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Power play at Consumer Financial Protection Bureau highlights need for reform

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A federal appeals court has already ruled that the structure of the Consumer Financial Protection Bureau is unconstitutional. Now, an unfolding power play in Washington highlights precisely why.

A Democratic Congress created the regulatory agency in 2010 following the financial crisis. In order to provide the bureau with the power to quickly punish big banks and other evil capitalists for supposed financial wrongdoing, Democrats freed it from traditional oversight. The result was an unaccountable bureaucracy led by an untouchable functionary who acted as judge, jury and executioner.

Mortgage lender PHH found out the hard way. After an administrative court ruling, the company faced a \$6.4 million fine for alleged misdeeds. But bureau director Richard Cordray arbitrarily jacked that to \$109 million, and the company sued.

In 2016, a unanimous three-judge panel of the D.C. Court of Appeals recognized the dangers inherent in such an arrangement, not the least of which is due process. The court found that a provision in the law essentially preventing the president or Congress from removing the director was an illegal deviation from the traditional setup for independent executive branch agencies. “The president alone is responsible for exercising executive power,” the court wrote.

Ilya Shapiro, a constitutional expert with the Cato Institute, points out, “We’re only supposed to have three branches of government “So to have an agency that is not accountable to the president or to Congress violates the constitutional structure.”

The ruling is under appeal. In the meantime, President Donald Trump and congressional Republicans have long insisted that the bureau is a poster child for regulatory overreach and central planning, drowning the nation’s lenders in a sea of red tape. When Mr. Cordray announced his resignation earlier this month, the president seized the opportunity to name former GOP House member Mark Mulvaney as his replacement.

Mr. Cordray, though, is having none of it. On the way out the door, he named Leandra English his deputy director, claiming the law empowers him to choose his own successor. But the statute allows only for the deputy director to “serve as acting director in the absence or unavailability of the director.”

The conflict is no doubt headed for court. But it proves the point of the bureau's critics. Where is the oversight if the president has little control over the leadership of an executive branch agency? The Constitution is built upon a system of checks and balances designed to limit the potential abuse of power. A federal agency with unchecked authority under the leadership of a one-man regulatory czar operating with minimal oversight poses a number of troubling constitutional issues — and Mr. Cordray's last-minute power grab proves it.