

BY SAM LOUIS TAYLOR

The CFPB in the Supreme Court, Again

The Consumer Financial Protection Bureau (CFPB) has been a source of debate since its creation in the 2010 Dodd-Frank Act. These debates, which have spilled out from the legislative branch into the courts, have often centered around the relative political independence granted by the agency's unique structure. A case that is now before the U.S. Supreme Court, *CFPB v. Community Financial Services Association of America*, challenges the constitutionality of the CFPB's funding structure and has the potential to throw into question regulatory decisions made by the agency.

The CFPB is an independent agency within the Fed that is charged with implementing and enforcing consumer protection laws in the financial services sector. The Board of Governors does not influence the operations of the CFPB, and regulatory decisions by the CFPB can be overturned only by a two-thirds vote of the Financial Stability Oversight Council, or through a special resolution of Congress. The CFPB is funded not through the annual appropriations process but through transfers from the Fed as well as penalties collected from its enforcement actions. The law requires the Fed to transfer the amount requested by the agency based on the director's assessment of need, subject only to certain statutory caps. The Fed itself is a self-funded entity and does not receive appropriations from Congress for its normal operations. This, in addition to other protections of its funds, makes the CFPB "double-insulated" from the normal congressional funding process and is unique even among other independent, self-funded agencies.

The CFPB's structure was previously before the Supreme Court only a few years ago. In its 2020 ruling in *Seila Law v. CFPB*, the court overturned

restrictions limiting the president's ability to remove the director of the CFPB from office but did not address whether the agency is constitutional.

The new case originated from a challenge to an agency rule related to payday lending that eventually worked its way to the U.S. Court of Appeals for the 5th Circuit. Though the appeals court judges dismissed many of the arguments made by the plaintiffs, they did agree that the CFPB's funding structure violated the Appropriations Clause of the Constitution. The 5th Circuit cited this "power of the purse" as an expressed "restriction upon the disbursing authority of the Executive department." The court wrote that, though the Fed is accountable by statutory requirements that any excess annual earnings be sent to Treasury's General Fund, Congress expressly excluded the CFPB from such a requirement and, essentially, created a perpetual funding stream without appropriate oversight. Congress, the court wrote, violated the Appropriations Clause and the separation of powers by giving too much of its funding authority away to the CFPB. Because the payday rule in question was created and enforced using an unconstitutional funding scheme, the court found, the payday rule in question was invalid.

Now that this case is before the Supreme Court, members of Congress have chosen to weigh in. As expected, given the historical disagreements over the CFPB, support for the agency has largely fallen along partisan lines.

In a friend of the court brief, 132 Republicans, led by House Financial Services Committee Chair Patrick McHenry, R-N.C., and Senate Banking Committee Ranking Member Tim Scott, R-S.C., are supporting the 5th Circuit ruling, urging the Supreme Court to overturn the CFPB's funding

structure and bring the agency into the regular appropriations process. Difficult funding decisions, they state, are "a feature, not a bug, of Article I and the Appropriations Clause." They argue that the total structure of the CFPB "amount to a clear transfer of Congress's Appropriations Clause powers over the CFPB."

A brief filed by 144 Democrats presents a contrasting argument. Led by Senate Banking Committee Chair Sherrod Brown, D-Ohio, and House Financial Services Committee Ranking Member Maxine Waters, D-Calif., they argue that the funding structure of the CFPB is just a recent example of Congress' clear authority to structure appropriations as it sees fit to meet the needs of the nation, which in this case was a lack of robust consumer protection enforcement leading up to the 2008 financial crisis. "To solve these problems," the Democrats' brief argues, "Congress consolidated federal regulatory authority for certain consumer protection laws into a single new agency—the CFPB—and provided the CFPB with a steady but capped appropriation." They also argue that the CFPB is not free from congressional oversight, citing the requirements for "semiannual testimony before two Committees of Congress and extensive financial auditing and reporting."

The Supreme Court is scheduled to hear the case on Oct. 3. A decision overturning the agency's funding structure could trigger challenges to many current CFPB rules as well as an intense debate in Congress over the future of the agency. Upholding the agency's structure would be unlikely to cool Republican calls for legislative reforms. The CFPB has been a keen point of interest for Congress since its inception and is sure to remain so for the foreseeable future. **EF**