

Supreme Court Strikes Restrictions on Removing CFPB Director, but Allows Agency to Continue Operating

JUNE 30, 2020

In a highly anticipated decision concerning the Consumer Financial Protection Bureau (CFPB), the U.S. Supreme Court has stricken restrictions on the President's ability to remove the CFPB's Director, but it did not abolish the agency entirely, as some observers thought it might. See *Seila Law LLC v. CFPB*, No. 19-7. Instead, the justices who would have upheld those restrictions aligned with three members of the Court's majority in saying that those restrictions were severable from the other provisions establishing the CFPB, allowing the agency itself to continue operating. The Court also did not settle what its ruling means for prior CFPB actions, instead leaving that to the lower courts and further litigation.

Established by 2010's Dodd-Frank Act, the CFPB was tasked with administering a new prohibition on unfair and deceptive consumer finance practices along with 18 other pre-existing federal statutes. In addition, the Dodd-Frank Act excused the CFPB from the need for annual budget appropriations, allowing it to request up to 12% of the total operating expenses of the Federal Reserve (also funded outside of the appropriations process through bank assessments). At the CFPB's head, the Dodd-Frank Act created a single Director, appointed by the President with Senate approval for a five-year term and removable by the President only for "inefficiency, neglect of duty, or malfeasance in office."

In 2017, CFPB issued a civil investigative demand (in effect, a subpoena) to Seila Law, which refused to comply on the ground that the restrictions on the President's ability to remove the Director were unconstitutional (and thus the CFPB lacked authority to issue the civil investigative demand). Seila Law lost at both the district court and in the Ninth Circuit Court of Appeals.

In a 5-4 opinion written by Chief Justice Roberts, the Supreme Court vacated the Ninth Circuit's decision on separation of powers grounds. The Court held that the ability to remove executive officers follows from Article II's grant to the President of "[t]he entire 'executive Power.'" Only two recognized exceptions to the President's unrestricted removal power exist, the Court continued, and neither articulated exception fits the structure of the CFPB. Where the Court had permitted restrictions on removing an individual, that individual had been an "inferior officer" (i.e., one not requiring Senate approval) such as a naval cadet-engineer or the independent counsel. Conversely, where the Court had permitted restrictions on removing "principal officers" such as the Federal Trade Commission (who require Senate approval) in *Humphrey's Executor v. United States*, the Court emphasized that there were five Commissioners who served staggered terms and of whom no more than three could be from the

same party. While the Court pointedly questioned the reasoning in *Humphrey’s Executor* (which relied on the since-discarded judgment that the FTC as it existed in 1935 exercised no executive power), it said there was no reason to revisit it.

Instead, the Court viewed the issue in *Seila Law* as whether to expand these exceptions to the President’s removal power to cover a different agency configuration from those previously approved. In that vein, the Court characterized CFPB’s Director as politically unaccountable, with a term long enough that some Presidents would not appoint one and a budget immune from the President’s veto. Only the President does not share authority with another individual, the Court continued, but that centralization is offset by making the President “the most democratic and politically accountable official in Government.” The majority concluded that the CFPB thus “has no basis in history and no place in our constitutional structure,” and refused to recognize a new exception to the President’s power to remove executive officials.

Crucially, however, three of the justices in the majority joined with the four justices who would have upheld the removability restrictions to hold that those restrictions were severable from the other provisions of the Dodd-Frank Act. That was a question on which the Court had specifically requested briefing. As the Court noted, refusing to sever the removability restrictions would have abolished the CFPB altogether, but one of the agencies whose regulatory authority was transferred to the CFPB no longer existed, the others did not have the staff or appropriations to absorb the CFPB’s operations, and no agency would be left with the authority to administer the Dodd-Frank Act’s prohibition on unfair and deceptive consumer finance practices. Congress also signaled its intent with a severability clause, which the Court refused to set aside as mere boilerplate. Consequently, seven justices voted that the CFPB could continue operations notwithstanding the majority holding that the restrictions on removing its Director were unconstitutional.

Importantly, the Court’s decision did not resolve the question whether the CFPB’s prior decisions remain valid. The Government contended that the civil investigative demand to *Seila Law* had since been ratified by an Acting Director who was accountable to the President and that this ratification meant the civil investigative demand could still be enforced. The Court did not endorse that contention, instead noting that the parties contested both whether any such ratification occurred and whether it was legally sufficient to cure the defect in the original demand. The Court remanded this issue for consideration in the lower courts.

The Court’s decision in *Seila Law* means that the CFPB can continue to operate, but the validity of its previous actions remains unresolved and will be the subject of further litigation. It is not clear whether the courts will hold that all CFPB actions taken while its Director could not be removed except for cause are invalid, that they are all valid, or that some have been effectively ratified while others have not been (or cannot be). It is also unclear whether the courts will apply the *Seila* decision in the context of other, single-head agencies—for example, the Federal Housing Finance Agency (FHFA), which serves as regulator of Fannie Mae and Freddie Mac. Clients that have been affected by CFPB actions are encouraged to consult with the attorneys listed below or their usual Winston contact to explore their options.

4 Min Read

Related Locations

- Charlotte
- Chicago
- Dallas
- Houston
- Los Angeles
- New York
- San Francisco
- Silicon Valley
- Washington, DC

Related Topics

- Appellate & Critical Motions
- Supreme Court
- The Supreme Court of the United States
-
-

Consumer Financial Protection Bureau (CFPB)

Dodd-Frank Act

Related Capabilities

Appellate & Critical Motions

Tax

Related Regions

North America

Related Professionals



Linda Coberly



Kathi Vidal



Matthew Carter



Kobi Kennedy Brinson