

Is the Consumer Financial Protection Bureau Unconstitutional?

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[00:00:00] Jeffrey Rosen: On Tuesday, October 3rd, the Supreme Court heard oral arguments in Consumer Financial Protection Bureau versus Community Financial Services. The question in the case is whether the funding structure of the Consumer Financial Protection Bureau makes it unconstitutional under the Appropriations Clause of the Constitution.

[00:00:20] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center's a nonpartisan, nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people.

[00:00:37] Jeffrey Rosen: In this episode, I'm joined by two leading administrative law scholars to recap the oral arguments in the CFPB case, what questions the Justices were most focused on and to discuss the future of the Administrative State. Jennifer Mascott is Assistant Professor of Law and Co-Director of The C. Boyden Gray Center for the study of the Administrative State at The Antonin Scalia Law School.

[00:01:02] Jeffrey Rosen: She previously served as Deputy Assistant Attorney General in the Office of Legal Counsel. She filed a brief on behalf of 132 members of Congress for the respondent. And she clerked for Justice Thomas during the 2008 term. Jennifer, it is wonderful to welcome you back to We the People.

[00:01:19] Jennifer Mascott: Great to see you, great to be here and be part of your important work.

[00:01:23] Jeffrey Rosen: And Brianne Gorod is the Constitutional Accountability Center's Chief Counsel. She joined the CAC from O'Melveny & Myers where she was counsel in the Supreme Court's firm, and she clerked for Justice Breyer during the 2008 term, meaning that she and Jenn Mascott clerked at the same time. Brianne, welcome back to We the People.

[00:01:43] Brianne Gorod: Great to be here. Thanks, Jeff.

[00:01:46] Jeffrey Rosen: Jenn, this case is a really important challenge under the Appropriations Clause of the Constitution. The Fifth Circuit struck down the funding

structure of the CFPB under the Appropriations Clause. Tell us what the court's reasoning was and why you think it was correct?

[00:02:07] Jennifer Mascott: So the Fifth Circuit decided in this case that the funding structure of the CFPB did not comply with the constitution's restrictions or provision in the Appropriations Clause that all appropriations to be taken out of the Treasury are authorized by law. And so the Fifth Circuit essentially determined that because the funding structure, the CFPB's funding's coming out of the Federal Reserve Fund.

[00:02:31] Jennifer Mascott: And Congress, in the Dodd-Frank Act, authorized the CFP director to determine the amount of funding that would be reasonably necessary to come out of the Federal Reserve Fund. And so the concern, particularly highlighted by the Fifth Circuit, is that there's an intervening party there. This is not Congress directly instructing or telling the CFPB exactly how much to spend and why and on what.

[00:02:56] Jennifer Mascott: But it's an indefinite authorization for the director as he deems reasonably necessary to take money out of the Federal Reserve Fund. Now, I'm not actually sure now that the arguments are before the Supreme Court, however, that the parties and the litigants before the court are focused on precisely the same aspects of the funding and the spending concerns of the Fifth Circuit.

[00:03:17] Jennifer Mascott: In fact, it's hard to imagine after listening to Tuesday's oral argument that however the decision comes down, that it would be anywhere near as broad in some of its language as part of the Fifth Circuit's reasoning. There might be several reasons for that. I mean, first of all, obviously, the court's able to take a much closer look at this issue. Also, it only has in front of it the more crystallized question about the Appropriations Clause challenge. The Fifth Circuit had a number of challenges the parties had raised, although decided the case really just on this one aspect.

[00:03:51] Jennifer Mascott: But a lot more arguments had been raised. And so the Fifth Circuit doesn't really go into as much depth, and of course, it doesn't have the benefit of nearly as much briefing as the Supreme Court Justices will get. But I think after Tuesday's argument and as the Constitutional Law Professor in my academic capacity looking at this, I do think you know the issues are more complex than they might appear if one is just looking at a quick summary of the Fifth Circuit decision. Because the terms of the clause require just that appropriations are made by kind of the Treasury bylaw, meaning Congress has a significant role.

[00:04:25] Jennifer Mascott: And that's a point that Brianne's brief highlights quite a bit as the legislative supremacy here. We do have a law. We have a law enacted in the statutory code addressing how the CFPB's gonna get money. And so the real question, I guess, is structurally, and with the meaning of the word, "appropriation" the concept of how that's been understood, are there limitations or restrictions on how the law has to operate for it to count as a constitutionally meaningful appropriation? And that's really what the Justices were trying to explore on Tuesday with the advocates on both sides.

[00:04:59] Jeffrey Rosen: Thank you so much for that. Brianne, as Jenn suggests two of the simple questions at the oral argument were: what are the requirements for an appropriation?

And what's the limiting principle on appropriation? You make some powerful arguments in your brief on both of those scores. In your view, what are the requirements for an appropriation? What's the limiting principle? And why was the Fifth Circuit wrong to strike down the funding structure of the CFPB?

[00:05:26] Brianne Gorod: Sure. I think it's important to start with the text of the Appropriations Clause which says that, "No money shall be drawn from the Treasury but in consequence of appropriations made by law." That's only 16 words. 16 words. And all those words require is that Congress have set out in legislation a source and purpose for money. That's what appropriation meant at the founding, and it's what it continues to mean today. And there's nothing in those 16 words that really imposes any other restrictions or limits or requirements on Congress in exercising that discretion.

[00:06:01] Brianne Gorod: And the brevity and simplicity of the Appropriations Clause makes sense in light of its history. The appropriations power developed in England and later here as a legislative check on executive power, not a judicial check on legislative power. And notably, Congress has never relied exclusively on annual appropriations or time-limited funding. And instead, has given federal agencies perpetual dedicated funding sources like the CFPB's, literally since the nation's founding.

[00:06:28] Brianne Gorod: And as Solicitor General Prelogar noted repeatedly at the argument this week constitutional text and constitutional history should be the court's guideposts in determining what the Appropriations Clause requires. And the fact the CFPB's funding source is so similar to the funding of agencies going literally to the founding and continuing to today, is proof positive that the CFPB's funding is constitutional.

[00:06:54] Brianne Gorod: There was a lot of discussion of limiting principles at the argument this week. And I think Justice Jackson was right to point out that the burden really isn't on the government to figure out what the limiting principles are or what the farthest bounds of Congress's authority are. The burden is on the payday lenders who are challenging the CFPB's funding to explain where the limits that they are asking the court to impose exist in either the text or history of the Constitution.

[00:07:19] Brianne Gorod: And that was something that I think their attorney really struggled to do with the argument. And you saw a number of the Justices, including Justice Barrett, for example unclear of where in the text of the clause they could find any of the limits or restrictions that the payday lenders wanna impose or that the Fifth Circuit sought to impose.

[00:07:35] Jeffrey Rosen: Jenn, during the oral argument, General Prelogar adopted the definition of the Appropriations Clause that Brianne just flagged. It's a law that provides funding and specifies the scope and purpose of the funding. By contrast, Noel Francisco said that appropriation was a law that provides a fixed amount of funding with the ability to be clawed back or a fixed end date and therefore, the possibility of just a cap was not enough to satisfy it. Tell us more about General Francisco's definition of an appropriation and why you think it was correct?

[00:08:08] Jennifer Mascott: So first just to pick up on Brianne's point about the text of the, of the clause, I certainly agree. I think the court is gonna front and center decide this case on the text. And I think because as Brianne points out here and in her brief and SG Prelogar, and I think former SG Francisco as well point out you know, by law here is legislation. And so I don't actually think the court's gonna really focus necessarily a lot on the by law in isolation. I think it will be what exactly is an appropriation and what is required.

[00:08:38] Jennifer Mascott: And so as you mention one of the definitions front and center on the table is the question of it providing for funding and some kind of scope and purpose of the funds. And you know, we've seen another context in the claims sometimes in other cases that say Congress can't unconstitutionally delegate its power and the standard is Congress is to provide an intelligible principle. A lot of times these cases rise and fall on the meaning or the specificity of what those concepts and those texts mean and how they're applied and what they stand for.

[00:09:09] Jennifer Mascott: I don't actually think that Noel Francisco at argument, or even necessarily in the respondent's brief and certainly the Justices, I don't think anybody is going to be focused on the question as much about the indefinite nature of the funding here. Because I think this was pointed out there are a number of spending bills over time that have lapsed significant specificity and that are more open-ended and are not key to an annual process.

[00:09:39] Jennifer Mascott: And one point we haven't actually mentioned yet but is in the text of the Constitution, there is actually a provision in the Constitution that imposes a time limit on appropriations and it says, "No money can be raised in support of armies lasting for more than two years." So I just don't think this case is gonna be determined on the idea that one bill that doesn't have an end time limit is somehow unconstitutional when it involves spending.

[00:10:03] Jennifer Mascott: I interpreted the respondent's argument here to hinge on the combination of all of the factors here 'cause there's also actually arguably an upwards cap too on this funding source for the CFPB. I think some of the questions that the respondents are focused on, at least at oral argument, is there's a problem in maybe the indirect way that it makes the money comes to the CFPB through the law and through the Federal Reserve funding structure.

[00:10:34] Jennifer Mascott: So if we turn to the statute that's being challenged in particular, it's section 5497[a][1] in title 12 of the US Code. And it talks about "And the Board of Governors shall transfer to the Bureau from the combined earnings of the Federal Reserve System the amount determined by the director." And here that's the director of the CFPB. "To be reasonably necessary to carry out the authorities of the Bureau under Federal Consumer Financial Law."

[00:10:57] Jennifer Mascott: Now, we'd always have to look at the context of provisions surrounding that. And then some other surrounding provisions, of course, we get the cap on what that money can be. So it is indefinite. There is however, a cap even though the respondent say the cap is above what the CFPB is actually spending. I think the trickier questions are going to be: is there something that's not really true to the character of a

congressional appropriation by law that happens when we have the Federal Reserve Fund that's, that's getting a lot of resources from funds collected by the Federal Reserve?

[00:11:33] Jennifer Mascott: And now it's being handed over to a separate actor leading a separate agency who determines as reasonably necessary how much on a yearly basis has to come out to fund the CFPB. And is that extra move there, particularly in light of the vast power of the CFPB to impose regulations and carry out adjudications, a lot of which have not been specifically required by law, but then to use money reasonably necessary for those. Is there something that happens in that big process that is in tension with and indeed in violation of the Constitutional scheme?

[00:12:08] Jennifer Mascott: And one thing I find really interesting is that I think Brianne's brief masterfully talks about the supremacy of Congress in the Appropriations Scheme. And so one way to cast that out is to say, "Well, then we defer to Congress on how it structures it." But when you look at the reasoning, and the, and the, and the masterful description of history there about why we didn't want the king to be running off and spending money the way that he saw fit, but he had a separate, he had a separate pot of money that were his private funds that he could spend as he saw fit.

[00:12:37] Jennifer Mascott: And then parliament had to determine how the rest of it was spent with some level of specificity, it's almost like that whole structure, that whole practice almost seems to support the argument on the other side with respondents that we don't want the executives with the pot of money that's not theirs just deciding how it's spent. And which seems in a lot of ways, really be what, as a practical matter, is happening here with the CFPB. So I think those are the things motivating the respondent's challenge here, if I had to guess.

[00:13:06] Jeffrey Rosen: Thanks much for that. Well, let's play a clip right now. There was an exchange where Justice Thomas asked-

[00:13:11] Justice Thomas: Mr. Francisco, just briefly I'd like you to complete this sentence "Funding of the CFPB is... violates the Appropriations Clause because..."

[00:13:22] Mr. Francisco: Because Congress has not determined the amount that this agency should be spending. Instead, it has delegated to the director the authority to pick his own appropriation subject only to an upper limit that's so, so high, it's rarely meaningful.

[00:13:38] Jeffrey Rosen: And Justice Jackson was skeptical of that limitation. She said, "Where did you get that in the text? What's the definition?" And she was not persuaded that a fixed amount or a cap was located in the Appropriations Clause. What's your evaluation of the effect of these exchanges with Justice Thomas and Justice Jackson?

[00:13:56] Jeffrey Rosen: And then tell our listeners why you think that in addition to the fact that the text doesn't contain the limitation, history including Alexander Hamilton's statements in the Federalist Papers suggest Congress's broad authority?

[00:14:08] Brianne Gorod: I think you know your argument at the Supreme Court is not going particularly well when you get a question like that from Justice Thomas toward the

very end of the argument. I think it is testament to the fact that Noel Francisco, throughout the argument, really struggled to give the Justices a satisfying standard or satisfying explanation for why he believes the CFPB's funding is unconstitutional.

[00:14:31] Brianne Gorod: And I think that difficulty goes back to the text of the Constitution, the fact that there is no basis for it in the text, and also the history. You know, Jenn mentioned earlier non-delegation principles that could be at play here too. And obviously, this was a case that, that clearly presents only an Appropriations Clause challenge, but even if you think about broader non-delegation principles the fact is there too you need to look to history.

[00:14:53] Brianne Gorod: And from 1789 on in the appropriations' context, there have been very broad delegations of authority to the executive branch to spend within the bounds set by Congress. We see that repeatedly. The very first appropriations laws were structured very much like this one, in the sense that they provided the executive could spend up to a cap set by Congress itself. And you know, I think that's just testament again to the importance of congressional discretion here, that this was really about making sure that funding decisions were in the hands of the people's representatives.

[00:15:25] Brianne Gorod: And the fact is, as Justice Kavanaugh pointed out a number of times at the argument this week, Congress can always change its decision. So here Congress passed a law it set up the CFPB with this funding structure. And it's worth noting that that was a very deliberate choice on the part of Congress. The CFPB was established in the wake of the 2008 financial crisis to fight against big banks, sent to protect America's consumers.

[00:15:48] Brianne Gorod: And Congress believed that it was critical that the CFPB have a stable funding source to ensure that there weren't interruptions in the critical work that it does on behalf of the American people. Congress made that determination when it set up the Bureau. But Congress, as Justice Kavanaugh pointed out, can always go back and change that.

[00:16:04] Brianne Gorod: And so the determination lies in the hands of the people's representatives which is exactly what the founders wanted. And you see that as you noted in statements from the founding, Alexander Hamilton making the point that all you need for an appropriation made by law is legislation directing the source and purpose of funding. And again, that is exactly what we have here.

[00:16:26] Jeffrey Rosen: Jenn, what do you make of that Hamilton quotation, in other words he explained, "Before money can legally issue from the Treasury for any purpose, there must be a law authorizing an expenditure and designating the object and the fund." And Brianne's brief also argues that Hamilton's famous claim that the court should have no influence over the purse or the sword means that the court shouldn't be second-guessing appropriations bills like this.

[00:16:50] Jennifer Mascott: So I think Brianne should be given props, first of all, in her brief because her brief seems to introduce a surprise actor onto the scene of the 2023 oral arguments of the Supreme Court. And this is the 1789 Custom Service, which I love. And I have to just say after listening to the oral argument and drilling down more about how the

Custom Service came into the argument first in the briefs, I noticed that SG Prelogar's brief, although it did mention a number of early statutes, I don't think, highlight the Custom Service.

[00:17:26] Jennifer Mascott: Brianne and the common law history scholars address it. And then it makes an appearance in SG Prelogar's reply brief, and then actually gets center stage at the oral argument. And so that's really great when an outside brief can bring a nice factor like that into the discussion. And I also think it's undeniable if you read the statutes. And I spent a lot of time in the first Federal Congress's statutes writing my study of officer's of the United States and how they operate.

[00:17:55] Jennifer Mascott: And of course it is true that the appropriations measures are general and they're not detailed. And they authorize, essentially, the executive branch to spend the money as it sees fit. But here is the really significant distinction. And I really hope, 'cause I don't actually think this is played out because there's so many issues in the case, it'd be hard in the briefs to focus on just this one piece.

[00:18:21] Jennifer Mascott: But I do hope that there's a significant amount more drilling down and looking at how the Custom Service and the revenue officers and everybody else operated within the early Congress before the court would ever look to that or rely on that practice or any of these bills in issuing a decision. Because there are some really significant distinctions. Number one, if you look at the statutory scheme as a whole and the long, really quite lengthy and I wrote a whole article on this in the delegation context, quite lengthy detailed specificity about customs duties.

[00:18:55] Jennifer Mascott: Not just with the customs duties themselves should be the fees, but what the customs officers are authorized to do. It is aggressive in a sense. Brianne's brief is correct. People are entering ships, they're imposing fees, they're opening up goods and packages to make sure there's no fraud. But it's very detailed. And so even if there's an appropriation at the time that suggests that the officers have some discretion in how they're collecting or the amount of funding they're getting, lots of references to by law in the custom statutes themselves, meaning they are engaged in the duties that they have been specifically instructed to do by law with very specific instructions about how they collect duties, how they inspect ships.

[00:19:39] Jennifer Mascott: And so there's a lot of collective direction going on that has hemmed in the discretion that then would be used to collect the funds and store the funds. There has to be supervision, I think at one point of a Treasury Officer in collecting the funds. And then if you actually look at the separate statute that creates the Treasury Department, there's a whole process put into place for how Treasury officials can essentially audit and look at records of whether the other public officers have appropriately and lawfully collected the funds and whether they owe anymore and have to hand over anymore, number one.

[00:20:13] Jennifer Mascott: Number two, a distinction that General Francisco, former General Francisco talked about a lot at the oral argument, Noel. I should call him Noel. He's not in his private capacity. That the fees being collected here, and so this is more of like a good governance or accountability or constitutional structural values argument. In all of these other instances, the agencies spending the money is spending money that it's collected

through its assigned duties by Congress. But also where it's had to go through the electoral cost or the public policy political cost of exercising its authority and imposing rules in the American public and then collecting penalties and fees as a result.

[00:20:52] Jennifer Mascott: So there's a little bit of an inherent limit there because to get the money, they've gotta burden the people. And so it operates just like our taxes, right? Congress has to pay some political cost to collect more taxes from people. And so that's actually not happening here with the CFPB 'cause they're taking out of the Fed Reserve's piggy bank and its penalties. They're not taking out of all penalties that they have collected themselves. And so is there something again about that that's a little bit further down the line? That's a more of a historical practice point.

[00:21:22] Jennifer Mascott: I don't think the historical practice lines up to come anywhere close to just buying this particular scheme. As a constitutional textural matter, then you have to look to what's happening with appropriations, and hopefully the court will think through very closely whether there's some meaning there to that term that's being undermined a little bit by this, by the complicated structure in play here.

[00:21:43] Jeffrey Rosen: Brianne, your discussion of English and American history argues that the phrase, "appropriated by law," simply means being authorized by legislation, not requiring granularity. You also argue that it would redefine the plain meaning of Treasury to include non-Treasury appropriations which have long been considered okay.

[00:22:05] Jeffrey Rosen: And Jenn, helpfully, sort of notes that her argument is based on good governmental structural values, the idea that you have to go through the cost of going through the political process in order to get an appropriations. To what degree before the court did Noel Francisco appeal to these non-textual principles, either non-delegation, separation of powers, or good government and not text, history and tradition?

[00:22:29] Brianne Gorod: I think that definitely was part of Noel Francisco's argument. And I think you saw some pushback from the Justices who made the point that certainly, one could've structured our system differently. Maybe there are arguments that it should be structured differently. But it's not the place of the Supreme Court Justices to decide what is the best structure. That decision was made by the framers and by we, the people when the Constitution was adopted.

[00:22:52] Brianne Gorod: And so the job of the Justices and the Supreme Court now is to understand what are the limitations imposed by the Constitution. But I think it's worth noting that to the extent that we're concerned with the practicalities and how this works. The way it has been working since the nation's founding, as we've been discussing, is that Congress has enjoyed this discretion.

[00:23:10] Brianne Gorod: And I appreciate Jenn pointing out the prominent role that the Custom Service played in the argument. We were delighted that we could bring that to the court's attention because we do think that is a very strong example. The argument Solicitor General Prelogar pointed to it as the best example historically. And we think if you look at the different characteristics of the Bureau's funding that the payday lenders are attacking the Custom Service seems to line up really nicely.

[00:23:34] Brianne Gorod: I mean, this was an example. This is the very first agency Congress created in 1789. It wielded authority over a vital component of the economy as Solicitor General Prelogar pointed out the service could board ships and seize vessels and inspect records and conduct searches. It could levy penalties and collect fines.

[00:23:51] Brianne Gorod: And there was no way to avoid that regulation. And it was financed not with an annual appropriation, but with an indefinite revenue stream provided in the legislation creating it. I think it's worth remembering that a lot of the argument was spent with the Justices and the attorneys talking about lots of different examples, both historical and contemporary. And we saw Noel Francisco spend a lot of time trying to explain why the CFPB is different from both historical examples and modern day examples.

[00:24:21] Brianne Gorod: And I think he really failed to offer a constitutionally meaningful way to distinguish them. At one point, Solicitor General Prelogar noted that perhaps in some ways, the CFPB is unprecedented but in the way that you could say this is the only agency that has the acronym CFPB. That's obviously true, but it doesn't track the constitutional value. And so in thinking about whether and to what extent the CFPB is different from these historical analogs and from all of the other federal, financial regulators that are also funded out of the annual appropriations process today, you have to really think what is the constitutional value that is being served, and whether any of those differences are meaningful from that perspective.

[00:25:00] Brianne Gorod: I think that's relevant in thinking about this question of fees that Jenn was talking a little bit about. Because I guess there's, from my perspective, two problems with that, and Solicitor General Prelogar talked about this a bit at the argument. If you think that the problem here is one of accountability and Congress giving away its power, it doesn't really address that issue that other fee funded agencies directly collect their money from entities they regulate.

[00:25:27] Brianne Gorod: The other problem is more of a factual or descriptive one, which i'm not sure actually imposes that much of a check on those agencies. A number of those agencies are imposing fees or collecting fees from entities they regulate that can't exit the regulatory sphere just because they disagree with regulations. And so it's not clear that it imposes much of a check at all. Particularly, when you remember that the CFPB actually has a quite meaningful check, which is a statutory cap that was put in place by Congress.

[00:25:52] Brianne Gorod: And if the CFPB, at some point, feels that it needs more money than that, it's gonna have to go to Congress and ask for that money, which is why the key here is that Congress made the decision, Congress exercised its discretion and that was a decision made by people that the American people elected to represent them.

[00:26:09] Jeffrey Rosen: Jenn Brianne's brief also argues that the Supreme Court has rejected the only claim that it's encountered asserting the statute violated the Appropriations Clause. In the Cincinnati Soap case from 1937, it emphasized that the clause means simply that no money can be paid out of the Treasury unless it's been appropriated by an act of Congress. Is that right that this is the only precedent on the other side? And how big a deal would it be for the court to strike down the CFPB under the Appropriations Clause given the fact that it's never done that before?

[00:26:40] Jennifer Mascott: Well, I think the absence of as much precedent in this area as there are with certain other clauses in the Constitution like the Commerce Clause or due process or whatever, actually gives the court a lot of freedom here to be looking at what it concludes is the correct answer, and the constitutionally textually-driven answer and the structural answer.

[00:27:02] Jennifer Mascott: I think that's why we saw history and a lot of this reasoning and real sort of reasoning through the questions come out the oral argument. Because the Justices are not operating in a space where there's as much thick precedent as before. Then of course, CFPB is a relatively new agency, there's a lot of new issues there and perhaps with how it's structured.

[00:27:24] Jennifer Mascott: And so I wanted to go back to Brianne's point about the CFPB when we're trying to come up with the sanction, sure we can say, "Well, you're 54 inches instead of 52, you have CFPB as opposed to SEC, and those are not constitutionally meaningful." I took her brief to the folks at the argument to be talking about legislative supremacy, and looking at Congress and how many decisions it has made and how it's decided to do things.

[00:27:48] Jennifer Mascott: So I guess on that point, I wanna just again go back to the Custom Service and whether these historical precedents are an analog 'cause there was a lot of discussion at oral argument about historical practice. And sometimes I think we're blending some of the, some of the questions in their statements that the Custom Service had a lot of control over the economy. And there's just very meaningful distinctions. Like, yes, we can say appropriations rules or laws or those provisions in isolation in 1789 more broad.

[00:28:18] Jennifer Mascott: But that's because they were carrying into effect or authorizing expenditure of funds by agencies that were significantly guided by Congress and what they should be doing. And the Custom Service, in particular, was really heavily guided, not just procedurally with how and when inspections and certificates and records needed to be written and where. But they actually didn't control the economy. They were involved in an aspect of the economy, international trade and the shipment of goods.

[00:28:49] Jennifer Mascott: But if you look at the debates from the early Congress it's replete with significant fine-grain discussion and negotiation about exactly what the duties were gonna be on every subcategories of goods. And so the Custom Service is simply carrying out and effectuating all of these decisions about the amount of duties to collect, how and when to collect them. Even sometimes how we were gonna handle weighing and measuring goods, what the measuring unit should be.

[00:29:16] Jennifer Mascott: And so the appropriations discretion is how they're gonna spend money to carry out all of these finely-grained tasks. And with the CFPB in contrast, we have an agency that was put into being by Congress in very general terms, authorized to do very general things in some cases. And now we have a funding structure that says the director can get the money as he deems reasonably necessary. It doesn't really tell him to do what. Congress hasn't given him or her a lot of directions to do what in other context.

[00:29:49] Jennifer Mascott: And so is that collective structure and that collective system about legislative supremacy? Clearly not. Is it so broad that it's a violation of the Appropriations Clause? I actually do think some of the issues in questions that come into play there are a lot of the ones that come up in the delegation context. Because there's something meaningfully that Congress has to decide to appropriate money. If the court decides the answer to that is yes, I could very much see them coming up with a decision here on the side of the respondent.

[00:30:18] Jennifer Mascott: And so I think we'll just have to wait and see 'cause it's one final practical point. I think we saw some interesting dynamics in the Justices on the bench. Seemed to me that Justice Barrett and perhaps Justice Kavanaugh too, but particularly Justice Barrett was having some lack of ease with this idea of needing to come up with a governing principle moving forward.

[00:30:35] Jennifer Mascott: Think the court in the past has declined to issue broad rulings when it doesn't know what principle it's gonna govern. And I hope in general that sometimes the Justices are nonetheless willing to issue decisions in these cases when maybe they conclude something's far away from a line, a constitutional line and not have to feel comfortable that they know how to answer 100 cases ahead.

[00:30:58] Jennifer Mascott: Because I don't see if we don't have a lot of precedent governing it, how they're ever going to decide a case consistent with constitutional principles if they feel like to do that, they have to come up with the text that can govern the future circumstances. We have one statutory provision, one agency here at issue. And the question is, has Congress ginned up a process and a procedure that's so self-operating here and so self-funding that it no longer is maintaining the control that the Constitution's assigned it to provide?

[00:31:35] Jeffrey Rosen: Thanks for that. Brianne, Jenn just put it vividly, "Has Congress come up with mechanisms that's so self-funding that's not consistent with the Constitution's requirement of legislative supremacy?" Your thoughts on that question, your answer to her interesting discussion of the Customs Bureau, which you introduced in your brief?

[00:31:55] Jeffrey Rosen: Then your reaction to her interesting suggestion that really, it's non-textual, non-delegation principles that are at the heart of the argument. Did you hear any sympathy on the court for embracing a non-delegation approach to this case?

[00:32:13] Brianne Gorod: Yeah. I wanna start by addressing this idea that there's only one agency at stake here. Certainly, this is a challenge to the funding of one particular agency. But I think one reason why this case is so important and has the potential to be so consequential is because really, much more is at stake. A decision by the Supreme Court affirming the Fifth Circuit's decision in this case could have implications that extend well beyond the CFPB and could threaten many other federal agencies like the Federal Reserve and other federal financial regulators.

[00:32:46] Brianne Gorod: And even programs like Social Security and Medicare that Congress also chose to fund outside of the annual appropriations process. It's certainly the case that the court doesn't always need to set out a rule that's going to govern every other case

that comes before it. But I think the reason why we saw Justice Barrett and others struggling to come up with the standard or principle that they should be applying in this case is because the funding of the CFPB is so similar in so many ways to that of other federal agencies and programs.

[00:33:16] Brianne Gorod: And I think we heard from the Justices a real concern that what they do in this case could have implications for other agencies. I think it was Justice Kagan who asked Noel Francisco if he thinks the Federal Reserve is unconstitutional under his theory. And he tried to say that it wasn't, but then couldn't give to the Justices a satisfying explanation of why that is. I think that's why Social General Prelogar noted during the argument that what the payday lenders seem to be seeking, what Noel Francisco seem to be arguing for was a gerrymander, a view of the Appropriations Clause that would hold the CFPB unconstitutional, but leave every other federal agency standing.

[00:33:53] Brianne Gorod: He didn't come up with a really coherent theory about how to interpret and apply the Appropriations Clause that would give you that result. I think it's important to think here not just about the Bureau but the larger principles in this case, what they would mean for other agencies. And as I said, that's something the Justices were really struggling with.

[00:34:14] Brianne Gorod: I don't think that it seemed like there was really any appetite to go down a non-delegation path here. And again, doing that would still require the Justices to: one, grapple with history to try to figure out some way to distinguish the Bureau from all of the other agencies that had been funded outside the annual appropriations process literally since the nation's founding.

[00:34:38] Brianne Gorod: And I don't think that they were given any coherent, standard or principled way to distinguish the Bureau from either those historical examples or modern day examples. I think that's why there was so much skepticism of the payday lenders' arguments at the court this week.

[00:34:56] Jeffrey Rosen: Thanks so much for that. Jenn, what about the claim that striking down the CFPB would call into question of the Fed? Was that a concern that the Justices shared? And who, among the Justices, did you think was most sympathetic to the argument for striking down the CFPB?

[00:35:15] Jennifer Mascott: So I think that the respondent's argument distinguished the other federal agencies by making one, one point in particular which is that the Federal Reserve are spending money out of fees and penalties that they have collected. And so the structure doesn't map onto the CFPB, which is taking funding from some other agency's fund. The challenge, some of this will turn on, on what ground do the Justices wanna reach the decision.

[00:35:47] Jennifer Mascott: And if it's gonna be historical practice, there just is no good historical analog for the particular structure and arrangement that the CFPB has right now under section 54 97 of title 12 of the US Code. And as far as coming up with one unified principle to distinguish the CFPB from the others, I think that's sort of mixing and matching

the question. I think we would think it's appropriate for the court to think through what is the principle or the meaning of the Appropriations Clause itself.

[00:36:19] Jennifer Mascott: And obviously, there need to be some principles and some understandings there that the court's going to apply to future cases and apply fairly and in the same way over time. Historical practice is not really an enterprise where you can have one principle or a one-size-fits-all distinction, right? Because the whole thing for historical practice is you're looking for specific analogs to the particular issue and practice at stake.

[00:36:48] Jennifer Mascott: And either it's going to line up completely or it might be that the CFPB differs from 20 past examples, but differs from each of them in a slightly different way. So of course, there's not one principle that governs how it's distinct because it's distinct from all 20 past examples perhaps in slightly different ways each time.

[00:37:05] Jennifer Mascott: So I would think that if the court wants to look for principles, hopefully it will look, moving forward, at what this appropriations mean. My own view of the history and looking at it, as we've talked about a lot, is that the CFPB doesn't, you know, specifically map on. It seems to me that Justice Alito and Justice Thomas seemed to be asking questions that were most at the level of the structural constitutional principles.

[00:37:29] Jennifer Mascott: I think there were obviously a number of Justices that seemed to be skeptical or having questions of the respondent's argument because they're obviously the ones coming in contending that there is a structure in the government that's not constitutional. Now, this is just me as a private citizen and again, as a professor listening in on the argument. I did wonder at some point just listening to the questions that was a very interesting discussion and interesting dialogue.

[00:37:57] Jennifer Mascott: I almost at some times felt as though the Solicitor General and the Justices together, some of the Justices were all obviously federal officials. They're all federal officials, they're in different branches of government but they're looking at this federal law that's enacted by Congress and signed by the president. And at times, I almost felt as though the Justices themselves were taking on the role of federal defenders. And it's sort of interesting to think about what is their role and their place here?

[00:38:28] Jennifer Mascott: Because on one hand they are federal actors, and now they've been sort of asked with this challenging case and the decision by the Fifth Circuit to review, "Are we gonna be the ones in the federal government who are gonna sit here and look closely at whether this violates the Constitution? And if we're gonna determine yes, we have to be the one entity against the others who reached that decision."

[00:38:49] Jennifer Mascott: Now the court's done this many, many times with many, many statutes in the past over the last 200 years. I just sometimes almost just felt the Justices, in their questions, seemed to be almost taking on advocate for federal prerogatives rather than dispassionately fitting and looking at the question from just at the private role. And it made me just think what is their role here? What are they being asked to do? And which way does that cut in terms of how they've reached their decision here?

[00:39:25] Jeffrey Rosen: Brianne one last question about historical analogs to the CFPB. And your brief includes historical examples like the Custom Service and the petitioner's brief lists a series of characteristics including standing appropriation, discretion to request funds, enforcement of regulatory functions and so forth.

[00:39:47] Jeffrey Rosen: And the respondents say that there's no historical example that has all the characteristics at once. This debate is coming against a backdrop of a big debate on the court about history and tradition. Do you need a clear historical analog for an agency to justify its current constitutionality? And how do you think the court is gonna resolve these questions about whether there's a historical analog to the CFPB's funding mechanism?

[00:40:15] Brianne Gorod: Right. I think the court has made clear in many different contexts that you look to historical context to help understand the meaning of the text in the Constitution. But this idea that you need to find a historical twin that is exactly the same in every particular as whatever provision or agency or issue is being considered in the case, I think is not the way that constitutional law is done either in the appropriations context or in any other context.

[00:40:41] Brianne Gorod: I think Justice Jackson was the one who pointed out an argument this week that, you know, the burden isn't on the government to point to an exact historical analog or even to define the limit. We've been having a lot of conversation today about what exactly the limits are and what exactly the standard is. But you do look to history to understand the scope of Congress's discretion to make funding choices. And the fact that we have here so many different historical analogs that all in various ways have the different features that you pointed out and that were discussed at argument as potential problems with the Bureau's funding all underscores why the Bureau so squarely is constitutional.

[00:41:21] Brianne Gorod: As Justice Kagan put it, the payday lenders' argument she said, "Is flying in the face of 250 years of history." And Solicitor General Prelogar made the point that sometimes the court will say that if something is so unprecedented and there's no basis for it, then that can be reason to question it. But the converse is also true, that when something is very well-entrenched and very well-established and has been done since the founding that provides strong support for its constitutionality.

[00:41:48] Brianne Gorod: And as she said at the argument, this is not novel. The CFPB and the basic funding structure that we have here is not novel. And is something that Congress, as the people's representatives have decided is the best way to fund federal agencies literally since the founding and continuing to the present day, not just in the CFPB, but in lots of other examples.

[00:42:08] Brianne Gorod: I think what the Justices were wrestling with and Jenn's comments about their role were very interesting. But I think what we saw them doing was kind of raising the question of whether they, the judiciary, should be in the position of second-guessing Congress's judgments about how best to fund the CFPB and how best to fund other agencies.

[00:42:25] Brianne Gorod: And I think that brings us back to the point that we talked about at the very top which was what was the purpose of the Appropriations Clause? The

Appropriations Clause was designed to provide a legislative check on executive power, not to provide a judicial check on legislative power. And I think if the court here were to put itself in the position of second-guessing Congress's judgment to give itself that new power that it has never before exercised in the nation's history that would be a clear departure from history and would really turn the Appropriations Clause on its head.

[00:42:57] Jeffrey Rosen: Thank you so much, Jennifer Mascott and Brianne Gorod for a civil, thoughtful, deep and really wonderfully illuminating discussion. It was just a model of thoughtful, engaged constitutional friendship and a civil examination of these crucially important issues. Jenn, Brianne, thank you so much for joining.

[00:43:17] Brianne Gorod: Thank you.

[00:43:17] Jennifer Mascott: Thank you.

[00:43:21] Jeffrey Rosen: Today's episode was produced by Bill Pollock, Samson Mostashari and Lana Ulrich. It was engineered by Bill Pollock. Research was provided by Cooper Smith, Samson Mostashari, Yara Daraiseh and Lana Ulrich. Please recommend this show to friends, colleagues or anyone anywhere who's eager for a weekly dose of constitutional debate.

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