

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOWER EAST SIDE PEOPLE'S FEDERAL
CREDIT UNION, on behalf of itself and its
members,

Plaintiff,

v.

DONALD JOHN TRUMP, in his official
capacity as President of the United States of
America; JOHN MICHAEL MULVANEY,
in his capacity as the person claiming to
be acting director of the Consumer Financial
Protection Bureau,

Defendants.

Case No. 17 Civ. 9536

COMPLAINT

Plaintiff Lower East Side People's Federal Credit Union, on behalf of itself and its members and by and through its attorneys Emery Celli Brinckerhoff & Abady LLP, for its Complaint alleges as follows:

PRELIMINARY STATEMENT

1. The Lower East Side People's Federal Credit Union in New York City is regulated by the United States Consumer Financial Protection Bureau (CFPB). President Trump has attempted an illegal hostile takeover of the CFPB, throwing the Credit Union and other credit unions and banks into a state of regulatory chaos. Even worse, defendant Trump has purported to appoint an Acting Director whose mission is to destroy a Bureau that protects thousands of the Credit Union's members.

2. The Credit Union does not know who is validly in charge of the CFPB, who is authorized to make the rules, or whose rules to follow. The Court must resolve this regulatory

chaos. It must determine who is in charge of the Bureau. To the Credit Union, it is plain that Leandra English is the only lawful Acting Director in charge of the CFPB.

3. The Dodd-Frank Act of 2010 created the Bureau as an independent federal agency, to be led by a single director. When Bureau Director Richard Cordray resigned, Deputy Director Leandra English became the agency's Acting Director: the Deputy Director "*shall . . .* serve as the acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5)(B). By statute, she will remain the Acting Director until the President appoints and the Senate confirms a new Director. 12 U.S.C. § 5491(b)(2).

4. Notwithstanding this statutory language, President Trump purported to install defendant Michael Mulvaney, the Director of the White House Office of Management and Budget, as the Bureau's Acting Director. Defendant Trump would have his at-will employee in the White House run a statutorily independent agency on the side.

5. The President claims authority to appoint Mr. Mulvaney under the Federal Vacancies Reform Act of 1988, 5 U.S.C. § 3345(a)(2). But the Vacancies Reform Act is not available where, as here, another statute—in language that is mandatory rather than merely permissive—"expressly . . . designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity," 5 U.S.C. § 3347(a)(1)(B). The President's position runs contrary to Dodd-Frank's later-enacted and more specific text, the overall statutory design and independence of the Bureau, and Congress's approach to appointments at other independent agencies. The President's stance also does not square with the relevant legislative history: An earlier version of the Dodd-Frank Act would have allowed the President to use the Vacancies Reform Act to temporarily fill the office. But that language was

eliminated and replaced. The current language in the law designates the Deputy Director (Ms. English) as the Acting Director.

6. In addition, it is undisputed that under the Vacancies Reform Act, the President cannot appoint an acting director to an independent multi-member board or commission without Senate approval. 5 U.S.C. § 3349c(1). But that is exactly what President Trump did. The Acting Director of the CFPB is by operation of law one of the five members of the board of the Federal Deposit Insurance Corporation, an independent agency. 12 U.S.C. §§ 1812(a)(1)(B), 1812(d)(2). Defendant Trump has appointed his at-will employee, Mr. Mulvaney, to serve on the FDIC board. That is plainly illegal. 5 U.S.C. § 3349c(1).

7. Even if President Trump could appoint *someone* as CFPB Acting Director (he cannot), he cannot appoint a White House employee who serves at his whim and pleasure to run this independent agency. A major purpose of the Dodd-Frank Act was to create a CFPB independent of the President and insulated from political pressure. The purported Mulvaney appointment destroys CFPB independence altogether.

8. The Credit Union contests the legality of President Trump's appointment of Mr. Mulvaney. It seeks a declaration and an injunction barring this and any other CFPB Acting Director appointment by defendant Trump absent Senate approval.

JURISDICTION AND VENUE

9. This Court has jurisdiction over the subject matter of this action for declaratory and injunctive relief under 28 U.S.C. §§ 1331, 1361, 1651, 2201, and 2202.

10. Venue is proper in this district under 28 U.S.C. § 1391(e)(1).

PARTIES

11. Plaintiff Lower East Side People’s Federal Credit Union (“Credit Union”) resides in Manhattan. The Credit Union’s principal place of business is at 37 Avenue B. The Credit Union is regulated by the CFPB. For example, the Credit Union must comply with the CFPB’s “Know Before You Owe” mortgage disclosure rules by providing specified disclosures to members seeking home mortgages. Those regulations, also called the TILA-RESPA Integrated Disclosures rule, were issued by the CFPB to implement the Real Estate Settlement Procedures Act (12 CFR Part 1024, Regulation X) and the Truth in Lending Act (12 CFR Part 1026, Regulation Z). As a second example, the Credit Union must comply with the CFPB’s Ability to Repay and Qualified Mortgage Standards under the Truth in Lending Act (12 CFR Part 1026, Regulation Z). Those regulations require the Credit Union to make a reasonable, good faith determination of a consumer’s ability to repay a mortgage.

12. Established in 1986, the Credit Union is a non-profit financial cooperative that promotes fair lending, financial inclusion and economic opportunity in New York City neighborhoods. The Credit Union is owned by its approximately 8,500 members and is dedicated to providing high-quality financial services and community development investments in low income, immigrant and other underserved communities. The Credit Union has made approximately \$100 million dollars in housing, small business, and consumer loans; served more than 30,000 people; and today serves approximately 8,500 members, primarily in Manhattan. The majority of the Credit Union’s members are low income and vulnerable to predatory lending practices and other misconduct the CFPB exists to prevent.

13. President Trump’s attempted illegal takeover of the CFPB has thrown the Credit Union into regulatory chaos. The Credit Union does not know who should be lawfully running

the Bureau, who has the authority to make the rules, or whose rules to follow. The Credit Union has a compelling interest in immediately resolving this regulatory uncertainty, and re-establishing clarity and order in its dealings with the CFPB, both for itself and its membership.

14. In addition, Defendant Mulvaney—who has, *inter alia*, called the CFPB a “sad, sick joke”—is already gutting the CFPB, undermining its mission, and reportedly rolling back regulatory protections that protect the Credit Union’s members. The Credit Union’s members need the CFPB to protect them against unscrupulous payday lenders, mortgage sellers, and others regulated by the CFPB. Unlike defendant Mulvaney, the Credit Union believes in CFPB’s mission, its regulations, and its vital role in protecting American consumers, and creating a level playing field for responsible lenders such as the Credit Union. The appointment of defendant Mulvaney poses an immediate threat to American consumers, including and especially the Credit Union’s vulnerable, low-income membership.

15. Defendant Donald J. Trump is the President of the United States and is responsible for the purported designation of Defendant Mulvaney as Acting Director of the Consumer Financial Protection Bureau.

16. Defendant John Michael Mulvaney, also known as Mick Mulvaney, is the Director of the White House Office of Management and Budget and a person claiming to be designated as the Acting Director of the Consumer Financial Protection Bureau.

STATEMENT OF FACTS

Statutory Background

The CFPB Is an Independent Bureau Whose Deputy Director “Shall Serve as Acting Director” in the Absence or Unavailability of the Director

17. In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010), which created the Consumer

Financial Protection Bureau and established it as “an independent bureau” located “in the Federal Reserve System.” 12 U.S.C. § 5491(a). A key response to the 2008 financial crisis, the CFPB is the first federal agency with the sole goal of protecting consumers of the U.S. financial services industry. Conscious of the regulatory failures that had fueled the 2008 crisis, 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.

18. The CFPB is designed to be led and managed by a single Director, “who shall serve as the head of the Bureau.” 12 U.S.C. § 5491(b)(1). The Director, who serves a five-year term, is to be “appointed by the President, by and with the advice and consent of the Senate.” 12 U.S.C. § 5491(b)(2). To ensure 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. 12 U.S.C. § 5491(c)(3) (“The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.”).

19. 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.” 12 U.S.C. § 5491(b)(5).

20. This designation of the Deputy Director as the “acting Director” reflects Congress’s deliberate choice to depart from the default procedure for naming an acting official under the Federal Vacancies Reform Act of 1988 (FVRA). An early version of the Act that passed the House of Representatives in December 2009 did not provide for a Deputy Director, and instead explicitly stated that a temporary replacement for a Director would be chosen “in the

manner provided by” the FVRA. H.R. 4173, 111th Cong. § 4102(b)(6)(B)(1) (engrossed version, Dec. 11, 2009). But the Senate bill introduced and passed months later contained the present statutory language. S. 3217, 111th Cong. § 1011(b)(5)(B) (2010).

21. The Vacancies Reform 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.” 5 U.S.C. § 3347(a)(1)(B).

The President “Shall Not” Appoint a Member of the FDIC Board without Senate Confirmation; the Acting Director of the CFPB is a Member of the FDIC Board

22. In addition, the President’s Vacancies Reform Act appointment powers “shall not apply” to any members of an independent multi-member board or commission. 5 U.S.C. § 3349c(1).

23. The Acting Director of the CFPB is an automatic member of an independent multi-member board or commission: the Federal Deposit Insurance Corporation (FDIC) board. 12 U.S.C. §§ 1812(a)(1)(B), 1812(d)(2).

24. Therefore, the Vacancies Reform Act does not apply to the appointment of the Acting Director of the CFPB.

25. Even defendant Trump’s own Office of Legal Counsel at the U.S. Department of Justice admits that the Vacancies Reform Act “shall not apply” to independent multi-member boards or commissions such as the FDIC board. As OLC admits, “Congress has indeed determined that some positions with hallmarks of independence should not be filled on an acting basis through the Vacancies Reform Act.”

26. One such position is FDIC board member.

27. Because the President cannot appoint an FDIC board member on an acting basis, the President cannot appoint the Acting Director of the CFPB, who is an FDIC board member.

28. The Acting Director of the CFPB is, by statute, one of only five members of the FDIC board. 12 U.S.C. § 1812(a)(1)(B).

Ms. English's Appointment in Accordance with 12 U.S.C. § 5491(b)(5)

29. Richard Cordray was confirmed as the first Director of the CFPB by a 66-34 vote in the United States Senate on July 16, 2013, and took office on July 17, 2013.

30. Mr. Cordray resigned his position as Director of the CFPB, effective at midnight on November 24, 2017.

31. At approximately 2:30 p.m. on the afternoon of November 24, 2017, before leaving office, Director Cordray publicly announced that he had appointed Leandra English—up until then the Bureau's Chief of Staff—as the Bureau's Deputy Director, to ensure that she would become the Acting Director pursuant to 12 U.S.C. § 5491(b)(5) until the confirmation by the Senate of a new Director appointed by the President.

32. “In considering how to ensure an orderly succession for this independent agency,” Director Cordray explained in a statement, “I have also come to recognize that appointing the current chief of staff to the deputy director position would minimize operational disruption and provide for a smooth transition given her operational expertise.”

33. In addition to serving as the CFPB's Chief of Staff, Ms. English has served in a number of senior leadership roles at the CFPB, including Deputy Chief Operating Officer, Acting Chief of Staff, and Deputy Chief of Staff. In addition to her work at the CFPB, Ms. English has 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.

The President Violates the Law

34. At approximately 8:50 p.m. on the evening of November 24, 2017, the White House press office issued the following statement: “Today, the President announced that he is designating Director of the Office of Management and Budget (OMB) Mick Mulvaney as Acting Director of the Consumer Financial Protection Bureau (CFPB).” The White House statement did not refer to Director Cordray’s earlier appointment of Ms. English as Deputy Director.

35. By purporting to name Mr. Mulvaney as Acting Director of the CFPB, defendant Trump is also purporting to name Mr. Mulvaney a member of the board of the independent, multi-member FDIC.

36. Mr. 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.

37. Mr. Mulvaney has described the CFPB as a “sad, sick joke,” has co-sponsored legislation proposing to eliminate the agency, and said at a hearing in the House of Representatives: “I don’t like the fact that CFPB exists, I’ll be perfectly honest with you.”

38. Ms. English is the Acting Director of the CFPB.

39. *First*, at the moment that Director Cordray’s resignation became effective, she was the agency’s Deputy Director, a position created by Congress via the Dodd-Frank Act. 12 U.S.C. § 5491(b). 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.” *Id.* § 5491(b)(5)(B). Under a plain reading of this language, the Deputy Director

automatically becomes the Acting Director when the Director leaves office: a Director no longer serving in office is “absent” as well as “unavailable.” Thus, when a Director resigns, the Deputy Director serves as Acting Director. This legal arrangement was triggered by the resignation of Director Richard Cordray on November 24, 2017, and his appointment of Ms. English as Deputy Director on that same date.

40. As Acting Director of the CFPB, Ms. English is also a member of the board of the FDIC. 12 U.S.C. §§ 1812(a)(1)(B), 1812(d)(2).

41. However, defendants threw this orderly succession into utter chaos when defendant Trump purported to appoint defendant Mulvaney as Acting Director. The President’s purported use of the Federal Vacancies Reform Act to appoint an Acting Director of the CFPB is an obvious contravention of Congress’s statutory scheme. General principles of statutory interpretation make plain that the FVRA cannot apply where there is a more specific provision determining a plan for filling a particular vacancy, and the FVRA itself provides that it does not control where, as here, “a statutory provision expressly . . . designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity.” 5 U.S.C. § 3347(a)(1)(B).

42. *Second*, the President’s Vacancies Reform Act appointment powers “shall not apply” to any members of an independent multi-member board or commission. 5 U.S.C. § 3349c(1).

43. The Acting Director of the CFPB “shall be” a member of the board of the FDIC, an independent multi-member board or commission. 12 U.S.C. §§ 1812(a)(1)(B) (CFPB Director “shall be”), 1812(d)(2) (CFPB Acting Director “shall be”).

44. Defendant Mulvaney “shall not” be on the FDIC board, 5 U.S.C. § 3349c(1), and therefore cannot be the Acting Director of the CFPB.

45. *Third*, the purported appointment of a White House staffer to lead the CFPB violates Congress’s statutory mandate that the agency be “independent.” 12 U.S.C. § 5491(a).

46. Defendant Mulvaney is the Director of the White House Office of Management and Budget. OMB is an agency within the Executive Office of the President. He is an at-will employee. He serves at the whim and pleasure of the President. He does not enjoy the statutory protections given to the CFPB director. Mr. Mulvaney is particularly susceptible to the direct presidential influence that Congress sought to avoid when it created the CFPB.

47. Even if the President could appoint an Acting Director to the CFPB (he cannot), he still could not appoint his at-will employee Mr. Mulvaney.

48. Nor can the President under any circumstances appoint his at-will employee to be a member of the board of the FDIC. Yet that is what defendant Trump has purported to do.

Defendant Mulvaney Begins to Dismantle the CFPB

49. On November 24, the CFPB, through Mr. Cordray, announced that Ms. English would be the Acting Director until a new Director was confirmed. On November 25, CFPB took the opposite position. The CFPB’s General Counsel, Mary McLeod, issued a November 25, 2017 memorandum to the CFPB’s Senior Leadership Team directing “all Bureau personnel to act consistently with the understanding that Director Mulvaney is the Acting Director of the CFPB.” Defendants and the CFPB subsequently stated to the world that Mr. Mulvaney is the Acting Director, including by listing him as the Acting Director on its website.

50. Meanwhile, according to press reports, Ms. English continues to assert that she is Acting Director and is instructing CFPB employees accordingly.

51. In just a week as the purported Acting Director, defendant Mulvaney has reportedly stopped all new CFPB regulations, stopped all new contracting, stopped all new lawsuits, installed his aides into important CFPB positions, and stopped all payments from the CFPB civil penalties fund.

52. Defendant Mulvaney “d[oesn’t] like the fact that CFPB exists.” Now he is trying to minimize its existence.

CLAIMS

53. President Trump’s appointment of Defendant Mulvaney contravenes 12 U.S.C. § 5491(b)(5)(B), which establishes that Leandra English is the Acting Director of the Consumer Financial Protection Bureau.

54. Article II Section 2 of the Constitution provides that the President must appoint all “officers of the United States” with “the advice and consent of the Senate.” The President may only bypass Senate confirmation in one instance: where Congress “vest[s] the appointment of such inferior officers . . . in the President alone.”

55. Defendant Trump did not appoint defendant Mulvaney with “the advice and consent of the Senate.”

56. Congress did not vest the appointment of the CFPB Acting Director in the President alone.

57. Congress did not vest the appointment of a member of the FDIC board in the President alone.

58. By appointing Mr. Mulvaney in the absence of any Congressional statute so authorizing, President Trump violated constitutional principles of Separation of Powers and the Appointments Clause.

59. Though Mr. Mulvaney is acting *ultra vires*, defendant Mulvaney and the CFPB have taken a final action to install him and recognize him as CFPB Acting Director, in an irrational and unjustified change in agency position. Under the Administrative Procedures Act, plaintiff is adversely affected and aggrieved by that agency action and is entitled to judicial review thereof.

60. A declaration of rights under the Declaratory Judgment Act, 28 U.S.C. § 2201 and the Court's inherent powers is necessary to resolve who is running the CFPB. The Court must rule that Mr. Mulvaney is not the Acting Director of the CFPB, that Ms. English is the Acting Director of the CFPB, and that neither defendant has any ability to make or receive an appointment for the position of Acting Director of the CFPB, or to otherwise act as an officer of the CFPB.

61. In addition, under 28 U.S.C. § 2202, the All Writs Act, and the Court's inherent equitable powers, the Court should grant "[f]urther necessary or proper relief," including an injunction, preventing defendant Mulvaney from serving as Acting Director and defendant Trump from purporting to appoint anyone as CFPB acting director absent Senate confirmation.

62. The Credit Union will be and is irreparably harmed by the defendants' actions and threatened actions, and is without an adequate remedy at law.

PRAYER FOR RELIEF

The Credit Union requests that the Court:

- a. Declare that defendant Mulvaney's appointment as the Acting Director of the Consumer Financial Protection Bureau is unconstitutional and in violation of 12 U.S.C. § 5491(b)(5)(B) and enjoin him from serving as the Acting Director of the Consumer Financial Protection Bureau;

- b. Declare that Leandra English is the Acting Director of the Consumer Financial Protection Bureau under 12 U.S.C. § 5491(b)(5)(B);
- a. Declare that the Federal Vacancies Reform Act does not control the appointment of a temporary Acting Director of the Consumer Financial Protection Bureau because the Dodd-Frank Act “expressly . . . designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity,” 5 U.S.C. § 3347(a)(1)(B);
- b. Declare that the Federal Vacancies Reform Act does not control the appointment of a temporary Acting Director of the Consumer Financial Protection Bureau because that position is excluded from the Federal Vacancies Reform Act under 5 U.S.C. § 3349c(1);
- c. Declare that defendant Mulvaney and other at-will employees in the White House cannot be the Acting Director of the Consumer Financial Protection Bureau;
- d. Order defendant Trump to refrain from appointing any individual to the position of Acting Director of the Consumer Financial Protection Bureau;
- e. Order defendant Mulvaney to refrain from accepting any appointment to the position of Acting Director of the Consumer Financial Protection Bureau, or asserting or exercising in any way the authority of that office;
- f. Award all other appropriate relief, including attorneys’ fees and costs.

Dated: New York, New York
December 5, 2017

Respectfully submitted,

/s/ Ilann M. Maazel

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