



Financial Services Litigation ADVISORY ■

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Supreme Court Hears the CFPB Declare Itself Unconstitutional

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In response to the 2008 financial crisis, Congress passed the Dodd–Frank Act and created the Consumer Financial Protection Bureau (CFPB)—arguably one of the most powerful independent agencies in the history of the United States. This past week, the U.S. Supreme Court heard [oral argument](#) on whether the CFPB’s structure, the source of its power and independence, is constitutional.

The Road to Oral Argument

The dispute before the Supreme Court began when the Seila Law firm refused a CFPB civil investigative demand (CID). When Seila Law refused to comply, the CFPB filed a petition to enforce the CID in federal district court. Seila Law argued that the CID should not be enforced because the CFPB, as an agency with expansive enforcement powers and a single director removable only for cause, was structured unconstitutionally. The district court denied Seila Law’s argument and upheld the CID. Seila Law appealed to the Ninth Circuit, which affirmed.

On October 18, 2019, the Supreme Court granted certiorari to decide the constitutionality of the CFPB’s leadership structure, and also ordered the parties to brief and argue a second question on whether the for-cause removal provision was severable from the remainder of the Dodd–Frank Act, which contains a severability clause.

By this point, however, an interesting wrinkle had arisen. In its response to Seila Law’s petition for certiorari, the CFPB abandoned its long-held position that its structure is constitutional. In an unprecedented about-face, the agency asked for its own structure to be held unconstitutional. That left no party arguing for the constitutionality of the CFPB’s structure. To address this, the Supreme Court appointed former solicitor general Paul Clement to argue as amicus curiae in support of the judgment below.

Additionally, the House of Representatives, another amicus curiae, requested and was granted leave to participate in oral argument.

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The Oral Argument

Seila Law

Arguing for *Seila Law*, lawyer Kannon Shanmugam told the Court that the CFPB's structure was unconstitutional because "[n]ever before in American history has Congress given so much executive power to a single individual who does not answer to the President" and "[b]y significantly limiting the President's ability to remove the CFPB's director, Congress violated the core presidential prerogatives [of Article II] to exercise the executive power and to take care that the laws be faithfully executed." In terms of remedy, he argued that there was no need for the Court to go further than invalidating the CFPB's CID.

Justice Ginsberg was the first Justice to question Shanmugam, grilling him on a jurisdictional question related to a prior ratification of the CID by then-acting director Mick Mulvaney following the departure of the CFPB's inaugural director, Richard Cordray. When he ratified the CID, Mulvaney was removable at will. Justice Ginsberg mused that because of the ratification by a director removable at will, the "case has kind of an academic quality to it," plainly suggesting the Court lacked jurisdiction to decide it.

In response, Shanmugam stood his ground and argued that the case was hardly academic because there remained a "live dispute between [Seila Law] and the government because [Seila Law] want[s] the civil investigative demand to be invalidated and the government seeks to enforce it."

Once past the jurisdictional questions, Chief Justice Roberts weighed in on the merits, asking whether the Court could avoid the constitutional question entirely if the Court read the for-cause removal provision as only minimally limiting the President's ability to remove a CFPB director.

But Shanmugam countered again, this time referring the Court to "Judge Wilkinson's concurring opinion in the D.C. Circuit in *PHH*, which [he said] walks through each of the terms" in the for-cause removal provision—inefficiency, neglect of duty, or malfeasance in office—"and explains what those terms really require is something closer to outright incompetence."

The CFPB

Next, solicitor general Noel Francisco argued on behalf of the CFPB. He began his argument by distinguishing *Humphrey's Executor*, where the Court upheld essentially the same for-cause removal provision for the multimember Federal Trade Commission. Francisco asserted that *Humphrey's Executor* shouldn't be extended to single-headed agencies like the CFPB for two reasons: (1) without this limiting principle, Congress would effectively be able to limit the President's ability to remove cabinet members for cause; and (2) that would, in turn, sever executive power from political accountability.

But not all the Justices appeared to agree with this logic. Justice Kagan, in particular, pushed back with the idea that the President has less (rather than more) ability to influence multiheaded agencies: "if a President can get one person on the phone, that's a lot easier than if he has to worry about seven people who are all doing their own thing."

Lastly, Francisco urged the Court to address the severability issue, explaining that "[i]f the Court doesn't address the severability clause," but instead merely invalidates the CFPB's CID as suggested by Shanmugam, "then there really is a cloud hanging over everything that the CFPB does." He then argued that how the Court should rule was a "very easy question in this case in view of the clear and unambiguous severability clause."

Amici curiae

When Clement began, he went straight for the throat on the jurisdictional issues flagged by Justice Ginsberg earlier in the argument. He argued that “what the Solicitor General wants from this Court ... [is] an advisory opinion. And this Court lacks jurisdiction to issue it.”

Next, Clement invoked the doctrine of constitutional avoidance, contending that were the Court to reach the merits, it could resolve the case by interpreting the for-cause provision in a way that avoids any constitutional problem.

However, the Justices did not receive this suggestion well. Justice Kavanaugh referred to this as “watering down” the provision, and Chief Justice Roberts said that it would result in “litigation over whether or not the standard has been met or not met ... , which would be the worst of all possible worlds.”

In conclusion, Clement took on the distinction Francisco drew between single- and multiperson agency leadership structures. He argued that the Court’s decision in *Free Enterprise Fund* provided “in an Appointments Clause context, a way of saying the difference between a single member and a multimember [agency head] doesn’t make a constitutional difference.”

Finally, Douglas Letter argued on behalf of the U.S. House of Representatives. Letter spoke mostly about the dramatic impact that would result if the Court held the for-cause provision both unconstitutional and nonseverable. He explained that the CFPB replaced seven different consumer protection agencies, some of which no longer exist, so striking down the CFPB entirely would be disastrous.

Takeaways

There was no consensus among the four advocates on how the two questions should be resolved or whether they should be resolved at all. The Justices, similarly, were divided on what they seemed to view as important. The majority seemed willing to engage the issues on the merits rather than dispose of the case on jurisdictional grounds. But that was as far as their agreement seemed to go.

Given this, the most likely outcome still appears to be that a conservative majority of the Court will hold the CFPB’s structure to be unconstitutional, but the plain text of the Dodd–Frank Act’s severability clause will likely save the CFPB from total annihilation.

A ruling from the Court is expected this summer.

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