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CFPB Critics to Supreme Court: The Agency Must Go

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The main question in the Supreme Court case on the Consumer Financial Protection Bureau deals with the president's ability to fire a CFPB director. But most legal briefs filed in the case urge the court to go much further.

The case has drawn intense interest because of the questions it raises about the separation of powers. The Dodd-Frank Act says a CFPB chief, who does not answer to a board or commission, can only be removed "for cause."

But the case argues that that provision is unconstitutional. Yet most of the 23 amicus briefs filed so far by House Republicans, industry groups and others say striking that provision is not enough and that the high court should invalidate the CFPB entirely.

"This Court has never tolerated such an affront to the separation of powers," 27 House Republicans said in a brief filed with the court. "Allowing it now would take a wrecking ball to one of the central pillars of our constitutional architecture."

The briefs argue that the high court must provide a check on the CFPB's power by going further than the court has said it will go in the past.

At issue is whether the "for cause" provision can be severed from the rest of Dodd-Frank, which would allow the CFPB to remain but would give the president greater oversight over its leadership. Business groups and others argued that such "severability" would result in an agency drastically different from what Congress intended, with the president able to fire the agency's director at will.

"If this Court strikes down the removal restriction in this case, it should likewise invalidate the statutory powers that Congress granted to the CFPB's independent Director," the House Republicans wrote. "This Court should not automatically reassign those powers to the President, which would usurp the legislative role."

The case, *Seila Law v. CFPB*, is being closely watched by banks and financial firms in the event that the high court invalidates the CFPB, essentially dismantling all its rulemakings, decisions and enforcement actions taken in the past nine years.

Most legal observers say that such a move by the justices is unlikely. Indeed, the Trump administration has focused only on the "for cause" provision.

Yet the Supreme Court, in agreeing to hear the case, said it wanted to hear arguments on both questions: the constitutionality of the CFPB's leadership structure, and whether the "for cause" provision could be severed from the rest of the statute that created the agency.

"I strongly doubt that the court would depart from the principle that courts want to preserve the structure established by Congress when possible, although the court potentially could break from that principle on analyzing this constitutionality issue," Quyen Truong, a partner at the law firm Stroock & Stroock & Lavan and a former CFPB assistant director, said in an interview. "I would not gamble on the outcome of whether the court would find the CFPB unconstitutional or not."

Many business groups and some constitutional fundamentalists argue that if the CFPB is found to be unconstitutional, then oversight of 19 consumer protection statutes should revert back to the seven agencies that had oversight before Dodd-Frank became law in 2010. The Consumer Bankers Association has pushed for a compromise that would protect the CFPB head from presidential firings but have the director answer to a bipartisan commission to oversee the agency.

"If the Court determines the Bureau's single-director structure is unconstitutional (and assuming the Court cannot itself create the bipartisan commission Congress would have desired), the appropriate remedy is to invalidate Title X in its entirety and leave it to Congress, exercising legislative judgment that only it possesses, to formulate a new, permissible structure," the CBA wrote in a brief.

"If Congress cannot do so, the result would not be the wholesale elimination of federal consumer-financial protection, but reversion to the regime that existed prior to Dodd Frank's enactment, when most of the powers the Bureau now exercises were assigned to other, constitutionally permissible independent agencies."

A second round of briefs supporting the CFPB's independent, single-director structure will be filed after Jan. 15, when Paul Clement, a former Republican solicitor general, argues in defense of the Dodd-Frank provision. The high court appointed Clement because the Department of Justice refused to defend the CFPB in the case.

The Supreme Court will hear oral arguments March 3. Seila Law is an Irvine, Calif., debt collection law firm that argued it did not have to respond to a CFPB investigative demand because the bureau's leadership structure is unconstitutional.

Most of the briefs argue that the "for cause" provision cannot be severed from the rest of Dodd-Frank. Their rationale is that Congress would have preferred an independent agency with a multimember commission to either no agency at all or an agency with a single director who can be fired by the president.

"Congress would have preferred a bipartisan, multimember commission over a CFPB director who serves at the will of the President," wrote the Credit Union National Association. "A remedy that severs the 'for cause' removal provision would yield an agency design that the 111th Congress would have rejected. In truth, Congress did not want the CFPB to be an executive

agency. And for that reason, the Court cannot sever the removal provision in Title X, when what will remain is an administrative Frankenstein the 111th Congress would have rejected."

Still, other trade groups such as the Mortgage Bankers Association argue that the high court should not abolish the agency. Rather, the MBA suggests the court sever the "for cause" removal requirement and make no further changes, meaning a CFPB director would serve at the pleasure of the president.

Striking down the CFPB in its entirety "would result in immediate and severe disruption to the real estate financing industry, causing significant harm to consumers and the economy at large," the MBA said in its brief. "Such an outcome would immediately cause significant disruption to the American economy, overturning regulatory guideposts, upsetting settled expectations, and creating substantial uncertainty in our housing markets, all in contravention of Congress's clearly expressed intent to promote financial stability."

Some of the briefs criticize a 1935 Supreme Court decision, *Humphrey's Executor v. U.S.*, in which the high court allowed Congress to limit the president's ability to remove agency officials without giving a reason. Others raise a more recent separation of powers case, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, decided by the Supreme Court in 2010. Some of the briefs take a pejorative view of *Humphrey's*, claiming it has allowed Congress to create a vast government bureaucracy.

"The rationale behind *Humphrey's Executor* and subsequent cases has become muddled, and the Court's removal doctrine is now so convoluted that it is impossible for Congress, the lower courts, or private actors to anticipate whether a given agency structure is constitutional," wrote the Cato Institute.

"Into this constitutional confusion, Congress inserted the Consumer Financial Protection Bureau, an independent agency with a novel and constitutionally dubious structure. The CFPB is the most independent of independent agencies, essentially accountable to no one."

Many of the briefs raise political criticisms of the bureau that have been around since it was created in response to the financial crisis.

"The Consumer Financial Protection Bureau is an unprecedented threat to the separation of powers and to the democratic legitimacy of the federal government," the House Republicans said in their brief.