
March 2, 2020

Supreme Court to Decide Constitutionality of CFPB

On March 3, 2020, the U.S. Supreme Court will hear oral argument to determine the constitutionality of the Consumer Financial Protection Bureau. Created by Congress as part of the Dodd-Frank Act, the CFPB is an independent agency responsible for implementing and enforcing federal consumer-protection law.¹ The agency is led by a single director who is appointed by the President for a five-year term and may be removed only for “inefficiency, neglect of duty, or malfeasance in office.”²

The question before the Court in *Seila Law LLC v. CFPB*, No. 19-7,³ is whether the CFPB’s structure—an independent agency led by a single director who can be removed by the President only for cause—violates the separation of powers. If the Court agrees that the CFPB is unconstitutionally structured, the Court might also choose to address whether the statutory restriction on the President’s removal power can be severed from the remainder of the Dodd-Frank Act.

Factual Background

In 2017, the CFPB issued a civil investigative demand as part of an investigation into whether Seila Law, a California-based law firm that helps individuals resolve their debts, violated federal consumer-protection law. When Seila Law objected to the demand on the ground that the CFPB was unconstitutionally structured, the CFPB petitioned a federal district court for enforcement. The court granted the petition, and the Ninth Circuit affirmed.⁴

Seila Law petitioned the Supreme Court to take up the case. Before the Supreme Court, the CFPB changed positions, agreeing that the for-cause removal restriction on the President’s ability to remove the agency’s director violated the separations of powers. The Supreme Court granted review in October 2019 and appointed an amicus curiae to argue in defense of the judgment below upholding the constitutionality of the CFPB.

¹ 12 U.S.C. 5491(a), 5511(a).

² 12 U.S.C. 5491(b), (c).

³ Paul, Weiss is serving as lead Supreme Court counsel for Seila Law.

⁴ *CFPB v. Seila Law LLC*, 923 F.3d 680 (9th Cir. 2019).

Arguments Before the Supreme Court

In their briefing before the Court, both Seila Law and the CFPB argue that the agency's statutory restrictions on removal violate Article II's mandate that the President "take Care that the Laws be faithfully executed."⁵ In *Myers v. United States*, 272 U.S. 52 (1926), the Court explained that under Article II, the President generally retains the power to remove executive officers.⁶ The Court recognized a narrow exception to that rule in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), where the Court upheld a statute protecting the commissioners of the multi-member Federal Trade Commission from removal except for "inefficiency, neglect of duty, or malfeasance in office."⁷ In that case, the Court based its holding on the fact that the FTC is a "body of experts" exercising no executive power.⁸ Seila Law and the CFPB argue that the CFPB bears little resemblance to the FTC as described in *Humphrey's Executor*. In particular, they contend that the CFPB's single-director structure "has few parallels in American history, poses a unique threat to individual liberty, and unduly inhibits the President's ability to supervise the exercise of the executive power."⁹ The Court should thus decline to extend *Humphrey's Executor's* narrow exception to the CFPB. Both further contend that if the Court disagrees that *Humphrey's Executor* is inapplicable, it should overrule or limit *Humphrey's Executor* as necessary.

In his brief, the court-appointed amicus first asks the Court to refrain from deciding the constitutional question. He argues that the statute's restriction on the President's ability to remove the CFPB's director has "almost nothing to do with" the enforcement of the civil investigative demand.¹⁰ Even if it did, he contends, the current CFPB director agrees that she can be removed for any reason, so her decision to pursue the enforcement petition severs any connection between the constitutional violation and the civil investigative demand at issue in the case. Amicus suggests that the Court wait to decide the constitutional question until a case arises involving a challenge to the President's removal of a director.

Turning to the question presented, amicus argues that the Constitution does not explicitly address the President's removal power, but does grant discretion to Congress to organize and structure the executive branch. According to amicus, the Court's precedents establish that as long as the President is the one exercising the power to remove executive officers, Congress may impose modest restrictions on that power. Alternatively, amicus suggests that the Court can interpret the statutory standard of removal, which allows

⁵ Art. II, § 3.

⁶ *Id.* at 122.

⁷ *Id.* at 619-620.

⁸ *Id.* at 624-625, 628.

⁹ Pet. Br. 3.

¹⁰ Amicus Br. 17.

the President to remove the director for “inefficiency, neglect of duty, or malfeasance in office,” broadly enough to avoid any constitutional problems.

If the Court finds the CFPB’s structure unconstitutional, Seila Law asks the Court to reverse the court of appeals’ judgment and order the denial of the CFPB’s petition for enforcement. Once the Court has done so, Seila Law believes the Court’s work is complete. But if the Court reaches the question of severability, Seila Law asks that it invalidate Title X of the Dodd-Frank Act in its entirety. The alternative would be to sever the statute’s removal provision from the remainder of the Act, which would then allow the President to remove the director for any reason. But Seila Law explains that would thwart Congress’s intent: because political independence was at the core of the agency Congress created, Congress would not have created a CFPB with a director that is removable at will by the President.

The CFPB disagrees. Relying primarily on the Dodd-Frank Act’s general severability clause,¹¹ the CFPB argues that the Court should sever the statute’s removal provision from the remainder of the Act. The CFPB contends that Congress would prefer a CFPB with a director that is removable at will to no CFPB at all. If the Court invalidates all of Title X, the CFPB claims that the result would be “severely disruptive.”¹²

The Court will hear argument on March 3, 2020. Kannon Shanmugam of Paul, Weiss will argue for Seila Law, Solicitor General Noel Francisco will argue for the CFPB, Paul Clement will argue as court-appointed amicus defending the judgment below, and Doug Letter will argue for the House of Representatives, which is participating as an amicus supporting affirmance. The Supreme Court is likely to issue a decision by June 2020.

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¹¹ See 12 U.S.C. 5302.

¹² Resp. Reply Br. 21.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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