

# NASFAA's "Off the Cuff" Podcast – Episode 234 Transcript

OTC Inside the Beltway: NASFAA 2022 Debrief, Congress' Summer Agenda, Regulatory Updates from ED and SCOTUS

Justin Draeger:

Hey everybody. Welcome to another edition of Off The Cuff. I'm Justin Draeger.

Karen McCarthy:

I'm Karen McCarthy from NASFAA's Policy Team.

Jonathan Fansmith:

And I'm recurring special guest Jon Fansmith from the American Council on Education's Government Relations Team.

Justin Draeger:

Glad to have you back here, Jon. Karen, welcome. And producing this week is our senior reporter, Hugh Ferguson. Hugh and Karen, you were just with me in Austin, Texas. On a scale of one to 10 ... Hugh, this was your very first NASFAA conference, yes?

Hugh Ferguson:

Yeah, this was my very first time.

Justin Draeger:

Okay. Scale of one to 10, how great was the NASFAA conference for you?

Hugh Ferguson:

It was a great experience. Am I going to put in a heat index terms because then it's definitely a 10.

Karen McCarthy:

Yeah.

Hugh Ferguson:

But-

Justin Draeger:

You're from New Jersey and you were in Austin, Texas in June, so it was warm.

Hugh Ferguson:

Yes.

Justin Draeger:

Were you at the Hilton? Here's the question, Hugh. Were you at the Hilton or the JW Marriott or somewhere else?

Hugh Ferguson:

I was at the JW Marriott.

Justin Draeger:

Yeah. So you had to walk the three blocks to the conference center.

Hugh Ferguson:

Wait, there was a closer option?

Justin Draeger:

Yeah.

Karen McCarthy:

Yes.

Justin Draeger:

I didn't know this until I was walking one day and I saw what looked like ants, but happened to be our staff and other attendees who were at the Hilton and had a skywalk directly into the ... And then I wondered what I had done to upset Jennifer to be put over in the JW.

Karen McCarthy:

Yeah, Justin was like, "Why am I in the other hotel?"

Justin Draeger:

If I can't get over in the Hilton, what's going on here? Okay. So Hugh, you thought it was great though?

Hugh Ferguson:

Yeah.

Justin Draeger:

10. And besides the heat ... I feel this is my impression, for new staff going to the annual meeting ... You're not new, but you've never been to a conference because of the pandemic and whatnot. But going to the conference gives you a sense of just how big and vast and vibrant the community is. You can't recreate that sort of energy virtually.

Hugh Ferguson:

For sure. I mean, just aside from being able to catch up with everyone and meet some new people that had started. This was my first experience really seeing NASFAA at its full capacity, and just seeing all the departments interact with one another. And it was really just rewarding and fulfilling to see how all those things come together in one space. I don't think there's any other way in which you can really experience that.

Justin Draeger:

Jon, on a scale of one to 10, how much FOMO did you have?

Jonathan Fansmith:

I'm usually busy enough that the idea of taking time away to do something else seems more terrifying than relaxing, but there was a lot of actually really positive social media content that just kept popping up in my various feeds. So I don't know. It looked like you guys were having a great time. There was a notable level of FOMO happening for me.

Justin Draeger:

Oh, good. I'm glad to hear that. And this, of course, was what you were seeing via your anonymous Twitter account. Didn't you tell me you have an anonymous one?

Jonathan Fansmith:

It's not anonymous. No, no.

Justin Draeger:

Oh, you actually. You just don't ...

Karen McCarthy:

He doesn't use it.

Jonathan Fansmith:

I don't ever post. I just retweet other things.

Justin Draeger:

How many of our social media posts did you like? And Hugh has the actual numbers.

Jonathan Fansmith:

I don't actually know how many I liked. I mean, as an ACE employee, I'm not supposed to promote other associations. We must rule above them all.

Justin Draeger:

I understand. ACE idiom. I always know when you guys say umbrella organization, I know what that means. It's a throne. It's the way you say it. Karen, how about you? On a scale of one to 10, you've been to, what, 35 conferences now? What-

Karen McCarthy:

Not 35 NASFAA conferences. I'm not that old.

Justin Draeger:

Not do one to 10. Was this the best NASFAA conference you've ever been to? There's only one right answer here. I'm setting you up.

Karen McCarthy:

I thought it was one of the best. Yes. I would say that. That's honest.

Justin Draeger:

Okay, good. And what was so good about it? Was it just because we didn't have one for two years?

Karen McCarthy:

That's part of it, and seeing all the members, seeing all of our staff. I mean, we haven't seen each other or all that often over the last couple years, so that was great. I really like Austin as a city. I think it's a great conference location. Your convention center, hotels, there's stuff you can walk to that's all right there. I really enjoyed that thought. Thought there were some really great sessions.

Justin Draeger:

I would agree. And we had some good portion of time set aside for socializing. So good content. There was good socializing. We had good events on site. Did you get your tarot cards read or your fortune told, Karen?

Karen McCarthy:

No. I don't know. I think you were around. I was glad I wasn't the only one who was like, that's a little too voodoo for me. I wondered if I was crazy.

Justin Draeger:

I was totally in.

Karen McCarthy:

Somebody else said the same thing. You ran right over.

Justin Draeger:

I just couldn't get through the line. The line was too long. Our members may be flirting a lot with the occult and that's something we're going to have to consider for future conferences.

Karen McCarthy:

It was a really long line.

Jonathan Fansmith:

That's a future session.

Justin Draeger:

I don't know. It was very popular. We had tarot card readers. I think we had palm readers. Very long lines. So, all right.

Jonathan Fansmith:

I'm taking notes for the ACE annual meeting.

Karen McCarthy:

Oh, we had lots of fun stuff, Jon, if you're looking for fun stuff to do in the exhibit hall.

Justin Draeger:

We had old school arcades. We had massages that were given out because. Being an aid professional is stressful. And so we wanted folks to relax a little bit in between sessions and ...

Jonathan Fansmith:

I like this. I'm going to steal all your ideas.

Justin Draeger:

Okay. Do it. Karen, anything stand out. Anything you want to highlight from the conference? Any fun experiences or anything else?

Karen McCarthy:

Let's see, fun experiences. I did participate in the typewriter rodeo thing. I don't know if you did that.

Justin Draeger:

I don't know what that is? No. What is that?

Karen McCarthy:

That was the group of poets all on their typewriters. There was a line for that too. And you have a conversation with your poet about what you want them to bang out a poem about, and they ask you some follow up questions, "So tell me more about blah, blah, blah." And it's just a little five minute conversation and they say, "Okay, give me a couple minutes." And they bang out a poem and put it in a little plastic sleeve for you and you get to take it home.

Justin Draeger:

What was your poem about?

Jonathan Fansmith:

Yeah.

Justin Draeger:

Can you tell us?

Karen McCarthy:

I was having a really hard time.

Justin Draeger:

I'm surprised you even got in line for this. Karen, you are a literalist, in every sense of the word to me. So what possessed you to even pursue this?

Karen McCarthy:

I don't know. Hugh, were you with us? Were you with us in line for this?

Justin Draeger:

Oh, I see. You were following the herd.

Hugh Ferguson:

I attempted to get in line and just ended up doing some line waiting on a couple of options.

Karen McCarthy:

It was a long line. I had them write a poem about my daughter. And then they said, "Okay. So well, you say, ah." But then they say, "Okay, so tell me about her." And of course the things that popped into mind first were not the most positive. So I gave him a bunch of things. I said, "Okay, so now I need to say some nice things." But what the poem ... so he pulled out what he wanted to focus on. And so what he focused on is the fact that she is learning how to drive and kinda frustrated. Thinks she's never going to get this and she's going to kill everybody. And so it was this uplifting, stick with it. Just like in life, you just have to keep at it and you'll get better at it. And it turned out really cute and she likes it.

Justin Draeger:

Oh good.

Karen McCarthy:

Yeah.

Jonathan Fansmith:

Did it rhyme?

Justin Draeger:

I thought you were going to say ... Oh, sorry about that.

Karen McCarthy:

No, it was not rhyme.

Jonathan Fansmith:

Could you ask for it to rhyme?

Justin Draeger:

I thought you were going to say you were just rattling off vital statistics, like her height is this, her eye color is that.

Karen McCarthy:

No, it was things like, I'm always giving her a hard time about not putting her dishes in the dishwasher and stuff like that. I was like, "Can you a poem out of that?"

Justin Draeger:

The stuff of most poems.

Justin Draeger:

Can you make a poem out of that to really deliver a message? The poet didn't want to be weaponized in your family warfare.

Karen McCarthy:

He was nodding along and he did say, "Okay, so typical teenager stuff. Okay. I got it. Keep going." He was ... it was good.

Justin Draeger:

Very good. It was good. All right. Let's jump into our agenda. Jon, Congress? Usually around this time of year they're wrapping up work, going into a recess. Is this summer any different? What's it look like?

Jonathan Fansmith:

No. I mean, they're doing the same thing schedule-wise. They're on recess now as we record this and they've got their regular August month off recess pending, so there's a couple more weeks when they come back to do legislative business before then. There's a few things they're going to try and wrap up. I thought one of the things that was most interesting was the House Appropriations Committee actually stayed in to do their work during the recess. That's pretty uncommon, frankly, because it requires members to be there to vote. So that was, I think, certainly unusual and I think a sign of their commitment to the process.

Jonathan Fansmith:

Unfortunately, I think they're going to wrap up their work. We don't know when the bills they pass of committee, will actually go to the floor, but ... if they will go to the floor. But it looks like there's still no agreement on the top line numbers. We've done this, I don't know how many, four or five years in a row, where the House passes their bills because it's easy for the House, and the majority can push through what they want. And the Senate doesn't even release bills and at some point they reconcile levels between the two committees. And well down the road, we'll see an omnibus bill that wraps all those appropriations spending bills together, and they'll pass that at some point, probably end of the year, early next year.

Justin Draeger:

So this is the House Labor-H Bill, the Appropriations Bill that funds our programs. This is one data point. Senate has to do something, the full House has to do something yet. But I imagine the funding bill that came out of the House, the Labor-H Bill, was friendly towards higher ed, am I right? How did it fare?

Jonathan Fansmith:

No, absolutely. No. And it's really the high water mark. This is true every year, that the House usually puts in numbers that are the best numbers for higher education. The Senate, when we've seen bills tends to be lesser on a lot of those programs. This was a good bill. This was a very good bill. There's a \$500 increase for the Pell maximum award. That's what the President asked for in his budget as part of his request for a \$1775 increase, so that's in there. There's really funding increases across the board. TRIO Program's got a big jump up. Teacher Quality Partnership Program, that got a big jump up. Childcare programs. There are some programs that got very large percentage wise increases, but everybody got something. Huge amount of money also for minority serving institutions, which we're pretty happy to see too. So a very good bill, but I think it's unlikely the final bill will be at those levels.

Justin Draeger:

So it's the high watermark they'll negotiate from here. But \$500 increase in the Pell grant ain't nothing.

Jonathan Fansmith:

No. Biggest in 10 years.

Jonathan Fansmith:

So we're glad to see that. That's fantastic. The other question I always have with these spending bills is, because eventually these are sometimes the only bills that are getting passed, is it too early in the process to see if there'll be any policy riders attached to any of these? Are we going to see any policy riders or have we seen any right now?

Jonathan Fansmith:

In our world there weren't really ... There were two big ones, and I'll get to those. But usually there's lots of little things in there and there's a lot of things about the opinion of the Congress is X, Y, and Z on a bunch of issues. The two big ones though are, they would extend Title IV eligibility to DACA recipients. That's something we've seen proposed in a bunch of different legislation over the last couple years. Unfortunately it hasn't, as its inclusion this bill sort of demonstrates, it hasn't made it through to the finish line. We would love to see that. We're very supportive of that, hopeful that it's included. But again, if history is prelude, it usually winds up not making the final bill.

Jonathan Fansmith:

The other one, which was interesting was, they moved the 90-10 standard. They revised it to the 85-15 level. I don't know if folks are intimately familiar with that, but it's an accountability rule that applies to proprietary institutions that essentially says what percentage of their revenue can come from the federal government. Currently it's 90%, so 10% has to come from other sources. Originally when it was meant to allow us 85-15, the House bill proposed moving it back to 85-15. So again, we'll see if that actually holds up. It's been proposed before, but with the tightening of those rules, after the regulations the department put out, that's a big change. Another 5% would have a real impact on those institutions.

Justin Draeger:

So in previous years, when you have one party that's in control of the House and the Senate, they want to get something through easier. According to at least Senate rules, they'll often move it through a budget reconciliation that only requires a simple majority. Is reconciliation on the table this year? And if so, what might fit into it?

Jonathan Fansmith:

It's a bit of a mess. We talked about Build Back Better last year, there's tons of money in it for higher ed. And ultimately that was derailed because it couldn't get Senator Manchin's support. He has now announced his support for a much smaller package, one that uses some of the savings that would come from tax increases to pay down the debt. So there's a lot that goes, not to any new program funding. The rest of it would be around, another big provision would be negotiating, letting the federal government negotiate over pharmaceutical prices. But there's nothing in it for higher ed, nothing at this point. I mean, we're trying to get some things included. It seems unlikely. He wants a very narrowly focused bill.

Jonathan Fansmith:

The problem they have with reconciliation is they have another thing looming, which is that the Affordable Care Act, the payments to the states need to be extended and that expires August or September. I forget the exact date. So now they have to do reconciliation to get that done. No Republican will support that as a standalone bill, so they're bundling that together. The other thing that sort of impacts our world is that because they're now moving forward with reconciliation, Mitch McConnell in particular, but congressional Republicans have said, "Well, if you are going to do this and force this bill through without our support, we are going to withhold our support for the Innovation Bill that they are working on." USIC in the Senate, Competes in the House.

Jonathan Fansmith:

For our purposes, there's a lot of stuff about research, which is great for institutions. But for financial aid officials, the two provisions in there that are pretty interesting, the most important would be, it would extend PELL eligibility to short term programs. That was added in the House, wasn't in the Senate. There's a possibility it could be included in the final bill. Again, all of this other stuff with reconciliation is making that bill, which had bipartisan support in the Senate, harder and harder to move. In a lot of ways they're tying all these threads together, which just makes it frankly, a more difficult process rather than something that they had, frankly, hoped to resolve during this period.

Justin Draeger:

And we talked to Under Secretary Kvaal at our conference about this idea of using Pell grants to fund short term programs. And I think Hugh, we ran that last week as our podcast episodes, so people can go back and hear that conversation. But along with providing Pell Grant for short-term programs, is a lot of talk, at least talk, about accountability for those programs that they actually lead to a job that would leave someone better off than had they not sought that short term certificate or boot camp or credential previously. Is all of that also wrapped up in Competes, how you infuse accountability into this?

Jonathan Fansmith:

The one other thing that was actually in the same amendment that put the Pell eligibility in was, they would pass the College Transparency Act, which is to that point. But what it would actually do is create a department of education level student unit record database. So individualized student records that could track students through their academic careers, tie that to things like social security, IRS databases, so that you get these very detailed individual levels information about programs and institutions that could then be used. Clearly the intent to strengthen accountability of and oversight of institutions.

Justin Draeger:

This sort of thing's been debated for a very long time. The other side of it is, of course, privacy debates. But what's interesting about the student unit record level tracking is, it's mostly states that lean more conservative that have sort of implemented these at a state level already. So performance based funding is largely based on this idea of unit record level tracking. So anyway, thanks very much, Jon, we'll continue to watch all of that and partner with you and your colleagues at ACE as we work through these appropriation and other congressional issues.

Justin Draeger:

Karen, other big news coming out of the department of education this week. We've been waiting for proposed regulations on a whole host of topics and we got our first look this last week. Why don't you catch us up?

Karen McCarthy:

Sure. If everybody remembers, we had two separate negotiating sessions over this past year, one really focused on borrower provisions. One more on school accountability. And now we are at the proposed rule stage for both of those groups and how it's coming out is, they're mixing all the topics and grouping things into NPRMs. And the idea here is that you push out the proposed rules, you have a public comment period. Then ED needs to take all of those public comments, respond to all of them, make any changes that they're going to make. And then issue final rules, which if they do by November 1st, would be effective, unless there's early implementation provisions, would be effective next July. July 2023.

Karen McCarthy:

So because of the tight timeline that ED is under, things are being grouped in, what might not be logical ways. You don't see all of the first session items being grouped together in an NPRM and all the second session. So we got the first NPRM and all that is to say, it's a mix of things that the first group did things that the second group did. It's also a mix of items where there was consensus and items where there was not. So where there was consensus, we know what it's going to say because the group all agreed. And so, there aren't any surprises there.

Karen McCarthy:

On other areas where there was not consensus, the department can write it however they see fit. So those are the ones that we really want to take a closer look at because we did not know what to expect and which direction the department might go in. So some of the biggies that are in this group, I would say that the more controversial or the bigger topics would be, borrower defense. No consensus there. So that will take quite a lot of digging in to get into all the nuances and the details there. And also PSLF where they also did not have consensus, but it was mostly over some smaller issues that just didn't get resolved. Borrower defense was much more contentious, I would say.

Justin Draeger:

So on PSLF one of the sticking points was that student and consumer groups wanted people who were doing public sector work at for-profit companies to qualify for PSLF, which I think sounds great in concept. I'm thinking about doctors who are working at for-profit hospitals. Sounds great in concept, but seems slightly problematic for implementation, especially given the fact that this program doesn't have a great track record on implementation. So where's the department here?

Karen McCarthy:

My impression is that there was a general philosophical agreement around the table that it would be really great if we could make that work. But they never really came up with a way to make this work in regulation. So I believe that in the NPRM, ED specifically called out that issue and said, "We would love it. If people would submit comments on how we could do this." So it sounds like they're willing to go down that path, they just haven't figured out how to make it work operationally.

Justin Draeger:

The other one that you just mentioned, Karen, was borrower defense. And this one will largely be ... I mean, this will be of most interest to for-profit schools, especially given everything that's been going on at the department over the last couple years, but technically could apply to all schools. This is about students who have received a judgment that a school has willfully misled them in some significant way that impacted why they went to school there, that they took out loans there and what kind of job they can get on the back end. And basically, the department's ability to group borrowers together in a similar situation and adjudicate more of these in a more timely way. Do I have that summarized right? Or what am I missing?

Karen McCarthy:

In previous negotiations, in previous versions of the rules than what we have right now ... I guess I should say, current rules. There is no group process, so every application has to be reviewed individually at the department, which logically, you would think contributed to the enormous backlog that they had at the department. So the idea here was to allow borrowers who all are in a similar situation, are making the same claim, to be processed more expeditiously through the process.

Justin Draeger:

So if the department has a finding at a school that they did misrepresent, then any student who attended or fits within that criteria, they could take them as a cohort as opposed to adjudicating each one individually.

Karen McCarthy:

Right.

Justin Draeger:

Okay. So however you fall conceptually or ideologically on this, this is another one where if it can't be implemented, it's not workable. So they're trying to propose a more workable solution. We'll have to balance off of, do schools have enough ability then to weigh in on any claim that's made against them so that it can be adjudicated fairly?

Karen McCarthy:

Correct.

Justin Draeger:

Karen, on borrower defense, there was another announcement out of the department that was largely, except again, by maybe for-profit schools, that may have been overlooked. The department came out with an announcement, was it this week or just last week maybe, at our conference, about for-profit institutions who found themselves on a list that the department published. And students who attended schools at these schools can, I guess, submit for borrow defense claims. What's the story here?

Karen McCarthy:

If you remember, there was several years ago in 2019, a class action lawsuit filed against the department that basically accused them of not processing the borrower defense claims. So this is the backlog issue. The hundreds of thousands of borrowers who had applied and were just hanging out and not getting any decision at all from the department. No updates. "What's happening to my claim?" So

there was a class action lawsuit filed then, and they just reached a settlement that would allow in effect about 200,000 borrowers would get their claims automatically approved. It's about \$6 billion. And the terms of the settlement is that, you had to have already filed the claim on or before when they announced the settlement, so it was mid June.

Justin Draeger:

So if I'm a borrower and I hadn't already filed a claim, but I went to one of these schools on this list, I'm not included in this action?

Karen McCarthy:

Right. I mean, you could still apply for borrower defense. But you would not be part of the group for this class action. Yes.

Justin Draeger:

All right.

Karen McCarthy:

Yes. And so, as a way to streamline this process apparently, the department has this list, and there's over 150 schools on it, and said, if you applied, you submitted an application on or before June 22nd, and you haven't received the decision or you received a denial, and you attended one of these particular schools, then we are going to process your claim. I mean, the settlement still has legal things that have to take place. There's a hearing for the court to approve the settlement later in July. It's not going to happen tomorrow, I guess, is my point. But there's a list of schools there, that 150 schools, I think the vast majority are for-profit institutions. And the institutions, as far as I know, from what we've heard from some of the schools on the list, weren't notified that they were on this list, didn't know how they ended up on this list at all.

Justin Draeger:

So let me back up for a second. So they weren't notified. It's never good if you're a school and you find yourself on a list like this. But the department had said, I thought ... and this is where I'm getting a little lost in maybe conflicting information. The department put schools on this list, but the only criteria for the school being on this list was if they were named in the class action lawsuit, regardless of how many borrower defense claims there were. So for example, you could have a Corinthian that has hundreds of thousands of borrower defense claims. You could also be another school that has two. Is that true?

Karen McCarthy:

They did. We're trying to get some clarity on that because it does say that the department has noted a high number of borrower defense applicants from the schools on this list. But some of these schools, our impression is, that some of them only had like very few, like one, two or three borrower defense claims.

Justin Draeger:

And most of the time you wouldn't consider that a high number. And the other thing I want to key in on is, you said the vast majority but not all are for-profit schools. So this is where I'm a little sort of like ... I think a lot of times with for-profit institution issues, borrower defense, gainful employment, a lot of

schools might just check out, this doesn't apply to me. Gainful employment applies to a lot of schools that aren't for-profits and borrower defense, if they're creating these sorts of things ... I guess what I'm saying is, private nonprofits, I would think, should also be paying attention to any precedence that's being set with potentially just issuing a list and your schools on it, and they're encouraging borrowers out there to file claims. Am I being too cynical here, Karen?

Karen McCarthy:

I would not say. I mean, I found it alarming when some of these schools reached out and said, "How do we get on this list? I'm only aware of one claim filed against our school. How are we on this list?" And you see that high number of borrowers. I mean, I would be concerned that they could issue a list at any time based on ... I don't know. The criteria aren't particularly clear. Not a great precedent.

Justin Draeger:

Okay. So there's certainly something there for proprietary schools to sort out, but we don't think everybody on this list was even proprietary. There might have been a few private non-profit schools too. So it sounds like we have a little bit more digging to try to understand who's on the list and exactly why and what a high number of borrower defense claims actually means, as far as the list is concerned. Okay. NASFAA, and I'm sure Jon over at ACE, you guys have already started reading the ... How many pages is this? Is this hundreds of pages or what? How many pages is the NPRM?

Jonathan Fansmith:

Oh, 750.

Justin Draeger:

750. Okay. So I'm sure you guys have already started digging in. Karen, I know you and your team have already dug in. Jon, I assume you've read it twice already.

Jonathan Fansmith:

Mm-hmm.

Justin Draeger:

Okay, good.

Jonathan Fansmith:

Have a summary for you after this.

Justin Draeger:

It came out, did it?

Karen McCarthy:

I mean, the public comment period isn't triggered until it appears in the federal register. So we're not at that yet officially, but it is only a 30 day comment period. I don't know if you noticed that yet.

Jonathan Fansmith:

Yes. Oh yes. I paid a lot of ... First thing I look at when they release one is, when is the comment are due.

Karen McCarthy:

I mean, I think that's the minimum, that they have to-

Jonathan Fansmith:

It's the least they can do.

Justin Draeger:

They didn't check in-

Jonathan Fansmith:

And it ends right in August so that's always good too. Really helps with people's vacation schedules.

Karen McCarthy:

Yeah.

Justin Draeger:

Jon, I assume like us, you submitted your vacation schedules up to the department and they just ignored them outright.

Jonathan Fansmith:

Every year I do it every year. They put a new rule, making a place for when I'm on vacation. So.

Justin Draeger:

"Dear Secretary Cardona, FYI, this is why I'm planning vacation this summer."

Jonathan Fansmith:

And Ted doesn't love me using the letterhead for that, but it's fine. We'll work it out.

Justin Draeger:

That's just good GR work. You keep your nose to the grindstone there, Jon. Okay. This is in the last, I don't know, three or four months, the Supreme Court has probably received more public attention than maybe it has in the previous, I don't know, five to 10 years. Those of us inside the beltway are obviously always watching where these intersections of higher education and other forms of legal review intersect with higher ed. But now everybody is paying attention in one of the latest Supreme Court rulings. It sort of impacted, I think it was the EPA, Jon, but might have some residual impacts on higher ed. Do you want to summarize for us?

Jonathan Fansmith:

I mean, obviously the case, overturning Roe and gun control... There's been a lot of very high profile decisions by the Court recently, this would be an easy one to miss. But it basically goes back to the State of West Virginia brought a suit against the Environmental Protection Agency saying essentially that the regulations EPA had put forward were too vast, too broad, that it exceeded their authority to do them.

And that principle, that a federal agency, as long as they're following statute, can implement regulations that comply with that statute and that makes them enforceable, has stood for a really long time. It's essentially the power of the executive branch of the government. The court found otherwise.

Jonathan Fansmith:

They introduced this new principle that said, you can do regulations, but if they have a major impact, you need Congress to actually do this. This should only be done through legislation. It cannot be done through regulation. It's not abundantly clear where they would draw that line as to what's a major impact. But anytime you have a Supreme Court precedent that is severely curtailing the authority of the executive agencies, that's going to be used in a lot of different ways.

Jonathan Fansmith:

And the one that springs immediately to mind is the Title IX regulations that the Biden administration has released, they haven't formally introduced them yet. But through every change in Title IX, there's been extensive litigation. The rules are always immediately challenged in court. With this Supreme Court it would be very easy to argue something that, look there's 20 million students, there's 4500, or 6000 Title IV institutions. These would have a major impact if they were put into place. And maybe they would say, that nullifies the Biden administration's Title IX rules. You could see it for other things, student loan cancellation, the repayment costs-

Karen McCarthy:

GE.

Jonathan Fansmith:

GE.

Karen McCarthy:

They could .... yeah.

Justin Draeger:

What about debt forgiveness?

Jonathan Fansmith:

Sure. I mean you, if the standard is an undefined line of major impact. \$300 billion, is that a major impact? Sure. 1.7 trillion certainly is a major impact. We don't know, but we do know that there's a court that ultimately will be deciding where that line is drawn. That's probably, as they've always shown, pretty suspicious and hostile to strength at the executive agency. So it would be very easy to expect that you'll see a lot of things that this administration might be trying to push forward, ultimately struck down by the courts.

Justin Draeger:

One of the sort of many, many, many legal opinions I've been reading, I'm not a lawyer, but one of them I found interesting was, postulating that as the legislature becomes less potent, less able to get things done, that that gives space for the other branch of branches of government, the executive and the judicial, to sort of rise in power and prominence. And we've certainly seen the executive do that. I mean,

over the last decade and a half, we've seen more executive orders, more regulations, because Congress isn't passing any significant, at least in higher ed space, significant legislation. There's no reauthorization for 14 years.

Justin Draeger:

But now we're sort of seeing the rise of the Supreme Court, and these things are always pendulums. But the one area I did want to see, I wanted to revisit with you Jon, was, I saw a CBS YouGov poll that happened right after Roe was overturned about whether this ruling would motivate more Democrats or Republicans to vote in the midterm election. And Democrats, not surprisingly, were indicating by a count of two to one, to their Republican counterparts, that it would be motivating for them to show up at a midterm election. And I wonder, are you thinking, rethinking or revising any of your predictions about the House or the Senate in November?

Jonathan Fansmith:

So I think my general point, that the Republicans will take the House and Dems will hold the Senate, still stands. I think probably what we're talking about is margins. I mean, if you thought 25 to 35 seat margin for the Republicans in the House, maybe now you're talking 10 to 20 seat margin or something along that. Similar in the Senate, if it's one or two seats gained, so you have a very slight majority. Maybe it's three or four. There's four or five legitimate toss-up seats, and this kind of thing does provide momentum. It encourages people to fundraise. It encourages, get out the vote drives and activism. Those things are meaningful, but they're particularly meaningful at the margins. So I think that's what you're going to see. Things that were already sort of up for contest, it gives the Dems a little bit more energy, a little bit more momentum.

Justin Draeger:

Okay. Jon, Karen, thanks very much for coming on Off The Cuff this week. We will keep people informed and check out the show notes where we'll post links to all of the topics and resources we've talked about. Let me bring in our senior reporter and producer this week, Hugh Ferguson. Hugh, what else is going on in the news? Catch us up.

Hugh Ferguson:

Thanks Justin. So as we discussed earlier, NASFAA hosted its national conference last week in Austin, Texas. And we have had quite a number of sessions for our members to participate in. For those who might have missed a session or those who unable to attend, we have more than a dozen news recaps for members to catch up on. And we also turned our conversation with Under Secretary Kvaal into a special podcast episode. So members should be sure to check those out in the show notes and just get caught up on all the content they might have missed out on.

Justin Draeger:

All right. So people can check out all of that. And then just as a reminder, next week begins our virtual conference. Those are institutional licenses, so if a school purchases registration to the virtual conference, everybody who's on that school's roster will have access to it. So this is not a duplication of the in-person conference. This is unique programming, so people can check that out. Thanks everybody for joining us for our July edition of Off The Cuff. We'll be back again in a couple weeks, until then remember to subscribe, tell a friend. Leave a rating on your podcast app of choice, that helps other people find the podcast. And thank you to all of you who said hello at the annual meeting. It was great

to meet so many people and know that, Hugh, there are at least a couple dozen people that are definitely listening to Off The Cuff.

Hugh Ferguson:

For sure.

Justin Draeger:

All right. Everybody have a great week. Thank you.