WINSTON & STRAWN LLP

ARTICLE

5th Circ. CFPB Ruling Means Challenges For Federal Agencies

JULY 22, 2022

This article was originally published in Law360. Any opinions in this article are not those of Winston & Strawn or its clients. The opinions in this article are the author's opinions only.

With little fanfare, the first salvo was fired in what may be the next line of attack on the federal administrative state.

The attack merits greater attention because it will likely lead to increased litigation over federal agency operations for years to come.

The Fifth Circuit's En Banc All American Decision

On May 2, the U.S. Court of Appeals for the Fifth Circuit, sitting en banc, handed down its decision in Consumer Financial Protection Bureau (CFPB) v. All American Check Cashing Inc.[1]

The lead, unanimous opinion was of little significance. It vacated a panel decision upholding the removal protection afforded to the director of the CFPB because, after the panel's decision, the U.S. Supreme Court held in Seila Law LLC v. CFPB in 2020 that such protection violated the Constitution's vesting of the entire executive power in the president.[2]

Of greater import, however, was the concurring opinion by U.S. Circuit Judge Edith Jones, joined by four other Fifth Circuit judges. Therein the judges opined that Congress erred in more than just attempting to protect the CFPB's director from the wrath of the president.

Congress also exceeded its constitutional authority by affording the CFPB a perpetual source of funds insulated from the annual—or at least periodic—appropriations process.

More specifically, Congress provided that the CFPB would be funded by civil penalties it recovers as well as up to 12% of the budget of the Federal Reserve Board, which itself is self-funded through interest it receives on securities and investments, and through fees it charges to financial institutions.

According to the five-judge concurrence, the CFPB's independent funding structure is antithetical to the appropriations clause,[3] which requires temporal limits on funds Congress appropriates to executive agencies.

Such limits force agencies to be accountable to Congress—the federal government's most democratic branch—because they need periodically to return to Congress for funding to pursue their agendas.

The CFPB is not alone, the concurring judges note, in being an independently funded executive branch agency, but it is unique in the breadth of its mission. Other self-funded agencies have only targeted authority in selected industries, whereas the CFPB has "vast rulemaking, enforcement, and adjudicative authority" across "'a wide swath of industries,'" according to the opinion, quoting Seila Law.[4]

The five-judge concurrence addresses the remedy for this violation in its closing, and that remedy is harsh:

> Just as a government actor cannot exercise power that the actor does not lawfully possess, so, too, a government actor cannot exercise even its lawful authority using money the actor cannot lawfully spend.[5]

Accordingly, the concurring judges conclude that there is "no other option than dismissing the enforcement action" brought by the CFPB against All American.[6]

The Broad Implications of the Appropriations Clause Challenge

Were the concurring opinion adopted as a majority opinion of a court of appeals panel squarely presented with the issue, the impact on the CFPB would be substantial.

In the affected circuit, it would lead to dismissal of all CFPB enforcement actions, and likely the invalidation of all CFPB rules, subject to being reinstituted if the CFPB were properly funded.

This outcome seems fairly plausible at least in the Fifth Circuit, given that five judges on that circuit joined the concurrence, and no judge on the en banc panel wrote in opposition to its analysis.[7]

Moreover, if courts adopt the concurrence's constitutional analysis, its implications extend far beyond just the CFPB. Judge Jones, the author of the concurrence, went to some length to explain why independent funding of the CFPB is more pernicious than independent funding of other government agencies.

Judge Jones, however, did not provide a constitutional justification—perhaps intentionally—for why those other agencies can survive without being accountable to Congress through the appropriations process.

Indeed, the Supreme Court rejected the notion in Collins v. Yellen last year that "the nature and breadth of an agency's authority" affects whether "Congress may limit the President's power to remove its head."[8] The Supreme Court held:

> The President's removal power serves vital purposes even when the officer subject to removal is not the head of one of the largest and most powerful agencies [because it] helps the President maintain a degree of control over the subordinates he needs to carry out his duties.[9]

Applied in the appropriations clause context, this logic suggests that Congress cannot eliminate funding responsibility over even narrowly focused agencies because doing so cedes its financial control over the agencies.

While the concurrence downplays the reach of these other agencies, at least in contrast to the CFPB, the reality is that independently funded federal agencies have great power and authority over the financial sector of the U.S. economy, which in turn has a profound impact on the overall economy.

These agencies include, according to the concurrence, the Federal Reserve Board, the Federal Deposit Insurance Corp., and the Office of the Comptroller of the Currency.[10]

One can add to that list—depending upon how government-sponsored entities are characterized—the Federal Housing Finance Agency, the Farm Credit Administration, the Federal Home Loan Mortgage Corp. and the National Credit Union Administration, among others.

If these agencies "cannot exercise even [their] lawful authority using money [they] cannot lawfully spend,"[11] virtually all of their ongoing activities—from enforcement to rulemaking—are in jeopardy, Judge Jones stated.

Finally, the reach of the concurrence's appropriations clause interpretation is unclear.

There are only a handful of Supreme Court decisions interpreting the appropriations clause, and none squarely addresses limitations that clause imposes on the funding of executive branch agency operations.

All American represented an extreme case for a potential appropriations clause restriction: The CFPB is not only independently funded, but it is fully funded via independent sources, and Congress also bestowed upon the CFPB the authority to set its own budget.[12]

But what about executive agencies that are only partially self-funded? What about executive agencies with more restricted budgets? All American does not engage these issues.

The All American concurrence also is dependent on the premise that appropriations must have a temporal limitation, but it avoids tackling what timespan is acceptable—at least for appropriations not used to "raise and support Armies," which the Constitution caps at two years.

What's Next?

It is a safe bet that the All American en banc concurrence will encourage appropriation clause challenges to federal agency actions.

More substantially, there has been a strong movement in recent years attacking practices of the federal administrative state that are long-standing but only rarely scrutinized.

They include legal objections to officers insulated from removal without cause by the president, agency enforcement actions without a right to a jury trial, and agency regulation pursuant to vague, malleable, or open-ended congressional delegations of authority.

All American encourages agency opponents to mine other, rarely litigated constitutional directives like the appropriations clause in search of new challenges to press against the administrative state.

While All American garnered little fanfare when announced, it may have a lasting legacy in the annals of administrative law.

---

[1] 33 F.4th 218 (5th Cir. 2022).

[2] 140 S. Ct. 2183, 2197 (2020).

[3] US Const., Art I, Section 9, Clause 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law").

[4] 33 F.4th at 236 (quoting Seila Law, 140 S. Ct. at 2202 n. 8).

[5] Id. at 242.

[6] Id.

[7] The All American majority opinion did not reach the Appropriations Clause issue because it reversed on narrower grounds.

[8] 141 S. Ct. 1761, 1784 (2021).

[9] Id.

[10] All American, 33 F.4th at 235.

[11] Id. at 242.

[12] 12 U.S.C. § 5497.

5 Min Read

Related Locations

Dallas

Related Topics

Law360 | Banking | Consumer Protection

Related Capabilities

Appellate & Critical Motions | Advertising Litigation | Financial Services

Related Regions

North America

Related Professionals

Christopher R.J. Pace