Consumer Finance Monitor (Season 6, Episode 18): CFSA v. CFPB Moves to the U.S. Supreme Court: A Closer Look at the Constitutional Challenge to the Consumer Financial Protection Bureau's Funding, with Special Guest, GianCarlo Canaparo, Senior Legal Fellow in The Heritage Foundation's Edwin Meese III Center for Legal and Judicial Studies

Speakers: Alan Kaplinsky and GianCarlo Canaparo

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 podcast 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 counsel of the Consumer Financial Services Group at Ballard Spahr. 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, which also goes by the name of Consumer Finance Monitor. We've hosted the blog since 2011 when the CFPB was stood up or became operational. So there's a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those in the industry. So 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. Please leave us a review on Apple Podcast, Google Play, Spotify, or wherever you access your podcast. Also, please let us know if you have any ideas for any other topics that we should consider covering in a future podcast show or speakers that we should consider as guests on our show.

So today, we're going to revisit a topic that we dealt with last year in an extremely important case involving the Consumer Financial Protection Bureau or the CFPB. Some people might say it's a existential threat to the CFPB. I don't really characterize it that way. I view it as a threat to business as usual at the CFPB because I think this case could lead to there being a lot of changes as a result of the case. And I am referring to the case of CFPB versus CFSA. CFSA is a trade association of payday lenders. There's actually another plaintiff in the case that is a Texas trade association involved in payday lending. So this is a case that has been percolating in the courts for several years and it emanated out of a regulation promulgated during the waning period of Richard Cordray's tenure as director of the CFPB.

Indeed, he issued a final regulation shortly before he left the CFPB to go back to Ohio to run for governor. The regulation that was promulgated was a very, very sweeping regulation, which would've been extremely harmful if it ever went into effect to the payday lending industry. And indeed, even the CFPB acknowledged that it would wipe out a significant portion of the industry. It had two components to it, one dealing with the imposition of an ability to repay, a requirement in making a payday loan. And a second portion of it dealt with payments that were made by consumers that is to repay payday loans, which are short-term loans, generally two weeks in duration that's payable in a lump sum at the end of two weeks. Generally small dollar amounts and generally at a relatively speaking high annual percentage rates. And that of course is because of the customers of payday lenders are generally people that don't have outstanding credit, that don't have good credit scores.

And in order to cover the expected loan losses, the industry, the lenders have to charge a higher APRs. In any event, after Cordray left office, then the Trump administration came into office and initially they had an acting director of Mick Mulvaney, very conservative, very Republican. Ultimately, Trump appointed Kathy Kraninger to be the actual director. Kathy Kraninger's

nomination was confirmed by the Senate and she came into office as the next director of the CFPB. She essentially proposed another regulation and then finalized the regulation getting rid of ability to repay, the part of the regulation that was absolutely devastating. But she left intact the payments provision, which said in so many words that if somebody is paying by an ACH, that is an automatic electronic payment, and if on two occasions the payment does not clear, you can't do it a third time without getting a consent of the borrower. And as a result of the fact that she didn't throw out the entire regulation, the CFSA decided to continue to litigate the case.

Most of the arguments that they made were not constitutional in nature. They dealt with things like the record didn't adequately support the regulation, that it was contrary to the Administrative Procedures Act, and there was no authority for the CFPB to issue this kind of a regulation under its so-called UDAAP authority. And really sort of as an afterthought, the constitutional issue came into the case but that was not the initial strategy of CFSA. They lost in the district court. They went up to the U.S. Supreme Court. And now I am going to introduce our speaker finally, who's going to tell us more about the case. And let me just say this. Last year we did a podcast on the case, but it was after the Fifth Circuit opinion came down, but before a cert petition was filed in the Supreme Court before it was granted. So there's been briefing on the cert petition and were much further along. We will continue to follow this case on our blog and our podcast show because it is of extraordinary importance.

So let me introduce to you GianCarlo Canaparo. He's a Senior Legal Fellow in The Heritage Foundation's Edwin Meese III Center for Legal and Judicial Studies. He researches and writes about constitutional and administrative law. In addition to publishing law journals, he blogs on those topics for a blog called The Daily Signal. And with that introduction, GianCarlo, a very warm welcome to our podcast show. Thank you for being here.

GianCarlo Canaparo:

Thank you for having me, Alan.

Alan Kaplinsky:

Well, it's a pleasure. So I've provided a lot of the background so we don't have to get into that, but why don't you give us an overview of the case from the point where it gets up to the Fifth Circuit?

GianCarlo Canaparo:

Sure. As you mentioned, the case involves a payday lending rule, but the case is really a constitutional case and the nature of the rule is not at issue. What is at issue is the nature of the CFPB's structure. So if we wind back in time a little bit to when the CFPB was created, it was a very unique administrative agency, in that it was intentionally removed from some of the typical indicia of congressional oversight and executive oversight. So you'll remember there was a case a couple years ago called Seila Law. The CFPB director was initially established as a solo director who could not be removed by the president except for cause. So he was unaccountable to the president. In the case called Seila Law, the Supreme Court said that because he is a major officer of the United States and wield substantial power, the Constitution requires him to be accountable to the president.

And they said, so he must be. But they said the remedy there is not to strike down anything the CFPB does, but simply to make him removable. So we had one whittling down, if you will, of the CFPB's independence. Now there's another major aspect of the CFPB's independence, which is its funding mechanism. So unlike a lot of other agencies which are funded directly in appropriations bills by Congress, the bureau relies on what's called the Consumer Financial Protection Fund. This is a fund established or funded, the money of which comes from the Federal Reserve. The CFPB's director has the power to simply request as much money as he wants from the Federal Reserve Fund with a cap which can be waived up to 12% of the Fed's expenditures or operating revenues. And he just gets that money and then he can spend that money however he wishes.

If he doesn't spend that money, he retains it in the CFPB fund and can use it in the future. Now, this is unusual amongst most federal agencies. In fact, it's unique. There are other agencies that have some sort of insulation from normal appointment, normal appropriations process. So the Fed itself, for instance, makes its money on the interests that it gets by engaging in the bond markets. But no other agency has this, what the Fifth Circuit called double insulation. So you get to the Fifth Circuit and

the plaintiffs say, the payday lending rule is unconstitutional because, for a number of reasons, that it violates the Administrative Procedure Act and it violates the non-delegation doctrine, all of which the court rejects. But the court gets to this funding mechanism and they say, "Look, this appropriations, this funding mechanism that CFPB has violates the appropriations clause of the Constitution because the payday lending rule was derived from the salaries were paid by this funding mechanism. It's all fruit of the poison tree."

The Fifth Circuit agreed. The Fifth Circuit said essentially that the appropriations clause requires that Congress ultimately be responsible for spending of money. The CFPB here is insulated entirely from any sort of congressional oversight. So let me start with the appropriations clause. What it says is no money shall be drawn from the Treasury, but in consequence of appropriations made by law. Now the Fifth Circuit focuses on this phrase, appropriations made by law, and it says that whatever that means, it means that Congress has to appropriate money before it can be spent. It is not sufficient that Congress created the CFPB's funding mechanism by law because, and I'll quote from the opinion, "A law alone cannot suffice. An appropriation is required otherwise. Why not simply travel under the general procedures for enacting legislation? Otherwise, no federal statute could ever violate the appropriations clause."

So what the Fifth Circuit is really getting at ultimately is the question, does the appropriations clause only impose a restriction on the executive branch's ability to fund? Or does it also impose a restriction on Congress? Here, of course, Congress purported to give the CFPB its permission to spend money this way, but the Fifth Circuit says, "No, the clause constraints Congress too. Congress can't spend money, can't direct the executive to spend money this way."

Alan Kaplinsky:

Let me ask you a question, GianCarlo, and it's something that's puzzled me from the beginning of the case. You quoted or paraphrased the appropriations clause and it talks about, it doesn't say the government can't spend money, it says the Treasury can't spend money and I think it uses a capital T. And just reading that, one reaction might be, but I haven't heard the CFPB make the argument that there's no money coming from the Treasury and therefore the appropriations clause doesn't even apply at all. The money is coming from other sources within the government, but not the U.S. Treasury.

GianCarlo Canaparo:

Right. So what the Fifth Circuit does analytically is it interprets the phrase, the payment of money from the Treasury as synonymous with the word spending. Now, whether that is correct as a matter of the original understanding of the clause, ultimately is not. I don't know. The court has never opined on that question, but there's some reason to think that the Fifth Circuit might actually be right about that. And now to be clear, the Fifth Circuit, this is an assumed premise in the fifth Circuit's opinion, the Fifth Circuit doesn't elucidate this particular point either and neither does, and I'll get to it in a minute, the Second Circuit's decision going the other way. But there is good reason to think that the phrase, the payment of money from the Treasury just means government spending. And one of the reasons for that is that at the time of the founding, this was the only way that the federal government knew how and had the tools to spend money, was to pay out of the Treasury.

Now since then, of course, we've developed all sorts of other very interesting ways for the federal government to raise and spend money. The Federal Reserve, for instance, does this by raising its own money essentially and then spending it, although it remains also government money. And then when we also look at this from a first principles' perspective, what the clause is ultimately very concerned about, it is a separation of powers clause. And the ideas behind it, we find these in Federalist Paper Number 51 and in Joseph Story's Commentaries on the Constitution. The purpose of this clause is to make sure that one of the particular powers of government that is the power of the purse, the power to spend belongs to Congress and to Congress alone. They were very concerned, the founders were, that the president who had the power of the sword would not also have the power of the purse. So it lends itself to the suggestion, the assumed premise in the Fifth Circuit's decision that payment of money from the Treasury means spending broadly. And you're right, perhaps it doesn't, but the CFPB has not made the argument and I haven't seen it made anywhere else.

Alan Kaplinsky:

Yeah, I agree. So you've told us about the Fifth Circuit's decision and how they came out. Let's talk just a little bit about where the case stands right now. I guess the CFPB had a choice originally, they could have filed a petition for rehearing on bank in

front of the entire Fifth Circuit, but I think they looked at the composition of the court and it was predominantly a Republican conservative court, even if they had an on bank rehearing. They I think wisely opted to bypass that procedural option that they had and instead try to get the Supreme Court to hear the case. So tell us about that, just the procedure, what they've done and where we are right now with the case. And then we'll talk about, we'll turn to the Second Circuit case.

GianCarlo Canaparo:

Sure. So the Supreme Court, so the government, the CFPB appealed after the Fifth Circuit decision. Now let me pause there for a moment and say what the Fifth Circuit actually did. The Fifth Circuit said that the funding mechanism of the CFPB is indeed unconstitutional and therefore the payday lending rule, which flows from that is invalid. Now this set off, as you mentioned in your introduction, a lot of red flags because everything CFPB does is derived from this funding mechanism, which suggests that everything the CFPB does and has done since its founding would similarly fail if challenged in a court that agreed with the Fifth Circuit. So that is sort of the bigger implication. Now the CFPB appealed to the Supreme Court and the Supreme Court has taken the case up. Now we have, that just happened fairly recently so we don't have the merits briefs filed yet and we don't have amicus briefs in yet. But ultimately it will be deciding the question, this funding question. And I think the big question lurking in the background really is, does the appropriations clause constrain Congress or just the executive?

Alan Kaplinsky:

Right, right, right. The other issues in the case that were originally raised by CFSA and that were rejected, let's call them the non-constitutional issues, they try to get the Supreme Court to grant cert on those issues and that was denied. But yet there is a doctrine, it's called constitutional avoidance, and there are Supreme Court cases and lots of other appellate decisions saying that if there is an alternative basis for resolving the case, you don't even need to reach the constitutional issue. Do you think that this doctrine of constitutional avoidance will be an issue in the case? Because I sort of think that at least one of the arguments made by CFPB to the effect that they had no authority to take this very broad language in the Dodd-Frank Act that says you can prescribe unfair, deceptive, and abusive acts and practices. And from that, you get a very specific payday lending regulation. Is there a chance that the Supreme Court could still, even though they denied the cross petition for cert, could avoid dealing with the constitutional issue at the end of the day?

GianCarlo Canaparo:

No. I think they've made it very clear that they want to take this particular constitutional issue. There's a couple reasons for that. I think when you read the Fifth Circuit opinion, you'll notice that the Fifth Circuit is actually going through the constitutional avoidance rubric operating in the background. That's why they deal with this question last. Remember the Fifth Circuit said everything the CFPB did was perfectly fine under the Administrative Procedure Act, under its statutory authorization, under the non-delegation doctrine, all that was fine. So the only question that could possibly derail everything then was the last final constitutional question. Now, the court has just decided that it's not interested in the other preliminary questions. Maybe it agrees with the Fifth Circuit. Maybe those just aren't particularly interesting ways at getting those underlying questions. But ultimately, this was the question that derailed the CFPB in the Fifth Circuit, so that's the question that the court's going to take.

Alan Kaplinsky:

Were you surprised, GianCarlo, that the additional requests that was made by the CFPB to expedite the hearing so that it would be held during this brief and argued and decided in this term, which is going to end by the end of June. Were you surprised that they didn't expedite it and that they said, "We're not in a hurry here." There will be a leisurely briefing schedule which have got established shortly after they granted cert and it'll be heard next term.

GianCarlo Canaparo:

No, I'm not surprised on either count. Of course, the CFPB wanted to expedite because as we are seeing in some lower court decisions, similar arguments are being made against it and lower courts are staying some of those cases while the Supreme Court considers this one. So of course the CFPB wants to get back to work immediately, but the Supreme Court does not like

to be rushed. This case does not arise from an emergency injunction from below. The fact that this issue is important to the CFPB does not mean it's important to the Supreme Court enough that the Supreme Court feels that it needs to be rushed.

Alan Kaplinsky:

Right. So let's turn to the grant cert. I mentioned there's an, I called it a leisurely briefing schedule. Probably get argued I would think early in October after the new term begins. But it could be even later than that, might be a decision by the end of this year. I think more likely it'll leak into next year. It could be as late as the end of June of next year. But now another opinion came down in the Second Circuit. Why don't you tell us about that? What case is that and what did that court do?

GianCarlo Canaparo:

Sure, so that's the Consumer Financial Protection Bureau versus the Law Offices of Crystal Moroney. The actual mechanism that got this case to that court was very simply, they sent this lawyer a civil investigative demand. The lawyer said, "Sorry, you don't have the power to issue a civil investigatory demand because your whole organization is unconstitutional." So that was how they set up the same argument. What the Second Circuit did in that case, it took a very simple line. It said, "All that the appropriations clause requires is that Congress enacts a law." So remember the appropriations clause says, I'll quote it again, "No money shall be drawn from the Treasury, but in consequence of appropriations made by law." So the Second Circuit says essentially, you can cut out the words in consequence of appropriations. All that matters is is this done by law. And there is a statute here that establishes a CFPB'S funding mechanism, that's all that's required. Ultimately, what they're really saying is that the appropriations clause does not constrain, is not a limitation on Congress's exercise of the spending power, just a requirement that Congress exercise the spending power. And so because there's a statute, there's no problem here with the CFPB's funding structure. We disagree with the Fifth Circuit.

Alan Kaplinsky:

Let me ask you this. We now got a clear split in the circuits. There was also, although I don't really want to spend any time on it, there was Judge Kavanaugh's opinion in an earlier case involving PHH mortgage when Judge Kavanaugh, Justice Kavanaugh was on the D. C. Circuit Court of Appeals. And people will argue there was a split even before the Second Circuit. I'm not so sure that, I'm not sure it's important whether there is or is not. What do you think? You're now a Justice of the U. S. Supreme Court. Which decision do you think is right here? Is the Fifth Circuit right or is the Second Circuit right?

GianCarlo Canaparo:

Well, I think the Fifth Circuit is probably closer to being right than the Second Circuit. When the Second Circuit says that all the appropriations clause could possibly mean is that Congress enacts a statute, that can't be right for a number of reasons. It does denude the appropriations clause of its purpose, which is to make sure that Congress retains the power of the purse. Remember Congress's power over spending comes from the Constitution itself. It's like in the Declaration of Independence, it says we have certain inalienable rights, right? This is an inalienable power that Congress has. To some extent, therefore, it must not be alienable. There must be some limit on Congress's ability to give this power to the executive. But in consequence of appropriations made by law simply means law and law alone, that is probably not right because that would mean that all of the analysis and reasoning that for instance, Madison writes in 51 for the purpose of this clause, Federalist Number 51 for this clause is nothing.

So it must constrain Congress somehow. But to what extent does it really constrain Congress? There's a line drawing exercise here. Now the Fifth Circuit of course takes a early maximalist approach and there's a little bit of analytical muddiness in the Fifth Circuit's opinion. Now I'm going to walk through why it is that the Fifth Circuit says this violates the appropriations clause. They give a number of reasons. The one that has attracted of course all the attention in the public media is that this double insulation, so number one, the CFPB doesn't get its funding like the Federal Reserve. It gets its funding not from Congress but from something else, but also that the CFPB's money is double removed because Federal Reserve's money is removed, the CFPB's money is removed again.

Alan Kaplinsky:

That strikes me. I mean, I must admit, that in my mind may be a distinction without a difference. I mean, that didn't strike me as terribly compelling. It is certainly a distinction. But what's the logic of that? Is that really you think compelling?

GianCarlo Canaparo:

Yeah. My sense is that it's not particularly compelling and here's why. The reason is ultimately the Fifth Circuit is making two kinds of arguments here. One from first principles, which is that the appropriations clause and all the logic that underpins it requires Congress to retain authority. Congress does not retain authority under, well, it retains some, but still less than complete authority under single appropriations either that is singly removed appropriations, single insulated appropriations. So if your concern is with this first principles, which the Fifth Circuit decision is at least in part, then there isn't much of a meaningful difference between double and single insulation. But the Fifth Circuit doesn't stop there. It's also concerned with the fact that the CFPB retains control of these funds add infinitum. That is to say funds unlike the Federal Reserve, which its surpluses are deposited back into the Treasury, the CFPB retains its surpluses.

And then also Congress renounced, explicitly renounced its ability to restrict the executive branch's spending power here. So you have the problem of not only the CFPB having a particular power that perhaps it shouldn't have, but you have the double problem of the Congress renouncing its check, its ability to check that power. But now here's where things get a little muddy with the Fifth Circuit's reasoning. In addition to this double insulation distinction, this Fifth Circuit is also very concerned with the nature of the CFPB's power. It wields a lot more power over the American economy, over American individuals than other agencies which are similarly removed, one step removed from congressional spending. It has the ability to act as a miniature legislature, and I'm quoting from the opinion, a mini legislature, prosecutor, and court responsible for creating substantive rules for a wide swath of industries.

And on top of that, now after Seila Law, the director is accountable to the president, which means he's now a political actor. All of this means that the CFPB has a lot of authority. So the Fifth Circuit groups together both Congress's abdication of its exclusive power of the purse and the nature of the CFPB's power. Analytically though, these are two separate things. If you are concerned with the separation of powers and Congress's jealous guarding of its power of the purse, the nature of the CFPB power is not really relevant to whether or not Congress has abdicated its power.

Alan Kaplinsky:

Let me add this, if you're going to start comparing powers of the CFPB and you start comparing it to the Federal Reserve Board, which has got extraordinary power over the entire economy, not just the consumer finance industry, has the power to raise interest rates as we've seen and has a huge impact on the banking industry. I'm not sure that's real compelling either, that they've got more power than the Fed.

GianCarlo Canaparo:

You could definitely quibble about who has more power, the nature of those powers. So ultimately, that is not a compelling limiting principle to me. But to return to your original question, my sense, cutting that out and going to the first principles and the question of, does the appropriations clause constrain Congress in some way? The answer is on that front, the Fifth Circuit is correct, that it does. I think it may not be correct to take the maximalist position it has and it certainly is not correct to muddy that analysis with considerations of the nature of the power that is being used, which is a separate question from has Congress complied with its obligations under the appropriations clause?

Alan Kaplinsky:

So then, and it seems to me the Supreme Court, if they affirm the Fifth Circuit, they're going to have to distinguish the CFPB's funding from the way the Fed gets funded, the Federal Reserve Board. And not only that, the comptroller of the currency that regulates national banks, and they get funded by supervisory fees that are charged to national banks and the Federal Deposit Insurance Corporation, they get funded through deposit insurance. How's the Supreme Court going to deal with that issue, assuming that they really don't like the Fifth Circuit's distinction?

GianCarlo Canaparo:

Well, I mean, there's a lot of ways this could go down. One way that I find it's helpful to analytically think of this is to remember that what the real problem with the CFPB is not how it gets its money, it's how it spends its money. Now, it's a subtle but important distinction. It spends its money from funds which are not appropriated, right? The Federal Reserve gets its money by its operations, but it is not necessarily an appropriations clause problem to receive money from some other way. So for instance, if it was the case that we concluded the Fed itself, because it is one roof removed, one level of insulation removed is an appropriations clause problem. I think that Congress could solve that very easily by saying whatever monies the Federal Reserve earns through its activities may be spent in pursuit of its mission. And of course the rest remits as it does to the Treasury. The CFPB is in a bit of a pickle though because it doesn't make its money itself. It does have to receive its money, and therefore spend its money in a way which is at present, not tied to an appropriation or some independent earning.

That I think is probably where the rub will really be. Is that really a distinction without a difference? I'm not entirely sure. It strikes me as somewhat more compelling than trying to distinguish whether you're one or two levels of insulation removed.

Alan Kaplinsky:

Would another way of putting what you've just articulated, would it be for the Supreme Court to say, well, the Federal Reserve, the Comptroller and the FDIC and the Post Office, they are all self-funded. They in one manner or another. They don't look to Congress for their funding. Congress has already authorized how each of those agencies will be funded and none of them have ever been, nobody's ever questioned whether any of them are subject to the appropriations clause. CFPB on the other hand is not self-funded. They have no ability to charge supervisory fees to the many banks and non banks that they examine. They in enforcement matters, they can assess civil money penalties, but they can't use that for operations. That can only be used to provide some further redress to consumers who've been harmed, but where the target of their investigation doesn't have a deep enough pocket to make the consumers whole. So what do you think of that? Just say, I'd call it my simplistic way of making a decision, self-funded, not self-funded?

GianCarlo Canaparo:

It's possible. It strikes me as probably a better rule pragmatically than the Fifth Circuit's rule. But let me caution. The way that I think the Supreme Court is going to go about this analysis is like the Fifth Circuit, it's going to conduct a first principle's understanding of what the appropriations clause requires. So what you and I are trying to do is sort of reason backwards into what is a pragmatic, sensical, useful way of distinguishing these cases. Our analysis right now is sort of utilitarian. I don't think the Supreme Court will do that. It will try to establish what does the law require and it will follow it where it leads. And if that leads to some unfortunate repercussions for certain other executive agencies implications, so be it. But remember too that Congress can fix all of this at a moment's notice by passing a law to change the funding mechanisms to bring them in line with whatever the Supreme Court says. So there are potentially big implications, but also it's not like the court has the final say.

Alan Kaplinsky:

Yeah, no, no, I get that. But we've got to be careful here because the decision could come down during next year in the presidential election year. We already have a very divided Congress, it's hardly anything can the people agree upon. Can you imagine if the opinion comes down at the end of June and the Supreme Court says, I'm going to give Congress 30 or 60 days to fix this problem. If they don't fix it, we're going to determine what the remedy is going to be here. And people may not be very happy with that and there might be implications for other agencies. And if they were ever to cast any cloud over the Federal Reserve Board, that I think would be tantamount to not passing a budget. And I'd hate to see what the stock market would do then. It's a tricky situation and made trickier by the fact that it's not like you've got a Congress that is going to jump at fixing this problem.

GianCarlo Canaparo:

Yeah, I don't know whether they would or not, but as you said, there certainly are some pretty impressive implications depending on how it's decided.

Alan Kaplinsky:

Now let's talk for a second about remedies because that's another issue in the case. The CFPB claims that even if the Fifth Circuit is right in finding the funding mechanism unconstitutional for the CFPB, that still shouldn't have resulted in the Fifth Circuit concluding that the payday lending rule is invalid because the funding was not appropriated funds. And I guess you call it the fruit of the poison tree. The payday lending rule is out the window and the CFPB makes an argument based on another Supreme Court case, the columns case where it claims that that's not what the Fifth Circuit should have done. Do you have a reaction to that one, GianCarlo?

GianCarlo Canaparo:

I think that's the argument that they had to make. It's the yes, but we still win anyway argument. It's not a particularly powerful one. I mean, what's called administrative vacature is just sort of the de rigueur rule in administrative law cases. If an agency is indeed tainted or it's decision making process is tainted by some unconstitutional infirmity, the rule goes and that's sort of the default position.

Alan Kaplinsky:

Now, you talked a little bit about the Seila Law case that got decided a few years ago. Different issue in that case, dealing with whether the president had the right to remove the director without cause. The Dodd-Frank Act said in so many words that the director could only be removed for cause. Do you find anything in that opinion, while it's a different constitutional issue, that gives you any hint of what the Supreme Court might think about this funding issue?

GianCarlo Canaparo:

I don't actually think Seila Law is particularly helpful as a predictive mechanism for a couple reasons. Number one, although it does signify that the court is concerned about the separation of powers between Congress around the administrative state, Seila Law is concerned really with the separation of power between the administrative state itself and the president and his ability to control it, because of course the administrative state is part of the executive branch. But this case involves Congress, the separation of powers between Congress and the administrative state. But only as a secondary issue. Really the question is, what, if any, limitation does the appropriations clause impose on Congress itself? So although the court is aware and concerned about the collection in the administrative state of both legislative and executive power, I don't think that Seila Law tells us much more.

Alan Kaplinsky:

Yeah. Although I seem to recall, I reread the opinion in a while that the Supreme Court does devote some time. There is some language in the opinion where it sort of seems a little bit astounded to me at the amount what Congress created back in 2011 with the Dodd-Frank Act, a single director extraordinary power to do all kinds of things and no real check on the agency. And while I agree with you, they certainly didn't deal directly with the funding issue, I thought they didn't seem particularly happy with what Congress ended up creating and what the CFPB has become.

GianCarlo Canaparo:

Yeah, you see this in the Fifth Circuit opinion too. They're just sort of overawed by this creation of congresses and it is so unique and so unaccountable and so removed from any sort of political oversight of either branch. They're sort of shocked by it. And that shock applies, the shock belongs both to the fact that the director was unaccountable at this funding mechanism is unique, but this shock is sort of spread out evenly across all those potential constitutional infirmities. And so all of them are sort of, I think, magnified in the court's perception because of the part maybe, the whole maybe more shocking than its individual parts.

Alan Kaplinsky:

And then I look at other recent decisions of the Supreme Court, which I would say in general have been pretty bad for other administrative agencies. I'm thinking for example of State of West Virginia versus the Environmental Protection Agency, an opinion that came down, I think it was last year. Not a constitutional issue, but it dealt with the so-called major questions doctrine. And the court threw out an environmental protection regulation on the basis that there was no authority for EPA to adopt this regulation. It's been a long time since they've given Chevron deference to an agency. In fact, hardly ever gets mentioned in Supreme Court opinions anymore. And you have a very conservative court, six conservative justices, all Republicans, and they don't really like the so-called administrative state, not just at the CFPB, but in general.

GianCarlo Canaparo:

Well, Alan, let me pause you for a minute there. I think that statement may be painting with slightly too broad a brush. Let me juxtapose two different strands in administrative law recently. So we have the major questions doctrine, which says, "When an agency claims a certain authority that involves a major question of political or economic significance, it needs to find very clear statutory authorization for it." We also had in a lot of the emergency, the COVID-19 emergency cases, we had executive branch agencies claiming novel interpretations of their emergency statutes or existing statutes. And in those cases, the court has consistently said that stopped the agencies from claiming the authorities that they claimed. But here's where things are, here's where a really important distinction lies. What was going on in all of those cases was that the administrative agencies were claiming power that they hadn't previously claimed and required a sort of expansive reading of an existing statute.

But what we have not seen the court do is push back on Congress's ability to give power to the executive branch agencies. So the major questions cases, for instance, do not prohibit executive branch agencies from wielding immense power provided Congress gives it to them. The court has in the past though, been offered the opportunity in cases that would seek to revive what's called the non-delegation doctrine, which is to say that Congress may not delegate broad powers to the executive branch agency. It has been invited to say that Congress may not delegate broad power to the executive branch agencies, but it has not taken up that opportunity. That ultimately I think is what's going on in this case. The CFPB has been given a particular mechanism, a particular power by Congress. There's no debate about that. The question really is, is the court going to take sort of its first recent step in saying that there's some limit on Congress's ability to give its powers away? So that I think is the difference.

This case falls into that category and not the category of really expansive executive power claiming. So it's not clear to me that the past cases reigning in administrative action tell us a whole lot. And it's not clear to me that the conservative justice's skepticism of executive branch claims of power translates to skepticism of congressional grants of power.

Alan Kaplinsky:

No, that's a good point, GianCarlo. What do you think there is another case that will be coming down I think fairly soon, certainly by the end of the term, dealing with the forbearance or the cancellation of student debt that the Department of Education and the Biden administration did effectuated and the claim there? I listened to the oral argument. It certainly seemed like a majority of the justices didn't think that the Biden administration had the power, that they were given that power by Congress. I guess you would say, well, that's a different issue, not the same issue.

GianCarlo Canaparo:

Yeah, I would say that that falls into the category of cases where the executive branch is claiming a novel and expansive use of a previously delegated power. So remember in that case, the Biden administration relied on an emergency powers statute that many emergency power statute is written in very vague terms, but has never in the past been used to cancel debt. And they're saying, well, in fact, that power does lie in that statute. So it's a case of the administrative agencies claiming that an existing statute grants it more expansive powers than it has wielded in the past. And so of course of the court's past precedence are quite insightful as predictive mechanisms. But this case I think is a different category.

Alan Kaplinsky:

How do you react to something I've been saying to clients, stated it publicly that the issue before the court is a case of first impression. I think arguments, good arguments can be made on both sides of the constitutional issue. But given the composition of the court, the fact that it is six justices are very conservative, that if there's any doubt there, they're going to come out on the side of finding unconstitutionality. Now, I know that's not supposed to make, politics are not supposed to enter into a Supreme Court opinion, but they are all human beings and most of them were involved in politics at one time or another and they were appointed to the court through a political process. How do you react to that? Do you think it does have a bearing or do you think I'm off base?

GianCarlo Canaparo:

Well, the question I think assumes a particular premise, which is that conservative justices share a uniform or at least consistent and similar skepticism of the administrative state writ large, which the jurisprudence doesn't bear out. So for instance, Justice Gorsuch is very much opposed on first principles grounds to an administrative state writ large. Justice Kavanaugh is not at all in fact, and neither is the chief justice. They have very different views about the legitimacy of the administrative state in general and the particular contours of how that should be crafted. To me, telling me that six of the justices are appointed by Republicans doesn't actually help me understand how the case is going to come down. I can say with some certainty that Gorsuch and maybe Justice Thomas will be against the CFPB here because they take a maximalist position on the separation of powers.

The three other conservatives, I can't say that for. But I'll make another broader point, which is that remember the constitutional issue of which the justices are ultimately aware is not, is the CFPB good or bad? It's, does the appropriations clause constrain Congress? And if so, to what extent? Once you have framed a question in terms of sort of higher order constitutional considerations, yes, those political concerns are always there, but they are second order concerns. And the justices will realize that the answer to this question today is going to affect cases tomorrow that will cross political valances. And then one other point I'll make is that when you read the media about the court, naturally the media focuses on those cases which implicate high profile political positions. And in those cases, the justices do tend to come out on sides aligning with they're perceived politics.

But bear in mind also that those cases tend not to be administrative law decisions. And that also those cases comprise typically 10% of the court's docket. I think if you look last term, how many cases divided by justice's vote according to political party, less than 20%. And that was high, historically high. So yes, it can be useful sometimes, not as much as I think it is perceived by the public. And typically not in cases involving administrative law questions because even on the conservative side, the realm of difference of opinion is actually quite large.

Alan Kaplinsky:

How do you think that looking at this court, and I hear you about don't get too carried away with what political party any of the justices is a part of. What do you think the court's going to do?

GianCarlo Canaparo:

I think the court will probably side with the Fifth Circuit, but perhaps not as far as the Fifth Circuit went. I think the court will probably conclude that the appropriations clause does constrain Congress in some way. I would anticipate that Justice Gorsuch and Justice Thomas would say that it requires Congress to retain ultimate and exclusive power over spending. But I anticipate that Justice Roberts, Kavanaugh and Barrett will take something, will take a much less extreme position. And that say that Congress may delegate, may create funding mechanisms outside of the strict sort of, I appropriate a dollar, you spend a dollar context. But again, as between the Fifth Circuit's position and the Second Circuit's position that all that is required is any statute, the Supreme Court concerned about the separation of powers in general. And this applies to at least Justice Kagan as well amongst the liberal justices, is not going to be happy with the implication of that holding, which is that Congress can simply wave away the appropriations clause by passing a law.

Alan Kaplinsky:

Right. So I think if I'm hearing you correctly, you think it'll be a close decision, but that ultimately the majority will decide that Fifth Circuit conclusion is correct, even though the reasoning could be quite a bit different?

GianCarlo Canaparo:

I think that's right. Which raises the question, you're probably about to ask it, what happens next?

Alan Kaplinsky:

Yeah, what happens next? Does the Supreme Court enter a stay and say, okay, Congress, I'm giving you 60 days to go at it, and if you don't do something at 60 days to correct the funding mechanism, we're going to issue our mandate?

GianCarlo Canaparo:

It could do that. It has done that in the past, although not very often. Although you might recall during the eviction moratorium case during the COVID pandemic, Justice Kavanaugh provided the dispositive vote in a case to essentially give the executive branch a month or so to wind down its unconstitutional program. So he may again try to do that here, or it might simply say, look, the funding mechanism is unconstitutional. The rule therefore falls and sort of leave the implication hanging. Congress isn't stupid. They'll read the writing on the wall and they may decide to change it. They may decide not to change it. How they do that will be very interesting.

Alan Kaplinsky:

Wow. During an election year, and you can be sure that if it goes back to Congress, the funding mechanism will be only one issue that the majority of Republicans are going to want to put on the table. They're going to want the Congress to substitute a five member commission similar to the FTC because they don't like a single director. They've never liked it. I would guess the industry will be creating a wishlist of other things, actions that the CFPB has taken that it'll want Congress to reverse. And then there'll be some things that will get ratified, I'm sure, as part of an overall package. But it's not going to be, you may not like seeing how they make a sausage is that old cliche goes. It isn't going to be all that easy.

And then of course, the other thing I think should get mentioned is that not everything the CFPB has done has incurred the wrath of the banking industry or other parts of the consumer finance industry. For example, the mortgage industry is very happy with all the regulations that were promulgated by Richard Cordray very soon after the Dodd-Frank Act became law dealing with mortgage origination and mortgage servicing. If they hadn't done that, the language that was in the Dodd-Frank Act would've gone into effect and it would've been a lot tougher on the industry. It would've been very Draconian. So you will find in amicus briefs that get filed, a number of industry amicus briefs are going to say, don't throw out the baby with the bath water here. We do agree that there needs to be reform, but don't throw out the CFPB all together and say everything it's done isn't good, that it's all invalid, because that creates another set of problems. You agree?

GianCarlo Canaparo:

Yeah. I mean, I can say that the nuts and bolts of consumer finance protection are outside my area of expertise, but I am at least capable of recognizing that the implications here are significant and that Congress will have to engage in the debate which it should do, but doesn't really seem to like to do.

Alan Kaplinsky:

I think anybody who thinks that Congress is going to moot the case by dealing with the issue before the Supreme Court does, I think, I don't know what they're smoking. But I can imagine in a million years that Congress is going to take up the issue until the Supreme Court opinion comes out.

GianCarlo Canaparo:

Yeah, I think that's probably right.

Alan Kaplinsky:

Okay. Well, we've come to the end of our program today, GianCarlo. We've covered a lot of ground in the past hour. I want to thank you tremendously for sharing your wisdom with us today and your expertise on constitutional law, administrative law, and your knowledge of the Supreme Court. I think it's been very helpful. I wanted to mention actually one other thing just to, for I guess a little bit of a chuckle. So I had Adam White on as a guest last year, and he took I think great joy in finding instances where the CFPB over the years has used the fact that it's not subject to congressional appropriations to get out of certain other responsibilities. And I don't know if you saw an op-ed written by George Will in the Wall Street Journal, where you can imagine where George Will came out on the issue. But George Will cited through back at the CFPB all these statements that they had made saying that, "We're not subject to congressional appropriations." That might get cited in a Supreme Court opinion, but I doubt whether that's going to carry any weight. Do you agree with me?

GianCarlo Canaparo:

No, I think it makes great reading in the op-ed pages. But no, I think a more straightforward constitutional analysis of what the appropriations clause requires will govern the day.

Alan Kaplinsky:

Well, thank you again. And after this, maybe even after the briefing is concluded, we may invite you back to the program to talk about the case again. And certainly when the decision comes down, we'll want to have you back on the program.

GianCarlo Canaparo:

I'd be delighted, Alan. Thank you for having me.

Alan Kaplinsky:

Yeah, and to our listeners today, really want to thank them for listening to the program and remind everybody to make sure you don't miss our future episodes. Subscribe to our show on your favorite podcast platform, be it Apple Podcast, Google Play, Spotify, or whatever platform you use. Don't forget to check out our blog, consumerfinancemonitor.com for daily insights on the consumer finance industry and anything and everything related to this case and the Second Circuit case. And if you have any questions or suggestions for our show, please email us at podcast@ballardspahr.com. Stay tuned each Thursday for a new episode. Thanks again for listening, and I wish everybody a very good day.