

A Circuit Split Emerges on the Constitutionality of the CFPB's Funding Structure, Months Before the Issue Comes Before the U.S. Supreme Court

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On March 23, 2023, the Court of Appeals for the Second Circuit issued a decision in [*CFPB v. Law Offices of Crystal Moroney*](#) (*Moroney*). The case reviewed constitutional challenges to the Consumer Financial Protection Bureau's (CFPB) funding structure previously decided by the Fifth Circuit Court of Appeals last October in [*Community Financial Services Association of America, Ltd. v. CFPB*](#) (*Community Financial*). In *Community Financial*, the Fifth Circuit vacated the CFPB's 2017 "Payday Lending Rule" on the grounds that it was invalid "as the product of the Bureau's unconstitutional funding scheme." The CFPB's petition for writ of certiorari was granted by the U.S. Supreme Court in February.

Appellant Moroney, a debt collection law firm, challenged the enforceability of the CFPB's civil investigative demand (CID). Moroney argued, amongst other things, that the CFPB's CID was unenforceable because the CFPB's funding structure violated the Appropriations Clause and the nondelegation doctrine.

The Second Circuit declined to follow the Fifth Circuit's reasoning and decision in *Community Financial* on several key grounds:

1. The Supreme Court has previously articulated that the Appropriations Clause states that "the payment of money from the Treasury must be authorized by a statute." Here, Congress passed the Consumer Financial Protection Act, authorizing the CFPB to draw funding from the Federal Reserve, a provision signed into law by the President. Additionally, Congress limited the CFPB to draw, at maximum, twelve percent of the Reserve System's 2009 Operating Expenses annually with adjustments for increased labor costs. Because the funding structure is bound by statutory provisions, the CFPB's funding structure does not violate the Appropriations Clause.

2. The Constitution does not impose “time limits” on agency appropriations. By comparison, the Constitution provides that “no Appropriation of Money” to raise and support an army shall be for a longer term than two years. The Second Circuit reasons that this negative implication cuts against the reasoning of the Fifth Circuit in the *Community Financial* that the CFPB must go before the Appropriations Committee to seek funding.
3. The CFPB’s funding structure is proper under the nondelegation doctrine because the Consumer Financial Protection Act (CFPA) provided an intelligible principle to guide the CFPB in setting and spending its budget. The CFPA not only states the purpose of the CFPB and its budget. It also lists five “objectives” and six “primary functions.” In doing so, Congress “delineated the general policy” and “the boundaries of [the CFPB’s] delegated authority.”

The Second Circuit further states in a footnote that the Fifth Circuit’s reasoning in finding a violation of the Appropriations Clause circumvents the Supreme Court’s nondelegation doctrine cases. In addition to the requirement that Congress lay out an intelligible principle, the Fifth Circuit adds that Congress must also assert “direct control” over the CFPB’s budget “on the front end” and review the CFPB’s expenditures “on the back end.” The Second Circuit notes that these additional requirements are at odds with the Supreme Court’s guidance that an intelligible principle is all that is required to satisfy separation of power concerns.

In sum, the Second Circuit found no historical Supreme Court precedent to support arguments that the CFPB’s funding structure is constitutionally infirm under either the Appropriations Clause or the nondelegation doctrine.

The *Moroney* decision was rendered while we wait for *Community Financial* to be heard before the Supreme Court. It is uncertain how much consideration will be given to the Second Circuit’s decision in *Moroney*. Importantly, the *Community Financial* and *Moroney* cases are both similar constitutional challenges but made in different regulatory contexts. While *Community Financial* challenges the Bureau’s rule-making authority, *Moroney* challenged the Bureau’s enforcement authority. One issue to watch is whether the Supreme Court’s rationale and holding will influence which of these powers will be affected, or whether both will be affected by one decision.

Topics

Fifth Circuit Court Of Appeals, CFPB, SCOTUS, Second Circuit Court Of Appeals, CFPA