



Behind the latest Washington war: An agency that neither side should control

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While most of us were recovering from all the turkey and pie last Friday, a showdown was brewing at the Consumer Financial Protection Bureau. As of Monday, there were two people claiming to be the new acting director of the federal agency.

And while the CFPB might not yet be a household name, perhaps it should: The agency's director is far too powerful, and the tussle over who should possess that power, President Trump's choice or an Obama administration holdover, may have far-reaching consequences.

The question of who rightfully leads the agency is a complex one, full of technical arguments and arcane legal concepts. But the real story is that the position of director (or acting director) is just too powerful. The actions of the agency over the last several years are evidence enough — and if the position were not so powerful, no one would care this much about who becomes acting director.

The story began earlier this month when Richard Cordray announced he would resign as director before December. President Trump announced his intent to name Office of Management and Budget Director Mick Mulvaney as acting director until a new one could be confirmed by the Senate.

However, just hours before resigning Friday night, Cordray tried to handpick his own successor, naming longtime staffer Leandra English to the position of deputy director, with the intention that she'd become acting director on his departure.

So who's on first?

It's a question of which statute takes precedence — the Federal Vacancy Reform Act, which suggests Trump's nominee should now run the agency, or Dodd-Frank, which suggests the position should fall to Cordray's choice — and isn't an easy one to answer. But regardless of who's selected, too much can be done by the acting director in just the months it will take for a new director to be nominated and confirmed.

The CFPB was created under Dodd-Frank as an independent agency, and that law does not allow the president to fire the director simply because of a policy disagreement. This isn't unusual, but few other independent agencies are led by individual directors. The Securities and Exchange Commission, for example, includes Republican and Democratic commissioners, and requires any one member to secure the agreement of at least two colleagues before taking meaningful action.

It's this combination of independence and sole directorship that makes the agency so unusual — and makes the position of director so important.

As director, Cordray has followed a policy driven by ideological zeal. And the agency's short history demonstrates how much damage one person can do in control of the CFPB.

The agency was given wide-ranging authority over consumer financial matters. But Cordray wasn't content to stay within even those broad bounds, seeking to trespass in the areas of school accreditations and auto sales as well. He has imposed unreasonable penalties, unilaterally reinterpreted longstanding regulatory guidance and increased the fine imposed on one company by more than 18 times the amount initially levied — for conduct that was not even illegal when it happened.

He has charged forward with a rule limiting short-term loans without due consideration of the harm it will cause to vulnerable Americans.

Meanwhile, under his leadership, the agency failed to uncover the widespread fraud at Wells Fargo, relying instead on the LA Times to break the story. After the story broke, the agency was happy, however, to take full credit for stopping the Wells Fargo fraud.

For those who support his vision, the fact that he wielded enormous power was a great boon. But the flip side is that Mulvaney, as acting director, will wield the same power, but to forward a very different vision. The solution, then, is to make the position less important by diffusing its power. As others have argued, the agency — if it must exist at all — would be better structured as a commission, with each commissioner acting as a check on the others.

Cordray may have had the best intentions in pursuing his left-wing policies, but good government requires that we acknowledge human frailty by limiting any one person's ability to inflict damage. This is the guiding principle behind the Constitution's separation of powers, pitting one branch of government against another, limiting the power of each and requiring that all be ultimately accountable to the people.

As it stands the CFPB's structure enshrines just the opposite, rendering it accountable to no one and making its directorship far too sweet a prize.

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