

Supreme Court Weighs Petition To Rein In Obama's Most Powerful Agency

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January 3, 2017

The Supreme Court is weighing a petition which could significantly curtail the authority of the Consumer Financial Protection Bureau (CFPB), the most powerful agency established under President Barack Obama.

A petition filed before the end of the year asks the justices to strike down a wide range of actions taken by CFPB before its director was officially installed. Federal law requires all agency actions be approved and carried out by an agency's executive officer, the individual to whom Congress makes an explicit grant of power.

The case was occasioned when CFPB levied a number of fines and penalties against Chance Gordon, a California lawyer accused of violating several provisions in the Consumer Financial Protection Act. The agency ultimately assessed an \$11 million fine against Gordon and his law practice for charging fees for legal services he allegedly did not provide.

Gordon's penalties were initiated when CFPB did not have a director, and was not empowered to take such punitive steps. When the current director of CFPB, Richard Cordray, assumed office, he issued an order retroactively sanctioning a number of actions taken by the agency before his confirmation, including the penalties assessed against Gordon.

Now, Gordon argues Cordray's order violates the Constitution's Appointments Clause. Because, he argues, Cordray had not been appointed director at the time he was sanctioned by the agency, CFPB did not have standing to bring a case against him. Furthermore, he argues Cordray cannot lawfully authorize actions taken by the agency before he became director, especially where those actions were authorized without consideration of related facts. CFPB asserts Cordray's order encompasses all federal court orders rendered as a result of his fiat. The 9th U.S. Circuit Court of Appeals sided with Cordray and CFPB in the dispute in April 2016.

Gordon is represented in the litigation by the Washington Legal Foundation (WLF), a center-right public interest law firm and policy center that promotes legal and regulatory reforms. The U.S. Chamber of Commerce, the Cato Institute, and the Center for Constitutional Jurisprudence filed amicus (or "friend of the court") briefs in support of WLF. Attracting the support of such high-profile "amici" may increase the chances the high court agrees to hear the case.

Cato argues the 9th Circuit's decision essentially strips the Appointments Clause of all meaning, and would allow federal agencies to take all manner of actions not authorized by Congress. Their brief reads:

The bootstrapping sanctioned by the Ninth Circuit would effectively render the Appointments Clause a nullity. Agencies would be free to act without the prior approval of Congress, even when Congress has made its express approval required. This not only threatens a central check on executive authority, but also the basic liberties our constitutional system of separation of powers was meant to protect.

The U.S. Chamber of Commerce argues that the 9th Circuit's decision contradicts the precedents of the Supreme Court and other federal circuit courts. The justices are much more likely to hear a case if multiple circuit courts disagree on the issue at hand.

A decision on whether the justices will hear the case could come as soon as Jan. 9.