



## **Divided Supreme Court debates constitutionality of Consumer Financial Protection Bureau**

Devin Dwyer

March 3, 2020

A sharply divided Supreme Court on Tuesday debated the constitutionality of the Consumer Financial Protection Bureau and whether a president should be able to remove its head for any reason, including disloyalty or policy differences.

At stake is the very existence of the independent watchdog agency, created in the wake of the 2008 financial crisis, and whether it will remain insulated from politics with a leader not directly answerable to the White House and only removable for cause.

A sign stands at the construction site for the Consumer Financial Protection Bureau's headquarters in Washington, Aug. 27, 2018. All Americans who have credit cards, home mortgages or investments with major U.S. financial institutions have a stake in the CFPB and its oversight of Wall Street.

The Trump administration, and a California-based law firm targeted by CFPB, are challenging the structure as unconstitutional and have long sought to limit its regulatory authority.

"Never before in American history has Congress given so much executive power to a single individual who does not answer to the president," argued an attorney for Seila Law, the firm contesting investigation by the agency.

Trump Solicitor General Noel Francisco, who refused to defend the law on behalf of the government, argued that the president should retain full power to remove executive officers as he sees fit.

"The president stands for election," Francisco said. "The director of the CFPB does not."

The law creating the agency set a fixed 5-year term for a CFPB director only fireable by the president for "inefficiency, neglect of duty, or malfeasance in office."

The Supreme Court is seen under stormy skies in Washington, June 20, 2019.

The court's liberal justices mounted a spirited rebuttal of that standard.

"This is a very modest restraint," said Justice Ruth Bader Ginsburg. "It stops the president from at whim removing someone, replacing someone with someone who is loyal to the president rather than to the consumers that the Bureau is set up to serve. Congress passed this law so consumers would be better protected against financial fraud."

Justice Elena Kagan suggested that Congress -- not the court -- should have discretion to decide how to structure agencies it creates.

"It's actually the political branch's decision as to which is the best way to promote liberty, " she said, adding that the Constitution "essentially allows to Congress with the president -- the president has to sign these laws -- to decide which institutions of governance and which modes of governance are best to promote liberty and to serve the public interest."

Justice Sonia Sotomayor pointed out that the Social Security Administration and the Office of Special Counsel inside the Justice Department each have singular heads fireable only for cause.

"I don't think this is so unprecedented," she said.

The CFPB is a signature achievement of former President Barack Obama and Massachusetts Sen. Elizabeth Warren, now a 2020 Democratic candidate for president. Both have passionately argued for its defense.

Kathleen Kraninger testifies before a Senate Banking Committee hearing on her nomination to be director of the Consumer Financial Protection Bureau on Capitol Hill in Washington, July 19, 2018.

But the court's conservatives warned of unchecked power beyond the system of checks and balances the Constitution imposed.

"The next president might have a completely different conception of consumer financial regulatory issues and yet will be able to do nothing about it," said Justice Brett Kavanaugh, who called such an arrangement "troubling."

Justices Samuel Alito and Neil Gorsuch shared those concerns, drawing comparisons between the CFPB head and a member of the president's cabinet, who also leads an agency.

"If we were to approve single-member agencies without any presidential removal power ..." pondered Gorsuch, "We would run into questions about the cabinet, for example, which are just agencies, right?"

Chief Justice John Roberts, who could be the decisive vote in the case, also raised concerns during oral argument with both sides.

"After a wide-ranging discussion of constitutional structure and executive power, the conventional wisdom holds," said Ilya Shapiro, director of the Cato Institute's center for constitutional studies, who attended Tuesday's arguments. "The Supreme Court will likely make the head of the CFPB removable at-will, but not otherwise change the agency."

The court is expected to hand down its decision by the end of June.