

[Banking and Finance Law Daily Wrap Up, CONSUMER FINANCIAL PROTECTION BUREAU—U.S. Sup. Ct.: Justice Department wants to concede that CFPB is unconstitutional, \(Sept. 18, 2019\)](#)

Banking and Finance Law Daily Wrap Up

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By [Richard A. Roth, J.D.](#)

The Justice Department has told the Supreme Court that it believes the Consumer Financial Protection Bureau's structure violates the Constitution's separation of powers requirements and that it will not defend the Dodd-Frank Act provisions.

The Supreme Court should grant certiorari in *Seila Law LLC v. CFPB* and reverse a decision by the U.S. Court of Appeals for the Ninth Circuit that the Consumer Financial Protection Bureau's single-director organization is constitutional, according to the Justice Department. In its [reply](#) to Seila Law LLC's [petition for certiorari](#), Justice suggests that the Court should consider appointing an amicus curiae to argue for affirming the decision. However, Justice continues to argue that the proper remedy is severing the Dodd-Frank Act provision that the CFPB director can be removed by the president only for cause, rather than invalidating the entire Bureau as Seila Law wishes.

Basis of dispute. Seila Law is a law firm that offers consumer debt relief services. The firm is challenging the CFPB's effort to determine whether its marketing violated any consumer financial protection laws, and part of the challenge is an attack on the constitutionality of the Bureau's structure, which features a single Senate-confirmed director who can be removed by the president only for cause.

The firm bases its argument on two parts of the Constitution: Article II, Section 1, which vests the executive power in the President, and Article II, Section 3, which requires the President to "take Care that the Laws be faithfully executed..." The independence of the CFPB director prevents the President from fulfilling his Section 3 duties, the firm maintains. Seila Law also asserts that the CFPB's funding mechanism, which exempts it from the appropriations process and allows it to draw funds from the Federal Reserve Board's assessments, furthers the Bureau's excessive independence.

Those arguments were rejected by the Ninth Circuit. The Bureau director's independence is constitutional under Supreme Court precedent because the Bureau exercises quasi-legislative and quasi-judicial powers, not simply executive powers, the appellate court said ([Banking and Finance Law Daily](#), May 7, 2019).

Justice Department argument. In both this litigation and elsewhere, Justice has agreed with Seila Law that the Dodd-Frank arrangement is unconstitutional. However, it disagrees with the firm's argument that the only cure is the invalidation of all of Dodd-Frank Act Title X, the Consumer Financial Protection Act. All that is needed to cure the constitutional defect is to transform the Bureau into an executive branch agency by severing the offending section, Justice says.

Justice disagrees with the Ninth Circuit's application of Supreme Court precedent. Those supreme Court decisions are irrelevant because they upheld removal restrictions in the context of agencies led by multiple-member commissions, the brief says. The combination of a removal restriction and a single director creates too much independence from presidential authority. Justice adds that the current CFPB director, Kathy Kraninger, agrees with this analysis.

The case is [No. 19-7](#).

Attorneys: Kannon K. Shanmugam (Paul, Weiss, Rifkind, Wharton & Garrison LLP) for Seila Law LLC. Noel J. Francisco, Solicitor General, for Consumer Financial Protection Bureau.

Companies: Seila Law LLC

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