

# Yes, Mulvaney's strategic plan would shackle CFPB – as it should

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Acting Consumer Financial Protection Bureau Director Mick Mulvaney's proposal to subject every new CFPB rule to congressional approval would be "dangerous," according to [recent commentary](#) by Rob Blackwell, American Banker's editor-in-chief.

The piece contends that Congress doesn't have the expertise or bandwidth to adequately review the agency's every rulemaking.

But it's dangerous and contrary to America's three-party constitutional system for the people's body, Congress, not to make policy.

Mulvaney's proposal that Congress should sign off on CFPB's major rules would help restore an appropriate balance of powers.

As George Washington law professor Jonathan Turley [has warned](#), "our carefully constructed system of checks and balances is being negated by the rise of a fourth branch, an administrative state of sprawling departments and agencies that govern with increasing autonomy and decreasing transparency."

These concerns are embodied by the CFPB, which by design has enormous autonomy as well as significant enforcement, de facto lawmaking and adjudicative powers.

Moreover, Philip Hamburger, a professor of law at Columbia University, argues that administrative law is [fundamentally at odds](#) with eight centuries of Anglo-American conceptions of law. Rules can only have the obligation of law if they come from the constitutionally established legislature.

To be sure, Congress has willingly delegated vast legislative powers to the unelected administrative state, shirking its constitutional duty. There is, however, purpose in Congress' dereliction. It can claim credit for enacting high-minded law purportedly protecting consumers against a greedy financial service industry and making the financial system safer, while outsourcing messy and often controversial lawmaking to unelected, unaccountable and often highly partisan, regulators.

In vesting vast power in the CFPB, which is insulated from institutional political checks, the architects of the Dodd-Frank Act assumed their ideological kin would continue to control the administrative state, regardless of who controlled the White House or Capitol Hill.

Hamburger has argued that Congress can reclaim its legislative power by converting rules to statutes, agency by agency. Mulvaney's proposal would be a good start for doing so at the CFPB.

The plan would require Congress to affirmatively approve the bureau's proposed rules — a masterful attempt to force the legislature to reassert its

role as policymaker and limit the agency to enforcement. Nonetheless, it could still harness the purported regulatory experts to draft the detail.

Blackwell worries Mulvaney's proposal would "shackle" the bureau. But that's a feature, not a bug. All administrative agencies should be shackled to enforcing the law, nothing more, nothing less.

The agency's proposals have been controversial, and while administrative-state masterminds likely can more efficiently sort out policy issues, that's not America's system. Policy controversies are most appropriately resolved by the politically accountable legislature, not by unelected regulatory bureaucrats. In fact, the more controversial the issue, the more important it is that Congress, not apolitical regulators, attempt to resolve it.

Blackwell also warns that a "hyperpartisan" and "distracted" Congress isn't fit to resolve complex problems "better handled by regulators on the ground." But partisanship isn't bad. In fact, momentous issues inspire partisanship, and it's Congress' job to resolve those fights. It's the task of regulators to implement the legislature's solutions.

In addition, Blackwell notes that Congress after the fact can review regulations under the Congressional Review Act. That's all well and good, but it shifts the burden. Congress has to act to prevent something rather than to act for something to occur. That's a huge difference.

Blackwell charitably characterizes former CFPB Director Cordray's rank lawlessness as pushing "the limits of his power." Yet in truth, Cordray's flagrant flouting of the express text of the law and his pernicious rulemaking

by enforcement was a forceful reminder the bureau needs to be shackled. While Congress is guilty of enabling a lawless administrative state, the courts have cut administrative agencies enormous slack.

Rolling back an absolutist administrative state to make it the law's servant rather than its overlord is vital for the health of the financial services industry and the country. Mulvaney's proposal to make the bureau's rules subject to congressional approval would be a step in the right direction.

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