kraninger and her predecessor, Director Richard Cordray, deflected constitutional challenges and advocated for the

26 Mr. Clement also noted that Congress applied this rationale to the Board of Governors of the Federal Reserve. Hr'g Tr. 63:14–17.

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Bureau's constitutional legitimacy on a case-by-case basis, SG Francisco explained during oral argument why the Bureau must endure. Specifically, SG Francisco pushed the Court in the government's briefing to leave the Bureau's enabling statute and the Bureau itself intact because a decision holding the opposite would be "severely disruptive," to say the least.[27] Ironically, SG Francisco lauded the Bureau's work, noting

> The Bureau is the federal government's only agency solely dedicated to consumer protection. It has issued numerous significant rules, obtained billions of dollars in relief through enforcement, and reached millions of consumers through its education functions. Invalidating [the enabling statute] would lead to grave doubt as to the validity of those rules and eliminate the safe harbors Congress established for regulated entities who relied in good faith on them (citation omitted). It would eliminate important new consumer protection authorities (citation omitted). It would undo substantive amendments to several consumer protection statutes (citation omitted). And it would require unwinding the transfer of functions and staff to the Bureau from seven transferor agencies, one of which, the Office of Thrift Supervision, no longer even exists.[28]

Seila Law unexpectedly revealed the Trump administration's inclination to keep the Bureau alive, given its important "day to day" work supervising, regulating, and disciplining regulated entities in the consumer finance markets. Furthermore, the case demonstrates how it may be more fruitful moving forward for businesses to utilize other strategies in challenging and defending against Bureau CIDs and enforcement actions. This advice is palpably true given that the Bureau, as well as the Trump administration, have shown their hand. Unless the Court rejects the Trump Administration's invitation, it appears that neither constitutional challenges, nor pandemics, will halt the Bureau's important work.

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27 Reply Brief for Respondent, at 21, *Seila Law LLC v. Consumer Fin. Prot. Bureau* (No. 19-7).

28 *Id.* at 21–22.