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High Court Clarifies CFPB's Future, Complicates CFPB's Past

By **Eric Mogilnicki** (July 1, 2020, 7:11 PM EDT)


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This week's U.S. Supreme Court decision resolving the constitutionality of the Consumer Financial Protection Bureau's structure reflects the wisdom of an old saying: Be careful what you wish for.

The Seila Law LLC v. CFPB case involved a CFPB civil investigative demand, or CID, served upon a law firm, Seila Law. Seila Law refused to comply, arguing that the bureau was unconstitutional. In particular, Seila Law argued that the Dodd-Frank Act requirement that the bureau director be terminated only for "inefficiency, neglect of duty, or malfeasance in office" was an unconstitutional infringement on the president's authority to fire executive branch employees.

Seila Law lost in California federal district court, and then in the U.S. Court of Appeals for the Ninth Circuit, just as similar arguments by other litigants had failed in the U.S. Court of Appeals for the D.C. Circuit.

The Supreme Court saw matters differently. In a decision authored by Chief Justice John Roberts, the court found that this limitation on presidential authority, when applied to the CFPB director, violates separation of powers principles. However, the court avoided a more sweeping ruling that would have invalidated the CFPB altogether.

The court's opinion repeatedly describes the bureau as having vast powers and unusual independence, but makes clear that "the only constitutional defect we have identified in the CFPB's structure is the Director's insulation from removal." Further, the court ruled that this sole constitutional defect is severable from the rest of the Dodd-Frank Act. As a result, the bureau still stands, even though its director now lacks any protection from presidential termination.

Sorting Out the Winners and Losers

On paper, the court's decision was a victory for Seila Law. However, the Supreme Court remanded the case for further proceedings, meaning that the petitioner's reward is the expense and bother of additional litigation over a CID issued in 2017.

Similarly, the Trump administration and the current bureau director prevailed, as both had argued that the relevant limitation on the president's removal authority was unconstitutional. However, the Trump

administration added to the power of the president in a way most likely to be exercised by his successor, as there is no indication that the president wants to fire the present director. Speaking of whom, Director Kathleen Kraninger was confirmed for a five-year term ending in December 2023, but could lose her job as early as January 2021 if there is a change in administration.

Conservative organizations that supported the administration's position with amicus briefs also prevailed, and struck a blow for unitary executive authority. However, they did so by persuading a majority of the court to describe and enforce a constitutional principle that does not appear in the text of the Constitution. This earned a tart dissent from Justices Elena Kagan, Stephen Breyer, Ruth Bader Ginsburg and Sonia Sotomayor, which all but accuses the conservative majority of judicial activism. Penned by Justice Kagan, the dissent asks: "[W]hat does the Constitution say about ... the President's removal authority? Spoiler alert: ... nothing at all."

Meanwhile, defenders of the bureau's autonomy appeared quite happy with having lost the case. Former Director Richard Cordray wrote in the Washington Post that "this ruling is a sheep that comes in wolf's clothing." Sen. Elizabeth Warren, D-Mass., likewise hailed the limitations on the court's ruling, arguing that it means "the CFPB is here to stay."

The good news for these supporters of the bureau was twofold: The bureau had survived an existential challenge, and the odds of new, progressive leadership at the bureau took a leap forward.

Pandora's Box

There was at least one aspect of the court's decision that may please no one: the uncertainty left behind regarding the status of all of the actions taken by bureau directors who were "unconstitutionally insulated" from termination. In particular, the court's opinion invites litigation regarding the adequacy of any ratification of prior bureau actions by the bureau's current director.

The court was forced to focus on the issue of ratification by one pesky fact. Although the initial CID to Seila Law was issued when Richard Cordray served as bureau director, the bureau claimed that CFPB Acting Director Mick Mulvaney ratified that action during his time leading the agency. As a mere acting director, Mulvaney was not insulated from termination by the president, and so his actions were not tainted by the unconstitutional limitation on the president's authority to fire the director. The CFPB argued that this ratification made the CID issued to Seila Law enforceable.

However, the court was not prepared to rule on the issue of ratification. The court noted that ratification "turns on case-specific factual and legal issues not addressed below and not briefed here." These legal issues include "whether and when the temporary involvement of an unconstitutionally insulated officer in an otherwise valid prosecution requires dismissal." This "lingering ratification issue" is "best resolved by the lower courts in the first instance."

The court thereby dropped the "lingering ratification issue" into the current director's inbox. After the court's action, Kraninger is no longer "unconstitutionally insulated" from presidential termination, and so she is in a position to ratify both her own prior actions and those of her predecessors. Such an exercise is not without precedent: In the early 1990s, the director of the Office of Thrift Supervision engaged in the painstaking exercise of reviewing and ratifying each of the actions of a predecessor who was found to have been unconstitutionally appointed. Kraninger could do the same, out of an abundance of caution and a commitment to continuity.

On the other hand, the Supreme Court has just ruled that it is important that executive officials be subject to the control of an elected president — which is hardly an invitation to the current director to ratify actions taken by the prior administration. Further, even if Kraninger ratifies every action of her predecessors, that may not end the uncertainty. After all, the Supreme Court explained that the legal effect of such ratification is an open legal issue "best resolved by the lower courts in the first instance."

The issue of whether prior actions have been ratified, and whether that ratification is sufficient, may have ripple effects across the bureau's activities. To begin, all pending CIDs are subject to the litigation similar to that Seila Law may pursue on remand. The bureau's enforcement rules state that objections to a CID are waived if not promptly pursued by a formal petition to modify the CID. But those rules were themselves promulgated by a director who was "unconstitutionally insulated" from presidential termination. Those rules have not yet been ratified, and that ratification has not been tested in court.

Although the court's decision focused on prosecutorial decisions, it does not distinguish the CFPB director's role in enforcement from the CFPB director's role in issuing regulations. This creates significant uncertainty about the bureau's regulations, and poses additional questions for Kraninger. For example, she must decide whether to ratify regulations that include a prepaid card rule and a payday lending rule that a Democratic director promulgated during the Trump administration.

This uncertainty may pass. There may be relatively few financial institutions willing to aggressively litigate these issues. The courts may uphold prior directors' actions as a matter of course. In doing so, they may invoke the de facto officer doctrine, which the Supreme Court has used to uphold the validity of actions taken by a person acting under the color of an official title even if the legality of their appointment is later ruled deficient. And a case pending in the U.S. Court of Appeals for the Fifth Circuit, All American Check Cashing Inc. v. CFPB, involves the ratification issue that was not briefed in Seila Law, and so may shed light on the path forward.

In short, the Seila Law decision resolved considerable constitutional uncertainty. We now know that the CFPB director may be terminated by the president, but that the CFPB itself is likely to stay. By finding that the unconstitutional limitation on the president's authority was severable, the court secured the CFPB's future. But by ducking the issue of ratification, the court has raised new questions about the bureau's past.

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