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CFPB Funding Challenge: Supreme Court Appears Skeptical



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On October 3, 2023, the U.S. Supreme Court heard oral argument in *CFPB v. Community Financial Services Association of America* to decide whether the CFPB's funding structure violates the Constitution's Appropriations Clause.

The Appropriations Clause states, in part, that “no money shall be drawn from the Treasury, but in consequence of appropriations made by law.” Instead of appropriating a specific dollar amount to the CFPB from the Treasury, Congress authorized the CFPB to request a capped amount of funds from the Federal Reserve each year. Solicitor General Elizabeth Prelogar defended the CFPB's funding scheme, arguing that it comports with the text of the Appropriations Clause and Congress's historical practices when appropriating funds to the executive branch. On behalf of Community Financial Services Association of America (“CFSA”), former Solicitor General Noel Francisco argued that the CFPB's funding structure is unconstitutional. According to Francisco, Congress “has not determined the amount [the CFPB] should be spending.” Rather, Congress “delegated to the Director the authority to pick his own appropriation, subject only to an upper limit that's so high it's rarely meaningful.”

Over the course of the hearing, the Court grappled with fundamental questions about the text of the Appropriations Clause. For example, much of the questioning focused on whether the Appropriations Clause restricts the amount of funds that Congress can appropriate to an executive agency, prohibits or limits the duration of standing appropriations, or requires Congress to allocate specific dollar amounts to an executive agency instead of authorizing an agency to spend up to a certain amount. Justice Alito appeared sympathetic to CFSA's argument that Congress

improperly delegated its appropriations authority to the CFPB when it created a capped standing appropriation to the CFPB, without setting a specific amount or expiration date for the appropriation. Others, including Justices Jackson and Coney-Barret, were concerned that no language in the Appropriations Clause itself constrains the amount, duration, or specificity of an appropriation by Congress. They highlighted the practical difficulties that the Court faces in establishing rules for appropriations to executive agencies (*e.g.*, How much is too much for an appropriation? How long is too long for a standing appropriation?), and whether it is proper for the Court to make these rules in the first place.

The Court's questioning also focused on whether and to what extent the CFPB's funding structure is unique, and whether any distinctions between the CFPB and other agencies are constitutionally significant. Justice Sotomayor, for example, seemed to agree with the Solicitor General that Congress used well-accepted methods to fund the CFPB, even if the combination of methods used to fund the CFPB was unique. Similarly, Justice Jackson did not believe that CFSA could prove its case merely by showing that the CFPB's funding structure was novel. By contrast, Justice Alito was troubled by the fact that there is no perfect historical analogue for the CFPB's funding mechanism. In one of his few statements of the day, Justice Roberts also indicated that he saw no historical analogue for the CFPB.

Oral argument suggested that CFSA will not be able to secure the five votes necessary to uphold the Fifth Circuit's ruling. Justices Kagan, Jackson, and Sotomayor were vocal critics of CFSA's position. Justice Sotomayor, for example, stated that she was "at a total loss" in trying to understand Mr. Francisco's argument. Justice Coney-Barrett seemed unconvinced by Mr. Francisco's effort to ground CFSA's theory in the text of the Appropriations Clause, and troubled by the practical difficulties in crafting rules for Congress to follow when appropriating funds to agencies. Justice Kavanaugh appeared to disagree with CFSA's argument that the CFPB is improperly insulated from Congressional control because, as Mr. Francisco conceded, Congress could discontinue the CFPB's funding even if doing so would be practically or politically difficult. Justice Alito appeared to accept CFSA's views of the Appropriations Clause issue, while Justice Thomas's position was somewhat ambiguous. Early in the hearing, Justice Thomas appeared skeptical of what he called the "skeletal" restrictions on Congress's appropriation authority proposed by the CFPB. But later in the hearing, he appeared dissatisfied with Mr. Francisco's theory as to why the CFPB's funding violates the Appropriations Clause, and prompted Mr. Francisco to "complete this sentence: Funding of the CFPB violates the appropriations clause because..." Justice Gorsuch and Chief Justice Roberts were relatively quiet during oral argument and revealed little about their views.

The Court is expected to issue its decision by June 2024.
