

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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CONSUMER FINANCIAL PROTECTION )  
BUREAU, ET AL., )  
  Petitioners, )  
  v. ) No. 22-448  
COMMUNITY FINANCIAL SERVICES )  
ASSOCIATION OF AMERICA, LIMITED, )  
ET AL., )  
  Respondents. )  
- - - - -

Pages: 1 through 111  
Place: Washington, D.C.  
Date: October 3, 2023

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4   BUREAU, ET AL.,                            )  
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7   COMMUNITY FINANCIAL SERVICES            )  
8   ASSOCIATION OF AMERICA, LIMITED,        )  
9   ET AL.,                                     )  
10                                    Respondents.            )  
11   - - - - -

12  
13                                    Washington, D.C.  
14                                    Tuesday, October 3, 2023  
15

16           The above-entitled matter came on for  
17   oral argument before the Supreme Court of the  
18   United States at 10:04 a.m.  
19

20   APPEARANCES:  
21   GEN. ELIZABETH B. PRELOGAR, Solicitor General,  
22           Department of Justice, Washington, D.C.; on behalf  
23           of the Petitioners.  
24   NOEL J. FRANCISCO, ESQUIRE, Washington, D.C.; on  
25           behalf of the Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 22-448, Consumer Financial Protection Bureau versus the Community Financial Services Association. General Prelogar.

ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR  
ON BEHALF OF THE PETITIONERS

GENERAL PRELOGAR: Mr. Chief Justice, and may it please the Court:

The Fifth Circuit's decision in this case is the first time any court in our nation's history has held that Congress violated the Appropriations Clause by enacting a statute providing funding.

This Court should uphold the CFPB's funding statute because it is firmly grounded in constitutional text and in historical practice dating back to the founding.

The text of the Constitution shows that when the Framers wanted to limit Congress's appropriations authority, they did so expressly. And while the Framers restricted appropriations for the Army to two years, they

1 applied no similar limits on appropriations for  
2 any other agency.

3 History confirms that point. Since  
4 the founding, Congress has consistently funded  
5 agencies through standing appropriations that  
6 are not time-limited and that provide  
7 significant discretion over how much to spend.

8 The first Congress did exactly this  
9 with the very first agency it created, the  
10 Customs Service, and the same is true for other  
11 founding-era agencies, including the Post  
12 Office, the National Mint, the Patent Office,  
13 revenue officers, and the National Bank.

14 And Congress has used this kind of  
15 appropriation as the default when funding  
16 financial regulators, including the Federal  
17 Reserve Board, the Office of the Comptroller of  
18 the Currency, the Federal Deposit Insurance  
19 Corporation, the National Credit Union  
20 Administration, the Farm Credit Administration,  
21 and the Federal Housing Finance Agency.

22 The CFPB's appropriation fits squarely  
23 within this unbroken line of historical  
24 practice. In fact, Congress exercised  
25 significantly more discretion and control over

1 the Bureau's funding by capping its annual  
2 appropriation in an amount that is far lower  
3 than many other agencies' budgets.

4 Respondents argue that the combination  
5 of features in the CFPB statute violates some  
6 previously unrecognized constitutional line.  
7 But the Bureau's appropriation is materially  
8 identical to the numerous funding statutes I  
9 just listed, and Respondents concede those  
10 statutes are constitutional.

11 This Court should reject Respondents'  
12 attempt to gerrymander a rule to fit the CFPB  
13 alone without providing a coherent theory about  
14 how to interpret and apply the Appropriations  
15 Clause.

16 I welcome the Court's questions.

17 JUSTICE THOMAS: General, other than  
18 passing an appropriations law, are there any  
19 limits on what Congress can do?

20 GENERAL PRELOGAR: So I -- I think, at  
21 the outset, as your question touches on,  
22 Justice Thomas, the term "appropriation" itself  
23 contains some essential requirements. So that  
24 term is defined to mean a law that provides for  
25 funding and that specifies both the source and

1 the purpose of the funding. That's how an  
2 appropriation was defined at the founding, it's  
3 how it's always been understood, and that's  
4 still how it's defined today in sources like  
5 the GAO Red Book, which is Congress's own  
6 appropriations treatise.

7 So we think that at the outset, it's  
8 not just any old law but a law that contains  
9 those features that constitutes an  
10 appropriation.

11 And then I think the question becomes,  
12 are there other limits out there on how  
13 Congress can structure funding for a particular  
14 type of activities or government functions? We  
15 know, obviously, from the Army Appropriations  
16 Clause that the answer is yes. With respect to  
17 that particular government function, there's a  
18 durational limit, and it's based on the nature  
19 of the activity because the Framers were  
20 specifically concerned about having a standing  
21 Army.

22 But I think the Army Appropriations  
23 Clause itself demonstrates that there are not  
24 otherwise constraints in the Appropriations  
25 Clause that would limit Congress in how it

1 decides to structure the funding.

2 JUSTICE THOMAS: So, beyond the -- the  
3 initial almost skeletal requirements of  
4 duration and purpose, there isn't -- I'm hear  
5 -- if I hear you right, there is no other  
6 condition?

7 GENERAL PRELOGAR: We don't think that  
8 the Appropriations Clause places those limits  
9 on Congress itself when it enacts a funding  
10 statute, but I do want to emphasize that our  
11 argument here also relies heavily on history.  
12 And so, if you have in mind some kind of  
13 funding statute or arrangement that's never  
14 been done in all of this nation's history, I  
15 think the Court could take that into account in  
16 a future case.

17 Here, though, we have a specific type  
18 of appropriation, a capped lump-sum  
19 appropriation that's standing for a single  
20 agency, and our historical argument is that  
21 this is nothing new or unprecedented. All of  
22 the agencies I previously listed had similar  
23 appropriations.

24 JUSTICE THOMAS: Are there any -- is  
25 there any role in appropriations -- that --



1 that appropriations plays in the separation of  
2 powers? It seems that at least when I did --  
3 was in the executive branch, that Congress  
4 exercised appropriation to check the executive  
5 branch to some extent.

6 If there is in this case, what would  
7 be -- in the case of CFPB, how would that play  
8 out?

9 GENERAL PRELOGAR: So I do agree and  
10 think that, of course, it's a critical element  
11 of --

12 JUSTICE THOMAS: Yeah.

13 GENERAL PRELOGAR: -- the separation  
14 of powers that Congress has control over the  
15 purse.

16 JUSTICE THOMAS: Yeah.

17 GENERAL PRELOGAR: Our argument here  
18 is that Congress has exercised that power.  
19 This Court, of course, is looking at a statute  
20 that Congress itself enacted that set up this  
21 funding mechanism for the CFPB which is similar  
22 in kind to the way that Congress has funded  
23 other financial regulatory agencies.

24 JUSTICE THOMAS: You don't think this  
25 kind of eviscerates the -- the kind of exacting

1 control that Congress usually exercises in the  
2 appropriations process?

3 GENERAL PRELOGAR: I don't. And, you  
4 know, to the extent that this question is  
5 pressing on the annual appropriations --

6 JUSTICE THOMAS: Yeah.

7 GENERAL PRELOGAR: -- as a kind of  
8 counterpart here, I think that the question  
9 becomes, does the Constitution limit Congress  
10 with respect to the duration of appropriations?  
11 Is there some kind of implicit limit in the  
12 text that the Court could divine that means  
13 that Congress, in contrast to other laws,  
14 which, of course, can remain in effect until a  
15 future Congress acts -- is Congress limited in  
16 how long to leave appropriations in effect?

17 And, there, I think the Army  
18 Appropriations Clause does a lot of work  
19 because it's not like the Framers weren't aware  
20 of this dynamic. They thought specifically  
21 about the fact that appropriations, like all  
22 other laws, might be continuing, indefinite  
23 until a future Congress acts, and they were  
24 concerned about that with respect to a standing  
25 Army, but they didn't otherwise seek to limit

1 Congress's authority. I --

2 CHIEF JUSTICE ROBERTS: General, one  
3 of the things that struck me as I was reading  
4 it, your -- you have a very aggressive view of  
5 Congress's authority under the Appropriations  
6 Clause. I'm not saying remotely that that's  
7 not correct, but it struck me -- I mean, you're  
8 -- represent -- you represent the executive  
9 branch as well, and it -- it's a very strong  
10 power given to Congress.

11 And it struck me that the reason you  
12 would want to defend that is because it gives  
13 them more power to give away. And there are  
14 obviously -- legend has it there have been  
15 times when the same party controlled both  
16 houses of Congress and the White House, and in  
17 that situation, you can see Congress empowering  
18 the President in a way that might seem unusual  
19 to the Framers.

20 So keeping in mind that -- that  
21 imbalance -- in other words, it's kind of  
22 paradoxical, the more power you give Congress,  
23 I think, the more -- and this is, I think, your  
24 friend's argument on the other side -- there --  
25 there's more that it can give away and enhance

1 the authority of the executive.

2 Is that an unpersuasive concern?

3 GENERAL PRELOGAR: Well, certainly, I  
4 don't think it's an unpersuasive concern, but  
5 built into your question as I understood it,  
6 Mr. Chief Justice, was the idea that maybe  
7 Congress could do something that would be  
8 surprising or anomalous to the Framers.

9 And I guess what I would say is that  
10 if -- if you're looking at it through that  
11 lens, then history should play a powerful role  
12 in trying to understand the limits or scope of,  
13 you know, how much Congress can give away, when  
14 does it become too much.

15 And, here, the Court doesn't need to  
16 articulate any outer limits because we have a  
17 very specific type of appropriation that's  
18 actually far more constrained than many that  
19 Congress has enacted throughout history because  
20 Congress provided funding for a single agency  
21 and actually capped that amount of funding in  
22 an amount not to exceed the cap set by  
23 Congress.

24 CHIEF JUSTICE ROBERTS: Well, it's  
25 pretty unusual to have that agency drawing its

1 -- being able to request however much it wants,  
2 subject to a limit that it really hasn't gotten  
3 very close to over the years, from an entity  
4 that is also drawing money from the -- from the  
5 private sector.

6 I didn't see any particularly  
7 compelling historical analogues to that.

8 GENERAL PRELOGAR: Well, let me --

9 CHIEF JUSTICE ROBERTS: And, again,  
10 and to the extent that takes you away from the  
11 appropriations power, it significantly enhances  
12 the power of the executive.

13 GENERAL PRELOGAR: So I disagree that  
14 there is anything unprecedented about this  
15 funding arrangement when you look at the  
16 relevant constitutional value of protecting  
17 Congress's prerogatives.

18 And I know that there are a lot of  
19 different moving parts and pieces to the  
20 arguments Respondents have made, but as I  
21 understand it, they are attacking four features  
22 of the funding statute: the fact that it's a  
23 standing appropriation, so it remains in place  
24 and is not time-limited; that it gives the  
25 director of the CFPB some discretion to act

1 within the statutory cap in requesting the  
2 funding; third, that the CFPB has enforcement  
3 and regulatory functions; and, fourth, as your  
4 question touched on, that the CFPB's funding  
5 comes from a source that's not, in their words,  
6 constrained by market forces.

7           But we have numerous examples of  
8 agencies that have all four of those relevant  
9 characteristics. I dispute at the outset that  
10 we don't actually think the functions or the  
11 market forces constraint are relevant, but even  
12 taking the argument on its own terms, I can  
13 give you founding-era examples.

14           The Customs Service and the revenue  
15 officers were funded with that kind of  
16 mechanism. They had standing appropriations.  
17 For the Customs Service, it was uncapped.  
18 These were powerful regulatory entities. The  
19 Customs Service could board ships and seize  
20 vessels and inspect records and conduct  
21 searches and levy penalties and collect fines,  
22 and there was no way to avoid that kind of  
23 regulation.

24           So the market constraint theory that  
25 the users could just opt out or regulated

1 parties could decide not to fund the operations  
2 doesn't apply to those agencies.

3 And it's still the case with many of  
4 the financial regulators today. The ones I  
5 would put on that list are the Federal Reserve  
6 Board, the FDIC, the NCUA, the Farm Credit  
7 Administration, and the FHFA.

8 JUSTICE GORSUCH: General, I'm -- I'm  
9 sorry to interrupt. I -- I just want to  
10 understand, following up on the Chief Justice's  
11 question, what role the upper limit plays on  
12 your theory of the case.

13 Is that an essential feature to the  
14 constitutionality of this provision, or could  
15 Congress pass the same law with no upper limit,  
16 allowing the executive branch to determine  
17 however much it wished to take?

18 GENERAL PRELOGAR: So we don't think  
19 that Congress would have to provide a -- a  
20 statutory specified amount, but they would, of  
21 course, have to specify the purpose of the  
22 funding.

23 JUSTICE GORSUCH: Okay.

24 GENERAL PRELOGAR: And --

25 JUSTICE GORSUCH: But -- but just on

1 the amount, your theory doesn't turn on there  
2 being an upper limit?

3 GENERAL PRELOGAR: Our theory doesn't  
4 turn on it --

5 JUSTICE GORSUCH: Okay. So the --

6 GENERAL PRELOGAR: -- because of the  
7 --

8 JUSTICE GORSUCH: -- President could  
9 --

10 GENERAL PRELOGAR: -- wealth of  
11 historical evidence.

12 JUSTICE GORSUCH: -- take a trillion  
13 dollars if -- if he wished to do so?

14 GENERAL PRELOGAR: No, because I think  
15 that Congress itself has specified that the  
16 director is limited to the amount that's  
17 reasonably necessary to carry out --

18 JUSTICE GORSUCH: Sure. But, if the  
19 President --

20 GENERAL PRELOGAR: -- federal consumer  
21 financial law.

22 JUSTICE GORSUCH: -- if the President  
23 determined it was reasonably necessary to take  
24 a trillion dollars, that would satisfy your  
25 concern and, on the Appropriations Clause



1       itself, has no upper-limit constraint?

2               GENERAL PRELOGAR:  I -- I think that  
3       that would violate the statute, and the same  
4       theoretical possibility --

5               JUSTICE GORSUCH:  Sure.

6               GENERAL PRELOGAR:  -- exists with all  
7       of the other financial regulators I've been  
8       discussing.

9               JUSTICE GORSUCH:  Okay.  Now --

10              GENERAL PRELOGAR:  But, if you  
11       disagree, Justice Gorsuch --

12              JUSTICE GORSUCH:  No, I -- I -- I'm  
13       just --

14              GENERAL PRELOGAR:  -- of course, here,  
15       we have nothing like that.

16              JUSTICE GORSUCH:  -- trying to  
17       understand your theory.  That's all I'm trying  
18       to do.

19              GENERAL PRELOGAR:  Yeah.  So our  
20       theory is rooted in --

21              JUSTICE GORSUCH:  Yeah, from --

22              GENERAL PRELOGAR:  -- history.

23              JUSTICE GORSUCH:  No, I understand.

24              GENERAL PRELOGAR:  Congress has  
25       appropriated in this way without a cap for time

1 immemorial --

2 JUSTICE GORSUCH: Right. Okay.

3 GENERAL PRELOGAR: -- from 1789 on.

4 JUSTICE GORSUCH: And how about on  
5 the -- on the lower end of the scale? What if  
6 the President decided zero was the appropriate  
7 sum? I'm not going to take any money. I don't  
8 like the CFPB. You know, I don't think it's  
9 reasonably necessary to take another dollar.

10 Could the President do that?

11 GENERAL PRELOGAR: So I think that  
12 would violate the statute as well. At that  
13 point, the CFPB --

14 JUSTICE GORSUCH: No, I'm talking  
15 about the Appropriations Clause.

16 GENERAL PRELOGAR: So -- so I think  
17 that, you know, Congress itself has specified  
18 the purpose. And so I think that if the  
19 President or if the CFPB director didn't comply  
20 with the statute, that would be a violation,  
21 and I would expect Congress to step in and  
22 change the funding mechanism.

23 But all of these theoretical  
24 possibilities exist with respect to countless  
25 other appropriations. All of the other

1 financial regulators --

2 JUSTICE GORSUCH: No, I --

3 GENERAL PRELOGAR: -- for example,  
4 likewise --

5 JUSTICE GORSUCH: -- I understand -- I  
6 understand the practical realities, and I  
7 appreciate them, and I understand the statutory  
8 arguments. I'm just trying to understand the  
9 Appropriations Clause theory.

10 Is there anything that would prohibit  
11 the President from -- in the Appropriations  
12 Clause -- from deciding whether to take zero  
13 dollars and we've already established he could  
14 take a trillion?

15 GENERAL PRELOGAR: I don't think the  
16 Appropriations Clause would be a check there,  
17 although, of course, Congress could then  
18 exercise its authority and its power over the  
19 purse to change the discretion that's provided  
20 to require the President or the director of the  
21 agency to take a particular amount.

22 JUSTICE GORSUCH: Thank you.

23 JUSTICE BARRETT: General, can I ask  
24 you a question about --

25 JUSTICE SOTOMAYOR: Go ahead.

1           JUSTICE BARRETT: -- the -- the  
2 Treasury? So the professors of constitutional  
3 law and history say, listen, the Appropriations  
4 Clause doesn't even apply here at all because  
5 these funds aren't being drawn from the  
6 Treasury.

7           Do you agree with that argument? It's  
8 not the argument that you made.

9           GENERAL PRELOGAR: We are not making  
10 that argument. We accept that the  
11 Appropriations Clause applies here. The reason  
12 for that is we understand the term in the  
13 Constitution to refer to the public treasury as  
14 a general matter, not specifically to the  
15 Treasury Department.

16           Of course, at the time of the  
17 founding, ratification, the Treasury Department  
18 hadn't even been created, and that's also how  
19 this Court has described the scope of the  
20 Appropriations Clause in cases like OPM versus  
21 Richmond, where it referred to public monies  
22 generally.

23           And, of course, the -- the contrary  
24 approach would expose a gaping loophole in  
25 Congress's authority here --

1 JUSTICE BARRETT: Right.

2 GENERAL PRELOGAR: -- because it would  
3 mean the executive, if it has funds that aren't  
4 held in the general treasury, could spend even  
5 without Congress appropriating it or providing  
6 that authority in the first place.

7 JUSTICE ALITO: Are the -- are the  
8 money in -- the monies in the CFPB's budget  
9 appropriated monies?

10 GENERAL PRELOGAR: So, for  
11 constitutional purposes, yes, because Congress  
12 established this funding statute and it  
13 specified both the source and the funding. So,  
14 within the meaning of the Constitution, this  
15 counts as an appropriation. That's how OPM and  
16 the executive branch and GAO and Congress  
17 understand the source of the funding here.

18 JUSTICE ALITO: What do we make of the  
19 provision in the Dodd-Frank Act which says that  
20 the Bureau fund "shall not be construed to be  
21 government funds or appropriated monies"?

22 GENERAL PRELOGAR: So that was  
23 Congress trying to control for the interaction  
24 between this funding mechanism and other  
25 background rules that apply to appropriations

1 that go through the annual appropriation  
2 process.

3           There are rules out there about things  
4 like procurement and whether you can use  
5 appropriated monies in that sense for  
6 litigation expenses. The miscellaneous receipt  
7 statute requires agencies to deposit their  
8 revenues in the general treasury, and some of  
9 these background rules would actually interfere  
10 with the funding that Congress intended for  
11 this agency. So I think it was just trying to  
12 control for the interaction there.

13           JUSTICE ALITO: So it was wrong?

14           GENERAL PRELOGAR: And other agencies  
15 have the same provision.

16           JUSTICE ALITO: That statement -- that  
17 statement is incorrect in the -- in the  
18 Dodd-Frank Act itself, it's incorrect? These  
19 are appropriated monies?

20           GENERAL PRELOGAR: Well, I don't think  
21 that that statutory provision was taking a  
22 stance on the constitutional question of  
23 whether this fits the definition of an  
24 appropriation within the meaning of the  
25 Constitution.

1           And as I mentioned, Congress has used  
2           this formulation for other agencies as well,  
3           like the OCC and the FCA, and I think, again,  
4           it's -- it's all intended to just allow  
5           Congress to control for the interaction of  
6           various statutory provisions in this context.

7           JUSTICE SOTOMAYOR: Does it use --

8           JUSTICE ALITO: What I'm --

9           JUSTICE SOTOMAYOR: -- it for -- does  
10          it use it for the Post Office and for the Mint  
11          and for other agencies of that nature?

12          GENERAL PRELOGAR: So, Justice  
13          Sotomayor, I'm not familiar with whether this  
14          particular language appears in the statutes  
15          governing the Post Office.

16          You know, the Post Office, of course,  
17          was originally created and funded in -- in  
18          1792, and so it's not clear that some of these  
19          other background rules existed, but, certainly,  
20          we can point to examples today, including the  
21          OCC and the FCA, which have this same language,  
22          and I think it's meant to ensure, again, that  
23          there's no disruption with the funding  
24          operating in the way that Congress intended.

25          JUSTICE SOTOMAYOR: Could I go back to

1 Justice Thomas's question? There appears to be  
2 -- I'm sorry, I'm a bit congested. There  
3 appears to be wound up in this question of the  
4 appropriations bill the separation of powers  
5 and non-delegation.

6 Now I know the court below said  
7 non-delegation was forfeited. I'm not quite  
8 sure I understand -- and maybe you could  
9 explain it to me -- how separation of power is  
10 different from non-delegation? So, if one was  
11 forfeited, why wasn't the other?

12 But do you see those two other  
13 provisions, separation of power and  
14 non-delegation, as having a place in other  
15 constitutional provisions besides the  
16 Appropriations Clause? And if it has no place  
17 here, why not?

18 GENERAL PRELOGAR: Yes. So I think  
19 that, obviously, these concepts of separation  
20 of powers and the scope of the Appropriations  
21 Clause and non-delegation principles have in --  
22 in many respects potentially overlapping  
23 functions.

24 In this context, we understood  
25 Respondents to be making an argument about the



1 Appropriations Clause in particular, and the  
2 Fifth Circuit found that they hadn't separately  
3 raised a non-delegation challenge.

4           You know, I guess what I would say is  
5 that to the extent the Court is thinking about  
6 this from the perspective of general separation  
7 of powers principles, the -- the things that  
8 the Court generally consults in understanding  
9 the structural provisions of the Constitution  
10 are, first, the text, and, second, the history.  
11 Those indicators of intent here are  
12 overwhelmingly on our side.

13           And then, if the Court is thinking  
14 about it from delegation principles, I think  
15 there too you would have to look at history.  
16 And as Justice Scalia emphasized in his  
17 concurring opinion in *Clinton versus City of*  
18 *New York*, if you look across the course of  
19 history from 1789 on, it has been, in the  
20 appropriations context, marked by very broad  
21 delegations of authority to the executive  
22 branch to spend within the bounds set by  
23 Congress.

24           And the -- the very first  
25 appropriations laws were structured like this

1 one in the sense of providing that the  
2 executive could spend up to a -- a cap that was  
3 set by Congress itself.

4 So I think that, you know, the  
5 cleanest way to think about the arguments  
6 Respondents are presenting is under the  
7 Appropriations Clause, but I recognize that as  
8 the Court is thinking more broadly about these  
9 issues, the other doctrines could come into  
10 play.

11 JUSTICE KAGAN: General, could I --  
12 could I take you back to the line of  
13 questioning that you and Justice Gorsuch were  
14 talking about? In your reply brief, on page  
15 18, you discuss a -- a -- a -- a standing  
16 appropriation of "up to a quadrillion dollars  
17 for the President to fund as he deems fit the  
18 entire federal government, besides the Army."

19 So just on this question of where your  
20 outer limits are and what theory we might use  
21 to say there are some limits, what -- what do  
22 you want to say about that sort of statute?  
23 Would that be a constitutional violation? If  
24 so, why so? And why is that different from  
25 this?

1           GENERAL PRELOGAR: Yes. So that  
2 statute, as we understand it, is -- you know,  
3 would be completely unprecedented. It would  
4 effectively take the whole of Congress's  
5 appropriations authority and transfer it to the  
6 executive branch.

7           Congress has never done that for the  
8 past 230-plus years, and it's hard for me to  
9 imagine Congress ever would do that. But I  
10 think, if the Court were confronted with that  
11 issue in a future case, it could well recognize  
12 limits and the limits would come from history.

13           The Court, in -- in any number of  
14 separation of powers cases, has said that the  
15 fact that a method of structuring government  
16 has no historical precedent can strongly  
17 counsel against recognizing it as a  
18 constitutional way to proceed. That was the  
19 analysis the Court said in Free Enterprise  
20 Fund. It repeated it in Seila Law.

21           But that history works both ways. The  
22 Court has likewise said that the fact that a  
23 way of structuring government is well rooted in  
24 history and traces back to the founding is  
25 powerful evidence of the contemporaneous

1 understanding of original intent, and that's  
2 the box we're in here.

3 So I guess I would urge the Court to  
4 save for another day whether there's some  
5 theoretical possibility that Congress could go  
6 too far with a kind of appropriation we've  
7 never seen before and instead focus on this  
8 particular appropriations law, which we think  
9 finds its roots both in text and history.

10 JUSTICE ALITO: Well, I have the same  
11 question, basically, that Justice Kagan just  
12 asked you. Your response in your reply brief  
13 was an answer to a -- an argument that was made  
14 by the Respondents on page 24 of their brief,  
15 where they say: "If the Bureau is correct that  
16 there is no constitutional limit on Congress's  
17 power to pass laws providing funding to  
18 agencies, then a single Congress could allocate  
19 each year forever up to a trillion dollars to  
20 an agency like the FBI or FTC or even up to a  
21 quadrillion dollars for the President to fund  
22 as he deems fit the entire federal government  
23 besides the Army."

24 Now you answered the latter part of  
25 that in your reply brief about the quadrillion

1 dollars, and you just answered that in response  
2 to Justice Kagan. You didn't answer the first  
3 part of that about providing a very substantial  
4 sum of money to an agency like the FBI or the  
5 FTC.

6 So I -- I just want to understand what  
7 you think the limiting principle is. Let's  
8 take -- let's take the FTC, which I think had a  
9 budget of \$430 million. So let's say there's a  
10 law that allocates forever 1 -- up to \$1  
11 billion adjusted for inflation to the FTC to  
12 use as the FTC sees fit.

13 Would that be consistent with the  
14 Appropriations Clause?

15 GENERAL PRELOGAR: So I think, at the  
16 outset, if the law said "however the FTC deems  
17 fit," it's not clear that would count as an  
18 appropriation because it's not clear Congress  
19 would have specified the purpose. But I  
20 recognize you can tweak it and say, you know,  
21 "to carry out the FTC's functions."

22 In that context, I think the  
23 hypothetical would effectively be a standing  
24 uncapped appropriation because, of course, the  
25 FTC would never reach that amount. It would be

1 for a single agency. And we think that that is  
2 well grounded in history and, in fact, is how  
3 many agencies are funded today, particularly in  
4 the financial regulatory space.

5 But, if you have concerns about that  
6 principle, here, of course, we have the  
7 statutory cap. And Respondents say, you know,  
8 the cap is illusory, that it's more like the  
9 hypotheticals we've just been touching on.

10 But I don't see how they can tenably  
11 make that argument when the cap is set at \$600  
12 million adjusted only for inflation, and many  
13 of the agencies from which the CFPB inherited  
14 its responsibilities have far larger budgets,  
15 1.8 billion for the OCC, around a billion for  
16 the Federal Reserve Board, over a billion for  
17 the FDIC.

18 This is a meaningful restraint, and I  
19 think it just demonstrates that if the Court  
20 thinks it's important to have that constraint  
21 here, the CFPB is even more under Congress's  
22 control than these other agencies.

23 JUSTICE ALITO: So if a --

24 JUSTICE KAVANAUGH: Can I ask a --

25 JUSTICE ALITO: Well, could I just --

1 CHIEF JUSTICE ROBERTS: Sure.

2 JUSTICE ALITO: -- excuse me -- ask  
3 one follow-up question on that?

4 So I understand your answer to these  
5 hypotheticals is that we must look to  
6 Congress's historical practices. This is a  
7 matter of -- of seeing whether the setup that  
8 we have before us is consistent with Congress's  
9 historical practices. Is that right?

10 GENERAL PRELOGAR: We draw heavily on  
11 historical practices, also text --

12 JUSTICE ALITO: Is that --

13 GENERAL PRELOGAR: -- of course.

14 JUSTICE ALITO: -- is that the test?

15 GENERAL PRELOGAR: I don't want to  
16 lose sight of that.

17 JUSTICE ALITO: Is that the test? Is  
18 it the test?

19 GENERAL PRELOGAR: I think that the --  
20 the test in this context, as in most separation  
21 of powers cases, is, yes, text and history.  
22 And here again, we have a specific  
23 constitutional provision speaking to duration,  
24 speaking to particular types of functions,  
25 showing that the Framers were concerned about

1 funding the Army with a standing appropriation  
2 but didn't have that same concern or effort to  
3 restrict Congress's authority with respect to  
4 other functions.

5 And then we have an unbroken line of  
6 history. There have been agencies funded this  
7 way for every year of this nation's history.

8 JUSTICE ALITO: Well, what is your  
9 best historic -- your single best example of an  
10 agency that has all of the features that the  
11 CFPB has that are cited by the Respondents,  
12 single best example of an agency with all of  
13 the -- with that combination of features?

14 GENERAL PRELOGAR: I think our best  
15 example historically is the Customs Service.  
16 The first Congress created the Customs Service  
17 in 1789. It gave the Customs Service a  
18 standing, uncapped source of funding from the  
19 revenues that the Customs Service collected  
20 through things including coercive law  
21 enforcement activity, things like levying  
22 fines, also from import duties, which could not  
23 be avoided if you wanted to engage in trade  
24 with the new nation. And the Customs Service  
25 was one of the most powerful agencies that was



1 originally created because it was so important  
2 to have a stream of funding for the new  
3 republic.

4           So I think that if you look through  
5 all of the factors they're challenging here, we  
6 have the Customs Service and others, the  
7 revenue officers; U.S. Attorneys for a period  
8 of time were funded through conviction fees.

9           JUSTICE ALITO: What is your best  
10 example of an agency that draws its money from  
11 another agency that, in turn, does not get its  
12 money from a congressional appropriation in the  
13 normal sense of that term but gets it from the  
14 private sector?

15           GENERAL PRELOGAR: So I -- I can't  
16 give you another example of a source that's  
17 precisely like that one, but I would dispute  
18 the premise that that could possibly be  
19 constitutionally relevant. This is a case  
20 about Congress's own prerogatives over the  
21 purse, its authority. And if Congress has  
22 given away too much of its authority by not  
23 providing for a durational limit or not  
24 providing -- or providing for too much  
25 discretion to the agency, then I don't see how

1 it could possibly fix the problem that other  
2 fee-funded agencies directly collect their  
3 money from the entities they regulate.

4 JUSTICE ALITO: So I take it your  
5 answer is that you do not -- that is not  
6 consistent with any historical practice, but  
7 you think that to the extent it is  
8 unprecedented, it is unprecedented in a way  
9 that is not relevant for present purposes? Is  
10 that your answer?

11 GENERAL PRELOGAR: Yes, primarily. I  
12 think it would be unprecedented in the way that  
13 you could say this is the only agency that has  
14 the acronym CFPB. That's obviously true also,  
15 but it doesn't track the constitutional value.

16 But I also just want to make the  
17 factual point that I don't understand them to  
18 be saying it's significant that it's structured  
19 this way in the abstract. They say what it  
20 means is that there's not a check on the  
21 overall amount of funding the CFPB could get  
22 and there is a check on those other agencies.

23 And that's wrong as a descriptive  
24 matter. There is no similar checked on the  
25 Federal Reserve Board, the FDIC, the NCUA, the

1 FCA, or the FHFA. All of the entities they  
2 regulate cannot enter their -- or, I'm sorry,  
3 exit their regulatory sphere just because they  
4 disagree with regulations. So this --

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 GENERAL PRELOGAR: -- just isn't a  
8 tenable distinction on the facts.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Thomas, anything further?

11 JUSTICE THOMAS: No.

12 CHIEF JUSTICE ROBERTS: Justice Alito?

13 JUSTICE ALITO: Just a couple more  
14 questions possibly. Is -- I think you may have  
15 answered this indirectly, but I just want to be  
16 -- be clear. Do you think that the reference  
17 to appropriations in the Constitution is  
18 equivalent to public money? Do you think  
19 appropriated funds are the same thing as  
20 "public money"?

21 GENERAL PRELOGAR: So I think that  
22 funds that Congress has given to an agency do  
23 qualify as public money, yes.

24 JUSTICE ALITO: What if someone --  
25 what if Congress set up an agency with

1 substantial power but provided no method for  
2 that agency to obtain money other than private  
3 donations? Would that be consistent with the  
4 Appropriations Clause?

5 GENERAL PRELOGAR: I think that likely  
6 would be consistent. You know, that obviously  
7 speaks to the question of source. And I think  
8 that Congress has chosen different sources over  
9 time, but I don't think there's anything in the  
10 text of the Constitution that limits Congress's  
11 ability to try to determine the ways it wants  
12 to structure those kinds of funding mechanisms.

13 JUSTICE ALITO: So suppose Congress  
14 said there are a lot of outside entities that  
15 have a great interest in the work of the SEC,  
16 so we don't think we need to appropriate any  
17 money for the SEC. The SEC can simply rely on  
18 private donations and build up its own  
19 endowment, so to speak.

20 Would that be constitutional?

21 GENERAL PRELOGAR: I think that it  
22 likely would qualify as constitutional. Of  
23 course, if that created some kind of regulatory  
24 capture, I would expect that Congress would act  
25 to fix that, but, you know, there are examples

1 where throughout our history of scholarship  
2 funds, for example, that are administered by  
3 the federal government originally funded by an  
4 endowment, and those, I think, qualify as  
5 appropriations.

6 CHIEF JUSTICE ROBERTS: All set?

7 JUSTICE ALITO: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Sotomayor?

10 JUSTICE SOTOMAYOR: General, it might  
11 be a good sign or a bad sign, I don't know.  
12 Nobody's talked about remedy. Let me give you  
13 an opportunity to summarize your best argument  
14 why the Court below erred in its broad remedy  
15 of striking down basically not just this Payday  
16 Lending Rule but basically saying anything this  
17 agency's done since the beginning is invalid.

18 So can you tell us how you deal with  
19 that?

20 GENERAL PRELOGAR: Yes. The Fifth  
21 Circuit here recognized a sweeping  
22 retrospective remedy that we think conflicts  
23 with both severability principles and  
24 traditional remedial equitable principles in  
25 this space.

1           Just first on severability, Dodd-Frank  
2           itself has an express severability clause.  
3           This Court emphasized that point in Seila Law.  
4           And, here, the Fifth Circuit didn't even stop  
5           to consider whether any aspect of the CFPB's  
6           funding mechanism could be severed or would  
7           provide a basis to therefore limit the damage  
8           to Congress's work in trying to get this agency  
9           funded.

10           I think that was error and that there  
11           are several candidates for severability that  
12           would be a much less disruptive remedy in this  
13           context and would not entitle Respondents to  
14           any relief because the Payday Lending Rule they  
15           challenge isn't traceable to those features or  
16           aspects of the funding mechanism.

17           But even if you followed the Fifth  
18           Circuit's approach and thought that there was  
19           something about this entire funding mechanism  
20           that's invalid, even then I don't think a  
21           retrospective remedy is warranted.

22           You know, the Court would be writing  
23           on a blank slate because no court had  
24           previously found that Congress itself violated  
25           the Appropriations Clause, but under

1 traditional remedial equitable principles, it's  
2 necessary to take into account the public  
3 interest and the balance of the equities.

4           And, here, a prospective remedy which  
5 would prevent the CFPB from enforcing this rule  
6 against Respondents until it has a valid  
7 appropriation would give them a meaningful form  
8 of relief. And, instead, the retrospective  
9 remedy that the court adopted is sweeping in  
10 implications and would be profoundly  
11 disruptive.

12           I would point in particular to the  
13 amicus brief that was filed by the Mortgage  
14 Bankers Association that explains how many  
15 entities in various industries have critically  
16 relied on the CFPB's regulations, including, in  
17 particular, in the housing finance space.  
18 These create safe harbors for lenders so that  
19 they will be deemed to be in compliance with  
20 statutory requirements on things like ability  
21 to pay and on disclosure requirements.

22           And if the Fifth Circuit is right and  
23 there's the prospect that all of these actions  
24 should be unwound, it would create profound  
25 disruption in various economic -- economic

1 markets that would hurt the -- the regulated  
2 entities themselves. So we think that that  
3 provides powerful reason to reject that kind of  
4 retrospective relief and instead have a  
5 going-forward prospect of remedy only.

6 JUSTICE SOTOMAYOR: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice Kagan?

8 JUSTICE KAGAN: General, both  
9 Mr. Francisco and I think one of Justice  
10 Alito's questions suggests that, well, you  
11 might have the ability to say that each one of  
12 these features has a -- a historical precedent  
13 but that there's something special about the  
14 combination of all of them and that you can't  
15 point to a historical precedent which has every  
16 single feature that this scheme has.

17 And you said to Justice Alito that the  
18 Customs Department comes awfully close, but  
19 I -- I want you to step back a little bit  
20 and -- and just talk to me about, you know, how  
21 should we be -- how should we be thinking about  
22 that question?

23 Is -- is -- is it more important that  
24 all the parts have been used, or is it more  
25 important that the entire thing has an exact



1 precedent? Is -- is part of the lesson of  
2 history here that there's been enormous  
3 variation in the kinds of appropriations that  
4 Congress has made? How should we think about  
5 that feature of our history? Take it away.

6           GENERAL PRELOGAR: So I think it is  
7 absolutely correct to say that there has been  
8 enormous variation in how Congress has  
9 exercised -- exercised its appropriations power  
10 over the course of history.

11           Obviously, with respect to each of  
12 these challenged features, we think we have a  
13 wealth of evidence regarding standing  
14 appropriations or appropriations up to a  
15 particular cap.

16           But I don't want to lose sight of the  
17 fact that if the Court were to approach this  
18 issue looking at the combination of features,  
19 this is not novel, and I -- I want to try to  
20 unpack a little bit why that's so, because  
21 Justice Alito had asked me a couple of  
22 questions about the source of the funding and,  
23 in particular, about the idea that maybe the  
24 line that got crossed here or the relevant  
25 difference in how the CFPB is funded is because

1 it draws its funds from the Federal Reserve  
2 Board.

3 And I think the reason why that  
4 doesn't work and why it shows that this is not  
5 unprecedented is that the whole theory behind  
6 that premise is that that's a constraint on  
7 other agencies. Market forces will limit the  
8 overall pot of funding the other agencies have.

9 But that's not accurate as a  
10 descriptive matter with respect to things like  
11 the Federal Reserve Board itself, which  
12 regulates and assesses money on the Federal  
13 Reserve Banks required to stay in the system.  
14 They can't leave.

15 And if the overall value here is to  
16 determine does the agency have some limiting  
17 check on the overall amount of funds, the CFPB  
18 is far more constricted because it has a  
19 statutory cap actually imposed by Congress  
20 rather than regulated entities.

21 And I think, if the Court is looking  
22 at all of the features together, maybe some  
23 things subtract out Congress a little bit, but  
24 the cap adds in Congress in a very powerful and  
25 major way that I think distinguishes this

1 appropriation for purposes of congressional  
2 control.

3 JUSTICE KAGAN: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Gorsuch?

6 Justice Kavanaugh?

7 JUSTICE KAVANAUGH: Just two  
8 clarifying questions about the limits of your  
9 argument. There's a discussion sometimes about  
10 permanent appropriations and forever  
11 appropriations.

12 My understanding, but I want to make  
13 sure you agree, is that Congress could not  
14 entrench a funding scheme, in other words,  
15 Congress could not pass a law that says this is  
16 the funding scheme and no future Congress may  
17 alter this for 10 years or a hundred years.  
18 That would be constitutionally problematic, is  
19 my understanding, and I want to make sure you  
20 agree with that.

21 GENERAL PRELOGAR: Yes, I absolutely  
22 share that understanding, Justice Kavanaugh.  
23 And I think what it shows is that it's  
24 incorrect to characterize standing  
25 appropriations as lasting forever.

1           In fact, we've pointed to a number of  
2           examples where Congress has acted to change the  
3           standing appropriations, and the Customs  
4           Service is a great example on this one too.  
5           You know, it was funded through a standing  
6           appropriation for the first 120 years of this  
7           nation's history, and then, in 1912, Congress  
8           took it out of a standing appropriation and  
9           brought it into annual appropriations.

10           Congress just did this again in the  
11           debt limit bill recently. It rescinded many  
12           standing appropriations that had been part of  
13           the American Rescue Plan and the Inflation  
14           Reduction Act, and I think it just demonstrates  
15           that there is always that additional check of a  
16           future Congress deciding that it wants to alter  
17           the work of a prior Congress.

18           JUSTICE KAVANAUGH: So Congress could  
19           change it tomorrow?

20           GENERAL PRELOGAR: Absolutely,  
21           Congress could change it tomorrow.

22           JUSTICE KAVANAUGH: Okay. And then,  
23           if the statute here gave the Federal Reserve  
24           more than ministerial control, that the amount  
25           was in the control of the Federal Reserve to

1 range from zero to -- to the cap for what the  
2 CFPB would receive, would that change anything?

3 GENERAL PRELOGAR: I don't think that  
4 that would change the relevant constitutional  
5 analysis. You might think of that as  
6 functioning a little bit like an agency  
7 overseeing a sub-agency and making  
8 modifications to its budget.

9 In either example, Congress still  
10 retains a direct line in deciding how much  
11 funding should go to that sub-agency, and if it  
12 wants to change anything, there's no kind of  
13 double layer of insulation.

14 But even if the Court thought that  
15 maybe having that kind of more than ministerial  
16 process would create some kind of novel  
17 constitutional question, of course, here, it's  
18 important to emphasize that the Federal Reserve  
19 Board just has this ministerial role and it  
20 doesn't exercise any supervision.

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Barrett?

24 Justice Jackson?

25 JUSTICE JACKSON: Good morning,

1 General.

2           So I'm concerned that there might be  
3 burden-shifting happening in the way in which  
4 we're thinking about this, and so maybe you can  
5 help me just to keep the -- the right burdens  
6 in the right place.

7           Some of the questions that have been  
8 asked this morning are -- seem to be requiring  
9 you to establish whether or not Congress can do  
10 certain things, can -- you know, what if  
11 Congress, you know, delegated the authority to  
12 -- to determine a trillion dollars worth of  
13 funding and how the agency was going to do it?  
14 What if Congress set it up in this way or that  
15 way, et cetera?

16           But I sort of thought that the burden  
17 was on them to show that Congress can't set up  
18 the agency in this way, and the reason I think  
19 that is because of the language of the  
20 Appropriations Clause and the way in which it  
21 seems to give the legislature the prerogative  
22 of the purse. And, here, we have a statute in  
23 which the legislature has exercised that.

24           So am I right that that's really all  
25 you need to say to win? I mean, you don't lose

1 if you can't establish the limits in Congress's  
2 exercise of its authority, right?

3 GENERAL PRELOGAR: I think that's  
4 right, Justice Jackson, and I think it actually  
5 highlights an important aspect of this case.  
6 You know, this is a separation of powers case.  
7 We are here defending a statute that Congress  
8 provided to fund an executive branch agency.

9 And Respondents are coming in and  
10 asking the Article III courts to oversee and  
11 superintend Congress's own exercise of its  
12 prerogatives over the purse. So I think  
13 absolutely the burden is on them to show that  
14 that kind of judicial intervention and  
15 invalidation of a statute is warranted here.

16 JUSTICE JACKSON: And when we get to  
17 them, I would assume that in determining what  
18 limits there are, I -- you -- you say they've  
19 raised certain concerns. They say, oh, it's a  
20 problem with duration. Oh, it's a problem that  
21 the agency has this degree of discretion, that  
22 the agency has this amount of power, that the  
23 source is coming from, the, you know, private  
24 individuals, et cetera, et cetera.

25 But I guess their burden would have to

1 be to determine that those limits exist  
2 somewhere in the law. I mean, it's not just up  
3 to us to sort of say, geez, those things seem  
4 problematic. We would have to find a legal  
5 source, I would think, in order to agree with  
6 them that those limits are actually imposed on  
7 Congress's authority.

8           GENERAL PRELOGAR: That's right. And,  
9 obviously, there are a lot of different policy  
10 judgments that Congress can make in thinking  
11 about the right way to structure funding for  
12 different agencies. It's established a certain  
13 set of norms when it comes to financial  
14 regulators in particular, of which the CFPB is  
15 a part. And I think that the relevant question  
16 here is not, is this a good way to structure an  
17 agency, is that a good policy? It's does the  
18 --

19           JUSTICE JACKSON: Or even has it been  
20 done before?

21           GENERAL PRELOGAR: Right.

22           JUSTICE JACKSON: I mean, I appreciate  
23 all of your historical analysis and all the  
24 things that you're saying, and all of that may  
25 well be so, but I guess I don't understand,



1     like, what if we found that it -- it wasn't  
2     necessarily, you know, set up in this way?  
3     Does that -- does that on its own establish  
4     that Congress couldn't exercise its  
5     prerogative?

6             GENERAL PRELOGAR: I don't think it  
7     necessarily would, and especially it wouldn't  
8     if one of the -- the points of novelty was  
9     something that had nothing to do with  
10    aggravating any potential separation of powers  
11    issue.

12            And this relates back to what I was  
13    saying to Justice Alito, that maybe you can  
14    come up with distinctions, but they're not  
15    materially relevant to the question before the  
16    Court. Instead, I think, if -- if -- if there  
17    were truly some kind of unprecedented funding  
18    scheme, you'd have to ask: How does it differ  
19    and why does that matter? And it's  
20    Respondents' burden to establish those things.

21            JUSTICE JACKSON: Thank you.

22            CHIEF JUSTICE ROBERTS: Thank you,  
23    counsel.

24            Mr. Francisco.

25

1                   ORAL ARGUMENT OF NOEL J. FRANCISCO  
2                   ON BEHALF OF THE RESPONDENTS  
3                   MR. FRANCISCO: Mr. Chief Justice, and  
4 may it please the Court:

5                   This case is about checks and  
6 balances. One of Congress's most important  
7 checks on executive power is its power of the  
8 purse. That's why Alexander Hamilton said that  
9 the unification of sword and purse was the very  
10 definition of tyranny.

11                  This case reflects precisely that  
12 feared unification. The government agrees that  
13 Congress couldn't just authorize the executive  
14 branch to spend whatever it wants. But that's  
15 effectively what Congress did here, where it  
16 authorized the CFPB to spend whatever it deems  
17 reasonably necessary in perpetuity, subject  
18 only to a cap so high it's almost never  
19 relevant, all for the very purpose of making  
20 this the most independent agency in American  
21 history.

22                  If it can do that, then it can  
23 authorize the President to spend whatever he  
24 deems reasonably necessary as long as he  
25 doesn't exceed \$10 trillion, and that would

1 work a sea change in the separation of powers.

2           The government makes two basic  
3 arguments in response. First, it argues that  
4 that hypothetical would be unprecedented. But  
5 the CFPB is also unprecedented. Congress has  
6 never authorized an agency to pick its own  
7 perpetual appropriation, and if it can do that  
8 for the CFPB, it can do it for every other  
9 agency too.

10           Second, the government points to  
11 founding-era fee-for-services agencies like the  
12 Post Office and their modern analogues. But  
13 none of those can demand whatever they want.  
14 Instead, they're limited to what they can  
15 collect from the people that they serve and  
16 regulate. That's why Congress rejected that  
17 model for the CFPB. They thought it made the  
18 agency too politically accountable.

19           And if you jump the shark from those  
20 to this, then you have blessed a regime in  
21 which Congress can authorize the executive  
22 branch to spend whatever it wants to fund the  
23 entire government.

24           In short, the Court should hold the  
25 line where it stands. Otherwise, it will have

1 countenanced the very unification of sword and  
2 purse that the Constitution was designed to  
3 prevent.

4 I'm happy to answer Your Honor's  
5 questions.

6 JUSTICE THOMAS: Mr. Francisco, the --  
7 the -- it would be -- I think it would be  
8 helpful -- this is a -- a -- an Appropriations  
9 Clause case, and you seem to suggest there's a  
10 -- that there is a spillover into separation of  
11 powers issues, non-delegation issues, without  
12 telling us precisely how it does -- how we run  
13 into that problem --

14 MR. FRANCISCO: Mm-hmm.

15 JUSTICE THOMAS: -- and what the  
16 constitutional problem is. So we need a finer  
17 point.

18 I get your point that this is  
19 different, that it's unique, that it's odd,  
20 that they've never gone this far. But that's  
21 -- not having gone this far is not a  
22 constitutional problem. It may be a problem  
23 with analogues, but it doesn't --

24 MR. FRANCISCO: Mm-hmm.

25 JUSTICE THOMAS: -- prove your case.

1 And I think we just need you to give us a finer  
2 point than we've had.

3 MR. FRANCISCO: Sure. At a bare  
4 minimum, the Appropriations Clause requires  
5 Congress to determine how much the government  
6 should be spending. That's the core element of  
7 an appropriation. That's why I think everybody  
8 agrees that Congress can't simply say to the  
9 President: Spend whatever you want.

10 But if -- but -- but this is  
11 functionally no different when you're saying to  
12 an agency, spend whatever you want in  
13 perpetuity as long as you don't exceed a number  
14 so high it's almost never relevant. I think  
15 that's why this unique constellation of factors  
16 is so uniquely problematic --

17 JUSTICE JACKSON: But,  
18 Mr. Francisco --

19 MR. FRANCISCO: -- because --

20 JUSTICE JACKSON: -- I'm sorry --  
21 where do you get that from? So you said the  
22 definition is what now?

23 MR. FRANCISCO: I think the core  
24 element of an appropriation is that Congress  
25 has to, at a minimum, determine the amount that

1 the government should be spending. It cannot  
2 --

3 JUSTICE JACKSON: A fixed amount? It  
4 can't do it by a cap? It has to be a fixed  
5 amount?

6 MR. FRANCISCO: Your -- yes, Your  
7 Honor, I think it has to set the amount that it  
8 should be spending. It can leave some play in  
9 the joints, as it did in the founding-era "sums  
10 not exceeding" statutes. Remember those were  
11 annual appropriations in which --

12 JUSTICE JACKSON: Okay. So where --  
13 where do you get that from?

14 MR. FRANCISCO: Your Honor, I think  
15 that --

16 JUSTICE JACKSON: I mean, what -- what  
17 --

18 MR. FRANCISCO: So I get it from, I  
19 think, the text of the Appropriations Clause.  
20 I think that's the core element of an  
21 appropriation. But I also do think you have to  
22 --

23 JUSTICE JACKSON: I'm sorry, the word  
24 "appropriation" -- like, what -- what in the  
25 text of the Appropriations Clause --

1 MR. FRANCISCO: Sure.

2 JUSTICE JACKSON: -- makes it so that  
3 the requirement is that the government can only  
4 --

5 MR. FRANCISCO: Mm-hmm.

6 JUSTICE JACKSON: -- or the government  
7 has to fix the amount?

8 MR. FRANCISCO: Three things, Your  
9 Honor.

10 JUSTICE JACKSON: Yes.

11 MR. FRANCISCO: The first is I think  
12 that it is inherent in what an appropriation  
13 is. It's got to be the authorization to spend  
14 an amount of money.

15 Secondly, any spending has to be in --

16 JUSTICE JACKSON: But wait. Where is  
17 the fixed amount part of that?

18 MR. FRANCISCO: Sure, Your Honor --

19 JUSTICE JACKSON: Yeah.

20 MR. FRANCISCO: -- and that's what I'm  
21 getting to.

22 JUSTICE JACKSON: Okay.

23 MR. FRANCISCO: Secondly, any spending  
24 has to be in consequence of an appropriation.  
25 So it's got to be in consequence of Congress's

1 judgment. If you simply delegate to the  
2 executive the authority to make that front-line  
3 determination, the spending isn't in  
4 consequence of Congress's determination.

5 And the third does turn to history and  
6 purpose. The whole point of separating the  
7 sword from the purse is to protect individual  
8 liberty. If you allow Congress to essentially  
9 transfer its authority to pick the  
10 appropriation to --

11 JUSTICE JACKSON: But it -- it's not a  
12 transfer if --

13 MR. FRANCISCO: -- the executive  
14 branch itself --

15 JUSTICE JACKSON: So what if I defined  
16 "appropriation" differently, all right? What  
17 if -- what if an appropriation is just the  
18 decision that you are going to -- you know,  
19 that -- that a particular government department  
20 can spend up to a certain amount of money, that  
21 they have the ability to use a certain amount  
22 of the public fisc? What if that's my starting  
23 definition?

24 MR. FRANCISCO: Well, Your Honor, if  
25 that's --



1 JUSTICE JACKSON: Do you lose?

2 MR. FRANCISCO: -- your starting  
3 definition, then I think you've adopted a  
4 definition of "appropriation" that does, in  
5 fact, allow Congress to essentially let the  
6 President pick his own appropriation. And if  
7 you can do that --

8 JUSTICE JACKSON: But, if that's the  
9 definition in the Constitution, then I'm not  
10 allowing anything. That's what the  
11 Constitution says.

12 MR. FRANCISCO: Well, yeah, if you  
13 think that the Constitution allows Congress to  
14 essentially say to the executive, you pick the  
15 number, spend whatever you want forever, I -- I  
16 -- I would agree, I would lose this case.

17 JUSTICE KAGAN: Mr. Francisco --

18 MR. FRANCISCO: I happen to think --

19 JUSTICE KAGAN: -- if I could  
20 understand you because your argument in the  
21 briefs, as I understood it, did have a lot of  
22 moving parts, and -- and -- and now this is a  
23 -- a much clearer view of what the  
24 Appropriations Clause demands. And if you're  
25 saying it demands a specific number that, with

1 a little wiggle room, the executive has to  
2 spend, is that the way I understood it?

3 I mean, I do think that if you go back  
4 to founding-era statutes, there's this constant  
5 "sums not exceeding" --

6 MR. FRANCISCO: Mm-hmm.

7 JUSTICE KAGAN: -- "X" for a  
8 particular purpose. And, you know, Justice  
9 Scalia, in Clinton, said the constitutionality  
10 of such appropriations has never seriously been  
11 questioned.

12 So, if that's really the core --

13 MR. FRANCISCO: Sure.

14 JUSTICE KAGAN: -- argument that  
15 you're making, not, like, there are these 22  
16 different things that come together in this --

17 MR. FRANCISCO: Mm-hmm.

18 JUSTICE KAGAN: -- particular statute  
19 to create a unicorn, but -- but -- I mean, that  
20 seems a much more fundamental argument and one  
21 that has been decisively rejected --

22 MR. FRANCISCO: So two --

23 JUSTICE KAGAN: -- by our history.

24 MR. FRANCISCO: -- two responses, Your  
25 Honor. First, that's not the core of my

1 argument, and, secondly, I don't think it's  
2 been decisively rejected by history.

3 I think the problem, when you combine  
4 a delegation to the executive to pick his own  
5 appropriation in perpetuity, subject to a  
6 number that's so high it's almost never been  
7 hit, the problem with that combination of  
8 factors is because it uniquely essentially  
9 gives away the appropriations power.

10 If you can do that for one agency, you  
11 can do it for every agency. And then Congress  
12 can effectively --

13 JUSTICE SOTOMAYOR: I'm sorry --

14 MR. FRANCISCO: -- say to the  
15 executive --

16 JUSTICE KAGAN: I mean, can we -- can  
17 we just sort of -- I mean, this is \$600  
18 million, and this is a rounding error in the  
19 federal budget, honestly. Six hundred million  
20 dollars and says up to \$600 million, I mean,  
21 you say, oh, it's -- it's impossible to need  
22 it. I mean, at the CFPB, it's a pretty new  
23 agency, and, presumably, its regulatory  
24 programs are going to develop over time.

25 MR. FRANCISCO: Mm-hmm.

1 JUSTICE KAGAN: Congress thought \$600  
2 million was a pretty good number. Maybe that  
3 will prove to be too high and Congress will cut  
4 it back. Maybe, over time, the CFPB actually  
5 will hit \$600 million because they'll create  
6 new programs that -- but anyway --

7 MR. FRANCISCO: Mm-hmm.

8 JUSTICE KAGAN: -- \$600 million, \$400  
9 million, the CFPB, there's -- there was a -- a  
10 statement that the Chief Justice made, one of  
11 his year-end reports, talked about how great it  
12 was that we returned monies to the federal  
13 Treasury because that meant that we weren't  
14 wasteful.

15 So the CFPB is not being wasteful, and  
16 it's using --

17 MR. FRANCISCO: Sure.

18 JUSTICE KAGAN: -- what it should be  
19 using in its view and -- and generously, you  
20 know, basically saying not the rest. What is  
21 -- what is -- what is so constitutionally --

22 MR. FRANCISCO: So -- so a couple of  
23 things, Your Honor. First of all,  
24 respectfully, I -- I'd probably push back on  
25 the premise that the CFPB is being

1 parsimonious. I think what they are doing is  
2 asking for large amounts and rolling over a  
3 good chunk of that into their endowment. But  
4 I'll -- I'll put that to the side.

5           When you look at the caps, I think you  
6 have to look at it both from the back end and  
7 the front end. On the back end, I think most  
8 of us seem to agree -- and I think sort of the  
9 government agrees -- that there has to be some  
10 kind of upper limit, and if there is an upper  
11 limit, it's got to be meaningful. The fact  
12 that they've never actually hit that upper  
13 limit is pretty good evidence that it's not  
14 that meaningful a limit.

15           But I think the other thing you have  
16 to look at it is from the front end --

17           JUSTICE KAGAN: Maybe it's good  
18 evidence that the CFPB should be doing more.

19           MR. FRANCISCO: Well, Your Honor,  
20 that's -- that's when I think you also have to  
21 look at it from the front end. And from the  
22 front end, the question is, has Congress made a  
23 determination as to what the executive branch  
24 or the CFPB should be spending?

25           And, here, it's delegated that

1 judgment to the director in a way, I think,  
2 that the Gundy dissent illustrates the problems  
3 with this type of regime.

4 Remember, the problem from the  
5 dissenter's perspective in Gundy was that under  
6 SORNA, the Attorney General had the authority  
7 to set sex offender requirements anywhere  
8 between zero requirements on the one hand and a  
9 very real statutory maximum on the other, the  
10 requirements that applied to post-Act offenders  
11 but otherwise gave him broad discretion between  
12 the polls.

13 JUSTICE BARRETT: Mr. Francisco --

14 MR. FRANCISCO: Well, this is  
15 effectively --

16 JUSTICE BARRETT: -- what would the  
17 standard be -- is it like an intelligible  
18 principle of -- of money spent. I mean, I  
19 think we're all struggling to figure out then  
20 what's -- what's the standard that you would  
21 use, just assuming that you're right that there  
22 has --

23 MR. FRANCISCO: Mm-hmm.

24 JUSTICE BARRETT: -- to be something  
25 more than the \$600 million, how do you decide

1     how much is too much or how specific is  
2     specific enough?

3             MR. FRANCISCO:   So, Your Honor, I  
4     think that at the back end, it's -- it's  
5     difficult to come up with a hard-and-fast rule  
6     that's saying too much is too much, which is  
7     why I do think you need to look at it from the  
8     front end and ask:  Has Congress made a  
9     determination as to what the amount should be,  
10    or has it delegated that fundamental  
11    determination to the executive branch?

12            JUSTICE JACKSON:  But don't we, though  
13    --

14            MR. FRANCISCO:  And I think it's far  
15    worse --

16            JUSTICE JACKSON:  -- in doing that,  
17    don't we have to assume that that's what the  
18    Constitution requires of Congress?  That's  
19    where I'm getting hung up, that you keep saying  
20    Congress is delegating this authority, and we  
21    understand your argument with respect to it.

22            MR. FRANCISCO:  Mm-hmm.

23            JUSTICE JACKSON:  But what if that's  
24    not the sort of content of the authority?

25            MR. FRANCISCO:  Well --

1 JUSTICE JACKSON: What if Congress  
2 doesn't have to --

3 MR. FRANCISCO: Well, Your Honor --

4 JUSTICE JACKSON: -- do that?

5 MR. FRANCISCO: -- if -- if -- if  
6 that's your position, I -- I don't think I can  
7 get your vote, but I think, if you step back  
8 and you understand that the Appropriations  
9 Clause is meant to separate the power of the  
10 sword from the purse, then it has to be a  
11 starting point that Congress can't simply say  
12 to the executive: You know, you pick the  
13 amount. We're not going to pick it. You pick  
14 it, which is why I think, when you look at this  
15 language, at a minimum, Congress has to pick  
16 the amount.

17 JUSTICE GORSUCH: Mr. Francisco --

18 JUSTICE ALITO: I think that --

19 JUSTICE GORSUCH: -- I would -- I was  
20 hoping you might finish your answer to Justice  
21 Barrett.

22 MR. FRANCISCO: Sure.

23 JUSTICE GORSUCH: It would be useful  
24 for me.

25 MR. FRANCISCO: And -- and, with



1 respect -- Justice Barrett, with respect to  
2 your question, when it comes to delegation, I  
3 think it's particularly problematic with  
4 respect to the Appropriations Clause.

5 Remember, the Appropriations Clause isn't in  
6 Section 8 of Article I, it's in Section 9 of  
7 Article I.

8           So it is both a -- it is not just a  
9 privilege of Congress, it's an obligation and a  
10 duty that Congress has to check the executive  
11 branch. And if it can simply transfer to the  
12 executive its duty to check the executive, you  
13 are unifying the sword and purse.

14           So, to the extent that there's any  
15 delegation allowed in the context of setting  
16 the amount of the appropriation, it's got to be  
17 a very narrow one. And that is a perfect  
18 explanation for the founding-era "sums not  
19 exceeding" statutes.

20           Those were statutes where Congress, in  
21 an annual appropriation, fixed the amount that  
22 it thought that the government should be  
23 spending based on Hamilton's detailed  
24 estimates, often down to the penny. They just  
25 simply recognized a margin of error, and if

1 Congress got it wrong in one year, it could fix  
2 it in the next year.

3 That is, again, why I think that this  
4 unique constellation of factors is so uniquely  
5 problematic.

6 JUSTICE BARRETT: But -- but you  
7 concede that standing appropriations aren't  
8 per se unconstitutional. So you're saying  
9 Congress could fix it in the next year. But  
10 how long -- how long before a standing  
11 appropriation becomes a problem?

12 MR. FRANCISCO: Sure, Your Honor.  
13 I -- I would not concede that a -- a -- a -- a  
14 long-term standing appropriation would be  
15 constitutional. I think non-delegation  
16 principles generally recognize some play in the  
17 joints.

18 I actually think it would be  
19 problematic to simply delegate to the executive  
20 for one year to pick its own number within a  
21 broad band of discretion, but I don't have to  
22 defend that position because, here, we've got  
23 the entire opposite end of the spectrum. This  
24 is a perpetual delegation to pick your own  
25 number within a very broad range of discretion

1 --

2 JUSTICE KAVANAUGH: What -- what do  
3 you --

4 MR. FRANCISCO: -- even if you think  
5 that upper line is meaningful.

6 JUSTICE KAVANAUGH: Sorry. What --  
7 what do you -- the word "perpetual" I'm having  
8 trouble with because it implies that it's  
9 entrenched and that a future Congress couldn't  
10 change it. But Congress could change it  
11 tomorrow and there's nothing perpetual or  
12 permanent or -- that -- about this.

13 MR. FRANCISCO: So I -- I think it's  
14 entrenched, Your Honor, in the sense that I  
15 think maybe the Chief Justice was referring to.

16 Once Congress gives it over to the  
17 executive and expands executive power, you've  
18 now given, you know, a coequal branch of  
19 government a large amount of your power and you  
20 need to claw it back.

21 You can't claw it back through an  
22 ordinary law. You can only claw it back  
23 through either convincing the President himself  
24 to give up presidential power, something you've  
25 given to him, which is tough to do, or you've

1 got to override a presidential veto.

2 JUSTICE KAVANAUGH: Well, if a group  
3 -- if a member or a House of Congress tomorrow,  
4 if a majority of a House of Congress said we're  
5 not going to fund -- pick your agency -- unless  
6 we change the CFPB funding structure, they  
7 could do that.

8 MR. FRANCISCO: Sure, Your Honor, they  
9 could do that. But, nonetheless, once you give  
10 up power to another agency, you've suddenly  
11 flipped the baseline for getting it back.

12 JUSTICE KAVANAUGH: Right.

13 MR. FRANCISCO: You do need to use  
14 those very powerful tools and ultimately  
15 override a presidential veto or convince the  
16 President to give up his -- his own authority,  
17 which is very different --

18 JUSTICE KAVANAUGH: Right. I agree --  
19 I agree with you on flipping the baseline.  
20 I -- I agree with you on that. But just the --  
21 the word "perpetual" or "forever" or  
22 "permanent," I think, is -- is a little strong  
23 here.

24 Then, on the independent point, you  
25 said Congress had created the most independent

1 agency in American history. And I certainly  
2 agree that as originally constructed, the CFPB  
3 had in my view a massive constitutional flaw --

4 MR. FRANCISCO: Mm-hmm.

5 JUSTICE KAVANAUGH: -- in the single  
6 director who was protected by for-cause  
7 removal, but that, of course, was fixed and  
8 addressed in Seila Law. And now it's not  
9 independent at all, at least as the term  
10 "independent" is used.

11 MR. FRANCISCO: Sure.

12 JUSTICE KAVANAUGH: It's under the  
13 direct supervision and control of the  
14 President. So I don't think it's -- correct me  
15 if you think that's wrong -- but --

16 MR. FRANCISCO: Well, they certainly  
17 --

18 JUSTICE KAVANAUGH: -- it's not  
19 independent.

20 MR. FRANCISCO: -- they certainly  
21 fixed half the problem, but they didn't fix the  
22 other half of the problem in our view.

23 Look, everybody knew what was going on  
24 in 2010. The 2010 Congress knew that there  
25 would come a time when future Congresses didn't

1 look so favorably upon the CFPB, and they  
2 wanted to insulate a future CFPB from political  
3 pressure from a future Congress, and that's  
4 precisely why they adopted the funding regime  
5 that they adopted.

6 But future Congresses are supposed to  
7 have the ability to check the President through  
8 a continuing power of the purse. It's meant to  
9 be a continuing check on executive power.

10 And to come back to the fundamental  
11 problem of the transfer of that front-line  
12 determination to the executive branch, to the  
13 director, as far as this statute is concerned,  
14 I will even concede for the sake of argument  
15 that wide band is a meaningful one.

16 Within that band, if the director  
17 picks \$150 million or \$600 million, it's  
18 perfectly fine from Congress's perspective  
19 because Congress simply said to the Board: You  
20 make that determination.

21 And that top-line number isn't even a  
22 real number because they can further evade it  
23 by building out this continuing endowment that  
24 would --

25 JUSTICE KAGAN: Mr. Francisco, it --

1     it -- it does seem to me that your argument is  
2     essentially that what the Appropriations Clause  
3     demands is annual line-item appropriations,  
4     that that's the -- not just the paradigm  
5     appropriation but the only constitutionally  
6     valid kind of appropriations and that any  
7     deviation from that needs some special  
8     justification or maybe is just, like,  
9     unconstitutional per se. I'm not exactly sure  
10    what the argument is.

11             But the history of our country just  
12    rejects that scheme. I mean, that might have  
13    been a way to understand what the Framers were  
14    doing, but it turns out that from the very  
15    first year, that's not what they were doing.  
16    That's not what they did. Annual line-item  
17    appropriations were some appropriations but  
18    massively not all appropriations.

19             MR. FRANCISCO: And --

20             JUSTICE KAGAN: So you're just flying  
21    in the face of 250 years of history.

22             MR. FRANCISCO: And -- and,  
23    respectfully, Your Honor, that's not my  
24    argument. I think that the lack of durational  
25    limits here is what makes this particularly

1     problematic, but it's particularly problematic  
2     when you combine that with a delegation to an  
3     executive branch agency to pick its own  
4     appropriation, subject only to a limit that's  
5     so high it's almost never relevant.

6             If you can do that here, you can go  
7     agency by agency by agency and simply say:  
8     Spend whatever you think reasonably appropriate  
9     as long as you don't hit \$10 billion. And  
10    while my friends --

11            JUSTICE SOTOMAYOR: I'm sorry, I'm  
12    trying to understand your argument, and I'm at  
13    a total loss.

14            MR. FRANCISCO: I'll -- I'll try to do  
15    better, Your Honor.

16            JUSTICE SOTOMAYOR: Okay. Let -- let  
17    -- I think I understand it the way Justice  
18    Kagan does, but you're telling me it's  
19    something different. From the very beginning,  
20    Congress gave sometimes a lump sum and said to  
21    an agency you can spend this amount but didn't  
22    do a line by line on what or how much, and the  
23    agency would decide how much of that sum it  
24    needed.

25            Over 60 percent of the appropriations



1 -- I think it may be 73, 63, something like  
2 that -- are of standing -- standing  
3 appropriations. They're not given every year.  
4 And some of them are fixed and some of them are  
5 not. Some are, you know, whatever you need to  
6 run your agency, including, from the very  
7 beginning, in 1789, the Customs Service.

8           So I don't understand what you're  
9 saying.

10           MR. FRANCISCO: So -- so, Your Honor,  
11 respectfully --

12           JUSTICE SOTOMAYOR: It's -- unless  
13 you're saying standing appropriations are  
14 wrong, tell me why they're wrong. If they're  
15 not wrong, tell me when they're right. Tell me  
16 how much detail they have to go into and why is  
17 a cap different --

18           MR. FRANCISCO: Sure.

19           JUSTICE SOTOMAYOR: -- than a standing  
20 appropriation for a certain amount since we  
21 can't force anybody to spend as much money as  
22 you give. And, routinely, lots of agencies  
23 return money, including this one, the Court.  
24 So either -- I don't know what you want.

25           MR. FRANCISCO: So the -- so the first

1 thing, Your Honor, is I would like to address  
2 the Customs Service because my understanding of  
3 it is not the same as my friend's understanding  
4 of it.

5 As I understood the -- understand the  
6 Customs Service at the time of the founding, it  
7 was actually funded through fees that it  
8 collected as part of the collection of customs,  
9 and Congress set those formulas. Congress  
10 determined what fees they could collect or what  
11 formula they could use to collect those fees.

12 And, in addition, it was supervised by  
13 the Department of the Treasury, which it was  
14 itself subject to annual appropriations. So I  
15 -- I don't think it was a standing  
16 appropriation.

17 Now it was a standing appropriation  
18 between 1849 and 1912. There was a \$1.5  
19 million standing appropriation. But two things  
20 about that. It was still subject to the  
21 supervision of the Secretary of the Treasury,  
22 and that turned out not to be enough. They had  
23 to generally go back for regular  
24 appropriations. Now that's at least how I  
25 understand the history of the Customs Service.

1           In terms of what the standard is, I  
2     think our front-line rule is, at a minimum,  
3     Congress has to determine the amount. And the  
4     reason I'm focusing on the factors that I'm  
5     focusing on is because, when you bring those  
6     factors together, you have really exploded any  
7     limitation at all.

8           And I think it's enough to say that  
9     when you delegate to the executive the  
10    authority to pick its own numbers, subject only  
11    to a cap that's so high it's rarely relevant,  
12    and if not perpetually, at least for a -- a  
13    long period of time, you have uniquely brought  
14    together a set of factors that does allow  
15    Congress to essentially transfer its  
16    appropriations power to the executive branch  
17    for an indefinite period of time, and you just  
18    have to multiply that across the agencies to  
19    see why that's so dangerous. We don't --

20           JUSTICE KAGAN: It sure seems that on  
21    your view, the Federal Reserve would also be  
22    unconstitutional. Why -- why or why not?

23           MR. FRANCISCO: No, Your Honor, for a  
24    couple of reasons. I think the main one is  
25    that as this Court has suggested in *Seila Law*

1 and as I think then-Judge Kavanaugh suggested  
2 on the D.C. Circuit, the Federal Reserve is  
3 pretty much sui generis. I think it reflects  
4 the fact that at the time of the founding, the  
5 core functions of the Fed, controlling the  
6 money supply through open market transactions,  
7 weren't really considered governmental  
8 functions at all. That's why --

9 JUSTICE KAGAN: So there's also a  
10 governmental function component of your test?

11 MR. FRANCISCO: Well, no, Your Honor.  
12 I mean, if it's not --

13 JUSTICE KAGAN: Because you state a  
14 test, and then a -- a -- a -- a -- a agency  
15 that clearly fails under that test, you say,  
16 oh, no, I don't mean that.

17 MR. FRANCISCO: No, because, for the  
18 Fed, remember, the First and Second National  
19 Banks were organized as private banks. To this  
20 day, the presidents of the private regional  
21 reserve banks sit on the Federal Open Markets  
22 Committee, and it's also why I think that if  
23 this Court were ever to take the step of  
24 overturning Humphrey's Executor, it likely  
25 wouldn't impact the for-cause removal

1 restrictions on the Board itself. And I think  
2 it does reflect that historical tradition in  
3 the Fed of it not really --

4 JUSTICE KAGAN: Okay. It -- it's just  
5 --

6 MR. FRANCISCO: -- exercising  
7 governmental power.

8 JUSTICE KAGAN: Yeah, it's just too  
9 important and what -- whatever. I mean, the  
10 FDIC, the OCC, they also fail your test.

11 MR. FRANCISCO: No, the FDC -- IC and  
12 the OCC, I think, are well within the tradition  
13 of agencies that are limited to what they can  
14 collect from the people that they serve and  
15 regulate. But I think my more important point,  
16 Your Honor, is if you think that --

17 JUSTICE KAGAN: I mean, you're now  
18 adding a new thing to your test.

19 MR. FRANCISCO: No, I'm not, Your  
20 Honor. What I'm saying is that if you think  
21 that those serve as the model for the CFPB,  
22 then it really is Katy, bar the door. As my  
23 friend explained, those agencies don't even  
24 have a statutory cap.

25 So, if you think that that's what

1 justifies the CFPB, then you truly could go  
2 agency by agency and simply say: Spend  
3 whatever you want, full stop, period. We'll  
4 come back to you when we think we can  
5 override the Presidential veto.

6 JUSTICE KAVANAUGH: But then you just  
7 said --

8 JUSTICE ALITO: Mr. Francisco, until  
9 the very end of the Solicitor General's  
10 argument, I thought I understood the limiting  
11 principle that she was advocating and the  
12 limiting principle that you were advocating,  
13 and at least at a fairly high level of  
14 generality, I thought there was agreement on  
15 what the limiting principle was, and that was a  
16 comparison of the setup that is before us with  
17 historical practice.

18 And I don't think there's anything  
19 unusual about asking counsel in cases that come  
20 before us for the limiting principle of the  
21 argument that they're making. That's a basic  
22 question that we ask. I don't think it's a  
23 question of burden-shifting.

24 In any event, at the end of the  
25 Solicitor General's argument, she seemed to be

1 embracing a much broader argument that I think  
2 was posed by Justice Jackson's questions, and  
3 that is whether the Appropriations Clause is  
4 satisfied so long as Congress adopts any law  
5 that says that you, Agency, you get money in  
6 this way. So long as that there's any law that  
7 does that, that's consistent with the  
8 Appropriations Clause.

9 Now the Solicitor General on rebuttal  
10 can clarify whether she thinks that's the  
11 correct test that we should apply or whether  
12 it's the one that I had previously thought she  
13 was advocating, which looks to whether  
14 something falls far outside Congress's  
15 historical practices.

16 So could you comment on this broad  
17 "any law" argument and, in particular, answer  
18 the question whether the Appropriations Clause  
19 would have any meaning if that broad  
20 interpretation were adopted?

21 MR. FRANCISCO: Well, and -- and, Your  
22 Honor, that broad interpretation can't possibly  
23 be right if you think that the point of the  
24 Appropriations Clause is meant to ensure that  
25 Congress has the duty and obligation to

1 exercise a powerful check on executive power,  
2 because that would simply allow the very first  
3 Congress to say to President Washington:  
4 Mr. President, spend whatever you think is  
5 reasonably appropriate. We'll come back  
6 sometime if we think you got it totally wrong  
7 and we can override your veto.

8 So I think that cannot possibly be the  
9 test.

10 JUSTICE ALITO: And the -- the  
11 Constitution says "No Money shall be drawn from  
12 the Treasury but in Consequence of  
13 Appropriations made by Law." How money would  
14 be drawn by the -- from the Treasury without a  
15 law is something that baffles me.

16 MR. FRANCISCO: I -- I -- I think  
17 that's exactly right, Your Honor.

18 JUSTICE JACKSON: Mr. Francisco --

19 MR. FRANCISCO: And, again --

20 JUSTICE JACKSON: -- in Cincinnati  
21 Soap, I -- I had understood the point of the  
22 Appropriations Clause to prevent the executive  
23 in other circumstances from exercising the  
24 authority to take money without consent of the  
25 legislature. I -- I had understood the -- the



1 work of the clause not to be to direct the  
2 legislature as to how to exercise its own  
3 prerogative of the purse but, instead, to  
4 ensure -- to support the separation of powers  
5 concept by ensuring that the prerogative is  
6 lodged with the legislature and not with the  
7 executive or someone else. Am I wrong about  
8 that?

9 MR. FRANCISCO: Your Honor,  
10 respectfully, I think you are. I think it is  
11 both Congress's prerogative but also its  
12 obligation to check the power of the executive  
13 branch. That, after all, was the whole reason  
14 --

15 JUSTICE JACKSON: No, but I'm -- is it  
16 -- is there something about the Appropriations  
17 Clause that specifically directs Congress with  
18 respect to its own exercise of the  
19 appropriations power?

20 MR. FRANCISCO: Well, Your Honor, I  
21 don't think there's anything specifically in  
22 the word "appropriation" that necessarily  
23 answers it either way, which is why I think you  
24 do have to take a step back and --

25 JUSTICE JACKSON: But don't you have

1 to have that in order to say that Congress is  
2 violating the Appropriations Clause by the way  
3 in which it exercised it here?

4 MR. FRANCISCO: Not in -- not in terms  
5 of how --

6 JUSTICE JACKSON: I mean, I thought  
7 your answer would have to be -- I thought your  
8 answer would have to be that the appropriations  
9 language in the Constitution carries with it  
10 the limitations that you say have to be applied  
11 in this situation.

12 MR. FRANCISCO: Not in terms --

13 JUSTICE JACKSON: That it has to be  
14 fixed, that it has to be, you know, whatever,  
15 you know --

16 MR. FRANCISCO: Right.

17 JUSTICE JACKSON: -- the other aspects  
18 that you say are troubling --

19 MR. FRANCISCO: Yeah.

20 JUSTICE JACKSON: -- would have to be  
21 derived from that constitutional provision,  
22 right?

23 MR. FRANCISCO: Not in terms of how  
24 this Court traditionally interprets these  
25 provisions when it comes to separation of

1 powers. Look, as some members of the Court  
2 have pointed out, there's no removal clause in  
3 the Constitution, but you infer it --

4 JUSTICE JACKSON: But where do we get  
5 them from?

6 MR. FRANCISCO: You infer it from this  
7 --

8 JUSTICE JACKSON: If they're not in  
9 the Constitution, where do we get -- I don't  
10 understand. We can't just suddenly decide that  
11 things are troubling without some kind of legal  
12 reference point.

13 MR. FRANCISCO: Well, Your Honor, I  
14 think, when it comes to separation of powers,  
15 it's inferred from the text and structure of  
16 the Constitution construed in light of its  
17 overriding purpose. And, here --

18 JUSTICE BARRETT: But, Mr. Francisco,  
19 the removal clause comes from the vesting -- I  
20 mean, the removal cases focus on the vesting  
21 clause in Article II, so there is a textual  
22 hook.

23 MR. FRANCISCO: Well, and, here, Your  
24 Honor, there is a textual hook as well in the  
25 Appropriations Clause, which, again, is set

1       forth in Section 9 of Article I, which actually  
2       sets forth limitations and obligations upon  
3       Congress.

4                JUSTICE BARRETT:  Except the limit's  
5       --

6                MR. FRANCISCO:  And I think that --

7                JUSTICE BARRETT:  -- not there.  I  
8       mean, I guess that's what I'm struggling with  
9       and I take it some of the other questions are  
10      too.  I mean, you have the unitary executive  
11      theory, right?

12              MR. FRANCISCO:  Mm-hmm.

13              JUSTICE BARRETT:  You would say, well,  
14      if all executive power has to be in the  
15      President, then his ability to fire someone,  
16      his ability to remove someone can't be  
17      hindered.

18              But, here, you were just saying to  
19      Justice Jackson that there's nothing in the  
20      Appropriations Clause itself or in the word  
21      "appropriations" that imposes the limits that  
22      you're talking about.

23              MR. FRANCISCO:  No.  What I'm saying  
24      is that the word "appropriation" is -- you --  
25      you can interpret it in different ways.  At its

1 core, what the Appropriations Clause does,  
2 Congress has to make an appropriation. It's  
3 got to determine what the government should be  
4 spending. It's got to determine the amount  
5 that it should be spending.

6 And it's got a non-delegation  
7 component baked into it because you cannot  
8 simply transfer that core legislative function  
9 to the executive branch. And that's why I  
10 think that even if you, you know, put the issue  
11 of a cap aside, even if you think that this is  
12 a meaningful band of discretion, it's an  
13 extraordinarily wide band of discretion that  
14 excuses --

15 JUSTICE BARRETT: But what if you  
16 said, like, four years, \$400 million a year?  
17 Would that be a problem?

18 MR. FRANCISCO: If it were \$400  
19 million a year, I think that would be fine. If  
20 it said to the --

21 JUSTICE BARRETT: So 600 million was  
22 too much?

23 MR. FRANCISCO: If it said to the --  
24 well, what I'm getting at is, if Congress is  
25 fixing the right amount, the amount should be

1     \$400 million or the amount should be \$600  
2     million, I would -- that would be a much more  
3     difficult case for me.

4             But, when Congress is doing what it  
5     did here, it's saying to the director: You  
6     pick the amount that you think is reasonably  
7     necessary. It could be zero. It could be \$750  
8     million.

9             It's taking that core element of an  
10    appropriation, determining the amount that the  
11    government should be spending, and it's saying  
12    we, Congress, are not going to exercise that  
13    judgment, we're kicking that over to you, the  
14    executive branch, to exercise that judgment.

15            And that is what's so problematic and  
16    is what is so also historically unprecedented  
17    if we're going to use precedent as the test.  
18    The only counter-examples tend to be these  
19    self-funding agencies, the Post Office, the  
20    Patent Office, their modern-day analogues.  
21    Well, they don't get to pick their amount  
22    because they're different in a meaningful  
23    sense. They're limited to what they can  
24    collect from the people they regulate and  
25    serve.

1           And there's a historical tradition for  
2 those types of agencies, but that history tells  
3 us a couple of other things too. It's never  
4 been extended beyond that group of agencies.  
5 That model was rejected for the CFPB. That was  
6 actually the model that President Obama  
7 proposed for the CFPB, but Congress rejected it  
8 because it wanted to make this agency even more  
9 independent.

10           And, finally, if you do think that's  
11 the model, there really is no limit because  
12 those agencies don't even have a cap. So  
13 Congress could just say to every agency: Spend  
14 whatever you think reasonably appropriate, you  
15 make the front-line judgment within this very  
16 broad range of discretion in something maybe  
17 not quite perpetual but close to it.

18           CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20           Justice Thomas?

21           JUSTICE THOMAS: Mr. Francisco, just  
22 briefly, I'd like you to complete this  
23 sentence. Funding of the CFPB is -- violates  
24 the Appropriations Clause because?

25           MR. FRANCISCO: Because Congress has

1 not determined the amount that this agency  
2 should be spending. Instead, it has delegated  
3 to the director the authority to pick his own  
4 appropriation, subject only to an upper limit  
5 that's so -- so high it's rarely meaningful.

6 CHIEF JUSTICE ROBERTS: Justice Alito?

7 JUSTICE ALITO: Well, my -- my concern  
8 is the limiting principle that both sides are  
9 advocating, and you just addressed your answer  
10 to Justice Thomas, and I remain confused about  
11 the government's limiting principle, whether it  
12 is adopting the argument that any law -- any  
13 law suffices or whether it requires us to look  
14 at historical examples and see whether there's  
15 anything that's at least roughly analogous to  
16 what is before us, whether what is before us  
17 goes far beyond anything that Congress has done  
18 in the past.

19 I won't ask the question of the  
20 Solicitor General in rebuttal, but maybe she'll  
21 answer that question at that time.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Sotomayor?

24 JUSTICE SOTOMAYOR: I -- I don't know  
25 how to take your answer because it's so



1 open-ended. I don't know how much is too much.  
2 You know, are you going to say, if it -- if  
3 it's not close to 30 percent, 40 percent,  
4 50 percent of expenditures, 90 percent, are we  
5 going to have to apply this to every agency  
6 that returns money or underspends every year?  
7 I don't know.

8 But can I get to remedy for a moment?

9 MR. FRANCISCO: Sure.

10 JUSTICE SOTOMAYOR: All right. Tell  
11 me why basically saying every rule passed by  
12 this agency has to be struck down.

13 MR. FRANCISCO: Well, that's certainly  
14 not what we're saying, Your Honor. We -- we --

15 JUSTICE SOTOMAYOR: That's what the  
16 Fifth Circuit said.

17 MR. FRANCISCO: -- we have challenged  
18 one rule. We've asked for that one rule to be  
19 set aside and that rule --

20 JUSTICE SOTOMAYOR: But I want to tell  
21 me how the logic wouldn't apply to everything  
22 the agency has done, to every rule, and how do  
23 we avoid the market --

24 MR. FRANCISCO: Sure.

25 JUSTICE SOTOMAYOR: -- disruption that

1 the SG and the amici point to?

2 MR. FRANCISCO: Yeah. Your Honor, in  
3 a way, I don't think that this argument really  
4 stands on its own terms because, if we're  
5 right, then this does have to go back to  
6 Congress for a valid appropriation.

7 And when Congress adopts a valid  
8 appropriation, it can ratify whatever rules and  
9 regulations it wants to ratify, and if it  
10 doesn't ratify them, it pays the political  
11 price for that choice too.

12 JUSTICE SOTOMAYOR: All right. So  
13 tell me which parts of the law or which part of  
14 this structure you would strike down.

15 MR. FRANCISCO: The funding  
16 provisions, the -- the provision that --

17 JUSTICE SOTOMAYOR: So should they say  
18 every -- if they said something every year,  
19 whatever you spend on salaries, office space,  
20 your legal functioning, your experts, whatever  
21 else, the Federal Reserve Board has to pay just  
22 that amount, is that okay for you?

23 MR. FRANCISCO: Your Honor, I -- are  
24 we -- have we moved off of remedy on to -- back  
25 on to merits?

1 JUSTICE SOTOMAYOR: No, we're still on  
2 remedy. Is that still -- because if we sever  
3 that --

4 MR. FRANCISCO: No. No, Your Honor.  
5 I don't think it --

6 JUSTICE SOTOMAYOR: -- and say they  
7 can only ask for what they've spent?

8 MR. FRANCISCO: Oh, I see. No, Your  
9 Honor, because it's not severable. You'd  
10 essentially have to -- the only way to get to,  
11 you know, some alternative answer through  
12 severability is essentially pull out a white  
13 piece of paper and start on your own. There's  
14 no --

15 JUSTICE SOTOMAYOR: Well, a lot of  
16 people --

17 MR. FRANCISCO: -- provision that you  
18 can simply excise out of this.

19 JUSTICE SOTOMAYOR: Some of my  
20 colleagues have accused us of rewriting laws  
21 when we do that. I'm not one of them. So --

22 MR. FRANCISCO: Right.

23 JUSTICE SOTOMAYOR: -- follow my  
24 approach, which is, I think, the -- for me, the  
25 appropriate one, do the least harm, which is,

1 if we've got something unconstitutional, we  
2 don't throw away the baby with the bath water,  
3 we try to figure out what the bath water is.

4 MR. FRANCISCO: Mm-hmm.

5 JUSTICE SOTOMAYOR: So tell me what  
6 the bath water is.

7 MR. FRANCISCO: To me, there is --

8 JUSTICE SOTOMAYOR: And how do we  
9 limit the effect of what we're doing?

10 MR. FRANCISCO: To me, Your Honor,  
11 there is no bath water here. There is no valid  
12 way to do a severability analysis that gets to  
13 -- gets to something reasonable.

14 The -- the most that you could do is  
15 somehow rewrite this thing to come up with a  
16 standing appropriation of, say, \$750 million  
17 adjusted for inflation in perpetuity. But, if  
18 that were your remedy, you've essential --

19 JUSTICE SOTOMAYOR: And return -- and  
20 return -- and return the excess to the  
21 Treasury. Why is that a bad thing?

22 MR. FRANCISCO: Sure. But -- for two  
23 reasons, Your Honor. One -- one is just, as a  
24 technical matter, I just don't know how you can  
25 get there from this statute. So I think that

1 would be far beyond anything the Court's ever  
2 done in the severability world.

3 JUSTICE SOTOMAYOR: Why?

4 MR. FRANCISCO: Two, Your Honor, you  
5 would be adopting a funding stream, a -- a  
6 standing appropriation at an amount higher than  
7 this agency has never needed before. That's  
8 something that Congress has never done. As far  
9 as I know, never done.

10 And so you would essentially -- you  
11 know, the whole point of severability is to try  
12 to mirror legislative intent. Why on earth  
13 would you adopt a funding stream that Congress  
14 has never even considered before instead of  
15 just simply saying to Congress: It's now back  
16 in your court, you need to make a valid  
17 appropriation.

18 And if you need to stay your judgment  
19 for a period of time, as you did in the  
20 Northern Pipeline case, to facilitate that, we  
21 certainly have no objection to that. But --

22 JUSTICE SOTOMAYOR: Okay, counsel.

23 MR. FRANCISCO: -- at the end of the  
24 day, this should be in Congress's court.

25 CHIEF JUSTICE ROBERTS: Justice Kagan?

1 JUSTICE KAGAN: If I could take you  
2 back to your exchange with Justice Thomas, do I  
3 understand that to mean that you think that  
4 what Congress would have to do to make this  
5 constitutional is to change this from a "no  
6 more than \$600 million" to a "\$600 million, no  
7 more, no less"?

8 MR. FRANCISCO: Well, Your Honor, if  
9 it were \$600 million, no more, no less, my only  
10 remaining argument would be a challenge to its  
11 either perpetual nature or long duration --

12 JUSTICE KAGAN: Well, then you're --  
13 you're --

14 MR. FRANCISCO: -- of the nature, and  
15 that would be a --

16 JUSTICE KAGAN: -- then you're  
17 amending your answer to Justice Thomas.

18 MR. FRANCISCO: No -- no, I'm not.  
19 That would be a much more --

20 JUSTICE KAGAN: I think you are, Mr.  
21 --

22 MR. FRANCISCO: -- that would be a  
23 much more difficult question.

24 JUSTICE KAGAN: If -- if -- could you  
25 -- could I just please --

1 MR. FRANCISCO: Sure.

2 JUSTICE KAGAN: -- ask my question?

3 Because, when you talked to Justice  
4 Thomas, you said that the "because," what  
5 followed the "because," was that it was an up  
6 to X rather than a specification of a number,  
7 no more, no less.

8 So, if that's right, then it must be  
9 right that Congress could take this back and  
10 say you have to spend \$600 million, and that  
11 would be constitutional. And what I would  
12 suggest to you is that's what your argument is,  
13 and that's profoundly ahistorical in terms of  
14 our history.

15 MR. FRANCISCO: So a -- a couple of  
16 responses, Your Honor, and -- and I don't want  
17 to quibble with the premise of the question,  
18 but I think that when I listed out my standard  
19 to Justice Thomas, one of the factors was the  
20 fact that this was perpetual. I'll -- I'll put  
21 that entirely to the side.

22 If Congress does make a standing  
23 appropriation of \$600 million, at a bare  
24 minimum, it will have made a determination as  
25 to what the government should be spending, and

1 so I would have a much harder time arguing  
2 against that alone.

3 I don't think that that type of thing  
4 is historically precedented. Outside of the  
5 self-funding agencies like the Post Office and  
6 their modern analogues, I'm not aware of any  
7 agency that has been subjected to a standing  
8 appropriation for its operating budget, much  
9 less one that's done -- been subject to that  
10 kind of standing appropriation in perpetuity at  
11 a number that's higher than they actually need.

12 The closest I can think of throughout  
13 history is the Customs Service from 1849 to  
14 1912, where they had a \$1.5 million standing  
15 appropriation, but they were, one, subject to  
16 the supervision of the Secretary of the  
17 Treasury, who received regular appropriations,  
18 and, two, that amount wasn't even enough, which  
19 is why it went back for regular appropriations.

20 JUSTICE KAGAN: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Gorsuch?

23 Justice Kavanaugh?

24 Justice Barrett?

25 Justice Jackson?



1 JUSTICE JACKSON: Yes. So I think  
2 I've heard you say repeatedly that the problem  
3 here is that Congress is giving away the power  
4 of the purse in the way that it has set this  
5 up.

6 MR. FRANCISCO: Yes.

7 JUSTICE JACKSON: Is that your  
8 fundamental bottom-line problem with this?

9 MR. FRANCISCO: Yes.

10 JUSTICE JACKSON: Okay. And I guess  
11 my answer is maybe that it depends on what the  
12 power of the purse is in order for us to know  
13 whether or not it's being given away. And so  
14 I'm thinking of these two separate scenarios,  
15 and -- and maybe -- I don't know if this is  
16 helpful, but I'd like to get your reaction.

17 So, in Scenario Number 1, we have a  
18 Constitution that gives the legislature the  
19 power of the purse, and it specifies what that  
20 authority entails. It says: To exercise the  
21 power of the purse, you have to select a fixed  
22 sum of money on an annual basis and tell the  
23 recipient exactly how it must be spent.

24 I think, if that's our Constitution,  
25 then I might well agree with you that this

1 agency structure is giving up that power  
2 because, in fact, those determinations about  
3 how much is being spent and et cetera would be  
4 given to the agency, and the Constitution tells  
5 us that the legislature has to exercise that  
6 authority.

7 My problem is Scenario 2, which is the  
8 Constitution giving the legislature the power  
9 of the purse, and it defines the power of the  
10 purse as the power to decide how government  
11 departments are funded, period. That's what  
12 the Constitution says. It's got a definition  
13 section, and it says, when we say "power of the  
14 purse," we mean you have the ability to decide  
15 how the government is funded.

16 If that's your constitutional  
17 provision, I think you have a harder -- harder  
18 time, if not almost an impossible time,  
19 convincing me at least that by setting this  
20 agency up this way in which Congress has --

21 MR. FRANCISCO: Mm-hmm.

22 JUSTICE JACKSON: -- exercised that  
23 authority by deciding this is how the CFPB is  
24 going to be funded, that they have actually  
25 given up or, you know, ceded that authority --

1 MR. FRANCISCO: Mm-hmm.

2 JUSTICE JACKSON: -- or something. In  
3 fact, they've exercised it pursuant to my  
4 Constitution. So I guess I see and I hear the  
5 government arguing that our current  
6 Constitution is more like Scenario 2, and so,  
7 therefore, if that's true, don't you lose on  
8 this fundamental conception of you've given  
9 away your authority?

10 MR. FRANCISCO: Your Honor, if that  
11 were truly the conception embodied in the  
12 Appropriations Clause, then the answer to your  
13 question is yes. But, if that is truly the  
14 conception, then there really are no limits on  
15 the appropriations power. Congress can say --

16 JUSTICE JACKSON: But wait. Why is  
17 that a problem? If that's the conception,  
18 that's what Scenario 2 says --

19 MR. FRANCISCO: Sure, Your Honor. And  
20 so --

21 JUSTICE JACKSON: -- that the founders  
22 said we are trying to give to the legislature  
23 the authority to make the determination of how  
24 the government is funded --

25 MR. FRANCISCO: And -- and that's --

1 JUSTICE JACKSON: -- period.

2 MR. FRANCISCO: -- and that's my  
3 point, Your Honor. If your conception is that  
4 Congress can say to the President,  
5 Mr. President, you spend what you think is  
6 reasonably appropriate, full stop, period, if  
7 you think that's what it means, then I lose.

8 JUSTICE JACKSON: No, but I'm asking  
9 --

10 MR. FRANCISCO: I respectfully don't  
11 think that's what it means.

12 JUSTICE JACKSON: What I'm asking you  
13 is help me to understand why that's not what it  
14 means. That -- that's your burden, right?  
15 That's what the words seem to say. There's  
16 nothing in this Constitution that's like  
17 Scenario 1, like the Army Clause, where  
18 Congress -- where -- where the Framers have  
19 specifically restricted the exercise of  
20 authority that they're giving to Congress.

21 So what I need to find out from you is  
22 why we are not in Scenario 2 given the language  
23 of this, the history of the way in which the  
24 Appropriations Clause has been handled. Why  
25 isn't this just up to Congress, and if they

1     decide they want to set it up in this way,  
2     without limit --

3             MR. FRANCISCO:   Mm-hmm.

4             JUSTICE JACKSON:  -- so be it?

5             MR. FRANCISCO:   Because, Your Honor, I  
6     -- I think that that would be completely  
7     inconsistent with the entire purpose of  
8     separating the sword and purse, which Hamilton  
9     said, if you were to combine the two, would  
10    furnish one body with all the means of tyranny,  
11    which Madison said was the most complete and  
12    effectual weapon --

13            JUSTICE JACKSON:  But can I ask you  
14    why is that necessarily the case?  Congress  
15    could, as Justice Kavanaugh keeps saying, take  
16    it back.  Congress is getting reports in this  
17    situation about what's happening.  So, if  
18    Congress says, for the foreseeable future, what  
19    we would like to have happen is for this agency  
20    to get this amount of money and spend it on  
21    these general purposes, period, why is that,  
22    you know, risking the kind of tyranny that you  
23    suddenly seem to think is -- is the issue here?

24            MR. FRANCISCO:   Because what you're  
25    allowing Congress to do, as I understand your

1 question, is to say to the President,  
2 Mr. President, it's no longer our  
3 determination; it's your determination.  
4 Whatever you want, whatever you think is  
5 reasonable, that is fine with us.

6 I don't think anybody, even my friend  
7 on the other side, is defending that position.

8 JUSTICE JACKSON: So you're saying a  
9 provision of the Constitution is  
10 unconstitutional? Because, in my hypothetical,  
11 the Framers have said that in the Constitution.

12 MR. FRANCISCO: Well, Your Honor, I --  
13 I --

14 JUSTICE JACKSON: Congress, you can --  
15 you can set this up however you want, to  
16 include --

17 MR. FRANCISCO: Yeah.

18 JUSTICE JACKSON: -- allowing an  
19 agency to make this determination.

20 MR. FRANCISCO: And -- and --

21 JUSTICE JACKSON: So that's  
22 unconstitutional in your view?

23 MR. FRANCISCO: No, Your Honor,  
24 because I have conceded that if the  
25 Appropriations Clause actually means what

1 you're suggesting it means, I'm wrong.

2 JUSTICE JACKSON: Okay.

3 MR. FRANCISCO: I'm simply saying that  
4 that cannot possibly be what the Appropriations  
5 Clause means because, if it were, then the game  
6 is really over. One Congress can simply say to  
7 one President in one fell swoop:

8 Mr. President, it's up to you, spend whatever  
9 you want.

10 And what Madison thought was so  
11 dangerous, what Hamilton thought was so  
12 dangerous, would actually be precisely what the  
13 Constitution allows, the unification --

14 JUSTICE JACKSON: But, of course,  
15 that's not what's happening in this case,  
16 right? I mean, I think that's -- the -- the  
17 Solicitor's argument is maybe if we had  
18 anything close to that, the Court would  
19 consider whether or not tyranny is afoot.

20 But, for this particular scenario,  
21 there is -- there are the kinds of checks that  
22 you would expect to see in terms of Congress's  
23 exercise of its power.

24 MR. FRANCISCO: Two points, Your  
25 Honor. One, structures don't crumble in a day,

1 they crumble over time, and this would be the  
2 first very substantial step in the crumbling of  
3 that structure.

4           Secondly, if you adopt the theory  
5 you're suggesting, then it's not really the  
6 second step for the crumbling of the  
7 structures. You've simply announced -- you --  
8 you've -- you've -- you've simply announced  
9 that the structures do not stand.

10           Here, the fundamental issue is that  
11 Congress has to make a determination as to what  
12 the government should be spending. It cannot  
13 simply say we're going to let the President do  
14 that because, if you transfer that to the --

15           JUSTICE JACKSON: One final question,  
16 Mr. Francisco. So I'm a little worried, I  
17 think, about the separation of powers problem  
18 that may occur if the judiciary gets involved  
19 with telling Congress when and under what  
20 circumstances it can exercise its own  
21 prerogatives concerning funding.

22           How do we avoid the slippery slope of  
23 -- today you say the issues are duration and  
24 source and whatever. The next agency,  
25 someone's going to come up with a few more.



1 How do we avoid the judiciary becoming suddenly  
2 a supra legislator, just telling, you know,  
3 the -- the Congress agency by agency whether  
4 it's a thumbs up or thumbs down from our  
5 perspective about these things? I mean, where  
6 are these -- these limits in the law --

7 MR. FRANCISCO: The -- the --

8 JUSTICE JACKSON: -- that prevents us  
9 from overstepping our authority?

10 MR. FRANCISCO: Sure, Your Honor. And  
11 the judiciary has always played a vital role in  
12 policing the separation of powers, because the  
13 whole point is not to protect Congress from the  
14 President or President from the Congress, it's  
15 to protect the liberty of the people.

16 JUSTICE JACKSON: Right. But where  
17 are the limits that we have in order to do  
18 that? We've got to police relative to some set  
19 of rules.

20 MR. FRANCISCO: Sure, Your Honor.

21 JUSTICE JACKSON: And where are those  
22 coming from?

23 MR. FRANCISCO: And that's exactly  
24 what we've been talking about the whole time.  
25 Under the Appropriations Clause, Congress has

1 to make the determination as to what the  
2 government should be spending. It cannot  
3 transfer that core legislative power to the  
4 executive branch.

5 And the problem here is, when you  
6 allow that transfer for a very, very long  
7 period of time, subject to a limit so high  
8 you're almost never going to hit it, you've  
9 essentially created a blueprint for the total  
10 collapse of sword and purse, the very thing  
11 that the Framers thought was necessary --

12 JUSTICE JACKSON: Thank you.

13 MR. FRANCISCO: -- to protect liberty  
14 in a free society.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 General Prelogar, rebuttal?

18 REBUTTAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

19 ON BEHALF OF THE PETITIONERS

20 GENERAL PRELOGAR: Thank you,  
21 Mr. Chief Justice.

22 My friend said several times this  
23 morning that to make a valid appropriation,  
24 Congress needs to specifically fix the amount.

25 That's inconsistent with how an

1 appropriation was understood in the Founding  
2 Era. It was defined as the act of assigning  
3 something to a particular use. It required the  
4 specification of source and purpose, never a  
5 specific sum.

6 And if there were any debate about  
7 that point, the 230-plus years of this nation's  
8 history conclusively resolves it because the  
9 very first Congress appropriated without  
10 specifying a fixed sum.

11 The first act that it enacted that was  
12 an appropriation specified up to a particular  
13 cap of spending that was authorized, that's  
14 just how the CFPB's funding mechanism is  
15 structured today, and there have been countless  
16 appropriations that look like this throughout  
17 history.

18 My friend's theory would have sweeping  
19 consequences. Even today, in the 2022  
20 Consolidated Appropriations Act, we counted  
21 more than 400 uses of this kind of discretion  
22 to spend up to a specified cap.

23 And Congress has regularly enacted  
24 appropriations that define the amount in terms  
25 of purpose. The funds necessary for Social

1 Security or for the Judgment Fund or to pay  
2 interest on the national debt, that is not a  
3 historical outlier. It is the norm in  
4 appropriations law.

5 My friend turns to suggesting that the  
6 cap here is illusory. At the outset, I haven't  
7 heard any standard that would judicial -- be  
8 judicially manageable for courts to apply to  
9 try to make those judgments.

10 This is again a case about Congress's  
11 power over the purse. It's chosen a number.  
12 It's enacted a cap. And I don't know what  
13 basis courts would have to say that's too high,  
14 that's not a meaningful constraint, Congress  
15 should have set it lower. And I think that  
16 that is a real problem with their theory at the  
17 outset.

18 But even if the Court engaged with it,  
19 it's not factually accurate here to say this  
20 isn't a meaningful constraint. Congress, when  
21 it chose the \$600 million figure, said that  
22 this was modest compared to other agencies'  
23 budgets.

24 It was attempting to estimate the  
25 amount in the Federal Reserve System combined

1 earnings that had been previously spent on  
2 consumer protection. And, in fact, if you look  
3 at the CFPB's funding requests over the years,  
4 it's come closer and closer to the cap. I -- I  
5 think the most recent fiscal year, the CFPB was  
6 only \$30 million below the cap. So, if that  
7 trajectory continues, it's very likely the CFPB  
8 is going to have to go to Congress and ask for  
9 additional appropriations authority.

10 My friend also suggested that there  
11 was something constitutionally suspicious about  
12 standing appropriations. But I didn't hear any  
13 engagement with the text of the Army  
14 Appropriations Clause.

15 The Framers thought about this issue.  
16 They did want to limit Congress when it came to  
17 funding for the Army to create that durational  
18 requirement, but they wrote no other limit into  
19 the Constitution. And this too would have  
20 sweeping consequences because today, over  
21 60 percent of the federal budget comes in the  
22 form of these kinds of standing appropriations  
23 that exist in every sector of the federal  
24 government.

25 And then, at some point, I think my

1 friend had suggested that it's all of these  
2 features combined that add up to a  
3 constitutional problem here.

4           And, Justice Alito, I want to engage  
5 with your question about the limits. Our  
6 theory in this case is based on text and  
7 history. So I acknowledge that if there were,  
8 in fact, a funding statute that didn't look  
9 anything like what we've had in all of history  
10 and if -- and if the differences that you could  
11 ascertain are relevant to a potential  
12 separation of powers violation, that would  
13 count against us and it would mean that maybe  
14 the Court could determine that at some outer  
15 recess of the separation of powers a line was  
16 crossed.

17           But we have nothing like that here.  
18 We have an appropriation that in all material  
19 respects looks like countless others that have  
20 existed for time immemorial since 1789 on. And  
21 I think that leaves my friend suggesting that  
22 the Court should turn away from text, the Army  
23 Appropriations Clause, and turn away from all  
24 that history and find some kind of implicit  
25 additional limit on Congress's authority here.

1           But my friend hasn't offered a  
2 principle the Court could apply to draw those  
3 limits. With respect to whether the funding is  
4 too much, how is a court supposed to figure it  
5 out? With respect to duration, my friend says  
6 that some appropriations can last longer than  
7 two years, and I think he has to make that  
8 concession because of the Army Appropriations  
9 Clause. But then how long is too long? And  
10 how is a court supposed to determine what  
11 functions don't count?

12           He suggested that you can distinguish  
13 some of the other financial regulators, like  
14 the Federal Reserve Board, based on the  
15 particular functions that it carries out.

16           But that's not a point of distinction  
17 either. The Federal Reserve Board regulates,  
18 it enforces. The other financial regulators do  
19 the same. And I would point the Court to 12  
20 U.S.C. Section 1818 to demonstrate that these  
21 functions are not different.

22           Nor is there any principled line here  
23 that the Court could apply to try to ascertain  
24 and weigh the relative difference of function  
25 between different agencies, as the Court

1 observed in -- in Collins versus Yellen most  
2 recently.

3           And I think what all of this adds up  
4 to is that my friend is proposing that the  
5 Court go down the road of for the first time  
6 ever interpreting the Appropriations Clause to  
7 contain some kind of inherent, implicit limit  
8 on Congress that has never previously before  
9 been recognized and that is completely detached  
10 from history. We'd ask the Court to reject  
11 that approach.

12           CHIEF JUSTICE ROBERTS: Thank you,  
13 General, Mr. Francisco.

14           The case is submitted.

15           (Whereupon, at 11:38 a.m., the case  
16 was submitted.)

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