LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
MONDAY, MARCH 16, 2020

PERSPECTIVE

Arguments shed light on justices' thinking in *Seila v. CFPB*

By Blaine H. Evanson, Lochlan F. Shelfer and Jeremy M. Christiansen

The U.S. Supreme Court recently heard oral argument in one of the most highly anticipated separation-of-powers cases in years: *Seila Law LLC v. Consumer Financial Protection Bureau*. The CFPB is an independent agency that exercises substantial executive authority but is headed by a single director whom the president may not remove except for cause. The question presented in *Seila Law* is whether that structure is unconstitutional.

Congress established the CFPB in Title X of the Dodd-Frank Act of 2010, granting the independent agency responsibility to oversee 18 consumer-protection statutes previously administered by other agencies, and to bring enforcement actions for "unfair, deceptive, or abusive acts or practices." The CFPB is funded by the Federal Reserve, outside the ordinary appropriations process. And, central to this case, the CFPB is headed by a single director who serves a five-year term and may not be removed by the president except for "inefficiency, neglect of duty, or malfeasance in office." This is often called the "for-cause removal provision."

In 2017, the CFPB issued a civil investigative demand to Seila Law LLC, a law firm that provides debt-relief services. Seila Law opposed enforcement of the demand, arguing that the CFPB was unconstitutionally structured. The district court rejected the argument, as did the 9th U.S. Circuit Court of Appeals (923 F.3d 680 (2019)).

In the end, there are several different ways the court could resolve the case — from denying the petition as improvidently granted to striking down the CFPB altogether.

When the case reached the Supreme Court, the CFPB (now represented by the solicitor general) agreed with Seila Law that the forcause removal provision was unconstitutional, but urged the court simply to sever the clause and remand the case for further proceedings once the agency was subject to the president's plenary oversight. Given that neither party before the court defended the constitutionality of the CFPB's structure, the Supreme Court appointed veteran Supreme Court advocate Paul Clement as amicus to defend the CFPB's structure and permitted counsel representing the U.S. House of Representatives to participate in oral argument in defense of the CFPB.

The Supreme Court heard oral argument before a packed courtroom on March 3, with much of the justices' questioning focused not on whether the CFPB is unconstitutionally structured, but rather on whether the court should reach that question in the first place.

For example, the issue of "ratification" arose repeatedly throughout the morning. Between 2017 and 2018, the CFPB had been headed by an acting director, who, Clement had argued to the Supreme Court, was removable at will by the president and had ratified the civil investigative demand previously issued against Seila Law. Justice Ruth Bader Ginsburg thus asked Seila Law's attorney whether "this case has kind of an academic quality to it." Seila Law's attorney responded that there was a factual dispute as to whether the demand actually had been ratified, and that it was a question for remand — an issue Justice Neil Gorsuch later raised, asking Clement whether he was urging the court to dismiss the petition as improvidently granted.

Some justices also asked whether the merits could be avoided by broadly construing the statutory term "inefficiency," so as to permit presidential control over the director's decisions. Seila Law's counsel responded that he did not "think that that term has ever been understood that broadly," adding that the court in one of the key constitutional cases on the issue — *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) — had construed the same phrase as significantly curtailing presidential control. And when Clement urged this broad construction, the chief justice seemed concerned that this scenario would be "worse than *Humphrey* because what's going to happen is that there will be litigation" between the president and the official being removed "over whether or not the standard has been met," something the chief justice sounded hesitant to indulge.

In a similar vein, Justice Sonia Sotomayor asked: "Shouldn't we … wait until there's an actual dispute between the president and a director that he or she … wants to fire?" Seila Law's attorney responded that there were no "contested removals" in *Morrison v. Olson*, 487 U.S. 654 (1988), *Bowsher v. Synar*, 478 U.S. 714 (1986), and *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), and that those cases were premised on the idea that a violation of "the

separation of powers creates an injury that a private party can vindicate."

The justices also devoted significant airtime to the question whether the for-cause removal provision can be severed from the rest of the statute, or whether the entire statutory scheme falls. When he was a judge on the U.S. Court of Appeals for the D.C. Circuit, then-Judge Brett Kavanaugh dissented from the en banc decision in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc), that upheld the CFPB's structure. And his lengthy dissent had argued (among other things) that the for-cause removal provision was severable. Now-Justice Kavanaugh observed in his questioning that the Dodd-Frank Act contains a severability clause, and asked if the court would be "ignoring the text of the severability clause" if it were to strike down the entire statute, rather than just the for-cause removal provision. Seila Law's attorney responded that the court has held that such clauses create only a rebuttable presumption of severability. Justice Kavanaugh, however, seemed skeptical, stating that that rule came from "an era when we didn't pay as much attention to the text of the statute, and the text here has a severability clause."

Finally, on the merits, the justices seemed most interested in probing and testing each side's limiting principle. For instance, when Seila Law's counsel began his argument by calling the CFPB unprecedented, Justice Sotomayor pointed to the Social Security Administration and the Office of Special Counsel, each of which is headed by independent single directors like the CFPB. On the other side of the coin, Justices Samuel Alito and Gorsuch both peppered Clement with questions about his argument that Congress could not place for-cause removal restrictions on "cabinet" level Executive Departments, but could on others. Clement explained that the Constitution would not allow Congress to insulate from removal those Department heads that carry out the President's constitutional powers, which would include the State Department, the Defense Department, and the Department of Homeland Security. Justice Alito asked him whether Congress could make EPA an independent agency, and Clement conceded that under his theory Congress could insulate the EPA Administrator from at-will removal.

In the end, there are several different ways the court could resolve the case — from denying the petition as improvidently granted to striking down the CFPB altogether. A number of Justices voiced serious concerns with the constitutionality of the CFPB's structure, but there are colorable procedural barriers that could prevent the court from reaching that question. Look for a decision in late June. ■

Gibson Dunn currently represents a defendant challenging the constitutionality of the CFPB before the 5th U.S. Circuit Court of Appeals in All American Check Cashing, Inc. v. CFPB*, 18-60302, authored an amicus brief in support of petitioner Seila Law LLC before the Supreme Court in* Seila Law LLC v. CFPB*, 19-7, and previously represented the petitioner challenging the CFPB's constitutionality in* PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc).*

Blaine H. Evanson *is a partner in the Orange County office of Gibson, Dunn & Crutcher LLP, practicing in the firm's Appellate and Constitutional Law practice group.*

Lochlan F. Shelfer *is a senior associate in the Washington, D.C. office of Gibson, Dunn & Crutcher LLP, practicing in the firm's Appellate and Constitutional Law practice group.*

Jeremy M. Christiansen *is a senior associate in the Washington, D.C. office of Gibson, Dunn & Crutcher LLP, practicing in the firm's Appellate and Constitutional Law practice group.*

Reprinted with permission from the *Daily Journal*. ©2020 Daily Journal Corporation. All rights reserved. Reprinted by ReprintPros 949-702-5390.