At SCOTUS, business groups and lawmakers cast doubt on DOJ's proposed easy fix for CFPB

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I read the 23 amicus briefs filed Friday and Monday at the U.S. Supreme Court in Seila Law v. Consumer Financial Protection Bureau so you don't have to.

A bevy of business groups, including trade associations for consumer financial institutions regulated by the CFPB; Republicans in both the U.S. House and Senate; defendants in CFPB proceedings and conservative and libertarian groups told the Supreme Court that they agree with Seila Law that the CFPB's structure is unconstitutional because the bureau's lone director cannot be removed by the president except for good cause. You're probably all too familiar with arguments that the CFPB's structure violates separation of powers doctrine: They've been repeatedly asserted by defendants in CFPB enforcement actions for the past five years, exhaustively scrutinized by the en banc District of Columbia U.S. Circuit Court of Appeals in its 250-page decision in PHH v. CFPB and examined anew by the 9th Circuit in Seila Law's case challenging a CFPB civil investigative demand.

Even the CFPB has come to believe that its structure is unconstitutional. When the bureau and the Justice Department responded last September to Seila Law's petition for Supreme Court review of the 9th Circuit decision that the CFPB passes constitutional muster, the CFPB walked away from its previous defense of its structure, agreeing with Seila that the justices should take the case and find the bureau's director to be unconstitutionally insulated from accountability to the president.

The government said there was an easy fix for the constitutional flaw, though: The Supreme Court could simply sever the provision shielding the CFPB director from being removed without good cause. The CFPB was created as part of the Dodd-Frank financial reform statute, which includes a severability clause that isolates unconstitutional provisions to protect the rest of the law. According to the government, in both its response to Seila's petition for Supreme Court review and the merits brief DOJ filed earlier this month, Congress would have opted for a CFPB with a director who is accountable to the president over no CFPB at all.

Seila's lawyers at **Paul Weiss Rifkind Wharton & Garrison**, as I told you last week, disagreed with the government's proposed remedy. If the Supreme Court finds the CFPB to be unconstitutionally structured, they said, the justices should invalidate the bureau's investigation of Seila and stop there. It's not the Supreme Court's job to draft legislation, Seila argued, and the

history of Dodd-Frank's CFPB provisions suggest that the Congress that created the bureau might, in fact, have opted not to create the bureau at all instead of legislating a CFPB with a lone director who can be fired by the president without good cause.

Rather than try to divine what a past Congress might have done, Seila said, the Supreme Court should leave it to the current Congress to fix whatever constitutional defects the justices find in the CFPB's structure. (Seila added that if the justices insisted on specifying a remedy instead of limiting their ruling to the CFPB's case against Seila, the Supreme Court should strike down the entire CFPB.)

For the most part, the amici in the CFPB case agree with Seila and not with the DOJ and CFPB. Only one amicus brief, from the Mortgage Bankers Association and other real estate trade groups, urged the Supreme Court to sever the provision insulating the CFPB director if the justices determine the bureau's structure to be unconstitutional, arguing that any other approach "would immediately cause significant disruption to the American economy." Briefs from some conservative and libertarian think tanks, including the Cato Institute and the Washington Legal Foundation, did not address a remedy for the CFPB's allegedly unconstitutional structure. And one CFPB target engaged in litigation with the bureau, the Nationwide Biweekly Administration, said it took no position on whether the provision protecting the CFPB director can be severed from the rest of the statute, focusing instead on its argument that whatever the Supreme Court decides to do to fix the CFPB must include invalidation of all of the agency's previous enforcement actions.

All of the other amici that addressed a remedy argued, like Seila, that the Supreme Court cannot just remove the allegedly unconstitutional provision to make the CFPB director accountable to the president. Many amici, including the CFPB targets Harpeth Financial and RD Legal, emphasized that the Supreme Court would be defying Congressional intent if it were to effectively give the president control of the CFPB. (Harpeth and RD, like Nationwide Biweekly, argued that however the Supreme Court decides to fix the CFPB's alleged constitutional flaw, the justices must invalidate actions the bureau pursued under an unconstitutionally appointed director.)

I emailed **Paul Clement** of **Kirkland & Ellis**, who was appointed by the Supreme Court to defend the CFPB's constitutionality, for comment on the just-filed amicus briefs but didn't hear back. I also did not receive a response to requests for comment from DOJ and the CFPB.

Several amicus briefs, including those from the Consumer Bankers Association and the Credit Union National Association, argued that if the Supreme Court decides the CFPB's structure is unconstitutional, it must strike down all of the Dodd-Frank provisions creating the bureau. Both groups, whose members are regulated by the CFPB, argued, like Seila, that it's up to Congress to decide how to restructure the CFPB if it's found to be unconstitutional. In that event, the trade groups said, the Supreme Court should stay its mandate, giving Congress time to redraft the law.

Republican lawmakers from the House and Senate told the Supreme Court that it would be intruding on Congressional turf if the justices were to rewrite Dodd-Frank by severing the provision protecting the CFPB director. "Severing a statute is necessarily a legislative act, and the process of severance, therefore, necessarily intrudes into Congress' Article I authority," wrote Gene Schaerr of Schaerr Jaffe, who represents Republic Senators Mike Lee of Utah, James

Lankford of Oklahoma and Michael Rounds of South Dakota. “The end result is always a law that Congress did not pass and that the president did not sign.”

Two of the most interesting briefs – one from **Theodore Olson** of **Gibson Dunn & Crutcher** for the Center for the Rule of Law and the other from **Gregory Jacob** of **O’Melveny & Myers** for the Competitive Enterprise Institute and two other amici – argued forcefully that the CFPB director’s protection from being fired without due cause is not the bureau’s only constitutional flaw. Olson and Jacob, who have both been battling the CFPB’s constitutionality since the bureau’s early days, argue that the CFPB’s funding provisions, which allow the bureau access to hundreds of millions of dollars a year entirely outside of the usual Congressional appropriations process, violate the constitution’s entrustment to Congress of the power of the purse.

If the Supreme Court were to attempt to fix the CFPB’s allegedly unconstitutional structure by severing the provision shielding the director from accountability to the president, the CEI brief said, it would actually create even more of a separation-of-powers mess. The president would thus effectively control a self-funded law-enforcement agency whose budget doesn’t have to be approved by Congress. “That novel entity,” the brief said, “would aggrandize the president at Congress’ expense, and it would raise difficult questions about the compatibility of the CFPB’s funding mechanism with the Appropriations Clause.”

All told, the CFPB amicus briefs should give the justices a lot to think about when the case comes before them in March.