

Banking and Finance Law Daily Wrap Up, CONSUMER FINANCIAL PROTECTION BUREAU—U.S.: CFPB’s funding mechanism does not violate the Constitution’s Appropriations Clause, (May 16, 2024)

Banking and Finance Law Daily Wrap Up

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By Sherri M. Schroeder, J.D.

The Supreme Court held that the statute authorizing the Bureau to draw money from the combined earnings of the Federal Reserve System to carry out its duties satisfies the Appropriations Clause—based on the Constitution, legislative history, and certain funding practices.

Following an October 2022 decision by the U.S. Court of Appeals for the Fifth Circuit declaring the funding mechanism of the Consumer Financial Protection Bureau (CFPB) to be unconstitutional, the U.S. Supreme Court has held that the statute authorizing the CFPB to draw money from the combined earnings of the Federal Reserve System to carry out its duties satisfies the Appropriations Clause of the U.S. Constitution. The Court based its decision on the Constitution’s contextual use of the word “appropriation;” appropriations practices in England, the Colonies, and early state legislatures; and the practices of the First Congress in the United States. The Court’s majority also found the challenging associations’ principal arguments as to why the funding mechanism violates the Appropriations Clause to be unpersuasive. Therefore, the Court reversed the Fifth Circuit’s judgment and remanded the case for further proceedings. Justices Alito and Gorsuch dissented ([CFPB v. Community Financial Services Assoc. of America, Ltd.](#), No. 22-448 (U.S. May 16, 2024)).

Fifth Circuit. In connection with the underlying proceedings in the Fifth Circuit, on statutory and constitutional grounds, several trade associations representing payday lenders and credit-access businesses had challenged regulations issued by the CFPB pertaining to high-interest consumer loans. Pertinent to the legal issues before the Supreme Court, the Fifth Circuit accepted the associations’ argument that the Bureau’s funding mechanism violated the Appropriations Clause because the independent funding mechanism violated the Constitution’s separation of powers. The intermediate appellate court stated that the Bureau’s perpetual insulation from Congress’ appropriations power, including the express exemption from congressional review of its funding, rendered the CFPB “no longer dependent and, as a result, no longer accountable” to Congress and, ultimately, to the people.

Appeal to Supreme Court. In its appeal to the Supreme Court, the CFPB then presented the question, “Whether the court of appeals erred in holding that the statute providing funding to the [CFPB]... violates the Appropriations Clause... and in vacating a regulation promulgated at a time when the CFPB was receiving such funding” (see [Banking and Finance Law Daily](#), October 3, 2023, for more information about the oral arguments presented).

Constitution’s text. Concerning itself first with the meaning of the word “appropriation,” the Supreme Court’s majority found that “[t]aken as a whole, [the] evidence suggests that, at a minimum, appropriations were understood as a legislative means of authorizing expenditure from a source of public funds for designated purposes.”

Pre-founding history. The Court then noted that the pre-founding history of the struggle between England’s Parliament and Crown for control of the purse and appropriations practice in the Colonies and early state legislatures supported the conclusion that an identified source and purpose were all that was required for a valid appropriation. “In short, the origins of the Appropriations Clause confirm that appropriations needed to designate particular revenues for identified purposes. Beyond that, however, early legislative bodies exercised a wide range of discretion,” the Court stated.

First Congress. The court next noted that early appropriations laws made by the U.S.'s First Congress made annual lump-sum grants for government expenses. Appropriations for "sums not exceeding" a specified amount provided discretion over how much to spend up to a cap. The Court also noted that several early executive agencies, such as the Customs Service and the Post Office, were allowed to indefinitely fund themselves from revenue collected.

Unpersuasive arguments. The Court's majority found the associations' three principal arguments as to why the funding mechanism of the CFPB violated the Appropriations Clause to be unpersuasive. The Court found the associations' argument that the Bureau's funding is not "drawn... in Consequence of Appropriations made by Law" because the agency itself decides the amount of annual funding to draw from the Federal Reserve System to be unpersuasive. Because Congress imposes a statutory cap, the Court found that the only sense in which the CFPB decides its own funding is by exercising its discretion to draw less than the statutory cap. Furthermore, the Court again noted that appropriations of "sums not exceeding" a certain amount were commonplace immediately after the founding of the country.

The associations next argued that the Appropriations Clause requires both Chambers of Congress to periodically agree on an agency's funding, but the Court found that the Constitution did not explicitly limit the duration of appropriations for purposes other than supporting an army. Here, the Court again looked to history, as the First Congress' funding of the Customs Service and the Post office were not time limited. Although the associations argued that the Customs Service and the Post Office do not enjoy the same level of fiscal independence as the Bureau, the associations failed to explain the relevance of that difference to the question of whether a law complies with the constitutional imperative of an appropriation.

The associations' final principal argument was that the type of funding mechanism in question "provides a blueprint for destroying the separation of powers" and "invites tyranny by allowing the Executive to operate free of any meaningful fiscal check," in the words of the Court. Here, the Court found that the associations erred by reducing the power of the purse to only the principle expressed in the Appropriations Clause. The Court noted that the Appropriations Clause is phrased as a limitation and is placed within a section of other such limitations. The associations, however, offered no defensible argument that the Appropriations Clause requires more than a law that authorizes the disbursement of specified funds for identifiable purposes, and without such the associations' argument must fail, stated the court.

Dissent. In a dissenting opinion written by Justice Alito and joined by Justice Gorsuch, the two Justices asserted that the majority's decision "turns the Appropriations Clause into a minor vestige." Decrying the majority's decision, they noted that when the Appropriations Clause was adopted, it was not understood to be "a law that empowers the Executive to draw as much money as it wants from any identified source for any permissible purpose until the end of time." They also noted that the framers of the Constitution "would be shocked, even horrified, by this scheme." Because they believe that the CFPB's funding structure is unconstitutional, the dissenters would have affirmed the Fifth Circuit's judgment.

The case is [No. 22-448](#).

Judge: Thomas, C.

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