

Banking and Finance Law Daily Wrap Up, TOP STORY—High Court hears oral arguments as to the CFPB's structure, (Mar. 3, 2020)

Banking and Finance Law Daily Wrap Up

[Click to open document in a browser](#)

By [John M. Pachkowski, J.D.](#).

The constitutionality of the CFPB's structure was presented in oral arguments before the U.S. Supreme Court with a decision likely to be handed down later in 2020.

In [oral arguments](#), the U.S. Supreme Court has been asked to determine whether the structure of the Consumer Financial Protection Bureau, as an independent agency led by a single director who can be removed by the President only for cause, violates the separation of powers provisions of the U.S. Constitution in that the CFPB's structure inhibited the president from exercising the Constitution's Article II "Take Care" clause. Under *Humphrey's Executor v. United States*, the Court carved on an exception to the general principle that the president generally retains the power to remove executive officers; applying it to the commissioners of the multi-member Federal Trade Commission from removal except for "inefficiency, neglect of duty, or malfeasance in office."

Kannon K. Shanmugam presented oral argument on behalf of Seila Law, which challenged the issuance of a civil investigative demand to determine whether it had engaged in unlawful acts or practices in the advertising, marketing, or sale of debt relief services. Seila Law petitioned the CFPB to modify or set aside the CID, on the grounds that "an unconstitutional agency" had issued it, because the Dodd Frank Act's restriction on the President's authority to remove the Bureau's director violates the separation of powers.

During his argument, Shanmugam stated that the structure of the CFPB was "unprecedented and unconstitutional." He added, "Never before in American history has Congress given so much executive power to a single individual who does not answer to the President." In their questioning of Shanmugam, the "liberal wing" noted that there were "least two others, the Office of Special Counsel and the Social Security Administration, which have single heads subject to some limitations on removal." During Shanmugam's argument, the Court also questioned the operation of the severability clause found in the Consumer Financial Protection Act, which is Title X of the Dodd-Frank Act.

Arguing on behalf of the CFPB, Solicitor General Noel J. Francisco stated that insulating the CFPB director for presidential oversight in effect insulates the CFPB director's from "democratic control." The Solicitor General was initially questioned as to the meaning of the for-cause removal standard. Justice Ruth Bader Ginsburg also queried whether it was "uncommon for the Department of Justice not to defend a statute passed by Congress." Finally, the Solicitor General was questioned whether *Humphrey's Executor* should be extended to a single-headed agency. The Solicitor General concluded his argument stating "by severing the for-cause removal restriction, you leave fully intact that concentrated enforcement mechanism."

Paul D. Clement, which was named by as an amicus curiae to argue in support of the judgment handed down by the U.S. Court of Appeals for the Ninth Circuit, stated at the beginning of his argument that "Text, first principles, and precedent all support the validity of the removal provision at issue here. Nonetheless, the parties are in violent agreement that the provision is unconstitutional." He noted that the Court was called upon to render an "advisory opinion" and that "this Court lacks jurisdiction to issue it." During questioning, Justice Neil Gorsuch asked whether the Court should "DIG" the case, that is, dismissing the writ of certiorari as improvidently granted.

Finally, Douglas N. Letter, General Counsel for the House of Representatives, noted that the Court should not "DIG the case" adding that the Court should affirm on alternative grounds. Regarding severability, Letter observed that returning the consumer protection functions back to the agencies that exercised those functions

prior to the establishment of the CFPB is not a simple situation. Letter was also questioned by Chief Justice John Roberts about whether the House of Representative was concerned that the CFPB was taking away the House's budgetary authority "with respect to this very significant part of the economy." Letter answered, "We are not, Your Honor, because this is something that Congress has done with several agencies in the financial regulatory sectors, for example, the—the Fed, in particular."

The case is [No. 19-7](#).

Attorneys: Paul D. Clement (Kirkland & Ellis); Kannon K. Shanmugam (Paul, Weiss, Rifkind, Wharton & Garrison); Noel J. Francisco, Solicitor General, (Department of Justice); Douglas Neal Letter (Office of General Counsel, United States House of Representatives).

Companies: Kirkland & Ellis; Paul, Weiss, Rifkind, Wharton & Garrison; Seila Law, LLC

MainStory: TopStory BankingFinance CFPB DoddFrankAct FedTracker SupremeCtNews