

Consumer Finance Monitor (Season 6, Episode 43): The U.S. Supreme Court's Decision in Community Financial Services Association of America Ltd. v. Consumer Financial Protection Bureau: Who Will Win and What Does It Mean? Part I

Speakers: Alan Kaplinsky, Michael Williams, Adam Levitin, Scott Nelson, Jeffrey Naimon, Joshua Katz, and John Masslon

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 counsel of the Consumer Financial Services Group at Ballard Spahr. I will be moderating today's program.

For those of you who want even more information, don't forget about our blog, consumerfinancemonitor.com. It goes by the same name as our podcast show. We've hosted our blog since July 21, 2011 when the CFPB became operational. So, there's a lot of relevant industry content on our blog. 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.

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Today, we will be doing part one of a two-part series that consists of a repurposing of a webinar round table that we conducted on October 17th of this year. The title of our webinar round table is 'The US Supreme Court's Decision in CFSA Versus CFPB: Who Will Win and What Does It All mean?' So let me talk to you about what we're going to do this afternoon. Literally two weeks ago, the US Supreme Court heard oral argument in the CFSA versus CFPB case. I think it understates what I'm about to say, namely that it has profound implications for the future of the CFPB. It certainly does. And some people might say even existential importance to the CFPB.

And, of course, I'm sure all of you are familiar with the main issue that we will be focused on today, and that is whether the CFPB's funding mechanism violates the US Constitution's appropriations clause, and if so, what the appropriate remedy should be. There was intense questioning by all the justices of both the solicitor general and counsel to CFSA, and we're going to try to parse to the extent we're capable of doing that, a number of the questions that were posed by the nine Justices.

Our webinar round table brings today together six very distinguished attorneys who filed amicus briefs with the Supreme Court. They'll share their reactions to the oral argument, important insights into the thinking of the nine Justices, predictions for how and when the Court will rule and potential implications for the CFPB, the industry and consumers. Namely, they're going to look at this case at all angles as three of the briefs supported the CFPB, two supported the CFSA and one industry brief supported neither party, but took a very clear position on what the remedy ought to be. And we're going to get into that question as well.

So, let me now introduce our speakers. First of all, I want to introduce Joshua Katz. Joshua is a research fellow at the Cato Institute's Robert A. Levy's Center for Constitutional Studies. At Cato he's worked on a full range of constitutional issues and is very, extremely well-versed on the Appropriations Clause. Next, I want to introduce a good old friend of mine, not that he's old, but I've known him for a long time, namely Adam Levitin. Adam is the Carmack Waterhouse Professor of Law and

Finance at Georgetown University Law Center and together with Professor Patricia McCoy of Boston College Law School, my alma mater, by the way, Adam, he filed an amicus brief in support of the CFPB on behalf of a large group of financial institution scholars.

Next up, John Masslon. John is Senior Litigation Counsel of the Washington Legal Foundation. His practice focuses on drafting amicus briefs in important cases around the country. Last term, Washington Legal Foundation was recognized as having the most successful and efficient cert-stage amicus practice in the country. And he has filed an amicus brief in support of CFSA on behalf of the Washington Legal Foundation.

Next up, Jeffrey Naimon. Jeff, he's a partner in Orrick's DC office, a financial services lawyer who represents mortgage industry participants of all varieties with regulatory vice examinations, support and enforcement defense on statutes, regs, interpretations, governing mortgage lending with respect to the CFPB and other state and federal regulators who oversee the consumer finance industry. He's filed an amicus brief, in this case on behalf of the Mortgage Bankers Association, the National Association of Home Builders, the National Association of Realtors. And in their brief, they took no position on the merits of the constitutional issue, but with respect to the remedy, if the Court gets to the remedy issue, they urge the Supreme Court not to invalidate any of the mortgage banking regs of the CFPB.

Next up is another old friend of mine, known for years, and that's Scott Nelson. He's an attorney with Public Citizen Litigation Group in Washington DC where he has a pro bono public interest practice including consumer law, First Amendment issues, class actions, and I could go on and on. He has argued five cases in front of the US Supreme Court during his career and in this particular case, he has filed an amicus brief on behalf of 10 consumer advocacy groups. And last and certainly not least, Mike Williams. Mike is the principal Deputy Solicitor General for the state of West Virginia. And there he handles appellate litigation, other high impact matters, including the state's briefing in support of CFSA on behalf of more than two dozen states that have Republican Attorneys General.

So, with all those introductions of very distinguished presenters that we have on our round table today, and without further ado, I want to turn it over to Jeff Naimon to address the question of how did you look at this oral argument, Jeff? Were you surprised by it? Did it come in pretty much as you expected it to come in? And what do you glean from the questions of the various Justices, particularly the conservative wing of the Court who a lot of people, including myself, I admit, mea culpa, I thought well before the briefing began and the oral arguments, the conservative wing was going to vote as a bloc supply and they were going to find that against the CFPB. But, Jeff, your thoughts?

Jeffrey Naimon:

Thanks, Alan. I appreciate, first, you having me on this distinguished panel and also I need to probably say, my clients in this matter, the mortgage bankers, the realtors, and the home builders associations, we've filed an amicus brief on behalf of them. My comments today are my own, and they're not on behalf of those associations or any other client of the firm. And, as Alan mentioned, our brief did not take a position on the merits of the super interesting constitutional issue, but rather just went to remedy. But I think, Alan, as we had discussed just a couple of weeks before the argument when we were at the same conference, I was not that surprised by how the argument went in terms of who asked what and all that. So I'm going to go on to the question that you asked. How do I think it went? What are my predictions for the vote?

And I guess my thought is that the court is going to reverse the Fifth Circuit by a vote of 7-2, although I think 8-1 or 9-0 is possible. And you'd asked me to go through the Justices one by one to open up the discussion on that. So, I think it was very clear from the argument and I don't think anyone was surprised that, in essence, Justices Jackson, Sotomayor and Kagan, I think are going to vote to reverse the Fifth Circuit and uphold the constitutionality of the funding. Justice Kagan referenced her view from Salo Law from a couple of years ago, and I think I found the questioning that Justices Jackson and Sotomayor made, particularly of General Francisco, were pretty dismissive of the CFSA's position. So I view them as pretty clear votes for the Bureau's funding and against the CFSA.

Moving to the next group of votes, I think Justice Kavanaugh, who spent just a moment on this issue in a footnote in the PHH case where he didn't really merit it before and I don't think he's merited it in this matter either. And I think his questions betoken someone who is not going to bite on the funding issue in this matter. I thought Justice Barrett asked some very pointed, textual-based questions to General Francisco. She indicated a lot of concern with the CFSA's position.

Chief Justice Roberts I think was a little harder to read. He did scrutinize in his questions the government's position somewhat, but I don't think he did it in a manner that indicated he would be a vote against the Bureau's funding. In addition, he didn't really delve into the remedy issue, which was my issue, and I think he would have. I think Roberts is the type of justice who would've, if he was seriously thinking about voting to call the funding unconstitutional. I think he would've spent more time on the remedy question as what do we do if we do vote down the Bureau's funding?

Moving on to the next three, as it were, I think Thomas was looking for a better textual hook than the CFSA was able to give him. And, failing to get that, I see him as a vote for reversal of the Fifth Circuit. I think many people will disagree with me on that, and I'm hoping to have interesting discussion around that. And I think Alito and Gorsuch were both pretty hostile to the government's position in their questioning. I think they were very concerned about the idea that Congress can create any mechanism with no boundaries.

So I think they're the two most likely votes for the plaintiff's position here, although I could imagine, in this context, rather than voting to say that the Appropriations Clause doesn't allow this structure, I could imagine concurring opinions that are critical of this structure, but don't hold it unconstitutional and, as a result, try to create guardrails for how Congress ought to look at this when they're trying to not try to make an agency less accountable to Congress.

Alan Kaplinsky:

Yeah. Jeff, I'm wondering if you could, very briefly, it was in fact the opening argument by both Francisco and Prelogar were very, very brief. Could you summarize briefly CFPB's argument, which you think is going to prevail, and then CFSA's argument, just so that we've got it teed up for all of our listeners?

Jeffrey Naimon:

Oh, gosh. I think I'll do a terrible job of it, but I'll give it a shot, Alan. I think the government's position that the CFPB's funding is constitutional is that the way Congress addressed very specifically how this agency is to be funded, that that constitutes an appropriation under the Appropriations Clause, and that's good enough, that there aren't more boundaries around how Congress has to do it. And that, in fact, over the course of history, many different federal agencies have been funded in diverse ways.

On the flip side, and again, I think I will bumble this for the plaintiffs, my sense is that the argument is that there may be a lot of flexibility here, but this is a step too far, that the effort to make a federal agency this unaccountable was, in fact, uniquely unaccountable to Congress and it was basically a step too far. Because I don't think anyone was arguing that everything had to go in a certain way. I think they're arguing that this was outside of the pretty wide boundaries that the constitutional clause provides.

Alan Kaplinsky:

Okay. All right. Other members of our panel, anybody want to add anything to what Jeff has had to say? Yeah, Josh.

Joshua Katz:

I'll push back on Justice Gorsuch just a little bit and I won't fight too hard because I'm not terribly sure where he's coming out. But I was interested. He only asked one question to Francisco and it was a follow-up on Justice Barrett's question. Justice Barrett that asked about how to apply the intelligible principle rule, how specific do you need to be? Do you need to be more specific than just a cap?

And Justice Gorsuch seemed interested in hearing more about this because the answer was cut off by the questions from other Justices. And I looked at the answer and I said, "Is that answer going to satisfy Justice Gorsuch? Is it going to be enough for him to be satisfied with that answer?" I understand he asked questions, too, on the other side that were quite pointed, but just looking at that exchange, I'm wondering how convinced he is.

Alan Kaplinsky:

Yeah. I think Jeff also thinks, and I certainly concur with him, I think Gorsuch and Alito, I think he's pretty much a sure thing voting against CFPB and I think Gorsuch is as well. But let me, if I can, push back on a couple of things, Jeff, and that is the solicitor general was asked several times to give examples of other agencies that have been funded like this and she kept mentioning the Customs Department, it was called something else back then, but that really wasn't funded like the CFPB. That was self-funded. They didn't get any money from the Treasury and of course there was no Treasury Department as such back then. But their money didn't come from the government. It came from the people against whom they were assessing customs duty.

The other, the Federal Reserve Board, the Comptroller of the Currency, the FDIC, all these other agencies that CFPB has said could come crashing down in the event that you hold that the CFPB is unconstitutionally funded, same answer I have for that, that they are all self-funded. They don't get any funds from the government. And I can't really find any analog, I can't find any other agency that is like the CFPB in terms of how it was funded. By the way, it's not self-funded. It's getting its money from the Federal Reserve Board, Federal Reserve System. The revenues are actually being derived from the various Federal Reserve banks and they make their money through interest on various transactions dealing and government securities.

They don't get their money from the government either, but they are not self-funded. So I just think that CFPB is sui generis. There isn't any other agency that fits that model and that's why I do agree with you, unfortunately, that, based on the oral argument, I think CFSA has got an uphill road. They're going to have a tough time looking just at the questions that were asked in finding five votes.

You've got the three liberal justices, you've got Barrett who is really hostile, as hostile as I think any of the liberal Justices in questioning Francisco. And I've got uncertainty about the other conservative Justices, but I don't feel real good about CFSA being able to get that fifth vote. I think they will pick off at least one or two of the other conservative Justices. Adam, I'd like to get your thoughts.

Adam Levitin:

Sure. So, on the big picture, I have no disagreement with Jeff's description of how this is likely to pan out. I think this is probably 9-0, maybe 8-1, maybe 7-2 on the judgment, with a bunch of concurring opinions, which will note concern about how far the freedom from appropriations can go. They'll wave their hands, they'll make some noise, but in the end, I think CFPB is going to pretty clearly win this. And the best telltale sign is the lack of questioning about a remedy, oral argument. When it was only Sotomayor who was asking about a remedy, I think in part to make the point that if the Court wanted to go that way, it's going to get really messy really fast, and you're going to have effective probably some judicial lawmaking, which is supposed to be anathema to everyone, whether it's jurisprudence or-

Alan Kaplinsky:

Or, Adam. It may be that the Court can turn it over to our Congress to sort everything out, remedy, right?

Adam Levitin:

In theory, yes, but probably Matt Gaetz probably did more to save the CFPB than any other person in the United States by deposing cheugy McCarthy and leaving the House completely dysfunctional, the whole notion that, "Oh, just declare it unconstitutional, hand it over to Congress and everything's going to be fine. It's Congress's problem to fix," the Court can't responsibly do that. If Congress can't tie its own shoes, they can't even choose a speaker, it's not an adult thing to say, "Well, it's unconstitutional, but it's Congress's problem to fix the mess."

What I want to take some issue with, though, is something you said, Alan, which is that the CFPB is really sui generis. An argument that I made in my brief was no, actually that's really not the case. That, even if you just look at other federal financial regulators, pretty much all of them are funded outside of the appropriations process. And the CFPB's funding really matches that of the Federal Reserve Board to a T. They're both getting their funds from an assessment on the private regional Federal Reserve banks.

And it's true that the CFPB's funds go through the Board, but it's only the most ministerial pass through. The Board has no discretion in the matter about how much money the CFPB gets. And if you look at the audited balance sheets of the Board, they actually just list the CFPB's assessments as being a parallel item to their own assessments. And it seems strange to me that we would make the routing of money through an intermediary rise to the level of constitutional significance.

The Founders were not particularly concerned about whose bank account money moved through. If we're concerned about political control, fine. It's one thing to say everything has to be appropriated, and that's a reasonable policy position. But if we're going to go that way, we're changing the funding structure of lots and lots of government agencies, all the financial regulators, but even the Department of Justice, which has a huge civil asset forfeiture fund. They won't get any of that if it all has to go through appropriations. Everything would just go in the Treasury and it would be up to our illustrious Congress to figure this all out.

Alan Kaplinsky:

So, Adam, let me ask you this and then I'd like to, of course, get the views of others. What's the limiting principle here? There was a lot of discussion during the oral argument from a number of the Justices, conservatives and liberals, and they asked that same question on both sides. And the one that sticks in my mind is, would it be okay for Congress to enact a law saying, "CFPB, we just created this agency, they need money to conduct their operations. At any point during the year, they can ask for an appropriation up to \$10 trillion a year." Is that okay?

Adam Levitin:

Not an appropriation. They can just demand that the Fed-

Alan Kaplinsky:

They can ask the Fed, I'm sorry, not an appropriation. They can make a demand on the Federal Reserve Board that, "We want \$10 trillion this year. We're really going to expand our operations. We're going to hire thousands of enforcement attorneys because we need that kind of a police force in order to tame the banking and consumer finance industry." Is that okay?

Adam Levitin:

Yes, it may be. And if it seems ridiculous, there's an easy remedy, which is Congress always has the power to change that law, that if Congress doesn't like that result, it can change it. And if you don't like it, you can vote the bums out of office and put other bums in who will change it. The only limitation that we see with appropriations is you can't have appropriations for longer than two years for the Army. But once you go beyond that, if it's not an appropriation that goes through Treasury, there's no limitation. Other than [crosstalk] we have our basic political process where, if Congress doesn't like a result, it changes the law.

Alan Kaplinsky:

Yeah. Well, it can only change the law, though, if it's all one party, the House is controlled by one party, the Senate, the same party has at least 60 votes and the President is of the same party. That doesn't happen very often. If you don't have that, you can't change the law. There've been many efforts during the CFPB's life of about, was it 12 years now, over 12 years, to change some of the provisions in the CFPB, including the funding, subjecting it to annual appropriations, including changing the governance of the CFPB from a single director to a commission composed of five directors, bipartisan commission. Now, nothing has ever come close to getting through, but you say-

Adam Levitin:

That's our system. That's not a CFPB-specific problem. That's the nature of the dysfunction of American democracy in the 21st century where you need to get a super majority in the Senate that is rarely obtainable, and that you may say that's not the right or the best system, but that's not a CFPB problem. That's about just the nature of our system. And if it's good enough for how we deal with every other issue, I don't see why it wouldn't be a good enough answer for how we deal with the CFPB.

Alan Kaplinsky:

So, Jeff, giving you the same hypothetical. Do you agree with Adam that Congress could have said, in Dodd-Frank, they could get up to 10 billion a year? I think I said 10 trillion, let's lower it to 10 billion a year. That'd be okay?

Jeffrey Naimon:

It's not okay for the consumers who need financial services products and the industry providers of those products. But as a constitutional matter, and here I'm speaking exactly as me and not on behalf of any clients, yeah, I don't see any textual limitation on Congress doing that. I think, if you look at the Customs House and all these other precedents that were mentioned of not being in the appropriations process that go back, really, to the founding of our country, so they're going to go back to the original intent. That was the federal government's money. It wasn't like the Customs House were pirates who just took money from people.

They were a federal agency that collected customs. And in fact, that's how most of the United States government was funded for the first century of our country was mostly from the New York's Customs House in addition to ones in Boston, Philly, and other places. But I think the Constitution has words in it, and I don't think they say that Congress can't do it. So that would be my perspective. I know others will have other perspectives.

Alan Kaplinsky:

Yeah. Scott?

Scott Nelson:

Yeah, I agree with that. And I just want to say also, your starting point is, well, if you have this 10 trillion or 10 billion, or in the hypothetical at the oral argument, it was 80 quadrillion, appropriation in place, yes, political gridlock may make that hard to change, but the real constraint here is Congress actually loves its appropriation power. It doesn't give it away in those quantities. In this case, it gave it away, supposedly, to the tune of \$600 million a year, which, as Justice Kagan said, "That's a very modest annual appropriation for a federal agency." She called it-

Alan Kaplinsky:

A rounding error, she said.

Scott Nelson:

... in the federal budget. And even Francisco, when he was urged by Justice Thomas to give his rule, why was this unconstitutional? He was not going to argue that you can't have an indefinite appropriation because that would be untenable. So he had to come back with, "It can't be an indefinite appropriation without a realistic cap." The problem with that limiting principle is it doesn't come from any place, but also he loses under it because the cap on the CFPB, \$600 million by any accounts is a realistic cap on funding for a federal agency.

I think one of the problems in this case is that the CFSA, when pressed by Justice Thomas to provide the rule they proposed, articulated a rule under which they lose. I think that makes it hard for them to get any votes. Justice Alito, I think he was aggressive in his questioning, but much of his aggression was prompted by not the arguments of the parties. It was really focused on Justice Jackson's questioning, which had kind of supported the no-limiting-principle-at-all view, and that's what Justice Alito was pushing back on.

So I think, as Jeff said, you're likely to see different opinions that suggest, if we got some other case, there might be a limit and they might grope in different ways toward trying to articulate what that is. But I don't think any of them is going to find that the limit has been exceeded here. I also think, even in suggesting that there might be a limit, they're going to be challenged to say what it is, because, as Adam explains, it's very hard to find a limit in the Constitution, other than that Congress must, by law, empower the agency to expend government funds, identify where they come from, how much and for how long, and this law does that.

Alan Kaplinsky:

Right. What about a couple of you that filed briefs supporting the CFSA? And I know you're here today, really, expressing your own views, but do you buy what you've heard so far?

John Masslon:

I mean, I don't buy what I've heard so far. Three quick points, the first on the reasonable limit. The argument is not the reasonable limit is an amount, for example, here, somewhere close to \$700 million, it's what the CFPB actually needs to undertake its responsibilities under federal law. Every year it spent hundreds of millions of dollars underneath that limit. So if an agency, for example, only needs \$1 million to operate and you have it up to \$10 million that they can demand, it's not a meaningful limit because it's 10 times what they actually need. So the argument that CFSA is making here is just that it's not a meaningful limit when the CFPB can continue to carry out its actions with over \$200 million left over each year. Again, under the statute, wherever it demands it then can carry over indefinitely any surplus that it has.

Second, just quickly responding to Adam's point, I think he's trying to have it both ways by saying that Gaetz is the big friend of the CFPB because it shows that no responsible adult would kick this to Congress, but then saying, "Oh, by the way, if you don't like it, kick it to Congress." Well, no responsible adult would do that. You can't have it both ways, saying both that this is helpful because the Court won't want to do that, but yet the Court's not going to want to do that. So I think that really what's going on in Congress right now has no impact on what the Court's decision here's going to be, and it shouldn't. What the Court should do is just look to the text of the Constitution and see whether this statute complies with the Appropriations Clause.

And, third, on the other agencies, I just don't think that any of the other agencies even come close to what we have here. The other agencies that are cited, the FDIC, the Customs Agency, all those, they're collecting their own fees. And as I described in the brief that we filed, there was a long history of that, and then slowly but surely Congress and the states started going away from that model of funding agencies purely for public choice reasons. But to say that this is the same, I mean, even the state legislatures and congresses that have kept up these for a few agencies recognize that it's much different to say that you're collecting fees and then you're able to spend those fees versus just demanding an amount of money and having no accountability whatsoever.

And that's what the statute here provides is that the CFPB is not accountable to anyone, to Congress or otherwise, and that's the constitutional problem. I think you saw in Noel's argument that he kept going back to the adage that this is just the structure of the Constitution tells us that this is impermissible. I agree that the reason that he might lose Justice Thomas's vote is there's no real textual hook here, but I think his bigger argument is just you look at the Constitution structure as a whole, and that shows that this type of funding mechanism is unconstitutional versus looking just to the text of the Appropriations Clause.

Alan Kaplinsky:

The other thing I would add, I want to respond to Adam's point about how the Federal Reserve is a prototype of how the CFPB is funded, and there aren't any material differences between the two. I think the difference between my view and your view, Adam, is I view the income that's derived by the Federal Reserve banks as income that gets consolidated with the Federal Reserve Board itself. In other words, it's like I view it, if it were private corporations, I view the holding company as the Fed, and each of the Federal Reserve banks are subsidiaries of the Fed. And if you look at it that way, then it truly is self-funded, and it's very much like the comptroller and the FDIC, the Customs House, the post office, they are self-funded. And I think that is a way to make the distinction.

I wrote an op-ed in the American Banker the day before the oral argument, and the question that the American Banker asked me to answer in the op-ed was, how do I think the case should come out? Not what we're dealing with today. How do we think it actually is going to come out? And that's the argument I made in the op-ed. But when you get to these hypotheticals, there was one other hypothetical, I think it came up in the oral argument I had a lot of difficulty with, and that is what if Congress just said, "The President shall be given X trillions of dollars a year to sprinkle among all the executive agencies." Is that okay, too, Adam? That's a lot of power in the presidency.

Adam Levitin:

Yeah. I mean, even though if you take the view that there's a unitary executive, then I think that would actually probably be fine as a constitutional matter. There's no requirement in the Constitution that the executive be organized into particular departments or the like. That's just its own administrative housekeeping. And I think, as a constitutional matter, that probably suffices.

Alan Kaplinsky:

Well-

John Masslon:

I think there's-

Alan Kaplinsky:

Actually, I think that's a bridge too far, I would think. But yeah, go ahead.

John Masslon:

I actually think that there's a bit more constitution, I mean historical support for something like that. There were statutes passed, and I was a bit surprised they didn't get into this more in depth in the argument, that allowed the president to spend up to \$10,000 for any expense that came before him, that authorized President Jefferson to do that. And so when you have statutes from that early in the founding that just kind of wrote a blank check. Now, the argument that CFSA makes is that, sure, those were blank checks that the president could spend. However, they were generally based upon estimates that the Treasury Secretary had prepared, and they were kind of accurate, some of them down to the penny. However, still, I think there's at least more historical support for that hypothetical than the structure that the Court's considering here.

Alan Kaplinsky:

Okay. Yes, go ahead, Mike.

Michael Williams:

Yeah, I guess I would just say if we're talking about that extensive of an appropriation, and I'll use the term appropriation loosely, I don't see how we can square that with the concession from both sides that this is meant to serve a separation-of-power's function. I suppose the unitary executive is a great thing in some sense, but there also does need to operate as some functional check here. And if it's just hand over the bag of money, I fail to see how that works. I also think we have to read these against other background constitutional principles.

I mean, the non-delegation doctrine is still a thing. I know we don't wish it to be so among some parties, but I fail to see how there's any kind of intelligible principle when you're just handing over a bag of cash and saying, "Go forth and do." Even though the parties, I think, were running away from some of the intelligible principle cases for good strategic reasons, I think that kind of wholesale shift of the spending function, the power of the purse, I think is exactly the kind of thing that the non-allegation doctrine is meant to address.

So, we can't just read these things in isolation. That's why I do think it was fair that Noel kept going back to this idea that it's a structural function. You can't just read this in a vacuum and say, "We're just looking at the Appropriations Clause" in this ether, and then dismiss all these other structural considerations. They all kind of work together, and I think that's the reason why he, as John said, kept kicking back into the structural limitations that these things are actually supposed to be providing. I think we keep losing sight of that function.

Alan Kaplinsky:

That's a good point. I mean, what do you think the Founders would think? What would Hamilton think of some of these hypothetical examples? Particularly the last one, that the Congress gives the president a blank check, that he or she can spend however he or she sees fit on running the federal government, and it's a perpetual... Yes, another Congress can repeal that, but that's very often a heavy lift. So, Scott, you had something you wanted to add?

Scott Nelson:

Yeah. I mean, I think the idea of the hundred quadrillion to the president to spend as he wishes in perpetuity, I agree with Michael that, even though I'm not a huge fan of the non-delegation doctrine, even under the formulation that has been in place since the New Deal, there has to be an intelligible principle. There's no intelligible principle there. So, that might be a more fruitful way of identifying what might be wrong with that law, than saying it's not an "appropriation." But the other thing is, it is conceivable that a Congress might say on an annual basis, "We're going to appropriate \$4 trillion to the executive branch this year, and it can use those for lawful purposes that have already been established."

But no Congress would ever do that in perpetuity because every Congress knows that the President, after the next election, may be somebody that it does not want to give that kind of control to. So let's give some credit to the things that are built into the structure of our Constitution that make those hypotheticals so far-fetched that we don't need to even worry about them, rather than trying to find, in some provision of the Constitution, something that would prevent that, and then extending that to something that isn't even remotely comparable to that hypothetical.

Alan Kaplinsky:

Okay. So, Josh, do you have anything you want to add?

Joshua Katz:

I think it's right to say that there is a non-delegation concern. If we were to say, "Given our current structure, given the departments we do have and the structure of our executive branch as it exists today, the president is given \$4 trillion or 500 trillion," or whatever number you want to say, "to fund the entire government," you'd run into a non-delegation problem somewhere along the line. What I don't think you'd run into is an Appropriations Clause problem. So I think to worry about the delegation issue is simply to talk about another case, and that's what I think the concurrences are going to do. They're going to talk about the case that's litigated under the non-delegation principle, not one where the Fifth Circuit comes up and says, "It's an Appropriations Clause violation." There's no appropriation here.

Alan Kaplinsky:

Right. Okay. Yes, go ahead, Mike.

Michael Williams:

Yeah, I will just say I don't think it's a coincidence that we've seen the Court reference the Appropriation Clause maybe for the first time in six decades recently in a couple of these cases about administrative power. I think it probably is a signal that they're trying to link all these concepts together again. I think Josh is right that they probably are better viewed as distinct issues, but I think there might be some resistance from some quarters of the Court to do that.

I guess I would analogize it, because I work for West Virginia, everything comes back to West Virginia BEPA, so I would analogize it to the way the Court was engaging with the major questions doctrine for a while, where at least some of them were saying, "Oh, this is sort of a backdoor avenue to non-delegation doctrine, and maybe we'll mush it all together and get there to the right spot." We might see something similar, either in concurrences. I doubt very much we'll see something like that in the majority opinion, but I wouldn't be surprised to see them kind of muddle a little bit.

Alan Kaplinsky:

I want to thank all of our speakers today for contributing to our show, and I in particular want to thank all of our listeners who have downloaded our show today. This was part one of a two-part podcast show that is a repurposing of our webinar round table on October 17th. Part two will be available next week. To make sure you don't miss our future episodes of the show, subscribe to our show on your favorite podcast platform, Apple Podcast, Google, Spotify, or wherever you listen.

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