

# What Supreme Court case means for CFPB's future

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Published October 21 2019, 9:30pm EDT

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Even if the Supreme Court rules a provision regarding the Consumer Financial Protection Bureau is unconstitutional, the agency's rulemakings and enforcement actions likely will not be affected, legal observers said.

The high court on Friday said it will [accept a case](#) challenging the "for cause" provision, which blocks a president from firing a CFPB director without evidence of poor performance.

Some detractors of the CFPB have argued that ruling the leadership structure as unconstitutional would raise doubts about the agency's existing policies. But in agreeing to hear the challenge, the Supreme Court signaled a narrower approach. The justices asked the parties to address whether the "for cause" language can be severed from the rest of the Dodd-Frank Act, which created the bureau.

"Nobody really expects the Supreme Court to render eight years of enforcement and regulatory activity null and void," said Richard Gottlieb, a partner at Manatt, Phelps & Phillips. "There's very little chance that the court concludes the provision can't be severed. This case is strictly about the structure of the CFPB."



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Bloomberg News

Dodd-Frank includes a "severability clause" that states if one provision of the act is found to be unconstitutional, the entire statute would still remain.

Joe Lynyak, a partner at Dorsey & Whitney, said while Trump administration lawyers may believe the court could issue a broad ruling, they will be satisfied with removing the for-cause restriction.

"What the government will be arguing is, yes, it's unconstitutional, but just strike that clause and we're OK," Lynyak said.

At issue is a California lawsuit in which a debt collection law firm argued it did not have to respond to a CFPB investigation because the bureau's single-director leadership structure was unconstitutional. But the Supreme Court did not accept a case by a Mississippi payday lender, All American Check Cashing Inc., that sought to invalidate the agency.

The California case "really does address a lingering problem that keeps coming up but needs to be resolved," said Lynyak. "And it's a pretty clear-cut way of resolving something that gives everybody, including the legislative branch, a way forward."

Yet while the Supreme Court may take a narrow path on the issue, the decision could still have far-reaching implications, affecting other independent agencies — such as the Federal Housing Finance Agency — with similar for-cause provisions.

But some suggest the high court will preserve the for-cause provision by determining that Congress wanted an independent agency, and that giving the president greater authority to fire agency heads may have serious repercussions.

"I don't think it will be an easy decision to just say sever the 'for cause' provision," said Vaishali Rao, a partner at Hinshaw & Culbertson and a former Illinois assistant attorney general. "Some of the justices will question what actual duty of the president is being impeded such that he can't perform the functions of the office while the for-cause provision is in there."

Meanwhile, some believe there is still a chance that the court could go to the other extreme.

"I think there is a slim chance that the CFPB would be found to be unconstitutional and all of the Dodd-Frank Act could be struck down," said Yvette Garcia Missii, litigation counsel at the Center for Responsible Lending.

Last year, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit [ruled](#) that a for-cause limitation is unconstitutional for agencies with a single director. Now-Supreme Court Justice Brett Kavanaugh, then a judge at the D.C. Circuit, wrote that independent regulatory agencies posing as a "fourth branch" of government are a threat to individual liberty.

Striking the for-cause provision from Dodd Frank would remedy the unconstitutional concentration of power, Kavanaugh wrote. Yet that decision was later overturned by a full panel of the D.C. Circuit.

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Still, Rao said, the high court will have to debate what it means as a practical matter to allow the heads of federal agencies to be fired at will.

"Even though it seems simple to just fire someone, what you do is essentially create a system that invests a lot of power in the president," she said. "If you say for cause is severed and the president can fire someone because they don't like their politics, you are investing all the policies at all these agencies with the president. I don't think that's what Congress envisioned."

What's more is the court will also allow time for discussion about whether the California firm, Seila Law, even has standing in the case.

The court agreed to set aside time for oral arguments by Alan B. Morrison, an associate dean at George Washington University School of Law and co-founder of Public Citizen, who has argued 20 cases before the Supreme Court.

In a brief, Morrison essentially says any alleged injury to Seila Law is irrelevant to the question of removing the for-cause provision. Moreover, he argued President Trump had the ability to fire former CFPB Director Richard Cordray, who headed the bureau for 10 months while Trump was in office, but chose not to.

"There is a serious question as whether there is a real controversy (constitutional or otherwise) between the parties," Morrison writes. "The President and his party controlled both Houses of Congress for two full years, during which they had the virtually unchecked ability to revise the CFPB's removal provision to eliminate the restrictions. Despite the fact that Congress, with the agreement of the President, amended the [Dodd Frank] statute of which the creation of the CFPB was a part, they chose not to address this issue, preferring instead to ask the Court to decide."

Morrison wrote that the high court "should not come to the rescue of one branch of Government when that branch has the ability to remedy any perceived wrongs without invoking the power of the Court."

Rao and others agreed.

"The facts in the case are so light, that the company didn't want to respond to a subpoena, that it's a leap," Rao said. "If a president wants a change to be made to consumer financial protection, they have a number of ways to do that, and that is to go through Congress."

Oral arguments are expected to reference a 1935 Supreme Court decision, *Humphrey's Executor v. U.S.*, in which the high court allowed Congress to limit the president's ability to remove agency officials without giving a reason.

"I think it's taken on some White House political considerations because they have taken such an expansive view of the chief executive and this conforms to their view that the president can fire anybody for any purpose with very minor exceptions," said Lynyak. "But the chief justice has said they will go no further than *Humphrey's*."

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