



The Daily Dish

The CFPB Meets the Constitution

DOUGLAS HOLTZ-EAKIN, PATRICK HEFFLINGER | OCTOBER 12, 2016

[According to a new survey released on Tuesday](#) small business owners remain optimistic about economic growth but are facing headwinds. The survey found small business owners are struggling with hard-to-fill job openings and weak inventories. According to the National Federation of Independent Business (NFIB), small business owners are hesitant to hire and build their inventories because of political uncertainty.

[Last week the American Action Forum \(AAF\)](#) released new research examining the administration's issuance of unfunded mandates. AAF found the Obama administration has issued 101 unfunded mandates on states, local governments, and businesses. An unfunded mandate is a regulation without explicit Congressional consent or adequate funding. According to the research, the 101 unfunded mandates issued by the administration impose a regulatory burden of \$596 billion in net present value costs and 101 million paperwork hours.

Eakinomics: The CFPB Meets the Constitution

The Consumer Financial Protection Bureau (CFPB) was created by the Dodd-Frank Wall Street Reform Act — the president's signature financial regulation bill. From the outset, it has been an “unusual” entity. To begin, it was never obvious why consumers needed another agency to protect its economic interests. After all, isn't that what the [Federal Trade Commission](#) and DOJ's Antitrust Division are all about? Second, it was deliberately placed “off-budget”. That is, it is financed by the trading earnings of the Federal Reserve System and is, thus, not subject to the constraints imposed by the annual appropriations process. Finally, all of the powers of the agency are formally vested in a single individual, the Director, and not in a commission or board with a chair and other members. Moreover, the Director can only be removed by the president, and only with cause. He or she is a highly insulated autocrat.

Until yesterday, that is, when the U.S. Court of Appeals for the District of Columbia Circuit ruled that the CFPB violated the Constitution's separation of powers because the Director isn't answerable to the president. The Wall Street Journal [reported](#) “In light of the consistent historical practice under which independent agencies have been headed by multiple commissioners or board members, and in light of the threat to individual liberty posed by a single-Director independent agency....We therefore hold that the CFPB is unconstitutionally structured,” the court said. The ruling, written by Judge Brett Kavanaugh, allowed the CFPB to continue operating as an agency, but ordered a restructuring of how it operates in the executive branch. “The CFPB therefore will continue to operate and to perform its many duties, but will do so as an executive agency akin to other executive agencies headed by a single person, such as the Department of Justice and the Department of the Treasury,” the court said.”

This is likely only the beginning of transformation at the CFPB, which has drawn ire for _ its [rapidly expanding reach](#) and history of [unintended consequences](#). Ultimately, it must be transformed into a fair and effective regulator that is funded by Congress, subject to effective Congressional oversight, and treated on a level playing field with other federal cabinet or independent agencies.