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Consumer Financial Protection Bureau Reverses Course

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CONSUMER NEWS: CONSUMER FINANCIAL PROTECTION BUREAU REVERSES COURSE

Rebecca Garcia, News Editor

The debate over the constitutionality of the Consumer Financial Protection Bureau (“CFPB”) has recently taken a turn that could see its entire leadership structure declared unlawful during an upcoming Supreme Court term.¹ For years, the CFPB has defended its leadership structure and urged United States courts to declare it constitutional.² Now, Director Kathleen Kraninger has informed Congress that she has had a change of heart, and agrees with the Department of Justice (DOJ) that her agency’s leadership structure is unconstitutional and should be declared as such by the Supreme Court in *Seila Law LLC v. Consumer Financial Protection Bureau*.³ Now that the Supreme Court has granted certiorari, it will be interesting to see what the Court decides, as *Seila* has the potential to alter the entire structure of the CFPB.⁴

In July 2010, the President signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).⁵ The Dodd-Frank Act was a direct and comprehensive response to the 2008 financial crisis that nearly

¹ See Hailey Konnath, *Feds Won’t Defend CFPB’s Structure at High Court*, LAW 360 (Sept. 17, 2019, 11:33 PM), <https://www.law360.com/articles/1200045/feds-won-t-defend-cfpb-s-structure-at-high-court>.

² *Id.*

³ See Jon Hill, *So The CFPB Says It Has A Constitutional Flaw. Now What?*, LAW 360 (Sept. 20, 2019, 9:51 PM), <https://www.law360.com/articles/1200954/so-the-cfpb-says-it-has-a-constitutional-flaw-now-what->.

⁴ See Konnath, *supra* note 1.

⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

crippled the US economy.⁶ Its intended purpose was to promote the financial stability of the United States through the establishment of various measures designed to improve accountability, resiliency, and transparency in the financial system.⁷ The Dodd-Frank Act also established the CFPB to protect consumers, ensure that all consumers would have access to markets for consumer financial products, and ensure that markets for such products were fair, transparent, and competitive.⁸ To help monitor the CFPB, the Act established the position of Director to head the Bureau.⁹ The Director shall be appointed by the President, by and with the advice and consent of the Senate, for a term of five years. The President may not remove the Director except for “inefficiency, neglect of duty, or malfeasance in office.”¹⁰ This “for-cause” removal provision is the central issue to be decided in the *Seila* case.¹¹

The “for-cause” removal provision has also been the focus of multiple constitutional challenges that the CFPB has fought vigorously throughout the last few years; notably the DOJ has attempted to have it declared unconstitutional, arguing that it unduly restricts presidential authority.¹² Just last year, State National Bank of Big Spring filed a petition for a writ of certiorari in the Supreme Court.¹³ The case, which dates back to 2012, argues that CFPB’s structure under the Dodd-Frank Act violates the US Constitution’s separation of powers.¹⁴ The State Bank petitioners wrote, “[t]he CFPB represents an unprecedented combination of expansive, unchecked, and unaccountable executive authority that uniquely threatens the liberty of the governed.”¹⁵ The DOJ agreed with State National Bank, asserting that the restriction on the President’s authority to remove the Director violates the constitutional separation of powers.¹⁶ In its brief, the DOJ argued that the question of

⁶ S. Rep. No. 111-176, at 2 (2010).

⁷ *Id.*

⁸ 12 U.S.C. § 5511(a) (2011).

⁹ 12 U.S.C. § 5491(b), (c)(1) (2011).

¹⁰ 12 U.S.C. § 5491(c)(3) (2011).

¹¹ See Konnath, *supra* note 1.

¹² *Id.*

¹³ See Petition for a Writ of Certiorari, *State National Bank of Big Spring, et al. v. Steven Mnuchin, et al.*, (No. 18-307).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Brief for the Respondent in Opposition at 13, *State National Bank of*

whether the CFPB's structure is constitutional is important and warrants the Supreme Court's review in an appropriate case.¹⁷ However, the DOJ also argued that the case brought by State National Bank was not the most suitable vehicle for the Court to determine the provision's constitutionality, and State National Bank's petition was subsequently denied.¹⁸ Despite the DOJ's effort to reform the Bureau's structure, the CFPB had continued to defend its own constitutionality in subsequent cases, including during the early stages of the *Seila* litigation.

Seila Law, LLC is a consumer advocacy law practice that provides legal services to individuals nationwide. Specifically, Seila provides debt-relief services to consumers.¹⁹ Seila's constitutional challenge arose after the CFPB took the firm to court to enforce a civil investigative demand that was issued as part of an agency probe into potential violations of marketing and sale of debt-relief services regulations.²⁰ The CFPB filed the civil investigative demand in June 2017 and, when Seila refused to comply, the CFPB commenced legal proceedings to try to force Seila to comply with the demand.²¹ Seila argues that the petition to enforce a civil investigative demand should be denied because the "for-cause" removal provision of the CFPB is unconstitutional.²² More specifically, Seila argues that the agency is impermissibly shielded from constitutional accountability.²³

The CFPB defended the constitutionality of this "for-cause" removal provision in both the district court and the court of appeals, and prevailed in both courts.²⁴ The Ninth Circuit ruled, contrary to Seila's claim, that the "for-cause" provision

Big Spring et al. v. Steven T. Mnuchin, et al., (No. 18-307).

¹⁷ *Id.*

¹⁸ Tucker Higgins, *The Head of the CFPB Now Believes That the Financial Regulator is Unconstitutionally Structured*, CNBC (Sept. 17, 2019 6:05 PM), <https://www.cnbc.com/2019/09/17/cfpb-head-tells-supreme-court-agency-is-unconstitutional.html>; see also Konnath, *supra* note 1.

¹⁹ See Konnath, *supra* note 1.

²⁰ *Id.*

²¹ See generally Petition for a Writ of Certiorari, *Seila Law LLC v. Consumer Financial Protection Bureau*, (No. 19-7) [hereinafter *Seila* Petition for a Writ of Certiorari].

²² *Id.*

²³ See Konnath, *supra* note 1.

²⁴ Letter from Kathleen L. Kraninger, Director, CFPB, to Nancy Pelosi, Speaker, U.S. House of Representatives (Sept. 17, 2019) (on file with author).

“does not impede the president’s ability to perform his constitutional duty to ensure that the laws are faithfully executed.”²⁵ After being dealt two losses at the lower court level, Seila rallied and petitioned the Supreme Court to review whether the “substantial vesting of authority in the CFPB violates the separation of powers in light of the agency’s structure.”²⁶

While many were expecting to see a lengthy battle if the Supreme Court chose to hear this case, it is now guaranteed that a battle will not happen, despite the fact that Seila’s writ has been granted.²⁷ That is because CFPB Director Kathleen Kraninger has reversed the agency’s course and now agrees with the DOJ that the provision allowing the Director to be removed only for cause does violate the US Constitution’s separation of powers.²⁸ Director Kraninger informed Congress of this change of heart in letters sent on September 17, 2019.²⁹ In a letter to Speaker Nancy Pelosi, Director Kraninger stated that the DOJ would be filing a brief, on behalf of the CFPB, taking the position that the for-cause removal provision is unconstitutional.³⁰ Director Kraninger also informed Speaker Pelosi that she has “directed the Bureau’s attorneys to refrain from defending the for-cause removal provision in the lower courts.”³¹ Despite arguing that there is a major flaw in her Bureau’s leadership structure, Director Kraninger is adamant that she will continue to be able to carry out her statutory duties and defend the Bureau’s actions.³²

Shortly after Director Kraninger informed congressional leaders of her new position, the United States Government submitted a brief on behalf of the CFPB urging the Supreme Court to take the *Seila* case.³³ Unlike the government’s position in *State National Bank*, the government argues that this case in

²⁵ See Konnath, *supra* note 1.

²⁶ Seila Petition for a Writ of Certiorari, *supra* note 21, at 24.

²⁷ Jon Hill, *Justices Take Up CFPB Constitutionality Case*, LAW 360 (Oct. 18, 2019, 2:58 PM), <https://www.law360.com/articles/1204756/justices-take-up-cfpb-constitutionality-case>.

²⁸ See Konnath, *supra* note 1.

²⁹ See Letter from Kraninger, *supra* note 24.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Brief for the Respondent, *Seila Law LLC v. Consumer Financial Protection Bureau*, (No. 19-7).

particular is a “suitable vehicle” for the Supreme Court to hear the constitutional issue.³⁴ The CFPB is the respondent in the *Seila* case but the DOJ, on behalf of the CFPB, will not be putting up a fight, which means that both sides of the case will be arguing that the provision is unconstitutional in front of the Supreme Court. Therefore, the Court will need to appoint an experienced advocate to defend the for-cause provision as *amicus curiae*.³⁵ Shortly after the Court agreed to hear the case, Kirkland & Ellis LLP Partner Paul D. Clement was invited to defend the CFPB’s structure in front of the Supreme Court.³⁶ Mr. Clement is the former solicitor general under President George W. Bush and he has argued nearly 100 cases in front of the high court.³⁷

In October 2019, the US House of Representatives filed an amicus brief in support of the lower court judgment and in support of the for-cause removal provision.³⁸ The House leaders’ brief asks the Supreme Court to abide by an *en banc* ruling of the United States Court of Appeals for the District of Columbia Circuit in *PHH Corporation v. Consumer Financial Protection Bureau*.³⁹ The *en banc* court in *PHH* found that the agency’s single-director structure is indeed constitutional and that its director can only be fired by the president for “inefficiency, neglect of duty, or malfeasance in office.”⁴⁰ The House leaders also argue that the President has ample authority to fire the bureau’s director if she or he is not enforcing the law.⁴¹

Now that the Supreme Court has granted *Seila*’s writ of certiorari it will be interesting to see what effect this sudden change of position by the CFPB will have on the impending arguments this Spring.⁴² The decision has already been met with

³⁴ *Id.*

³⁵ See Letter from Kraninger, *supra* note 24.

³⁶ Jon Hill, *Kirkland’s Clement To Defend CFPB Structure At High Court*, Law 360 (Oct. 24, 2019, 8:24 PM), <https://www.law360.com/articles/1213012/kirkland-s-clement-to-defend-cfpb-structure-at-high-court>.

³⁷ *Id.*

³⁸ See Motion for Leave to File Brief Out of Time and Brief of Amicus Curiae United States House of Representatives in Support of the Judgement Below, *Seila Law LLC v. Consumer Financial Protection Bureau*, (No. 19-7) [hereinafter House Amicus Brief].

³⁹ *Id.* at 10; See generally *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75 (D.C. Cir. 2018).

⁴⁰ *PHH Corp. v. CFPB*, 881 F.3d at 77.

⁴¹ House Amicus Brief, *supra* note 38, at 4.

⁴² See Hill, *supra* note 27.

criticism from some consumer advocates who say that the CFPB leadership is what allows the Bureau to fight for consumers.⁴³ They say that because there is single director who is insulated from special interests, the agency can really make consumer protection a top priority.⁴⁴ If this independence is curbed, even slightly, some argue that there will pose a real threat to consumers.⁴⁵

This new position that the CFPB has taken may also have a substantial impact on the day-to-day business of companies across the country. The CFPB has the authority to make civil investigative demands of companies as it did with Seila Law, but companies may now have a real way to fend off these demands.⁴⁶ Companies like Seila Law that seek to combat investigative subpoenas or lawsuits from the CFPB often mount constitutional challenges to the agency's structure as part of their defense and the CFPB has pushed back.⁴⁷ However, now that the CFPB has stated that it will not defend its structure, those challenges provide companies with a real way to interfere with the CFPB's enforcement efforts.⁴⁸ It is entirely possible that every company the CFPB takes enforcement action against will now raise the constitutionality defense, even though they otherwise would have gone along with the CFPB's demands. This new stance by the CFPB could alter the CFPB's enforcement power as we know it, and only time will tell if the Supreme Court's decision will stand in the way of the CFPB's regulatory interests.

⁴³ See Konnath, *supra* note 1.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See Hill, *supra* note 3.

⁴⁷ *Id.*

⁴⁸ *Id.*