



## UPDATE: Who's the Boss at the CFPB?

Updated January 11, 2018

*Update: On January 10, 2018, the U.S. District Court for the District of Columbia [denied](#) Leandra English's request for a preliminary injunction, ruling that the Federal Vacancies Reform Act (Vacancies Act) authorized the President to appoint Mick Mulvaney to serve as the Acting Director of the CFPB. Since the Sidebar below was originally published, English filed an amended complaint and moved for a preliminary injunction on substantially similar grounds to those described below. In rejecting her motion, the district court held that because the provision of the Dodd-Frank Act that authorizes the Deputy Director to serve as the Acting Director when the Director is absent or unavailable did not expressly displace the Vacancies Act, the Vacancies Act remained available and authorized the President to fill the position. English had also argued that even if the Vacancies Act generally would allow the President to appoint an Acting Director, because Mulvaney is also the head of the Office of Management and Budget, an agency housed directly under the White House, he may not head an independent agency like the CFPB. But the judge rejected this argument, noting that no such restriction could be found in the text of the Dodd-Frank Act. The district court ultimately denied the request for a preliminary injunction because English had failed to show either a likelihood of success on the merits or that she would suffer irreparable injury absent relief. It is possible that English might appeal this order, and the U.S. Court of Appeals for the District of Columbia Circuit could weigh in on this issue.*

*The original post from November 28, 2017, is below.*

As consumers flocked to shopping outlets nationwide on Black Friday, a leadership shakeup ensued at the Consumer Financial Protection Bureau (CFPB). The CFPB's Director, Richard Cordray, [announced](#) that he had appointed Leandra English, the agency's chief of staff, to the position of Deputy Director. Cordray then [resigned and stated](#) that English would become the Acting Director of the agency, meaning that she would serve until the Senate confirms a permanent replacement. However, later that day, [President Trump announced](#) that he was designating Mick Mulvaney, the Director of the Office of Management and Budget, to serve as Acting Director of the CFPB. On Sunday, November 26, English [brought suit in federal court](#) seeking a declaration that she is the Acting Director of the CFPB, along with a temporary restraining order barring Mulvaney from acting in the position and President Trump from appointing any individual to the position. As of the date of this Sidebar, both English and Mulvaney have [reportedly claimed](#) to be Acting Director in communications to CFPB staff. Ruling from the bench on November 28, the federal judge presiding over English's suit [denied English's motion for a temporary restraining order](#) that would have prohibited Mulvaney from holding the position. However, this order does not resolve the underlying merits of the dispute, and future legal proceedings may be possible.

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Both then-Director Cordray and President Trump have asserted statutory authority to name an Acting Director. English, as the Deputy Director, [argues](#) that she is now the lawful Acting Director because the statute establishing the CFPB [provides that](#) the Deputy Director “shall . . . serve as acting Director in the absence or unavailability of the Director.” By contrast, [the White House claims](#) that the [Federal Vacancies Reform Act](#) (Vacancies Act) authorizes the President to fill the position. [Legal observers have disagreed](#) over whether English or Mulvaney has the better claim. Both the Department of Justice’s [Office of Legal Counsel](#) (OLC) and the CFPB’s own [General Counsel](#) (GC) have issued opinions that conclude President Trump enjoys authority under the Vacancies Act to appoint Mulvaney as Acting Director of the CFPB.

## The Vacancies Act Usually Governs Vacancies

The Vacancies Act generally [allows](#) the President to direct an individual who is currently serving in a different advice and consent position to temporarily fill a vacant position that requires Senate confirmation. As a general rule, the Act [provides](#) the exclusive authority for government employees to temporarily “perform the functions and duties of any office of an Executive agency . . . for which appointment is required to be made by the President, by and with the advice and consent of the Senate . . . .” Thus, only an individual who is serving in compliance with the Vacancies Act is normally authorized to temporarily perform duties that are [expressly assigned to a vacant advice and consent position](#). Therefore, assuming that the Vacancies Act applies, [it would seem to allow](#) the President to direct Mulvaney, as a person already serving in a different advice and consent position, to serve as Acting Director.

However, the Vacancies Act’s exclusivity provision contains a key exception that is a major part of the dispute over who may serve as the Acting CFPB Director. The Vacancies Act provides that it is the exclusive means of temporarily filling advice and consent positions [unless](#) another statutory provision “expressly . . . designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity.” The statute creating the CFPB, the [Dodd-Frank Act](#), states that the Deputy Director “shall . . . serve as acting Director in the absence or unavailability of the Director.” Consequently, two major legal questions at issue are whether the Dodd-Frank Act’s provision providing for the Deputy Director to serve as Acting Director applies to this vacancy, and whether it displaces the Vacancies Act entirely.

## Does the Dodd-Frank Act Apply To the Situation?

One threshold matter is whether the Dodd-Frank Act even authorizes the Deputy Director to serve in the case of a vacancy. The Vacancies Act [applies](#) when an officer has died, resigned, or “is otherwise unable to perform the functions and duties of the office.” By contrast, the Dodd-Frank Act [provides](#) that the Deputy Director shall serve when the Director is absent or unavailable. Because these statutes use distinct language when defining the need for an Acting Director, [one might argue](#) that they refer to two distinct circumstances: the Deputy Director serves as Acting Director under the terms of the Dodd-Frank Act when the Director is absent or *temporarily* unavailable, while the Vacancies Act controls when the Director is *permanently* gone and the office is truly vacant. (The White House and Mulvaney have suggested [they may raise this argument](#) in the ongoing litigation, but at this point have not relied on this position.)

Under this reading of the two statutes, Mulvaney would be lawfully serving as acting Director, given that the Vacancies Act governs the vacancy that occurred when Cordray resigned. However, [English argues](#) and [the OLC concedes in its opinion](#) that Cordray’s resignation also made him [unavailable](#), likely triggering the provisions of the Dodd-Frank Act. Further, as one legal scholar [has noted](#), many statutes have been construed as authorizing deputies to step in during permanent vacancies without specifically using the term “vacancy.” Others, however, [have noted](#) that different provisions in the Dodd-Frank Act *do*

use the term “vacancy.” These observers argue that the “absence or unavailability” language in the Dodd-Frank Act should not be construed to apply to permanent absences of a Director, and consequently, that the Dodd-Frank Act would not apply to the situation resulting from Cordray’s resignation.

## If Dodd-Frank Applies, Does It Supersede the Vacancies Act?

Assuming that the Dodd-Frank Act does apply in the case of a vacancy caused by resignation, the next major legal question is whether it *displaces* the Vacancies Act. The [OLC](#), along with the [White House and Mulvaney](#), claim that both statutes remain viable options for filling the position. The Vacancies Act [provides](#) that it is the “exclusive” method of appointment absent another provision that expressly authorizes a different method of filling a position. Assuming that the Dodd-Frank Act authorizes the Deputy Director to serve when the office of the Acting Director is vacant, the Vacancies Act would be nonexclusive. However, [the OLC argues](#) that just because the Vacancies Act is not the *exclusive* means for temporarily filling the office of the Director, that does not mean it is not *applicable*. Even if another statutory provision authorizes acting service, the OLC contends, that option does not eliminate the President’s discretion under the Vacancies Act.

This reading finds some support in a [decision](#) from the U.S. Court of Appeals for the Ninth Circuit. In that case, the Ninth Circuit held that where both the Vacancies Act and a separate statutory provision expressly provided “a means for filling . . . a vacancy,” both applied, and the President was “permitted to elect between these two statutory alternatives to designate” an acting officer. Unlike the Dodd-Frank Act, however, [the separate statute at issue in that case](#) provided that the President was “authorized to designate the officer or employee who shall act [in the office] during such vacancy.” By contrast, the Dodd-Frank Act does not vest discretion in the President. It provides instead that the Deputy Director “shall” serve as the Acting Director. Accordingly, that decision might be distinguishable from this dispute.

Notably, at least one commentator has [argued](#) that the Dodd-Frank Act’s provision relating to the Deputy Director serving as Acting Director does not “[expressly](#)” displace the operation of the Vacancies Act. In other words, while the Dodd-Frank Act may render the Vacancies Act non-exclusive, the Dodd-Frank Act’s provision is not *itself* exclusive. Because the Dodd-Frank Act does not expressly provide that it is the sole avenue to authorize acting service, or otherwise explicitly state that the Vacancies Act is inapplicable, it could be argued that both statutes may apply to permit acting service. On the basis of this argument, both [the OLC](#) and [the GC of the CFPB](#) contend that the President therefore acted lawfully in invoking the Vacancies Act to designate Mulvaney as Acting Director.

In contrast, English [argues](#) that the provision in the Dodd-Frank Act supersedes the generally applicable terms of the Vacancies Act, meaning that the Vacancies Act is unavailable to fill the CFPB Director’s office. English, along with [commentators](#) defending English’s claim, argues that Congress intended this later enacted, more specific provision in the Dodd-Frank Act to displace the Vacancies Act. English also [asserts](#) that allowing the President to install his pick of Acting Director under the Vacancies Act would undermine the statutory independence of the CFPB. A number of Members of Congress have filed an amicus brief in the ongoing litigation [affirming](#) this understanding of the statute (though this view [is not shared uniformly](#) by their legislative colleagues). In addition, the [Dodd-Frank provision](#) employs language typically construed as mandatory, providing that the Deputy Director “shall” serve as Acting Director. Legal scholars have [pointed out](#) that if both statutes are available, that reading would transform the Dodd-Frank Act’s terms from mandatory to permissive.

Some commentators have also [claimed](#) that the legislative history of the Dodd-Frank Act supports English’s position. A [prior version of the Dodd-Frank Act](#) expressly provided that in the event of a vacancy, the Vacancies Act would govern the appointment of an Acting Director. When Congress replaced this text with a provision providing that the Deputy Director will serve as Acting Director, the argument goes, it intended to displace the Vacancies Act. Others, however, have [argued](#) that the legislative history

might not be so clear. In the bench order denying the temporary restraining order, the trial court judge reportedly characterized this legislative history as “ambiguous at best.”

## If Both the Vacancies Act and Dodd-Frank Apply, Which Controls if Both Are Invoked?

The argument that both statutes govern acting service raises one additional question: if both statutes are available and both are invoked—as is the case here—which one wins? The conclusion that both statutes are available does not, in itself, resolve the question of primacy. Indeed, the OLC [acknowledged](#) that it could not “view either statute as more mandatory than the other.” The OLC resolved this conflict by [asserting](#) that the President’s designation must control in order for the Vacancies Act to “remain available as an actual alternative.” If both statutes apply, the Vacancies Act arguably becomes operational once the President has made the choice [to designate someone other than the first assistant](#) to serve as the Acting Director. The OLC argues that applying the Dodd-Frank Act to nullify the President’s pick would impermissibly render the Vacancies Act superfluous; accordingly, the Vacancies Act should take priority. English [argues](#) instead that the more specific, mandatory provision of the Dodd-Frank Act should control.

Where two statutes can both be given effect, [courts will generally try to do so](#). One possibility for reconciling these provisions is by reading the [Dodd-Frank Act](#) to define the Deputy Director as the “[first assistant](#)” to the Director of the CFPB, as that term is used in the Vacancies Act. This interpretation gives the Dodd-Frank Act some meaning—establishing that the Deputy Director is the “first assistant,” who automatically takes over as the default acting officer under the Vacancies Act upon the occurrence of the vacancy—but slots the operation of this provision into the framework of the Vacancies Act. This reading of the two statutes would mean that as the Deputy Director and “first assistant,” English would have [automatically served as Acting Director](#) upon Cordray’s resignation. But as contemplated by the Vacancies Act, the President would have [permissibly overridden this default rule](#) by selecting Mulvaney to serve as Acting Director instead.

## What Are the Consequences of Judicial Resolution of the Matter?

As mentioned, English challenged the appointment of Mulvaney in the U.S. District Court for the District of Columbia, seeking a [declaration](#) that she is the lawful Acting Director of the CFPB, along with an [order](#) from the court barring Mulvaney from acting in the office and directing President Trump to refrain from appointing any other individual to the position. The court’s [decision](#) on November 28, 2017, to deny English’s motion for a temporary restraining order appears to leave in place the status quo without definitively resolving the dispute over who may properly serve as the Acting Director. Decisions on temporary restraining orders are [not ordinarily appealable](#), and the judge [reportedly denied English’s request](#) to convert the court’s ruling on the temporary restraining order into a decision that is immediately appealable. It [appears](#) that English will instead be seeking a ruling that requires the district court to fully resolve the dispute based on the parties’ filings to date. Accordingly, the dispute remains ongoing—inside and outside of the courtroom. The district court may in the near future issue a final decision concerning the underlying complaint and that order may be appealable.

If a court fully explores the underlying merits of the dispute, in addition to the various arguments outlined above concerning statutory interpretation and legislative history, a court might also consider the case’s implications for the constitutional separation of powers. First, the structure of the CFPB was recently [ruled](#) unconstitutional by the U.S. Court of Appeals for the D.C. Circuit, a decision currently under reconsideration by the full court, sitting *en banc*. A three-judge panel [concluded](#) that the unusual structure of the CFPB, an independent agency headed by a single director who enjoys for-cause removal protection, violates Article II’s grant of executive power in the President. Although the panel’s decision was vacated while the *en banc* court reconsiders the case, the scope of power enjoyed by the CFPB

Director and the statutory independence of the CFPB from the President will likely be background considerations as the court considers this new dispute.

Second, the court's ruling will itself implicate the balance of power between the executive and legislative branches. If the court ultimately rejects the White House's position and agrees with English that the Dodd-Frank Act is the exclusive method of temporarily filling the office of the CFPB Director, the ruling may effectively eliminate the President's role in selecting an acting director of an independent agency. It may also permit the head of an independent agency to select his or her own replacement, at least until a permanent replacement is appointed by the President following Senate confirmation. Such an interpretation might be disfavored by the court on the grounds that it would arguably interfere with the President's constitutional function under Article II to oversee the executive branch. According to the [canon](#) of constitutional avoidance, if a statute can plausibly be read to avoid a difficult constitutional question, courts often select that reading.

A related consideration that might lead a court to adopt the Trump Administration's interpretation of the Vacancies Act concerns the significance of the remedy requested by English. While courts regularly [invalidate](#) *agency* actions for violations of the law, and may [nullify](#) decisions made by temporary *officeholders* appointed in violation of the law, English's suit is directed at the decision of the President himself to select the Acting Director of the CFPB. Courts might be [reluctant](#) to directly [interfere](#) with the President's appointment power by, for example, issuing an injunction barring him from designating someone to a position under the Vacancies Act.

The parties dispute only who can serve as Acting Director until a permanent Director is confirmed by the Senate. However, the legal implications of a court's ultimate decision in this case could be substantial. As a practical and immediate matter, if a court rules that either English or Mulvaney improperly attempted to exercise authority that she or he did not possess, agency action taken pursuant to the asserted authority [could possibly be invalidated](#). But more broadly, Congress's authority to shield executive branch officers from Presidential control is an evergreen question for [scholars](#) and the [courts](#). A court ruling could provide further clarity as to Congress's ability to bestow federal agencies with independence from executive oversight.

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