Consumer Finance Monitor (Season 6, Episode 3): How the U.S. Supreme Court Will Decide the Threat to CFPB's Funding and Structure: Part I, with Adam J. White, a Renowned Expert on Separation of Powers and the Appropriations Clause and a Close Follower of the U.S. Supreme Court

Speakers: Alan Kaplinsky, Rich Andreano, John Culhane, Michael Gordon, and Adam White

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer financial services, and what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm. I'm your host, Alan Kaplinsky, the former practice group leader for 25 years, and now Senior Council of the Consumer Financial Services Group at Ballard Spahr. And I'm very pleased to be moderating today's program. For those of you who want even more information, don't forget about our blog, consumerfinancemonitor.com, shares the same name as our podcast show. We've hosted our blog since 2011, so there's a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those in the industry. To subscribe to our blog, or to get on the list for our webinars, please visit us at ballardspahr.com. And if you like our podcast, please let us know about it. Leave us a review on Apple Podcasts, Google, or wherever else you obtain your podcasts.

Also, please let us know if you have ideas for other topics that we should consider covering, or if you can recommend speakers that we should consider as guests on our show. Today's podcast is part one of a two-part series of podcasts. We'll be doing today's podcast show, and then another one in a week. And it's repurposed from a webinar that we conducted in mid-December entitled How the US Supreme Court Will Decide the Threat to the CFPB's Funding and Structure. This, of course, what I'm referring to in the title is a landmark Fifth Circuit opinion that came down a few months ago, which held that the funding structure that Congress provided for in the Dodd-Frank Act for the Consumer Financial Protection Bureau is unconstitutional. That it violates separation of powers, and in particular, the requirement that any appropriations from the Treasury of the US have to be done by an act of Congress.

I'm very pleased to have my colleagues, Mike Gordon, Rich Andreano, and John Culhane join us for this two-part series. Although, most of our podcast show today, we will be featuring a very special guest, Adam White. Adam is a senior fellow at the American Enterprise Institute, and he's co-director of George Mason University's Gray Center for the Study of the Administrative State. Last year, President Biden appointed him to the Presidential Commission on the Supreme Court of the United States. He also serves on the Administrative Conference of the United States, and he is the next chair of the American Bar Association's Administrative Law Section. Earlier in his career, he practiced law and at that point, he helped to research and write legal briefs raising constitutional questions about the CFPB'S independence and funding.

And for those of you like myself, who follow every little move that the CFPB has made and all the reactions to it, you'll remember a case called State National Bank of Big Spring versus Geithner, and there were some cases that were related to that. And you may wonder why was Geithner named as the defendant? That's Timothy Geithner, the former Secretary of the Treasury. And during the first year, that is after enactment of Dodd-Frank, until it was stood up on July 21, 2011, it was managed by the Treasury Department. A very warm welcome to you, Adam. Pleasure to have you on our webinar today.

Adam White:

Well, it's a real pleasure to be here, Alan. Thanks for that kind welcome. Way back when I was practicing law, when Dodd-Frank was brand new, I benefited immensely from the CFPB Monitor blog and it's a real treat to be here. I'll say, I'm glad you mentioned the litigation, just so the viewers know, if it wasn't already clear, but I've studied the CFPB, I continue to study it now that I'm not in practice anymore, but I'm not entirely neutral on this. I come to this as somebody who spent time suing the CFPB with my colleagues at Boyden Gray Associates. And just a footnote to history, the other reason why Geithner was the named defendant was because our original lawsuits also challenged aspects of the Financial Stability Oversight Council, which the Treasury Secretary chairs and the Orderly Liquidation Authority, which the Treasury Secretary would administer. That feels like a long time ago, but a lot of happy memories in those cases.

Alan Kaplinsky:

Yeah. Adam, before we focus on the Fifth Circuit opinion, and the early proceedings before the Supreme Court, I want to build a foundation for all of our listeners. I want to first know, what does the lawsuit involve? When was it filed? Who were the plaintiffs and the defendant? Where did the lawsuit get filed? And what were the allegations in the complaint?

Adam White:

Is that all?

Alan Kaplinsky:

Absolutely, for a start.

Adam White:

That's okay. Okay, at the highest level of generality, I'll back up, but what's happening now in the Supreme Court is possibly a constitutional challenge over the CFPB's funding structure under Dodd-Frank. But as with most cases that raise constitutional issues around administrative agencies in the Supreme Court, the origins are much more complicated and the litigation is much more multifaceted. This case, which was brought by the Community Financial Services Association of America and the Consumer Service Alliance of Texas. It was originally filed early 2018 as a challenge to the CFPB'S final payday loan rule, which was itself issued under Director Cordray in late 2017. I think it might have been one of his last actions before he stepped down as the CFPB'S inaugural director. This rule was an exercise of the CFPB'S UDAAP authority, its authority to regulate unfair, deceptive or abusive acts and practices. It was focused on payday lenders, and it, as I recall, had two basic components.

First of all, it had a set of regulations for payday lenders in terms of their underwriting. Their analysis of the credit worthiness of their loan applicants, and the terms on which they granted out the loans. But then second, there was a aspect of the rule that focused on how the loans would be paid and the powers of the lenders in recouping funds that they had lent out. This lawsuit was filed in April of 2018. Later that year, the district court in Texas stayed the effective date of the rule. The rule's effective date was set off many months down the road, but with the litigation pending and the fact that the CFPB was by 2018 reconsidering the rule, the district court stayed the effectiveness of the rule. Now, while the case continued to depend in the district court, we had other developments involving the CFPB. Most importantly, the Supreme Court in the summer of 2020, declaring that the CFPB'S structure was unconstitutional in that it gave independence to the director, not a multi-member commission structure like the FTC, but a single director who was independent of the president.

And in the Seila Law case, the Supreme Court famously declared that that structure was unconstitutional, that for an agency like this, with its powers, you could either have a multi-member structure like say, the FTC or the Consumer Product Safety Commission, after which Senator, then Professor Warren, originally proposed the agency. Or you can have a director who answers to the president, and the Supreme Court struck down the CFPB's independence. Now, the lawsuit, in addition to the funding question, it had raised the challenge to the director's independence from the president. And it also, it raised some challenges under the Administrative Procedure Act, arguing that the rule itself was arbitrary and capricious, that it lacked a sufficient connection between the agency's record, its findings, and the actual rules that were proposed. That the agency had

failed to respond to serious criticisms that the litigants said had been raised against the rule. There was a number of issues that were raised for both the underwriting and the payback provisions of the rule.

Now, after Seila Law, the case gets amended in light of Seila Law. And also, along the way, the underwriting provisions had been rolled back by the agency. They fall out of the case. And all were left with, if I remember correctly, are the payment provisions. In August 2021. The district court grant's a motion for summary judgment in favor of the agency declaring that the funding structure is constitutional and that the APA claims fail. It goes to the Fifth Circuit. The Fifth Circuit issues a stay of its own. It stays the compliance date even after the rule goes into effect, it stayed the date with which industry would need to comply with the rule. Like a lot of cases, it has a very long life, but while the case is still pending, another case arises through the Fifth Circuit. It's called American Check Cashing. It had to do with, as the name suggests, a CFPB Enforcement action against a check cashing company.

And in this case, which eventually gets en banc treatment in the Fifth Circuit, one of the questions that arose but wasn't decided was whether the CFPB'S funding structure, which we'll describe was unconstitutional. The court doesn't declare it unconstitutional, but Judge Edith Jones, along with four of her colleagues, issue a concurring opinion raising real questions about the CFPB'S funding structure. Then finally, we get to October of this year where a panel of the Fifth Circuit, three judges on the court, issue a decision in favor of the CFPB on the APA claims. And also, you can refresh my memory, I guess they ruled in favor of the agency on the question of whether the agency's independence from the president at the time the rules promulgated was the grounds for undoing the rule. I guess they ruled in favor of the agency there, but the issue that got everybody's attention, I guess we'll be spending the rest of our time focused on was the agency's funding structure.

Because unlike most other agencies that are... We'll, I'll rephrase that, 'cause I think it's a point of contention. Unlike many federal agencies, the CFPB does not get funding through the normal appropriations process of Congress. They get it from the Federal Reserve and we'll delve into that. And the Fifth Circuit examining the structure declared that the CFPB's funding was unconstitutional and a grounds for undoing or rejecting the agency's rule.

Alan Kaplinsky:

Okay, that's a really good solid foundation that you built, Adam. Let's now get to the reasoning of the court, the three-judge panel that you mentioned that concluded, that relied substantially on Judge Jones's concurring opinion in the All American Check Cashing case. The enforcement case brought by the CFPB. What was the reasoning?

Adam White:

Sure, Alan. And I know you and your colleagues have had some really great slides that lay out the textual provisions we're talking about, and I don't see them on my screen. If it's possible for somebody to put up the text, that would probably be helpful. But for those of you viewing who want to look this up, you can just google 12 U.S.C. 5497, that's section 1017 of the Dodd-Frank Act. And this is how the CFPB is funded. Rather than the normal appropriations process that many agencies are subjected to, the Dodd-Frank Act from the very beginning, gave to the CFPB a statutory entitlement to funds from the Federal Reserve. Viewers may recall that under the terms of Dodd-Frank, the CFPB was at least nominally part of the Federal Reserve, although especially in the aftermath of Seila Law, it really is substantially independent from the Federal Reserve and answers instead to the President.

But under the original Dodd-Frank Act, under section 1017a, the CFPB is entitled annually or quarterly to determine how much the agency needs to fund its regulatory enforcement action activities. And then, it goes to the Federal Reserve, and requests that funding. You can look these letters up. They're on the CFPB's website. They're usually very brief, where the CFPB director says that he has determined the amount of money that's needed for the next quarter or for the next year. The Federal Reserve then replies with a very brief letter saying, we will convey the funds to you. And the CFPB can get an immense sum of money through this process. Dodd-Frank caps it at 12% of the federal's operating budget, so it's a limit. We should all be so lucky to have such a limit on our resources because with the Fed, I think its annual operating expenses, or let's look this up. Maybe $1.2 billion or somewhere around there. Or no, it's much more than that. What am I saying?

But in any event, though, the CFPB, for fiscal year 2023, for example, it's entitled to claim up to $750 million for that year's operations. Now, what would happen to these funds if they didn't go to the CFPB? Well, under another part of the US Code 12, section 289 dividends and surplus from the Federal Reserve banks would go directly to the Treasury. And that's important

I think, for this case. But that Dodd-Frank provision that I mentioned a moment ago, and sorry if I'm causing people to flip back and forth between slides, but back in 1017, there's a few other important aspects of Dodd-Frank's characterization and provisions for these funds that go to the CFPB. First of all, that section of Dodd-Frank says that the House and Senate appropriations committees have no power to review the CFPB's use of the funds that come from the Federal Reserve. There's another subsection of 1017 that says that these funds should not be construed as government funds or appropriated funds.

And there's a real clear theme in that provision that the CFPB does not need to go to Congress to ask for these funds. They can. They are authorized to go and ask for more funds from Congress if they need it. I don't think they've ever needed it except maybe at the very early stage of the agency. But by and large, the CFPB obtains these funds without Congress's approval and with very limited direct oversight, at least through the appropriations committees. Now for years, the agency has pointed this out in its financial reports and its strategic reports, pointing out that this was intended to give the CFPB significant independence from political interference so that the agency would be independent in its regulation of financial institutions. The Fifth Circuit saw this less as a feature though and more as a big constitutional bug. Because the constitutional provision, Article I, Section 9, Clause 7 of the US Constitution provides, "No money shall be drawn from the Treasury, but in consequence of appropriations made by law." And the question for the Fifth Circuit is whether the CFPB violates that provision by getting funds outside of appropriations.

And the argument then that we're having now more in the Supreme Court is whether Dodd-Frank itself qualifies as an appropriation statute for purposes of the Constitution. The Fifth Circuit didn't see it that way. The Fifth Circuit said that because the CFPB never has to go to Congress for new appropriations, the Supreme Court has perpetually freed it from any kind of appropriations. The Fifth Circuit rejected the idea that Dodd-Frank itself was actually an appropriation statute, and instead, the Fifth Circuit saw this as an example of the CFPB getting what are in effect treasury funds because otherwise the funds would flow through to treasury. Getting treasury funds without an appropriation from Congress. Now, the very specific limits and nuances of that holding are a little unclear. Some have read the Fifth Circuit as requiring the CFPB to be subject to annual appropriations processes. I don't quite read it that way, but the Fifth Circuit doesn't specify how often the CFPB should need to go to Congress to get appropriations.

What worried the Fifth Circuit in the end was the fact that the CFPB was perpetually free from any kind of appropriations process. It declared the rule at issue, again, the remaining portion of the payday lender rule unlawful because the rule was promulgated by an agency that was funded unconstitutionally, the court said without that funding, the agency never could have promulgated that rule. Therefore, the unconstitutionality of the funding is a grounds for striking down the rule.

Alan Kaplinsky:

I just want to clarify something for everyone. We say, number one, that the constitutional provision is applicable in this situation. The one that says that any monies that are paid by the Treasury, it must be done pursuant to an appropriation. And that language means a congressional appropriation. And the reason why we say or the Fifth Circuit says that funds here are being paid by the Treasury, is that it's an indirect payment by the Treasury. Because if you look at the structure of the Federal Reserve Board, they have several Federal Reserve banks that operate independently and indeed, the Federal Reserve banks fund the Federal Reserve Board.

And all the Fed Federal Reserve banks are self-funding entities, and to the extent that they have funds left over at the end of every year, they don't get to keep those funds. They have to send that money back to the Treasury to the extent that funds are not paid over to the CFPB pursuant to the language of Dodd-Frank, that money would otherwise go to the Treasury. It's an indirect type of funding by the Treasury, and I think everybody should be clear about that. The other thing-

Mike:

Alan, this is Mike. I wanted to interject if I could.

Alan Kaplinsky:

Sure.

Mike:

Just to provide the unspoken rationale that Congress had when they made this choice. We were talking about the policy, they choice they made regarding how to fund the Bureau, but it was very intentional at the time. And while the intent may or may not have any constitutional significance, I think it's important context, which is that Congress wanted very much to have the Bureau operate outside of the annual appropriations process because it wanted to insulate it from that process, and from the political influence that can occur during that process. Other bank regulators are not annually appropriated at the federal level as a rule, and Congress thought that the Bureau fit more into that model. But they were also concerned because of its mission being so singularly focused on consumer protection that the industry might use its lobbying muscle to affect the Bureau through the annual appropriations process. And I think there was a desire to insulate them from that kind of pressure.

And indeed, having worked in appropriated and unappropriated agencies during my career, I can attest that there is a significant difference in terms of how your funding is received and whether you have to go to Congress each year. There can be real significant differences in the types of oversight and leverage that Congress has and the ways in which they can affect agency powers and priorities. But I just thought I'd mentioned that as sort of the policy background.

Alan Kaplinsky:

Thank you, Mike. I want to go back to Adam though, because there's a strange statement made by the Fifth Circuit. At least I thought it was strange. I had to think about it a lot. They seemed to rely to some extent on the fact that they viewed the CFPB as being double insulated. Just wasn't insulated once, but there were two installations. First, the Federal Reserve Board is insulated because they don't have to rely on congressional appropriations, and the CFPB gets its money from the Federal Reserve Board, which in turn gets its money from the Federal Reserve system. Adam, how important do you think that is? It struck me as sort of interesting, but I don't think at the end of the day, that's going to be terribly persuasive at the Supreme Court.

Adam White:

Well, Alan, one of the running themes around this case and truly for our conversation is that both in the Fifth Circuit and what's coming next in the Supreme Court, there isn't sort of an off-the-shelf vocabulary of constitutional doctrine that applies squarely to this issue. In part because the CFPB is a pretty novel agency. Not completely novel, there are other financial regulators that were partly the inspiration for aspects of the CFPB as Mike points out. And by the way, I agree totally with Mike about the Congress's reasons. And in fact, Congress said much of this in the legislative history and the Senate Finance Committee's report that's in the legislative history, I think even in the Obama administration's Treasury Department blueprint for Financial Reform that first started to sketch out this agency. This was one of the running themes. And how that maps onto constitutional doctrine is not always clear.

To answer your question, Alan, I think the reason why the Fifth Circuit zeroed in on this notion of double insulation that the Fed is financially insulated from Congress and that the CFPB then, has its own insulation, but also sits underneath the protection of the Feds, is that that's an echo in many ways of recent Supreme Court cases involving double layers of insulation that an agency might enjoy against the president. The key case was called Free Enterprise Fund versus PCAOB. It was another financial agency. It was created not by Dodd-Frank, but by-

Mike:

Sarbanes-Oxley.

Adam White:

Sarbanes-Oxley, thank you. The Congress created an agency, the Accounting Oversight Board that was independent of the SEC, but it was underneath the SEC. The SEC theoretically had some independence from the president, that's contested for complicated historical reasons. And then, the PCAOB had independence from the SEC that sat on top of it. And the Supreme Court said, it's in this case from about 2010 that it's constitutional to have an independent multi-member commission, but you can't start stacking them almost like Russian dolls, one within another of multiple layers of independence, one within another,

but that's unconstitutional. The Roberts Court said, we're not going to disturb precedents like Humphrey's executor, but we're going to draw a little dotted line around them, and not allow double or triple layers of independence. That's what I think the Fifth Circuit was trying to analogize to you. I don't know that it's going to be the crux of the Supreme Court case, but the Fifth Circuit was clearly thinking about this with a few different analogies to constitutional doctrine.

Alan Kaplinsky:

Yeah, the other thing the Fifth Circuit talked about that to me, I didn't think it was that persuasive, was that there's no other agency they've seen that has got the power that the CFPB has. In terms of enforcement authority, I think they also were still concerned about the fact that there was one individual, that maybe there's no other agency where there's one individual who's got as much power as the CFPB. But if you look at the Federal Reserve Board for sure, as you can see from the impact that the chair of the Fed or the Federal Open Market Committee has on the stock market in a couple of days in terms of raising interest rates to fight inflation, it's hard to argue that at a macro level, that the CFPB is more powerful than the Fed. I don't know, that didn't strike me as... That was a throwaway, I think. You agree?

Adam White:

Well, I will say we made a version of that argument in our own cases a decade ago. Back when we were challenging both the independence of the agency, which was later struck down in Seila Law and the funding independence, plus the sheer breadth of regulatory power in the UDAAP authority provision. One of the running themes in litigation against the CFPB over the last decade has often been something kind of like that. That there are other agencies that are more powerful or even sometimes maybe more independent in other ways, but there isn't a purely regulatory agency that had that much independence from the President, that much independence from Congress, and that broad of a regulatory mandate in some ways trying to hook on to some of the doctrinal language in cases like Morrison versus Olson and others. But Alan, and I feel like I'm filibustering on your own show. I'm a guest in your house, and I'm taking up all the oxygen.

One of the challenges of this case all along, and now the court is going to grapple with it too, is how to situate the CFPB alongside the Fed, the OCC, the FDIC, other financial regulatory agencies. As Mike says correctly, as this audience knows better than anybody, that subset of agencies have always had substantial independence, especially from presidents because of the sensitive nature of their subject matter. And the agencies have traditionally been funded outside of the normal appropriations process or outside of appropriations at all because as Mike said, there is worry about politicizing the supervision of banks, and so on. Now, I think the difference that the litigants will raise in the Supreme Court is this. And this is going to be subject to debate and dispute for as long as this case is pending. But the Fed, it funds itself through its open market activities and other activities that generate profits or revenues for the Federal Reserve.

The OCC, it collects chartering fees when it charters banks, and so on. The FDIC receives revenue outside of appropriations through the FDIC insurance program, and so on. These are all outside of appropriations, and frankly, there are non-financial agencies that have outside revenue bases. I think the FCC gets user fees maybe on its radio station licenses, and so on. What I think is different about the CFPB, and again, I'm not entirely neutral on this, but what I think is different is the fact that the CFPB isn't really collecting from any of those kinds of sources. It's not funding itself through user fees or through bank chartering fees. It's just reaching into an entirely separate source of revenues, the Federal Reserves profits that would go on to the Treasury, and it's given broad discretion to claim those revenues. And the key word in the Constitution, because this is going to be litigated, surely, is they're not being taken directly out of the Treasury, but the language is "drawn from the treasury."

And the argument is that these are funds that CFPB didn't generate itself. They'd go to the Treasury if not for Dodd-Frank. And in that respect, it's different from anything else that we've seen in other agencies, but that'll be heavily litigated.

Alan Kaplinsky:

After the opinion came down, Adam, there was a lot of debate as to what the CFPB'S next move would be. Technically, there were three options. Do nothing, they couldn't do that. But a lot of people thought that they might file a petition for rehearing and rehearing en banc. That is a rehearing before the entire Fifth Circuit Court of Appeals. One advantage I thought of doing that was not that the outcome was going to be any different. I thought probably the petition wouldn't be granted because of

the composition of the Fifth Circuit. That is, the numbers were very much against them getting a petition granted. But I thought they might want to delay things a little bit because there were other cases percolating in other courts around the country where this constitutional issue either had already been raised, or it was going to be raised, and that they might hope to get a split in the circuits.

And I was wrong there. Not only did they decide to eschew that procedural move in front of the Fifth Circuit, they said, "We're done with the Fifth Circuit," and they filed their petition for certiorari well before the deadline. They were allowed I think 90 days, or 120 days maybe as a government entity, and they filed within 30 days. I was surprised. Most other people I think were not. How about you?

Adam White:

Well, those are all good points, Alan. I think there were plausible reasons why the CFPB might not have filed quite so quickly. Like you said, they could have gone for en banc. And sure, the Fifth Circuit has been very, very hospitable to lawsuits challenging administrative agencies in the last few years. It might not seem like a great bid, but the en banc court had not embraced the funding issue in that case that came up a few months earlier, All American Check Cashing. And the delay might have helped the agency, maybe a stay would've been in place so that the rule could have continued to have gone into effect. The Biden administration did in their cert petition sort of identify what they claim is a circuit split between the Fifth Circuit and the DC circuit's case and PHH Corp. I'm not sure that it's a classic circuit split, but maybe the CFPB ultimately concluded that there was enough to get the court's attention.

But you're right, they've filed very, very, very fast. As somebody who lives out by the Silver Line. It's very rare to see a federal program that comes in so far under budget and ahead of schedule as the CFPB cert petition. But they filed it very, very quickly, and they made clear they wanted the court to act on it, and hear the case this term. Now, that's complicated though by the fact that the prevailing side in the Fifth Circuit, they have reasons to want to appeal to the Supreme Court too because they lost on their other claims. Their APA claims and the claim involving the director's independence, and its effect on this rule. The plaintiffs in the case below, once the cert petition was filed, they had very quickly filed a motion asking for an extension on their reply.

They said, "Instead of filing this in December, we'd like to file it in January." They said, "We have a number of other Supreme Court cases pending that the lawyers need to focus on, but also we intend to file a cross petition for relief of our own. And that would be due in mid-January as well, so we'd like to file them both at the same time." And they added that they didn't believe the court does need to hear this case in the spring and decided in the summer. That there are reasons that it would be perfectly reasonable for the court to push it off till the fall. The court granted the motion for an extension. The response to the cert petition is due I believe, January 13th, and we should also probably see a cross petition that same day. It'll be interesting to see how fast the court moves on it, and whether it does try to hear the case in April, and decide it in the summer. This is all teed up, I guess, for the conference that the court would hold in February deciding whether to take the case or not.

Alan Kaplinsky:

Right. Let's get to what you think the Supreme Court will do. Not on the merits, but whether or not it will grant cert. When there's a case pending on certiorari for the Supreme Court, I'm usually very reluctant to predict that the Supreme Court is going to grant cert. But if I've ever seen a case where it begs for cert to be granted, this is it. Do you agree? I say it's close to a hundred percent.

Adam White:

I'd be surprised if the court didn't grant cert. You have a federal court striking down a US statute, and not a very small statute. This provision is very, very significant. It would be a huge change for the CFPBP. I expect the court to grant cert, and of course, it only takes four of the nine justices to say that they want to hear a case. I have no idea whether the court will decide to expedite the case to be argued in April and decided this summer. Precisely because it is such an important issue for the agency, for constitutional doctrine in general, that might be a reason for putting things off until the fall. That's the argument that the plaintiffs are making in their motion on the timing for their response. They argued that, if anything, the court should

take its time with this precisely because it is such a big issue and would benefit from significant briefing and from plenty of time to reflect and write the opinion.

I think in a way, the CFPB's arguments about urgency might actually cut against the CFPB in getting accelerated review. Now, key to this, and I'm talking too long again, I'm sorry, but key to this is the fact that the plaintiffs have said that all that's at issue right now, the upshot of the case is just the Payday Lending Rule. That nothing else has been frozen. That yes, there are other cases. The US Chamber of Commerce has its own power of the purse case pending against the agency in the Fifth Circuit. To the extent that, that in other cases challenge other CFPB actions. The CFPB can try to stay the effectiveness of any judicial decision in those cases. I think that's probably right. I think it's probably what the Fifth Circuit would do. That's why I think it's probably why the court will take its time, but I honestly wouldn't be surprised either way as to whether the court hears the case this spring or in the fall.

Alan Kaplinsky:

Yeah, the CFPB talks about the fact that they've already been besieged by motions that have been filed, particularly in the Fifth Circuit in other cases where the parties are asserting that the lawsuits enforcement action should be thrown out because of the unconstitutional funding. But as you point out, so far, I haven't seen any courts anywhere in the Fifth Circuit, outside the Fifth Circuit that have refused to grant a stay. I think it would be very surprising to me if there was a court that didn't do that, and I suppose if that happened, there would be probably a way to get some further relief in the Supreme Court in that particular case. But let's just touch very briefly on this cross petition that the CFSA has said that they're going to file, where they're going to claim that there were violations of the Administrative Procedures Act.

I don't know. When I say I don't know, I'm hopeful in a way that they do grant cert on that issue. I would like to see that issue dealt with by the Supreme Court. In light of its opinion last term in, I think it was State of West Virginia versus the Environmental Protection Agency, where the court ruled that the EPA's regulation had gone too far. That it was not authorized by the underlying statute. I tend to think the Supreme Court wouldn't mind getting ahold of that issue as well. But what I worry about there is what I don't want to happen is for the decision to be decided on that basis alone and for the Supreme Court to then decide we don't have to deal with the constitutional issue. There's the old maxim that courts have applied, if you can decide a case on non-constitutional grounds, you should do that. You shouldn't reach out. So, I have some trepidation there.

Adam White:

Alan, I got to teach the administrative law at the Scalia Law School for several years, and there's a reason why when you get to the arbitrary and capriciousness part of the class, you start reading a lot of DC Circuit opinions rather than Supreme Court opinions. The Supreme Court is usually not in the business of deciding those cases, deciding those issues. I think what? The five former DC circuit judges who are now on the Supreme Court probably like it that way. I could see possibly the Supreme Court hearing the challenges regarding the scope of UDAAP authority. That's a pretty significant issue, it cuts across many cases, and it does sort of echo the kinds of things that we saw around, again, the recent West Virginia Case involving the Clean Air Act, and so on. But my instinct is similar to yours that I don't expect the court to cloud up the case with too many issues.

The appropriations issue is pretty significant, and again, the agency lost on it, the government lost on it, and so the court's going to almost surely want to clean that up, either in favor of the agency or against it. Complicating the case much more than that would become bit too complicated.

Alan Kaplinsky:

Yeah, no, I agree. And I think for that reason, I'd be surprised if they do grant cert on the cross petition. I think they will try to keep this case very cleanly focused on the constitutional issue. Let's turn to couple of other things. You recently wrote an op-ed in The Wall Street Journal. You alluded to some of this a little bit earlier in our webinar, but I really got a chuckle out of reading what you had to say. Why don't you just briefly share with our viewers what it was that you pointed out?

Adam White:

Yeah. Oh, that's kind of you to say. I had fun writing this one as somebody who's tracked the CFPB for a decade. And for what it's worth, my broader thoughts on the Fifth Circuit opinion, they're available in a longer piece at the Yale Journal on Regulations blog. But at The Wall Street Journal, this would've been right after Thanksgiving. I had a piece, the editors gave it the headline, the CFPB engages in Legal Deception, sort of poking fun at the CFPB's UDAAP authority, I guess. But this is the basic point of the op-ed. In addition to everything we discussed about why Congress gave the CFPB this form of financial independence, what the constitutional issues might be, what might happen in the Supreme Court. One of the wrinkles in this case, and I think it's kind of ironic, is that the CFPB and the CFPB directors have basically spent a decade saying specifically, that the CFPB does not get appropriated funds.

Sometimes they say it's not subject to the normal appropriations process, which of course, is a little bit more nebulous, but over and over again, Director Cordray and his successors have said the CFPBPB does not receive appropriated funds. Now, that doesn't really bind the court. The court could say, "Well, the CFPBPB was wrong all those years. It actually did get appropriations all along through Dodd-Frank." But frankly, the justices will probably be a little bit more skeptical of the CFPB precisely because it said this all along. Chief Justice Roberts, I think what in particular, he loves chiding government lawyers over agency flip flops. He does this from administration to administration at oral argument, and my guess is that the CFPB's own words are going to be quoted back to the Solicitor General quite a lot at oral argument. And so, I tried to get a headstart on it in this Wall Street Journal op-ed, and it was a fun piece to write.

Alan Kaplinsky:

Right. All right. Now I'm putting you to the test here, Adam. What do you think the Supreme Court's going to do on the merits if you were a betting man?

Adam White:

If I were a betting man. Let me-

Alan Kaplinsky:

And I won't hold you to it, but I'd like to get your thinking because you do very carefully follow each of the justices.

Adam White:

Yeah. Thanks, Alan. It's nice to say. One of the joys of being a think tanker is you make all sorts of wild predictions that nobody ever holds you too accountable, but I'll-

Alan Kaplinsky:

People don't remember.

Adam White:

Yeah. Just a couple of very small bore things I want to focus on. Justice Kavanaugh is going to be very interesting to watch here. When he was on the DC circuit, when they heard the PHH case, maybe not a version of the Power of the purse argument, but the power of the purse issue came up sort of in conjunction with the executive power arguments in PHH. And Kavanaugh in a footnote, in his opinion, he kind of shrugs them off a little bit. He says, "The executive power issue is the really important issue here. To the extent that the power of the purse is a real constitutional problem here, that's just extra icing on an already unconstitutional cake." I'd be curious to see how Kavanaugh grapples with this issue if it were squarely presented separate from the executive power arguments. That's point one.

Point two is Roberts. I've be watching Roberts very closely because of the agency flip flop issues and the gotcha. But also, Roberts has been a real hawk on separation of powers issues. A lot of people tend to think of his administrative agency cases through the lens of NFIB versus Sebelius. That was where Roberts wrote the opinion upholding the Affordable Care Act's

individual mandate, surprising some people there. And then a few years later, in an administrative case called King v. Burwell, he ruled in favor of the Obama administration in its interpretation of the Affordable Care Act and the insurance subsidies. But apart from those cases, when you look at the broad sweep of Roberts' administrative law decisions, including most recently the West Virginia Case that he authored, over and over again, he is very, very concerned about the administrative process, about separation of powers. He wrote the PCAOB case that I mentioned earlier. I think he wrote Seila Law. I'd have to go back and double check, but he really focuses on this as much as any issue, so I'll be very curious to see his instincts in this case.

I think that Thomas and Gorsuch will probably be amenable to the constitutional claims given all their work on separation of powers. But again, the caveat to all of this I want to make clear, is that there just isn't off-the-shelf doctrinal vocabulary for these issues in the Supreme Court. There are so many cases on executive power. There are Supreme Court cases that touch on the power of the purse, and that's why the solicitor general petition can lines like Congress has plenary power under the Appropriations Clause, but what you've never seen is an agency quite like this. Again, this is maybe me making an argument, but I don't think we've ever seen an agency with quite this kind of power, with this much funding independence, in a way that's totally unrelated to the agency's own profit making or licensing activities. And I think as a matter of first principles, the conservative justices at least, will be open to these claims.

But once you try to write the opinion and really nail down the nuances, does an agency have to go to get appropriations every year? Every few years? There's another constitutional revision that says appropriations for the Army can't go for more than two years. So, maybe that implies that other agencies can get multi-year appropriations. I don't know. But I think in this case, as the Fifth Circuit said, the agency has perpetual freedom from appropriations going forward. That might be all the court has to gravitate around, and that could get five or six votes on the court. Also, I always think Kagan is interesting. She is such a deep thinker on administrative law issues. That's what she taught as a law professor and wrote about that. She's going to be very, very interesting, and I think she's going to ask really, really good questions at oral argument.

Alan Kaplinsky:

Okay. Let's assume the Supreme Court decides that the funding is unconstitutional. What remedy will be granted by the Supreme Court? The Fifth Circuit, as you pointed out earlier, invalidated the payday loan regulation on the theory that since the funding was invalid, any monies that were spent in developing that regulation, and there must have been a lot spent because it took many, many years of effort for the CFPB to finally issue that regulation, and then to defend its validity in court, and then it got changed again. What do you think the Supreme Court will do there from a remedial standpoint?

Adam White:

In terms of remedy, this is going to work at two levels. First of all, if the court does decide that the funding structure is unconstitutional, and again, not taking that for granted, but if it did, the first thing that they have to decide is what's called the severance issue. Is how much of the statute would need to go and how much would need to stay. And it would be interesting to see how exactly they carved pieces out of that part of Dodd-Frank, Dodd of Title 10. I don't know what exactly they would do, but that's the first level of remedy to watch for. But then second, no matter what they did, would be the question about what happens to other matters that are pending in court or that could still be sued over prior agency actions. Either early in the agency's history, those first few rules that to the extent that they're still on the books, or anything that's new, enforcement actions and other things. How does the Supreme Court or lower courts handle those cases? Does this just in instantly invalidate all those CFPBPB actions?

This isn't the first time this came up. A few years ago, the Supreme Court issued a decision in a case called Noel Canning. It was a challenge to the NLRB over President Obama's appointments to that agency. He claimed that they were recess appointments. The Senate disagreed, and the Supreme Court disagreed and said, "These are not recess appointments. They were just unconstitutional appointments without the Senate's advice and consent." That did call into question, at least theoretically, other actions that the NLRB had undertaken beyond just the one involving the Noel Canning company. They also arguably would've affected anything that Director Cordray had done in his first years at the CFPB since he initially served under the same "recess appointment". There was another case a couple years earlier that people might want to look at called New Process Steel. It was a totally different constitutional issue or legal issue, but it also involved the NLRB. The Supreme

Court declared that the NLRB had been, in effect, acting without a quorum for a couple of years, raising real questions about everything that NLRB did.

The answer, Alan, I think, is that the outcome would look something like what happened in New Process Steel, where ultimately, it would be up to the lower courts to decide which cases that were pending, could still seek the remedy of challenging the agency's action in light of the Supreme Court's decision to the extent that new cases were being filed. To what extent is it too late for new litigants to raise those issues? These are really, really nuanced questions. They're bound up in a lot of jurisdictional and ripeness and mootness doctrines. My guess is that if the Supreme Court were to strike down the agency's funding, there would be a lot of outcry that this is going to jeopardize a lot of the agency's actions.

In fact, you'll see some of that argument already and in the months ahead to try to scare the Supreme Court justices off of the position. But ultimately, it's going to become a much more nuanced fight in district courts over specific agency actions. That's not a real reassurance to either the regulators on this call or to the regulated community that might be worried about the instability of the uncertainty. I think there is going to be some uncertainty in the immediate months after a Supreme Court decision striking down the agency's funding structure, but I do think the district courts will get a handle on it pretty quick.

Alan Kaplinsky:

Yeah. I hear you about thinking that they'll sort of leave it to the district courts to resolve it. I tend to think they may do what they did in a case many years ago. I think dealing with the issue whether bankruptcy court judges were Article III judges. And at that point, I think they didn't issue their mandate. They issued their opinion, but then they deferred to Congress to correct the problem. They gave Congress a very brief period of time, and I'm wondering whether that something like that might happen.

Adam White:

That's a possibility. Was that case the Marshall versus Stern case from a few years ago? I can't remember exactly.

Alan Kaplinsky:

I don't remember the title of it.

Adam White:

But the example of that, that jumps out at me from a very different legal context, but in the 1970s when the Supreme Court grappled with the initial campaign finance laws, there was the famous case, lawyers read it in con law in the First Amendment cases, right? It's called Buckley versus Vallejo. We think of it as the First Amendment in campaign finance, but for administrative law nerds, there was another part of that case that focused on the structure of the FEC, the way that its members were appointed. The court rules against the agency structure. But at the end of the opinion, the court says that we will stay the effectiveness of our own decision. I can't remember if it was a couple of months or how long it was. Precisely so that Congress can offer a remedy. Maybe we'll see that again, but I would just offer two caveats. First, I'm not sure that the justices today would be as amenable to that approach.

I was once very lucky to take a seminar from the late Justice Scalia, and he taught that case, and he said in class how he thought it was a little hilarious that the justices would declare that something was unconstitutional, but okay for the next couple of months. I think the style of jurisprudence on the court has changed enough that many justices would see it Scalia's way. And then, I guess my second caveat would be what are our expectations about Congress? It's hard to imagine Congress doing a big legislative fix to ratify what the CFPB has previously done. It's not hard for me to imagine Congress giving appropriations to the agency going forward, but I can't imagine there's going to be any appetite in the new Congress, a divided Congress with the House under Republican control to retroactively protect what the CFPB previously did.

Alan Kaplinsky:

Thank you very much, Adam, for a extremely enlightening review and analysis of the Fifth Circuit opinion, and what you think is going to happen in the Supreme Court, and we really learned a lot today. But we're not done. As I mentioned at the outset

of our podcast show today, we have part two of our podcast show, which will be released one week from today. And during that show, Adam will of course, be back, but my colleagues Mike Gordon, Rich Andreano, and John Culhane will be much more involved in the discussion and the dialogue that we're going to have about this extremely important case pending before the US Supreme Court.

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