# Clues On High Court Outcome In CFPB Constitutionality Case

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On October 3, the U.S. Supreme Court heard oral arguments in the *Consumer Financial Protection Bureau v. Community Financial Services Association of America*, the latest in a long line of cases targeting the constitutionality of the CFPB.

The oral arguments offered a few clues that the CFPB will most likely survive this latest salvo against its existence, but the court appears sharply divided, once again, on a case of significant importance.

## The CFPB's Funding Mechanism and the Appropriations Clause

This case started as a challenge to the CFPB's payday lending rule brought by a number of trade associations representing payday lenders.

Unsuccessful at the district court level, the trade associations appealed to the U.S. Court of Appeals for the Fifth Circuit, which affirmed the district court's decision nearly in its entirety.

The Fifth Circuit relied on a rarely challenged provision of the Constitution — the appropriations clause — which provides that: "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law"[1] and held that the CFPB's funding mechanism was unconstitutional under the appropriations clause.

The Fifth Circuit then awarded the trade associations retrospective relief, vacating the entire payday lending rule.

The CFPB quickly appealed to the Supreme Court, arguing, among other things, that the Fifth Circuit's decision conflicted with a number of lower court decisions finding the bureau's funding mechanism constitutional, improperly interpreted Congress' authority and limitations — or lack thereof — under the appropriations clause, and that the retrospective relief granted would cause significant harm not only to the CFPB but to the American economy itself.

The Supreme Court accepted the CFPB's petition, and an oral argument was held last week.

## Majority Court Expresses Skepticism With Proposed Limits on Congress' Authority

While it can sometimes be a fool's errand to count votes during an oral argument, a majority of the justices expressed deep reservations with both the Fifth Circuit's decision finding the CFPB's funding mechanism unconstitutional and the remedy it enacted.

While the bureau focused on the history and text of the appropriations clause to urge reversal, the trade associations argued that the sum of the parts of the CFPB's funding mechanism is what made it a unicorn and thus unconstitutional.

First, the trade associations argued that the CFPB's funding mechanism did not include a specific amount of appropriation. This claim met stiff and aggressive resistance from Justice Ketanji Brown Jackson, who, based on the text of the appropriations clause itself, argued that no such requirement existed.

Second, the trade associations claimed that Congress' delegation of its duties to the executive branch was constitutionally suspect, a point echoed by the Fifth Circuit in its decision. A plurality of the court appeared to disagree, noting that historically, Congress had often made lump-sum appropriations committed exclusively to the discretion of the executive branch.

To bolster this position, U.S. Solicitor General Elizabeth Prelogar gave numerous examples of other agencies funded similarly to the CFPB, including the U.S. Customs Service, the Office of the Comptroller of Currency, the Federal Deposit Insurance Corporation, and the Federal Reserve Board. It is worth noting that some justices disputed this, including Chief Justice John Roberts, who did not believe there was a compelling historical analog to the bureau's funding mechanism.

Third, the trade associations contended that the perpetual nature of the CFPB's funding source was also problematic.

Under the Dodd-Frank Act, the CFPB's funding was set at approximately $597 million in 2010, subject only to inflation. The trade associations asserted this constituted a "perpetual" funding source. Perhaps surprisingly, Justice Brett Kavanaugh strenuously disagreed.

According to Justice Kavanaugh, a perpetual funding source would be a law mandating no changes to an agency's funding for a set number of years. Here, no such condition is included in the Dodd-Frank Act, and, according to Justice Kavanaugh, nothing would preclude Congress from changing the CFPB's funding mechanism in the future.

Fourth and finally, the trade associations argued that the statutory cap was illusory and not an actual cap. This too did not seem to find a receptive audience. A number of justices noted that the CFPB continues to get closer to the cap, and as Justice Elena Kagan wryly noted, this might simply be evidence that the bureau should actually be doing more, not less.

A majority of the court also appeared to struggle with the test to determine whether an appropriation is unconstitutional. Justice Amy Coney Barrett searched for a test or bright-line rule to determine when an appropriation was constitutional or not and appeared less than convinced with the trade association's arguments.

On the other side, three justices — Justices Neil Gorsuch, Samuel Alito, and Clarence Thomas — all expressed some interest in limiting Congress' ability to delegate its authority under the appropriations clause to the executive, with Justice Gorsuch in particular spending considerable time testing this limit, asking the solicitor

general: "[I]f the President determined it was reasonably necessary to take a trillion dollars, that would satisfy your concern, and, on the Appropriations Clause itself, has no upper-limit constraint."

Justice Roberts also expressed some skepticism with some of the CFPB's arguments — including that there was no limit on how much of Congress' power it can delegate to the executive, calling it "aggressive" — but was otherwise relatively quiet during oral argument.

## The Remedy Was Less of a Cause for Concern

Headed into oral argument, many assumed the CFPB would highlight the potential impact affirming the Fifth Circuit's decision could have on other rules and regulations promulgated by the CFPB.

While the litigants and justices considered the potential fallout of such a decision as well as the remedy promulgated by the Fifth Circuit, it was certainly not the focal point of oral argument which, as Justice Sonia Sotomayor indicated, "might be a good sign or a bad sign."

## Where Do We Go From Here?

A decision is not expected until spring 2024, but a majority of the court appeared to have significant reservations with the Fifth Circuit's opinion and what it means, not only for the CFPB but Congress' authority under the appropriations clause.

Simply stated, it does not appear that the trade associations will receive five votes in favor of affirming the Fifth Circuit's opinion in its entirety.

What appears to be more likely is either a bare majority of the court will reverse the Fifth Circuit's decision or will affirm it on much narrower grounds, which is similar to what happened in the 2020 Supreme Court decision in Selia Law LLC v. CFPB, when the court determined the statutory limitation on firing the CFPB director was unconstitutional.

Ultimately, it appears that the court's decision will end not with a bang but a whimper, and the CFPB will continue on its regulatory, enforcement and supervisory path set back in 2010.

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[1] U.S. Const. Art. I, § 9, Cl. 7.

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