Consumer Finance Monitor (Season 3, Episode 9): Seila Law: Why George Washington University Law School Professor Alan Morrison Argues SCOTUS Should not Rule on the CFPB's Constitutionality

Speakers: Alan Kaplinsky and Alan Morrison

Alan Kaplinsky:

Welcome to the Consumer Finance Monitor Podcast, where we explore important new developments in the world of consumer finance and what they mean for your business, your customers, and the industry. I'm your host today, Alan Kaplinsky. And I'll be moderating today's program. I chair the Consumer Financial Services Group at Ballard Spahr.

Alan Kaplinsky:

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Alan Kaplinsky:

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Alan Kaplinsky:

So, let's turn to today's subject, and it's a timely one indeed. Today, I am very pleased to be joined by Professor Alan Morrison. Alan, is an associate dean at the George Washington University Law School, where he teaches constitutional law and civil procedure. He has extensive litigation experience in the field of separation of powers, which is the subject of what we're going to be talking about today. That is we're going to, once again, really on the eve of the oral argument in the US Supreme Court in the Seila Law case. We're going to delve into that case. And by the end of the podcast, hopefully, you'll all have a better idea of what you think the court may do to resolve the case.

Alan Kaplinsky:

So, first of all, let me welcome you, Professor Morrison. And if you don't mind I will call you, Alan.

Prof. Alan Morrison:

Since I can call you Alan, you can call me Alan.

Alan Kaplinsky:

Okay. Good. And we're going to confuse our audience today with two Alans on the show. Okay. So, let's do a little bit of level setting here for those in our audience, Alan, who may not be as familiar with the Seila Law case, as certainly you and I are. So, tell us what the issue is and what's the procedural history and the posture today?

Prof. Alan Morrison:

Well, it's a little bit of a windup. So, let me go back to the Dodd-Frank Act in 2010, in which the Congress was trying to deal with problems arising out of The Great Recession. And as part of the Dodd-Frank Act, Congress enacted an idea that was now, Senator Elizabeth Warren's brainchild to consolidate all of the financial services regulation of consumer financial matters into a single agency. The House of Representatives originally put that into the bill and had it as a multi-member agency that it was headed by, I believe three individuals, all appointed by the president with the advice and consent of the Senate, subject to removal only for cause.

Prof. Alan Morrison:

When the matter got to the Senate, the Senate changed the form of the agency, but not its mission. It turned it into a single member agency headed by a director, also appointed by the president with the advice and consent of the Senate, and also subject to removal, only for cause. In addition, the financing for this agency was set so that the money came directly from the profits of the Federal Reserve system. And Congress didn't have anything to do with it. And it had very few other limitations on the ability of the director to carry out the mission.

Prof. Alan Morrison:

In other words, Congress wanted this job done. They wanted a financial regulator not tied to the banking industry, who would regulate on behalf of consumers. This idea was subject to a lot of criticism, not especially at the time of the legislation, but as soon as the law was passed and people started to realize that there was going to be a new tiger in town that would be coming after financial institutions in ways that had not happened before.

Prof. Alan Morrison:

And shortly thereafter, various challenges were brought to actions by the Consumer Financial Protection Bureau as it came to be known. And one of those cases went to the DC Circuit, now Justice, and then Judge Kavanaugh, was one of the dissenters who believe that the arrangement for the organization was unconstitutional. And I'll get to that in just a minute. That case did not go to the Supreme Court. But meanwhile, other cases were wending their way through the court, including now, Seila Law.

Prof. Alan Morrison:

Seila Law began with a demand by the CFPB, as it's known, for records and certain other information. And Seila Law gave them some, but then resisted. And so, the CFPB went to court in California federal court to enforce their demand. And Seila Law objected, among other reasons on the grounds, that the agency was unconstitutional.

Prof. Alan Morrison:

There are two aspects of potential agency unconstitutionality here. One of which is not in the case, which is a fairly common challenge. And that is to the appointment, The Appointments Clause of the constitution sets up principle officers and inferior officers. And then below them are employees. And there has been a fair amount of litigation over the status of those officers. Everybody agrees that the director here is a principal officer and that he or she was properly appointed.

Prof. Alan Morrison:

What the dispute is about, and this is the issue before the court, is whether the limits on the ability of the president to remove the director except for cause is an unconstitutional restriction on the power of the president. When the case was filed in the district court, the bureau was allowed by statute to represent itself. And it defended the constitutional challenge on the merits.

Prof. Alan Morrison:

When the case got to the court of appeals, it agreed. And the Ninth Circuit agreed that the law was constitutional, largely relying on the DC Circuit case that upheld it over a divided vote. Seila Law then filed a petition. And after taking an extension, the government came in now represented, not by the Bureau, but by the solicitor general, on behalf of the president, who said

that the restriction on the removal was unconstitutional as a limitation on the power of the president to take care that the laws be faithfully executed.

Prof. Alan Morrison:

At this point in the briefing, the government suggested that the court appoint an amicus to argue in favor of the constitutionality. As soon as that happened, the House of Representatives filed a motion for leave to file an amicus brief out of time saying it would defend the constitution reality.

Prof. Alan Morrison:

And I filed an amicus brief at that stage arguing, first, that because of the agreement between the parties on the merits, there was no active case or controversy and the court should not decide the case. And in addition, that brief argued that the Seila Law had no standing to object to those restrictions on the power of the president, that only the president could act. And that the proper way to get that issue before the court was the president to fire somebody, in this case, the director of Seila. And if that person contested it as it had happened in two earlier cases, then the president could have his case in controversy, and the court could decide the case properly.

Prof. Alan Morrison:

The court has now appointed an amicus, Paul Clement, a former solicitor general, and one of the top advocates in the Supreme Court to defend the law. I filed an additional brief amplifying my prior arguments at the merit stage. And the House of Representatives has also come in to defend the case.

Prof. Alan Morrison:

Both the House and Paul Clement, have argued that there is no standing here, that the case is not in the proper posture for this challenge. And they urge the court not to reach the merits. They do not embrace my somewhat larger argument that there's no case or controversy in this case as well. So, that's where we stand. And the argument is all set for the 3rd of March.

Alan Kaplinsky:

Right. Okay. Thank you. Excellent job in succinctly summarizing where we are today.

Prof. Alan Morrison:

I'm sorry. It wasn't more succinct, but there's a lot of procedural steps that we did.

Alan Kaplinsky:

Oh, yeah. Yeah. There's certainly is. So, let's dig a little deeper into the case. And let's focus first on standing. And your argument and the argument that Paul Clement has made, and that the House is made, that there is no standing. And I'd like you to explain that in more detail.

Prof. Alan Morrison:

Sure. The law of standing, which is, particular in this court, a quite restrictive law that is a generally does not have a wide ranging set of issues that allowed people to challenge actions by the government. Focuses on whether there has been an injury to the plaintiff from the unlawful or unconstitutional act of the defendant, in this case, the director. That's where it usually comes up.

Prof. Alan Morrison:

This case is a little bit odd because the standing issue arises with respect to a defense that has been raised by Seila Law, and not Seila law's original claim. And the argument is very simply, that a person is not entitled to rely on a constitutional defect, here the method of removal of the director, unless that person is injured by that constitutional defect.

Prof. Alan Morrison:

And in our view, the only person who was harmed by that restriction is the president of the United States. And that Seila Law can show no connection between the harm suffered by the president and any harm that it has suffered in this case. This is not a case in which they're claiming that the director was not properly appointed. Seila concedes that the director was properly appointed, and that would be a claim for which it has standing.

Prof. Alan Morrison:

But we argue that the court only has standing in a case in which someone has been fired. And the president argues that the firing was lawful, and the employee, or the officer argues that it was unlawful because of statutory restriction. The president then counters and says that restriction is unconstitutional.

Prof. Alan Morrison:

Among other things, of course, it assures us that we have all the facts and circumstances of the firing to see whether in fact there might have been cause, whether it otherwise complied with the statute. And we honor the principle of constitutional avoidance, which is that courts, especially the US Supreme Court should not decide cases if there are adequate other means of deciding them that do not raise standing problems such as we have here.

Alan Kaplinsky:

Okay. So, let me push back a little bit, Alan, on that. So, you argue Seila Law doesn't have any standing to challenge the removal provision, because it hasn't suffered an injury resulting from the fact that the director couldn't be removed at will by the president. How do you respond to Seila Law's argument that it did suffer such an injury, because any action taken by an unaccountable director was void, and it doesn't have to show that a hypothetical accountable director would have taken a different action?

Prof. Alan Morrison:

Well, one of the things about Seila's brief, it's only in their reply brief that you find that. And by the way, the government doesn't say that the CFPB's actions were void. Government is very careful not to say that. But void is a very capacious term. And I don't imagine that they think that everything that the director has done since the beginning of time is unconstitutional. And therefore, no matter whether anybody objected or not, no matter what the action was, that because there is this defect in the removal provision that everything has happened is illegal. That's a very far out position. And I don't believe it's warranted. The court has been very careful in other contexts to be sure to not use the term void except in the most extreme cases. And it's hard to imagine that this action has been taken is void in the sense that the court has used it.

Prof. Alan Morrison:

I think what they're doing is they're saying, "Well, yes, we can't show any connection, but we don't have to show any connection." And I don't think that the court's requirements of traceability and redressability are met under the standing doctrine in this case either, and that the injury is only to the president.

Prof. Alan Morrison:

Perhaps it would be better example, suppose that today the CFPB withdrew the demand, and it was now issued with a director who concedes that she is, because she was appointed by this precedent, removable at will. Would anything be any different? And I think the answer is clearly not. And it's only because the CFPB has chosen not to withdraw the prior demand and issue

another one that we even have this case in court. So, I guess unless the court is prepared to say that anything that the CFPB did is void, illegal, and have no force and effect from the beginning, I doubt that the court will buy the void argument.

Alan Kaplinsky:

Okay. Let me ask you another question that I gleaned from reading some of the replied briefs. You seem to argue that because only the president can be injured by the removal provision, to the extent it limits his ability to faithfully execute the law. Only the president can set up a case in which the constitutionality of the provision is challenged, such as by firing Director Kraninger. How do you respond to Seila Law's argument, which is made in response to Paul Clement's rightness argument, that a private party has the right to raise separation of powers issues, because such structural principles not only protect the president, but also protect individuals? And in fact, every action taken by an unconstitutionally structured agency.

Prof. Alan Morrison:

I would begin by agreeing in part that separation of powers principles are not meant just to protect other participants in the government, in this case, the precedent. That argument was made and rejected in a case that I argued, INS V Chadha, involving the legislative veto. And it's clear that with respect to the proper appointment, private parties have the right to object. That's a separation of powers kind of issue.

Prof. Alan Morrison:

And in a situation in which for example, the Congress stepped in as it did in a case involving the Washington Metropolitan Area Airports Authority, and try to run the airport by use of congressional delay tactics, Supreme Court said, no private parties have the right to object to that. But those provisions are there to assure that properly appointed officials are carrying out the law.

Prof. Alan Morrison:

This is the backend, this is a provision, which by the way, there is nothing in the constitution giving the president the power to remove officers to begin with. But everybody agrees that the president has that power. Yet nobody believes that that power is there to protect private parties, except obviously Seila think so here. And it's all about, and if you read the merits portions of the brief, about the power of the president is to do this, the power of the president is to execute the laws. The notion that the power of the executive branch is vested in the president. None of those are injuries or rights that in any way have to do with private parties.

Prof. Alan Morrison:

So, it would be a big stretch, I think, to say that private parties have these kinds of rights. I guess I should also disclose to the audience that this standing argument was not made in several recent cases in which the court did reach the merits of removal restrictions. And the court would have to say that those cases are distinguishable because they also involve the appointments. Or the court could also say, "Well, that was a drive by jurisdictional ruling. Nobody raised the issue." Now, that somebody raises the issue, we have to face the question of whether private parties can invoke a part of the constitution that is beneficial, primarily if not exclusively to the president.

Alan Kaplinsky:

Right. Well, let's turn now, Alan, to the second issue that you mentioned. Namely, is there a case or controversy that is a requirement under the constitution that the courts don't give advisory opinions? And you argue that there's no actual controversy here because the parties, namely Seila Law and the government agree on the merits of the constitutional question. They both agree that the statute or this particular part of the statute is unconstitutional. So, how do you respond to Seila Law's argument that's made in response to Paul Clement's mootness argument, that there is still a controversy because the CFPB, while acknowledging that the statute is unconstitutional, it hasn't withdrawn the CID. It's going full steam ahead in connection with its investigation of Seila Law. How do you reconcile that?

Prof. Alan Morrison:

Well, I think we reconcile it in this way, that this is entirely within the control of the CFPB now. If they could withdraw that CID tomorrow, and issue a new one instead, in which a director who now concedes that she may be removed without a cause. And they've chosen not to do that. They have in essence set up a case. It's just as if the president went to court and said, "I wanted the clarity judgment that I can fire the director at will."

Prof. Alan Morrison:

In a case called Raines against Byrd, the Supreme Court was faced with the kind of the opposite situation, in which members of Congress went to court seeking to declare the line item veto unconstitutional. And the court said that the members of Congress had no standing because they would be in effect asking for an advisory opinion. And in that very case, the court said, similarly, the president could not ask for an advisory opinion, which is in essence, what he's doing here.

Prof. Alan Morrison:

I also cited in my brief a case from just a few years ago called United States against Windsor. That was the case involving the Defensive of Marriage Act, in which the claim was that the plaintiff in that case had paid $350,000 or so in a state tax because the statute denied rather the marital exemption in the estate tax for same-sex married couples while granting it to opposite sex married couples. The government originally defended the action in a similar case and then switched positions. And by the time the case got to the Supreme Court, the government is 100% aligned on the merits with the plaintiff. And the Supreme Court asked for an amicus to argue the case that there was no case or controversy, and the case could not be decided because of the agreement between the parties.

Prof. Alan Morrison:

The House of Representatives who ironically, somewhat was represented in that case by Paul Clement, had intervened in the district court to argue that the statute was constitutional. The court by a vote of six to three, decided that it had a sufficient case or controversy to reach the merits. Although in the similar case, arising from California's Prop Eight, the courts said it did not have sufficient case or controversy, because in that case, the governor and the attorney general agreed that the Prop Eight was unconstitutional. Those cases are very similar to this one.

Prof. Alan Morrison:

And while in Windsor, the DOMA case, there was a very pragmatic considerations involved. There were 1100 federal statutes effected by DOMA. There was no other way that the case could be decided, if the court had not reached the merits. And all the parties ask the court to reach the merits. And so, and even in that case, it was a vote of six to three. One of the votes in favor of it was by Justice Alito, who said it was all right, because the House had become an intervening party. There is no intervening party here in this case.

Prof. Alan Morrison:

So and by the way, the chief justice and Justice Thomas, joined Justice Scalia's opinion on the lack of case or controversy. And I think that given the readily easy way for the president to get this issue decided the court should say, "No, we're not going to decide this case." And whether they refuse on standing or case, or controversy grounds, we are not going to in effect decide a friendly lawsuit.

Alan Kaplinsky:

Yeah. Now, I mean your legal arguments, I think are quite compelling, Alan. But there's a practical issue that I find troubling. And that is, I mean, we know that President Trump is not going to try to remove Kathy Kraninger. He appointed her. And he appointed her probably because he knew that she would run the agency the way he would like the agency to be run. So, he's not going to do it.

Alan Kaplinsky:

Now, I suppose if we have a Democratic president that gets elected in November that come after he, or she gets sworn in, at that point that president might try to remove Kathy Kraninger. But I would guess based on what Kathy Kraninger has already said, namely, that she believes that she can be removed at any time by the president. I doubt if she's going to change her mind when it's a Democratic president there. I don't think. And so, it's got to be very hard to get this case litigated, I think.

Alan Kaplinsky:

It may have been, I agree with your point, that while Cordray, served for 10 months while Trump was in office and he considered removing Cordray, but he never did. And he could have done it. But that's water over the dam. But looking forward, we have all these challenges that have been made in the context of, I think practically every enforcement proceeding that the CFPB has been involved in since Kathy Kraninger, has become director. This constitutional issues raised all the time. Don't you think there'll be some feeling on the part of the court, call it a practical concern that maybe we ought to get to the merits and move on.

Prof. Alan Morrison:

Well, I'm sure there are some people who will argue that. We want this constitutional issues decided. But I refer you to Justice Scalia's dissenting opinion in the DOMA case, in which he makes it very clear that that's not the job of the courts to decide cases, unless they have to decide them, especially momentous constitutional issues like this.

Prof. Alan Morrison:

But maybe even there are other agencies headed by single members, Social Security Administration is one of this. The Federal Housing Agency is another. Maybe the president could find another person to fire there.

Prof. Alan Morrison:

In addition, as I think you may know, the arguments in this case are, a, that the case of Humphrey's executors involving the Federal Trade Commission is distinguishable in the for cause removal there because it was a multi-member agency. But even if it's not distinguishable, those cases argues the government and Seila are wrong and they should be overruled. And if the president wants to fire somebody, he's got plenty of holdovers of Democrats in multi-member agencies around the government. And if he wants to fire somebody enough to pick a fight about that, he can do that.

Prof. Alan Morrison:

Indeed one of my arguments on the standing argument is, that if Seila Law has standing here, so does every single person, organization, company that's been affected by any order of the SCC, the FTC, the NLRB, the Federal Communications Commission, the Federal Election Commission, if it ever issues any other orders, and any other multi-member agency with for cause removals. Anyone can challenge any action on that grounds. And everybody under Seila's theory would have standing. I think that ought to be a pretty scary notion for the court to allow that kind of standing to go forward. But if they believe that they have standing and they believe that the law should be interpreted that way, the president does have other opportunities. But this is not a debating society. This is the Supreme Court of the United States, and it's not supposed to decide hard questions of major constitutional importance unless they're necessarily presented and necessary to be decision.

Alan Kaplinsky:

Okay. So, if it turns out that the court disagrees with you on standing in case of controversy, and it gets to the merits. I understand your position is that the statute as written is constitutional, am I right?

Prof. Alan Morrison:

That is correct. Although, my brief does not focus on that particular issue.

Alan Kaplinsky:
Right, right.

Prof. Alan Morrison:
But I agree with that proposition.

Alan Kaplinsky:
And you base that on a case you referred to Morrison's Estate.

Prof. Alan Morrison:
Humphrey's Estate.

Alan Kaplinsky:
Humphrey's. Yeah. Yes. What was involved in that case?

Prof. Alan Morrison:
That case is from 1935. It involved President Roosevelt's decision to fire, Mr. Humphrey as a member of the Federal Trade Commission. The Federal Trade Commission had similar restrictions on removal to what's involved here. And President Roosevelt, said he wanted somebody else who was more in line with his views. Humphrey was fired. He passed away. His estate sued for money damages. And the Supreme Court ruled unanimously that the limits on the power of the president to remove in that case, in that statute were constitutional. And that is the case and some other cases as well, in which the court has upheld limitations on removal that the House and Paul Clement, argue in their briefs are strong support for the restrictions here.

Alan Kaplinsky:
So, you don't buy the distinction that is made by Seila Law and the CFPB, to the effect that the FTC is a five member commission. It was a five member commission at the time that Humphrey's Estate was decided. Here we're talking, and it's a bi-partisan commission, where the argument goes that things cannot be done by one individual, I takes a village. You've got to get all five commissioners. You don't have to get them all to agree, but you got to get three of them to agree. And that makes it different than the situation here where you have one individual, who basically can do whatever he or she wants to do.

Prof. Alan Morrison:
Subject to laws, of course, but yes. Well, I guess the first question is, where is that distinction in the constitution? And the answer is no place. Second, the court has recognized that the original case on which the solicitor general and Seila rely, the case called Myers against the United States, in which there was a very, very long opinion by former president and then chief justice, William Howard Taft, in which he upheld the president's firing in that case. But the important point about that case as the Supreme Court has recognized subsequently, is that the limitation there was that the president had to get the approval of the Senate, excuse me, to remove the officer in question. And without that consent, the president had absolutely no power at all.

Prof. Alan Morrison:
Humphrey's executor involves a situation in which the Congress, or even the Senate has no role whatsoever once the statute was enacted. And by the way, signed by the president, in this case, Obama, into law. And the only restriction is that the president may not fire the director at will, but must have some good reason for doing so. And I think that this is an area where the court has said when we have limitations on presidential powers, a case called Nixon against GSA, involving the president's authority over his papers, and Morrison against Olson, involving the independent counsel, where the restrictions do not go to significantly impair the president's constitutional authority. Then those limitations by Congress in a statute are constitutional.

Prof. Alan Morrison:

So here, it's not as though the president cannot remove the director at all, it's that the president has to have good reasons for doing so. And just because the president doesn't like the policies or wants to replace the current director with one of his political favorites, that's not sufficient reason. That seems to me to be the kind of limited restriction that the Supreme Court has authorized in other contexts, when Congress makes that determination, that it's necessary in order to achieve other ends in the statute, in this case, assuring a significant vigorous regulation of the financial services industry for the benefit of consumers.

Alan Kaplinsky:

All right. Let me take you to a place where I don't think you want to go, but let me try to, I'm going to make you go there Alan, and that is, you lose argument too. You lose on standing, and case of controversy, and the court concludes that the statute is unconstitutional. The court teed up another issue that had not been teed up originally by the parties, namely, so what's the remedy? What happens next? Do you have an opinion on that?

Prof. Alan Morrison:

Well yes, I do. And it's that the restrictions on removal would be held to be unconstitutional, but that the rest of the powers of the agency would go forward. As the solicitor general makes clear in his reply brief, the creation of this agency was very, very important to Congress, and at the time President Obama. And the notion that if they knew that it was unconstitutional to have restrictions on removal, that they would have not simply not created the agency, but they would have wanted everything to go back to where it was before.

Prof. Alan Morrison:

Almost all of these powers given to the CFPB were powers that were dispersed in other agencies in the government. And then they were made more specific and given a greater potency. The notion that Congress would want that entire creation to be unraveled and people sent back to agencies from which they either never were, or haven't been in a number of years, it seems to me that the government is plainly right that this was intended to be severable.

Prof. Alan Morrison:

The Supreme Court has made it clear in a number of cases that if there's an unconstitutional provision, it does not destroy the entire statute. Unless I believe the court has said it's clear that Congress would not have wanted to save the parts that were constitutional without the parts that were unconstitutional.

Alan Kaplinsky:

Well, then there's clear severability language in Dodd-Frank, right?

Prof. Alan Morrison:

Yes. There's severability, I believe it's in the entire bill, but the not in the particular title in which this is found. So, Seila argues, well, they only meant that if the CFPB were unconstitutional, it wouldn't bring down the entire rest of Dodd-Frank, which is an even more extreme position. But I think that even the absence or presence of a severability clause has as the court has said, never been dispositive on this issue.

Alan Kaplinsky:

Okay. All right. We're drawing to the end of our podcast, and obviously you have, I think as I mentioned earlier, a compelling argument to be made, I think on standing and to a lesser extent case or controversy, but I think they're both pretty good arguments.

Alan Kaplinsky:

And as I thought about this case, I originally, my knee jerk reaction when I heard the Supreme Court granted cert, was all they're going to do what Justice Kavanaugh did, or they're going to follow his descent in the PHH case. They're going to find it's unconstitutional, and then they're going to sever. However, the more I think about it, I think there's a pretty good chance, it could be unanimous opinion where all the justices could get together and pump the case, either say that cert was improperly granted. I don't think they'll do that.

Prof. Alan Morrison:

I don't think they'll do that either, because it'll just cause another case to come up.

Alan Kaplinsky:

Right. But that probably all the justices could get together, or might be able to get, it's probably the only part of the case where there might be unanimity of opinion. Do you agree that you think it could be nine nothing on that?

Prof. Alan Morrison:

Well, first, I only wish that you had a vote on this case. That would be very helpful. Second, as I say often when I'm asked about these things, I'm a litigator, not a bookmaker. And the odds of nine to nothing are not all that great. It's certainly possible. The people who want to sustain the limits on removal would vote for any way not to avoid the merits.

Prof. Alan Morrison:

And ironically, the people on the other side that is, would most tend to favor the president are the strictest on the question of standing case or controversy. And so, appealing to that side of their jurisprudential mode, maybe we've got the votes on that side.

Prof. Alan Morrison:

It's also an election year, and this would be a very explosive issue on top of all the other issues the court has got. And I think it's right. I think our basic principle of we the court should not decide constitutional questions unless they're absolutely necessary should prevail here. If the president, and by the way, the next president may say, "Maybe that's right, but I think that on balance, the country is better off with the president, not being able to fire people. Because after all, if I put my people in now, the next president could fire my people. And I would just, as soon have them stay." And having this kind of stability is better for the government as a whole. That's why Congress put it in there. And I think that Congress has judgment on what's a fair trade off ought to be honored. So, they may never have to decide this question.

Prof. Alan Morrison:

Among other reasons, because many directors of this agency, if asked by the president to resign, if a new president comes in, rather than go through a big fight and a lawsuit, and worry about getting paid not getting paid, and looking petty, just say, "All right, I'll resign. And you can replace me." And guess what? The country will go on without having a firm resolution of this constitutional question, unless it's absolutely necessary.

Alan Kaplinsky:

Yeah. Of course, I know you're not a politician either, Alan, but in a way I was hoping that the outcome of this case might result in the Republicans and the Democrats getting together to amend the relevant provisions of Dodd-Frank to create a five member commission, making it similar to the FTC. But I rather doubt, whatever they might do here it could end up with that result.

Alan Kaplinsky:

I know, I read in maybe one of the amicus briefs that somebody argued that the court ought to find it unconstitutional and then not decide on the remedy, but give Congress a period of six months to amend the statute to make it constitutional. And people were thinking that might be the thing that resulted in Congress going back to the five member commission that originally was in the House bill of Dodd-Frank, and that Elizabeth Warren supported. But do you have any view on that before we wrap things up?

Prof. Alan Morrison:

So, I have two observations on that. First, if the president had been interested in having a meaningful five member commission, he had the power to get that through the House and the Senate in the first two years of his presidency. And no one even proposed that, let alone tried through an active.

Prof. Alan Morrison:

Second, I doubt that this Congress can agree on anything of this significance these days. They're paralyzed except for cutting taxes and passing a blown through the roof budget. And last is that doesn't solve the problem because after all, if Seila is right, then everything is void. What's going to happen to everything that's happened before now? And what's the agency going to do for the next six months until Congress maybe decides something?

Prof. Alan Morrison:

And remember, we're going to have an election. This will come down in June. We're having an election in November. Does anybody really think the Congress is going to do anything? And then we're talking about a new Congress and maybe a new president, or the same president. That is a recipe for the ultimate disaster. Leaving it to Congress in this situation, is the worst kind of punt. And I certainly hope the court doesn't do that.

Alan Kaplinsky:

Right. Okay. Well, Alan, we'll very much look forward to the oral argument and in particular, the decision of the court, which we know we'll have by the end of June when they convene for their summer recess. So, thank you very much for joining us today.

Alan Kaplinsky:

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Alan Kaplinsky:

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