

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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LEANDRA ENGLISH,

Plaintiff,

v.

DONALD JOHN TRUMP, et al,

Defendants.

- - - - - x

CA No: CV 17-2534

Washington, D.C.

Monday, November 27, 2017

4:30 p.m.

TRANSCRIPT OF MOTION HEARING
HELD BEFORE THE HONORABLE TIMOTHY J. KELLY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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P R O C E E D I N G S

1
2 THE DEPUTY CLERK: Your Honor, this is civil
3 matter 17-2534, Leandra English v. Donald John Trump, et al.

4 Will counsel please approach the podium and state
5 your appearance for the record.

6 MR. GUPTA: Good afternoon, Your Honor. Deepak
7 Gupta for the plaintiff, Leandra English, and with me at
8 counsel table are my colleagues, Joshua Matz and Danny
9 Townsend.

10 THE COURT: Good afternoon, Mr. Gupta.

11 MR. SHUMATE: Good afternoon, Your Honor. Brett
12 Shumate from the Department of Justice on behalf of the
13 defendants.

14 THE COURT: Good afternoon, Mr. Shumate.

15 All right. Well, an emergency motion was,
16 apparently, attempted to be filed yesterday or, maybe, it
17 was filed to -- it was filed to some degree according to
18 your papers and I got assigned to it, I think, sometime in
19 the afternoon and that's why I brought you all -- it was
20 filed on an emergency basis. That's why I've -- I asked you
21 all to be here so promptly and the Court appreciates that.

22 And so I'll first -- I'll start with you, Mr.
23 Gupta. If you would, I'd hear from you on your motion for
24 the TRO and then also, if, as a factual matter, you want to
25 bring me up to speed on any factual developments that have

1 happened today. I've been reading your briefs. I haven't
2 been paying attention to the outside world. So I don't know
3 if there are additional facts that cut one way or the other,
4 but I'll ask both the parties to address that in their
5 presentations.

6 MR. GUPTA: Thank you, Your Honor.

7 First, I want to thank the Court for scheduling
8 the hearing so quickly.

9 The reason we're here is that Congress, in the
10 Dodd-Frank Act in 2010 when it set up the new Consumer
11 Financial Protection Bureau, also set up a mandatory
12 succession plan for what happens when a Director leaves
13 office. The relevant statutory provision is 12 U.S.C.
14 5491(b)(5). And what that provision says, in mandatory
15 language, is that the deputy Director, shall serve as the
16 acting Director in the absence or unavailability of the
17 Director. Now, the Government agrees -- I think, if you
18 look at the Office of Legal Counsel opinion that was issued
19 over the weekend, the Government agrees that the language,
20 Absence or unavailability, covers this situation; that,
21 effective at midnight on Friday when Richard Cordray left
22 the office of the Director of the CFPB, that by operation of
23 the Dodd-Frank Act -- if you just look at the Dodd-Frank
24 Act, they agree that the deputy Director, Leandra English,
25 by operation of that statute, became the acting Director of

1 the CFPB. The reason we're here today, the controversy
2 arises because the President purported to make an
3 appointment not through the Dodd-Frank Act but by accessing
4 a different statute, the Federal Vacancies Reform Act
5 enacted earlier in 1988. That's a default provision that
6 applies across the Federal Government. And the question is,
7 what do you do about this conflict between the two statutes?

8 THE COURT: There are some exceptions, though;
9 correct? It applies across the Federal Government, but
10 there -- but the -- Congress carved out certain --

11 MR. GUPTA: That's right.

12 THE COURT: -- instances where it would not apply.

13 MR. GUPTA: That's right. And what it carved out
14 were independent agencies. It's generally understood that
15 independent agencies -- when there's a vacancy in an
16 independent agency, that is filled with a presidential
17 appointment and confirmation by the Senate and that's what
18 the Dodd-Frank Act provides. When there's a vacancy in the
19 directorship, that provision -- that permanent Director has
20 to be confirmed by the Senate. And so until such time as
21 the Senate confirms a Director, the acting Director is --
22 the deputy Director is the acting Director by virtue of this
23 mandatory succession plan. And so the question you have to
24 decide is how to resolve this conflict between the specific
25 mandatory language of the Dodd-Frank Act enacted in 2010 and

1 the background language of the Vacancies Reform Act enacted
2 in 1988. And the Vacancies Reform Act has a provision that
3 answers this question. It says that this is the way of
4 filling a vacancy unless -- and this is at 5 U.S.C. 3347(a),
5 Your Honor -- unless a statutory provision expressly
6 designates an officer or employee to perform the functions
7 and duties of a specified office temporarily in an acting
8 capacity. In our view, that's exactly what the Dodd-Frank
9 Act does. And I think the legislative history -- I mean, I
10 think the text is clear and the mandatory text is where you
11 should start. I think Justice Scalia taught all of us that.
12 But if you look at the legislative history, I do think it's
13 informative of why the text reads the way it does. The
14 original House version of this statute referenced the
15 Vacancies Reform Act specifically and it said, you know, the
16 way you fill this Director office, if it's open, is through
17 the Vacancies Reform Act. The Senate version later removed
18 that language and created the office of the deputy Director
19 and then included this mandatory succession language.

20 THE COURT: Doesn't that just put us right back
21 where we are? In other words, aren't there a lot of
22 explanations why the legislative history could look the way
23 you describe? If the law's as clear as OLC and others who
24 have opined about this say, perhaps, the legislative history
25 just meant they wanted to default to a status quo that they

1 argue allows the President to make that appointment.

2 MR. GUPTA: Well, I think the problem for the
3 Government's argument is, what is this language doing there
4 in the Dodd-Frank Act if they're right? In other words, if
5 they're correct that the Vacancies Reform Act applies
6 anyway, the Vacancies Reform Act says that the first
7 assistant of the agency becomes the acting Director unless
8 the, you know -- the President does something different. So
9 there would be no reason to include this mandatory
10 succession language. And so, you know, when you have
11 mandatory language in a statute that would be rendered
12 superfluous by reading, I think that's reason for doubt
13 about that reading. And so --

14 THE COURT: Aren't there plenty of other
15 situations with similar language?

16 MR. GUPTA: There are not. The Office of Legal
17 Counsel's opinion does not identify any mandatory language
18 like the -- the closest they come, I think -- and this is --
19 and I sympathize with Your Honor. I'm sure you have not had
20 a chance to look at all of this stuff. But the closest they
21 come in the OLC opinion, I think, is statutes that were
22 enacted before the Vacancies Reform Act. But, of course,
23 that makes sense; right? Those statutes don't tell us very
24 much about how to reconcile a conflict between the Vacancies
25 Reform Act and later enacted statutes. And the statutes

1 that they're referring to --

2 THE COURT: I think they make the point, though,
3 that the Vacancies Reform Act also uses mandatory language,
4 though; isn't that fair to say?

5 MR. GUPTA: Well, the Vacancies Reform Act, it's
6 true, uses mandatory language, but it -- then it has this
7 unless clause; right? And what Congress is saying in 1988
8 is, This is going to be how you fill these offices unless we
9 provide otherwise in another statute, including subsequent
10 statutes; right? And I think, you know, that's exactly what
11 the Dodd-Frank is doing -- Act is doing. It's designating
12 an officer to use the VRA exclusion language, Designating an
13 officer to perform the functions and duties of a specified
14 office temporarily in an acting capacity.

15 Now, the examples that the OLC opinion points to
16 are pretty different. Those are situations in which, you
17 know, the President has a choice or the -- or somebody that
18 works for the President has a choice; right? This is a
19 situation in which there's a mandatory provision that
20 designates a particular officer. It's very hard to
21 reconcile the Government's argument with this exclusion in
22 the VRA. If Congress had wanted to make the VRA available,
23 it, you know -- why would it have enacted this language;
24 right? It doesn't -- there has to be some account for why
25 Congress put this succession plan in if it intended the VRA

1 to be available as a default.

2 THE COURT: Tell me about -- are there any factual
3 points you want to make about what has happened --

4 MR. GUPTA: Sure.

5 THE COURT: -- about today?

6 MR. GUPTA: And, Your Honor, I may -- before I
7 turn to that, if I can, I just want to make clear that we
8 have an alternative argument.

9 THE COURT: Yes.

10 MR. GUPTA: Papers; right?

11 THE COURT: We will get to that.

12 MR. GUPTA: Okay.

13 So in terms of factual developments, I really
14 don't think there's anything that changes the question
15 before you because we are seeking to preserve the status quo
16 at the time we filed the complaint. But I'm sure you're
17 wondering, like everyone else is, what happened this
18 morning? And the answer is that Ms. English went to the
19 building. She is performing work for the bureau and in her
20 -- she believes, in her capacity as acting Director.
21 Obviously, Mr. Mulvaney believes otherwise and that's why
22 we're here, but they don't dispute that she's, I think, a
23 bureau employee and that she's, at least, the deputy
24 Director.

25 THE COURT: She has not been fired as of --

1 MR. GUPTA: She has not been fired. It -- unless
2 it's happened since we've gotten to the courthouse.

3 THE COURT: Okay. And do you expect her to be
4 fired imminently for any reason?

5 MR. GUPTA: I don't think so because I think the
6 problem is, who would fire her and under what authority? If
7 it's the Mulvaney -- Mr. Mulvaney firing her, he would be
8 doing that only by virtue of his appointment or purported
9 appointment as acting Director; right? So it just
10 replicates the problem if they attempt to fire her. I don't
11 think that really answers the question and, you know --

12 THE COURT: Not saying it does. I just --

13 MR. GUPTA: Right.

14 THE COURT: -- want to know if --

15 MR. GUPTA: And I think it's important to refer
16 you to the for-cause removal provision in the Dodd-Frank
17 Act. There's this protection that prevents the Director of
18 the CFPB from being removed. So they can't just do it on an
19 at-will basis. They would have to identify cause. And
20 what's interesting about that is this purported appointment
21 was made before Mr. Cordray's resignation took effect. If
22 it had been made after, you'd, then, have this question of,
23 well, can they do that? Do they have to remove the person
24 that's the incumbent for cause? And I guess a question for
25 them would be, do they think that Mr. Mulvaney enjoys that,

1 you know, protection as far as the statute -- statutory
2 interpretation is concerned? Otherwise, they -- I
3 understand they may have constitutional arguments, but as
4 far as statutory interpretation is concerned, that's a
5 puzzle for the Government's argument.

6 So the only thing I'd like to add, if I may, is
7 just to discuss the independent argument --

8 THE COURT: Yes.

9 MR. GUPTA: -- that we have. And that is that
10 even if Your Honor assumes that the President has the
11 authority -- the statutory authority to put someone in place
12 as the acting Director notwithstanding this mandatory
13 language in the Dodd-Frank Act, the Dodd-Frank Act is very,
14 very clear that it was -- what it was trying to do with the
15 CFPB was to establish an independent agency. Congress went
16 to great pains to protect this agency, establishing it as an
17 independent bureau within the Federal Reserve System. And
18 there may be tough questions at the margins about what
19 independence means, but we've never had an agency where it
20 is required by statute to be independent and, yet, somebody
21 who is a sitting White House official can simultaneously
22 hold the position of the Director of that agency and a White
23 House official. It would be as if you had an economic
24 advisor to the President who was named the Chair of the
25 Federal Reserve Board but insisted on continuing to serve as

1 a White House officer. So that's a separate problem --
2 statutory problem with this particular appointment.

3 THE COURT: Is that -- and so the basis for your
4 argument there is simply the statutorily-charged independent
5 mandate of CFPB --

6 MR. GUPTA: Right.

7 THE COURT: -- and Mr. Mulvaney's status as
8 working for the White House currently?

9 MR. GUPTA: Yeah, that's right. And it -- I mean,
10 this comes from the language, the very first words of the
11 Dodd -- the CFPB act within the Dodd-Frank Act; right? But
12 it also comes from the structure and the entire apparatus of
13 how this bureau is created.

14 THE COURT: Do you have any case law to support
15 that or additional legal material?

16 MR. GUPTA: I'm going to concede that there is not
17 a lot of case law on this question, but -- because it hasn't
18 come up, but I think, you know, one thing you can look at is
19 the Supreme Court's decision in *Humphrey's Executor*. And
20 what the Supreme Court said there is -- and I'm going to
21 just quote for you; this is on Page 9 of our brief -- It is
22 quite evident that one who holds his office only during the
23 pleasure of another cannot be depended upon to maintain an
24 attitude of independence against the latter's will. And so
25 if that's correct -- if what the Supreme Court has said is

1 correct, then having someone who serves at the pleasure of
2 the President -- and, indeed, in this case, not just at the
3 pleasure of the President, but in the White House in the
4 office of the President -- they cannot simultaneously be
5 independent and the head of an independent agency.

6 THE COURT: Do you see any distinction between the
7 fact that the President hasn't named Mr. Mulvaney the
8 permanent head? He hasn't attempted to nominate him and
9 receive the advice and consent of the Senate. He simply
10 named him to be acting for a period of time. Do you see any
11 distinction there?

12 MR. GUPTA: No. I mean, I think, if anything,
13 it's even worse; right? Because the -- one thing we haven't
14 talked about enough, maybe, is the way in which this
15 appointment circumvents the prerogatives of the Senate;
16 right? The whole point of this mandatory succession plan is
17 to ensure that if the President is going to put someone to
18 head this -- and I want to be clear about this. The
19 President has every right to do so. The President has the
20 right to name the head, but the President has to go through
21 Senate confirmation. And so if anything, the independence
22 problem, I think, is greater --

23 THE COURT: Well --

24 MR. GUPTA: -- in this circumstance.

25 THE COURT: -- one way or the other, even if the

1 acting Director were elevated -- or the deputy Director were
2 elevated, that person wouldn't go through Senate
3 confirmation either, fair to say? During their time as
4 acting.

5 MR. GUPTA: That's right.

6 THE COURT: Your client hasn't been confirmed by
7 the Senate either --

8 MR. GUPTA: No, that's right. That's absolutely
9 right. But the point here is to try to prevent the
10 President from being able to circumvent the confirmation
11 process in the Senate. And actually -- I mean, the
12 Vacancies Reform Act is also designed to do that and that's
13 why it has time limitations; right? So -- and this is a
14 problem with the Government's argument, just a practical
15 problem. If what they say is right, they can -- they could
16 install Mr. Mulvaney there indefinitely, have him as the
17 acting head and there would be no incentive to seek Senate
18 confirmation. I think that's why we have this mandatory
19 succession plan, Your Honor, and it's why we have a norm
20 that independent agencies do not have a situation where
21 you -- the President can just install someone without Senate
22 confirmation.

23 THE COURT: Can I ask you to address your client's
24 irreparable harm.

25 MR. GUPTA: Sure.

1 THE COURT: And, specifically, it's -- as I
2 thought about it, it seems as though -- well, first, is
3 there anything beyond -- you cited a case in your brief on
4 simply, sort of, her statutory -- her right to --

5 MR. GUPTA: Right.

6 THE COURT: -- right to function in her capacity.

7 MR. GUPTA: Right.

8 THE COURT: Is there anything beyond that or is
9 that where you rest your argument? And one other point I'd
10 like you to issue -- to address on this point is the
11 relationship with the merits. It, sort of, seems to me --
12 or the relationship with, you know, likelihood of success on
13 the merits.

14 MR. GUPTA: Right.

15 THE COURT: If your client is not -- don't they,
16 kind of, merge into the same analysis? In other words --

17 MR. GUPTA: Yeah.

18 THE COURT: -- if your client isn't, in fact,
19 lawfully the acting Director, then she doesn't have any harm
20 -- any irreparable harm --

21 MR. GUPTA: So a few points, Your Honor. I think
22 it's -- you're characterizing our argument largely
23 correctly. The principal but, I think, not only basis upon
24 which our irreparable harm argument rests is the statutory
25 right to hold the office which was recognized in *Berry v.*

1 Reagan and a few other cases like it as a basis for
2 irreparable harm. And you're right. It's like in a First
3 Amendment case, you know? There's this case, *Elrod v.*
4 *Burns*, that says, you know, the loss of First Amendment
5 rights is irreparable harm. It functions similarly to that.
6 And you're right that it turns on what one thinks about the
7 merits. If we do not have -- if she does not have any
8 statutory entitlement to the office, then this argument
9 falls away.

10 But there is another irreparable harm argument
11 that we identify -- and this is at the bottom of Page 10 of
12 our brief -- which is that if the relief that she is seeking
13 is not granted, there are things that can happen. And, you
14 know, this has been alluded -- you've alluded to this and
15 others have that she could be fired. Her status could be
16 modified in ways that cannot be retrieved. And that's, you
17 know -- that's not that different from other circumstances,
18 employment situations where an employment decision can be
19 made that can't be undone. And so that's the basis for the
20 irreparable harm argument.

21 And, you know -- and I think, ultimately, the
22 reason we spend so much time on the merits in the papers is
23 that that's largely what this is really about. I think
24 everyone acknowledges there needs to be an answer to this
25 question. There needs to be one soon. This may not be the

1 final stop in deciding what that answer is. And so, you
2 know, I think if Your Honor's able to decide this in a way
3 that facilitates, you know, expeditious review, that's a
4 good thing for everyone because the people who work at this
5 bureau need certainty; people in the marketplace need
6 certainty. Some -- the -- everyone needs to know, who is
7 the Director of this bureau?

8 Thank you, Your Honor.

9 THE COURT: Can I ask you just a few more
10 questions.

11 MR. GUPTA: Yep.

12 THE COURT: What, you know -- given the passage of
13 time since you filed the motion, what exactly is the relief
14 you're seeking as you stand here right now?

15 MR. GUPTA: The relief we're seeking has not
16 changed. It is the same relief as laid out in the proposed
17 order. We seek an order that the President refrain from
18 appointing, recognizing someone as the holder of this office
19 of acting Director or causing any person to recognize
20 someone other than the plaintiff as the holder of that
21 office and that would apply to both defendants and, to the
22 extent that there has been an appointment, that that
23 appointment shall be withdrawn because it's contrary to the
24 Dodd-Frank Act. And we want to be clear that any order that
25 the Court issues not be construed as preventing the

1 President in any way from doing what he's supposed to under
2 the statute which is naming a Director who would be
3 confirmed by the Senate.

4 THE COURT: One of the things, then, that you're
5 asking me to do is enjoin the President. And it seems to me
6 that that's an extremely -- that's not something you focused
7 in on your briefing. That's an extraordinary remedy. Do
8 you want to address that at all --

9 MR. GUPTA: Yeah. I don't deny that it's
10 extraordinary. This is an extraordinary case. And it's
11 interesting, you know, if you look for cases that most
12 directly address this question of, when can a District Court
13 enjoin the President, under what circumstances, you know?
14 What you end up finding is, you find D.D.C. cases where
15 someone is coming in in precisely these circumstances, cases
16 like Mackey where you have to enjoin the President because
17 the President is the person who makes the appointment or
18 removes the person from office and if you conclude that you
19 can't enjoin the President, then what you're saying is,
20 there is a prospective ongoing violation of federal law that
21 can't be remedied and the courts have been pretty clear
22 about this; that in these circumstances, the President can
23 be enjoined. The reason that we say that the President
24 can't be enjoined in lots of other cases is because there's
25 usually a subordinate official who's carrying out the

1 Executive Branch's function. And so the typical way you do
2 this is, you sue that person. There's no reason to sue the
3 President. It's pretty unusual that you have a circumstance
4 like this and presidential appointments and removal cases
5 are that situation and that's why, when you look at those
6 cases, you'll find that the District Court here -- this
7 District Court and the D.C. Circuit have, in fact, you know,
8 authorized and issued relief against the President.

9 THE COURT: Okay.

10 MR. GUPTA: Thank you.

11 THE COURT: All right. Thank you, Mr. Gupta.

12 Mr. Shumate?

13 MR. SHUMATE: Your Honor, if I may, I'd like to
14 start with your question about the facts on the ground. And
15 I'd like to start with Saturday, November 25th, when the
16 general counsel of the CFPB issued a memo to the senior
17 leadership team at the CFPB which says, and I quote, I
18 advise all bureau personnel to act consistently with the
19 understanding that Director Mulvaney is the acting Director
20 of the CFPB. By all accounts, all senior staff at the CFPB
21 are operating under the direction of the general counsel
22 that Director Mulvaney is the acting Director of the CFPB.
23 Based on the reports that I've read, he appeared at the CFPB
24 this morning; he was allowed into the building; he was shown
25 the Director's office; the conference room; he reviewed

1 transition materials/briefing materials; and was treated as
2 the Director -- the acting Director of the CFPB. So when
3 the plaintiffs say that they are asking the Court to merely
4 preserve the status quo, that is not correct. The status
5 quo is that acting Director Mulvaney is the acting Director
6 of the CFPB and what they are seeking is a mandatory
7 injunction asking the Court to disrupt that status quo and
8 place a different individual in the position of the acting
9 Directorship of the CFPB. And they have a heightened burden
10 to show irreparable harm. And I think they've already
11 explained why there is no irreparable harm to Ms. English
12 because, as I heard my friend say, she's -- there is no
13 concern that she will be terminated immediately. She's
14 still showing up at the office. She's still -- she is still
15 the deputy Director of the CFPB. So really, and from our
16 perspective, there is no emergency that requires the Court
17 to resolve this merits question on an emergency basis. We
18 are --

19 THE COURT: You don't expect her to be -- I mean,
20 we can't know the future. But you don't expect her to be
21 fired imminently?

22 MR. SHUMATE: I have no knowledge of that, Your
23 Honor. I would say, we are prepared to file a brief in
24 opposition to the TRO motion as soon as tonight if the Court
25 would like that, but, again, we don't think there's any

1 reason for the Court to expedite a ruling here. This is an
2 important question. The Court should get it right; take its
3 time. We're happy to brief it on whatever schedule the
4 Court deems appropriate, but really, we think an emergency
5 decision on this question really would not be necessary.

6 Again, Ms. English is not suffering any
7 irreparable harm. She showed up at the office today. She
8 has not been fired. She is still receiving a paycheck.
9 There is no imminent decision that the CFPB needs to make
10 that requires the Court to make a decision today so she can
11 exercise the powers of that office. To the extent the Court
12 were to decide in the future that Ms. English is the acting
13 Director, the Court could always reinstate that remedy at a
14 later date. But I would want to point out Your Honor's good
15 concern about the remedy that's being requested by the
16 plaintiff. And I think -- if you read the proposed order, I
17 think it's quite extraordinary for the reasons you identify.
18 They are asking the Court to enjoin the President from
19 exercising his Article II power to appoint an official
20 within the Executive Branch of the Federal -- of the
21 government and to withdraw any purported nomination of
22 acting Director Mulvaney. And *Mississippi v. Johnson* is the
23 court -- is the case that we will point Your Honor to in our
24 brief that we will file today. It explains that no court
25 has jurisdiction to issue a bill to enjoin a President of

1 the United States, especially in his official capacity. And
2 that's exactly what they're seeking to do here. They're not
3 seeking some ministerial action of the President here.
4 They're asking the Court to officially enjoin the President
5 from taking some official action and that would not be
6 appropriate.

7 In terms of success on the merits, Your Honor,
8 we'll be happy to brief that as well, but I think -- just
9 two data points for you. First is the OLC opinion that was
10 released on Sunday and the memorandum from the general
11 counsel of the CFPB, both of which agree that the President
12 was authorized to designate acting Director Mulvaney in the
13 way that he did under the Vacancy Reform Act. We're happy
14 to address all the plaintiff's arguments in our brief that
15 we'll file today, but I think that's a pretty good
16 indication that we have a strong likelihood of success --

17 THE COURT: It's fair, then, for me to assume that
18 those analyses are analyses that you're -- you will adopt?

19 MR. SHUMATE: Well, I think -- we're happy to
20 brief all of those -- I don't think the Court needs to
21 address all the questions in the OLC opinion, but certainly,
22 on the primary question of whether the President --

23 THE COURT: And the matters before this Court.

24 MR. SHUMATE: Right.

25 THE COURT: Okay. I want to ask one -- there's

1 one issue that really wasn't addressed in either of those
2 other -- it appears as though for either one of those -- the
3 OLC memo is this issue of whether, apart from the issues
4 about the vacancies -- about that act, whether Mr. Mulvaney
5 can wear two hats. And, again, put aside the remedy issue
6 and -- for the moment. What -- can you respond to the
7 plaintiff's argument that due to the independent nature of
8 the CFPB and the statutory mandate that it be independent,
9 that Mr. Mulvaney, as someone who works in the White House,
10 essentially, can't wear both of those hats at the same
11 time --

12 MR. SHUMATE: Well, sure. Sure, Your Honor. I'd
13 be happy to respond to that.

14 The first thing I would say is, one thing my
15 friend pointed out was that there are some statutory
16 exclusions for some independent agencies that do not fall
17 within the ambit of the Vacancies Reform Act, but the CFPB
18 is not one of them. In fact, the statute expressly says
19 that the CFPB -- executive agency. It is subject to the
20 Vacancies Reform Act. And I think they also forget that the
21 President of the United States has appointed the Director of
22 the CFPB in the past and will have the right to do so in the
23 future and there's no basis for the Court to impose some
24 extra statutory limitation that doesn't appear in any case
25 law or any statute or any regulation that will somehow limit

1 the President's power to select an acting Director. And
2 that certainly is not apparent from the Vacancies Reform Act
3 and there's no reason for the Court to impose some equitable
4 limitation on the President's authority to appoint whoever
5 he may choose. And I think there's going to be no dispute
6 between the parties that Mr. Mulvaney was a proper person
7 who could be designated because he had previously been
8 confirmed by the Senate as OMB Director. He could serve in
9 this capacity. Their argument is just that the CFPB Act
10 [sic] somehow trumps or controls over the Vacancies Reform
11 Act. And we'll happily explain why that is not the case
12 and, in fact, the CFPB general counsel and OLC have already
13 explained that.

14 THE COURT: Would your -- one of the elements of
15 the TRO analysis, as you know, is whether another party
16 would suffer injury. And I'm wondering if you could speak
17 to whether your clients would suffer injury if a Court were
18 to enjoin them, as the plaintiffs ask.

19 MR. SHUMATE: Sure. A couple thoughts, Your
20 Honor. The first is that the President would be harmed
21 because there would be a limitation on his ability to
22 appoint whom he chooses to appoint to this position. There
23 would also be widespread confusion at the CFPB. I mean,
24 they are already acting on the advice of the CFP general
25 counsel that acting Director Mulvaney is the acting Director

1 and they are treating him as the Director. So for a Court,
2 then, to step in and say, No, there's a different acting
3 Director, at least, on an interim basis pending a final
4 ruling, I think that would sew confusion. So I -- we think
5 the best course right now would be not decide this on an
6 interim basis but to set an ordinary briefing schedule. We
7 can -- we're happy to do it on an expedited basis and the
8 Court can reach a final judgment and we're happy to brief it
9 as quickly as the Court would like.

10 THE COURT: Let me ask -- I think that's all the
11 questions I have.

12 Mr. Gupta, let me just ask you quickly on this
13 issue of timing and timeline, is there a particular -- as
14 Mr. Shumate sketched out, if, indeed, Mr. Mulvaney is
15 operating there as the acting Director and there's no major
16 -- your client is not in danger of being fired that we know
17 of and she's functioning as the deputy Director and there
18 isn't any particular action that has to be taken by the CFPB
19 that would require the Court to decide this on an extremely
20 expedited basis, what kind of briefing schedule do you
21 think -- again, you know, I wanted to get both parties in
22 here as quickly as possible. Recognizing that the
23 Government hasn't yet had a chance to even file a brief --

24 MR. GUPTA: Right.

25 THE COURT: -- what do you think a reasonable

1 timeline that preserves your client's interests would be in
2 terms of a briefing schedule?

3 MR. GUPTA: It -- I mean, I think -- first of all,
4 I'd like to, you know -- we have reasons why we want
5 emergency relief; right? Because the status quo you should
6 look at it is the status quo when the complaint was filed,
7 not the status quo as it's changed today because that would
8 reward a defendant who wants to change the status quo when
9 someone's seeking injunctive relief. But if you set that
10 aside and you disagree with us that there's a, you know --
11 an emergency and you're inclined, essentially, to deny
12 emergency relief, I think the right way to do this is to set
13 it on a parallel track where the Government is opposing our
14 request for relief and you could treat it as a relief -- as
15 a request both for a temporary restraining order and for a
16 preliminary injunction --

17 THE COURT: Well, you haven't -- have you asked
18 for a preliminary injunction?

19 MR. GUPTA: No, we haven't --

20 THE COURT: Okay.

21 MR. GUPTA: -- but it's, I think, fairly routine
22 that -- the standards are the same --

23 THE COURT: Yeah. Mm-hmm.

24 MR. GUPTA: -- and you could treat it that way and
25 the reason that it would be good to treat it that way is,

1 then, any decision that you make would be expeditiously
2 appealable and there would be no question about that and
3 then the Government could file simultaneously with its
4 opposition a motion to dismiss and then, you know,
5 potentially that's dispositive and it would set the case up
6 appropriately for the D.C. Circuit. And I think, you
7 know -- I think it's realistic -- I don't want to speak for
8 the Government and I hate putting opposing counsel in an
9 unreasonable situation because we've already filed, but --

10 THE COURT: I've asked you the questions.

11 MR. GUPTA: But I, you know -- I think it should
12 happen this week. It should -- the briefing should be
13 complete this week and we'd be certainly prepared to make
14 sure that that that happens.

15 THE COURT: So other than just to -- so I
16 understand your position -- and I recognize that, you know,
17 events happened. I don't know the particulars of the --
18 filing the papers and everything. I know that I tried to
19 bring you all in as quickly as I could once I knew I was
20 assigned to the case, but --

21 MR. GUPTA: Yes.

22 THE COURT: -- putting aside the fact that the
23 facts on the ground may have changed before this hearing was
24 convened or even before the case was assigned to me, you
25 don't know of another -- and, I think, also recognizing your

1 argument that there's a public interest in resolving this --

2 MR. GUPTA: Yes.

3 THE COURT: -- certainly as well, you don't know
4 of any imminent action that would change the status quo such
5 that a briefing schedule that would resolve this this week
6 would prejudice your client?

7 MR. GUPTA: I don't know of any, but I do want to
8 say that I think it's notable -- I didn't hear Mr. Shumate
9 to be assuring the Court --

10 THE COURT: I understand.

11 MR. GUPTA: -- that there will be no such action
12 and the problem is that if there is such an action, the bell
13 not -- may not be able to be un-rung. And so, you know,
14 perhaps -- I think it would be appropriate -- if the
15 Government is able to make some assurances that no action
16 like that is going to occur, then I think it makes sense to
17 have the kind of briefing schedule you've described and, I
18 think, you know, both sides could agree to that.

19 THE COURT: It's hard to -- well, let me ask you,
20 then, both, maybe, to -- all right. I'll take that under
21 advisement and we'll -- we will try to work out a briefing
22 schedule.

23 Actually, Mr. Shumate, let me ask you, how far are
24 you -- I realize, you know, employees -- you're -- what kind
25 of assurances can you give the Court along the lines that

1 Mr. Gupta asked?

2 MR. SHUMATE: Your Honor, I can give no
3 assurances. It -- again, it is the plaintiff's burden.
4 They have said that they now do not have a fear that Ms.
5 English will be terminated imminently. I, obviously, can't
6 give any representations or assurances on that score that --

7 THE COURT: All right.

8 MR. SHUMATE: Well, one thing I would like to
9 point out is -- and we'll be prepared to cite many cases
10 that say this -- loss of a position is -- we will -- to
11 establish that that is not irreparable harm. So to the
12 extent that she is concerned that she is losing her
13 entitlement to the acting Directorship, that is not an
14 irreparable harm. We'll be happy to provide the Court with
15 cites on that.

16 THE COURT: I think they -- maybe, her position to
17 her isn't, but I think they do cite a case that says that if
18 she's unable to perform a particular statutory duty that she
19 believes she's entitled to, that is harm; is that accurate?

20 MR. SHUMATE: They do cite a case --

21 THE COURT: Okay.

22 MR. SHUMATE: -- that involves a commission; that
23 the President's action in that case prevented the
24 commission, I think, from functioning. This is --

25 THE COURT: Okay.

1 MR. SHUMATE: -- would be a very different
2 situation. The commission -- or the bureau is still
3 operating. We have an acting Director. Just in terms of
4 timing, Your Honor, we got the complaint and the brief last
5 night. We have not been served with the complaint. We --
6 but we are happy to move on whatever schedule the Court
7 thinks is appropriate.

8 THE COURT: How -- what do you think is a time --
9 because these are extremely important and complicated
10 issues, what do you think is a reasonable schedule that you
11 would be able to -- that the Government would be able to
12 respond to the motion but do so fully and robustly?

13 MR. SHUMATE: Sure. We had planned on filing an
14 opposition to the TRO motion tonight.

15 THE COURT: Okay.

16 MR. SHUMATE: Typically, we have 60 days to
17 respond to a complaint. Here, I think, we could file a
18 motion to dismiss in 30 days.

19 THE COURT: The complaint, I'm not as worried
20 about as the motion. So you were -- you believe you're on
21 track to file something tonight?

22 MR. SHUMATE: Yes, Your Honor.

23 THE COURT: All right. Okay. If that's the case,
24 what I will do is receive your brief tonight and inform the
25 parties what, you know -- read it and let the parties know

1 where we'll go after that.

2 Is there anything -- and since, Mr. Gupta, you
3 were -- you are the movant here, is there anything further
4 you either want to argue or bring to my attention?

5 MR. GUPTA: No, Your Honor. Thank you very much.

6 THE COURT: Okay.

7 Same for you, Mr. Shumate. Anything further?

8 MR. SHUMATE: No, Your Honor. Thank you.

9 THE COURT: All right. I will, then -- I
10 appreciate your argument. I will read the Government's
11 filing when it comes in and we'll go from there.

12 Thank you very much.

13 THE COURTROOM DEPUTY: All rise. This court is
14 adjourned.

15 **CERTIFICATE OF OFFICIAL COURT REPORTER**

16 I, TIMOTHY R. MILLER, RPR, CRR, NJ-CCR, do hereby
17 certify that the above and foregoing constitutes a true and
18 accurate transcript of my stenographic notes and is a full,
19 true and complete transcript of the proceedings to the best
20 of my ability.

21 Dated this 29th day of November 2017.

22 /s/Timothy R. Miller, RPR, CRR, NJ-CCR
23 Official Court Reporter
24 United States Courthouse
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