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After ruling, stage set for new battles over CFPB’s future

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The Supreme Court's decision that the head of the Consumer Financial Protection Bureau can be fired at will answered a key question about the agency's leadership structure. But like much of the agency's tumultuous nine-year history, a lot is still unresolved.

While the ruling ends years of litigation against the agency, observers said it could result in even more intense political jockeying to control the bureau, legal questions about new CFPB enforcement actions and rulemaking, a legislative effort to change the leadership structure, and a brighter spotlight on other agencies with single directors.

The outcome of Seila Law v. CFPB will further exacerbate "the political influence that has already plagued the bureau," said Richard Hunt, president and CEO of the Consumer Bankers Association. The ruling, he added, "subjects consumers and the financial services industry to potentially radical regulatory shifts with each administration."

"It is inconceivable that Congress, which wanted to shield the Bureau from political vagaries, would have approved that result," Hunt said.

In the 5-4 decision Monday written by Chief Justice John Roberts, the court found that the agency's structure vests too much power in the hands of one person. Roberts wrote that the president can remove the single director of the CFPB for any reason, striking the so-called "for cause" provision from the Dodd-Frank Act.

The CFPB structure places "significant governmental power in the hands of a single individual who is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is," Roberts wrote.

Yet the high court did not disband the CFPB or invalidate Dodd-Frank, so there is no impact on the agency's past nine years of rulemakings, decisions and enforcement actions. But the ruling calls into question another highprofile regulator with a single-director structure - the Federal Housing Finance Agency - as it charts a new future of Fannie Mae and Freddie Mac.

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The FHFA's "single-Director structure is a source of ongoing controversy," Roberts wrote in the court's ruling.

Still, many saw the ruling as paving the way for the CFPB to focus on its mission, putting to rest years of litigation looming questions about the constitutionality of the agency.

The agency's current director, who had supported the challenge of CFPB structure, hailed the decision.

"Today's Supreme Court decision finally brings certainty to the operations of the bureau," Director Kathy Kraninger wrote on Twitter. "We will continue with our important mission of protecting consumers with no question that we are fully accountable to the president. Consumers and market participants should understand the same rules continue to govern the consumer financial marketplace."

Former CFPB Director Richard Cordray agreed, saying the decision clarifies the leadership issue while making clear that the bureau can continue to exist.

"In some ways it's a green light to move ahead," Cordray said. "Roberts was pretty clear that the only effect is to sever the "~for cause' provision."

But following the decision, many suggested Congress will renew efforts to overhaul the agency's structure, creating a multi-member commission headed by the director. Adding that layer of oversight is seen as a way to remove concerns about the single-director structure while protecting the director from presidential firings. Such legislation, however, faces an uphill battle in a divided Congress.

"We still believe that Congress has an opportunity to strengthen the CFPB over the long term by converting the Bureau into a five-member, bipartisan commission," said Rob Nichols, president and CEO of the American Bankers Association.

Roberts was joined in the majority ruling by the four other conservative justices - Clarence Thomas, Samuel Alito, Neil Gorsuch and Brett Kavanaugh. Justice Thomas issued his own opinion - joined by Gorsuch - that concurred with the majority opinion that there are constitutional limits to Congress' ability to create federal agencies that operate independently of the president.

Dodd-Frank had stipulated that a CFPB director can be fired only "for cause." But with that provision now stripped and presidents now given more discretion to remove the agency's head, many observers say Kraninger's job security is in question should former Vice President Joe Biden, the presumptive Democratic nominee, win the White House in November.

But many observers warned that tying the agency's fate to each successive presidential administration is a slippery slope.

"This outcome weakens the independence of the agency as it was originally envisioned, and has the effect of bringing the Bureau's policy objectives more closely into alignment with each presidential administration's priorities," said Courtney Dankworth, a litigation partner with Debevoise & Plimpton.

The majority opinion held that there are circumstances where "for cause" protections are constitutional, but limited those cases to agencies with multimember commissions whose members serve staggered terms and whose functions are "quasi-legislative" or "quasi-judicial" in nature.

Meanwhile, the court pinpointed the FHFA as an agency led by a single director with no such commission.

"The only remaining example is the Federal Housing Finance Agency (FHFA), created in 2008 to assume responsibility for Fannie Mae and Freddie Mac," Robert said in the decision.

Isaac Boltansky, director of policy research at Compass Point Research & Trading, said the Supreme Court's ruling puts pressure on FHFA Director Mark Calabria to take concrete actions "to end the ... conservatorships [of Fannie and Freddie] prior to the election or shortly thereafter."

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But in a statement following Monday's decision, Calabria challenged the notion that his agency's structure is at risk.

"I respect the Supreme Court's decision in the Seila Law case," he said. "This ruling does not directly affect the constitutionality of FHFA, including the for-cause removal provision."

The U.S. Court of Appeals for the Fifth Circuit agreed to hear an appeal last year in a similar case, Collins v. Mnuchin, that the FHFA is unconstitutional because its director may be removed only "for cause."

The high court's CFPB decision was met with strong reactions from attorneys who represent financial firms before the agency. Some suggested they plan to sue to try to have current enforcement actions dropped, claiming that the agency's authority is now in question. Others said subjecting the agency to more oversight from the White House would have an effect on enforcement proceedings.

"Companies with political clout could have greater influence in CFPB rulemakings and to counter potential enforcement actions than existed under the previous Bureau structure," Dankworth said. "On the flip side, companies with high-profile errors or those that are disfavored by the political winds may find themselves increasingly targeted by an agency now more subject to political pressures."

Others suggested that the ruling would give special interest groups such as consumer advocates even more sway within the CFPB if Biden wins in November. Some noted that Kraninger should move quickly to finalize rulemakings such as a revised final payday lending rule given that she can no longer anticipate completing her five-year term if Biden is elected.

If Biden wins the election and nominates a Democrat to replace Kraninger, a Trump appointee, then next year there would be "a pronounced focus on the intersection of fair lending and algorithmic underwriting," Boltansky wrote in a research note.

Yet the ruling was widely unpopular among consumer advocates who have been most supportive of the agency's core mission developed in the aftermath of the financial crisis.

"The CFPB should not be thinking about political ramifications when deciding whether to bring an enforcement action or to enact rules to address consumer protection problems," said Lauren Saunders, an associate director at the National Consumer Law Center. "The Seila Law decision leaves the CFPB intact, but weakens the Director's independence, making it more likely that the Director will have to think twice before crossing politically powerful financial industry players that have the ear of the President."

But concerns about the impact of the ruling were not limited to consumer groups.

"By increasing the CFPB's political accountability, the ruling is likely to make future policy more volatile, which could chill competition, discourage innovation, and make consumers worse off," said Diego Zuluaga, the associate director of financial regulation studies at the Cato Institute.

In the case, Seila Law v. CFPB, a California debt collection law firm alleged that a civil investigative demand from the bureau was invalid because the agency's structure is unconstitutional. Kraninger and the Department of Justice both agreed with the law firm and declined to defend the CFPB's single-director structure.

Even though Thomas agreed with the majority opinion to eliminate the for-cause provision, he issued a separate dissent suggesting that the court should have gone even further. Thomas argued that the entire notion of executive agencies wielding quasi-legislative and quasi-judicial functions is without constitutional basis.

Justice Elena Kagan authored the liberal wing's dissent, which concurred with the majority decision that the "for cause" protection afforded to the director of the CFPB is severable from the rest of the Dodd-Frank Act.

But Kagan said the evolution of the court's understanding of the limits of legislative and executive power has consistently held those competing interests in balance, including the power of a president to remove the heads of agencies created by Congress.

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"In particular, the Court has commonly allowed those two branches to create zones of administrative independence by limiting the President's power to remove agency heads," Kagan said in her dissent.