President Trump Wants Power to Fire the Head of the Consumer Financial Protection Bureau

When PHH Financial, a mortgage lender, was fined $109 million by the head of the Consumer Financial Protection Bureau (CFPB), it filed suit against the agency for overreaching its prerogatives. It also demanded that the court dismantle the agency altogether. A three-judge panel of the U.S. Court of Appeals for the District of Columbia ruled last fall that, indeed, Richard Cordray, the CFPB's director, did overreach, but that dismantling the agency was itself too much to ask.

Last Friday Trump's Department of Justice (DOJ) made an unusual move in the case, which has been appealed to the full bench by filing an amicus brief. Said DOJ officials: "Because a single agency head is unchecked by the constraints of group decision-making among members appointed by different presidents, there is a greater risk that an 'independent' agency, headed by a single person, will engage in extreme departures from the president's executive policy."

This is how a lawyer complicates the simplest thing: The CFPB's head is not accountable to anyone. Its funding comes from the Federal Reserve where the agency is housed. Cordray cannot be fired, except for the grossest mismanagement. He is, in other words, immune from any oversight by the president, Congress, or the courts. He is a rogue head of a rogue agency.

The CFPB was buried in the Dodd-Frank legislation passed following the financial crisis of 2007-8, condensing functions from various agencies overseeing the financial sector (banks, credit unions, securities firms, payday lenders, debt collectors, and mortgage-servicing companies) into one. That was bad enough but then legislators went further, making the director totally unaccountable to anyone in the government.

One of the judges of the three making its ruling last fall, Brett Cavanaugh, elegantly expressed his opinion concerning the rogue Cordray:

> The director of the CFPB possesses more unilateral authority — that is, authority to take action on one's own, subject to no check — than any single commissioner or board member in any other independent agency in the U.S. government. The CFPB's concentration of enormous executive power in a single, unaccountable, unchecked director not only departs from settled historical practice, but also poses a far greater risk of arbitrary decision-making and abuse of power, and a far greater threat to individual liberty, than does a multi-member independent agency.

Judge Kavanaugh's specialty, it should surprise no one, is the separation-of-powers doctrine the Founders used to restrain rogue agents from exceeding their authority unilaterally.

The *Wall Street Journal* asked Norbert Michel, a research fellow at the Heritage Foundation, to comment on the CFPB. His comments echoed those of Kavanaugh:

> The CFPB has independent litigation authority, a single director removable only for cause, a budget completely immune to the regular appropriations process, and a mandate to regulate financial markets under an ill-defined new concept of consumer protection. No federal agency should have such power.

Observers expect the full court to make the rogue agency head accountable to Trump when it rules on the matter. It won't dismantle the agency. And Trump, once he has regained control of it, may not fire Cordray. But he could.

Which gives constitutionalists a modest degree of comfort: The separation-of-powers of doctrine still carries some weight, and serves its purpose, at least in the instant case, of reining in the actions, behaviors, rulings and interventions of an otherwise out-of-control agency head.

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