Has Trump Tamed the CFPB?

By Eric Grover

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Acting director Mick Mulvaney is off to a promising start, but ensuring that the sprawling agency will always hew to the rule of law remains a challenge, says Eric Grover.

At Davos in January, President Trump lambasted “unelected bureaucrats” who were imposing “crushing and anti-business and anti-worker regulations on our citizens with no vote, no legislative debate, and no real accountability.” He promised, “In America those days are over.” The absolutist Consumer Financial Protection Bureau epitomizes the unaccountable agencies Trump pledged to curb.

He’s made good—to a point.

In short order, acting CFPB director Mick Mulvaney has reined in a lawless and politicized bureau. But it hasn’t been institutionally checked by the courts or legislatively restrained. Last year’s proposed Financial Choice Act would have circumscribed the Bureau, but it ran aground in the Senate.

In the courts, a split decision from the U.S. Court of Appeals for the District of Columbia on Jan. 31 ruled that the CFPB having a single director with for-cause tenure protection is constitutional. No matter Mulvaney’s yeoman’s work, a future director appointed by the next Democratic president, say Kamala Harris or Eric Schneiderman, will reverse the transformation and unleash a predatory CFPB on the financial-services industry.

Near-Plenary Power

In his seminal book, The Spirit of Laws, French philosopher Montesquieu warned liberty requires that judging, legislative power, and executive power be separate. Influenced by Montesquieu, James Madison in The Federalist Papers wrote that “all powers, legislative, executive, and judiciary, in the same hands” is “the very definition of tyranny.”

The absolutist CFPB is Madison’s nightmare. Its architects insulated it from constitutional checks and balances. It writes its own budget, drawing funds from the Federal Reserve, and is run by a single director with what one Congressman called “unchecked unilateral powers.”

The Bureau has brazenly abused its near-plenary power, suppressing credit availability for the underserved, inhibiting financial-services innovation, subjecting firms and industries it didn’t like to regulatory waterboarding, and making a mockery of the rule of law.

Regulators are duty-bound to enforce the law. Their politics should be irrelevant and not discernible. However, with former director Richard Cordray at the agency’s helm, politics infused everything.

Dodd-Frank banned the Bureau from regulating auto dealers’ finance programs. Nevertheless, the CFPB went after Ally Bank’s wholesale auto-finance business, concocting charges of racial discrimination when it didn’t know borrowers’ race and had no evidence of intent to discriminate.

Mortgage lender PHH contended the Bureau’s interpretation of the Real Estate Settlement Procedures Act (RESPA) and a $109 million fine were illegal and its structure unconstitutional. On Jan. 31, the D.C. circuit, en banc, unanimously rejected the CFPB’s reinterpretation of the RESPA. However, worryingly, it ruled 7 to 3 that the Bureau’s structure, with a single director only removable for malfeasance, is constitutional. If not overturned, this decision would greenlight Congress to put additional administrative agencies outside the president’s control.

Zero Dollars

Mulvaney’s appointment as acting director after Cordray’s departure was a watershed.

His Jan. 23 memo to all hands declared the CFPB’s days of “pushing the envelope” of the law in the name of the “mission,” as it did under Cordray, are over. He quoted the great lawyer Sir Thomas More in A Man for All

Seasons to underscore his point that there would be no more going after real or imagined bad guys regardless of the law.

Out of the gate, Mulvaney put a 30-day freeze on hiring and new rule-making. He requested zero dollars from the Fed for the second quarter of fiscal 2018, intending rather to draw upon a reserve that the CFPB had, arguably unlawfully, built up, totaling $177 million.

He's put the CFPB's payday-lending and mortgage-data rules on hold for further review.

Mulvaney instructed staff to cease using civil investigative demands to launch fishing expeditions and bully targets. He instructed that staff rule-making abide by the Administrative Procedures Act.

He also ordered staff to avoid rule-making by enforcement, which under Cordray was common practice. Justice requires that men know the law before being subject to it.

But Mulvaney won't be there forever.

Trump will nominate a 5-year director. George Mason law professor Todd Zywicki and former Republican Congressman Randy Neugebauer, both CFPB critics, were rumored to be candidates. Either would provoke fierce opposition from Sen. Elizabeth Warren, who pushed for creation of the CFPB, and her ideological kin.

Candidates potentially more palatable to the left have been mentioned, like Ohio state lawmaker Jonathan Dever, former Bush Treasury official Dan Iannicola, and National Credit Union Administration Chairman J. Mark McWatters. If, however, they don't provoke outrage, or at least counterfeit outrage, from Warren, there's a problem.

Restricted Mandate

So, can the Bureau be permanently tamed?

There aren't enough votes in Congress to eliminate it. However, if Republicans hold the House in November and win a working majority in the Senate, there may be sufficient votes to bring it to heel. That would entail a number of changes.

First, Congress must control its purse strings. In defending its prerogative, Congress should be bipartisan. In practice, however, many Congressional Democrats calculate that, while they won't always control Congress and the White House, by vesting unbridled power in an executive agency they can shield their agenda from the politically accountable legislature.

Next, the CFPB should be run by a bipartisan board. Trump and Mulvaney may yet cause Democrats to welcome one.

Its mandate should be restricted to policing traditional unfair and deceptive practices. It should eliminate the "abusive" standard, which is highly subjective and itself subject to regulatory abuse.

In his book Is Administrative Law Unlawful? Colombia law professor Philip Hamburger makes a cogent case that it is. The CFPB should rely on independent courts for adjudication, where independent rather than administrative judges, due process, and jury trials are available to the accused.

And fines it collects that are not disbursed as restitution to consumers should go to the Treasury.

The CFPB's constitutionality may yet reach the Supreme Court. Congress, however, shouldn't rely on the courts to fix the problem it created.

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