

When Did the Federal Reserve become the National Treasury?



By Paul Engel

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- Why did the Founding Fathers place the power of the purse in the hands of Congress?
- Does Congress have the ability to give up the power of the purse?
- Why would Congress voluntarily give up a tool as powerful as the power of the purse?

Article I, Section 9, Clause 7 of the Constitution states “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law;”. That seems pretty straight forward. So how could Congress establish a government agency funded not by appropriations from the treasury, but by fees paid to another federal entity? This was the question brought to the Supreme Court in the case CFPB v. Community Financial Services Assn. of America. Sadly, it seems that the Supreme Court once again showed they have a hard time reading and understanding the English language.

One of the features of court opinions I often point out is how rarely they actually quote the Constitution. So I was initially pleased when the Supreme Court actually quoted the Constitution in the case CFPD v. CFSA.

The Constitution gives Congress control over the public fisc subject to the command that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by

Law.” Art. I, §9, cl. 7.

[Consumer Financial Protection Bureau et al. v. Community Financial Services Association Of America, Ltd.](#)

Sadly, that initial feeling of pleasure quickly evaporated as I read the syllabus of the opinion.

For most federal agencies, Congress provides funding through annual appropriations. For the Consumer Financial Protection Bureau, however, Congress provided a standing source of funding outside the ordinary annual appropriations process. Specifically, Congress authorized the Bureau to draw from the Federal Reserve System an amount that its Director deems “reasonably necessary to carry out” the Bureau’s duties, subject only to an inflation-adjusted cap.

[Consumer Financial Protection Bureau et al. v. Community Financial Services Association Of America, Ltd.](#)

For over 220 years Congress had funded federal agencies through appropriations from the Treasury. Then, in 2011, Congress decides to fund a new agency in a different way. After this new agency promulgated rules that members of the CFSA objected to, the trade agency sued, making several claims of both statutory and constitutional violations.

In the operative complaint, the associations argued, among other things, that the Bureau “takes federal government money without an appropriations act” in violation of the Appropriations Clause.

[Consumer Financial Protection Bureau et al. v. Community Financial Services Association Of America, Ltd.](#)

For this reason, the court looked to the Appropriations Clause, but it seems they only focused on one word: Appropriations.

Appropriations Clause

Since the court seemed so focused on the word “appropriation”, let’s start there as well.

The act of sequestering, or assigning to a particular use or person, in exclusion of all others; application to a special use or purpose;

[Appropriation – Webster’s 1828 Dictionary](#)

An appropriation is merely the setting aside of something to a particular purpose. In the case of the Appropriations clause, it’s the setting aside of money.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law;

[U.S. Constitution, Article I, Section 9, Clause 7](#)

So the U.S. Treasury cannot send any money until Congress has set it aside to a specific purpose by passing a law. Seems straight forward enough.

This case was first heard at the District Court, which found:

[T]he court explained that “[t]he Appropriations Clause ‘means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.’” ... And, because “a statute authorizes” the disbursements from the Federal Reserve System’s combined earnings to the Bureau “up to a certain cap,” the District Court concluded, “there is no Appropriations Clause issue.”

[Consumer Financial Protection Bureau et al. v. Community Financial Services Association Of America, Ltd.](#)

According to the District Court, Congress passed a law to authorize the Federal Reserve System to spend money, so there is no Appropriations Clause violation, However, the case didn’t end there.

On appeal, the associations renewed their argument that the “Bureau’s funding mechanism usurps Congress’s role in the appropriation of federal funds” by allowing it to take “federal money without an appropriations act.”

The Court of Appeals agreed with this argument and reversed. ... Drawing on the Constitution’s text and history, the court concluded that the Appropriations Clause “does more than reinforce Congress’s power over fiscal matters; it affirmatively obligates Congress to use that authority ‘to maintain the boundaries between the branches and preserve individual liberty from the encroachments of executive power.’” ... By giving the Bureau a “self-actualizing, perpetual funding mechanism,” the court reasoned, Congress in effect abandoned this obligation. It was not enough that Congress enacted the law authorizing the Bureau’s funding because a “law alone does not suffice—an appropriation is required.” ... The court thus held that the Bureau’s funding mechanism violates the Appropriations Clause.

[Consumer Financial Protection Bureau et al. v. Community Financial Services Association Of America, Ltd.](#)

The CFSA argued, and the Circuit Court agreed, that it’s not good enough for Congress to pass a law, but they must pass an actual appropriations act for the purpose.

Court Opinion

The Supreme Court disagreed.

Held: Congress’ statutory authorization allowing the Bureau to draw money from the earnings of the Federal Reserve System to carry out the Bureau’s duties satisfies the Appropriations Clause.

[Consumer Financial Protection Bureau et al. v. Community Financial Services Association Of America, Ltd.](#)

How did the court come to this conclusion?

Under the Appropriations Clause, an appropriation is a law that authorizes expenditures from a specified source of public money for designated purposes.

[Consumer Financial Protection Bureau et al. v. Community Financial Services Association Of America, Ltd.](#)

So far, the court is correct. An appropriation, in this context, is a law that authorizes expenditures from a specific source for a designated purpose. Sadly, the court's decision quickly goes off the rails.

The Bureau's funding is "drawn from the Treasury" and is therefore subject to the requirements of the Appropriations Clause.

[Consumer Financial Protection Bureau et al. v. Community Financial Services Association Of America, Ltd.](#)

Except the CFPB's funding isn't "drawn from the Treasury", it's drawn from the Federal Reserve, a semi-executive agency. The court recognizes that, under the Appropriations Clause, an appropriation is a law authorizing expenditures from a specific source, but that source must be the U.S. Treasury. So does the CFPB funding even raise an Appropriations Clause question?

Since the Dodd-Frank bill that created the CFPB appears to have been attempting to find a funding source that was not up for regular congressional approval, we have to wonder why? I believe Justice Alito gives us a clue in his dissent.

Since the earliest days of our Republic, Congress's "power over the purse" has been its "most complete and effectual weapon" to ensure that the other branches do not exceed or abuse their authority. ... The Appropriations Clause protects this power by providing that "[n]o Money shall be drawn from

the Treasury, but in Consequence of Appropriations made by Law.” Art. I, §9, cl. 7. This provision has a rich history extending back centuries before the founding of our country. Its aim is to ensure that the people’s elected representatives monitor and control the expenditure of public funds and the projects they finance, and it imposes on Congress an important duty that it cannot sign away. “Any other course” would give the Executive “a most dangerous discretion.”

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There’s more to the Appropriations Clause than just the appropriation of money.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

While the Treasury is required to regularly provide a statement and an account of all receipts and expenditures, the Federal Reserve is not.

[U.S. Constitution, Article I, Section 9](#), Clause 7

The Board of Governors and the Federal Reserve Banks annually prepare and release audited financial statements reflecting balances (as of December 31) and income and expenses for the year then ended. The Federal Reserve Bank’s financial statements also include the accounts and results of operations of two limited liability companies (LLCs) that have been consolidated with the Federal Reserve Bank of New York and one LLC that has been consolidated with the Federal Reserve Bank of Boston.

[Fed Financial Statements](#)

It appears that Dodd-Frank attempted to bypass not only the

routine appropriations process to have a regular source of funding, but the reporting requirements of the U.S. Treasury as well. This appears to be an attempt to remove CFPB from congressional oversight, which brings up another question. Was Congress attempting to establish an executive agency that was outside the “power of the purse” the Constitution delegated to Congress?

Dereliction of Duty

The Constitution is very specific. Congress can only collect taxes of various forms for three very specific purposes, and consumer protection is not one of them.

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States;

[U.S. Constitution, Article I, Section 8](#), Clause 1

Congress is not authorized to collect “fees” to fund an agency, or anything else for that matter. Furthermore, by funneling these ill-gotten fees through the Federal Reserve, Congress is attempting to hide this money from the Appropriations Clause reporting requirements, thereby hiding it from the American people. In short, it appears Congress has been “cooking the books”, by hiding a portion of its taxing and spending through the Federal Reserve. Why would Congress create an agency that was outside its most powerful oversight tool? Was it the intent of Congress to create an unaccountable agency? Or was it the intent of a couple of Congressmen and the rest of Congress simply went along with it? In any case, what we have here is not a violation of the appropriations part of the Appropriations Clause, but of its reporting requirements. More importantly, we have a violation of the [Tenth Amendment](#), since Congress has empowered a federal agency outside of the United States Treasury to spend money, a power not delegated to Congress.

Conclusion

Leave it to lawyers and judges to twist a simple sentence to make it say something completely different. The Appropriations Clause is pretty clear that money cannot be spent out of the Treasury without appropriations. This court though, has somehow deemed a semi-government agency, the Federal Reserve, is the United States Treasury. The Congress is not delegated the power by the Constitution to allow entities other than the Treasury to spend public money, especially for the purpose of hiding it from the American people. As Justice Alito stated in his dissent:

The Court upholds a novel statutory scheme under which the powerful Consumer Financial Protection Bureau (CFPB) may bankroll its own agenda without any congressional control or oversight.

[Consumer Financial Protection Bureau et al. v. Community Financial Services Association Of America, Ltd.](#)

Once again, the court turns its head away from the law and justice for a political agenda. Of the nine justices on the court, only two, Alito and Gorsuch, saw some of the problems in this funding mechanism.

What's even worse, now that the court has placed a false imprimatur of legitimacy to the CFPB's funding mechanism, what is to stop Congress from doing this for other agencies?

Finally, the associations contend that if the Bureau's funding mechanism is consistent with the Appropriations Clause, then Congress could do the same for any—or every—civilian agency, allowing the Executive to operate free of any meaningful fiscal check.

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Imagine a country where agencies like the EPA, DOJ, and Social Security no longer need congressional approval to spend money, and none of the details are reported? All these agencies would need is to tell the Federal Reserve how much they want, as long as they stay within the limits Congress has set. I guess that's one way for Congress to get out of its responsibility to pass a budget. All they'd have to do is pass a single one-time bill saying how much an agency could draw from the Federal Reserve, and how much that pot would grow every year. What do you think our national debt would look like then?

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