

# CFPB Leadership Dispute: Impacts and Next Steps

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A dramatic legal fight over interim leadership of the Consumer Financial Protection Bureau (CFPB or Bureau) saw its first round end November 28, 2017, when a federal judge denied a motion for a temporary restraining order (TRO) requested by the CFPB's recently appointed Deputy Director, Leandra English. In her motion, English relied on Section 1011 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) to assert that, as Deputy Director, she—and not President Trump's interim appointee for the position, Mick Mulvaney—is the Bureau's Acting Director. The US government opposed English's motion, asserting that Mulvaney was duly appointed under the Federal Vacancies Reform Act of 1998 (Vacancies Act). English's motion is part of a larger suit in which she seeks injunctive and declaratory relief against the President and Mulvaney. Although the dispute has generally been characterized as a political power struggle, it also has potentially significant policy implications, especially for those institutions with matters pending currently before the Bureau.

Since Friday, November 24, 2017, both English and Mulvaney have purported to be the CFPB's Acting Director. The CFPB's website currently identifies Mulvaney as Acting Director, and he is now working from the CFPB Director's office and has announced a slate of changes to the agency's agenda. Meanwhile, English has e-mailed CFPB staff and met with Democratic Senators on Capitol Hill to bolster her position. Notably, the CFPB is not a plaintiff in the case.<sup>1</sup> Rather, English, in her personal capacity, is the sole plaintiff. She is expected to continue to challenge Mulvaney's claim to the Acting Directorship and could do so in a few ways, all with a view towards appeal to the DC Circuit Court of Appeals (DC Circuit), including:

- **Continuing to press the complaint, and then appeal.** The next phase would entail the Administration filing motions to dismiss for a number of possible reasons, including lack of jurisdiction and failure to state a claim.<sup>2</sup> English's counsel has indicated that she would attempt to appeal these, which would allow *de novo* review by the DC Circuit.
- **Seeking interlocutory appeal of the TRO or a preliminary injunction.** Appellate courts rarely permit appeals of TROs, and only do so in extraordinary circumstances. English has not yet moved for a preliminary injunction, a decision on which would be more readily appealable. And the judge has stated that, if she does so, he would expect more thorough briefings and further hearings on all the issues concerning such a motion, including Constitutional issues raised in enjoining the President of the United States. On appeal, both would be reviewed for abuse of discretion.

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Notwithstanding the potential, short-term impact of this dispute, the case will become largely irrelevant when President Trump appoints, and the Senate confirms, a new, permanent CFPB Director. Assuming Mulvaney remains in place as the Acting Director, which seems likely, a newly appointed and confirmed CFPB Director could ratify Mulvaney's actions as Acting Director, even if Mulvaney's interim appointment is determined to be unlawful.

Perhaps the most significant impact of this dispute is that it appears to have renewed and energized discussion in Congress about CFPB reform, including replacing the single director structure with a bipartisan commission. This alert discusses the history and likely next steps in the *English* case, as well as its key policy and practical implications.

## Background

The Acting Director controversy has emerged against a backdrop of increasing uncertainty concerning the CFPB's policy agenda, its role as a regulator and supervisor, as well as its single director structure, which, perhaps ironically, was championed by its supporters as a way to minimize political pressures and avoid politicizing the agency's mission. No matter the outcome of *English v. Trump*, President Trump will ultimately appoint a permanent Director who is expected to significantly depart from the former CFPB Director Richard Cordray's approach and agenda. This, of course, highlights the impact on, and potential vulnerability to agency stability of a structure that appears to eschew debate and deliberation among various policy viewpoints in favor of directed action.

### How did we get here?

On November 15, 2017, former CFPB Director Richard Cordray announced that he would resign by the end of the month.<sup>3</sup> On November 24, Cordray announced that instead he would resign at the end of the day and was naming English, his chief of staff,<sup>4</sup> as his Deputy Director so that she could succeed him as Acting Director under Section 1011 of the Dodd-Frank Act.<sup>5</sup> Later that day, President Trump announced that he was appointing Mulvaney to serve as the CFPB Acting Director pursuant to the Vacancies Act.<sup>6</sup>

Timeline	
11/15	<ul style="list-style-type: none"> <li>CFPB Director Cordray announces resignation (effective Nov. 30 2017)</li> </ul>
11/24	<ul style="list-style-type: none"> <li>Cordray promotes chief of staff Leandra English to Deputy Director, stating she will become Acting Director upon his resignation</li> <li>President Trump announces that OMB Director Mick Mulvaney will serve as Acting Director</li> </ul>
11/25	<ul style="list-style-type: none"> <li>DOJ releases a memorandum supporting the President</li> <li>CFPB General Counsel issues a memorandum in support of the President's position and the DOJ memorandum</li> </ul>
11/26	<ul style="list-style-type: none"> <li>English sues Mulvaney and President Trump, seeking an emergency TRO, an injunction, and declaratory relief</li> </ul>
11/27	<ul style="list-style-type: none"> <li>Mulvaney assumes control as CFPB Acting Director</li> <li>English arrives at the CFPB and sends an e-mail to CFPB employees as Acting Director (does not issue any directive to staff), and then holds meetings on Capitol Hill</li> <li>Mulvaney directs employees to disregard any instructions from English and to direct correspondence from her to the CFPB General Counsel</li> <li>Mulvaney announces a 30-day freeze on CFPB hiring, rulemaking, regulations, guidance and payments from the civil penalties fund pending his transitional review</li> <li>English's case is assigned Monday afternoon to Judge Timothy Kelly and a hearing is held at 4:30 PM</li> <li>The government submits its motion opposing the TRO</li> </ul>
11/28	<ul style="list-style-type: none"> <li>Sen. Crapo (R-ID) writes to Mulvaney as CFPB Acting Director asking for an update on his priorities as Acting Director and how the CFPB can be reformed</li> <li>Judge Kelly denies English's request for a TRO</li> </ul>

## The Administration's position

In support of Mulvaney's appointment, the Administration relies on established DOJ interpretations concerning how the Vacancies Act interacts with other statutes that provide for interim successions at executive agencies.<sup>7</sup> The DOJ views the Vacancies Act as the "exclusive" means to fill a top vacancy on an interim basis, *unless* another statute, like the Dodd-Frank Act, provides another mechanism. According to the DOJ, where the Vacancies Act is not the *exclusive* means to fill an "acting" agency position, it is still a valid means to appoint an interim successor at an Executive agency.<sup>8</sup> Accordingly, the Administration argues that the Vacancies Act provides additional methods (*i.e.*, beyond the Dodd-Frank Act) for the President to appoint the CFPB's Acting Director.<sup>9</sup>

Notably, the CFPB's General Counsel, Mary McLeod, who was appointed to her position by former CFPB Director Cordray, reached the same conclusion as the DOJ's interpretation and advised all CFPB personnel "to act consistently with the understanding that ... Mulvaney is the Acting Director."<sup>10</sup>

## English's position

In addition to seeking an emergency TRO (the subject of the judge's November 28 ruling), English seeks injunctive and declaratory relief such that she, as the CFPB's Deputy Director, is statutorily designated to serve as the Bureau's Acting Director, and to preclude Mulvaney and anyone else from currently serving in that capacity until President Trump appoints a new CFPB Director.

English relies on Section 1011 of Dodd-Frank which states that the Deputy Director is "appointed by the Director" and "serve[s] as Acting Director in the absence or unavailability of the Director."<sup>11</sup> Principally, English maintains that Congress created the CFPB as an independent agency, and that this succession provision is consistent with the CFPB's independence in the Dodd-Frank Act, a newer and more specific statute that deviates from the older and more general Vacancies Act.

We note that the pending appeal of the *PHH* case before the DC Circuit may affect the independence of the CFPB and undercut some of English's arguments.<sup>12</sup>

## The judge's ruling

### The judge's ruling only concerned the TRO

The November 28 ruling only concerned English's request for an emergency TRO, the purpose of which is to preserve the status quo and prevent irreparable harm until a hearing can be held.<sup>13</sup> Judge Kelly denied the TRO request.

Judge Kelly's denial was based principally on his view that English was unlikely to prevail on the merits of her case. To this end, Judge Kelly essentially adopted the DOJ's interpretation of the interplay between the Vacancies Act and Dodd-Frank Act (*e.g.*, noting that the CFPB is not among the Vacancies Act's exceptions and that the legislative history is, at best, ambiguous). In addition, Judge Kelly explained that he believes the Vacancies Act is more specific than Section 1011 of the Dodd-Frank Act because the Vacancies Act expressly concerns *vacancies*, whereas Section 1011 only concerns the "absence" and "unavailability" of the CFPB Director, conditions he views as more temporary than a resignation. Judge Kelly added that he wished to construe the statutes so that they could be read consistently with each another, and noted that he saw no statutory reason why Mulvaney could not serve as both OMB Director and CFPB Acting Director.

### English will likely seek to appeal a final ruling as swiftly as possible

Because Judge Kelly denied the TRO, the case now proceeds with English's complaint for injunctive and declaratory relief. However, based on statements made at the November 28 hearing, English is keen to have a final decision that she can appeal to the DC Circuit.

English's counsel has stated that she may continue to press the complaint, which would entail briefings, hearings, and rulings on future motions to dismiss by the government. Assuming the Administration seeks to dismiss on the grounds that English lacks subject-matter jurisdiction, because she lacks standing, and/or for a failure to state a claim, English could then appeal the judge's rulings on such motions.

In addition, she might seek interlocutory appeal of the TRO. English's counsel, however, did not clearly indicate that she intends to pursue this option. Under some extraordinary exceptions, where the grant or

denial of a TRO can have serious or irreparable consequences, a TRO may be appealed.<sup>14</sup> But this case does not appear to present such extraordinary exceptions. Alternatively, English may seek a preliminary injunction. Although English's counsel sought to expedite hearings on a possible motion for preliminary injunction so that they would occur over the next seven to ten days (English would immediately appeal the ruling), Judge Kelly indicated that he expected full briefing and hearings on any such motion, including the Constitutional issues that enjoining the President would entail. As a result, it is not clear that English will pursue this approach either, as it may not be sufficiently expeditious for her.

## Implications going forward

### The implications of English's future appeals and continued litigation

- **Continuing to press the complaint** entails motion practice under Rule 12 of the Federal Rules of Civil Procedure. Such motions are appealable and are reviewed *de novo*,<sup>15</sup> which may be preferable for English, even if this approach may be the most time-consuming. Regardless, the Administration will likely have chosen and confirmed a permanent Director before English could attain meaningful relief.
- **Interlocutory appeal of the TRO or a preliminary injunction.** Appeal of a TRO would likely be denied by the DC Circuit because of its rare use and the extraordinary circumstances required for it. Even if the appeal were granted, TROs are temporary in nature and it is not clear how much time English would gain or what she could do as purported Acting Director during that limited time. A favorable ruling, however, would prevent Mulvaney from functioning as Acting Director. Appealing the TRO might also have the effect of encouraging the DC Circuit to issue its much anticipated *en banc* decision in the *PHH* case.<sup>16</sup> Alternatively, a preliminary injunction would most likely be denied by the judge for the same reasons that the TRO was denied. Because the judge has indicated that he will not expedite the preliminary injunction proceedings, and because TROs and preliminary injunctions are reviewed on appeal only for abuse of discretion, both are suboptimal courses of action for English.

### Official acts under an Acting Director

- **Mulvaney's actions as Acting Director are likely valid or will be ratified as such.** Mulvaney has *de facto* control of the Bureau and even if Section 1011 of the Dodd-Frank Act is held to apply, the future, permanent Director can ratify Mulvaney's acts, as Cordray previously ratified the CFPB actions taken during his tenure as an unlawful recess appointee of President Obama.<sup>17</sup> A mere "rubber-stamp" ratification would likely suffice.<sup>18</sup>

Already, Mulvaney has signaled that the CFPB will be "dramatically different" under his interim leadership.<sup>19</sup> On his first day as purported Acting Director, Mulvaney instituted a 30-day freeze on CFPB hiring, rulemaking, regulations, guidance and payments from the civil penalties fund. He is also reviewing all rules and guidance pending before the CFPB.

- **English's actions as Acting Director are invalid if the Administration prevails; if English prevails, a permanent Director will likely reverse course, assuming English takes any actions.** If English unlawfully serves as Acting Director in violation of the Vacancies Act, all acts she takes in that capacity are void under the Vacancies Act.<sup>20</sup> If, however, English prevails and the Dodd-Frank Act controls, although her acts (and it is not at all clear that she will act) would be valid, eventually President Trump will appoint a permanent Director who can simply undo any such acts, as he or she deems appropriate.

### Other developments to expect

- **Policy shifts and operational changes.** As noted above, Mulvaney, an ardent critic of the CFPB, will undoubtedly scale back the Bureau's rulemaking (e.g., in the areas of debt collection and overdraft) and enforcement activity and roll back guidance (e.g., concerning indirect auto lending). Mulvaney also is likely to re-examine and retool other Bureau policy initiatives, including, among other things, the Bureau's approach to its amicus program and its No-Action Letter policies. Finally, particularly given his dual OMB role, Mulvaney is also widely expected to ensure that broader Administration policy to streamline operations and improve the functioning of federal banking agencies is advanced at the Bureau.
- **Appointment of permanent Director accelerated.** Given the existing circumstances, it is reasonable to assume the Administration may seek to expedite, to the extent feasible, its vetting process. Individuals

identified as being under consideration include a number of critics of the Bureau's structure, focus of its agenda, and prior regulatory and supervisory approach.

- **CFPB reform debate rekindled.** Had Congress created the CFPB as a bipartisan commission—rather than a single director appointed for a five-year term and only removable for cause—much of the uncertainty and acrimony around the Bureau's current interim leadership would have been avoided. The Vacancies Act provides an explicit carve-out for such independent commissions.<sup>21</sup> Accordingly, notwithstanding the allure of installing their own Director, many Congressional Republicans are expected to continue to press for CFPB structural as well as operational reforms, including, among other things, proposing that the Bureau be led by a commission structure and be subject to Congressional appropriations, and rolling back its supervisory and enforcement jurisdiction in certain areas. Senator Mike Crapo (R-ID), Chair of the Senate Banking Committee, already has sent a letter to Mulvaney seeking input on ways the CFPB could be improved by increasing transparency and accountability, presumably with an eye towards drafting CFPB reform legislation.
- **Political fallout.** When the dust settles from this week, the Democrats appear weakened, and the Administration, strengthened—Mulvaney is in *de facto* control, according to the DOJ, the CFPB, and a US District judge. Cordray's eleventh-hour maneuvering likely weakens (possibly significantly) Democratic efforts to resist a permanent Trump appointee and Republican CFPB reform efforts.

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1 Complaint at 1, *English v. Trump*, No. 1:17-cv-02534-TJK (D.D.C. Nov. 26, 2017).

2 Fed. R. Civ. P. 12(b)(1) and (b)(6), among other possibilities.

3 Memorandum from Steve A. Engel, Asst. Att’y Gen., to Donald F. McGahn II, Counsel to the President, *Designating an Acting Director of the*

4 *Bureau of Consumer Financial Protection* at 1 (Nov. 25, 2017) (“DOJ Memorandum”).

5 English worked on the original US Treasury Department team that set up the CFPB.

6 12 U.S.C. § 5491(b)(2).

7 The Vacancies Act provides multiple ways for an executive agency to have an interim head. See 5 U.S.C. § 3345. The Administration relies on 5

8 U.S.C. § 3345(a)(2) (“Notwithstanding [an option allowing the first assistant to the head of an agency to become its acting head], the President

9 (and only the President) may direct a person” who has already been appointed to an office and confirmed by the Senate, to act as that officer

10 temporarily). Another option under the Vacancies Act allows the President to “direct an officer or employee of such Executive agency to perform

11 the functions and duties of the vacant office temporarily in an acting capacity.” 5 U.S.C. § 3345(a)(3).

12 DOJ Memorandum at 1; Acting Attorney General, 31 Op. O.L.C. at 209–11; Acting Director of OMB, 27 Op. O.L.C. at 121 n.1.

13 See 5 U.S.C. § 3347(a)(1)(B); DOJ Memorandum at 5 (explaining that the two statutes should be read “in parallel”).

14 In addition, the Administration argues that the use of mandatory language (“shall”) in each statute is not dispositive because one cannot be more

15 mandatory than the other.

16 Memorandum from Mary E. McLeod, CFPB General Counsel, to CFPB Senior Leadership Team, *Acting Director of the CFPB* at 1 (Nov. 25,

17 2017) (“McLeod Memorandum”).

18 12 U.S.C. § 5491(b)(5).

19 *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 5 (D.C. Cir. 2016) *vacated, reh’g en banc granted, PHH Corp. v. Consumer Fin. Prot.*

20 *Bureau*, No. 15-1177, 2017 U.S. App. LEXIS 2733, at \*1 (D.C. Cir. Feb. 16, 2017) (referred herein as *PHH* case).

21 See *Granny Goose Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 439 (1974).

See, e.g., *United States v. Hubbard*, 650 F.2d 293, 314 n. 73 (D.C. Cir. 1980) (“The denial is, however, appealable when it is equitable to denial

of a preliminary injunction.”); *Berrigan v. Sigler*, 475 F.2d 918, 919 (D.C. Cir. 1973) (“While the denial of a temporary restraining order is normally

not appealable, an exception is made where the denial serves for all practical purposes to render the cause of action moot or where appellant’s

rights will be irretrievably lost absent review.”).

See, e.g., *Ord v. District of Columbia*, 587 F.3d 1136, 1140 (D.C. Cir. 2009).

See *PHH* case, *supra* note 12.

*Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1190-91 (9th Cir. 2016) (“The initial invalid appointment of Cordray also is not fatal ...

[t]he subsequent valid appointment, coupled with Cordray’s ... ratification, cures any initial Article II deficiencies.”) (citations omitted).

*Id.* (citations omitted).

Rob Blackwell and Ian McKendry, “Mulvaney Pledges ‘Dramatic’ Shift at CFPB, Freezes Rules and Hiring,” *American Banker* (Nov. 27, 2017),

<https://www.americanbanker.com/news/mulvaney-pledges-dramatic-shift-at-cfpb-freezes-rules-and-hiring>.

5 U.S.C. § 3348(d) (“An action taken by any person who is not acting under [the specified provisions of the Vacancies Act], in the performance of

any function or duty of a vacant office ... shall have no force or effect [and] may not be ratified.”).

5 U.S.C. § 3349c(1).