
Supreme Court Justices Struggle to Determine Presidential Authority to Fire CFPB Director

By Joann Needleman / Mar 04, 2020

On Tuesday, March 3, 2020, the Supreme Court of the United States heard argument in the case of *Seila Law, LLC (Seila) v. Consumer Financial Protection Bureau (CFPB)*; a case many believed would have not only a lasting impact on the future of the CFPB, but the authority of a President to fire future heads of independent federal agencies. Based upon the queries of the Justices and the arguments made by the respective parties, it appears this case may be resolved in a whimper and the question of the CFPB's structure may be left for another day.

The Underlying Case

Seila involved a law firm from California that provided debt relief services to consumers. The CFPB served a civil investigation demand (CID) upon the law firm. When the law firm failed to respond to the CID, the CFPB filed a Petition to Enforce the CID in the Federal District Court in California. *Seila* argued that the CFPB did not have authority to issue the CID because the structure of the CFPB -- a single director who can only be fired for cause by the President -- was unconstitutional and violated the separation of powers.

The District Court granted the CFPB's Petition and rejected *Seila*'s constitutional argument. *Seila* appealed to the Ninth Circuit Court of Appeals, which affirmed the lower court's decision. The CFPB defended its structure in the Ninth Circuit case. *Seila* then petitioned the Supreme Court to review the decision. While this petition was pending, the CFPB changed its longstanding legal position and agreed with the Trump Administration's Department of Justice (DOJ) that its own structure violated the separation of powers. The Supreme Court agreed to hear the case. Because none of the parties would be defending the CFPB's structure, the Court appointed amicus curiae, Paul Clement, a former Solicitor General and current partner with Kirkland and Ellis, to argue on behalf of the CFPB. The House of Representatives, another amicus curiae, was also invited to present argument.

The questions presented by the Court were twofold:

Whether the vesting of substantial executive authority in the CFPB, an independent agency led by a single director, violates the separation of powers; and

If the CFPB is found unconstitutional on the basis of the separation of powers, can 12 U.S.C. §5491(c)(3) be severed from the Dodd-Frank Act?

Dissecting the Oral Arguments

On behalf of *Seila*

Seila's counsel's, Kannon Shanmugam, argument focused on the remedy owed his client if the CFPB's structure is found unconstitutional. Shanmugam suggested that the CID be invalidated and the Court reverse the judgment below. *Seila* encouraged the Court to let Congress determine how best to fix the defective CFPB structure rather than just strike the for-cause clause. This encouragement strayed a bit in semantics from *Seila*'s original underlying argument that Title X of the Dodd Frank Act, which governs the CFPB, be eliminated.

Justice Sotomayor noted that the CFPB's powers were not unprecedented, as other agencies like the Social Security Administration and Office of the Special Counsel have single heads subject to some limits on removal. Justice Sotomayor also expressed concern that the case lacked a contested removal, and maybe the Court should wait for an actual dispute between the President and the Director. She also asked why severability was not addressed first, because if the Court finds that the for-cause provision is unconstitutional, the issue of harm is left for another day.

Justice Ginsberg raised the issue of what encompasses the "for cause" standard which was addressed by the other Justices later in the argument, including Chief Justice Roberts. Justice Roberts somewhat framed the argument by suggesting that scrutiny of the "for clause" standard needs to occur before the clause can be struck down. Justice Kavanaugh directly questioned *Seila* on the issue of severability; namely, that the court would be rewriting Dodd-Frank no matter whether the Court struck the clause or chose to do nothing. *Seila* argued that the Supreme Court historically has found that severability clauses create only a presumption, an aid in determining the intent of a "hypothetical Congress."

On behalf of the United States

Noel Francisco, the Solicitor General (SG) of the United States, argued that while *Humphrey's Executor* upheld the for-cause removal of the Chairman of the FTC, a multi-member commission, that authority should not be extended to single-head agencies because there is no coherent limiting principle and Congress could potentially impose such a removal restriction on the President's entire cabinet. The SG argued that the severability clause was clear and unambiguous. The SG encouraged the Court to strike the provision while still maintaining the CFPB and the remaining portions Title X of the Dodd-Frank Act.

Justices Kagen and Ginsburg had a hard time reconciling why a single director versus multi-member commission made a difference. However, both felt the President had more influence over a single director. Chief Justice Roberts questioned the scope of the for-cause removal, to which the SG noted that it cannot be interpreted to allow the President to remove the officer "simply because he has lost faith in their judgment or simply because ... he [c]an do better."

Justice Beyer noted that workability for independent agencies requires some sort of limitation regarding removal. Justice Beyer also questioned why the government was seeking another standard that does not exist and why the for-cause removal was not the best standard.

Justice Kegan raised concern that the Constitution says nothing about removal and that the decision about how these agencies should be run should be left to the political branches -- as in Congress in conjunction with the President. Further, Justice Kegan added that a President has control over the appointment process and removal is more of a "nuclear bomb" which has historically been more difficult to do.

Both Justices Roberts and Kavanaugh raised issue with the fundamental structure of the Bureau, such as the lack of budgetary oversight and the tenure of the CFPB Director which could result in a holdover to the next President's term, respectively.

Finally, like Justice Kavanaugh, Justice Alito questioned whether the severability clause was dispositive at all.

On Behalf of the CFPB

Much like his amicus curiae brief, Paul Clement argued that a constitutional issue did not exist in the matter before the court and therefore the SG was trying to elicit nothing more than an advisory opinion.

Justice Gorsuch questioned whether Clement was seeking a DIG (dismissal of the [certiorari] as improvidently granted). Justice Gorsuch got into a heated exchange seeking an answer to the question: if the SG is not seeking a DIG and the Court approved a single member agency with no removal authority, how would the court distinguish that from other cabinet agencies or otherwise prevent Congress from enacting another single member agency where the President has no removal authority? The exchange went into additional hypotheticals of whether the removal clause could be applied to Homeland Security or the EPA, as well as what that removal standard would look like.

Chief Justice Roberts expressed concern that there would be litigation over whether the standard had or had not been met.

On Behalf of the House of Representatives

Douglas Letter was invited to speak on behalf of the House of Representatives. He argued in support of the severability clause for its limited purpose. He cautioned the Court not to go farther and hold that Title X is non-severable and return to the pre-Dodd-Frank regulatory scheme.

What will be the Outcome?

While there was tremendous fanfare leading up to this case, the questions presented by the Justices suggest somewhat of a buyer's remorse. The circumstances which brought this case before the Court seemed somewhat orchestrated. To have the DOJ taking a position adverse to Congress and then the CFPB jump on the band wagon made it appear that only the Supreme Court could settle the uncertainty once and for all. Yes, the structure of the CFPB is problematic and the authority of the Director is unfettered, but was *Seila* the appropriate vehicle to challenge those issues? As the conservative wing peeled back the layers of the onion, it was apparent that no standard existed regarding a for-cause removal, which either in effect leaves the President with no power at all or invites protracted litigation as to whether the removal was proper.

There was little persuasive argument from either side regarding the severability issue other than the amici for the House of Representatives who rightfully said that if you blow up the agency, you create a hole in the financial services regulatory system. There was simply no discussion regarding the future implications of severability due to a lack of accountability by the Director, namely, what remedies are available to parties who were targets of enforcement or supervision or how to reconcile rulemakings.

The takeaway appears to be that broad sweeping changes are not coming to the CFPB at least for the moment, and this decision will do little in settling long-standing concerns about the authority of the agency. The holding will be narrowly tailored to the facts of the *Seila* case, leaving open the opportunity for others to continue to challenge the agency's authority which provides no relief for consumers the CFPB is charged to protect or for industry that seeks regulatory clarity.