Consumer Finance Monitor (Season 4, Episode 23): Should the Office of the Comptroller of the Currency (OCC) be Abolished? A Conversation with Special Guest Carter Dougherty, Financial Reform Advocate and Author of "The Money Trust" Newsletter

Speakers: Alan Kaplinsky, Carter Dougherty, and Scott Coleman

Alan Kaplinsky:

Hello, I'm Alan Kaplinsky at Ballard Spahr and I'm the host of our podcasts today, called consumer finance monitor. The name of our podcast show is the same as the name of our blog. Our blog has been ongoing for about 10 years now, we'll actually be celebrating our 10th anniversary on July 21, which coincides with the very day that the CFPB was stood up. And I can assure you, we're going to have a commemorate that occasion with some important virtual events, which I'm not at liberty to share with you now what they are, but all I can say is if you're on our mailing list, be on the lookout for an important announcement that will be coming up soon. So, let me give you a very brief background about what we're going to get into today. Our guest today is Carter Dougherty. And Carter is a writer and an advocate for financial reform based near Washington, DC. He writes a newsletter, that's called the money trust. That's about Wall Street's influence on our economy, politics and society.

Alan Kaplinsky:

Anything he says today on this podcast does not reflect the views of his employer, there're his own views only. And I assume that that's the case with an article that prompted me to reach out to Carter about a month ago, to see if he'd be interested in sharing his views on our podcast show. He published an article, March the third, in the Washington Monthly. The title of the article is Abolish Lincoln's Bank Regulator. For those of you who are not familiar with Civil War history, or the history of banking in the United States, what Carter is referring to is the Office of the Comptroller of the Currency, which is the regulator of national banks and federal thrift institutions. And Carter, wrote this op-ed article, where he espoused eliminating the Comptroller of the Currency, and perhaps merging it into another federal regulator called the FDIC.

Alan Kaplinsky:

Federal Deposit Insurance Corporation, which is best known for insuring deposit accounts that you have and companies have, depository institutions all over the country where you see that logo that says, insured by the FDIC, that means that if a bank fails, you're going to have insurance that is going to cover that loss up to a certain maximum dollar amount. And so anyway, I had to first of all, let me say this Carter, welcome to our show. It's really a pleasure to have you on our show and to see you again.

Carter Dougherty:

Thank you, Alan.

Alan Kaplinsky:

Now, I felt that because of your views, being I would describe as not conventional, that I needed to get somebody that would be a counterpoint to those views, so that we would have a good exchange of ideas and I reached out to my partner, Scott Coleman. For 25 years, Scott has represented banks and bank holding companies in connection with mergers, stock purchase transactions, branch purchase and assumption transactions, raising capital for banks, corporate restructuring, branching, non-bank acquisitions, changes in bank control, charter conversions, forming new banks and he's represented and dealt with many, many national banks and many banks that are state charter banks and are not regulated by the Comptroller of the Currency. So, Scott, welcome to our show.

Scott Coleman:

Thank you very much Alan.

Alan Kaplinsky:

So, let's get into it now. And I'll start with some, you would describe as softball questions, Carter, before we get to the meat and potatoes of what you are advocating here, how did we end up with a federal banking regulator called the Comptroller of the Currency?

Carter Dougherty:

Yeah, thanks for the question, Alan. That was one of the most fascinating parts of writing the piece that you described for the Washington Monthly, because it was one of those situations where you go back and look at the history and you're somehow surprised but not surprised. The short answer is that we ended up with the Office of the Comptroller of the Currency by accident. The National Bank Acts that were passed in 1863 and 1864, were really primarily intended as desperate measures to raise money to finance the Union armies, who were in the, we now know to be middle stages of crushing the slaveholder rebellion, but was not at all clear that the union would be victorious at that time. And the Treasury secretary was telling Lincoln, there is no more money left, we're going to run out. So something needed to be done.

Carter Dougherty:

And so Abraham Lincoln, the great emancipator, became personally involved in lobbying very strongly for the passage of the National Bank Acts. And the first, the main thing that they did was they taxed state bank notes out of existence, which were the common currency of pre-Civil War America, those were simply notes that drew on bank's core capital. And Congress, and then they were all chartered by states. And Congress said, no, we're going to create a national bank charter. And we're going to require that these new national banks hold all of their reserves in US government bonds. So, and bear in mind, since they were taxing their competitors out of existence, they knew there would be the massive creation of a lot of national banks. And so at a stroke, they created a massive new financing source for the federal government that helped finance the Civil War. And it was also a measure of prudential regulation, because by adjusting how much the national banks could lever their reserves, you could affect the currency supply, roughly. It was certainly a very rough system.

Carter Dougherty:

And I'd add, Alan, that this was in some senses the end of a long debate that the United States had had, about concentrated financial power. Most of us when we learn American history, we grew up learning about the Bank of the United States and how this was created. And Alexander Hamilton Musical has brought this into popular culture and then, Andrew Jackson smashed the thing into pieces. And this was the end of that debate in which Congress said, okay, we're going to create these strong nationally chartered financial institutions that will be the source of credit creation. And the important thing to remember is it was done under the cover of patriotic duty. We're creating these big financial institutions to finance the war. The goal of the law was really to stamp out all those state chartered banks, although they later developed a new business model that would be familiar to us today, where they would mobilize the savings of people and then turn that into a commercial and industrial level.

Carter Dougherty:

I should add that there's also a fascinating backstory about the brother of a prominent Philadelphia banker no less, I believe Ballard Spahr is headquartered in Philadelphia if I'm not mistaken. So, you may know the name Jay Cooke. Jay Cooke was the preeminent financier of the Civil War. And his brother was good buddies with salmon Chase, the treasury secretary. And he used that position to advocate for the National Bank Act. So there was a certain level of corruption in its creation that would be familiar to anyone who's worked in today's Washington.

Alan Kaplinsky:

Yeah. First of all, I have a follow up question for you. But Scott, do you have anything to add to the historical explanation Carter has given?

Scott Coleman:

No, I think the history that Carter has provided is accurate. And yeah, the question that I'm more focused on is where we go today, which I think we'll get to a little later.

Alan Kaplinsky:

Yeah. Well, we're going to get to it right now. So Carter, why does the OCC's history, which you just chronicled for us, why does that matter in understanding the role of the Comptroller of the Currency today?

Carter Dougherty:

Sure. If the origin of the OCC is fascinating, then what happened next is a bit more of a signal lesson in politics, which is in 1913, the United States created the Federal Reserve, not the fed that we recognize today, that was more of a product of the New Deal. But in 1913, we created the reserve banks that still exists today. And we suddenly had reserve notes with an implicit backing of US Government as the currency. So there was really no need after 1913 for national banks, or for the OCC, but the OCC became a sort of advocate for these banks within the system. And based on my reading of the historical record, no one seems to have even considered that this system had outlived its usefulness. I can't find any serious discussion of maybe repealing the National Bank Act and abolishing the OCC back then.

Carter Dougherty:

And I don't think that's a coincidence. These were powerful banks. And they had enough heft that the creators of the Federal Reserve had a hard enough time just getting them to join the Federal Reserve System. So that was a sign a little over 100 years ago that this was a regulator, a very powerful institution just paying for it.

Scott Coleman:

Again, I'm not going to disagree on this issue, I think probably some of the motivation of the national banks, even at that time was a desire not to be regulated in the various states. They would prefer to have one single regulator to whom they were accountable, as opposed to multiple regulators. Certainly, that regulator could have been the FDIC. But more to the point is we really do have a divergence between states' rights and a federal system, and it feeds into some of the very preemption questions that we frequently deal with today.

Alan Kaplinsky:

Yeah. So well, let's talk about the so-called dual system of banking. And that is the fact that there are banks that can be chartered at the federal level, federal national banks and federal SNL's are federal thrifts. And then each state has got its own laws that provide for the incorporation of their own banks. And what is the fundamental problem that you have Carter with having multiple ways to charter a bank? Because what I always hear, whenever there's the discussion of the dual system of bagging, that that's really a healthy thing in effect, to allow an institution to be chartered under the state, or at the National Bank level and from throughout my very lengthy career as a banking lawyer, the tide shift frequently. Sometimes the clients of mine want to be chartered under state law, because they feel that the state regulator is in closer proximity to them. They're more approachable.

Alan Kaplinsky:

Other times I have other clients that are more concerned about federal preemption, and they want to have a National Bank charter, or federal thrift charter. And you often hear that enables banks to experiment. There isn't only one way to do things, there are two different laws and people can make a decision which way they want to go. What's wrong with that?

Carter Dougherty:

So on one level, I think this is about regulatory arbitrage, which is that what bankers will see as flexibility, from a public interest perspective we have to consider is forum shopping and looking for the way to have the minimum amount of regulation possible. I use this example in the article that you referenced, Alan, which is to some extent, to a large extent, banking regulators are enforcement agencies. And what if we had a system where bank robbers would get to choose their forum. I like this judge, he's a little more friendly to defendants or not. I think we would find something odd about that. And I don't see the argument for it with respect to banks, and I also don't see why the OCC necessarily needs to be a part of that, because you could just as easily see chartering in multiple states as fulfilling this desire for diversity and experimentation that you hope for.

Carter Dougherty:

But, on another level we just have to consider that the OCC has become the guardian of a privileged class of banks with particular powers. And if there was evidence that the OCC didn't behave like the guardian of big bank interests within the regulatory system, then I would find the dual banking argument perhaps more persuasive, because we do have a national state system, a federal system, but that's just not the track record that the OCC has had.

Scott Coleman:

Well, yeah, I'm not going to say forum shopping has never occurred, because certainly I've seen it happen where regulatory relationships deteriorated and an institution felt that a change was appropriate. So I understand the risk. There is an issue though, of whether the rules are the same and are applied the same or not and maybe we'll get into that. There's also the view that regulatory reputations change over time. We might have seen 20 years ago a discussion amongst bankers that said, boy, the FDIC is the toughest regulator going, or maybe it's New York State or California. Today, they might say it is the OCC, I do to echo one point that Carter's made, I do think the OCC's reputation is that it is more often seen to cater to the larger institutions.

Scott Coleman:

I'm not saying that, that's my opinion, but if you talk to some community bankers around the country, especially in the financial crisis, there was a real feeling that the OCC wanted to be the regulator of large institutions only and that they were being encouraged by the level of regulation they felt to seek another charter and another regulator, whether that's true or not, or it's just that the OCC was a tougher regulator is subject for discussion. But in some ways that kind of echoes one of Carter's points that the OCC tends to cater to larger super regional or globally significant financial institutions.

Carter Dougherty:

And let me chime in with something there, Scott, because this is from the another side of the table is if you talk to other non OCC regulators, people from the Fed, people from the FDIC, when they talk about being a round tables with people from the OCC, their mentality seems to be one of being a big bank regulator. They don't echo consistently the concerns of community bankers about size, about all the lists that I probably don't need to explain to you. Their perception is very much of when they get around a table, there's the FDIC, there's the Fed and there's the representative of the big bankers, the OCC.

Alan Kaplinsky:

Well, let me make a heretical statement once even if that's true, what's wrong with that? What's wrong with... because when we're talking about banking in the United States, maybe we got too many banks, right? And maybe we, Canada only has five or six banks. Most other countries don't have nearly the number of banks that we have. And as we move to a less of a bricks and mortar environment, where everything, we're leading towards a point where all transactions are going to be done online and probably from your smartphone. What, why does it matter that they're catering to the big banks? The number of banks is declining and the banks are just going to continue to get larger?

Carter Dougherty:

Well, there's a couple arguments one can make there. First is, we generally have a principle somewhat atrophied, but coming back that we disagree with big, in general as a danger to democracy in this country. That a long strong tradition of antitrust and a particular distrust of concentrated financial power. So and that's a great American tradition that needs to be reinvigorated. But the second point I will make to you is, it's not entirely clear to me what exactly is good for consumers for ordinary Americans? I've spent a lot of time working in Germany, where you get much the same complaints from bankers, "there are too many banks, this place is over banked, it needs to be consolidated." But the fact of the matter is that dual system does a great, it's highly unprofitable for bankers relative to say the UK or the United States.

Carter Dougherty:

And that is because the healthy competition forces banks to constantly pass on increases in productivity and efficiency to the consumer, they can't hoard it as profits, it doesn't accrue to this to the shareholder. So when I hear complaints about there being too many banks, I ask myself, well, who exactly is objecting here? I can definitely see that if you would like to see a greater return on equity, you would prefer there would be fewer banks, in which case move to the UK. That's a great place for a few banks and bad service for consumers.

Scott Coleman:

Maybe I'm not going to be counterpoint, maybe Carter is going to draw me over to his side here. For about 28 years I've represented as part of my practice, community banks and I do get concerned at the pace of consolidation in the industry, the industry has been consolidating at about 3% a year since the Great Depression. And I do wonder what the impact of that is on smaller communities and particularly rural communities. And if we'll see pricing and service impacts that will negatively impact the consumers at the expense of large corporate profits. I'm certainly willing to and do represent national banks as well, I appreciate the balance between the two systems.

Carter Dougherty:

That, by the way is a secular trend, the decline in the number of banks. It predates Dodd Frank and the financial crisis, and it is continued.

Alan Kaplinsky:

Right. So, okay. Carter, so far the main criticism you've had of the OCC is that it caters too much to the larger banks and at the expense of the community banks. But what else is there about the OCC that you don't like? Tell me about their bad track record. I think they've done a lot of good things.

Carter Dougherty:

Well, if there's a great new book out on this, by the way, I highly recommend by a guy named Arthur Wilmarth called Taming the Megabanks. This is a scholar at George Washington University. Yeah, he's spent a lifetime, it's a lifetime of scholarship and it's a really impressive-

Alan Kaplinsky:

But he does, I believe, represent the conference of state bank supervisors. If I'm not mistaken. He's done a lot of work for them over the years. So I would think he might be a little bit aligned with state banks, but go ahead.

Carter Dougherty:

Take a look at his 1000 pages of carefully documented scholarship. It's a persuasive one and I don't think that detracts from his meticulous documentation, for example of the way that the OCC pushed to open the banking system to the derivatives market. Pushed the banking system to become a laundry for subprime loans, for the originate and distribute model. I also have to say that I, in my time, I used to be a journalist looking at the OCC's behavior, it exuded a certain contempt for Congress and anybody else who would try to restrain their generalized advocacy on behalf of big banks, the Comptroller when Dodd Frank was passed, John Dugan immediately started giving speeches after Dodd Frank was passed, saying we might be going to Congress for legislative changes, because we don't like this blah, blah.

Carter Dougherty:

And I have also witnessed senior OCC officials openly mocking duly passed laws and promising not take them too seriously. I found that pretty shocking. And I think it's a indicator of how detached institutionally the OCC has become from the notion that it is a creates a democratic creation and has to respect to the will of Congress.

Alan Kaplinsky:

So let me just make one comment and then get Scott's reaction. Yeah, it's fair to say that during the recession of 2008, 2009, which was caused in large part by the origination of mortgages that people were unable to repay and the securitization of those mortgages by the billions and billions, that none of the regulator's really grace themselves with any glory. Not just the Comptroller of the Currency, which I agree with you fell down on the job. But the same goes for all the bank regulators, the state chartered bank regulators. The FDIC, the Fed, all of them missed the boat here, don't you think?

Carter Dougherty:

I don't disagree with that, I would give somebody like Sheila Bair at the FDIC credit before the crisis for seeing what was coming. I would also add that there were plenty of voices outside the banking regulatory establishment, who were warning of a housing bubble, of serious problems in this market, of widespread fraud and mortgages and I'll just give you a quick example of that under the tenure of Alan Greenspan at the Fed, the Consumer Advisory Board was repeatedly raising concerns about mortgage fraud and bubble-like conditions in the subprime markets. There was just one problem was that Alan Greenspan never bothered to attend any meetings of the Consumer Advisory Board.

Alan Kaplinsky:

So Scott, what do you think about what Carter has sad about the OCC has basically done a bad job? They've been a bad regulator. And we should get rid of them for incompetence.

Scott Coleman:

I would have two comments on that. One, I will come back to the notion of the OCC as an advocate for federal preemption of state laws. I think whether it's the OCC or another federal regulator that does that, you can look at that issue from two perspectives and two lenses. Carter might say, well, it's just helping the big banks. I might say it's creating a level playing field for financial institutions. So we don't have either of two factors happening. One is, states throwing up roadblocks to commerce that are anti-consumer, even if they think they're pro consumer. And two, there being a race to the bottom where we might see some state regulator who wants to draw a business and will eliminate protections to try to invite banks in. Having a federal regulator out there and having federal preemption really benefits the system. The second is, if it's not the OCC, who's it going to be? Is the FDIC, for example, better position to regulate financial institutions on a national basis than the OCC?

Alan Kaplinsky:

Yeah. Well, yeah, I'd like to get your reaction there Scott, because in your article, that seems to be one of the things that you're advocating. So yeah. What makes the FDIC any better?

Carter Dougherty:

Let me offer two things is, there's a couple of models of... there're many models of preemption. It's a big legal doctrine with many, many details. So one way of thinking about it is that a federal regulator could set a floor and say, we're going to have this level of consumer protections and if the state's want to do more for their consumers, that's fine. The OCC has not tended to function like that. It has more been about actively trying to poke holes in what states would like to do. And of course, I don't need to tell you there's a long running legal battle when Cuomo was Attorney General in New York that was essentially taken to the Supreme Court. But, preemption doesn't have to be about a race to the bottom. It can be setting a bottom and encouraging race to the top.

Carter Dougherty:

Now, on the FDIC question, everything I have come to appreciate about the FDIC has been that it bears the signs of what it is, an insurance company. Which is there's a certain degree of conservatism in what it's willing to indulge in the system, because it is responsible for the integrity of the deposit insurance fund. And that culture, routing banking regulation in that culture, rather than in the OCC culture of, let's be an advocate for big banks and make sure that they can do things and not have the states get in the way and everything, is a better road to good consumer protection and to financial stability. And there was one other thing I was going to say about the FDIC, but I lost track of things.

Carter Dougherty:

I just wanted to add that we're always going to have the problem of regulators potentially being captured by their regulated entities, human beings are not going to turn into angels anytime soon, no matter what institutional setup we create. So the question becomes rather than how can we stop captures, how can we make it least likely? And I think the FDIC offers the best chance of that, by merging it in with the OCC. It's never going to be perfect. It's always going to be a work in progress. But I think that would be better institutional guardrail than an independent OCC.

Alan Kaplinsky:

So Scott, how do you react to it? I know I have a thought but I'd like you to go first. And then I'll add to whatever you say.

Scott Coleman:

Right? I'm not sure I actually do agree with Carter that the FDIC is better served. There's a complicating factor here that if you are the insurer, number one, you still run the same risks of being incoming captive, which Carter acknowledges. But number two, just the fact that you are providing deposit insurance may in fact, influence your determinations. Right? And we actually did anecdotally believe this was happening. In the financial crisis, we saw a number of failures, we saw taxing in the deposit insurance fund. Eventually, we reached a point where some institutions which had the same characteristics as institutions that had failed, were not closed by the FDIC and there was a question of was the deposit insurance fund worried about running out of money? Were they making political determinations as opposed to prudential determinations?

Scott Coleman:

And I'm not sure that it necessarily follows. Yeah, there could be a strong case for having one single federal regulator, I'm not sure that I necessarily agree that the FDIC is by definition better positioned to do it.

Carter Dougherty:

Let me offer one thought on that if I may, Scott, which is let's think about this a little bit differently. And think about that maybe an FDIC duly empowered and with the assistance of good state supervisors, would be acting to prevent failures in the first place, with smart, prudential and consumer protection regulation precisely because it has its eye on the deposit insurance fund. And because its culture is one of being a long term steward of this money, strikes me that's what we're aiming for in a financial regulatory system. Not to avoid these stress situations which forced those difficult decisions that you just described. Also, if memory serves from the financial crisis, when it's in a pinch I believe the FDIC has also operated banks until it could engineer a less costly solution. I believe it operated Indimac for a good, was a good six or nine months or something like that. So there're options there between letting it fail and taxing the deposit insurance fund.

Alan Kaplinsky:

Well, you haven't advocated this, but if your concern was consumers need to have more protection and the OCC is not providing enough and we don't know so much about what the FDIC is going to do, we do know about the CFPB, right? We do know that they're devoted to protecting consumers. How come we didn't advocate that they take over the chartering of national banks?

Carter Dougherty:

Let me give that one some thought. There's traditionally been assumed-

Alan Kaplinsky:

And to make it clear, I'm not advocating that.

Carter Dougherty:

Yeah. There's been a certain distinction between consumer regulation and prudential regulation. And to some extent, the CFPB is a realization of what I'm advocating, but just on the consumer finance side, right? That was consolidation of the enumerated statutes that by now, from heart, from Dodd Frank that became the purview of the CFPB.

Alan Kaplinsky:

Right. So, let's talk about just a few things that the OCC has done that might rankle you a bit. So we've got one regulation that was issued late last year by the OCC's acting Comptroller of the Currency that codifies the true lender doctrine and makes it clear that if the bank's name is on the loan document or the bank funds the loan, it's the lender for purposes of Section 85 of the National Bank Act, which is the federal use reprovision, which the Supreme Court has held preempts state laws throughout the country that might otherwise apply to protect borrowers. And there's been a lot of litigation over this issue of who's the true lender, is banks and partnered-

Carter Dougherty:

That I believe, yeah.

Alan Kaplinsky:

And my guess is, you're not too happy with what the OCC did there, am I right?

Carter Dougherty:

And I think that's a really good example of looking for preemption opportunities that the OCC has undertaken. And here you're talking about a, it really was a combination of the so called madden fix and the true lender regulation that the OCC has put through. And this one is particularly outrageous though, because states very explicitly have made decisions in Arkansas to have it's usually rate embedded in state constitution in West Virginia has a little bit different New York and all. And this is simply the OCC trying to use regulation to outflank those state protections and it really is outrageous, it has the potential to empower some of the worst actors in the business. Scott, you mentioned race to the bottom issues, you know full well, they're banks that some lawyers even refuse to represent.

Carter Dougherty:

Because they're willing to use the charter for whatever purposes. And this is going to be a real, real bad thing for consumers and for banking regulation in general if the true lender rule persists. That having been said, you're probably aware that there was a bipartisan vote in the senate to roll it back under the Congressional Review Act and this will no doubt be coming up in the house fairly soon.

Alan Kaplinsky:

Yeah. And I believe that it's going to come up for a vote in this, it's already passed the Senate, you're right. It's coming from vote in the House and it clearly will get through and Biden will sign it. But I would argue that that's bad, not only bad for the banking industry, but it's bad for consumers. Because it's going to result in a large segment of the consumer population, particularly those with less than A1 credit, being cut out of the legitimate lending market. And those individuals are going to have to turn to other sources that are just not being regulated, such as offshore banks or some tribes that are lending money to individuals at gargantuan interest rates that much higher APRs than you see in a lot of the bank model lending.

Alan Kaplinsky:

And in fact, a lot of these joint ventures and now between banks and non-banks, the APR is 36% or below. So the net result of eliminating the certainty, which the OCC provided by coming up with what really amounted to a black line test, a very clear test of when a bank was a true lender, is that it's going to result in a lot of consumers not getting loans and some consumers paying much higher prices.

Carter Dougherty:

Yeah, I'm going to respectfully disagree with you there, Alan. And the reason for that is pretty empirical, which is this rent-a-bank model as it's come to be known, for all its faults in the early 2000s, the OCC stamped this out, there was something inside the agency that they found it to be icky, the notion of partnering with non-bank lenders, potentially very predatory lenders. So this really didn't happen. It happened when the Trump appointed regulators ruled and declared that they were going to throw the doors open to all sorts of things. And so this industry started to take shape. And then they made clear they were going to do this the Madden fix, excuse me, regulation and then the true lender.

Carter Dougherty:

So I don't subscribe to this notion that if you don't pass this regulation, that suddenly people are going to be at the mercy. Also, there's a little bit of, I have a little problem with this logic of, we, in order to avoid exposing people to predatory lenders, we should enable banks to do predatory lending. There's a certain circularity to it that I've never quite tweaked it.

Alan Kaplinsky:

Well, except that you may not believe what the Comptroller said at the time when it issued the regulation or when it proposed it, but they made it clear that they would not tolerate any behavior by any of the banks that they regulate, or the non-banks over which they would be, again, the right to supervise and to regulate that they would not tolerate them running roughshod over the rights of consumers that banks, and they once again expressed the view that pure ren-a-bank arrangement would not be acceptable, that banks had to really perform underwriting functions, they had to be integrally involved, they had to very carefully monitor what their non-bank partner was doing. And having a, he referred back to what the OCC did several years ago, probably 15, 20 years ago, they didn't like the fact that payday lenders had partnered with national banks.

Alan Kaplinsky:

And you're right. They basically said, we're not going to allow that anymore because they felt rightly or wrongly, that there was predatory behavior occurring. But at least I haven't heard that any of the bank partnerships that the OCC is monitoring, and frankly, most of them are done under the aegis of the FDIC, because it's state chartered banks that are more heavily involved in this partnering. I haven't seen any evidence of consumers suffering as a result. And if anything, I've seen credit being made much more available. It's, I would say, more democratic.

Carter Dougherty:

Well, to demean that position, you have to have a certain faith in the OCC and as you saw, I wrote a lengthy magazine article suggesting that I do not, so this might be something that we can agree to disagree on. I would say, that I believe that was a brief allusion to the recent announcement that the OCC is reconsidering its regulation on the Community Reinvestment Act, which is something we haven't discussed.

Alan Kaplinsky:

Well, that's a good segue because I did want to get into that.

Carter Dougherty:

Yeah. The first I would say is, this is a really good example of the OCC playing this role of the banker's advocate within the system where a determined Comptroller pushed the FDIC to do this. And I also have to say it was just, it was simply an astonishingly corrupt spectacle from an administration that really set new records in corruption. You had Joseph Otting has a dust up with community groups over the Community Reinvestment Act when he was at one West. He sees the chance because his buddy Steven Mnuchin is treasury secretary to become comptroller. He becomes comptroller and immediately sets about doing his best to water down the Community Reinvestment Act any way he can, goes out of his way to try to discredit opponents of what he was doing, and then leaves office the day after it is finalized.

Carter Dougherty:

I have a hard time finding a different example of such clear, I'm going through the revolving door here, but I'm here to do essentially favors for my old bank and my industry. And with no consideration whatsoever that any consideration was given to the public interest. So it's great that this is being reexamined. It was also some indication that even within the system of regulatory arbitrage, there were limits because the Fed refused to go along with the CRA.

Alan Kaplinsky:

Right. Right. So, Scott, what's your reaction to the CRA reg of the comptroller?

Scott Coleman:

I would say a couple things. One, I am particularly happy that they are reconsidering it, because I do have concerns from an industry perspective about there being a CRA arbitrage available. On the Community Reinvestment Act, we ought to have one rule and one rule only. I would say, Carter's views are probably a lot more pointed than mine about the OCC's reforms. And I'm not going to debate him on that, I will point out and he may disagree on the motivations that until the very end, the FDIC was in cooperation, it is true that the Fed wanted to go a different direction, the FDIC had determined to join the OCC and it was the pandemic and the belief of the FDIC that it did not want to institute the new regime and all of the changes that state banks would have to do to address it, in the middle of a pandemic that caused them not to join in the issuance of the final rule. But in every step above and until that point, everything that's been reported to us is that they were in lockstep with the OCC.

Alan Kaplinsky:

Well, yeah. They were and it would have been interesting if they had joined with the OCC, what the result would have looked like. Would it have been significantly different than what the OCC came up with? And would the FDIC want to get rid of what they had done along with the OCC in order to get the Fed on board? So yeah. Now, it was not a good result. I would agree with both of you having them, the OCC go in one direction, totally unprecedented and it made no sense, frankly. And now, at least the regulators are probably going to move in sync with one another. What they're going to come up with, I have no idea. It's very, very uncertain, okay.

Scott Coleman:

Once again, I have to say that it wasn't just that it was a bad result. It was a bad process. Rotating out of the industry into the government for the purpose of watering down a regulation you found irksome as a banker, where is the sense of public interest that public official should have when they take an oath of office? It was just, it was really shocking.

Alan Kaplinsky:

Right, right, right. One regulation we haven't talked about and I don't know whether you follow it to the same extent that we've been following it Carter but it's often referred to as the fair access to banking reg, where the OCC again, toward the end of Brian's tenure as deputy comptroller, he came out with a regulation that basically forced national banks to deal with industries that they didn't want to deal with. Like gun manufacturers or it could be people engaged in payday lending or whatever. That it required banks, when underwriting alone to just look at the merits of who the applicant is, and not that particular product or service they're involved in, or what's the impact that that company might have on the environment. Wondering what you thought about that?

Carter Dougherty:

Yeah, well, just a couple things here. You never quite sure what's going on in the mind of someone like this. But whether it was Keith Noreika with his Make America Great hat, when he was the acting comptroller or Brian Brooks, pursuing what is manifestly a Republican talking point that a somehow woke banks are denying credit to gun dealers or oil and gas drillers or whatnot, is really some indication not just of the OCC being political in the sense that it does the bidding of one particular constituency in the economy, but that it also has these tuned political antenna and were determined to kiss the asses of what they thought were the powers that be at the time, it sure seemed like Brian Brooks was angling to get the full nomination to be the comptroller. If memory serves, he did, but they didn't get to confirmation of it. And perhaps-

Alan Kaplinsky:

He got nominated by Trump but it didn't go any further than that.

Carter Dougherty:

Maybe he was angling for Trump would be reelected, and he would get the full job and stuff. But what was, by the time he was making his arguments, this was something you could hear from Republicans on Capitol Hill so clearly he had to be on the right page if he was ever going to be nominated and confirmed.

Alan Kaplinsky:

Scott, do you have anything you'd like to add? We're drawing toward the end of our show today. And, want to make sure we've covered the important points.

Scott Coleman:

Talking about fair access to banking, for one minute, it's interesting on a couple levels. Number one, it cuts against Carter's point that the OCC is too beholden to the banks, right? The banks were not in favor of that act and that act was perhaps a third rail for them politically, they are responsible to their consumers, their employees, the economic desires. And they felt that this was going in a direction they didn't want. And so maybe what we're saying, and maybe we can agree that the OCC has at times been too political. And that may be something that is worth talking about. Certainly, political decisions about bank prudential matters and bank operations probably don't result in good determinations on a go forward basis. I do come to the point where if we are going to have a super regulator in charge of the financial system, I'm wondering how that will work? And what that will look like and what Carter's thoughts are on that. And in particular, not only should we get rid of the OCC, should we get rid of the Fed to and should we have one central banking regulator?

Carter Dougherty:

There's a couple things to think about here. One is, we have alluded to the too big to fail problem and the notion of breaking up banks, in many discussions. I think that any consideration of a super regulator has to go hand in hand with a new Glass-Steagall that makes some clear decisions about commercial investment and investment banking. And that also pronounces on the question of size. I don't need to tell either of you that, when you look at the size of banks and plot them on a graph in this country, and it looks like a hockey stick, it goes here and then as a way up. We have 10 banks with these huge levels of deposits and dominance in many business lines and whatnot. And we really need to grapple with that because even if you do abolish the OCC, these entities are always going to be very, very powerful for other reasons, for political ones, if nothing else, the campaign contributions, the money and on and on and on.

Carter Dougherty:

We have a fair shot though, at making the small account our way to the very large. The community banks are not shrinking violets at the political level. And anybody who's followed this knows the name of Camden Fine, the longtime president of the independent community bankers of America, who with the intensity of a Baptist preacher, encourage community bankers to feel proud about who they are and to organize politically, at one point Jamie Dimon of JPMorgan Chase called him a jerk on an interview on CNBC, which gives you some indication that he's good at getting under the skins of Wall Street bankers. So there is a pretty good argument that within a super regulator, you could balance out these interests.

Carter Dougherty:

Now, whether that includes folding in things that the Fed does, again, you could make an argument, the bank holding company act that governs this at the Fed has always been a somewhat mysterious creation that gives the fed a toehold into what it wants. But otherwise, it stays out of what it does. And so I think we could do better in finding the balance there.

Alan Kaplinsky:

Okay, we've come to the end of our program today. And I want to first thank our very special guests, Carter Dougherty, who's been kind enough to join us today to share his thoughts on an article that he wrote back in March, where he advocated eliminating or abolishing the OCC and perhaps merging it into the FDIC. And I want to thank my partners, Scott Coleman, for sharing his thoughts about this very topic. One thing is clear from the discussion is that this is going to be a very heavy lift, if anybody politically tries to have introduce the bill that will actually abolish the comptroller. I don't think that's going to happen. But what certainly could happen is that President Biden could nominate somebody as the next Comptroller of the Currency, you could easily get confirmed, who may take a completely different tack than that taken by the Comptroller of the Currency and by the acting comptrollers during the Trump administration.

Alan Kaplinsky:

So with that, we are going to conclude our program today. I want to thank everybody who downloaded our program today and to encourage you not only to listen to our weekly podcast, but also to make sure you consult our blog. Also known by the name of Consumer Finance Monitor. There's a lot of content on that blog. Thank you.

Carter Dougherty:

Thank you very much, Alan.