A BUREAU IN DISTRESS

JONATHAN FOXX*

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Once again, I find myself having to defend the rule of law over the rule of profligate politics. Again, my concern involves the Consumer Financial Protection Bureau ("CFPB" or "Bureau"). (For instance, previously, I provided magazine articles, White Papers, and posts in defense of the CFPB's Arbitration Rule, which endeavored to preserve consumers' access to class action litigation.[1])

I stand by this guiding principle:

> What is good for the consumer is good for the merchant. No amount of dissimulation or convoluted reasoning should be given credence with respect to ascertaining the consumer's fundamental, constitutional right to the pursuit of happiness in a symmetric marketplace.

On Sunday evening (11.26.17), Leandra English, the CFPB's Deputy Director, sued Donald Trump,[2] the President, from replacing her as Acting Director with Mick Mulvaney, who is the Director of the White House Office of Management and Budget. English, a CFPB official with an impeccable background, filed the case in her capacity as a private citizen. Her suit names both Trump and Mulvaney as defendants.

English was named Acting Director on Friday, shortly before Director Richard Cordray resigned his position, effective at midnight on November 24, 2017.[3] At approximately 2:30PM-EST on November 24, 2017, before leaving office, Director Cordray publicly announced that he had appointed Leandra English, who was the Bureau's Chief of Staff, as the Bureau's Acting Director, to ensure that she would become the Acting Director until the confirmation by the Senate of a new Director is appointed by the President.[4]

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* Jonathan Foxx, PhD, MBA is the Chairman and Managing Director of Lenders Compliance Group®

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Her lawsuit asks the federal court in Washington to prevent Trump from installing Mulvaney as the Bureau's Acting Director. If Mulvaney keeps his current job and yet obtains this appointment, his role as Acting Director of the CFPB would entitle him to also sit on the board of the Federal Deposit Insurance Corp. as well as the Financial Stability Oversight Council, a panel of regulators created by Dodd-Frank. Such a configuration of responsibilities may cause a conflict of interest.

Mulvaney has never previously served in any capacity in a consumer-protection enforcement or financial or banking regulatory agency at the state, federal, or local level. Indeed, he has described the CFPB as a "sad, sick joke," and co-sponsored legislation proposing to eliminate the agency. At a hearing in the House of Representatives, Mulvaney said, "I don't like the fact that CFPB exists, I'll be perfectly honest with you." How does this individual's background and philosophy square with the notion that the consumer should have an advocacy agency that is not beholden to financial interests?

Compare the foregoing credentials to those of English. She has served as the CFPB's Chief of Staff as well as several senior leadership roles at the CFPB, including Deputy Chief Operating Officer, Acting Chief of Staff, and Deputy Chief of Staff. Outside of the CFPB, English served as the Principal Deputy Chief of Staff at the Office of Personnel Management, the Chief of Staff and Senior Advisor to the Deputy Director for Management at the White House Office of Management and Budget, and as a member of the CFPB Implementation Team at the U.S. Department of the Treasury.

As a consumer, which of these individuals would you want to be your advocate?

I should like to point out that there has never been a consumer advocacy agency at the federal level quite like the CFPB. There have been dozens of agencies that provide regulatory support, supervision, examination and enforcement of entities providing financial services. However, there simply has not been an agency devoted to the consumer to provide a means to redress financial wrong-doing on the part of financial institutions. Until the CFPB was established, consumers had virtually no place at the table! We know that the CFPB has been effective because it has succeeded in its investigations of companies that have evinced inappropriate, illegal, and unethical behavior. We know the CFPB has been effective because its enforcement actions have returned $12 billion to 29 million Americans. It has succeeded in defending the consumer, even while its very existence has been under attack right from its inception!

I have carefully studied the legislation and the history involving the formation of the Bureau. Over the years, my firm has spent countless hours working with our clients in preparing for CFPB examinations and guiding them through the labyrinth of enumerated authorities that were transferred to the CFPB. I have written extensively about the Bureau and called it out when I felt there was overreaching or attempting to promulgate rules through enforcement. But at no time did I believe the CFPB was acting capriciously. Never did I take the position that its actions were arbitrary, careless, unpredictable, or wayward. I viewed the Bureau as a beacon of light for the consumer in an asymmetrical market where the consumer often does not have the advantage. I did not lose sight of the fact that only a few scant years ago many consumers were badly damaged financially by the egregious actions of banks and nonbanks. I did not forget that the consumers were being blamed for the financial carnage of those years. Blaming the victims

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of financial shenanigans is not the way to ensure a vibrant market in which, one way or the other, each and every one of us participates.

It is important to disentangle the threads of this knotted challenge facing the CFPB today. In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act,[5] which created the Bureau and established it as "an independent bureau" located in the Federal Reserve System.[6] The establishing of the Bureau was a crucial response to the 2008 financial crisis, with the CFPB becoming the very first federal agency with the sole goal of protecting consumers of the U.S. financial services industry. Given the political suasion that could compromise this agency, Congress took pains to ensure that the new agency would be independent enough to resist capture by powerful financial interests and fulfill its critical responsibilities to American consumers. "Regulatory capture" has been one of the formidable weaknesses of the capitalist enterprise in the United States.

The CFPB was designed to be led and managed by a single Director, "who shall serve as the head of the Bureau."[7] The Director is appointed to serve a five-year term. That appointment is made by the "President, by and with the advice and consent of the Senate."[8] To ensure and preserve the Bureau's independence, Congress specified that the Director would not serve at the pleasure of the President and could instead be removed only for cause, to wit, the President would be lawfully permitted to remove the Director for "inefficiency, neglect of duty, or malfeasance in office".[9]

Indeed, so important was the need for this agency's independence from the politicians' demands, that, as an additional measure of independence, Congress ensured that the President could not circumvent the need for Senate confirmation by naming a temporary replacement for a Director who leaves before the expiration of his or her term. Instead, Congress provided that the Bureau's Deputy Director, who is "appointed by the Director," shall "serve as acting Director in the **absence or unavailability** of the Director."[10] (My emphasis.)

Keep the words "absence or unavailability" in mind, for these words are twisted by the Administration and the Office of Legal Counsel to mean something that the applicable legislation and its legislative history most certainly did not mean.

The designation of the Deputy Director as the "Acting Director" reflected Congress's deliberate choice to *depart from the default procedure* for naming an acting official under the Federal Vacancies Reform Act of 1988 ("FVRA" or "Vacancies Act"). An early version of the Act that passed the House of Representatives in December 2009 did not provide for a Deputy Director; instead, it explicitly stated that a temporary replacement for a Director would be chosen "in the manner provided by" the FVRA.[11] But the Senate bill introduced and passed months later contained the present statutory language.[12] The Vacancies Act, by its own terms, does not control where, as with the Dodd- Frank Act, "a statutory provision expressly . . . designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity."[13]

Nevertheless, on Saturday (11.25.17), the Department of Justice's Office of Legal Counsel released a Memorandum ("Memorandum") providing legal arguments in support of Mulvaney's appointment. The

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Memorandum acknowledges that the statutory scheme of the CFPB provides that the Deputy Director shall become the Acting Director when there is a vacancy in the position of the Director. But even though that is admitted to be the case, the Memorandum also claims that the President may still choose to appoint someone from outside the agency to take the position of Acting Director as provided in the Vacancies Act.[14] Put otherwise, the President apparently believes that he has authority to appoint Mr. Mulvaney under the FVRA.[15]

There are serious flaws in the OLC's position. The Vacancies Act, by its own terms, *does not apply* where another statute "expressly . . . designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity,"[16] which is exactly what the Dodd-Frank Act does! The President's interpretation of the FVRA, relying as it does on the Memorandum, actually runs contrary to Dodd-Frank's later-enacted, more specific, and statutorily mandated text. Thus, the President's stance does not conduce to the relevant legislative history.

In the earlier version of the Dodd-Frank Act, the President would have been allowed specifically to use the Vacancies Act to temporarily fill the office, but <u>that version was eliminated and replaced with the current language</u> designating the Deputy Director as the Acting Director. This was obviously and ostensibly done in order to shield the CFPB's leadership from tampering with the Bureau's independence by politicians and financial interests who would inure it to "regulatory capture," notwithstanding the fact that the President is actually attempting to appoint a still-serving White House staffer to displace the acting head of this independent agency, a classic run-around that rebuffs the overall statutory design and independence of the Bureau.

Let's take a look at the thorny language of "absence or unavailability." It seems clear as day that English has a clear legal entitlement to the position of Acting Director of the CFPB. At the moment that Director Cordray's resignation became effective, she became the Bureau's Acting Director, a position created by Congress via the Dodd-Frank Act.[17] The statutory provision creating the position states, in mandatory language, that the Deputy Director "shall . . . serve as acting Director in the **absence or unavailability** of the Director."[18] (My emphasis.) Under a plain reading of this language, the Deputy Director <u>automatically</u> becomes the Acting Director when the Director leaves office, that is, when a Director who no longer serves in office is "absent" or is "unavailable."

Thus, when a Director resigns, the Deputy Director serves as Acting Director, insofar as the Director is now "absent" and "unavailable." In fulfilling the statutory requirements set forth in the subject legislation, when Cordray resigned, his appointment of English as Acting Director became immediate. Any intervention or contravention by the President to appoint Mulvaney as Acting Director is in fact unlawful. It is then indisputable that the President's use of the Vacancies Act to appoint an Acting Director of the CFPB would be an obvious contravention of Congress's statutory framework. It is a well-settled feature of statutory interpretation that, where two statutes conflict, the later-enacted, more specific statute prevails – and Dodd-Frank controls, being the later-enacted statute.

In effect, the President is arguing, based on the Memorandum, that the Vacancies Act may be used in lieu of or as an alternative to the Dodd-Frank Act, with respect to the appointment of the Acting Director. But

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the problem with the Memorandum's analysis is that such reasoning contradicts the part of the legislative history cited therein. Indeed, a Senate Report on the FVRA made abundantly clear that existing statutes are treated differently than future statutes under the FVRA. For existing statutes, the FVRA is an alternative to the succession mechanism detailed in the statute. The Senate Report, however, specifically mentions this for the Attorney General, the OMB, and the NLRB General Counsel positions. Congress was of course able to do this because a later statute can always override an earlier one.

Yet, for future statutes, the FVRA is either exclusive or is not applicable. As the Senate Report notes: "where Congress provides that a statutory provision expressly provides that it supersedes the Vacancies Reform Act, the other statute will govern. But statutes enacted in the future purporting to or argued to be construed to govern the temporary filling of offices covered by this statute are not to be effective unless they expressly provide that they are superseding the Vacancies Reform Act."[19]

According to Adam Levitin, Professor of Law at Georgetown Law, who specializes in bankruptcy, commercial law, and financial regulation, this would have to be the case because one Congress cannot tie the hands of a future Congress. Professor Levitin states:

> "At most they can set up a default rule, but Congress if [it] passed a law providing that one statute would always provide an alternative method of appointment no matter what any future Congress wanted to do, a future Congress would not have to repeal such a statute to avoid its application to a new office, only make clear that it did not apply to the new office. In other words, the different treatment of existing and future statutes makes a lot of sense. The CFPB is, of course, under a future statute, unlike all of the cases the OLC has addressed in the past. That would suggest that **the OLC's past opinions, on which it heavily relied in this opinion, were of limited value**. Yet strangely the above quoted language received no mention in the OLC opinion."[20] (My emphasis.)

Indeed, Professor Levitin offers this poignant observation:

> "… even if the FVRA were to stand as an alternative, what says that it is the President's choice? That assumption is not consistent with section 3347(1)(A), which contemplates statutes that authorize either "a court, or the head of an Executive department, to designate an officer or employee" to serve as the acting official temporarily. Such a delegation of authority to a court or a head of an Executive department would be meaningless if the President had the ability to override it by invoking the FVRA as an alternative. Thus, **it's hard to see how the FVRA could be an alternative method of succession that is always available to the President**."[21] (My emphasis.)

In reading the Memorandum, one gets the impression that insufficient research was conducted, and the legislative history was not clearly followed or understood. The impression given is a strained reading of the history in the enactment of the Dodd-Frank Act. It's almost as if the DOJ was told to find ways to justify the firing of Cordray and, since he resigned instead, find ways to fire his statutorily mandated successor!

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But in a situation now where the plain meaning and legislative history of a statute loses its way, the Memorandum, while acknowledging that Dodd-Frank had set up a method for putting an Acting Director in place, nevertheless determined that the FVRA operated alongside Dodd-Frank.

Having made such determination, the Memorandum found that the President's authority outweighs that of any mechanism set up by the Dodd-Frank Act.

To quote the Memorandum, signed by Assistant Attorney General Steven A. Engel:

> "… as with other office-specific statutes, when the president designates an individual under the Vacancies Reform Act outside the ordinary order of succession, the president's designation necessarily controls. Otherwise, the Vacancies Reform Act would not remain available as an actual alternative in instances where the office-specific statute identified an order of succession, contrary to Congress's stated intent."[22]

As if that was not enough posturing, this flimsy argument was even backed up by none other than the CFPB's own general counsel in a separate Saturday memo, where Mary McLeod, the Bureau's General Counsel, said that she found the OLC's argument that the FVRA should hold sway "on point and persuasive," and that it answers the question of whether Mulvaney should be seen as the rightful Acting Director of the CFPB. To this conclusion she added, "This confirms my oral advice to the Senior Leadership Team that the answer is 'yes.' I advise all bureau personnel to act consistently with the understanding that Director Mulvaney is the acting director of the CFPB." [23]

In seeking declaratory judgement, English rejects that argument, claiming instead that the President could not appoint the leader of an executive branch agency who retains his title as OMB director to lead the CFPB, which is an independent agency. As mentioned above, in his role as acting CFPB director, Mulvaney would also sit on the board of the Federal Deposit Insurance Corp. as well as the Financial Stability Oversight Council.

As English states in her lawsuit:

> "The president may not, consistent with the statutory requirement of independence, install a still-serving White House staffer as the acting head of an independent agency - particularly when doing so would displace an acting head who has a clear legal entitlement to the position."

Meanwhile, as we go to press, Mulvaney has shown up today at the Bureau's offices to be the Acting Director. His first act was to send out an email to the Bureau's staff requiring them to ignore all communications from the other Acting Director:

> "It has come to my attention that Ms. English has reached out to many of you this morning via email in an attempt to exercise certain duties of the Acting Director. This is unfortunate but, in the atmosphere of the day, probably not unexpected. … Please disregard any instructions you

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> receive from Ms. English in her presumed capacity as acting director. … I apologize for this being the very first thing you hear from me. However, under the circumstances I suppose it is necessary. If you're at 1700 G Street today, please stop by the fourth floor to say hello and grab a doughnut."[24]

The case has not yet been assigned to a judge at the D.C. District Court, so English's bid to block Mulvaney's appointment would not have been heard before CFPB's doors opened this morning.

Given Mulvaney's avowed wish to dismantle the CFPB, one wonders if we will ever again hear about the Bureau obtaining $100 million in fines against Wells Fargo for secretly opening unauthorized accounts and funding them with money transferred out of authorized consumer accounts. Or if the CFPB will ever again order Citibank to pay $3.75 million back to customers, as well as a $2.75 million civil money penalty, after misleading student loan borrowers about eligible tax deductions and erroneously charging them late fees.

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[1] See Lenders Compliance Group / Articles at http://lenderscompliancegroup.com; and Mortgage Compliance Forum at https://mortgagecomplianceforum.blogspot.com; among other venues
[2] English v. Trump, case number 1:17-cv-02534, in the U.S. District Court for the District of Columbia.
[3] Cordray resigned his position as Director of the CFPB, effective at midnight, 11.24.17
[4] 12 U.S.C. § 5491(b)(5)
[5] Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010)
[6] 12 U.S.C. § 5491(a)
[7] 12 U.S.C. § 5491(b)(1)
[8] 12 U.S.C. § 5491(b)(2)
[9] 12 U.S.C. § 5491(c)(3)
[10] 12 U.S.C. § 5491(b)(5)
[11] H.R. 4173, 111th Cong. § 4102(b)(6)(B)(1) (Dec. 11, 2009)
[12] S. 3217, 111th Cong. § 1011(b)(5)(B) (2010)
[13] 5 U.S.C. § 3347(a)(1)(B)
[14] Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345–3349d
[15] Idem, 5 U.S.C. § 3345(a)(2)
[16] 5 U.S.C. § 3347(a)(1)(B)
[17] 12 U.S.C. § 5491(b)
[18] Idem, § 5491(b)(5)(B).
[19] S. Rep. 105-250, 1998 WL 404532 at 15
[20] Levitin, Adam, *OLC Legal Opinion and the Missing Legislative History*, Credit Slips, http://www.creditslips.org/creditslips/2017/11/olc-legal-opinion-and-the-missing-legislative-history.html
[21] Levitin, Adam, *Legal Malarkey from the White House about the CFPB Putsch,* Credit Slips, http://www.creditslips.org/creditslips/2017/11/legal-malarkey-from-the-white-house-about-the-cfpb-putsch.html
[22] *Memorandum for Donald F. McGahn II, Counsel to the President, Re: Designating an Acting Director of the Bureau of Consumer Financial Protection*, Steven, A. Engel, Assistant Attorney General, November 25, 2017
[23] McLeod, Mary E., Subject: *Acting Director of the CFPB*, Memorandum to: The Senior Leadership Team, CFPB, FROM: Mary E. McLeod, General Counsel, November 25, 2017
[24] Merle, Renae, *At the CFPB, two acting directors show up to take command; one brings doughnuts, the other well-wishes*, The Washington Post, https://www.washingtonpost.com/news/business/wp/2017/11/27/at-the-cfpb-two-acting-directors-show-up-to-take-command-one-brings-doughnuts-the-other-well-wishes/?utm_term=.d1ec89ddc27c

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