

***I. Interims and Uncertainty: Positions and Predictions
Concerning the Competing Claims to the Interim
Director Position at the CFPB***

A. Introduction

When Richard Cordray resigned as the Director of the Consumer Financial Protection Bureau (CFPB) on November 24, 2017, he named Leandra English as his Deputy Director. He believed this move would secure her position as the interim Director of the Agency in accordance with specific succession guidelines dictated in the Dodd-Frank Wall Street Reform Act (Dodd-Frank or the Act).¹ Hours later, President Trump issued a memoranda directing John (Mick) Mulvaney to serve as interim Director, and the legitimacy of both the President's and Cordray's orders have been fiercely debated ever since.² With Mulvaney making decisions that could permanently alter the structure and function of the CFPB,³ what will happen next in this game of regulatory musical chairs remains unclear.

Section B of this article provides background on the conflict surrounding the interim Director position at the CFPB. Next, Section C highlights what is at stake for CFPB proponents by detailing Mulvaney's actions to date in the interim Director position. Section D summarizes English's and Mulvaney's strongest arguments in favor of their claims to the position. Section E details the analysis of these arguments in the U.S. District Court for the District of Columbia, highlighting the issues most likely to be evaluated moving forward. Finally, this article concludes by suggesting alternatives for overcoming this conflict in the interest of maintaining a strong and cohesive CFPB.

¹ English v. Trump, No. 17-2534, slip op. at 5 (D.C. Cir. Jan. 10, 2018) (“[Cordray] also named English, his Chief of Staff, to serve as Deputy Director . . . explaining that the appointment was intended ‘to ensure an orderly succession for this this independent agency’ by effectively making English the acting Director after he left office.”).

² *Id.* at 6 (“[President Trump] issued a memorandum directing Mulvaney to ‘perform the functions and duties’ of the CFPB director ‘until the position is filled by appointment or subsequent designation’ . . .”).

³ See, e.g., Gillian B. White, *Mick Mulvaney Is Quickly Deregulating the Financial Industry*, ATLANTIC (Jan. 5, 2018), <https://www.theatlantic.com/business/archive/2018/01/cfpb-gop-trump/549755/> [<https://perma.cc/8TUN-U4H9>] (detailing Mulvaney's numerous efforts to deregulate the financial industry since starting at the CFPB in November 2017).

B. Background and Legal Action as of February 2018

Meant to target unfair competition and consumer-abusive behavior in the financial sector,⁴ the CFPB originated in 2010 from Dodd-Frank.⁵ As specified in the Act, the CFPB's primary objective is to "implement and, where applicable, enforce Federal consumer financial law consistently"⁶ Up until November 2017, Cordray served as the Director of the CFPB.⁷ Cordray, an Obama appointee confirmed in 2013, had a reputation for being "a tough regulator of banks and other financial institutions," and he was widely and openly disliked by Republican legislators.⁸ Over his five year tenure as the Director of the CFPB, Cordray ordered some of the nation's largest financial entities to pay an estimated aggregate of \$12 billion in fines.⁹ Last year alone, Cordray was instrumental in a CFPB order that Wells Fargo pay \$185 million as punishment for the unauthorized opening of over 3.5 million consumer accounts.¹⁰ From the perspective of CFPB-developer and

⁴ Spencer S. Hsu & Thomas Heath, *Federal Judge Rules that Trump's Choice Can Remain at Head of Consumer Watchdog Bureau*, WASH. POST (Nov. 28, 2017), www.washingtonpost.com/local/public-safety/2017/11/28/3aa11fe6-d479-11e7-b62d-d9345ced896d_story.html?utm_term=.c730127fca3f ("The CFPB was created after the financial crisis to target unfair or abusive practices by financial institutions offering consumer products, including credit cards, mortgages and loans.").

⁵ *English*, slip op. at 1 ("The CFPB is a government agency created after the financial crisis of 2007–2008 by [Dodd-Frank]").

⁶ 12 U.S.C. § 5511(a) (2012).

⁷ *English*, slip op. at 5 ("CFPB Director Cordray resigned from his position effective as of midnight, well short of the completion of his five-year term.").

⁸ Avie Schneider, *Richard Cordray Stepping Down as Head of U.S. Consumer Protection Agency*, NPR (Nov. 15, 2017, 12:35 PM), <https://www.npr.org/sections/thetwo-way/2017/11/15/564349200/richard-cordray-stepping-down-as-head-of-u-s-consumer-protection-agency> [<https://perma.cc/EF78-LW47>].

⁹ *Id.* ("At the CFPB, Rich Cordray forced the biggest financial institutions to return \$12 billion directly to the people they cheated," Warren said in a statement Wednesday.").

¹⁰ *Id.* ("[The CFPB] ordered Wells Fargo to pay \$185 million in fines and penalties for secretly opening accounts that had not been authorized by consumers."); see also Samantha Masunaga & James Rufus Koren, *Wells Fargo's Estimate for Unauthorized Accounts Jumps 67%, to 3.5 million*, L.A. TIMES (Aug. 31, 2017), <http://www.latimes.com/business/la-fi-wells-fargo-accounts-20170831-story.html> (explaining Wells Fargo & Co. said it may have created

proponent Elizabeth Warren, these fines “held big banks accountable,” and the payments served to return money directly to cheated consumers.¹¹ However, from the alternative perspective, Cordray’s tenure overstepped the bounds of government and inexcusably restricted the free market.¹²

On November 24, 2017, Cordray resigned from his position as Director of the CFPB and appointed his Chief of Staff, Leandra English, as the CFPB’s Deputy Director, a position that had been unoccupied since the summer of 2015.¹³ According to Cordray and English, under specific directions detailed in Dodd-Frank, as Deputy Director, English would serve in the position as Interim Director of the CFPB until a new Director’s official appointment.¹⁴ However, immediately following Cordray’s resignation, President Trump issued a memorandum ordering Mulvaney, Director of the White House Office of Management and Budget (OMB), to serve as the CFPB’s interim Director instead.¹⁵ Mulvaney immediately claimed title to the position the following Monday.¹⁶

On November 26, 2017, English filed an emergency motion for a temporary restraining order in an attempt to prevent President Trump from appointing an interim director other than her.¹⁷ This

as many as 3.5 million checking, savings, and credit card accounts without customers’ authorization over the last eight years).

¹¹ Schneider, *supra* note 8.

¹² See Sylvan Lane, *Acting Consumer Bureau Chief Declares ‘New Mission’ in Rebuke of Predecessor*, HILL (Jan. 23, 2018, 4:56 PM), <http://thehill.com/policy/finance/370361-acting-consumer-bureau-chief-declares-new-mission-in-rebuke-of-former-regime> [<https://perma.cc/K8PY-9GSK>] (explaining Mulvaney denounced Cordray’s aggressive tactics in a letter to CFPB employees, arguing that “pushing the limit on how aggressively the government can penalize banks, lenders, credit card companies and other financial firms could be devastating to average Americans”).

¹³ English v. Trump, No. 17-2534, slip op. at 5 (D.C. Cir. Jan. 10, 2018).

¹⁴ Hsu & Heath, *supra* note 4 (“English argued that the 2010 Dodd-Frank act that established the agency after the financial crisis laid out a specific plan of succession authorizing the deputy director to take over until a White House nominee is confirmed by the Senate.”).

¹⁵ English, slip op. at 6.

¹⁶ *Id.*

¹⁷ *Id.* at 7.

motion was denied several days later.¹⁸ Also on November 26, 2017, English filed for a preliminary injunction seeking to “restrain the President from appointing an acting Director other than her” that would “require the President to withdraw Mulvaney’s appointment” and prevent Mulvaney from serving in the position.¹⁹ After two hours of oral arguments on December 22, 2017, the injunction was ultimately denied on January 10, 2018.²⁰ On January 12, 2018, “English filed an appeal to the U.S. Court of Appeals for the District of Columbia Circuit. She also requested an expedited view of her case.”²¹

C. The CFPB Under Mulvaney: What’s at Stake on Appeal?

Unless English is able to turn the tides and conjure some judicial support on appeal at the D.C. Circuit, Mick Mulvaney will continue to serve as the interim Director of the CFPB and, for proponents of the agency as it existed under Cordray, the prospect is daunting, to say the least.²² Mulvaney and the Trump administration generally are

¹⁸ *Id.* at 8 (“[T]he Court held another hearing and denied the TRO motion, finding that English had not shown a likelihood of success on the merits and had otherwise failed to meet the prerequisites for emergency relief.”).

¹⁹ *Id.* at 1–2, 7.

²⁰ Theodore R. Flo, *Judge Questions Highlight Serious Concerns He Has Over English’s Bid to Claim the Acting Director Role at the CFPB*, NAT’L L. REV. (Dec. 26, 2017), <https://www.natlawreview.com/article/judge-questions-highlight-serious-concerns-he-has-over-english-s-bid-to-claim> [<https://perma.cc/2284-DG8A>] (“U.S. District Court for the District of Columbia held oral arguments on Leandra English’s preliminary injunction motion through which she seeks to block Mick Mulvaney from continuing to serve as the Acting Director of the CFPB.”); Jim Puzanghera, *Judge Denies Injunction to Remove Mick Mulvaney as Consumer Bureau’s Acting Director*, L.A. TIMES (Jan. 11, 2018, 5:20 AM), <http://www.latimes.com/business/la-fi-cfpb-acting-director-20180110-story.html> (“A federal judge on Wednesday denied a request for a preliminary injunction to remove Mick Mulvaney as acting Director of the Consumer Financial Protection Bureau.”).

²¹ Kelsey Ramirez, *Battle over CFPB Leadership Continues, Heads to D.C. Court of Appeals*, HOUSINGWIRE (Jan. 15, 2018), <https://www.housingwire.com/articles/42290-battle-over-cfpb-leadership-continues-heads-to-dc-court-of-appeals> [<https://perma.cc/6LA9-3FBQ>].

²² *See, e.g.*, White, *supra* note 3 (detailing the drastic changes Mulvaney made to the CFPB between November 2017 and January 2018).

known critics of the CFPB's past policies.²³ In June 2017, the Treasury Department issued a report reviewing Dodd-Frank, calling for drastic changes to its banking and regulatory laws and a reduction in the agency's power, which some believe could lead to the elimination of the CFPB altogether.²⁴ Furthermore, President Trump has called Dodd-Frank "a disaster," and, before taking office, "promised to do a number on it."²⁵

Technically a full-time employee of the OMB, Mulvaney has worked three days a week at the CFPB since late November 2017.²⁶ In early January, Mulvaney asked for \$0 from the Federal Reserve Bank to cover the CFPB's second quarter expenses, saying the agency had \$177 million remaining in surplus at the start of the federal government's fiscal year in September 2017.²⁷ He asked that the previously-allocated \$145 million in CFPB funding be sent to the U.S. Treasury so that it "might make a small dent in the federal deficit."²⁸ Since then, Mulvaney has announced plans to cut back on consumer safeguards adopted under Cordray designed to protect citizens from payday lenders servicing high-interest loans.²⁹ Mulvaney has also halted hiring,

²³ See Lane, *supra* note 12 (explaining Mulvaney's past criticism of the CFPB); see also Marcy Gordon, *Trump Administration Looks to Curb CFPB Powers, Change Bank Rules*, USA TODAY (June 12, 2017, 7:44 PM), www.usatoday.com/story/money/2017/06/12/trump-administration-looks-curb-cfpb-powers-change-bank-rules/102795120/ [<https://perma.cc/XJ4R-DSM4>] (detailing the Trump administration's previous position on the CFPB).

²⁴ *Id.* ("The Trump administration is proposing to curb the authority of the consumer finance watchdog created following the economic crisis as it drives toward easing restrictions on banks and financial institutions.").

²⁵ *Id.*

²⁶ *English v. Trump*, No. 17-2534, slip op. at 6 (D.C. Cir. Jan. 10, 2018) ("As of early December, [Mulvaney] was spending three days a week working [at the CFPB], and three days a week at OMB.").

²⁷ Kevin McCoy, *Trump Appointee Seeks \$0 Funding for Consumer Financial Protection Bureau*, USA TODAY (Jan. 19, 2018, 12:46 PM), www.usatoday.com/story/money/business/2018/01/19/trump-appointee-seeks-0-funding-consumer-watchdog/1047642001/ [<https://perma.cc/9EPS-FD7A>] ("Mick Mulvaney . . . said he needed \$0 to cover the watchdog's second quarter expenses.").

²⁸ *Id.* ("[Mulvaney] asked the Fed to redirect the \$145 million it would have sent to the consumer bureau instead to the U.S. Treasury, where it might make a small dent in the federal deficit.").

²⁹ *Id.* ("Mulvaney announced plans for a new rule-making procedure that could roll back safeguards the watchdog finalized last year to protect

delayed the implementation of CFPB prepaid credit card rules aimed at improving transparency for consumers, and cut requirements from the Home Mortgage Disclosure Act, among other drastic changes.³⁰ Perhaps most notably, Mulvaney has changed the CFPB mission statement to include goals of “identifying and addressing outdated, unnecessary, or unduly burdensome regulation,”³¹ language mirroring the broader goals of the Trump administration.³² In Mulvaney’s own words, “[t]he days of aggressively ‘pushing the envelope’ of the law in the name of ‘mission’ [at the CFPB] are over.”³³ With each passing day, the CFPB under Mulvaney is moving in a radically different direction from its past practices and origins.

D. The Preliminary Injunction: Arguments

1. English’s Arguments

Desperate to gain control over the CFPB and reverse Mulvaney’s recent alterations, English presented several legal arguments in her suit for a preliminary injunction.³⁴ To begin, English asserted there is a specific plan for succession in the event of the resignation of a CFPB Director, and this specified plan supersedes the protocol detailed in the Federal Vacancies Reform Act of 1998 (FVRA).³⁵ Section 5491(b)(5) of Dodd-Frank specifies the Deputy Director of the CFPB will “serve as acting Director in the absence or unavailability of the Director.”³⁶ Although the FVRA provides the President with the authority to authorize “an acting official to perform the function and duties of an officer of an Executive agency,”³⁷ English argues this

consumers from so-called payday lenders that provide high-interest loans to borrowers trying to make ends meet between paychecks.”)

³⁰ See White, *supra* note 3.

³¹ *Id.*

³² See Gordon, *supra* note 23 (detailing the Trump administration’s past criticisms of the CFPB).

³³ Lane, *supra* note 12.

³⁴ English v. Trump, No. 17-2534, slip op. at 11–12 (D.C. Cir. Jan. 10, 2018) (listing most of English’s arguments against Mulvaney).

³⁵ *Id.* at 12 (“English argues that the FVRA is inapplicable because the CFPB Director is excluded from its coverage.”).

³⁶ 12 U.S.C. § 5491(b)(5) (2012).

³⁷ Memorandum from Stephen Engel to Donald F. McGahn II, Counsel to the President 1 (Nov. 25, 2017) (on file with U.S. Department of Justice, Office of Legal Counsel).

provision is inapplicable in light of Dodd-Frank section 5491(a) which states, “Except as otherwise provided expressly by law, all Federal laws dealing with . . . officers [or] employees . . . shall apply to the exercise of the powers of the [CFPB].”³⁸ English argues, based on the applicable statutory language, Dodd-Frank intends other federal law to apply *only* in instances where a particular protocol is not specified in Dodd-Frank itself.³⁹ Although the CFPB is not listed as an explicit exception to the FVRA like several other agencies, English argued this point is irrelevant because the FVRA predates Dodd-Frank and the CFPB and alleged the CFPB would have been included as an exception under a more recent model of the FVRA.⁴⁰ Because Dodd-Frank specifically dictates that the Deputy Director shall serve as interim Director in the event of a Director’s absence and notes that other Federal law applies to the CFPB when a procedure is not expressly detailed in Dodd-Frank, English argued she is the rightful Deputy Director of the CFPB.⁴¹

English also argued, even if President Trump was able to appoint an interim Director under the FVRA, Mulvaney’s appointment is invalid because it violates the Appointments Clause and Constitutionally-mandated separation of powers.⁴² According to English, Mulvaney’s appointment is invalid because Dodd-Frank established the CFPB as an independent federal agency, and an agency’s independence necessitates that its director be free from direct Executive

³⁸ 12 U.S.C. § 5491(a) (2012).

³⁹ *English*, slip op. at 5 (“Except as otherwise provided expressly by law, all Federal laws dealing with . . . officers [or] employees . . . apply to the exercise powers of the [CFPB].”).

⁴⁰ *Id.* at 13 (“English argues . . . the exception indirectly applies, because the CFPB Director (whether permanent or acting) also serves on the Board of Directors of the Federal Deposit Insurance Corporation (‘FDIC’), which is . . . a multi-member body” to which the exception directly applies.”).

⁴¹ *Id.* at 11 (explaining English’s argument that Dodd-Frank should control over the FVRA because it “was enacted later in time, and speaks with greater specificity to the question at hand”).

⁴² See Barbara S. Mishkin, *Three Amicus Briefs in Support of President Trump and Mick Mulvaney Filed in D.C. CFPB Acting Director Litigation*, NAT’L L. REV. (Dec. 20, 2017), www.natlawreview.com/article/three-amicus-briefs-support-president-trump-and-mick-mulvaney-filed-dc-cfpb-acting [https://perma.3ZS3-H5HU] (“Ms. English’s position . . . raises the question of whether the Deputy Director/Acting Director is an ‘inferior officer’ or instead a ‘principal officer’ who may only be appointed by the President with the Senate’s consent.”).

control.⁴³ From this perspective, because Mulvaney works in the White House OMB directly under President Trump, he cannot simultaneously head an independent agency, as doing so would subject that agency to impermissible Executive overreach.⁴⁴

2. *Mulvaney's Arguments*

In response to English's position, Mulvaney made the following significant counterarguments. First, Mulvaney argued the FVRA provides the President with the authority to override any appointment rule within an agency and select a temporary head when that agency's Director is normally filled by presidential appointment with the advice and consent of the Senate, as is the case with the CFPB.⁴⁵ Notably, both the Justice Department's Office of Legal Counsel and the CFPB's general counsel, Mary McLeod, agree with this position.⁴⁶ Although the FVRA may not be the "exclusive" means for filling agency vacancies, the statute always remains an available option for the President to rely upon, as clarified in the 9th Circuit decision *Hooks v. Kitsap Tenant Support Services, Inc.*⁴⁷

⁴³ *English*, slip op. at 36 (“[T]he appointment of Mulvaney is particularly unlawful because the Dodd-Frank Act establishes an ‘independent’ CFPB, and Mulvaney is a ‘White House staffer’ who continues to serve as the Director of OMB.”).

⁴⁴ *Id.*; see also Hsu & Heath, *supra* note 4.

⁴⁵ Memorandum from Stephen Engel, *supra* note 37 (“The CFPB Director is an office filled by presidential appointment, by and with the advice and consent of the Senate. . . . The Federal Vacancies Reform Act of 1998 . . . provides the President with authority ‘for temporarily authorizing an acting official to perform the functions and duties’ of an officer of an Executive agency whose appointment ‘is required to be made by the President, by and with the advice and consent of the Senate.’”).

⁴⁶ Hsu & Heath, *supra* note 4 (“Deputy Assistant Attorney General Brett Shumate had argued that Trump had authority under an earlier law, the 1998 Presidential Vacancies Reform Act, and cited supporting opinions by the Justice Department's Office of Legal Counsel and the CFPB's general counsel.”).

⁴⁷ 816 F.3d 550, 555–56 (9th Cir. 2016) (finding the FVRA can be utilized by the President even when an alternative agency statute or rule exists); see also Memorandum from Stephen Engel, *supra* note 37 (“[E]ven when the Vacancies Reform Act is not the ‘exclusive’ means for filling a vacancy, the statute remains an available option, and the President may rely upon it in designating

Additionally, in support of Mulvaney, CFPB General Counsel Mary McLeod argued that, even if the Dodd-Frank provision cited by English was to exclusively apply over the FRVA, English's appointment would still be inappropriate under the specific semantics of the cited provision.⁴⁸ Section 5491(b)(5) applies in instances of a Director's "absence" or "unavailability," which arguably does not include a Director's official resignation from his or her position, but merely encompasses less permanent situations such as illness.⁴⁹ Finally, Mulvaney argued that English's position, which prohibits the President from designating a CFPB Director despite the FVRA, would present Constitutional concerns by directly limiting Executive authority.⁵⁰

E. Judicial Responses & Remaining Open Issues

1. *The D.C. Circuit's January 10th Holding*

In his refusal to enjoin President Trump from appointing Mulvaney as interim Director of the CFPB, Judge Timothy J. Kelly of the U.S. District Court for the District of Columbia made several notable points. To begin, Judge Kelly asserted that, under the FVRA, the President may override the default rule of any agency specifications regarding the appointment of an interim director.⁵¹ When Dodd-Frank was passed, Judge Kelly explained, Congress was fully cognizant of how the FVRA typically interacts with an agency's appoint-

an acting official in a manner that differs from the order of succession otherwise provided by an office-specific statute.”).

⁴⁸ See Lawrence H. Tribe, Opinion, *Sorry, Mr. President. You Can't Make Mulvaney 'Acting' Head of the Consumer Financial Protection Bureau*, WASH. POST (Nov. 27, 2017), https://www.washingtonpost.com/news/post-everything/wp/2017/11/27/sorry-mr-president-you-cant-make-mulvaney-acting-head-of-cfpb/?utm_term=.304456d60e6a (explaining the argument that “the director’s resignation makes his status something other than ‘unavailable’”).

⁴⁹ *Id.*; see also Mishkin, *supra* note 42 (“[T]he phrase ‘absence or unavailability’ in the CFPB provision does not cover a vacancy created by the CFPB Director’s resignation . . .”).

⁵⁰ See Mishkin, *supra* note 42 (explaining Mulvaney’s assertion “that Ms. English’s position, which would deny the President the ability to designate a CFPB Acting Director under the FVRA, raises serious constitutional issues by limiting the President’s executive authority”).

⁵¹ *English v. Trump*, No. 17-2534, slip op. at 15 (D.C. Cir. Jan. 10, 2018) (“[T]he two statutes can, and therefore must, be read harmoniously.”).

ments specifications and, despite this, there is no specific language included in Dodd-Frank indicating that the FVRA should not apply, suggesting Congress meant to permit it to do so.⁵² Judge Kelly agreed with Mulvaney's argument that "absence" and "unavailability" apply only to temporary states and not to a Director's resignation, as the word "vacancy" is not specifically included in the provision.⁵³ In light of the doctrine of constitutional avoidance, which favors a court reconciling two statutes over determining that the statutes are in conflict, Mulvaney's interpretation of the FVRA and Dodd-Frank are more appropriate and plausible.⁵⁴

In regard to the appointment of Mulvaney specifically, Judge Kelly stated, "[s]imply put, Dodd-Frank does not prohibit the Director of OMB from also serving as the acting Director of the CFPB," nor does it state that an interim head of the agency must remain "independent" from the President.⁵⁵ The absence of these provisions is especially striking considering there are specific provisions in place in Section 5491(d) of the Act prohibiting any Federal Reserve Bank employee from serving as Director or Deputy Director of the agency.⁵⁶

Finally, Judge Kelly asserted that prohibiting the President from appointing an interim agency director could interfere with Article II of the Constitution in the event that the President and Senate cannot agree on a new permanent agency head.⁵⁷ Under English's logic, in the

⁵² *Id.* at 15–16 (“[W]hen passing Dodd-Frank, Congress was aware of how the FVRA typically interacted with other statutes. And the FVRA’s exclusivity provision makes clear that it was generally intended to apply alongside agency-specific statutes, rather than be displaced by them.”).

⁵³ *Id.* at 20 (“If Congress intended to displace the FVRA, it could have explicitly referred to ‘vacancies,’ as the title FVRA does. Certainly, it has done so in numerous other agency-specific statutes.”).

⁵⁴ *Id.* at 24 (explaining Mulvaney’s statutory interpretation is favorable because, “if by any fair course of reasoning the two [statutes] can be reconciled, both shall stand”).

⁵⁵ *Id.* at 36.

⁵⁶ *Id.* at 37 (citing 12 U.S.C. §5491 (d) which stipulates “[n]o Director or Director Deputy may hold any office, position, or employment in any Federal Reserve Bank, Federal home loan bank covered person, or service provider during the period of service of such person as Director or Deputy Director”).

⁵⁷ *Id.* at 2 (“Congress has long accounted for [extended agency vacancies] by authorizing the President to direct certain officials to temporarily carry out the duties of a vacant office [requiring Presidential appointment and Senate confirmation] in an acting capacity, without Senate confirmation.” (quoting *NLRB v. SW Gen., Inc.* 137 S. Ct. 929, 934 (2017))).

event of a long interim period, the President would not only be denied Article II appointment control for potentially months on end, but a Director like Cordray could name anyone as an agency's interim director "no matter how unqualified that person might be," and that person could gain control of a federal agency for an indefinite period of time.⁵⁸ From Judge Kelly's perspective, Mulvaney's arguments are more consistent with traditional agency operation and provide the most sensible solution to the conflict at hand.⁵⁹

2. *Open Issues*

Despite Judge Kelly's harsh criticism of English's arguments against Mulvaney's appointment, several key issues are likely to be further explored and reexamined on appeal. First, although Dodd-Frank may permit the FVRA to apply in this situation, it is unclear whether the FVRA itself allows this, as a specific provision in the FVRA indicates that it does not apply in cases where an agency-specific statute dictates an appropriate procedure.⁶⁰

Additionally, although Judge Kelly deems the CFPB's independent status as irrelevant in his analysis, many still question the link between President Trump and Mulvaney, and whether that connection compromises the independence of the CFPB.⁶¹ If the President has the direct ability to fire an agency head without cause, that person indisputably cannot run an independent government body like the U.S. Federal Reserve, the Office of Special Counsel, or the Federal Trade

⁵⁸ *Id.* at 31.

⁵⁹ *Id.* at 45–46 (“Granting English an injunction would not bring about more clarity; it would only serve to muddy the waters. Therefore, the balance of the equities and the public interest weigh against the injunction.”).

⁶⁰ Tribe, *supra* note 48 (“Yet OLC concluded, unconvincingly, that the 1998 Federal Vacancies Reform Act still leaves the President with the option of installing Mulvaney, even though that statute's own terms explicitly state that it *doesn't* kick in when another agency-specific statute [applies].”).

⁶¹ See Peter Conti-Brown, Opinion, *Battle Over Bank Watchdog Whiffs on the Law*, BLOOMBERG VIEW (Dec. 15, 2017, 8:00 AM), <https://www.bloomberg.com/view/articles/2017-12-15/both-sides-are-wrong-in-cfpb-power-struggle> [<https://perma.cc/LW7C-PAY3>] (“Even if federal law turns out to favor Trump's claim that the president has the authority to pick a temporary director of the bank-regulation agency, the Consumer Financial Protection Bureau, it doesn't let him pick just anybody. It's Trump's particular choice of Mick Mulvaney, the White House budget director, that should hit a legal brick wall.”).

Commission.⁶² Because Mulvaney can be fired by President Trump without cause, he is explicitly barred from heading any of these aforementioned agencies. Why Mulvaney should be barred from heading these agencies, but not from running the CFPB, remains to be seen.

F. Conclusion

With viable statutory and constitutional arguments on either side, English and Mulvaney's legal battle will inevitably continue without Executive intervention. To lessen the chances of English winning on appeal, President Trump could appoint one of the many other "Senate-confirmed financial regulators" who are not under his direct control, whether they be positioned under the Comptroller of the Currency, the Securities and Exchange Commission, or the Federal Deposit Insurance Corporation Board without compromising the CFPB's independent status.⁶³ Furthermore, to dismantle the conflict entirely, the President must simply nominate a new permanent Director for the CFPB and, as of now, there are already a few qualified candidates on the shortlist.⁶⁴ J. Mark McWatters, the current Chairman of the National Credit Union Administration is a potential candidate who is often described as "pragmatic and measured" and rarely vilified by Democrats.⁶⁵ However, some members of the financial industry say that McWatters may not be the best candidate for the job, arguing that McWatters "is too close to the industry he supervises" and would not

⁶² *Id.* ("[I]ndependence revolves around the relationship between a president and an agency's leader. If the president has direct control of a public official, that person can't run an independent government body As budget director, Mulvaney reports directly to Trump, who has sole authority to fire him. That's not independence by any definition.").

⁶³ Brief for Peter Conti-Brown as Amicus Curiae Supporting Plaintiff's Motion for Preliminary Injunction at 14, *English v. Trump*, No. 17-2534 (D.C. Cir. Jan. 10, 2018).

⁶⁴ Victoria Finkle, *Credit Union Regulator McWatters on Shortlist to Head CFPB*, AM. BANKER (Dec. 28, 2017, 5:44 PM), <https://www.americanbanker.com/news/credit-union-regulator-mark-mcwatters-on-shortlist-to-head-cfpb> [<https://perma.VZ2C-SLYX>] (explaining how appointing a new permanent Director could help "soften the sharp partisan fight that is brewing" at the CFPB).

⁶⁵ *Id.* (describing McWatters as "pragmatic and measured, which will make it very difficult for Democrats to vilify him during the nomination process.").

be able to impartially lead the CFPB without complication.⁶⁶ Alternative candidate Jonathan Denver, an Ohio Republican state representative and defense lawyer, is also being “touted as a top candidate . . . according to political insiders.”⁶⁷ With options at the ready and viable candidates in queue, the power to prevent reexamination, legal headache, and potentially irreparable change and disorder at the CFPB rests entirely in the hands of President Trump. Whether President Trump will take constructive action or let the conflict escalate remains to be seen.

Emily Cousino⁶⁸

⁶⁶ Ian McKendry, *A New Name Emerges as Possible Head of CFPB*, AM. BANKER (Jan. 18, 2018, 10:01 PM), <https://www.americanbanker.com/news/a-new-name-emerges-as-possible-head-of-cfpb> [<https://perma.cc/F5RM-CXRR>].

⁶⁷ Ian McKendry, *A New Name Emerges as Possible Head of CFPB*, Am. Banker (Jan. 18, 2018, 10:01 PM), <https://www.americanbanker.com/news/a-new-name-emerges-as-possible-head-of-cfpb> [<https://perma.cc/F5RM-CXRR>].

⁶⁸ Student, Boston University School of Law (J.D. 2019).