

Consumer Finance Monitor (Season 8, Episode 16): Prominent Journalist, David Dayen, Describes his Reporting on the Efforts of Trump 2.0 to Curb CFPB

Speakers: Alan Kaplinsky and David Dayen

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 Ballard Spahr, and 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. And I'm 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 same name as our podcast show, Consumer Finance Monitor.

We launched our blog on July 21st, 2011, a date familiar with any of you who follow the CFPB because that was the date that the CFPB became operational. 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'd like our podcast, please let us know about it. You can leave us a review on whatever platform you use, be it Apple Podcasts, YouTube, Spotify, or any other podcast platform. Also, please let us know if you have any ideas for other topics that we should cover or consider covering, or speakers that we should consider inviting as guests on our show.

So, today we're going to get back to a topic that we cover very frequently for regular listeners to our podcast show, and that is the Consumer Financial Protection Bureau or the CFPB. Every now and then I get impressed by something that journalists are writing about the CFPB or anything pertaining to consumer finance. And my guest today is somebody who really did impress me a lot by recent writing he's done by the CFPB. So, I'm going to introduce you now to David Dayen.

David is the executive editor of the American Prospect, a magazine about ideas, politics, and power. He's the author of Chain of Title: How Three Ordinary Americans Uncovered Wall Street's Great Foreclosure Fraud was published in 2016. He's the winner of the Studs and Ida Terkel prize for that publication. And he also has published another book called Monopolized: Life in the Age of Corporate Power, published in 2020. He writes extensively about economics and politics at the Prospect, and he was the winner of the 2021 Hillman Prize for Magazine Journalism, and he practices his profession in Los Angeles. So, David, a very warm welcome to you. I'm absolutely delighted that you're on our show today.

David Dayen:

Thank you for having me.

Alan Kaplinsky:

A pleasure. So, David, you've been a journalist for a long time and you've covered the CFPB going back quite a ways. Tell us a little bit just about your coverage of the CFPB prior to Trump 2.0, and then we're going to focus, of course, mostly on what happened afterwards.

David Dayen:

Sure. Well, it's been a short but never dull history. This is an agency that has been under some sustained pressure from the industry since its inauguration, many lawsuits, many trips to the Supreme Court, and also a lot of work that's been done to safeguard the American people. By last count, over \$20 billion has been returned to consumers. So, between Richard Cordray in Obama's term. And then the kind of odd move that was kind of a prelude to this, in Trump the first term where Mick

Mulvaney, the head of OMB at the time, Office of Management and Budget took it over. There was some question as to whether the deputy, Leandra English or Mulvaney was the actual director.

There was kind of a pope and anti-Pope kind of situation, and eventually the courts decided that Mulvaney was legally the director that passed on to an appointee, Kathy Kraninger during a lawsuit, during Trump's first term, the president got the ability to fire the CFPB director, which Biden did on day one with Kraninger, and Rohit Chopra was put into that position, and that was a much more aggressive posture for the CFPB, and it took a couple of weeks in the Trump's term, but Trump eventually fired him and now we're off and running with what we are seeing today.

Alan Kaplinsky:

Yeah, that's a good summary of what happened. There's absolutely no doubt the CFPB has done a lot of good for consumers, but the big problem is that the industry had with Rohit Chopra was their belief that he was overreaching. And in particular, after the election in November, between that time and the time when Trump actually fired him, which I was surprised didn't happen within minutes after the inauguration, that was a surprise. They were leaving him alone and there was speculation, well, he's friendly with JD Vance and maybe they're going to keep him there. Yeah, a slight chance.

David Dayen:

My understanding from my reporting is they were waiting to have someone take over for him, and they needed people nominated and confirmed in order to do that. So, Scott Bessent, as soon as he was confirmed as treasury secretary, he briefly took over. And then once Russell Vought the new OMB director, once he was confirmed by the Senate, then they transferred authorities to him.

Alan Kaplinsky:

Yeah, right, right. Yeah, no, absolutely. That was the reason behind it. If he had fired Chopra right away, I believe that Zixta Martinez, who was the deputy director, would've gone into that slot at least temporarily.

David Dayen:

Yeah. My understanding was that they were having trouble finding a replacement, the Republicans, finding someone who was actually willing to do the job. Eventually now, Jonathan McKernan, who's a former vice chair of the FDIC, he has been nominated, and we'll see when that confirmation happens and whether that changes the posture of the administration.

Alan Kaplinsky:

Yeah, that sort of surprised me. I don't know if it surprised you, but I always viewed McKernan as not just somebody who would be a placeholder, he'd be, or a caretaker, I guess is a better word, that he's really a stand-up guy. Yes, with conservative Republican ideas, but not ... much higher quality, I thought, than a lot of the other Trump appointees. And I thought that that was sort of counter to everything else that was going on with the agency. Did you have the same reaction?

David Dayen:

Yeah, I mean, I think McKernan is the kind of nominee that I would have expected regardless of who the incoming Republican president was. He is someone that sort of fits the ... obviously is going to be a little lighter in terms of his regulatory posture, but is a serious person who's going to take the agency a little more seriously. And what we've seen with Russ Vought is he's someone that actually doesn't believe the agency has a place or a purpose in American life. And know, I think what Vought has run into is that, well, first of all, don't mess with compliance lawyers, number one. But second of all, I think he's run into the sort of basic problems with trying from the perch of the executive branch without congressional imprimatur to delete an agency. And those promise have been significant and I see the imminent return of McKernan as perhaps a return to something approaching normalcy.

Alan Kaplinsky:

Yeah, I think approaching something similar to what we saw under Kathy Kraninger's tenure, which was certainly a lighter touch of regulation and enforcement supervision, but nothing coming close to deleting the agency. So, okay for some, well, I guess I know why McKernan hasn't ... he has been approved by the Senate committee and it's a waiting floor action and with everything else going on, I guess they just haven't had time to slot it in.

David Dayen:

Yeah, I mean, there are literally 1,200 executive branch appointees that you have to get to, so everybody's got to get in line for a little bit. I don't foresee a lot of problems with McKernan getting confirmed.

Alan Kaplinsky:

Yeah, no, I'm sure he will be confirmed. I don't think he'll get any Democrat votes. But anyway, let's dig into some of the articles that you wrote. I think you wrote about 10 articles. I didn't count them up so far, and I'm sure there will be more on the way, but I think you began to write about it almost immediately after Chopra was fired and Scott Bessent became the temporary acting director for about a week, I think. Tell our audience what your first article was about.

David Dayen:

Right, so Bessent comes in, and I don't know exactly how much direct contact he had with this process, but one thing I found interesting right off the bat, and it kind of characterizes what maybe the impulse to go much further than Trump did in his first term in terms of weakening the agency is, so, Bessent sent out an initial sort of pause order, saying to pause certain enforcement activities, pause certain the rulemaking and various research functions, then Bessent files a second order blatantly, and he adds one thing to that order, which is that the CFPB should not designate new non-banks under what is known as the larger participant rule. And that is a rule that designates mainly the way it was used under Chopra, mainly tech firms who are getting into the space of financial services. So, non-banks that are giving payment services or money transfer services, things like that. There was a rule that said these non-banks can be subject to supervision and examination the way that larger banks are.

Alan Kaplinsky:

Let me just interrupt you for a second, David. I think that what Bessent was referring to was a more general language in Dodd-Frank that said, in addition to the banks, the kinds of businesses that were non-banks that were subject to supervision by the CFPB and banks with more than 10 billion in assets there, from time to time, CFPB can promulgate rules designating certain other non-bank sectors of the consumer finance industry to be subject to the larger participant rule. And then there was what I call the wildcard provision that hadn't been used by anyone until Rohit Chopra's term.

And that was in addition, the CFPB can designate a non-bank that poses a threat of, I'm paraphrasing now, injury to consumers. And he started using that. There were, we had clients I know that were subjected to it, and it was a pretty big hammer because if you didn't voluntarily agree to submit to supervision, then it would get published. It would get published in the federal register that they were seeking to have you become subject to the supervision. I think that's what Bessent was referring to. They were worried that Chopra, well, it wouldn't be Chopra, but that somebody could do something like that.

David Dayen:

Right. But I mean, if you read between the lines, why was this thing that I think Chopra was pretty explicit. The people he wanted and was concerned about were these tech firms that were getting into payments. So, it wasn't included in the initial order and it gets included in the second order and during this time, we have Elon Musk saying, delete CFPB, we have X signing a deal with Visa to start their own payment system. It just seemed very clear to me that the world's richest man who was sort of stage managing the federal government at this point, his people said, "Oh, can you also make sure that they don't designate us for any kind of examination or supervision?"

Alan Kaplinsky:

Didn't he forget one other thing, David? I thought he added, and I don't remember the exact timing here, but in the original stand down order where he told everybody to stop working, maybe that came later.

David Dayen:

Well, this is Vought. So, there are two sets of orders, right? There's the Bessent orders, which are what we described, which were very consistent by the way, with what Mick Mulvaney did in 2017. They were fairly consistent. Put a pause on this, let's see what's happening, and then we'll move on. And then Russ Vought comes in. Bessent lasts about a week, something like that. And Russ Vought comes in and his order is far more comprehensive, let's say, to the extent that he says essentially nobody work or do anything, he shuts down the offices, the headquarters. He doesn't necessarily put people on administrative leave, but he says essentially go home and don't do anything. And not only don't do anything, but he sets up a tip line.

And the tip line is for companies to report on CFPB officials if they're doing any work. So, it's very clear that Vought is trying to stop the agency from performing whatsoever. And we have now, because of court cases, communications from that time that lay out a strategy, a plan through a three-stage process, essentially fire almost everybody at the CFPB to get it down to five men in a room who had statutory obligations where their actual job title is in the statute of Dodd-Frank. And to essentially sit them in a room with a phone and have really nothing going on at CFPB other than that. So, that was a broad evolution from what Bessent did, which I thought was interesting just because of that inclusion of this protection for big tech to what Vought did, which is essentially stop this agency from functioning.

Alan Kaplinsky:

Well also, didn't he ... was that the point where he fired or got rid of the probationary employees, or did that come later?

David Dayen:

That was step one of the process that probationary employees are those who are there for less than a year, or in some cases who have moved to a new job and have been in that job for less than a year. There was a belief on the part of the Trump administration that those people had fewer legal protections and therefore could be fired essentially en masse. What we have learned through subsequent court cases is that judges have reversed that and said, actually, no, you have to have still a cause to fire those people. And about 25,000 of those probationary workers who were fired have been reinstated with back pay. And that's true of CFPB as well.

Alan Kaplinsky:

Do we know how many have actually come back, David?

David Dayen:

I think it's in the hundreds. I don't know the exact number, but some of those people got new jobs in the interim and so didn't come back. There was also the case of what are known as term employees, which at CFPB meant there were some employees that had a fixed term like you're here for three years, or you're here for four years. And there was also a thought that it would be easier to fire them. So, those people were told, your term is now up. That was stage one, the proposed stage two, and this is before a temporary injunction was filed. The proposed stage two was a reduction in force, and that was supposed to be about 1,300 people at the agency. And I believe the agency only has about 1,700 employees. So, that was going to be the bulk of everybody in stage two. And then whoever's left, I guess, was reserved for stage three.

Alan Kaplinsky:

And they didn't allow any of the people who were told to go home, they didn't allow them to come back into the building in DC. They were barred even going back to get personal effects.

David Dayen:

And to show how quick and haphazard this all was. The way that the term employees and the probationary employees were fired was with an attempted mail merge that went bad. So, the way that these people were fired, it said, dear name, like in parentheses, you have been fired from your job at position in parentheses. So, they didn't even take the time to personalize these in any way. It was just sort of you person, you are fired.

Alan Kaplinsky:

Right, right, right. They tore the signage off the building, I think, to try to terminate. There were other things, right? They terminated their contracts with third parties and-

David Dayen:

Yes, including expert witnesses, which made a lot of people think, okay, are they going to stop enforcement of existing cases at all? And in fact, there was a succession of cases that were terminated, active cases that they had against places like Capital One for not providing interest as promised to borrowers. There were several cases against, I believe, debt collection cases that were terminated. And so there was a sort of systematic way in which enforcement was being stopped, and all cases, whether they terminated the case or not, all cases were essentially paused where lawyers for the CFPB were told to go into courtrooms and say, we need a continuance indefinitely.

Alan Kaplinsky:

And one day on the actual oral argument in the fifth circuit.

David Dayen:

yes, I call that Amnesty Day. That was when five cases were dropped. That was actually during Jonathan McKernan's Senate confirmation hearing, as well as there were cases dropped during oral arguments during the major lawsuit, which is in DC Circuit Court, but there were five cases that were dropped in succession while McKernan was sitting in front of the Senate Banking Committee. And in fact, Senator Warren, who obviously was the brainchild of CFPB, referred to this during the hearing, like, I've just got breaking news. Your agency is dropping cases left and right. And posed that question to McKernan like, is this what we can expect from you? So, he was on a bit of a hot seat, and it was almost embarrassing for McKernan where he's talking about restoring the agency and bringing some coherence to it, and meanwhile these cases are being dropped left and right.

Alan Kaplinsky:

What I concluded, I don't know if you reached the same conclusion, let me say first there was at least one, well, any case where they were a co-enforcement case where they were a co-plaintiff with a state agency like a state AG, I think those cases have not been dropped or they have not dropped out of them. And then there's at least one case, and maybe there's more than one now where they've indicated they're going to continue to prosecute it.

David Dayen:

Yeah, I think it was the MoneyLion case they have indicated they would go forward, but that might have been just for the purposes of that, of an initial hearing. I haven't followed up on that, so I'm not sure where they're at with that.

Alan Kaplinsky:

What I concluded, and I do, I and my firm does a lot of CFPB enforcement work, is that if you filed a motion of some kind that required them to do any amount of work something like a motion to dismiss or motion for summary judgment or some dispositive motion, they dropped the case because they had nobody there that could do the work. They could get cases stayed, but that's all they could do.

David Dayen:

I mean, clearly this was a huge tip off to industry who was under some sort of enforcement order that all they had to do was make them blink essentially, and they're going to get their cases dropped. So, I mean, I think that's deliberate. I think that it didn't take a whole lot of brainpower to figure out that that's what they were going to do. And so those individuals I'm sure in their mind they feel vindicated, but it's a situation where we have these laws on consumer protection and their essentially enforcement has taken a walk.

Alan Kaplinsky:

Yeah. I will say this though, I think you may have mentioned this in one of your articles, that those companies whose cases were dropped are not necessarily out of the woods yet. They're okay insofar as the CFPB is concerned, but state enforcement agencies, state AGs I know are scrutinizing the cases that were dropped with the thought of potentially bringing new lawsuits against those same companies and private litigants. I was out on the phone with the other day with a very important plaintiff's class action lawyer, and he told me that the law firms are looking at those cases with the idea if they can, of bringing class action lawsuits.

David Dayen:

Yeah, that's not surprising. And I think more broadly, once McKernan gets in, and we can talk about how a lot of these attempts by Vought to delete the agency have been reversed or he's scaled it back. But I think more broadly, even when McKernan gets in, to the extent that there will be a lighter regulatory touch from Washington, we are going to see these other states step up. California has its own sort of mini CFPB, the Department of Financial Protection and Innovation, Minnesota has inaugurated an anti-fraud task force out of their Attorney general's office. There is going to be an attempt to substitute this enforcement. However, as you know, particularly with regard to national banks, there's the opportunity where the federal government can preempt or attempt to preempt any kind of investigation at that level. The vast majority of these offenders will still have to face something probably, but big banks might be able to use that preemption function.

Alan Kaplinsky:

Yeah, no, you're right. So, let's talk now about the litigation that's been filed, because you cover that pretty thoroughly. There are two lawsuits, if I'm correct, that deal directly with what the minimalization of the CFPB or some people have called it a shutdown. I think it's a shutdown that morphed into a minimalization. But tell us a little bit, tell us about these two lawsuits.

David Dayen:

Well, I've mainly been following the main lawsuit, and that was filed by the National Treasury Employees Union, which is the Union for CFPB Workers, and that's in DC District Court with Judge Amy Berman Jackson. That's the one I'm most familiar with, because almost immediately, Judge Jackson did put an injunction on firing additional workers at the CFPB. So, the phase two where the bulk of the employees were going to be let go, that was stopped by that order. And I believe Deepak Gupta is among the lawyers for the NTEU, and they have put together just a host of declarations that have sort of laid out this strategy that CFPB leadership, Vought and Mark Paoletta, who's the chief legal Officer of OMB, who's been detailed the CFPB have been attempting to do, and that goes through a host of things.

I mean, the big thing that they've made the case on is that there are statutory functions embedded in CFPB that cannot simply be deleted by the executive branch without Congress's input. The biggest one is the consumer complaint database, which is where consumers can file a complaint. And I believe they have to get answers within 15 days after they're forwarded to the particular companies. That database has been far less functional. Any kind of new company in it cannot be inputted. If there's a spelling error on the company, it cannot be inputted because you have to manually fix that. And so the database was one of the big functions because it's statutory. It says CFPB shall maintain a consumer complaint database in Dodd-Frank. And so that was an example of something where Vought and his team then sort of rolled that back or said they were rolling that back. Whether these things are actually happening is kind of open to debate. It's kind of a Schrodinger's CFPB function. I don't know if things are actually happening or not.

Alan Kaplinsky:

You mentioned a bunch of affidavits that the plaintiff's attorneys filed. I know Deepak Gupta very, very well. I have a lot of respect for him. He and I at one time co-chaired the Practicing Law Institute, Annual Institute on Consumer Financial Services. He used to be at the CFPB for a while, went into private practice, and he is a very, very good attorney. Who signed these affidavits? Were they former employees of CFPB?

David Dayen:

Yes. These affidavits were former, and in some cases, current and pseudonymous employees who said they would reveal who they were in camera in the chambers, but several of them were formers people like the Student Loan Ombudsman, who is a statutory role, someone, they're supposed to be a student loan ombudsman's office within CFPB. And she testified that these functions weren't being carried out in violation of the statute. That's a funny one, because in response, CFPB's leadership claimed, well, we have an Office of Ombudsman, and so anyone with student loan problems can go there when in fact the Office of Ombudsman is an ombudsman for people who have problems with the CFPB, not with any outside student loan service or student loan company where they may be having problems.

So, that, I think was an example of the very haphazard and shifting sort of justifications that the CFPB leadership was making to, in an attempt to shut down the agency. So, some current employees who testified to what was being said to them that the agency was going to be wound down that it's all over the terminations, these were direct testimony from people who were in meetings with CFPB leadership, including the chief financial officer, Adam Martinez, who made declarations of his own on the side of the defendants. And some of those declarations were shown to be erroneous or to be unclear, or to I believe they were accusing Martinez of just flat out lying to the court in some instances.

So, Martinez kind of took a beating here. He ended up having to testify directly for hours before Judge Jackson. This was on March 10th, I believe. And in the course of that, basically Jackson has been extending out this restraining order over and over again. And now I believe it's to the end of March until she has to make another decision. But apparently the plans are still being made by the CFPB if they happen to win this case to terminate the entire agency. That sort of sword of Damocles is still hanging over the head of the agency. And it's one of the reasons why the plaintiffs say that we need a permanent injunction.

Alan Kaplinsky:

And I take it just so we give the complete picture, the defense of the government, of the people who've been, of Vought and his minions let's say, has been that the executive has got the right to downsize or right size, I think is the words they use the agency, and there's nothing unusual or untoward about it. Right?

David Dayen:

That's generally their idea. But it's been very slippery because of the more aggressive stances, like the full-on stop work order initially. There's a difference between right-sizing an agency and deleting it. And CFPB, Vought and Paoletta have attempted to sort of reverse engineer what they were saying. After they realized, well, we can't actually shut down statutory functions. They sent a separate email to all people in the agency saying, "I'm very concerned that you're not carrying out statutorily required work, and you're supposed to do that. And if you're not doing that, that's a problem and please move on with this work." And that was a complete contravention of the February 10th email that Paoletta sent saying, stop all work.

There was no exception made for statutory or statutorily prescribed work. And so I think the general defense that has been taken is what you say, that we have the ability under a theory that has been promulgated by a lot of conservative law officials, that the unitary executive has the right to determine what the executive branch is doing, and we can rightsize this agency. But they've kind of backed into that after trying to shut down the entire agency, realizing that some functions needed to be kept, and then deciding, hey, when we said shut down, stop all work, we didn't mean stop all work. So, I think that is the issue that Judge Jackson is wrestling with.

Alan Kaplinsky:

Yeah. But let's talk about Judge Jackson for a minute. And she hasn't come down with her opinion yet, and people seem to think it will happen before the end of March because I think that's when her TRO is set to expire, although it could be extended again by her. And she's pretty hostile to the government, right? I mean, she said some things in court that something like, was it the Martinez was saying things with his fingers crossed beyond his back or something like that?

David Dayen:

I think as you know, as anyone who's been a litigator knows, the judges kind of don't like it when you do that, when they feel like they're being misled, when they feel like they are not being treated with either respect or just not being dealt with squarely. Judges tend to recoil at that. And I think Judge Jackson fits in there.

Alan Kaplinsky:

Now, I know you said there is another case brought by the city of Baltimore, and I think there's some other plaintiffs, and I know you haven't covered that case in nearly the same-

David Dayen:

I'm familiar with it.

Alan Kaplinsky:

Okay. But yeah, tell us about it and how does it differ from the case brought by the unions?

David Dayen:

My understanding is that that case is largely uplifting individual stories of people who cannot get their complaints heard, cannot get relief from enforcement actions that were already taken, things of that nature, and saying that this is a violation of the duties and authorities under the Consumer Protection Laws. I mean, there are about a dozen consumer protection laws that were transferred to CFPB that were previously being adjudicated by the Federal Reserve or other agencies of the government that in the absence of any action taking place at CFPB, these federal laws, these things that are on the books are not really being enforced by anybody. And so I think the heart of the city of Baltimore case is the idea that these actions aren't being taken, and that's a violation of our ability under the law to be protected.

Alan Kaplinsky:

And the judge denied the motion for either a TRO or preliminary injunction about a week ago on the basis that CFPB had not taken final agency action and therefore under the Administrative Procedures Act. It was not a justiciable controversy at that point.

David Dayen:

Yeah, I mean, that's perhaps why I've focused a little more on the NTEU case, which seems to be getting a lot more traction. I mean, the probationary employees have been returned to the agency for the most part. The second round of mass firings has not been taking place, and more people are actually working at CFPB than was true when Vought initially came into the agency. And there's one area that I think is very interesting here that I'd like to talk about. And that's the ways in which the regulated entities have said either privately or maybe more publicly, that they would like the CFPB to stick around.

And this is true in certain cases, and one of the most interesting to me is known as the APOR tables. So, the APOR tables stands for the average price offer rate, and it's a survey, it refers to the qualified mortgage rule. And what that means is that there are certain mortgages where the ability to pay standard, which was put in after the financial crisis, because a lot of people were getting loans, mortgage loans, without anyone testing whether or not they could pay them back. Some of these loans were defaulting on the first payment, which is kind of a bad sign. So, the qualified mortgage rule was put in and it said, okay, if

you are giving a loan above a certain standard, we're going to force you to determine and document the ability to repay on the part of the borrower.

If you put them in this range with, it's a fixed rate, it's a certain interest rate, you don't have to, you have a safe harbor essentially from this rule. And the way that's determined is on a rolling basis, because mortgage rates aren't static and it's determined by these APOR tables. And CFPB has the function of putting those out. And so when Vought initially shut down the agency, a lot of mortgage market participants came to him and said, "Hey, we have to file these APOR tables, and if we don't, mortgage companies are not going to know whether the mortgages that are coming to them actually are qualified mortgages or not." And the entire mortgage market could seize up as a result of that.

So, within about a day after I heard this and I reached out to the agency and said, "Hey, are you going to update the APOR tables this week?" They decided that they would, and they brought somebody back specifically to do that. And it was an example of how, I mean, regulation in this country is, I think a lot of industries see it as something that is a burden that is a compliance burden, but it also creates standardized rules for markets in ways that are beneficial to regulated entities. And in this case, this was a perfect example of that, where we actually kind of need these rules so that everyone has the same rules of the road and everything functions in the same fashion. And I just thought that was a really interesting way. It was sort of the broad ambitions of Vought to delete this agency and whoever is supporting it within the Trump administration, those broad ambitions crashed against the APOR tables, and we're seeing the results of that reverberate to this day.

Alan Kaplinsky:

Yeah, interesting. Yeah, well, you get to a, we're at a point where I think if you were to ask the average person, they'd say the industry, meaning the banking industry, and everybody else engaged in consumer finance wants to delete the CFPB. That's not the case at all, as I know you know because you've written about and interviewed people at the Mortgage Bankers Association and you've identified an absolutely critical issue. But there are other things in the mortgage industry too. Right after Dodd-Frank was an act, then the CFPB became operational. The first order of business was for the CFPB to promulgate a whole host of mortgage related regulations dealing with origination of mortgages and servicing of mortgages. And the industry is now used to, they complained about it, they carped about it at the time, but now they're used to complying with it. And you know, there's a lot of just uncertainty about what happens to those regulations, who's going to ... there are changes that need to be made or they need to be tweaked. Who's going to do that?

David Dayen:

It's a critical point, and I think we saw a lot of this during the lawsuit that attempted to find the CFPB unconstitutional a couple of years ago, where the mortgage industry is a little worried about what might happen in the absence. There's a theory known as Gresham's Law, right? Where the dishonest companies push out the honest ones. And so there's a vested interest for the honest ones to have standardized rules of the road, otherwise they're not able to compete with a company that just is trying to maximize profits or whatever. And the vast majority of companies, I think, fall into that honest services category. And so I think that that majority of companies wants and needs a CFPB on the beat. They might not like it every if they're poking around in their stuff, but they appreciate the fact that there's someone out there who is creating standardized rules of the road.

Alan Kaplinsky:

Yeah. So, let me, I'm going to throw out, here's my theory of what I think needs to be done here, and I'd love to get your reaction to it. So, if I were ... and some of this you're not going to like, because I know you think it's silly, but because I know you've written about it. So, when Hal Scott wrote his first op-ed in the Wall Street Journal, which happened right after the CFSA case came down from the Supreme Court, and that case decided this constitutional issue of whether it was constitutional to allow CFPB to be funded essentially by the Fed out of earnings of the Federal Reserve banks. And that got resolved at the time. And then Hal Scott, a professor emeritus at Harvard, he wrote an op-ed in the Wall Street Journal that he didn't put the title on it because I've talked to him and I've done two podcast shows with him already shortly after he did the first op-ed, and then the more recent one after Chopra got fired that said, was it a pure victory for the CFPB in the Supreme Court?

He then laid out a theory about why CFPB was still being unlawfully funded because of the fact that the combined earnings, now, and this is the language in the Dodd-Frank Act, of the Federal Reserve Banks in September 2022 became negative. There were no combined earnings. They started the Federal Reserve Banks on a combined basis started losing money. They've lost billions and billions of dollars of money ever since. All of that, a result of actually, ironically, of the Fed itself raising interest rates during that period. And eventually it caught up with the Federal Reserve Banks as they had all these instruments that they carried on their balance sheet that were way under market.

And anyway, to make a long story short, they started losing money. And Hal Scott threw out this idea that they were, since that point, there were no earnings in the Federal Reserve Banks, and therefore the CFPB was acting unlawfully after that point and requesting funds quarterly from the Federal Reserve, and the Federal Reserve was unlawfully funding the CFPB. I happen to think that is a solid argument. Now, I've done ... I know you think it's not a good argument.

David Dayen:

Well, I mean, I think Adam Levitin of Georgetown Laws has sort of did the definitive takedown of this. But the idea that Congress had in mind that there would be a consumer Financial protection agency, but only in years where the Federal Reserve made money, seems to me to be wildly off course, that they would not delete an agency for a year just because it didn't, because the Federal Reserve balance sheet was different than before, and that they would then bring back the agency when the Fed had a good year. It just seems like a really ridiculous way to assume that Congress was legislating.

Alan Kaplinsky:

Well, let me give you a little inside baseball if I can. Okay.

David Dayen:

Please.

Alan Kaplinsky:

And some of this you may already be aware of. I don't know. So, at the time that Dodd-Frank became law and that language, which was put in about how it would be funded, first of all, that language changed. There was an earlier version of it, and I don't have the language right in front of me that basically didn't limit the earning, it didn't limit the funds that they would receive.

David Dayen:

There was no cap. There was no cap.

Alan Kaplinsky:

Yeah. And it got changed. That's number one. Number two, in Dodd-Frank, there were two other agencies, and Hal Scott, I think mentions, in addition, by the way, to the two op-eds, I commend to your reading two articles where Hal Scott has written in a lot more specificity about his reading, and he's rebutted all the arguments made by Adam, Professor Levitin. But the main thing is, at the same time, the Congress put that limitation in limiting the CFPB. There were two other agencies that also were going to be funded by the Fed, but there was no limitation. There didn't have to be earnings. That's another thing.

David Dayen:

Are you talking about the Office of Financial Research?

Alan Kaplinsky:

Yeah, there was that. And there's one other one. Yeah. Now here's the thing. Never in the history of the Federal Reserve and the Federal Reserve Banks had it ever collectively lost money. When Dodd-Frank became law in that in 2010, July 21, 2010, if

you looked at the history, never had that occurred. So, it was something that people weren't terribly concerned about. I know, I can't mention the name of the person, but I know of somebody that was involved in the conference creating the conference report and was very much involved in putting that language in. And the Democrats didn't like it, but they basically, they said, we're not going to worry about it because it's never happened before, and we're going to just let it go. We'll give them that. They got everything else that they wanted.

David Dayen:

Here's what I'd say. I mean, I think that everybody's looking for a little semantic crack to try to get five Supreme Court justices to agree with their side of the story. Democrats certainly created that funding mechanism to keep it out of the appropriations process. I don't think that that's a big secret. And Republicans clearly want that put back in the appropriations process for the purposes of them being able to manage it and cut it and limit it. And we're going to have a bunch of semantic games, whether it's Hal Scott or somebody else, until the Supreme Court comes down one side or the other. Now in CSFA, they came down on the side that this is something that's lawful and liable to do. Now maybe this new kind of strategy will be successful with the court, maybe it won't. I haven't seen a lawsuit based on Hal's reading yet.

Alan Kaplinsky:

This is what I'm leading up to. So, clearly the Trump administration, Russell Vought and Bessent and all of them know about the Hal Scott op-ed. I'm sure they know about the two articles that he has published in an organization, periodical and online publication, of which he's the CEO, I think. And they have elected not to use this argument. Instead, they're relying on the unitary executive argument. If they had relied on this argument, they'd have something that really litigate over, and maybe the issue would get up to the Supreme Court. It got raised in 13 enforcement cases the CFPB brought, but it never got resolved on the merits. There were three opinions that decided the issue on the other grounds. And some of the other cases where it got raised, have been dropped. And I don't think it's ever, right now, it's slated for a Supreme Court review. The Republicans have the opportunity here to raise this issue, and I don't know how it would come out.

David Dayen:

Frankly, though, the Republicans have the opportunity right now to change the funding mechanism of the CFPB. All they have to do is write a law that says that the CFPB is now under appropriations. And we continue to try to use the courts because Congress has decided they don't want to really write laws anymore. And it would be better if our elected representatives made these decisions, came up with these ideas so that they could be sort of tested and adjudicated in the court of public opinion rather than in these courts.

I think one of the reasons in Trump term one, why they didn't go this hard on CFPB is because the public generally supports this agency. And nothing I've seen has really changed that. They support the idea of not being screwed on their mortgages or harassed by debt collectors or any other form of consumer financial transactions. And I think that that's what's going to be a bit sustaining for the agency right now, is that public opinion would go pretty sharply negative, and it would be an accumulation of that as consumers continue to be ripped off or put into trouble and have nobody that they can turn to within the government for help. So, I think that's really the answer to this. That's really the choice that we're going to see.

Alan Kaplinsky:

And now I think what's going to happen when the dust settles and McKernan gets in there, we're going to see legislation. I think you're right, that they could change the funding through the budget reconciliation bill, and they wouldn't need, they could do it just with the majority of the Senate. They wouldn't need the 60 votes.

David Dayen:

Heck, Chuck Schumer just gave up on the continuing resolution the other day, so maybe they could even get it under the regular budget order process.

Alan Kaplinsky:

Yeah. Well, I don't know about that.

David Dayen:

Democrats seem very, very reluctant to shut down the government over anything. And so are they going to shut down the government because they changed the funding mechanism for CFPB? I don't know. So, I think that it would be better if we had these debates in public rather than in courtrooms.

Alan Kaplinsky:

Absolutely. So, ultimately, this gets me to the main thing. This issue needs to be resolved legislatively, needs to be done by Congress and it's more than the funding. There is at least one and two other really essential things that I think the Republicans are going to insist upon. And that is to change the governance of the CFPB so that it is a five member bipartisan commission. One individual should not possess the power, be it a Republican or a Democrat of the director of the CFPB.

David Dayen:

The only thing I would say to that is that as recent events have made very clear, Donald Trump believes that he has the power to fire any independent agency commissioner that he wants if they defy his wishes. So, the difference between an individual director and a multi-member commission in a world where FTC commissioners are being fired and National Labor Relations Board commissioners being fired, I don't think there's much of a discrepancy there anymore, especially if the Supreme Court reverses Humphrey's executor and blesses the idea that the president can just fire any independent commissioner he wants. And I think that's going to play a big role actually, in the potential change of CFPB from a director to a multi-member commission.

Alan Kaplinsky:

Yeah, really good point. That issue is definitely, I think, going to get to the Supreme Court. And in the seal of law case, the case you referred to, I think you've definitely mentioned in your article, which gave the president the right to remove the director of the CFPB for any reason at all, no need for there to be a for-cause reason. In that case, while they held that was the language in Dodd-Frank, which limited the discretion of the president, the fire, that was held to be unconstitutional, they distinguished the Humphrey's executor case, which dealt with the Federal Trade Commission. And I think that case is going to go up there. And you're right, that's going to have to get resolved. That's a predicate. It's always hard to predict what the Supreme Court's going to do. But I think that Justice Roberts and Justice Amy Barrett, I think would be inclined to combine with the three liberal justices and reject that.

David Dayen:

Even Justice Kavanaugh has had writings in the past, defending Humphrey's executor, though he was on a lower court at the time. So, it's not impossible that they would save it, but this was in Project 2025 that let's challenge Humphrey's executor. And ultimately what that means is the president could fire the Federal Reserve chair and members of the Board of Governors, and that's the third rail.

Alan Kaplinsky:

And see, that's why I don't think the Supreme Court as conservative as the majority is, I think it would scare the hell out of them to think that Trump could-

David Dayen:

Well, them and Wall Street, which would bear on the CFPB debate as well.

Alan Kaplinsky:

Can you imagine what would happen if he fired J. Powell and that?

David Dayen:

Talk about uncertainty, which I think this change to where the rules are in consumer protection, the uncertainty would go way up if you're messing with the monetary policy of the Central Bank.

Alan Kaplinsky:

Well, we've come to the end of our program, David, and really I enjoyed this discussion and conversation. Our listeners are really going to enjoy the listening to what you have to say and just keep up the good work, because I think you are doing a fantastic job, even though you and I have our differences on what we think.

David Dayen:

Yeah, and I appreciate that we could come on and talk about those differences in kind of a civil fashion. So, thank you for having me. I do thank you for reaching out.

Alan Kaplinsky:

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