



Insight

A Look at CFPB's "Unconstitutional" Actions

SAM BATKINS | OCTOBER 18, 2016

This week, the U.S. Court of Appeals for the District of Columbia, regarded as the second-highest court in the nation, ruled that the Consumer Financial Protection Bureau (CFPB) is unconstitutional. Specifically, the Court noted, "We therefore hold that the CFPB is unconstitutionally structured." What does this mean for the agency and Director Richard Cordray? Based on American Action Forum (AAF) research, he has presided over more than \$2.6 billion in regulatory costs during his official, Senate-confirmed tenure, and more than 8 million paperwork burden hours.

Critics of CFPB have long-argued that funding the agency through the Federal Reserve, instead of Congressional appropriations, and appointing a single individual to lead an independent commission, raised constitutional concerns. For example, the SEC, FCC, FTC, and Federal Reserve are all staffed with a commission made up of several members, rather than a single individual, the latter of which is a hallmark of a cabinet agency. After the recent court ruling, the president will have the power to remove the CFPB Director at will, so the court has restructured it, "as an executive agency akin to other executive agencies headed by a single person, such as the Department of Justice." The agency has a history of [regulating faster](#) than cabinet agencies, so it remains to be seen if this ruling will check the speed of rulemaking or the thoroughness of benefit-cost analysis.

Strangely, this is not the first time a court has moved to check actions at CFPB. In [NLRB v. Noel Canning](#), the Supreme Court held that when President Obama made recess appointments [to the NLRB](#) and for Richard Cordray to lead CFPB, he did so when the Senate was not in recess. The actions of the NLRB were voided, but because the Senate later reached an agreement to confirm Cordray, the practical implications of his unconstitutional appointment were moot. It can be said Cordray was unconstitutionally appointed to an unconstitutional role at CFPB.

How did this arguably unconstitutional bureau regulate during its brief existence?

According to AAF's [RegRodeo](#), CFPB has cumulatively imposed **\$2.8 billion** in costs, with more than 16.9 million paperwork hours. However, as an independent agency, it was not required to conduct comprehensive regulatory impact analyses. All of these totals aren't attributable to Director Cordray, as he was not officially confirmed until July of 2013, although he was serving during his recess appointment. Excluding earlier rules yields a total under his tenure of \$2.6 billion, with slightly more than eight million paperwork burden hours.

The two largest rules during his tenure, [Integrated Mortgage Disclosures](#) and [Home Mortgage Disclosure](#), represent the vast majority of the regulatory burdens under the tenure of Director Cordray, roughly the entire \$2.6 billion. The ruling didn't specifically address these two regulations, but previous actions could be the subject of legal battles, especially considering there are many who believe the existence of CFPB, not just the position and power of the Director, is unconstitutional.

Part of the problem of quantifying the impact of the current director's tenure is the lack of rules with monetized regulatory impact analyses and the vast power of the agency, beyond formal regulation. For example, the \$2.6 billion figure doesn't incorporate the fines levied, [guidance documents](#), and letters to companies that might result in unfunded mandates on states or private entities.

Conclusion

For the second time during the current director's tenure, courts have found constitutional issues with the CFPB's structure. This unprecedented legal rebuke raises questions about past actions at the agency and the future of what could soon be a cabinet-level agency. With \$2.6 billion in costs and more than eight million paperwork hours, how high will these figures climb if the White House imposes formal benefit-cost analyses on CFPB? Will the agency's funding stream need to change? It's clear that \$2.6 billion only scratches the surface of Director Cordray's regulatory tally, and without substantive changes, this figure will likely increase.