Feds' Student Debt Relief Defense Has Constitutional Flaws

By **Lawrence Ebner and Herbert Fenster** (March 2, 2023)

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Almost all the 3 ½ hours of colloquy at the Tuesday U.S. Supreme Court hearing on the student debt relief cases, Biden v. Nebraska and U.S. Department of Education v. Brown,[1] was devoted to two issues: (1) whether the plaintiff states and/or individuals have standing to challenge the debt cancellation program, and if they do, (2) whether the mass cancellation of more than $400 billion in student loan debt is authorized under the Higher Education Relief Opportunities for Students, or HEROES, Act and otherwise is procedurally proper.[2]

Only Justices Clarence Thomas and Neil Gorsuch asked questions specifically focused on the most fundamental — but barely mentioned — underlying issue in these cases: Does the Biden administration's half-trillion dollar so-called debt forgiveness giveaway to tens of millions of borrowers violate the appropriations clause of the U.S. Constitution?

The answer is that the entire mass student debt cancellation is unconstitutional.

It unavoidably violates the appropriations clause because there is no congressional appropriation covering the executive branch's unilateral attempt to write off more than $400 billion from the government's financial books.

The appropriations clause is fundamental to the separation of powers, and the executive branch's abrogation of hundreds of billions of dollars in student loan debt is an unappropriated — and thus unconstitutional — expenditure of government money.

In our view, even if the Supreme Court were to find that the HEROES Act, coupled with the pre-midterm election pretext of the now soon-to-expire COVID-19 pandemic emergency, somehow authorizes the mass debt cancellation, the court should address the question of whether the program is constitutional and hold that it is not.

The appropriations clause states "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

In plain English, this means that even if an executive branch program is authorized by a statute, e.g., the HEROES Act, there must be a separate, explicit, congressional appropriation covering the program's implementation.

This congressional power of the purse is a tenet of the separation of powers. It is a crucial check on executive branch spending. As Yale Law School professor Kate Stith commented in a classic 1988 law review article, "[t]his empowerment of the legislature is at the foundation of our constitutional order."[3]

There is no congressional appropriation authorizing the mass cancellation of a half-trillion dollars in student loan debt receivables held by the U.S. Department of the Treasury. Erasing these financial assets from the government's books is tantamount to an unappropriated expenditure of hundreds of billions of dollars in violation of the

appropriations clause, and thus unconstitutional.

During U.S. Solicitor General Elizabeth Prelogar's oral argument in Biden v. Nebraska, Justice Thomas zeroed in on the appropriations clause, saying "[t]here's some discussion in the briefs that ... this is, in effect, a cancellation of a debt — that's really what we're talking about — and that as a cancellation of $400 billion in debt, in effect, this is a grant of $400 billion, and it runs headlong into Congress's appropriations authority, and I'd like to give you some time to respond to that."[4]

Solicitor General Prelogar began her response as follows:

> Sure. And so, first, I want to take on the argument that some amici have made in this case about implicating appropriations authority. Of course, implementing this program doesn't require that any money be drawn from the Treasury, and so I don't think that it strictly raises an appropriations issue, which is why I think the states aren't raising that argument here. And to the extent that the concern is about the Secretary taking action in a way that Congress didn't authorize, it seems to me that it just collapses back into the central interpretive question in this case, which is does the HEROES Act authorize the Secretary's action or not.[5]

There are two major flaws in the solicitor general's answer to Justice Thomas' question.

First, discarding more than $400 billion in student debt assets is in every respect a withdrawal of money from the Treasury. Canceling such receivables is as much an expenditure of federal government funds as paying $400 billion for a major weapons system. In fact, federal direct student loans are listed as line-item assets on the government's balance sheets.

Second, the solicitor general's assertion that the appropriations question "collapses back" into the question of HEROES Act authorization ignores the "distinction between authorizing legislation and appropriating legislation," per the U.S. District Court for the District of Columbia's 2015 decision in U.S. House of Representatives v. Burwell.[6]

Regardless of whether the HEROES Act authorizes student debt forgiveness for tens of millions of borrowers, it is indisputable that there is no appropriations bill that "specifically states that an appropriation is made" for the mass debt cancellation program.[7]

Justice Gorsuch followed up on Justice Thomas' appropriations question. During Nebraska Solicitor General James Campbell's oral argument, Justice Gorsuch asked:

> Counsel, on the merits, if I could direct you to the Solicitor General's argument suggesting the Major Questions Doctrine does not apply because this is a benefits program, despite our holding in King versus Burwell, and arguing that it doesn't implicate the Appropriations Clause authority of Congress. Can you address that argument, please?[8]

Nebraska's solicitor general, who represents the plaintiff states, responded in part as follows:

> Yes, Your Honor. The whole point of the Major Questions Doctrine is to preserve the separation of powers, and it rests on the presumption that Congress intends to address major questions for itself. [I]f anything, I would say that there are more reasons to apply the Major Questions Doctrine here, because what the agency is

> effectively doing is exercising the power of the purse by going into the federal balance sheet and crossing off nearly a half-trillion dollars in loans payable to the government.[9]

This is exactly correct. Through the appropriations clause, the Constitution allocates the power of the purse to Congress alone.

No matter how well intended — or politically motivated — the executive branch may be, it cannot usurp this constitutional power without violating the separation of powers. But this is precisely what the Biden administration is attempting to do by allowing a half-trillion dollars in government assets to evaporate into thin air despite the absence of a congressional appropriation.

It remains to be seen how the court will decide the student debt cases. But if the court remains true to first principles, it can and should address the inescapable appropriations clause issue and hold that the debt cancellation program is unconstitutional.

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Disclosure: The authors submitted an amicus brief in the student debt cases on behalf of the Atlantic Legal Foundation in support of the plaintiffs-respondents.

[1] Biden v. Nebraska, No. 22-506 & Department of Education v. Brown, No. 22-535.

[2] 20 U.S.C. § 1098bb.

[3] Kate Stith, Congress' Power of the Purse, 97 Yale L. J. 1343, 1344 (1988).

[4] Tr. at 37.

[5] Tr. 37-38.

[6] U.S. House of Rep. v. Burwell ("Burwell II"), 185 F. Supp. 3d 165, 168-69. (D.D.C. 2015).

[7] 31 U.S.C. § 1301(d) ("A law may be construed to make an appropriation out of the Treasury . . . only if the law specifically states that an appropriation is made . . . .").

[8] Tr.at 97.

[9] Tr. at 97-98.