

Reining in regulatory absolutism

Congress and courts must reassert their constitutional prerogative

By Eric Grover

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A soft authoritarian regulatory fog from Washington has rolled in over the financial services industry, suppressing innovation and availability. Bad policy expressed in clear and specific law made by Congress would be worrying enough. Increasingly however, the people's body delegates vast authority to an unaccountable administrative state in which regulators are a law unto themselves, which is more dangerous.

The economic recovery has been anemic in part because empowered and increasingly lawless regulatory mandarins have their boots on the financial services industry's throat. George Mason University's Mercatus Center reported as of December 2014, the Dodd-Frank Act had imposed nearly 28,000 new regulatory restrictions. That's more than all other laws passed during the Obama administration combined.

As James Madison observed in The Federalist Papers, "If angels were to govern men, neither external nor internal controls on government would be necessary." Washington regulators aren't and can't be expected to be angels. Agencies have been amassing unchecked power for decades because of abject judicial deference and Congress' unwillingness to protect its institutional prerogative. In his seminal book "Is Administrative Law Unlawful?" Columbia law professor Philip Hamburger warns that by consolidating power, the administrative regime puts rule through and under law at risk. It's at odds with Madisonian separation of and checks on power in the Constitution to protect economic and political freedom.

When people brazenly jump turnstiles in the Metro, it spurs others to do so as well, and worse. When one regulator makes law and abuses his authority, so will others.

The record of regulatory overreach and abuse is daunting.

In February the Federal Deposit Insurance Corporation's acting inspector general reported the FDIC used its supervisory and enforcement powers to force three banks out of the refund-anticipation-loan business in 2011 and 2012. The banks were "abusively threatened." A ratings downgrade was "predetermined before the examination began."

Dodd-Frank established the Financial Stability Oversight Council (FSOC), with what until March had seemed plenary authority to dub any financial organization systemically important. Defying the conventional wisdom of kissing the regulator's ring, MetLife challenged its designation as systemically important, contending FSOC didn't comply with statutory requirements and that its life insurance business didn't pose risks comparable to large banks. In a stunner, Judge Rosemary Collyer of the U.S. District Court for the District of Columbia granted MetLife summary judgment on March 30, holding that the FSOC didn't abide by its own rules or consider costs.

The U.S. Department of Justice's Operation Choke Point and kindred regulatory initiatives deny payment processing and banking to legal but politically out-of-favor businesses, including subprime credit providers, pawnbrokers, firearms suppliers and tobacco retailers. "Reputational risk" is the catch-all reason used by banks and processors to justify refusing profitable, legal business their Washington overlords don't like.

In February, the House fired a salvo across regulators' bow, 250-169, passing the Financial Institution Customer Protection Act. It would bar regulators from terminating customers or restricting or discouraging banks from serving customers based solely on reputation risk.

The Office of the Comptroller of the Currency warned general-purpose reloadable prepaid card specialists not to offer consumer credit with greater than a 30 percent annual percentage rate, even in states where it's legal.

The Federal Reserve rewrote Dodd-Frank's debit-card interchange price controls, permitting recovery of costs the legislative text proscribes. Retailers sued and Judge Richard Leon of the U.S. District Court for the District of Columbia granted summary judgment, ruling the Fed's implementation ran "afoul of the text, design and purpose of the law."

However, the U.S. Court of Appeals for the District of Columbia, deferring to the administrative state, overturned Judge Leon's decision.

The Fed reportedly proposes retroactively changing derivative contracts. Ex-post-facto law or regulation is lawless.

While many financial regulators' authority and conduct have been troubling, with few structural checks, no agency more embodies absolutism than the Consumer Financial Protection Bureau (CFPB). It enjoys nearly unfettered consolidated power, is run by a director who can only be removed by the president for cause, has no bipartisan board, no inspector general to self-police, and writes its own budget drawn from the Fed.

Meting out star chamber justice, the bureau ruled PHH Mortgage illegally steered mortgage-insurance business to carriers, using its reinsurance business. The CFPB's administrative law "judge" reaching back arguably further than the three-year statute of limitation permitted, imposed a \$6 million fine disgorging reinsurance profits. Administrative hearings lack an independent judge, robust protections and a jury of peers for the accused. On appeal, director Richard Cordray — the prosecutor, judge and, arguably, lawmaker — increased the fine to \$109 million.

Dodd-Frank bars the bureau from regulating auto dealers' finance programs. To evade that ban, the CFPB guesses borrowers' race and with no evidence of intent to discriminate, concocted racial-bias charges against auto dealers' wholesale bank suppliers. It first targeted Ally Bank, rightly reasoning Ally would bend the knee because it needed regulatory approval to keep its insurance business.

Unchecked, regulators expand their turf. The CFPB issued a civil-investigative demand to the Accrediting Council for Independent Colleges and Schools, which doesn't provide consumer credit. In April, Judge Leon ruled the bureau lacked authority to do so and warned it and other agencies not to "plow headlong into fields not clearly ceded to them by Congress."

To rein in administrative absolutism, the judiciary must engage and Congress reassert their constitutional prerogative.

Eric Grover is principal at Intrepid Ventures.