



1           IN THE SUPREME COURT OF THE UNITED STATES  
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3   CONSUMER FINANCIAL PROTECTION           )  
4   BUREAU, ET AL.,                            )  
5                                    Petitioners,            )  
6                                    v.                                ) No. 22-448  
7   COMMUNITY FINANCIAL SERVICES           )  
8   ASSOCIATION OF AMERICA, LIMITED,       )  
9   ET AL.,                                     )  
10                                    Respondents.            )  
11   - - - - -

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

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

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

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P R O C E E D I N G S

(10:04 a.m.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 I welcome the Court's questions.

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

20 GENERAL PRELOGAR: So I 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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