CFPB faces another challenge at the Supreme Court : NPR

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Business

Consumer watchdog agency's fate at Supreme Court could nix other agencies too

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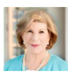

Nina Totenberg

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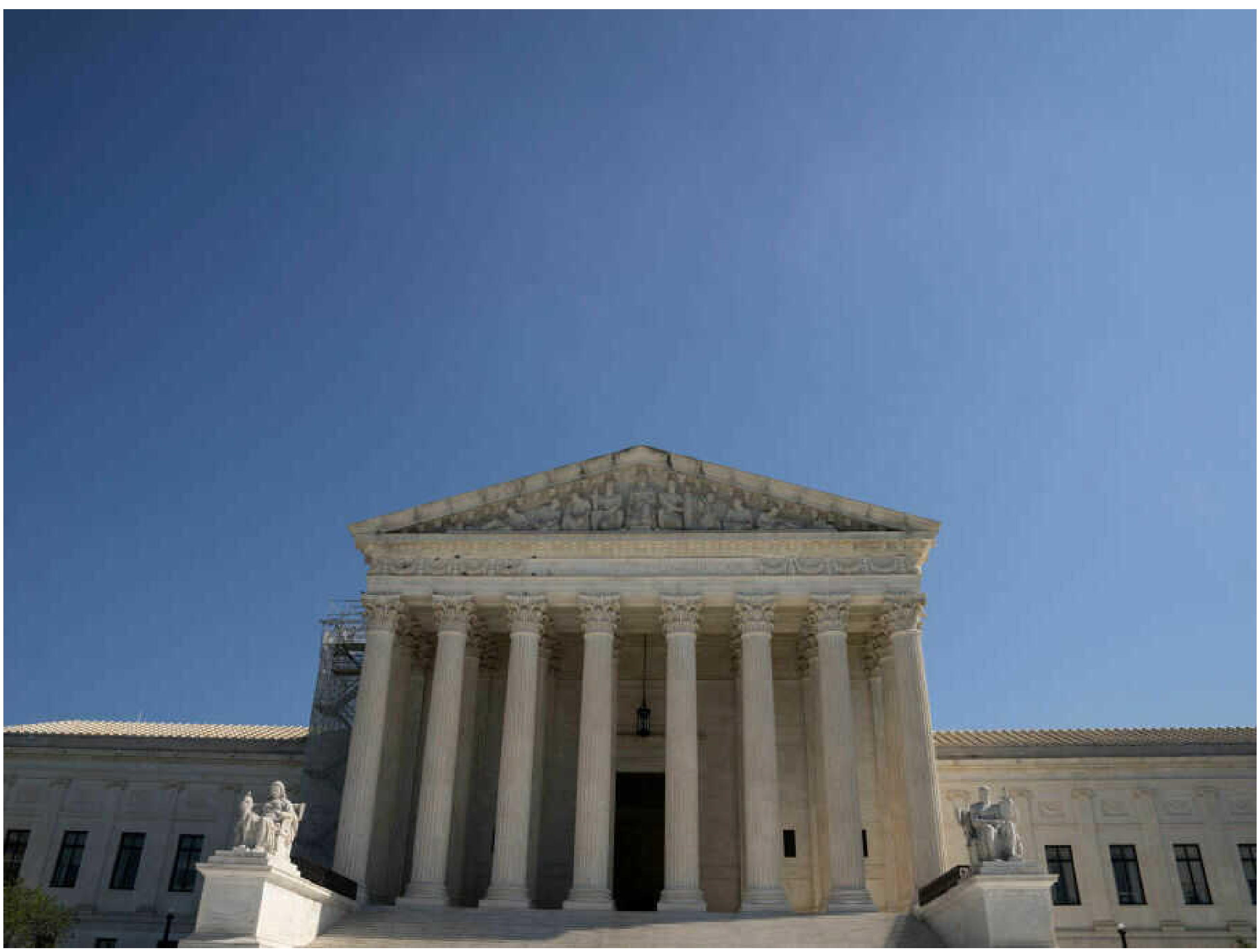

The fate of the CFPB, and other agencies that are similarly funded, is in the hands of the U.S. Supreme Court.

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If you have a mortgage or a loan or a credit card, you likely have more protection from deceptive practices in the financial services industry today than you did at the time of the 2008 financial crash. Now, however, those protections could be in doubt.

On Tuesday, the U.S. Supreme Court hears arguments in a major case that could threaten the very existence of the Consumer Financial Protection Bureau and potentially numerous other federal agencies.

After the financial crisis, Congress created the CFPB to protect consumers from what were seen as predatory and dishonest practices by financial institutions. Since then, the CFPB has established consumer protections for financial transactions ranging from mortgages to credit cards. It has won $17.5 billion in restitution and taken steps to cancel debts for some 200 million eligible Americans, according to the agency.

Law

Supreme Court to hear case that threatens existence of consumer protection agency

Now, its survival is being challenged by payday lenders who have often reaped enormous profits from people of limited means who need a short-term loan. Prior to the enactment of CFPB regulations, payday lenders were routinely rolling over the amount due, and tacking on fees as often as twice a day, so that borrowers ended up owing thousands of dollars on small loans of $500 or less.

In an attempt to protect consumers, the CFPB enacted a rule to limit these repeated fees, and other practices. And the payday lenders challenged the rule in court, losing repeatedly. Eventually, however, one federal appeals court, the Fifth Circuit, ruled that the agency's funding is unconstitutional because the agency gets its money from the Federal Reserve, which in turn, is funded by bank fees.

How the CFPB is funded

Lawyers for the payday lenders declined to be interviewed for this article. But Helgi Walker, who represents 21 former members of Congress opposed to the CFPB, explains the argument that the payday lenders are making.

Law

Appeals court says financial watchdog agency CFPB's structure is unconstitutional

"The Constitution gives Congress the power of the purse," requiring government spending to be "pursuant to funds appropriated by Congress," she says. "And here the CFPB was intentionally designed by its creators to not operate pursuant to appropriated money."

The Biden administration replies that the appropriations clause in the Constitution was not meant to straightjacket Congress in how it sets up funding. The clause says that "no money shall be drawn from the Treasury but in consequence of appropriations made by law." In this case, the government argues, Congress enacted a law that funds the agency by providing up to a capped amount each year from the combined fees earned by the federal reserve system.

Other agencies potentially affected

Like the CFPB, many important government agencies are not funded by annual appropriations, including the Federal Reserve itself, and the Federal Deposit Insurance Corp., which protects bank depositors, the office of the Comptroller of the Currency, the U.S. Mint and more.

"A bad decision in the Supreme Court could wreck the financial security of millions of families and turn our economy upside down," says Sen. Elizabeth Warren, D-Mass., who first proposed the creation of the CFPB when she served in the Obama administration.

"If the Supreme Court says that Congress doesn't have the power to set up government agencies and laws without going through appropriations, understand, not only do all the banking regulators fall on their faces, Social Security and Medicare are now at risk," Warren says, noting that none of these agencies are financed through the appropriations process.

Rather, they are all financed in different ways — Social Security, for instance through a separate tax. So the implications of the CFPB case "could echo through the lives of every person in America," Warren says.

That is undoubtedly why a total of 30 friend-of-the-court briefs have been filed in the CFPB case. What distinguishes the briefs supporting the CFPB is that they have been filed, not just by the usual suspects, but by an array of groups that don't normally side with regulators. The mortgage bankers, the homebuilders and the realtors associations warn that a decision against the CFPB could send the housing market into "chaos."

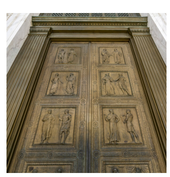
Representing them, lawyer Robert Loeb notes that the regulations established by the CFPB for residential mortgages provide a uniform set of rules that protect not just consumers, but also the people issuing and servicing loans. If they follow the rules, they are protected from liability.

"If those rules were to just disappear," Loeb says, "there could be a freeze-up of the mortgage system," and the resulting "paralysis" could have "severe consequences for consumers, for bankers and for the economy as a whole."

Impact on the military and veterans

Also siding with the CFPB is a coalition of 15 military and veterans organizations — groups that don't normally file in the Supreme Court. Cory Titus of the Military Officers Association of America notes that Congress, in creating the CFPB, gave the bureau enforcement authority over the Military Lending Act and other laws aimed at protecting the financial well-being of servicemembers and their families, as well as veterans.

"The immediate effect on servicemembers would be, you have a law that's on the books to protect them, and there's no real policeman," Titus says. "The overall impact of that is frightening to think about."



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Part of the reason the military is especially worried is that young servicemembers with a regular pay check and a job are particular targets for payday lending businesses. Indeed, most military bases are surrounded by payday lender signs, and online lenders can reach members of the military anywhere in the world. In just the last few years, the CFPB has brought a number of critical enforcement actions under the Military Lending Act to prevent payday lenders from charging more than the legally capped 36% annual percentage rate on loans, and to protect servicemen and women from onerous and deceptive practices that end up costing them thousands of dollars to pay off a $250 or $500 loan.

The payday lenders seem to be relatively on their own in this case, with much — though not all — of the business world on the agency's side. Lawyer Walker is not surprised. "Sometimes it takes a renegade like these payday lenders to bring this kind of structural challenge to a federal agency," she observes.

Indeed, the CFPB's structure was successfully challenged in 2020 by a law firm charged with defrauding clients with deceptive practices. Back then the law firm prevailed in arguing that the leadership structure was unconstitutional. In a wide-ranging oral argument at the time, the court's conservatives were openly hostile to the agency.

Law

Supreme Court Casts Doubt On Independence Of Consumer Protection Agency

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"They don't even have to go to Congress to get their money," noted an incredulous Chief Justice John Roberts. "Isn't that something we should factor into the substantive question?"

Whether Roberts and the court's other conservatives want to go further now, opening up a potential Pandora's box of legal questions involving other agencies, remains to be seen.