

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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Place: Washington, D.C.
Date: October 3, 2023

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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 think, at the
21 outset, as your question touches on, Justice
22 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 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.

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 branch
9 as well, and it -- it's a very strong power
10 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's
25 more that it can give away and enhance the

1 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 just want to understand,
10 following up on the Chief Justice's question,
11 what role the upper limit plays on your theory
12 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 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 because it would mean

1 the executive, if it has funds that aren't held
2 in the general treasury, could spend even
3 without Congress appropriating it or providing
4 that authority in the first place.

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

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

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

20 GENERAL PRELOGAR: So that was
21 Congress trying to control for the interaction
22 between this funding mechanism and other
23 background rules that apply to appropriations
24 that go through the annual appropriation
25 process.

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

11 JUSTICE ALITO: So it was wrong?

12 GENERAL PRELOGAR: And other agencies
13 have the same provision.

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

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

24 And as I mentioned, Congress has used
25 this formulation for other agencies as well,

1 like the OCC and the FCA, and I think, again,
2 it's -- it's all intended to just allow
3 Congress to control for the interaction of
4 various statutory provisions in this context.

5 JUSTICE SOTOMAYOR: Does it use --

6 JUSTICE ALITO: What I'm --

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

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

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

23 JUSTICE SOTOMAYOR: Could I go back to
24 Justice Thomas's question? There appears to be
25 -- I'm sorry, I'm a bit congested. There

1 appears to be wound up in this question of the
2 appropriations bill the separation of powers
3 and non-delegation.

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

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

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

22 In this context, we understood
23 Respondents to be making an argument about the
24 Appropriations Clause in particular, and the
25 Fifth Circuit found that they hadn't separately

1 raised a non-delegation challenge.

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

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

22 And the very first appropriations laws
23 were structured like this one in the sense of
24 providing that the executive could spend up to
25 a -- a cap that was set by Congress itself.

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

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

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

23 GENERAL PRELOGAR: Yes. So that
24 statute, as we understand it, is -- you know,
25 would be completely unprecedented. It would

1 effectively take the whole of Congress's
2 appropriations authority and transfer it to the
3 executive branch.

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

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

18 But that history works both ways. The
19 Court has likewise said that the fact that a
20 way of structuring government is well rooted in
21 history and traces back to the founding is
22 powerful evidence of the contemporaneous
23 understanding of original intent, and that's
24 the box we're in here.

25 So I guess I would urge the Court to

1 save for another day whether there's some
2 theoretical possibility that Congress could go
3 too far with a kind of appropriation we've
4 never seen before and instead focus on this
5 particular appropriations law, which we think
6 finds its roots both in text and history.

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

21 Now you answered the latter part of
22 that in your reply brief about the quadrillion
23 dollars, and you just answered that in response
24 to Justice Kagan. You didn't answer the first
25 part of that about providing a very substantial

1 sum of money to an agency like the FBI or the
2 FTC.

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

10 Would that be consistent with the
11 Appropriations Clause?

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

19 In that context, I think the
20 hypothetical would effectively be a standing
21 uncapped appropriation because, of course, the
22 FTC would never reach that amount. It would be
23 for a single agency. And we think that that is
24 well grounded in history and, in fact, is how
25 many agencies are funded today, particularly in

1 the financial regulatory space.

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

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

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

20 JUSTICE KAVANAUGH: Can I ask a --

21 JUSTICE ALITO: Well, could I just --

22 CHIEF JUSTICE ROBERTS: Sure.

23 JUSTICE ALITO: -- excuse me -- ask
24 one follow-up question on that?

25 So I understand your answer to these

1 hypotheticals is that we must look to
2 Congress's historical practices. This is a
3 matter of -- of seeing whether the setup that
4 we have before us is consistent with Congress's
5 historical practices. Is that right?

6 GENERAL PRELOGAR: We draw heavily on
7 historical practices, also text --

8 JUSTICE ALITO: Is that --

9 GENERAL PRELOGAR: -- of course.

10 JUSTICE ALITO: -- is that the test?

11 GENERAL PRELOGAR: I don't want to
12 lose sight of that.

13 JUSTICE ALITO: Is that the test? Is
14 it the test?

15 GENERAL PRELOGAR: I think that the --
16 the test in this context, as in most separation
17 of powers cases, is, yes, text and history.
18 And here again, we have a specific
19 constitutional provision speaking to duration,
20 speaking to particular types of functions,
21 showing that the Framers were concerned about
22 funding the Army with a standing appropriation
23 but didn't have that same concern or effort to
24 restrict Congress's authority with respect to
25 other functions.

1 And then we have an unbroken line of
2 history. There have been agencies funded this
3 way for every year of this nation's history.

4 JUSTICE ALITO: Well, what is your
5 best historic -- your single best example of an
6 agency that has all of the features that the
7 CFPB has that are cited by the Respondents,
8 single best example of an agency with all of
9 the -- with that combination of features?

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

25 So I think that if you look through

1 all of the factors they're challenging here, we
2 have the Customs Service and others, the
3 revenue officers; U.S. Attorneys for a period
4 of time were funded through conviction fees.

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

11 GENERAL PRELOGAR: So I -- I can't
12 give you another example of a source that's
13 precisely like that one, but I would dispute
14 the premise that that could possibly be
15 constitutionally relevant. This is a case
16 about Congress's own prerogatives over the
17 purse, its authority. And if Congress has
18 given away too much of its authority by not
19 providing for a durational limit or not
20 providing -- or providing for too much
21 discretion to the agency, then I don't see how
22 it could possibly fix the problem that other
23 fee-funded agencies directly collect their
24 money from the entities they regulate.

25 JUSTICE ALITO: So I take it your

1 answer is that you do not -- that is not
2 consistent with any historical practice, but
3 you think that to the extent it is
4 unprecedented, it is unprecedented in a way
5 that is not relevant for present purposes? Is
6 that your answer?

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

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

19 And that's wrong as a descriptive
20 matter. There is no similar check on the
21 Federal Reserve Board, the FDIC, the NCUA, the
22 FCA, or the FHFA. All of the entities they
23 regulate cannot enter their -- or, I'm sorry,
24 exit their regulatory sphere just because they
25 disagree with regulations. So this --

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 GENERAL PRELOGAR: -- just isn't a
4 tenable distinction on the facts.

5 CHIEF JUSTICE ROBERTS: Justice
6 Thomas, anything further?

7 JUSTICE THOMAS: No.

8 CHIEF JUSTICE ROBERTS: Justice Alito?

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

17 GENERAL PRELOGAR: So I think that
18 funds that Congress has given to an agency do
19 qualify as public money, yes.

20 JUSTICE ALITO: What if someone --
21 what if Congress set up an agency with
22 substantial power but provided no method for
23 that agency to obtain money other than private
24 donations? Would that be consistent with the
25 Appropriations Clause?

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

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

16 Would that be constitutional?

17 GENERAL PRELOGAR: I think that it
18 likely would qualify as constitutional. Of
19 course, if that created some kind of regulatory
20 capture, I would expect that Congress would act
21 to fix that, but, you know, there are examples
22 where throughout our history of scholarship
23 funds, for example, that are administered by
24 the federal government originally funded by an
25 endowment, and those, I think, qualify as

1 appropriations.

2 CHIEF JUSTICE ROBERTS: All set?

3 JUSTICE ALITO: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Sotomayor?

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

14 So can you tell us how you deal with
15 that?

16 GENERAL PRELOGAR: Yes. The Fifth
17 Circuit here recognized a sweeping
18 retrospective remedy that we think conflicts
19 with both severability principles and
20 traditional remedial equitable principles in
21 this space.

22 Just first on severability, Dodd-Frank
23 itself has an express severability clause.
24 This Court emphasized that point in Seila Law.
25 And, here, the Fifth Circuit didn't even stop

1 to consider whether any aspect of the CFPB's
2 funding mechanism could be severed or would
3 provide a basis to therefore limit the damage
4 to Congress's work in trying to get this agency
5 funded.

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

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

18 You know, the Court would be writing
19 on a blank slate because no court had
20 previously found that Congress itself violated
21 the Appropriations Clause, but under
22 traditional remedial equitable principles, it's
23 necessary to take into account the public
24 interest and the balance of the equities.

25 And, here, a prospective remedy which

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

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

18 And if the Fifth Circuit is right and
19 there's the prospect that all of these actions
20 should be unwound, it would create profound
21 disruption in various economic -- economic
22 markets that would hurt the -- the regulated
23 entities themselves. So we think that that
24 provides powerful reason to reject that kind of
25 retrospective relief and instead have a

1 going-forward prospect of remedy only.

2 JUSTICE SOTOMAYOR: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

19 Is -- is -- is it more important that
20 all the parts have been used, or is it more
21 important that the entire thing has an exact
22 precedent? Is -- is part of the lesson of
23 history here that there's been enormous
24 variation in the kinds of appropriations that
25 Congress has made? How should we think about

1 that feature of our history? Take it away.

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

7 Obviously, with respect to each of
8 these challenged features, we think we have a
9 wealth of evidence regarding standing
10 appropriations or appropriations up to a
11 particular cap.

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

24 And I think the reason why that
25 doesn't work and why it shows that this is not

1 unprecedented is that the whole theory behind
2 that premise is that that's a constraint on
3 other agencies. Market forces will limit the
4 overall pot of funding the other agencies have.

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

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

17 And I think, if the Court is looking
18 at all of the features together, maybe some
19 things subtract out Congress a little bit, but
20 the cap adds in Congress in a very powerful and
21 major way that I think distinguishes this
22 appropriation for purposes of congressional
23 control.

24 JUSTICE KAGAN: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

2 Justice Kavanaugh?

3 JUSTICE KAVANAUGH: Just two
4 clarifying questions about the limits of your
5 argument. There's a discussion sometimes about
6 permanent appropriations and forever
7 appropriations.

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

17 GENERAL PRELOGAR: Yes, I absolutely
18 share that understanding, Justice Kavanaugh.
19 And I think what it shows is that it's
20 incorrect to characterize standing
21 appropriations as lasting forever.

22 In fact, we've pointed to a number of
23 examples where Congress has acted to change the
24 standing appropriations, and the Customs
25 Service is a great example on this one too.

1 You know, it was funded through a standing
2 appropriation for the first 120 years of this
3 nation's history, and then, in 1912, Congress
4 took it out of a standing appropriation and
5 brought it into annual appropriations.

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

14 JUSTICE KAVANAUGH: So Congress could
15 change it tomorrow?

16 GENERAL PRELOGAR: Absolutely,
17 Congress could change it tomorrow.

18 JUSTICE KAVANAUGH: Okay. And then,
19 if the statute here gave the Federal Reserve
20 more than ministerial control, that the amount
21 was in the control of the Federal Reserve to
22 range from zero to -- to the cap for what the
23 CFPB would receive, would that change anything?

24 GENERAL PRELOGAR: I don't think that
25 that would change the relevant constitutional

1 analysis. You might think of that as
2 functioning a little bit like an agency
3 overseeing a sub-agency and making
4 modifications to its budget.

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

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

17 JUSTICE KAVANAUGH: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Barrett?

20 Justice Jackson?

21 JUSTICE JACKSON: Good morning,
22 General.

23 So I'm concerned that there might be
24 burden-shifting happening in the way in which
25 we're thinking about this, and so maybe you can

1 help me just to keep the -- the right burdens
2 in the right place.

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

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

20 So am I right that that's really all
21 you need to say to win? I mean, you don't lose
22 if you can't establish the limits in Congress's
23 exercise of its authority, right?

24 GENERAL PRELOGAR: I think that's
25 right, Justice Jackson, and I think it actually

1 highlights an important aspect of this case.
2 You know, this is a separation of powers case.
3 We are here defending a statute that Congress
4 provided to fund an executive branch agency.

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

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

21 But I guess their burden would have to
22 be to determine that those limits exist
23 somewhere in the law. I mean, it's not just up
24 to us to sort of say, geez, those things seem
25 problematic. We would have to find a legal

1 source, I would think, in order to agree with
2 them that those limits are actually imposed on
3 Congress's authority.

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

15 JUSTICE JACKSON: Or even has it been
16 done before?

17 GENERAL PRELOGAR: Right.

18 JUSTICE JACKSON: I mean, I appreciate
19 all of your historical analysis and all the
20 things that you're saying, and all of that may
21 well be so, but I guess I don't understand,
22 like, what if we found that it -- it wasn't
23 necessarily, you know, set up in this way?
24 Does that -- does that on its own establish
25 that Congress couldn't exercise its

1 prerogative?

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

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

17 JUSTICE JACKSON: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Mr. Francisco.

21 ORAL ARGUMENT OF NOEL J. FRANCISCO

22 ON BEHALF OF THE RESPONDENTS

23 MR. FRANCISCO: Mr. Chief Justice, and
24 may it please the Court:

25 This case is about checks and

1 balances. One of Congress's most important
2 checks on executive power is its power of the
3 purse. That's why Alexander Hamilton said that
4 the unification of sword and purse was the very
5 definition of tyranny.

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

17 If it can do that, then it can
18 authorize the President to spend whatever he
19 deems reasonably necessary as long as he
20 doesn't exceed \$10 trillion, and that would
21 work a sea change in the separation of powers.

22 The government makes two basic
23 arguments in response. First, it argues that
24 that hypothetical would be unprecedented. But
25 the CFPB is also unprecedented. Congress has

1 never authorized an agency to pick its own
2 perpetual appropriation, and if it can do that
3 for the CFPB, it can do it for every other
4 agency too.

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

14 And if you jump the shark from those
15 to this, then you have blessed a regime in
16 which Congress can authorize the executive
17 branch to spend whatever it wants to fund the
18 entire government.

19 In short, the Court should hold the
20 line where it stands. Otherwise, it will have
21 countenanced the very unification of sword and
22 purse that the Constitution was designed to
23 prevent.

24 I'm happy to answer Your Honor's
25 questions.

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

9 MR. FRANCISCO: Mm-hmm.

10 JUSTICE THOMAS: -- and what the
11 constitutional problem is. So we need a finer
12 point.

13 I get your point that this is
14 different, that it's unique, that it's odd,
15 that they've never gone this far. But that's
16 -- not having gone this far is not a
17 constitutional problem. It may be a problem
18 with analogues, but it doesn't --

19 MR. FRANCISCO: Mm-hmm.

20 JUSTICE THOMAS: -- prove your case.
21 And I think we just need you to give us a finer
22 point than we've had.

23 MR. FRANCISCO: Sure. At a bare
24 minimum, the Appropriations Clause requires
25 Congress to determine how much the government

1 should be spending. That's the core element of
2 an appropriation. That's why I think everybody
3 agrees that Congress can't simply say to the
4 President: Spend whatever you want.

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

12 JUSTICE JACKSON: But,
13 Mr. Francisco --

14 MR. FRANCISCO: -- because --

15 JUSTICE JACKSON: -- I'm sorry --
16 where do you get that from? So you said the
17 definition is what now?

18 MR. FRANCISCO: I think the core
19 element of an appropriation is that Congress
20 has to, at a minimum, determine the amount that
21 the government should be spending. It cannot
22 --

23 JUSTICE JACKSON: A fixed amount? It
24 can't do it by a cap? It has to be a fixed
25 amount?

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

7 JUSTICE JACKSON: Okay. So where --
8 where do you get that from?

9 MR. FRANCISCO: Your Honor, I think
10 that --

11 JUSTICE JACKSON: I mean, what -- what
12 --

13 MR. FRANCISCO: So I get it from, I
14 think, the text of the Appropriations Clause.
15 I think that's the core element of an
16 appropriation. But I also do think you have to
17 --

18 JUSTICE JACKSON: I'm sorry, the word
19 "appropriation" -- like, what -- what in the
20 text of the Appropriations Clause --

21 MR. FRANCISCO: Sure.

22 JUSTICE JACKSON: -- makes it so that
23 the requirement is that the government can only
24 --

25 MR. FRANCISCO: Mm-hmm.

1 JUSTICE JACKSON: -- or the government
2 has to fix the amount?

3 MR. FRANCISCO: Three things, Your
4 Honor.

5 JUSTICE JACKSON: Yes.

6 MR. FRANCISCO: The first is I think
7 that it is inherent in what an appropriation
8 is. It's got to be the authorization to spend
9 an amount of money.

10 Secondly, any spending has to be in --

11 JUSTICE JACKSON: But wait. Where is
12 the fixed amount part of that?

13 MR. FRANCISCO: Sure, Your Honor --

14 JUSTICE JACKSON: Yeah.

15 MR. FRANCISCO: -- and that's what I'm
16 getting to.

17 JUSTICE JACKSON: Okay.

18 MR. FRANCISCO: Secondly, any spending
19 has to be in consequence of an appropriation.
20 So it's got to be in consequence of Congress's
21 judgment. If you simply delegate to the
22 executive the authority to make that front-line
23 determination, the spending isn't in
24 consequence of Congress's determination.

25 And the third does turn to history and

1 purpose. The whole point of separating the
2 sword from the purse is to protect individual
3 liberty. If you allow Congress to essentially
4 transfer its authority to pick the
5 appropriation to --

6 JUSTICE JACKSON: But it's not a
7 transfer if --

8 MR. FRANCISCO: -- the executive
9 branch itself --

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

19 MR. FRANCISCO: Well, Your Honor, if
20 that's --

21 JUSTICE JACKSON: Do you lose?

22 MR. FRANCISCO: -- your starting
23 definition, then I think you've adopted a
24 definition of "appropriation" that does, in
25 fact, allow Congress to essentially let the

1 President pick his own appropriation. And if
2 you can do that --

3 JUSTICE JACKSON: But, if that's the
4 definition in the Constitution, then I'm not
5 allowing anything. That's what the
6 Constitution says.

7 MR. FRANCISCO: Well, yeah, if you
8 think that the Constitution allows Congress to
9 essentially say to the executive, you pick the
10 number, spend whatever you want forever, I -- I
11 would agree, I would lose this case.

12 JUSTICE KAGAN: Mr. Francisco --

13 MR. FRANCISCO: I happen to think --

14 JUSTICE KAGAN: -- if I could
15 understand you because your argument in the
16 briefs, as I understood it, did have a lot of
17 moving parts, and -- and -- and now this is a
18 -- a much clearer view of what the
19 Appropriations Clause demands. And if you're
20 saying it demands a specific number that, with
21 a little wiggle room, the executive has to
22 spend, is that the way I understood it?

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

1 MR. FRANCISCO: Mm-hmm.

2 JUSTICE KAGAN: -- "X" for a
3 particular purpose. And, you know, Justice
4 Scalia, in Clinton, said the constitutionality
5 of such appropriations has never seriously been
6 questioned.

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

8 MR. FRANCISCO: Sure.

9 JUSTICE KAGAN: -- argument that
10 you're making, not, like, there are these 22
11 different things that come together in this --

12 MR. FRANCISCO: Mm-hmm.

13 JUSTICE KAGAN: -- particular statute
14 to create a unicorn, but -- but -- I mean, that
15 seems a much more fundamental argument and one
16 that has been decisively rejected --

17 MR. FRANCISCO: So two --

18 JUSTICE KAGAN: -- by our history.

19 MR. FRANCISCO: -- two responses, Your
20 Honor. First, that's not the core of my
21 argument, and, secondly, I don't think it's
22 been decisively rejected by history.

23 I think the problem, when you combine
24 a delegation to the executive to pick his own
25 appropriation in perpetuity, subject to a

1 number that's so high it's almost never been
2 hit, the problem with that combination of
3 factors is because it uniquely essentially
4 gives away the appropriations power.

5 If you can do that for one agency, you
6 can do it for every agency. And then Congress
7 can effectively --

8 JUSTICE SOTOMAYOR: I'm sorry --

9 MR. FRANCISCO: -- say to the
10 executive --

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

20 MR. FRANCISCO: Mm-hmm.

21 JUSTICE KAGAN: Congress thought \$600
22 million was a pretty good number. Maybe that
23 will prove to be too high and Congress will cut
24 it back. Maybe, over time, the CFPB actually
25 will hit \$600 million because they'll create

1 new programs that -- but anyway --

2 MR. FRANCISCO: Mm-hmm.

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

10 So the CFPB is not being wasteful, and
11 it's using --

12 MR. FRANCISCO: Sure.

13 JUSTICE KAGAN: -- what it should be
14 using in its view and -- and generously, you
15 know, basically saying not the rest. What is
16 -- what is -- what is so constitutionally --

17 MR. FRANCISCO: So -- so a couple of
18 things, Your Honor. First of all,
19 respectfully, I'd probably push back on the
20 premise that the CFPB is being parsimonious. I
21 think what they are doing is asking for large
22 amounts and rolling over a good chunk of that
23 into their endowment. But I'll -- I'll put
24 that to the side.

25 When you look at the caps, I think you

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

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

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

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

20 And, here, it's delegated that
21 judgment to the director in a way, I think,
22 that the Gundy dissent illustrates the problems
23 with this type of regime.

24 Remember, the problem from the
25 dissenter's perspective in Gundy was that under

1 SORNA, the Attorney General had the authority
2 to set sex offender requirements anywhere
3 between zero requirements on the one hand and a
4 very real statutory maximum on the other, the
5 requirements that applied to post-Act offenders
6 but otherwise gave him broad discretion between
7 the polls.

8 JUSTICE BARRETT: Mr. Francisco --

9 MR. FRANCISCO: Well, this is
10 effectively --

11 JUSTICE BARRETT: -- the standard
12 phrased it like an intelligible principle of --
13 of money spent. I mean, I think we're all
14 struggling to figure out then what's -- what's
15 the standard that you would use, just assuming
16 that you're right that there has --

17 MR. FRANCISCO: Mm-hmm.

18 JUSTICE BARRETT: -- to be something
19 more than the \$600 million, how do you decide
20 how much is too much or how specific is
21 specific enough?

22 MR. FRANCISCO: So, Your Honor, I
23 think that at the back end, it's -- it's
24 difficult to come up with a hard-and-fast rule
25 that's saying too much is too much, which is

1 why I do think you need to look at it from the
2 front end and ask: Has Congress made a
3 determination as to what the amount should be,
4 or has it delegated that fundamental
5 determination to the executive branch?

6 JUSTICE JACKSON: But don't we, though

7 --

8 MR. FRANCISCO: And I think it's far
9 worse --

10 JUSTICE JACKSON: -- in doing that,
11 don't we have to assume that that's what the
12 Constitution requires of Congress? That's
13 where I'm getting hung up, that you keep saying
14 Congress is delegating this authority, and we
15 understand your argument with respect to it.

16 MR. FRANCISCO: Mm-hmm.

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

19 MR. FRANCISCO: Well --

20 JUSTICE JACKSON: What if Congress
21 doesn't have to --

22 MR. FRANCISCO: Well, Your Honor --

23 JUSTICE JACKSON: -- do that?

24 MR. FRANCISCO: -- if -- if -- if
25 that's your position, I -- I don't think I can

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

11 JUSTICE GORSUCH: Mr. Francisco --

12 JUSTICE ALITO: I think that --

13 JUSTICE GORSUCH: -- I would -- I was
14 hoping you might finish your answer to Justice
15 Barrett.

16 MR. FRANCISCO: Sure.

17 JUSTICE GORSUCH: It would be useful
18 for me.

19 MR. FRANCISCO: And -- and, with
20 respect -- Justice Barrett, with respect to
21 your question, when it comes to delegation, I
22 think it's particularly problematic with
23 respect to the Appropriations Clause.
24 Remember, the Appropriations Clause isn't in
25 Section 8 of Article I, it's in Section 9 of

1 Article I.

2 So it is both a -- it is not just a
3 privilege of Congress, it's an obligation and a
4 duty that Congress has to check the executive
5 branch. And if it can simply transfer to the
6 executive its duty to check the executive, you
7 are unifying the sword and purse.

8 So, to the extent that there's any
9 delegation allowed in the context of setting
10 the amount of the appropriation, it's got to be
11 a very narrow one. And that is a perfect
12 explanation for the founding-era "sums not
13 exceeding" statutes.

14 Those were statutes where Congress, in
15 an annual appropriation, fixed the amount that
16 it thought that the government should be
17 spending based on Hamilton's detailed
18 estimates, often down to the penny. They just
19 simply recognized a margin of error, and if
20 Congress got it wrong in one year, it could fix
21 it in the next year.

22 That is, again, why I think that this
23 unique constellation of factors is so uniquely
24 problematic.

25 JUSTICE BARRETT: But -- but you

1 concede that standing appropriations aren't
2 per se unconstitutional. So you're saying
3 Congress could fix it in the next year. But
4 how long -- how long before a standing
5 appropriation becomes a problem?

6 MR. FRANCISCO: Sure, Your Honor.
7 I -- I would not concede that a -- a -- a -- a
8 long-term standing appropriation would be
9 constitutional. I think non-delegation
10 principles generally recognize some play in the
11 joints.

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

21 JUSTICE KAVANAUGH: What -- what do
22 you --

23 MR. FRANCISCO: -- even if you think
24 that upper line is meaningful.

25 JUSTICE KAVANAUGH: Sorry. What --

1 what do you -- the word "perpetual" I'm having
2 trouble with because it implies that it's
3 entrenched and that a future Congress couldn't
4 change it. But Congress could change it
5 tomorrow and there's nothing perpetual or
6 permanent or -- about this.

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

10 Once Congress gives it over to the
11 executive and expands executive power, you've
12 now given, you know, a coequal branch of
13 government a large amount of your power and you
14 need to claw it back.

15 You can't claw it back through an
16 ordinary law. You can only claw it back
17 through either convincing the President himself
18 to give up presidential power, something you've
19 given to him, which is tough to do, or you've
20 got to override a presidential veto.

21 JUSTICE KAVANAUGH: Well, if a group
22 -- if a member or a House of Congress tomorrow,
23 if a majority of a House of Congress said we're
24 not going to fund -- pick your agency -- unless
25 we change the CFPB funding structure, they

1 could do that.

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

6 JUSTICE KAVANAUGH: Right.

7 MR. FRANCISCO: You do need to use
8 those very powerful tools and ultimately
9 override a presidential veto or convince the
10 President to give up his -- his own authority,
11 which is very different --

12 JUSTICE KAVANAUGH: Right. I agree --
13 I agree with you on flipping the baseline.
14 I -- I agree with you on that. But just the
15 word "perpetual" or "forever" or "permanent," I
16 think, is -- is a little strong here.

17 Then, on the independent point, you
18 said Congress had created the most independent
19 agency in American history. And I certainly
20 agree that as originally constructed, the CFPB
21 had in my view a massive constitutional flaw --

22 MR. FRANCISCO: Mm-hmm.

23 JUSTICE KAVANAUGH: -- in the single
24 director who was protected by for-cause
25 removal, but that, of course, was fixed and

1 addressed in Seila Law. And now it's not
2 independent at all, at least as the term
3 "independent" is used.

4 MR. FRANCISCO: Sure.

5 JUSTICE KAVANAUGH: It's under the
6 direct supervision and control of the
7 President. So I don't think it's -- correct me
8 if you think that's wrong -- but --

9 MR. FRANCISCO: Well, they certainly
10 --

11 JUSTICE KAVANAUGH: -- it's not
12 independent.

13 MR. FRANCISCO: -- they certainly
14 fixed half the problem, but they didn't fix the
15 other half of the problem in our view.

16 Look, everybody knew what was going on
17 in 2010. The 2010 Congress knew that there
18 would come a time when future Congresses didn't
19 look so favorably upon the CFPB, and they
20 wanted to insulate a future CFPB from political
21 pressure from a future Congress, and that's
22 precisely why they adopted the funding regime
23 that they adopted.

24 But future Congresses are supposed to
25 have the ability to check the President through

1 a continuing power of the purse. It's meant to
2 be a continuing check on executive power.

3 And to come back to the fundamental
4 problem of the transfer of that front-line
5 determination to the executive branch, to the
6 director, as far as this statute is concerned,
7 I will even concede for the sake of argument
8 that wide band is a meaningful one.

9 Within that band, if the director
10 picks \$150 million or \$600 million, it's
11 perfectly fine from Congress's perspective
12 because Congress simply said to the Board: You
13 make that determination.

14 And that top-line number isn't even a
15 real number because they can further evade it
16 by building out this continuing endowment that
17 would --

18 JUSTICE KAGAN: Mr. Francisco, it --
19 it -- it does seem to me that your argument is
20 essentially that what the Appropriations Clause
21 demands is annual line-item appropriations,
22 that that's the -- not just the paradigm
23 appropriation but the only constitutionally
24 valid kind of appropriations and that any
25 deviation from that needs some special

1 justification or maybe is just, like,
2 unconstitutional per se. I'm not exactly sure
3 what the argument is.

4 But the history of our country just
5 rejects that scheme. I mean, that might have
6 been a way to understand what the Framers were
7 doing, but it turns out that from the very
8 first year, that's not what they were doing.
9 That's not what they did. Annual line-item
10 appropriations were some appropriations but
11 massively not all appropriations.

12 MR. FRANCISCO: And --

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

15 MR. FRANCISCO: And -- and,
16 respectfully, Your Honor, that's not my
17 argument. I think that the lack of durational
18 limits here is what makes this particularly
19 problematic, but it's particularly problematic
20 when you combine that with a delegation to an
21 executive branch agency to pick its own
22 appropriation, subject only to a limit that's
23 so high it's almost never relevant.

24 If you can do that here, you can go
25 agency by agency by agency and simply say:

1 Spend whatever you think reasonably appropriate
2 as long as you don't hit \$10 billion. And
3 while my friends --

4 JUSTICE SOTOMAYOR: I'm sorry, I'm
5 trying to understand your argument, and I'm at
6 a total loss.

7 MR. FRANCISCO: I'll try to do better,
8 Your Honor.

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

18 Over 60 percent of the appropriations
19 -- I think it may be 73, 63, something like
20 that -- are of standing -- standing
21 appropriations. They're not given every year.
22 And some of them are fixed and some of them are
23 not. Some are, you know, whatever you need to
24 run your agency, including, from the very
25 beginning, in 1789, the Customs Service.

1 So I don't understand what you're
2 saying.

3 MR. FRANCISCO: So -- so, Your Honor,
4 respectfully --

5 JUSTICE SOTOMAYOR: It's -- unless
6 you're saying standing appropriations are
7 wrong, tell me why they're wrong. If they're
8 not wrong, tell me when they're right. Tell me
9 how much detail they have to go into and why is
10 a cap different --

11 MR. FRANCISCO: Sure.

12 JUSTICE SOTOMAYOR: -- than a standing
13 appropriation for a certain amount since we
14 can't force anybody to spend as much money as
15 you give. And, routinely, lots of agencies
16 return money, including this one, the Court.
17 So either -- I don't know what you want.

18 MR. FRANCISCO: So the -- so the first
19 thing, Your Honor, is I would like to address
20 the Customs Service because my understanding of
21 it is not the same as my friend's understanding
22 of it.

23 As I understood the -- understand the
24 Customs Service at the time of the founding, it
25 was actually funded through fees that it

1 collected as part of the collection of customs,
2 and Congress set those formulas. Congress
3 determined what fees they could collect or what
4 formula they could use to collect those fees.

5 And, in addition, it was supervised by
6 the Department of the Treasury, which was
7 itself subject to annual appropriations. So I
8 -- I don't think it was a standing
9 appropriation.

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

19 In terms of what the standard is, I
20 think our front-line rule is, at a minimum,
21 Congress has to determine the amount. And the
22 reason I'm focusing on the factors that I'm
23 focusing on is because, when you bring those
24 factors together, you have really exploded any
25 limitation at all.

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

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

16 MR. FRANCISCO: No, Your Honor, for a
17 couple of reasons. I think the main one is
18 that as this Court has suggested in *Seila Law*
19 and as I think then Judge Kavanaugh suggested
20 on the D.C. Circuit, the Federal Reserve is
21 pretty much *sui generis*. I think it reflects
22 the fact that at the time of the founding, the
23 core functions of the Fed, controlling the
24 money supply through open market transactions,
25 weren't really considered governmental

1 functions at all. That's why --

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

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

6 JUSTICE KAGAN: Because you state a
7 test, and then a -- a -- a -- a -- a agency
8 that clearly fails under that test, you say,
9 oh, no, I don't mean that.

10 MR. FRANCISCO: No, because, for the
11 Fed, remember, the First and Second National
12 Banks were organized as private banks. To this
13 day, the presidents of the private regional
14 reserve banks sit on the Federal Open Markets
15 Committee, and it's also why I think that if
16 this Court were ever to take the step of
17 overturning Humphrey's Executor, it likely
18 wouldn't impact the for-cause removal
19 restrictions on the Board itself. And I think
20 it does reflect that historical tradition in
21 the Fed of it not really --

22 JUSTICE KAGAN: Okay. It -- it's just
23 --

24 MR. FRANCISCO: -- exercising
25 governmental power.

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

4 MR. FRANCISCO: No, the FDC -- IC and
5 the OCC, I think, are well within the tradition
6 of agencies that are limited to what they can
7 collect from the people that they serve and
8 regulate. But I think my more important point,
9 Your Honor, is if you think that --

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

12 MR. FRANCISCO: No, I'm not, Your
13 Honor. What I'm saying is that if you think
14 that those serve as the model for the CFPB,
15 then it really is Katy, bar the door. As my
16 friend explained, those agencies don't even
17 have a statutory cap.

18 So, if you think that that's what
19 justifies the CFPB, then you truly could go
20 agency by agency and simply say: Spend
21 whatever you want, full stop, period. We'll
22 come back to you when we think we can
23 override the Presidential veto.

24 JUSTICE KAVANAUGH: But then you just
25 said --

1 JUSTICE ALITO: Mr. Francisco, until
2 the very end of the Solicitor General's
3 argument, I thought I understood the limiting
4 principle that she was advocating and the
5 limiting principle that you were advocating,
6 and at least at a fairly high level of
7 generality, I thought there was agreement on
8 what the limiting principle was, and that was a
9 comparison of the setup that is before us with
10 historical practice.

11 And I don't think there's anything
12 unusual about asking counsel in cases that come
13 before us for the limiting principle of the
14 argument that they're making. That's a basic
15 question that we ask. I don't think it's a
16 question of burden-shifting.

17 In any event, at the end of the
18 Solicitor General's argument, she seemed to be
19 embracing a much broader argument that I think
20 was posed by Justice Jackson's questions, and
21 that is whether the Appropriations Clause is
22 satisfied so long as Congress adopts any law
23 that says that you, Agency, you get money in
24 this way. So long as that there's any law that
25 does that, that's consistent with the

1 Appropriations Clause.

2 Now the Solicitor General on rebuttal
3 can clarify whether she thinks that's the
4 correct test that we should apply or whether
5 it's the one that I had previously thought she
6 was advocating, which looks to whether
7 something falls far outside Congress's
8 historical practices.

9 So could you comment on this broad
10 "any law" argument and, in particular, answer
11 the question whether the Appropriations Clause
12 would have any meaning if that broad
13 interpretation were adopted?

14 MR. FRANCISCO: Well, and -- and, Your
15 Honor, that broad interpretation can't possibly
16 be right if you think that the point of the
17 Appropriations Clause is meant to ensure that
18 Congress has the duty and obligation to
19 exercise a powerful check on executive power,
20 because that would simply allow the very first
21 Congress to say to President Washington:
22 Mr. President, spend whatever you think is
23 reasonably appropriate. We'll come back
24 sometime if we think you got it totally wrong
25 and we can override your veto.

1 So I think that cannot possibly be the
2 test.

3 JUSTICE ALITO: And the -- the
4 Constitution says "No Monies shall be drawn
5 from the Treasury but in Consequence of
6 Appropriations made by Law." How money would
7 be drawn by the -- from the Treasury without a
8 law is something that baffles me.

9 MR. FRANCISCO: I think that's exactly
10 right, Your Honor.

11 JUSTICE JACKSON: Mr. Francisco --

12 MR. FRANCISCO: And, again --

13 JUSTICE JACKSON: -- in Cincinnati
14 Soap, I -- I had understood the point of the
15 Appropriations Clause to prevent the executive
16 in other circumstances from exercising the
17 authority to take money without consent of the
18 legislature. I -- I had understood the work of
19 the clause not to be to direct the legislature
20 as to how to exercise its own prerogative of
21 the purse but, instead, to ensure -- to support
22 the separation of powers concept by ensuring
23 that the prerogative is lodged with the
24 legislature and not with the executive or
25 someone else. Am I wrong about that?

1 MR. FRANCISCO: Your Honor,
2 respectfully, I think you are. I think it is
3 both Congress's prerogative but also its
4 obligation to check the power of the executive
5 branch. That, after all, was the whole reason
6 --

7 JUSTICE JACKSON: No, but I'm -- is it
8 -- is there something about the Appropriations
9 Clause that specifically directs Congress with
10 respect to its own exercise of the
11 appropriations power?

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

17 JUSTICE JACKSON: But don't you have
18 to have that in order to say that Congress is
19 violating the Appropriations Clause by the way
20 in which it exercised it here?

21 MR. FRANCISCO: Not in -- not in terms
22 of how --

23 JUSTICE JACKSON: I mean, I thought
24 your answer would have to be -- I thought your
25 answer would have to be that the appropriations

1 language in the Constitution carries with it
2 the limitations that you say have to be applied
3 in this situation.

4 MR. FRANCISCO: Not in terms --

5 JUSTICE JACKSON: That it has to be
6 fixed, that it has to be, you know, whatever,
7 you know --

8 MR. FRANCISCO: Right.

9 JUSTICE JACKSON: -- the other aspects
10 that you say are troubling --

11 MR. FRANCISCO: Yeah.

12 JUSTICE JACKSON: -- would have to be
13 derived from that constitutional provision,
14 right?

15 MR. FRANCISCO: Not in terms of how
16 this Court traditionally interprets these
17 provisions when it comes to separation of
18 powers. Look, as some members of the Court
19 have pointed out, there's no removal clause in
20 the Constitution, but you infer it --

21 JUSTICE JACKSON: But where do we get
22 them from?

23 MR. FRANCISCO: You infer it from this
24 --

25 JUSTICE JACKSON: If they're not in

1 the Constitution, where do we get -- I don't
2 understand. We can't just suddenly decide that
3 things are troubling without some kind of legal
4 reference point.

5 MR. FRANCISCO: Well, Your Honor, I
6 think, when it comes to separation of powers,
7 it's inferred from the text and structure of
8 the Constitution construed in light of its
9 overriding purpose. And, here --

10 JUSTICE BARRETT: But, Mr. Francisco,
11 the removal clause comes comes from the
12 vesting -- I mean, the removal cases focus on
13 the vesting clause in Article II, so there is a
14 textual hook.

15 MR. FRANCISCO: Well, and, here, Your
16 Honor, there is a textual hook as well in the
17 Appropriations Clause, which, again, is set
18 forth in Section 9 of Article I, which actually
19 sets forth limitations and obligations upon
20 Congress.

21 JUSTICE BARRETT: Except the limit's
22 --

23 MR. FRANCISCO: And I think that --

24 JUSTICE BARRETT: -- not there. I
25 mean, I guess that's what I'm struggling with

1 and I take it some of the other questions are
2 too. I mean, you have the unitary executive
3 theory, right?

4 MR. FRANCISCO: Mm-hmm.

5 JUSTICE BARRETT: You would say, well,
6 if all executive power has to be in the
7 President, then his ability to fire someone,
8 his ability to remove someone can't be
9 hindered.

10 But, here, you were just saying to
11 Justice Jackson that there's nothing in the
12 Appropriations Clause itself or in the word
13 "appropriations" that imposes the limits that
14 you're talking about.

15 MR. FRANCISCO: No. What I'm saying
16 is that the word "appropriation" is -- you can
17 interpret it in different ways. At its core,
18 what the Appropriations Clause does, Congress
19 has to make an appropriation. It's got to
20 determine what the government should be
21 spending. It's got to determine the amount
22 that it should be spending.

23 And it's got a non-delegation
24 component baked into it because you cannot
25 simply transfer that core legislative function

1 to the executive branch. And that's why I
2 think that even if you, you know, put the issue
3 of a cap aside, even if you think that this is
4 a meaningful band of discretion, it's an
5 extraordinarily wide band of discretion that
6 excuses --

7 JUSTICE BARRETT: But what if it said,
8 like, four years, \$400 million a year? Would
9 that be a problem?

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

13 JUSTICE BARRETT: So 600 million was
14 too much?

15 MR. FRANCISCO: If it said to the --
16 well, what I'm getting at is, if Congress is
17 fixing the right amount, the amount should be
18 \$400 million or the amount should be \$600
19 million, I would -- that would be a much more
20 difficult case for me.

21 But, when Congress is doing what it
22 did here, it's saying to the director: You
23 pick the amount that you think is reasonably
24 necessary. It could be zero. It could be \$750
25 million.

1 It's taking that core element of an
2 appropriation, determining the amount that the
3 government should be spending, and it's saying
4 we, Congress, are not going to exercise that
5 judgment, we're kicking that over to you, the
6 executive branch, to exercise that judgment.

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

18 And there's a historical tradition for
19 those types of agencies, but that history tells
20 us a couple of other things too. It's never
21 been extended beyond that group of agencies.
22 That model was rejected for the CFPB. That was
23 actually the model that President Obama
24 proposed for the CFPB, but Congress rejected it
25 because it wanted to make this agency even more

1 independent.

2 And, finally, if you do think that's
3 the model, there really is no limit because
4 those agencies don't even have a cap. So
5 Congress could just say to every agency: Spend
6 whatever you think reasonably appropriate, you
7 make the front-line judgment within this very
8 broad range of discretion in something maybe
9 not quite perpetual but close to it.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Thomas?

13 JUSTICE THOMAS: Mr. Francisco, just
14 briefly, I'd like you to complete this
15 sentence. Funding of the CFPB is -- violates
16 the Appropriations Clause because?

17 MR. FRANCISCO: Because Congress has
18 not determined the amount that this agency
19 should be spending. Instead, it has delegated
20 to the director the authority to pick his own
21 appropriation, subject only to an upper limit
22 that's so -- so high it's rarely meaningful.

23 CHIEF JUSTICE ROBERTS: Justice Alito?

24 JUSTICE ALITO: Well, my -- my concern
25 is the limiting principle that both sides are

1 advocating, and you just addressed your answer
2 to Justice Thomas, and I remain confused about
3 the government's limiting principle, whether it
4 is adopting the argument that any law -- any
5 law suffices or whether it requires us to look
6 at historical examples and see whether there's
7 anything that's at least roughly analogous to
8 what is before us, whether what is before us
9 goes far beyond anything the Congress has done
10 in the past.

11 I won't ask the question of the
12 Solicitor General in rebuttal, but maybe she'll
13 answer that question at that time.

14 CHIEF JUSTICE ROBERTS: Justice
15 Sotomayor?

16 JUSTICE SOTOMAYOR: I don't know how
17 to take your answer because it's so open-ended.
18 I don't know how much is too much. You know,
19 are you going to say, if it's not close to
20 30 percent, 40 percent, 50 percent of
21 expenditures, 90 percent, are we going to have
22 to apply this to every agency that returns
23 money or underspends every year? I don't know.

24 But can I get to remedy for a moment?

25 MR. FRANCISCO: Sure.

1 JUSTICE SOTOMAYOR: All right. Tell
2 me why basically saying every rule passed by
3 this agency has to be struck down.

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

6 JUSTICE SOTOMAYOR: That's what the
7 Fifth Circuit said.

8 MR. FRANCISCO: -- we have challenged
9 one rule. We've asked for that one rule to be
10 set aside and that rule --

11 JUSTICE SOTOMAYOR: But I want you to
12 tell me how the logic wouldn't apply to
13 everything the agency has done, to every rule,
14 and how do we avoid the market --

15 MR. FRANCISCO: Sure.

16 JUSTICE SOTOMAYOR: -- disruption that
17 the SG and the amici point to?

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

23 And when Congress adopts a valid
24 appropriation, it can ratify whatever rules and
25 regulations it wants to ratify, and if it

1 doesn't ratify them, it pays the political
2 price for that choice too.

3 JUSTICE SOTOMAYOR: All right. So
4 tell me which parts of the law or which part of
5 this structure you would strike down.

6 MR. FRANCISCO: The funding
7 provisions, the provision that --

8 JUSTICE SOTOMAYOR: So should they say
9 every -- if they said something every year,
10 whatever you spend on salaries, office space,
11 your legal functioning, your experts, whatever
12 else, the Federal Reserve Board has to pay just
13 that amount, is that okay for you?

14 MR. FRANCISCO: Your Honor, are we --
15 have we moved off of remedy on to -- back on to
16 merits?

17 JUSTICE SOTOMAYOR: No, we're still on
18 remedy. Is that still -- because if we sever
19 that --

20 MR. FRANCISCO: No. No, Your Honor.
21 I don't think it --

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

24 MR. FRANCISCO: Oh, I see. No, Your
25 Honor, because it's not severable. You'd

1 essentially have to -- the only way to get to,
2 you know, some alternative answer through
3 severability is essentially pull out a white
4 piece of paper and start on your own. There's
5 no --

6 JUSTICE SOTOMAYOR: Well, a lot of
7 people --

8 MR. FRANCISCO: -- provision that you
9 can simply excise out of this.

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

13 MR. FRANCISCO: Right.

14 JUSTICE SOTOMAYOR: -- follow my
15 approach, which is, I think, the -- for me, the
16 appropriate one, do the least harm, which is,
17 if we've got something unconstitutional, we
18 don't throw away the baby with the bath water,
19 we try to figure out what the bath water is.

20 MR. FRANCISCO: Mm-hmm.

21 JUSTICE SOTOMAYOR: So tell me what
22 the bath water is.

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

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

1 MR. FRANCISCO: To me, Your Honor,
2 there is no bath water here. There is no valid
3 way to do a severability analysis that gets to
4 -- gets to something reasonable.

5 The most that you could do is somehow
6 rewrite this thing to come up with a standing
7 appropriation of, say, \$750 million adjusted
8 for inflation in perpetuity. But, if that were
9 your remedy, you've essential --

10 JUSTICE SOTOMAYOR: And return -- and
11 return -- and return the excess to the
12 Treasury. Why is that a bad thing?

13 MR. FRANCISCO: Sure. For two
14 reasons, Your Honor. One -- one is just, as a
15 technical matter, I just don't know how you can
16 get there from this statute. So I think that
17 would be far beyond anything the Court's ever
18 done in the severability world.

19 JUSTICE SOTOMAYOR: Why?

20 MR. FRANCISCO: Two, Your Honor, you
21 would be adopting a funding stream, a standing
22 appropriation at an amount higher than this
23 agency has never needed before. That's
24 something that Congress has never done. As far
25 as I know, never done.

1 And so you would essentially -- you
2 know, the whole point of severability is to try
3 to mirror legislative intent. Why on earth
4 would you adopt a funding stream that Congress
5 has never even considered before instead of
6 just simply saying to Congress: It's now back
7 in your court, you need to make a valid
8 appropriation.

9 And if you need to stay your judgment
10 for a period of time, as you did in the
11 Northern Pipeline case, to facilitate that, we
12 certainly have no objection to that. But --

13 JUSTICE SOTOMAYOR: Okay, counsel.

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

16 CHIEF JUSTICE ROBERTS: Justice Kagan?

17 JUSTICE KAGAN: If I could take you
18 back to your exchange with Justice Thomas, do I
19 understand that to mean that you think that
20 what Congress would have to do to make this
21 constitutional is to change this from a "no
22 more than \$600 million" to a "\$600 million, no
23 more, no less"?

24 MR. FRANCISCO: Well, Your Honor, if
25 it were \$600 million, no more, no less, my only

1 remaining argument would be a challenge to its
2 either perpetual nature or long duration --

3 JUSTICE KAGAN: Well, then you're --
4 you're --

5 MR. FRANCISCO: -- of the nature, and
6 that would be a --

7 JUSTICE KAGAN: -- then you're
8 amending your answer to Justice Thomas.

9 MR. FRANCISCO: No, I'm not. That
10 would be a much more --

11 JUSTICE KAGAN: I think you are, Mr.
12 --

13 MR. FRANCISCO: -- that would be a
14 much more difficult question.

15 JUSTICE KAGAN: If -- if -- could you
16 -- could I just please --

17 MR. FRANCISCO: Sure.

18 JUSTICE KAGAN: -- ask my question?

19 Because, when you talked to Justice
20 Thomas, you said that the "because," what
21 followed the "because," was that it was an up
22 to X rather than a specification of a number,
23 no more, no less.

24 So, if that's right, then it must be
25 right that Congress could take this back and

1 say you have to spend \$600 million, and that
2 would be constitutional. And what I would
3 suggest to you is that's what your argument is,
4 and that's profoundly ahistorical in terms of
5 our history.

6 MR. FRANCISCO: So a couple of
7 responses, Your Honor, and I don't want to
8 quibble with the premise of the question, but I
9 think that when I listed out my standard to
10 Justice Thomas, one of the factors was the fact
11 that this was perpetual. I'll put that
12 entirely to the side.

13 If Congress does make a standing
14 appropriation of \$600 million, at a bare
15 minimum, it will have made a determination as
16 to what the government should be spending, and
17 so I would have a much harder time arguing
18 against that alone.

19 I don't think that that type of thing
20 is historically precedented. Outside of the
21 self-funding agencies like the Post Office and
22 their modern analogues, I'm not aware of any
23 agency that has been subjected to a standing
24 appropriation for its operating budget, much
25 less one that's done -- been subject to that

1 kind of standing appropriation in perpetuity at
2 a number that's higher than they actually need.

3 The closest I can think of throughout
4 history is the Customs Service from 1849 to
5 1912, where they had a \$1.5 million standing
6 appropriation, but they were, one, subject to
7 the supervision of the Secretary of the
8 Treasury, who received regular appropriations,
9 and, two, that amount wasn't even enough, which
10 is why it went back for regular appropriations.

11 JUSTICE KAGAN: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Gorsuch?

14 Justice Kavanaugh?

15 Just Barrett?

16 Justice Jackson?

17 JUSTICE JACKSON: Yes. So I think
18 I've heard you say repeatedly that the problem
19 here is that Congress is giving away the power
20 of the purse in the way that it has set this
21 up.

22 MR. FRANCISCO: Yes.

23 JUSTICE JACKSON: Is that your
24 fundamental bottom-line problem with this?

25 MR. FRANCISCO: Yes.

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

8 So, in Scenario Number 1, we have a
9 Constitution that gives the legislature the
10 power of the purse, and it specifies what that
11 authority entails. It says: To exercise the
12 power of the purse, you have to select a fixed
13 sum of money on an annual basis and tell the
14 recipient exactly how it must be spent.

15 I think, if that's our Constitution,
16 then I might well agree with you that this
17 agency structure is giving up that power
18 because, in fact, those determinations about
19 how much is being spent and et cetera would be
20 given to the agency, and the Constitution tells
21 us that the legislature has to exercise that
22 authority.

23 My problem is Scenario 2, which is the
24 Constitution giving the legislature the power
25 of the purse, and it defines the power of the

1 purse as the power to decide how government
2 departments are funded, period. That's what
3 the Constitution says. It's got a definitions
4 section, and it says, when we say "power of the
5 purse," we mean you have the ability to decide
6 how the government is funded.

7 If that's your constitutional
8 provision, I think you have a harder -- harder
9 time, if not almost an impossible time,
10 convincing me at least that by setting this
11 agency up this way in which Congress has --

12 MR. FRANCISCO: Mm-hmm.

13 JUSTICE JACKSON: -- exercised that
14 authority by deciding this is how the CFPB is
15 going to be funded, that they have actually
16 given up or, you know, ceded that authority --

17 MR. FRANCISCO: Mm-hmm.

18 JUSTICE JACKSON: -- or something. In
19 fact, they've exercised it pursuant to my
20 Constitution. So I guess I see and I hear the
21 government arguing that our current
22 Constitution is more like Scenario 2, and so,
23 therefore, if that's true, don't you lose on
24 this fundamental conception of you've given
25 away your authority?

1 MR. FRANCISCO: Your Honor, if that
2 were truly the conception embodied in the
3 Appropriations Clause, then the answer to your
4 question is yes. But, if that is truly the
5 conception, then there really are no limits on
6 the appropriations power. Congress can say --

7 JUSTICE JACKSON: But wait. Why is
8 that a problem? If that's the conception,
9 that's what Scenario 2 says --

10 MR. FRANCISCO: Sure, Your Honor. And
11 so --

12 JUSTICE JACKSON: -- that the founders
13 said we are trying to give to the legislature
14 the authority to make the determination of how
15 the government is funded --

16 MR. FRANCISCO: And that's --

17 JUSTICE JACKSON: -- period.

18 MR. FRANCISCO: -- and that's my
19 point, Your Honor. If your conception is that
20 Congress can say to the President,
21 Mr. President, you spend what you think is
22 reasonably appropriate, full stop, period, if
23 you think that's what it means, then I lose.

24 JUSTICE JACKSON: No, but I'm asking
25 --

1 MR. FRANCISCO: I respectfully don't
2 think that's what it means.

3 JUSTICE JACKSON: What I'm asking you
4 is help me to understand why that's not what it
5 means. That -- that's your burden, right?
6 That's what the words seem to say. There's
7 nothing in this Constitution that's like
8 Scenario 1, like the Army clause, where
9 Congress -- where -- where the Framers have
10 specifically restricted the exercise of
11 authority that they're giving to Congress.

12 So what I need to find out from you is
13 why we are not in Scenario 2 given the language
14 of this, the history of the way in which the
15 Appropriations Clause has been handled. Why
16 isn't this just up to Congress, and if they
17 decide they want to set it up in this way,
18 without limit --

19 MR. FRANCISCO: Mm-hmm.

20 JUSTICE JACKSON: -- so be it?

21 MR. FRANCISCO: Because, Your Honor, I
22 -- I think that that would be completely
23 inconsistent with the entire purpose of
24 separating the sword and purse, which Hamilton
25 said, if you were to combine the two, would

1 furnish one body with all the means of tyranny,
2 which Madison said was the most complete and
3 effectual weapon --

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

15 MR. FRANCISCO: Because what you're
16 allowing Congress to do, as I understand your
17 question, is to say to the President,
18 Mr. President, it's no longer our
19 determination; it's your determination.
20 Whatever you want, whatever you think is
21 reasonable, that is fine with us.

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

24 JUSTICE JACKSON: So you're saying a
25 provision of the Constitution is

1 unconstitutional? Because, in my hypothetical,
2 the Framers have said that in the Constitution.

3 MR. FRANCISCO: Well, Your Honor, I --
4 I --

5 JUSTICE JACKSON: Congress, you can --
6 you can set this up however you want, to
7 include --

8 MR. FRANCISCO: Yeah.

9 JUSTICE JACKSON: -- allowing an
10 agency to make this determination.

11 MR. FRANCISCO: And -- and --

12 JUSTICE JACKSON: So that's
13 unconstitutional in your view?

14 MR. FRANCISCO: No, Your Honor,
15 because I have conceded that if the
16 Appropriations Clause actually means what
17 you're suggesting it means, I'm wrong.

18 JUSTICE JACKSON: Okay.

19 MR. FRANCISCO: I'm simply saying that
20 that cannot possibly be what the Appropriations
21 Clause means because, if it were, then the game
22 is really over. One Congress can simply say to
23 one President in one fell swoop:
24 Mr. President, it's up to you, spend whatever
25 you want.

1 And what Madison thought was so
2 dangerous, what Hamilton thought was so
3 dangerous, would actually be precisely what the
4 Constitution allows, the unification --

5 JUSTICE JACKSON: But, of course,
6 that's not what's happening in this case,
7 right? I mean, I think that's -- the
8 Solicitor's argument is maybe if we had
9 anything close to that, the Court would
10 consider whether or not tyranny is afoot.

11 But, for this particular scenario,
12 there is -- there are the kinds of checks that
13 you would expect to see in terms of Congress's
14 exercise of its power.

15 MR. FRANCISCO: Two points, Your
16 Honor. One, structures don't crumble in a day,
17 they crumble over time, and this would be the
18 first very substantial step in the crumbling of
19 that structure.

20 Secondly, if you adopt the theory
21 you're suggesting, then it's not really the
22 second step for the crumbling of the
23 structures. You've simply announced -- you --
24 you've -- you've simply announced that the
25 structures do not stand.

1 Here, the fundamental issue is that
2 Congress has to make a determination as to what
3 the government should be spending. It cannot
4 simply say we're going to let the President do
5 that because, if you transfer that to the --

6 JUSTICE JACKSON: One final question,
7 Mr. Francisco. So I'm a little worried, I
8 think, about the separation of powers problem
9 that may occur if the judiciary gets involved
10 with telling Congress when and under what
11 circumstances it can exercise its own
12 prerogatives concerning funding.

13 How do we avoid the slippery slope of
14 -- today you say the issues are duration and
15 source and whatever. The next agency,
16 someone's going to come up with a few more.
17 How do we avoid the judiciary becoming suddenly
18 a supra legislator, just telling, you know,
19 the -- the Congress agency by agency whether
20 it's a thumbs up or thumbs down from our
21 perspective about these things? I mean, where
22 are these -- these limits in the law --

23 MR. FRANCISCO: The -- the --

24 JUSTICE JACKSON: -- that prevent us
25 from overstepping our authority?

1 MR. FRANCISCO: Sure, Your Honor. The
2 judiciary has always played a vital role in
3 policing the separation of powers, because the
4 whole point is not to protect Congress from the
5 President or President from the Congress, it's
6 to protect the liberty of the people.

7 JUSTICE JACKSON: Right. But where
8 are the limits that we have in order to do
9 that? We've got to police relative to some set
10 of rules.

11 MR. FRANCISCO: Sure, Your Honor.

12 JUSTICE JACKSON: And where are those
13 coming from?

14 MR. FRANCISCO: And that's exactly
15 what we've been talking about the whole time.
16 Under the Appropriations Clause, Congress has
17 to make the determination as to what the
18 government should be spending. It cannot
19 transfer that core legislative power to the
20 executive branch.

21 And the problem here is, when you
22 allow that transfer for a very, very long
23 period of time, subject to a limit so high
24 you're almost never going to hit it, you've
25 essentially created a blueprint for the total

1 collapse of sword and purse, the very thing
2 that the Framers thought was necessary --

3 JUSTICE JACKSON: Thank you.

4 MR. FRANCISCO: -- to protect liberty
5 in a free society.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 General Prelogar, rebuttal?

9 REBUTTAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

10 ON BEHALF OF THE PETITIONERS

11 GENERAL PRELOGAR: Thank you,
12 Mr. Chief Justice.

13 My friend said several times this
14 morning that to make a valid appropriation,
15 Congress needs to specifically fix the amount.

16 That's inconsistent with how an
17 appropriation was understood in the founding
18 era. It was defined as the act of assigning
19 something to a particular use. It required the
20 specification of source and purpose, never a
21 specific sum.

22 And if there were any debate about
23 that point, the 230-plus years of this nation's
24 history conclusively resolves it because the
25 very first Congress appropriated without

1 specifying a fixed sum.

2 The first act that it enacted that was
3 an appropriation specified up to a particular
4 cap of spending that was authorized, that's
5 just how the CFPB's funding mechanism is
6 structured today, and there have been countless
7 appropriations that look like this throughout
8 history.

9 My friend's theory would have sweeping
10 consequences. Even today, in the 2022
11 Consolidated Appropriations Act, we counted
12 more than 400 uses of this kind of discretion
13 to spend up to a specified cap.

14 And Congress has regularly enacted
15 appropriations that define the amount in terms
16 of purpose. The funds necessary for Social
17 Security or for the Judgment Fund or to pay
18 interest on the national debt, that is not a
19 historical outlier. It is the norm in
20 appropriations law.

21 My friend turns to suggesting that the
22 cap here is illusory. At the outset, I haven't
23 heard any standard that would judicial -- be
24 judicially manageable for courts to apply to
25 try to make those judgments.

1 This is again a case about Congress's
2 power over the purse. It's chosen a number.
3 It's enacted a cap. And I don't know what
4 basis courts would have to say that's too high,
5 that's not a meaningful constraint, Congress
6 should have set it lower. And I think that
7 that is a real problem with their theory at the
8 outset.

9 But even if the Court engaged with it,
10 it's not factually accurate here to say this
11 isn't a meaningful constraint. Congress, when
12 it chose the \$600 million figure, said that
13 this was modest compared to other agencies'
14 budgets.

15 It was attempting to estimate the
16 amount in the Federal Reserve system combined
17 earnings that had been previously spent on
18 consumer protection. And, in fact, if you look
19 at the CFPB's funding requests over the years,
20 it's come closer and closer to the cap. I -- I
21 think the most recent fiscal year, the CFPB was
22 only \$30 million below the cap. So, if that
23 trajectory continues, it's very likely the CFPB
24 is going to have to go to Congress and ask for
25 additional appropriations authority.

1 My friend also suggested that there
2 was something constitutionally suspicious about
3 standing appropriations. But I didn't hear any
4 engagement with the text of the Army
5 Appropriations Clause.

6 The Framers thought about this issue.
7 They did want to limit Congress when it came to
8 funding for the Army to create that durational
9 requirement, but they wrote no other limit into
10 the Constitution. And this too would have
11 sweeping consequences because today, over
12 60 percent of the federal budget comes in the
13 form of these kinds of standing appropriations
14 that exist in every sector of the federal
15 government.

16 And then, at some point, I think my
17 friend had suggested that it's all of these
18 features combined that add up to a
19 constitutional problem here.

20 And, Justice Alito, I want to engage
21 with your question about the limits. Our
22 theory in this case is based on text and
23 history. So I acknowledge that if there were,
24 in fact, a funding statute that didn't look
25 anything like what we've had in all of history

1 and -- and if the differences that you could
2 ascertain are relevant to a potential
3 separation of powers violation, that would
4 count against us and it would mean that maybe
5 the Court could determine that at some outer
6 recess of the separation of powers a line was
7 crossed.

8 But we have nothing like that here.
9 We have an appropriation that in all material
10 respects looks like countless others that have
11 existed for time immemorial since 1789 on. And
12 I think that leaves my friend suggesting that
13 the Court should turn away from text, the Army
14 Appropriations Clause, and turn away from all
15 that history and find some kind of implicit
16 additional limit on Congress's authority here.

17 But my friend hasn't offered a
18 principle the Court could apply to draw those
19 limits. With respect to whether the funding is
20 too much, how is a court supposed to figure it
21 out? With respect to duration, my friend says
22 that some appropriations can last longer than
23 two years, and I think he has to make that
24 concession because of the Army Appropriations
25 Clause. But then how long is too long? And

1 how is a court supposed to determine what
2 functions don't count?

3 He suggested that you can distinguish
4 some of the other financial regulators, like
5 the Federal Reserve Board, based on the
6 particular functions that it carries out.

7 But that's not a point of distinction
8 either. The Federal Reserve Board regulates,
9 it enforces. The other financial regulators do
10 the same. And I would point the Court to 12
11 U.S.C. Section 1818 to demonstrate that these
12 functions are not different.

13 Nor is there any principled line here
14 that the Court could apply to try to ascertain
15 and weigh the relative difference of function
16 between different agencies, as the Court
17 observed in Collins versus Yellen most
18 recently.

19 And I think what all of this adds up
20 to is that my friend is proposing that the
21 Court go down the road of for the first time
22 ever interpreting the Appropriations Clause to
23 contain some kind of inherent, implicit limit
24 on Congress that has never previously before
25 been recognized and that is completely detached

1 from history. We'd ask the Court to reject
2 that approach.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 General, Mr. Francisco.

5 The case is submitted.

6 (Whereupon, at 11:38 a.m., the case
7 was submitted.)

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