



Appeals court upholds U.S. consumer watchdog bureau's independence

Kevin McCoy and Richard Wolf

January 31, 2018

A federal appeals court Wednesday ruled that the structure of the U.S. Consumer Financial Protection Bureau is constitutional, dealing a legal defeat to many Republicans and business groups that say the watchdog is too powerful.

The much-watched decision by the U.S. Court of Appeals for the District of Columbia Circuit said the bureau's leadership by a single director who can only be removed by the president for good cause did not violate legal boundaries.

The 7-3 ruling, largely along partisan lines, drew praise from consumer advocates, criticism from business groups and could prompt a Trump administration appeal to the U.S. Supreme Court.

"Nothing about the CFPB stands out to give us pause that it — distinct from other financial regulators or independent agencies more generally — is constitutionally defective," Judge Cornelia Pillard wrote in the majority opinion.

"History teaches that financial regulators are exemplars of appropriate and necessary independence," added Pillard, one of four judges named to the powerful court by President Barack Obama. "Congress's decision to afford removal protection to the CFPB Director puts the agency squarely within the bounds of that precedent and history, fully consonant with the Constitution."

The structure of the consumer bureau has been a target of political debate virtually from the day it was created under the Dodd-Frank Wall Street reforms enacted a decade ago after the national financial crisis. It has undertaken dozens of enforcement actions against banks, credit card issuers, payday lenders and other business groups that allegedly wronged American consumers.

Unlike other federal regulators, the bureau is led by a single director appointed by the president and only removable for wrongdoing. The watchdog also receives its funding directly from the Federal Reserve, bypassing congressional oversight of its budget.

Many Democrats have argued that the bureau requires independence to guard against attacks by politically influential business interests that may harm consumers. However, business organizations and many Republicans have contended that the bureau has too much regulatory power and has often overstepped its authority.

In an October 2016 decision, a three-judge panel of the appeals court ruled that the bureau's structure violated the Constitution. However, the full court agreed to weigh the appeal that the consumer bureau filed that November, before President Trump took office. That action set the legal stage for Wednesday's decision.

"Congress's decision to provide the CFPB Director a degree of insulation reflects its permissible judgment that civil regulation of consumer financial protection should be kept one step removed from political winds and presidential will," the majority opinion concluded. "We have no warrant here to invalidate such a time-tested course."

However, other appeals court judges disagreed with the majority opinion in lengthy written dissents.

"Consent of the governed is a sham if an administrative agency, by design, does not meaningfully answer for its policies to either of the elected branches," wrote Judge Karen Henderson, an appointee of President George H.W. Bush.

Separately, Judge Brett Kavanaugh, appointed by President George W. Bush, argued that "the independent agencies collectively constitute, in effect, a headless fourth branch of the U.S. Government" and "hold enormous power over the economic and social life of the United States."

Trump appointed Mick Mulvaney to lead the agency shortly after the outgoing director appointed his own successor. Video provided by Newsy Newslook

In an emailed statement, the consumer bureau said it was "analyzing the decision."

The watchdog's acting director is Mick Mulvaney, a longtime critic of the consumer bureau who was appointed by Trump late last year. His appointment came as Richard Cordray, the Obama appointee who had led the consumer bureau, resigned and tried to stage-manage an automatic elevation of Leandra English, the outgoing director's deputy.

English is currently challenging Mulvaney's appointment in federal court.

Wednesday's decision drew swift reactions from organizations on both sides of the constitutionality question.

Brianne Gorod, chief counsel for the liberal Constitutional Accountability Center, characterized the decision as a "slam dunk" for the consumer bureau.

"Members of Congress believed, and still believe, that it is critical to the mission of the CFPB that it remain independent of the President, so it can act promptly and decisively in response to new threats to consumers," Gorod said in a formal statement. "The D.C. Circuit today made it clear: that leadership structure is constitutional, and arguments to the contrary are wholly without merit."

The Chamber of Commerce, the largest lobbying group in Washington by far, has filed a lawsuit against the Consumer Financial Protection Bureau to stop customers from filing class action lawsuits. Jose Sepulveda (@josesepulvedatv) has more. Buzz60

While acknowledging the court's decision, Richard Hunt, CEO and president of the Consumer Bankers Association, said the ruling doesn't mean the consumer bureau's structure is good for the regulator's long-term credibility.

"Congress should create a bipartisan commission at the CFPB, in place of a sole director, to uphold the Bureau's mission of consumer protection," Hunt said in a formal statement. Such a structure change, he said, "would establish transparency, diversity of thought, additional industry insight, and rule-makings beneficial to consumers, the industry, and the economy."

Ilya Shapiro, a senior fellow in constitutional studies at the libertarian Cato Institute, urged the Supreme Court to take up the case "and find that the Constitution cannot countenance this fifth branch of government."