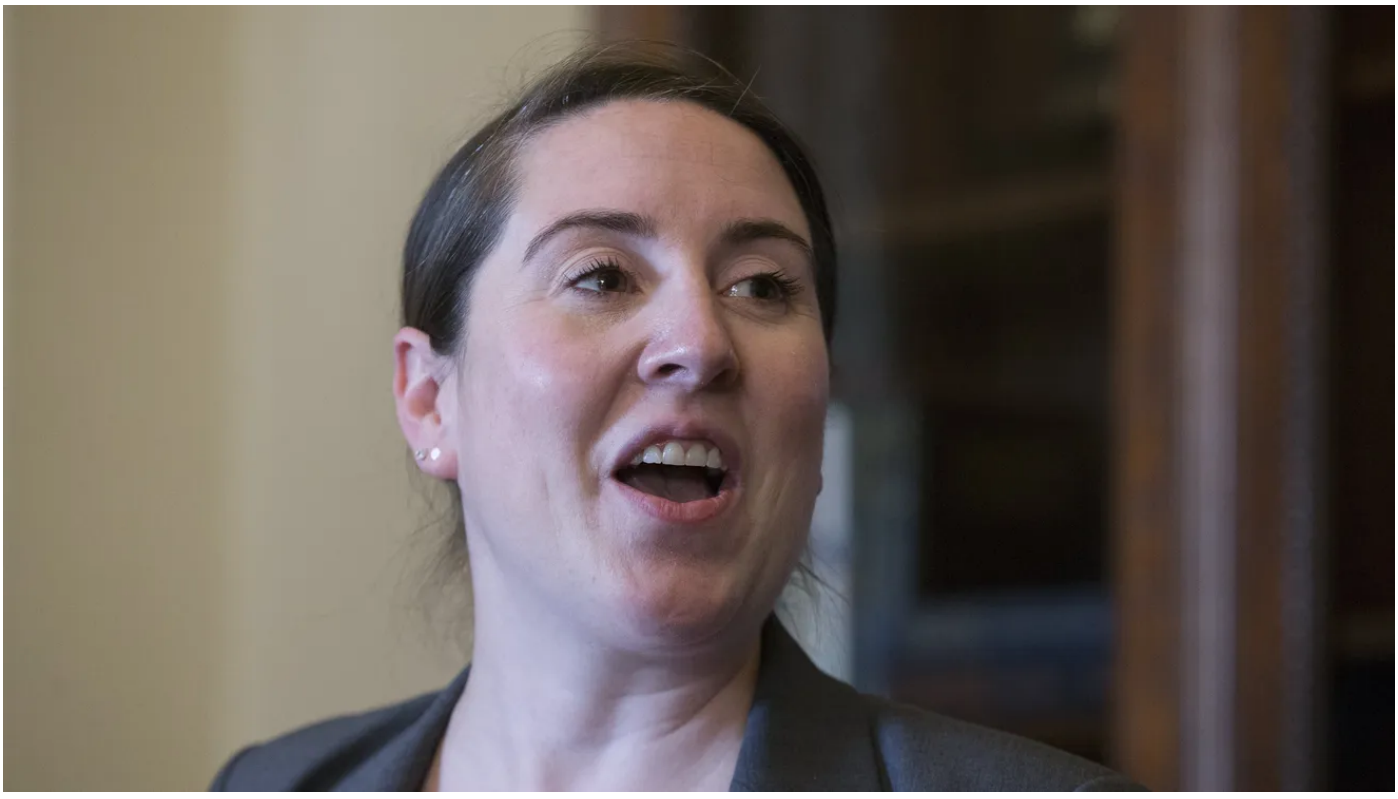
President Trump is constitutionally right on the CFPB even if we oppose him otherwise

Looking back through Dodd-Frank, Supreme Court decisions and the Constitution, all support Trump appointing a new Consumer Financial Protection Bureau head.



In the latest round of high-stakes constitutional poker, President Donald Trump holds all the high cards.

Who gets to run the consumer watchdog agency created in 2010 by the Dodd-Frank Act? Richard Cordray, an Obama appointee, resigned last week

as the Director of the Consumer Financial Protection Bureau and on his way out named Leandra English to serve as the Bureau's Deputy Director. Cordray's allies say that under Dodd-Frank, English is now in charge. But President Trump has invoked another statute, the 1998 Vacancy Reform Act, which he says allows him to fill the slot, at least for now, with his man, Mick Mulvaney. With lightning speed, the matter has been brought before a federal district court.

The statutes are ambiguous. On the one hand, in sharp contrast to many other statutes, Dodd-Frank does not expressly use the word "vacancy." It says that the Deputy may act in the Director's stead when the Director is "absent or unavailable," not when the Director is nonexistent because he has resigned, been fired, or been removed via impeachment. On the other hand, the phrase "absent or unavailable" can plausibly be read broadly to cover vacancies. Moreover, the Vacancy Act statute is itself equivocal. The Act provides the "exclusive" way a president can fill a vacancy unless some other statute provides otherwise; but the Act does not explicitly say that it provides a "nonexclusive" alternative mechanism for filling a vacancy if another statute (such as Dodd-Frank, read broadly) also applies.

But statutes do not stand alone. They stand alongside and beneath the Constitution itself. And the Constitution makes Donald Trump — not Richard Cordray, not former Representative Barney Frank (the co-sponsor of Dodd-Frank), not Senator Elizabeth Warren (another strong supporter of Dodd-Frank and the CFPB) — the decider-in-chief on this issue.

The big constitutional idea is that the president must be in charge of his own

branch. Article II begins by vesting executive power in the president. Article II goes on to say that the president, and no one else, is responsible for taking care that the laws are faithfully executed. He is thus the superintendent-in-chief, and he must be able to monitor all the executive departments, whose heads answer to him and him alone pursuant to another Article II provision, known as the Opinion Clause. For Departments headed by a single person, such as the State Department or the Defense Department, the president is also the sacker-in-chief, authorized to fire any department head at will.

This last point does not expressly appear in the Constitution's text, but was fixed by the First Congress and George Washington in a landmark settlement known as the Decision of 1789, which the Supreme Court has repeatedly and unanimously reaffirmed. True, the 1789 precedent does not apply to multi-member commissions, who can be statutorily insulated from at-will removal. But Cordray was not a commissioner; rather he was the sole head of his agency, constitutionally akin to a Cabinet Secretary.

Thus, even if Cordray had statutory authority to name English as his replacement, English can be fired at will under the Decision of 1789. True, Dodd-Frank purports to insulate the director from at-will presidential removal, but this statute does not expressly say this about the deputy. Even if it did, it would raise serious constitutional doubts, given the Decision of 1789. This fact alone means the president wins, because courts must construe the statute to avoid these constitutional doubts (just as the Roberts Court in 2012 upheld Obamacare by construing the statute in a way that avoided constitutional difficulty). In fact, a panel of the DC Court of

Appealshas already ruled that even the director himself cannot be insulated from at-will presidential removal, thanks to the Decision of 1789; only multi-member commissions can be insulated. Although that ruling has not yet reached the Supreme Court, when it does the Court should and likely will affirm this well-reasoned panel decision.

Consider, finally, one other constitutional trump card in Trump's hand. Unlike Cordray and Mulvaney, English has never been confirmed by the Senate, nor was she picked by a president. Under the Article II appointments clause, she must therefore be an "inferior" officer. But she also now claims to be an agency head. Which is it? How can she be both at the same time — head and inferior? If she is truly inferior (as she must be, to be constitutional), how can she also claim to be independent? She cannot be both, and thus she loses under the clear language and crisp logic of two recent Supreme Court inferior-officer cases, Edmond v. United States (1997) and FEC v. PCAOB (2012).

Those of us who oppose President Trump politically must concede that he is the president. When he violates the Constitution, we must resist via all lawful and appropriate measures. But if we insist that he follow the Constitution, we must do the same ourselves.

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