Will Social Security Be Subject to Annual Appropriations Process?

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Judges make clear that any decision regarding CFPB has no implications for mandatory spending programs.

I received an email recently regarding a 2022 decision by a three-judge panel for the Fifth Circuit Court of Appeals. The decision found the funding of the Consumer Financial Protection Bureau (CFPB) unconstitutional because the agency gets its money outside of the annual appropriations process. The Supreme Court has now agreed to hear the case.

The question is whether the Supreme Court's decision on this issue would have any implications for Social Security, Medicare, Medicaid, and other programs whose spending is also not subject to the annual appropriations process. My view is that the answer is "no," and the judges go out of their way to make that clear.

A little background on the case. In 2021, a Texas District Court had rejected the plaintiffs' challenge to the CFPB's 2017 Payday Lending Rule, which among other things limited the number of times a lender can initiate transfers after two consecutive attempts have failed for insufficient funds. The Plaintiffs contended that:

1. the Bureau had acted arbitrarily and capriciously and exceeded its statutory authority.
2. the Bureau Director was unconstitutionally insulated from presidential removal.
3. Congress had inappropriately delegated too much authority to the Bureau.
4. the Bureau's funding mechanism violated the Appropriations Clause of the Constitution.

The District Court rejected all four arguments and upheld the Bureau's Payday Lending Rule. The Fifth Circuit agreed with the lower Court on the first three, but, with regard to the fourth issue, concluded that Congress's decision to abdicate its appropriations power violates the Constitution's structural separation of powers.

So how is the CFPB funded? The Bureau receives most of its funding from the Federal Reserve System, with a cap equal to 12 percent of the Fed's operating expenses in 2009, adjusted for inflation. To receive funding beyond this cap, the CFPB **must seek additional appropriations** from Congress.

To ensure its independence, the **Federal Reserve itself** is not subject to the congressional budgetary process, but rather derives its income primarily from the interest on U.S. government securities that it has acquired through open market operations. After paying its expenses, the Federal Reserve turns the rest of its earnings over to the U.S. Treasury.

This “double-insulated funding mechanism” was too much for the three-judge panel of the Fifth Circuit. It reversed the judgement of the District Court and held that the Payday Lending Rule violated the Appropriations Clause.

Two points before addressing the Social Security et al. issue. First, as the judges acknowledge in their decision, the CFPB’s funding arrangement has been raised in other court cases and has not been found unacceptable. Second, to ensure their independence, a number of regulators – the **Federal Deposit Insurance Corporation** among others – are funded outside the annual appropriations process.

But the topic at hand is whether following the Fifth Circuit’s reasoning to its logical conclusion could threaten Social Security and other programs that are also not funded through annual appropriations. The judges in a long footnote contend that any finding regarding the CFPB has absolutely no implications for Social Security and other programs. In my view, they hit the nail on the head:

“The Bureau self-directs how much money to draw from the Federal Reserve; the Social Security Administration (SSA) exercises no similar discretion…Quite to the contrary, SSA pays amounts Congress has determined to beneficiaries whom Congress has identified.”

In short, Congress has total control over so-called “mandatory” spending, which includes Social Security, Medicare, and Medicaid, as well as a large number of smaller programs. It sets the rules of the road – eligibility and benefit levels – and the agencies are required to make the payments as long as the money is in the relevant trust fund. It would be senseless to interject an annual appropriations process. I’m going to worry about something else.