Who's Properly in Charge of the CFPB?

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The day after Thanksgiving, Consumer Financial Protection Bureau Director Richard Cordray announced his resignation, and appointed his chief of staff, Leandra English to become Deputy Director. Cordray's position was that English will lead the Bureau until a permanent replacement is confirmed by the Senate.

A few hours later, the President appointed Mick Mulvaney, the director of the Office of Management and Budget, to serve as interim Director until a permanent CFPB Director is confirmed by the Senate, setting up a conflict with Cordray's appointee.

English sued, and a federal judge in Washington, D.C. denied her request to temporarily bar Mulvaney from occupying the job until the lawsuit is decided. That ruling essentially leaves Mulvaney in the job until the lawsuit runs its course, or the Senate confirms a permanent replacement. The parties are currently briefing another motion of English's asking the court to consider temporarily barring Mulvaney from running the Bureau. A second lawsuit, filed in New York by the Lower East Side People's Federal Credit Union, is similarly challenging Mulvaney's tenure.

As the White House and the CFPB continued to dispute who is currently leading the Bureau, the issue will be settled by the courts. While not free from doubt due to the lack of clear precedent and the likelihood that court rulings may be affected by the politicized nature of the issue, the better conclusion is that the President has the authority to appoint a temporary successor when the CFPB Director resigns, and as a result, Mulvaney is likely to remain as interim Director until the Senate approves a replacement.

The issue of Director Cordray's succession will be determined by how the courts read the two statutes each side is using to claim they are right about who is running the CFPB: (1) the Dodd-Frank Wall Street and Consumer Protection Act ("Dodd-Frank Act"); and (2) the Vacancies Reform Act.

Cordray's allies argue the Dodd-Frank Act lets him appoint a temporary successor because it states the "Deputy Director . . . shall . . . serve as acting Director *in the absence or unavailability of* the Director." (emphasis added).

The Trump Administration, on the other hand, points to an earlier-enacted statute called the Vacancies Reform Act, which says if an officer of an executive agency who is subject to Senate confirmation (which the CFPB Director is) "dies, resigns, or is otherwise unable to perform the

functions and duties of the office," then the President has several options, one of which is to "direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity." Mulvaney is such a person.

The Vacancies Reform Act further provides that this is the "exclusive means" of filling the role unless another statutory provision expressly designates an officer or employee to perform the duties of the office in an acting capacity. This means that if the Dodd-Frank Act's "absence or unavailability" language encompasses a resignation (rather than a temporary period of unavailability), Cordray's appointment will stay in place until the Senate confirms a replacement. If not, the Vacancies Reform Act controls and Mulvaney will serve as interim Director.

The best interpretation of the Dodd-Frank Act is that the Vacancies Reform Act determines the procedures to be followed when the CFPB Director resigns. While the plain meaning of the phrase "absence or unavailability" in Dodd-Frank is ambiguous when read in isolation, the Dodd-Frank Act treats that concept in other sections as a temporary or involuntary condition, and uses the term "vacancy" to describe a permanent absence.

Throughout its provisions, the Dodd-Frank Act treats "vacancy" as a separate concept from "absence." It equates "absence" with "disability," indicating it entails something involuntary, unlike a resignation. When Congress wished to refer to a permanent vacancy in the Dodd-Frank Act, it knew how to say so, and it used the term "vacancy." *See* 12 U.S.C. § 1812(d)(2) ("Management of the Federal Deposit Insurance Corporation"); 12 U.S.C. § 5321(c) ("Financial Stability Oversight Council Established").

Thus, the best interpretation of the Dodd-Frank Act is that Congress intended that resignations would be covered by the procedures in the Vacancies Reform Act and the "absence or unavailability" language in Dodd-Frank provides only for the Director's temporary, involuntary absence, such as due to illness, disability, or otherwise being temporarily unavailable. This distinction is consistent with the enabling acts of other independent agencies.

Here, Congress wrote a statute that placed succession in the hands of the political process. If the phrase "absence or unavailability" in the Dodd-Frank Act were construed to apply to a voluntary resignation, the CFPB Director could theoretically resign six months into his 5-year term, leaving a Deputy Director who is not subject to Presidential nomination and Senate confirmation as the head of the agency for the remaining 4 ½ years of the term. Such an interpretation would be at odds with the purpose and language of the Dodd-Frank Act, which states that "the Director shall be appointed by the President, by and with the advice and consent of the Senate." It would also run counter to the long-standing tradition that the selection of executive agency heads is subject to the political process, namely Presidential nomination and Senate confirmation.

Because Congress consistently equates the term "vacancy" with a permanent absence, such as a resignation, and consistently equates the term "absence" with a temporary or involuntary condition (such as a disability), the more likely outcome is that the court will determine Mulvaney is rightfully the interim CFPB Director.

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