12-21-2017

The Risk of an Anti-Consumer CFPB

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Published in Democracy: A Journal of Ideas
December 21, 2007

By Christopher L. Peterson

In recent weeks, a leadership crisis at the Consumer Financial Protection Bureau made headlines around the country. This latest battle in the long-running political war over the consumer Bureau arose when its longtime director Richard Cordray announced that he would be stepping down. (Cordray has since announced his candidacy for Governor of Ohio.) Before leaving office, Cordray put a sensible transition plan in place that included appointing his chief of staff, Leandra English, to be the Bureau's deputy director. Under a plain reading of the Dodd-Frank Act, the Bureau's deputy director automatically assumes the role of a temporary acting director until the President nominates and the Senate confirms a new director to a five-year term. So, when Cordray resigned, Ms. English—a no-nonsense career civil servant with an impeccable reputation for competence—should have legally assumed temporary leadership of the CFPB until the Senate confirms the Administration's new nominee. But President Trump had other plans.

Instead of simply sending a nomination to the Senate, President Trump announced that Mick Mulvaney, the current head of the Office of Management and Budget within the White House, would *simultaneously* serve as acting director of the CFPB instead of Ms. English. Mulvaney represented South Carolina in the House between 2010 and 2017, where he advocated "getting rid of" the agency, calling it a sad, sick "joke."

The President's unorthodox maneuver is legally questionable for two reasons. First, the Dodd-Frank Act states that the deputy director of the Bureau "*shall*" serve as the acting director in the "absence or unavailability" of the director. Both Dodd and Frank of the Dodd-Frank Act joined an amicus brief stating that their intention was to leave temporary succession to the Bureau's director. Past precedent in other single-headed agencies, such as the now defunct Office of Thrift Supervision, suggests Cordray's decision was well within the norm. For his part, President Trump insists that the Federal Vacancies Reform Act gives the him the power to appoint an acting director at the CFPB upon the director's resignation. But, that older statute was superseded by the Dodd-Frank Act, and by its own terms forbids appointments to the multi-member boards that the CFPB acting director must serve upon.

Moreover, the very first substantive section of the Title X of the Dodd-Frank Act established the CFPB as an "independent" agency, although the details of what was meant by this word remained slightly vague. Either way, it is hard to imagine in what way Mick Mulvaney is "independent" while he simultaneously serves as a cabinet-level official in the executive office of the President.

Reasonable minds can disagree about whether the President's maneuver was legal. For now, the federal district court in D.C. has refused to issue an emergency order against the President. But, this decision is far from the final word. English has another hearing revisiting the issue coming up and both sides will have the opportunity to appeal to the D.C. Circuit Court of Appeals. Meanwhile, a small, progressive credit union has filed a parallel lawsuit against President Trump in New York City making many of the same arguments. The credit union is reasonably demanding that the courts clarify which acting director's decisions the credit union should follow.

The President's back-door installation of Mulvaney, beyond being another display of the President's disregard for normal political process and democratic norms, portends several onerous consequences. First, the President's maneuver side-stepped the politically moderating benefits of the Senate confirmation process. In order to win confirmation, a permanent director must consider whether to make concessions to Senators, on the record and under oath. There is a real chance that a Senate-confirmed director would have promised to preserve (if not enhance) many of the CFPB's critical tools and accomplishments, including its publicly available complaint database, its service member affairs and student lending programs, its pending payday lending regulation, and perhaps especially the CFPB's muscular supervision and law enforcement program. This could have both set expectations within the Bureau and shaped industry perceptions outside of it. Mulvaney had to make no such promises.

Additionally, the installation of Mick Mulvaney has echoes of the Merrick Garland Supreme Court seat battle. If Mulvaney is entrenched at CFPB, we can expect that President Trump will be in no rush to nominate a permanent director any time soon. Instead, the President may be tempted to leave Mulvaney in place as long as possible. If President Trump takes the most aggressive posture (and when does he not?), he could wait to nominate a permanent director until the end of his first term in office approaches. That way, a permanent director would serve for another five years—long after Trump's first (and possibly only) term in office has expired. The next President might not be allowed to appoint a director at all.

All of this matters because the work of the agency matters. One of the great ironies behind the longstanding fight over the CFPB is how uncontroversial the laws the agency has focused on are. I recently published a study analyzing every publicly announced CFPB enforcement case from the agency's inception through 2016. Although there is great breadth in the type of companies and financial services subject to CFPB jurisdiction, more than any other factor, the thing that CFPB defendants tend to have in common is *deception*. Over 93 percent of consumer relief returned to American families came in cases where the bank or financial company misled their customers with respect to a material characteristic of their service. This included large cases such as Wells Fargo's fraudulent creation of over two million unauthorized bank accounts. But it also included dozens of smaller cases such as the H&R Block franchise on the outskirts of the

Navajo reservation in New Mexico that steered low-income, American Indian customers into triple-digit interest-rate tax refund loans, and then lied to its customers about whether their tax refunds had arrived in order to allow more interest to accrue. Under Director Cordray nearly 30 million Americans—over ten percent of the adult population—received restitution in CFPB enforcement cases like these.

And yet, one of Mulvaney's first actions upon seizing control of the Bureau was to announce a suspension of any new enforcement investigations and a review of all current cases with plans to abandon those Mulvaney disagrees with. Although the Bureau does not comment on its current investigations, it would be wildly naïve to believe that this does not include serious cases of bank or finance company deception with struggling families hoping for assistance from their government. It is profoundly disturbing that a President that agreed to pay $25 million in a consumer fraud lawsuit has seized control of an independent agency and called a halt to investigations of companies that lied to their customers.

The Senate, consumer rights organizations, and the public are right to insist that the Trump-appointed CFPB director must continue to enforce federal laws protecting American families; and that must include an environment in which the agency's staff feel they can continue to carry out their essential work without political interference or fear of reprisal. Law enforcement attorneys and examiners need the trust and confidence of their supervisors to effectively identify and challenge illegal financial activity. When law enforcement staff are cowed, the temptation is simply too great to look the other way when companies push the envelope with creative legal theories, sketchy record keeping, or misleading language. Indeed, the entire 2008 financial crisis was built upon a cumulative foundation of little deceptions and gimmicks. If professional staff at the CFPB are at risk of ridicule, reassignment, or even being fired when they raise questions about problematic financial practices, it will jeopardize the ability of the agency to protect the public from harm.

The risks of an anti-consumer CFPB go beyond just those cases currently under investigation. America has a massive financial sector that is constantly evolving and reinventing itself. This striving for innovation and efficiency is, of course, one of the American financial system's great advantages. Nevertheless, the Sun-Tzu-worshipping, MBA-wielding financiers that use boilerplate consumer credit contracts as weapons in their endless market-share battles are paying attention to what the agency is doing—and more importantly, to what it is *not* doing. A chilled CFPB law enforcement program will embolden the consumer finance industry to roll out more misleading advertising, more deceptive sales scripts, more onerous hidden fees, larger kickbacks in exchange for ripping off customers, weaker credit reporting accuracy safeguards, less identity-theft resilient services, and more dehumanizing one-on-one debt collection. At its core, the fight over CFPB leadership matters because a chilled CFPB law enforcement program will lead to a disempowered, less affluent America.