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ALERTS

SCOTUS Cert Recap: A Second Constitutional Challenge To The CFPB, And A Criminal-Sentencing Question That Has Sharply Divided The Lower Courts

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Highlights

On Feb. 27, the Supreme Court agreed to consider the following questions:

Does the funding mechanism for the Consumer Financial Protection Bureau – by which the agency directly requisitions funds from the earnings of the Federal Reserve – violate the Appropriations Clause?

Does the "safety valve" provision of the federal sentencing statute – which applies only where "the defendant does not have—(A) more than 4 criminal history points…; (B) a prior 3-point offense…; and (C) a prior 2-point violent offense" – merely require that the defendant not have all of these three conditions, or does it require that the defendant not have any of these three conditions?

On Feb. 27, the U.S. Supreme Court agreed to hear two cases – one on whether the funding mechanism for the Consumer Financial Protection

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Bureau (CFPB) violates the Appropriations Clause, and another involving the proper interpretation of the "safety valve" provision of the federal sentencing statute.

This will be the second time the Supreme Court has heard a constitutional challenge to the CFPB, and the stakes will be just as high as the first time around: The CFPB's existence will be on the line and the case is sure to receive considerable attention, particularly from consumer groups and the financial industry.

The criminal case, while less high-profile, will have significant consequences for federal criminal defendants, and will be closely followed by criminal-law practitioners and statutory-interpretation experts.

Court Takes Up Major Appropriations Clause Challenge to CFPB

CFPB v. Community Financial Services Association of America raises a question with sweeping implications: Does the CFPB's funding mechanism violate the Appropriations Clause?

Congress created the CFPB in the wake of the 2008 financial crisis, tasking the agency with ensuring that consumer debt products are safe and transparent. In structuring the agency, Congress adopted somewhat novel measures – the extent of their novelty is disputed – designed to insulate the CFPB from political influence: The agency would be led by a single director removable only for cause, and it would draw its funding directly from the Federal Reserve.

The Supreme Court addressed the single-director aspect of the CFPB three years ago in *Seila Law LLC v. CFPB*. The challengers there argued that having a single director who can be terminated by the president only for cause violates the separation of powers and renders the CFPB "unconstitutional and powerless to act." The Court agreed that the for-cause removal provision is unconstitutional, but it held that this provision could "be severed from the other statutory provisions relating to the CFPB's powers and responsibilities." *Seila Law* thus made the CFPB director removable at will but otherwise left the CFPB intact.

The Court has now agreed to address the CFPB's other unusual feature – its funding mechanism. Unlike most other federal agencies, the CFPB does not rely on annual congressional appropriations. Rather, Congress has authorized the CFPB to requisition funds directly from the Federal Reserve, which also is not funded from congressional appropriations, but instead earns money from service fees and interest on loans and securities. The CFPB's statute entitles the agency to whatever funding its director believes is "reasonably necessary," subject to a statutory cap annually adjusted for inflation (this year the CFPB requisitioned about $640 million). And the statute further provides that this funding "shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate" and "shall not be construed to be Government funds or appropriated monies."

The U.S. Court of Appeals for the Fifth Circuit held that this funding scheme violates the Appropriations Clause, which provides that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." The Fifth Circuit noted that the Clause

"ensures Congress's *exclusive* power over the federal purse," and it reasoned that Congress unconstitutionally renounced this power "by providing that the Bureau's self-determined funding be drawn from a source that is itself outside the appropriations process." In response to this point, the CFPB pointed out that other financial regulators – such as the Federal Reserve, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency – have similar funding schemes that do not rely on congressional appropriations. Yet the Fifth Circuit dismissed those comparisons, arguing that the CFPB's "perpetual self-directed, double-insulated funding structure goes a significant step further than that enjoyed by the other agencies," and that none of these other agencies "wields enforcement or regulatory authority remotely comparable to" the CFPB.

The Fifth Circuit concluded the CFPB's funding is unconstitutional, and because this funding is essential to everything the agency does, it further concluded that all current and former CFPB actions – including CFPB regulations – are necessarily invalid.

The Supreme Court has agreed to review the Fifth Circuit's decision – unsurprising, in light of the decision's wide-reaching significance, and the fact that it splits with several lower-court decisions rejecting similar challenges. *Seila Law* drew dozens of amicus briefs across both sides of that case and this case is sure to draw at least as much interest. The Supreme Court has had very few Appropriations Clause cases, and this case could decide the validity of the CFPB – and potentially other, similarly funded agencies.

Much Ado About "And": Interpreting the Federal Sentencing Statute's "Safety Valve"

The second case, *Pulsiver v. United States*, concerns the "safety valve" provision of the federal sentencing statute, which sets out circumstances where federal courts should disregard otherwise-applicable statutory mandatory minimum sentences. The safety valve applies only to sentences imposed for certain nonviolent drug offenses, and even then applies only if the defendant satisfies five statutory requirements. The first concerns the defendant's criminal history and requires that the court find that "the defendant does not have—(A) more than 4 criminal history points…; (B) a prior 3-point offense…; *and* (C) a prior 2-point violent offense."

The question in *Pulsiver* is whether the word "and" in this provision has a conjunctive or joint sense (such that a defendant satisfies this requirement so long as he does not have all of these three conditions) or a disjunctive or distributive sense (such that the defendant must instead show that he does not have any of these three conditions).

This question has thoroughly divided the lower courts. The U.S. Courts of Appeals for the Fourth, Ninth, and Eleventh Circuits have adopted the conjunctive or joint reading, and the U.S. Courts of Appeals for the Fifth, Sixth, Seventh, and Eighth Circuits have adopted the disjunctive or distributive reading. And many of these decisions, on both sides of the question, have themselves drawn dissents.

The courts adopting the former reading have emphasized that "and" ordinarily has a conjunctive meaning, including where, as here, it is used

in a list of requirements that follows a negative: A person violates the directive “Do not drink and drive,” for example, only when the person both drinks *and* drives. On the other hand, the courts adopting the latter reading have argued that “and” can distribute the words that precede the list (here, “the defendant does not have”) to each item in the list, such that this provision should be read to mean the safety valve applies only if the court finds that 1) the defendant does not have more than 4 criminal history points, 2) the defendant does not have a prior three-point offense, and 3) the defendant does not have a prior two-point violent offense. And these courts further contend that this reading is necessary to avoid surplusage, on the ground that a defendant that has a prior three-point offense and a prior two-point violent offense would necessarily also have more than four criminal history points.

The Supreme Court has now agreed to resolve this vexing question. Its answer will not only determine which criminal defendants can avoid often-lengthy mandatory minimum sentences, but will also give important indications as to how different justices approach difficult questions of statutory interpretation. This case is thus worth watching as well.

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