

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.

Tuesday, November 28, 2017

4:00 p.m.

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

APPEARANCES:

For the Plaintiff:

DEEPAK GUPTA, ESQ.
Gupta Wessler PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741

For the Defendants:

BRETT A. SHUMATE, ESQ.
BENJAMIN T. TAKEMOTO, ESQ.
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, DC 20530
(202) 532-4252

Court Reporter:

Timothy R. Miller, RPR, CRR, NJ-CCR
Official Court Reporter
U.S. Courthouse, Room 6722
333 Constitution Avenue, NW
Washington, DC 20001
(202) 354-3111

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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 appearances for the record.

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

9 THE COURT: Good afternoon.

10 MR. SHUMATE: Good afternoon, Your Honor. Brett
11 Shumate from the Department of Justice. Also from the
12 Department of Justice, we have Christopher Hall and Ben
13 Takemoto and from the CFPB, we have Steven Bressler from the
14 Office of General Counsel.

15 THE COURT: Good afternoon to all of you.

16 One little quick announcement if -- for when you
17 all are speaking. We have an overflow room here today with
18 some interests in our proceedings. And so if each of the
19 counsel could approach and make sure you speak into the
20 microphone so that the folks in that room can hear them, I'm
21 sure they'd appreciate it.

22 I want to start today, then, with, Mr. Gupta, your
23 scheduling request that you filed. The Court has been
24 operating under the assumption -- obviously, you filed an
25 emergency TRO and I'm prepared to proceed as you would like,

1 although if -- given that you filed as an emergency TRO, we
2 -- I certainly am prepared to rule today, given the, you
3 know -- the emergent nature of the relief you have
4 requested. That having been said, I -- if you would, A,
5 like to have time, I know the Government did file their
6 opposition as they said they would. If you -- we can
7 proceed -- I do want to proceed expeditiously if you're
8 going to be proceeding with a TRO. What that means is, I
9 will give you the opportunity to file a reply if you would
10 like and we can come back tomorrow and argue the TRO;
11 however, if you would also like to -- if you would instead
12 like to proceed with a PI, we can do that, too. As you
13 noted, the standard is the same, but certainly, the briefing
14 schedule that I would -- what I would do in that case is ask
15 you to confer with the Government and reach a -- reach -- at
16 least, propose to the Court a briefing schedule for a PI,
17 but I don't want -- what I don't want to do is, kind of, be
18 in limbo here. Right now, you have an emergency TRO before
19 the Court. As I said, I'm happy to hear argument and rule
20 on it now, but you are the movant. You are why we are --
21 you and your client are why we are here today. So if you
22 would rather proceed through a PI with a more deliberate
23 briefing schedule, I'm happy to accommodate that as well,
24 but I would ask that you, then, withdraw the TRO and file a
25 PI and we'll do it that way.

1 MR. GUPTA: Your Honor, so we're happy to waive
2 any right to a reply brief with respect to the TRO and we're
3 also -- I mean, it would be in our interest, of course, to
4 have more fulsome briefing on a motion for a preliminary
5 injunction. We're happy to waive that right, too, in order
6 to permit the Court -- if the Court were, for example, to
7 deny the request for a TRO, to construe that also as a
8 request for a preliminary injunction and to deny both in
9 order to facilitate expeditious review to the Court of
10 Appeals because I think we all agree -- everyone agrees that
11 this is a matter that requires quick resolution. It
12 requires finality and certainty. I think that's in the
13 interest of the Government and in Ms. English's interest,
14 but it's also in the interest of all the people regulated by
15 the bureau and the people who work at the bureau. And so we
16 would waive any right to additional briefing or process that
17 we would have in the ordinary course if we were only seeking
18 a preliminary injunction. I don't think that prejudices the
19 Government because the Government has made all the arguments
20 it would make. The standards are the same. And so I think
21 if the Court is prepared to rule, I think that's in
22 everyone's best interest.

23 THE COURT: Mr. Shumate, would you like to
24 respond, please.

25 MR. SHUMATE: Yes, Your Honor. Thank you.

1 We do object to the Court construing the motion
2 for a TRO as a motion for a PI. They've filed a motion for
3 a TRO presumably for a reason. There was an emergency in
4 their view. We do not believe there is and the Court should
5 take their motion as it stands right now, as a motion for a
6 TRO. If they would, then, like to come back and file a
7 motion for a PI, we're happy to respond to that, but we
8 don't think there's any need for any type of emergency
9 relief here.

10 I would -- I did want to respond to this point
11 that we've exhausted all of our legal arguments. That is
12 not true. We filed a brief in less than 24 hours to respond
13 to the emergency nature of the request. We believe the
14 Court should deny that for the reasons we've explained and
15 then if they would like to file a PI motion, we're happy to
16 respond to that.

17 THE COURT: Okay. Mr. Gupta, I agree with Mr.
18 Shumate. I, you know -- you filed for an emergency TRO.
19 Again, we are here on that motion. I think it --
20 particularly, since -- look, I understand. You have an
21 interest in having a PI which is potentially appealable;
22 however, one of the things about a PI is, there's a little
23 bit more room in terms of a briefing schedule and things
24 like that to tee up something both to educate me to get --
25 to receive the arguments of the parties and to give -- and

1 to provide a decision -- a written decision that's more
2 susceptible to appeal. So again, I'll proceed as you want.
3 I'm happy to -- again, if -- I understand your interest --
4 part of your interest and your client's interest is in
5 having something that's appealable here. Again, I --
6 depending on the facts on the ground and what's happening
7 here, I feel like I have to either rule today or, if you
8 want to take time to respond, that's fine. We can come back
9 tomorrow. But as far as the TRO that is before the Court, I
10 don't think I have a choice but to address it promptly. I
11 appreciate the Government responding late last night. And
12 so I'm in a position to rule, but -- I mean, again, I want
13 to -- I'll defer to whatever your pleasure is.

14 MR. GUPTA: So Your Honor, the only one who would
15 be prejudiced by moving more expeditiously on a preliminary
16 injunction would be the plaintiff; right? Because the, you
17 know -- in other words, if you're inclined to deny the
18 request for emergency temporary restraining order, the -- we
19 are happy to waive any additional process that we would get
20 in the interest of having that denial be a denial both of a
21 TRO and a preliminary injunction and it would effectively be
22 the same thing. We're really just talking about formalism
23 at that point. We're talking about the label that you place
24 on the order. And I think the D.C. Circuit, you know, would
25 appreciate some certainty about what it is that the Court is

1 denying. We are the master, obviously, of our motion; of
2 our request; and we are prepared to frame it as a
3 preliminary injunction and we're formally requesting a
4 preliminary injunction, but we are not requesting any
5 additional time or process and because we are the only ones
6 who would be prejudiced, that waiver should be dispositive.
7 The Court should be able to be in a position, particularly
8 if the Court is inclined to deny the TRO, to deny both. The
9 only thing that would be accomplished by denying the TRO but
10 not denying the PI would be to leave everyone in limbo for
11 longer and to thwart immediate appellate review. And I
12 don't think -- unless the, you know -- I think the
13 Government has said that they agree with us that expedition
14 is paramount here. Unless they're, sort of, litigating
15 inconsistent with that claim, I think we should all agree
16 that we're prepared to let you rule on the PI and take this
17 up to the D.C. Circuit.

18 I don't want to beat a dead horse. So I think
19 that's, pretty much, all I have to say about that.

20 THE COURT: Okay.

21 Mr. Shumate, do you want to respond?

22 MR. SHUMATE: Yes, very briefly, Your Honor, just
23 to say we don't think this court is a -- just a pit stop on
24 the way to the Court of Appeals. I think we need to have
25 full briefing in this court. Yes, we're happy to move as

1 quickly as the Court would like, but if, you know -- we have
2 a TRO motion pending before the Court right now. If the
3 Court denies that, there is no emergency; there is no need
4 for, you know, expeditious litigation. We would still be
5 happy to respond to a PI. We would still have 60 days to
6 respond to the complaint. And I would just point out, these
7 appointment clause cases are litigated all the time and they
8 take years to litigate. There's -- in my mind, I don't have
9 any understanding of any of these cases -- PHH, Noel
10 Canning -- being litigated in a TRO posture and going
11 immediately up to the Supreme Court. These cases take time
12 and we urge the Court to take its time to write a thorough
13 opinion that resolves all the legal issues in the case.

14 THE COURT: Mr. Shumate, again, I find myself
15 agreeing with you on this, you know? I agree. I -- well, I
16 particularly agree that this court is not merely a pit stop
17 on the way to the D.C. Circuit. And so I do want to -- if
18 we're going to proceed on a preliminary injunction motion, I
19 think it's appropriate that the parties have additional time
20 to brief the issues. There have been -- we've already had
21 one -- I think, two outside groups that want to weigh in.

22 And so again, I guess I would say, you know, Mr.
23 Gupta, you made the decision to file an emergency TRO and
24 not to file a PI. So what I'm going to ask you to do is
25 just decide. Again, I can proceed, but I'm not going to

1 convert today with nothing filed and convert our proceeding
2 today into a PI decision. I am happy to proceed other than
3 that however you would like. Again, if you want a ruling on
4 a TRO, I can give you a ruling on a TRO today or, again, if
5 you want to do that tomorrow, perhaps, but if we're going to
6 do a PI that's appealable where I'm going to write an
7 opinion, we're going to have a little more briefing.

8 MR. GUPTA: So if Your Honor is prepared to rule
9 on the TRO now, we don't have any objection to you ruling on
10 the TRO now. We don't think it makes any sense to not
11 accompany that denial with a denial on the preliminary
12 injunction, but we're not -- I don't want to beat a dead
13 horse. We're not going to insist on it, but we will not --
14 I think, at that point, what we would propose is not that we
15 file a motion for a preliminary injunction, but instead, as
16 we suggested in the scheduling order, you know, we get this
17 over with. I mean, this is a purely legal question. You've
18 gotten some fulsome briefing. You've gotten amici briefing.
19 We should be able to get a motion from the Government to
20 dismiss the case for the same reasons that they have given
21 in opposition to this motion and allow the Court to decide a
22 dispositive motion and then if the Court were prepared to
23 grant that motion, then that would, you know, certainly be
24 an appealable order and it would be, you know, on the
25 merits. So that's the -- that's what we would do. We would

1 not -- if you're -- if the Court is denying our request to
2 treat the temporary restraining order request as also a
3 request for a preliminary injunction, then we propose to
4 have a very expeditious schedule on the merits.

5 THE COURT: If -- Mr. Gupta, if you want me to
6 treat it as a PI, then I won't rule today and I will set a
7 -- I mean, I'm happy to -- I'm not trying to be formalistic
8 about this, but I do think if we -- if I have an outstanding
9 TRO in front of me, then I feel an obligation to rule on
10 that TRO. If you're telling me now you would prefer I -- to
11 withdraw that and proceed as if --

12 MR. GUPTA: No.

13 THE COURT: Okay.

14 MR. GUPTA: We're -- I want to be clear. We're
15 not withdrawing our request for emergency relief. We would
16 like you to rule. And so I'm not going to stop you from
17 ruling. I'm not going to ask you to -- not to rule.

18 THE COURT: That's good.

19 MR. GUPTA: So --

20 (Laughter.)

21 THE COURT: All right. All right. So then I will
22 hear -- if there's any additional argument on the TRO, I
23 will hear that and -- from you and from Mr. Shumate; I'll be
24 prepared to rule; and then we'll go forward. I guess I
25 don't have -- at that point, I won't have a PI in front of

1 me and I'd ask you to go ahead and file one and we will
2 treat that -- we will set a briefing schedule. Actually --
3 well, let's put it this way. Let me hear argument on the
4 TRO and we'll deal with how we deal with a PI after that
5 argument. So if you have any further argument on the TRO,
6 I'll hear --

7 MR. GUPTA: So I think, based on yesterday's
8 hearing, I think Your Honor understands the arguments that
9 both sides are making and, even though Your Honor did not
10 have very much time with the papers, I think everyone moved
11 heaven and earth to get this to happen and I appreciate the
12 expeditious nature with which the Court has treated this and
13 recognized its importance.

14 And so I don't want to belabor things by repeating
15 what I said yesterday. I -- the only thing I would add is,
16 you know, I know that the Court was interested in what's
17 happening out there in the world. And so, you know, just to
18 give you a sense; just to give you a quick update -- so I
19 think I may have said this yesterday. Yesterday, Ms.
20 English went to the bureau; she performed bureau business;
21 she had meetings; she went and met with members of Congress
22 and other stakeholders in her capacity as a representative
23 of the bureau and was received as the acting Director by
24 stakeholders on the Hill. Today, she has -- I haven't
25 spoken with her in a few hours, but my understanding is,

1 she's in the bureau building and she has been there all day
2 performing bureau business. And the only thing I would just
3 add is to reiterate the concern that I expressed yesterday
4 that there may be some action taken with respect to her
5 status; that we didn't hear an assurance yesterday from the
6 justice department that that won't occur; and we continue to
7 be concerned that that might occur and we have reason to
8 believe that that might occur based on communications she's
9 received. I haven't had a chance to talk with her. I just
10 -- I am concerned that there could be a situation where
11 she's set up to take some kind of personnel action and that
12 would change the status quo. And so that is another reason,
13 apart from the many other reasons that concern everyone in
14 the country who's affected by the bureau, why, I think,
15 everyone agrees that this important legal question ought to
16 be decided quickly.

17 And so I appreciate the care that Your Honor has
18 given the case and I really don't have anything else to add
19 except, if the justice department has more to add, I would
20 appreciate the opportunity to respond.

21 THE COURT: Mr. Gupta, before you leave the
22 microphone, let me just ask you to follow up on that point.
23 So you said that -- well, what's the factual basis, to the
24 extent you can tell me, for your concern that there might be
25 some personnel action that could affect your client.

1 MR. GUPTA: Well, she has been reprimanded by -- I
2 think that's the right word. I'm hesitant to say too much
3 about this only because it's such an evolving situation, but
4 she has received communications, emails from Mr. Mulvaney
5 reprimanding her for the way that she has held herself out
6 and bureau employees have been instructed to report any
7 communications with her to the general counsel and I think
8 there, you know -- there's, sort of, a chill on her ability
9 to do her job, even her job as Deputy Director which, I
10 think, they acknowledge she holds the position as Deputy
11 Director and much of the activity that she's engaged in is
12 activity that she would -- engaged in in the proper course
13 of her duties as the Deputy Director even if she were not
14 also the acting Director. So that's our concern. Our
15 concern is that, you know, she may be set up for a claim
16 that she was somehow, you know, not performing her duties
17 properly in some way and we just don't want to see that
18 happen because that would obviously change -- it could
19 change the contours of the litigation.

20 THE COURT: But nothing more specific than that?
21 No threat to fire her or anything like that?

22 MR. GUPTA: No, unless that happened on my way to
23 the courthouse, I'm not aware of it. Thank you.

24 THE COURT: Okay. All right, then. Let me turn
25 to Mr. Shumate.

1 Do you have anything to add? I know you did not
2 really argue the merits yesterday. You filed your brief in
3 opposition. I've read that. Do you have -- but I'll hear
4 argument from you.

5 And then, Mr. Gupta, absolutely, you will have a
6 chance to respond.

7 MR. SHUMATE: Sure. If I can just speak first to
8 the facts on the ground --

9 THE COURT: Yes.

10 MR. SHUMATE: -- because I think I can shed a
11 little bit more light on what's going on. But the first
12 thing I wanted to say is, the nature of the TRO request does
13 not have anything to do with her employment status with the
14 bureau. It has to do with ordering -- the request is to
15 order -- for the Court to order the President not to appoint
16 Mr. Mulvaney as the acting Director; withdraw that. There's
17 nothing in the TRO request before the Court about ordering
18 the President not to terminate Ms. English. So that is
19 really not before the Court at all.

20 But in terms of the facts on the ground, I said a
21 few things yesterday about Mr. Mulvaney was in the office.
22 He's in residence as the acting Director. He met with the
23 senior leadership yesterday. He's meeting with them again
24 today. He's being briefed by the heads of all the primary
25 divisions of the bureau as the acting Director. He is on

1 the CFPB's organizational chart as the acting Director. His
2 bio and headshot will be on the website shortly. There were
3 a couple of announcements he gave yesterday in his speech
4 that -- one I wanted to bring to the Court's attention, he
5 said that the bureau is going to institute a soft freeze on
6 agency action. So in terms of the status quo, there will be
7 no significant regulatory actions issued by the bureau in
8 the next week or week-and-a-half. That's my understanding.

9 So in terms of the status quo, the status quo is
10 that acting Director Mulvaney is in office as the acting
11 Director. And I would point out, I did receive the actual
12 designation order from the President. I can pass it to the
13 Court if that would be helpful. It's dated November 24th.
14 The acting -- the general counsel of the CFPB on the next
15 day on Saturday recognized acting Director Mulvaney as the
16 acting Director. The complaint was filed the next day. So
17 in terms of what the status quo is and what their burden is
18 to change that status quo, it is that Mr. Mulvaney is the
19 acting Director of the CFPB.

20 Another thing that Mr. Mulvaney said yesterday was
21 that the bureau intends to enforce the law, including the
22 Dodd-Frank Act. So any fears that he's going to not enforce
23 the law are not accurate based on what he has said.

24 Certainly, the bureau may take a different regulatory
25 direction with Mr. Mulvaney as the Director, but I think

1 what the plaintiff is concerned about is that she is not the
2 one that gets to make those decisions, but that is not
3 irreparable harm. We cited a series of cases including one
4 from the D.D.C. that recognizes loss of employment status is
5 not irreparable harm. So we think the Court should deny the
6 emergency relief that's requested on that basis alone.

7 I'm happy to turn to the merits and make a few
8 points about that, if the Court would like. Otherwise --

9 THE COURT: Yes.

10 MR. SHUMATE: -- I'm happy -- okay.

11 Just a few points, Your Honor. Again, I pointed
12 the Court yesterday to the opinions by the Office of Legal
13 Counsel and the CFPB general counsel and those raise a
14 couple key points that I just wanted to make.

15 The first is that the VRA applies to executive
16 agencies by its own terms. That's in 5 U.S.C. 337 --
17 3347(a) and the CFPB is an executive agency. So by its own
18 terms, the statute applies to the CFPB. There's also a
19 clear statement rule in Section 5491(a) of the Dodd-Frank
20 Act. It says, Except as otherwise provided expressly by
21 law, all federal laws apply to the bureau, and that includes
22 Title 5 which includes the Vacancies Reform Act. There's no
23 evidence that Congress, in Section 5491, intended to exclude
24 the VRA expressly from applying to the Director of the CFPB.
25 In fact, Congress knows how to expressly carve out agencies

1 and Directors and agency heads from the VRA and we've
2 pointed this Court to Section 3349(c) that carves out
3 certain multi-member commissions from the VRA. The CFPB is
4 not a multi-member commission. It is not identified as
5 excluded or carved out from the VRA. The VRA also speaks
6 directly to the question of, what happens when there is a
7 vacancy? The Dodd-Frank Act does not. It identifies a
8 situation where there's -- the Director is unavailable. So
9 in terms of which statute is more specific, we think the VRA
10 is the more specific one. It speaks directly to the -- what
11 happens in a situation where there's a vacancy.

12 So it -- as OLC concluded in their memorandum and
13 explained, the VRA is the exclusive mechanism to appoint an
14 acting official, but that doesn't mean it gets displaced
15 when there's an agency-specific statute. There are a number
16 of them. And the Ninth Circuit addressed a situation like
17 this involving the NLRA, the Hooks case that we cited to the
18 Court. And what OLC reasonably concluded is that the
19 President's power to appoint an official or designate an
20 acting official does not get displaced. It is, then -- the
21 VRA is an additional method or avenue available to the
22 President. And we think the Court should recognize that
23 these two statutes can be interpreted in parallel and the
24 Court should not reach a conclusion of the VRA that
25 eviscerates the President's power to appoint an acting

1 Director.

2 So I think those are the only merits points I'd
3 like to make today, Your Honor.

4 THE COURT: Okay. All right.

5 So then, Mr. Gupta, please.

6 MR. GUPTA: I'll be brief, you know, because,
7 again, I don't think there's any need to repeat what we've
8 discussed yesterday.

9 With respect to the question of, you know, who the
10 defendant is and injunctive relief against the President, I
11 do just want to point out that Mr. Mulvaney is a defendant
12 here, as well. And so you know, to the extent the Court has
13 any concerns about enjoining the President, we, you know --
14 I just want to make clear, we're also seeking an injunction
15 against Mr. Mulvaney which would enjoin him from receiving a
16 purported appointment. And so you know, that could be
17 sufficient to alleviating the harms to some degree.

18 On the question of irreparable harm, we discussed
19 this yesterday in the colloquy between you and I. I think
20 we acknowledged that a lot collapses into the merits. If
21 you see it one way -- it's like a rabbit or duck problem.
22 If you see it one way, there is irreparable harm; if you see
23 it the other way, there's not. And so that just tees up how
24 important it is to get a resolution on the merits.

25 There is one case that we did not cite that I just

1 -- I want to direct your attention to. If the Government
2 wants to respond to it in writing afterwards, they would
3 have the right to because we're just raising it for the
4 first time. It's *Barrow v. Graham*. It's a case of this
5 court. 124 F. Supp. 2d 714. And it's relevant because it
6 concludes in the context of a temporary restraining order
7 that the loss of a government position would constitute
8 irreparable harm and, of course, we cited the *Berry* case,
9 these other cases involving presidential removal where
10 the -- where this court has held that that constitutes
11 irreparable harm.

12 On the merits, just the only thing that's new that
13 Mr. Shumate mentioned that I think I ought to just briefly
14 respond to is this catch-all provision in the Dodd-Frank Act
15 because we didn't address it in the -- in our initial
16 briefing. I think that just restates the problem. I mean,
17 it's, you know -- it's a lot like the question about whether
18 the VRA's exclusion applies. What you're really asking is,
19 is this succession provision in the Dodd-Frank Act a
20 contrary congressional command? So it's the same question.
21 I'd just say that, you know, this is a very general
22 provision and you've got a very specific command in the
23 Dodd-Frank succession provision. So the specific versus the
24 general canon, I think, is important there, and also, this,
25 you know -- this all personnel laws apply thing, it's got

1 this unless clause and so I think the unless clause is
2 covered -- covers this. And, finally, it applies to the
3 powers of the bureau. And so I'm not sure it has anything
4 to say about what the President can or cannot do with
5 respect to the VRA.

6 That's really all I have and if the Court is
7 prepared to rule, we're prepared to receive that ruling.

8 THE COURT: Okay.

9 MR. GUPTA: Thank you very much.

10 THE COURT: I thank all the -- both parties. As
11 one of you said, you did move heaven and earth to brief this
12 out quite quickly and the Court appreciates that.

13 As I said, we are -- what's before the Court is an
14 emergency motion for a temporary restraining order and
15 that's why the Court -- that's why I feel that it's
16 incumbent upon the Court to rule today. This is the -- this
17 is a motion that suggests that there's ongoing harm to the
18 plaintiff and given that it was filed on -- particularly
19 that it was filed on an emergent basis and given the nature
20 of temporary restraining orders, that's why the Court will
21 rule today.

22 First, to quickly review the standard for TRO,
23 plaintiff must demonstrate substantial likelihood of success
24 on the merits; that it would suffer -- that the plaintiff
25 would suffer irreparable injury if the injunction is not

1 granted; the injunction would not substantially injure other
2 interested parties; and that the public interest or the
3 balance of the equities would be furthered by granting the
4 injunction.

5 Now, TRO is a remedy that's often used when the
6 plaintiff seeks, essentially, to freeze the status quo so
7 that the issues might be more fully briefed. That's, again,
8 why I'm prepared to rule today. If a preliminary injunction
9 is filed, I'm happy to take that up again, but -- take that
10 up going forward and, obviously, the case will proceed on
11 the merits as well, but given the procedural posture of what
12 was filed, the Court -- I will rule from the bench today.

13 This is a dispute that, at base, is one of
14 statutory interpretation between the parties. The plaintiff
15 asserts that the Dodd-Frank Act that created the Consumer
16 Financial Protection Bureau wholly displaces the President's
17 right to name Mr. Mulvaney the acting Director and plaintiff
18 believes that she is the acting Director by virtue of the
19 process outlined in the Dodd-Frank statute at 12 United
20 States Code 5491(b)(5) which states that, There is
21 established the position of Deputy Director who shall be
22 appointed by the Director and serve as acting Director in
23 the absence or unavailability of the Director.

24 The defendants contend that the Vacancies Reform
25 Act applies to permit the President to name Mr. Mulvaney

1 acting Director pursuant to 5 United States Code 3345 and
2 3347. What they contend is that, while under those
3 provisions, the Vacancies Reform Act is not the exclusive
4 method by which the position of acting Director can be
5 filled, but it is available -- nonetheless, available to the
6 President.

7 In terms of the facts, it -- both the plaintiff --
8 one of the -- both the plaintiff and one of the defendants,
9 Mr. Mulvaney, contend that as of 12:01 on the day that Mr.
10 Cordray -- the day after Mr. Cordray resigned, they both
11 ascended to the role of acting Director by virtue of the
12 respective pieces of these statutes that they cite.

13 The Court will deny the motion for temporary
14 restraining order for the following reasons. And I'll --
15 I'm going to go through each of the provisions in order.

16 First is the issue of demonstrating a substantial
17 likelihood of success on the merits. First, we start out
18 with the fact that the -- and I do conclude that the
19 defendant [sic] has not demonstrated a substantial
20 likelihood of success on the merits. The first is that,
21 obviously, by virtue of its -- on its face, the Vacancies
22 Reform Act does appear to apply to this situation. And I
23 will -- it sets forth, again, quoting from 5 United States
24 Code 3347, that the -- Sections 3345 and 3346 are the
25 exclusive means for temporarily authorizing an acting

1 official to perform the functions and duties of any office
2 of an executive agency, including the Executive Office of
3 the President and other than the Government Accountability
4 Office, for which appointment is required to be made by the
5 President by and which -- and with the advice of the Senate,
6 unless a statutory provision explicitly designates an
7 officer or employee to perform the functions and duties of a
8 specified office temporarily in an acting capacity.

9 Now, there is somewhat agreement between the
10 parties that (a)(1)(B) -- that 5 U.S. Code 3347(a)(1)(B) is
11 at issue here. I will say -- I'm -- (a)(1)(B), yes. I will
12 say that -- yes -- that and 3347 interacts with 5 United
13 States Code 3345 that says, Notwithstanding Paragraph 1, the
14 President may direct a person who serves in an office for
15 which appointment is required to be made by the President by
16 and with the advice and consent of the Senate to perform the
17 functions and duties of the vacant office temporarily in an
18 acting capacity subject to the time limitations in Section
19 3346.

20 In any event, under 5 United States Code 3347, the
21 defendants -- the Government believe that the President has
22 lawfully made use of that provision and that, again, that
23 provision is -- while it is not exclusive by virtue of the
24 text, it is available and the burden the plaintiff has is to
25 show, in fact, that this is -- that the VRA is, in fact, not

1 available, but, again, just based on the text of the VRA,
2 the text does not say that it is -- the VRA would not be
3 available in this situation and, in fact, it says the
4 opposite. The fact that it says it's not exclusive -- when
5 used in context here, the fact that it says that, under
6 certain circumstances, it -- the VRA would not be exclusive
7 even suggests that there would be other methods and modes by
8 which the President could fill the -- one of these
9 positions. So based on the -- just the text of the VRA, not
10 only does the text of the VRA not support the plaintiff's
11 argument. I would argue there's no obvious, on the face of
12 it, conflict with the later enacted Dodd-Frank statute.

13 The plaintiff's argument is that the use of the
14 word "shall" in the Dodd-Frank language makes the later
15 enacted Dodd-Frank provision mandatory, displacing the VRA
16 completely, but "shall" does not always mean "may," again,
17 focusing first on the series of arguments both sides have
18 advanced based upon the text of the statute. For example,
19 there's an example in the Dodd-Frank law, 12 U.S. Code
20 5491(c) that talks about how -- the Director's term in
21 office. (c) (1) says the Director shall serve for a period
22 of -- for a term of five years and (c) (3) says that the
23 President may remove the Director for insufficiency, neglect
24 of duty or malfeasance of office, may remove, but no one
25 would argue that the "shall" in (c) (1) would trump the "may"

1 in (c) (3) if the President chose to trigger that. So
2 there's good reason that "may" -- that -- sorry, that
3 "shall" does not always mean "way" -- does not always mean
4 "may". And, in fact, there are additional texts --
5 additional parts of the VRA weigh against that construction
6 of the statute.

7 The other part -- another part of the Dodd-Frank
8 statute that both parties, I think, mentioned here today is
9 a provision in 12 United States Code 5491(a). It reads,
10 Except as otherwise provided expressly by law, all federal
11 laws dealing with public or federal contracts, property
12 works, officers, employees, budgets or funds, including the
13 provisions of Chapters 5 and 7 of Title 5, shall apply to
14 the exercise of the powers of the bureau. So in other
15 words, all federal laws dealing with matters such as
16 officers and employees of the CFPB shall apply unless
17 otherwise provided expressly by law. I think whatever the
18 parties want to make of the statutory -- the two statutes at
19 issue here, I don't think we have an express provision in
20 the Dodd-Frank Act that would overrule the Dodd-Frank Act,
21 especially given that clause there.

22 The plaintiff also argues specificity; that the
23 VRA is a more -- and makes use of the canon of construction
24 that the specific shall take precedence over the general,
25 but I think that, in this particular context, that's -- that

1 argument is, at least, a wash. The VRA is -- does -- is
2 more generic in terms in that it applies to all agencies and
3 the Dodd-Frank Act only to the CFPB, but the VRA is more
4 specific in that it addresses the issue of vacancies, not
5 absences or unavailabilities like the Dodd-Frank Act does.
6 So I think, in terms of specificity, there isn't a strong
7 argument either way, but overall, I think there's -- one of
8 the cannons of statutory construction is that statutes
9 should be read consistently with one another, if possible,
10 and I think that that can be done here and certainly weighs
11 in favor of the fact that -- or the interpretation that the
12 VRA is available to the President.

13 The plaintiff also argues recency; that since
14 Dodd-Frank is the more recently enacted statute, that that
15 should take precedence, but I don't -- I do think that the
16 provision cited earlier as part of 12 U.S.C. 5491, the
17 provision about how, unless otherwise provided expressly by
18 law, all federal laws dealing with, among other things, the
19 officers and employees of the bureau apply to the bureau, I
20 think that's -- I think that counsels against that recency
21 argument since that's part of the Dodd-Frank statute.

22 The other thing that, I think, weighs against that
23 argument is the fact that the Dodd-Frank, as the Government
24 has pointed out, there are -- codified at 5 United States
25 Code Section 3349(c), there are certain -- Congress decided

1 to carve certain positions within the executive branch;
2 carve them out from the VRA; and when Dodd-Frank was passed,
3 Congress obviously knew how to exclude provisions --
4 positions completely and did not do so in terms of the
5 Director of the CFPB. So although Congress could have done
6 it, I don't -- it doesn't -- it did not do it clearly, amend
7 the VRA in that way.

8 Turning to the -- so as far as, then -- as far as
9 the statutes at issue and the canons of statutory
10 interpretation, I don't believe they weigh -- they assist
11 the plaintiff in demonstrating a substantial likelihood of
12 success on the merits.

13 Looking at, then, the arguments on legislative
14 history, I'm -- even though I did -- well, I'm dubious of
15 the value of legislative history, but in any event, I think,
16 in this case, it's, again, ambiguous at best and doesn't
17 help the plaintiff meet the high bar that she has. The
18 plaintiffs argue that the -- in their brief that the -- or
19 in their motion that the House bill had no -- an earlier
20 passed version of Dodd-Frank had a Deputy -- had a -- had no
21 Deputy Director in it and that, through the VRA -- and then
22 -- and succession was laid out in that bill specifically
23 through the VRA and then, subsequent to that, a Senate bill
24 had included the position of Deputy Director, but the --
25 included the language that we are with -- that we have here

1 today that does not specifically mention the VRA. In my
2 view, this simply begs the question of what -- of whether
3 the language is exclusive or not and doesn't tell us one way
4 or the other whether it was intended to be. We know that
5 one bill had a Deputy Director position; another did not.
6 It's logical that some specific sort of language that
7 governed when the -- that the Director was unavailable when
8 the Deputy Director could assume those powers, but it
9 doesn't tell us anything about what Congress intended one
10 way or the other in terms of the exclusivity.

11 Moreover than the -- there is language in the
12 conference report for Dodd-Frank at -- that has language
13 that probably weighs in favor of Mr. Mulvaney; that one of
14 the pieces of that conference report, the -- one of the
15 provisions in it mentions that it's -- it was important that
16 the Director of the CFPB be presidentially appointed and
17 Senate confirmed. And whatever one thinks of the two
18 individuals here who each of whom claims to be acting
19 Director, Mr. Mulvaney is the one who is presidential
20 appointed and Senate confirmed, albeit for a different
21 position, but he has gone through that process and that may
22 weigh slightly in his favor. In any event, I -- again, I
23 think, given the statutory language used and the canons of
24 construction, I don't weigh the legislative history one way
25 or the other very strongly, but I do believe it's, sort of,

1 a mixed bag at best.

2 Finally, the plaintiff puts forth issues or
3 arguments relating to the structure of the CFPB in terms of
4 trying to -- wanting to construe how they construe the
5 various statutes and the argument boils down to a claim that
6 the CFPB was intended to be independent. Again, I don't
7 think this line of argument demonstrates a substantial
8 likelihood of success on the merits either. It --
9 undoubtedly, CFPB was intended to be independent; however,
10 it's still a part of the executive branch which is headed by
11 the President who was duly elected by the people. On the
12 record here, denying the President the authority to replace
13 Mr. Cordray with Mr. Mulvaney, an individual who is
14 otherwise qualified by the VRA to hold the position of
15 acting Director, I think, raises significant constitutional
16 questions that haven't been briefed fully by the parties and
17 those questions have to do -- and so I think not only the
18 structure of the CFPB is something the Court should
19 consider, but our constitutional structure and our -- and
20 the -- our structure that sets out the various powers
21 between the three branches. So given that courts have a
22 duty to construe statutes so as to avoid constitutional
23 problems, especially given the fact that we've only had time
24 for about 24 hours' worth of briefing on the matter, I don't
25 think that the arguments regarding the structure of the CFPB

1 are availing for the plaintiff.

2 The plaintiff also argues as a separate basis for
3 substantive -- for the merits relief that Mr. Mulvaney can't
4 be named as head of CFPB because -- by virtue of his
5 employment in the White House. Similarly, I think a lot of
6 this argument turns on this issue of independence. There's
7 nothing in the statute that I could find that would prevent
8 Mr. Mulvaney from holding both these positions. And so,
9 again, given the lack of any statutory basis for this
10 argument, again, I do not believe that the defendant [sic]
11 has demonstrated, at this point, a likelihood of success on
12 the merits.

13 Let me now turn to the issue of harm which, as Mr.
14 Gupta just mentioned, in some ways is, sort of -- the harm
15 claimed by each party is almost the mirror image of the
16 other. So on the one hand, I think it's -- if I find --
17 and, sort of, collapses in with the merits. Because I find
18 that the plaintiff has not met her burden of success on the
19 merits, I equally don't believe she's met her burden of
20 demonstrating irreparable harm. Her harm on the record
21 before the Court, there's nothing to suggest that she's
22 about to be fired for her position. Mr. Gupta's -- the
23 facts he set forth earlier notwithstanding, there's nothing
24 that suggests she's in -- going to be fired imminently and
25 the harm that she, essentially, argues is a statutory right

1 to act as the acting Director that she -- and that -- and
2 she believes she's entitled to act as the acting Director,
3 but because -- again, but because I find she hasn't met her
4 burden of demonstrating success on the merits, I find that
5 she has not demonstrated the appropriate harm to obtain the
6 temporary restraining order.

7 The third and fourth prongs of -- elements of a
8 temporary restraining order are injury to other parties and
9 what the public interest requires. Sometimes these elements
10 are described as the balance of the equities. Ordinarily, a
11 TRO is a mechanism through which a party might freeze the
12 status quo without injury to another party so that the
13 issues she advances may be more thoroughly litigated. Here,
14 both parties believe that they were lawfully acting Director
15 as of 12:01 the day after Mr. Cordray left his post as
16 Director, but what's happened since then is that the status
17 quo at present is that Mr. Mulvaney has showed up and -- at
18 the bureau and is functioning as acting Director. There was
19 never a time when the plaintiff was in the building and
20 without -- she may have alleged -- she may have -- she may
21 contend that she was acting Director, but there's never a
22 time that she was recognized by the bureau as acting
23 Director and Mr. Mulvaney, apparently, has been accepted by
24 the CFPB's general counsel as the lawful acting Director.
25 So what the plaintiff really seeks at this point is

1 something that would change the status quo.

2 Now, there's some case law that suggests there's
3 even a higher burden on a plaintiff in that situation. I
4 don't think it's necessary to apply -- and but the D.C.
5 Circuit has not ruled one way or the other on it. I don't
6 think it's necessary to apply that higher burden, but I note
7 that there is case law such as that she would be subject to
8 a higher burden. But here, in considering the injury to
9 other parties and the public interest, I do think that even
10 if I weigh -- even if I credit Ms. -- the plaintiff's
11 argument about injury, I still have to equally credit the
12 injury on the other side of the ledger since both parties --
13 even if we put the merits aside, I would still have to
14 weigh -- even if I considered her meeting the irreparable
15 harm standard, I'd still have to weigh the harm to the other
16 side. And Mr. Mulvaney's harm would be, sort of, the mirror
17 image of the plaintiff's harm in that he believes he's
18 lawfully the acting Director of the CFPB, but then also on
19 that side of the ledger, I would have the harm to the other
20 defendant, the President, who, again, lawfully believes
21 that, by virtue of his election to the President, he is
22 entitled to name the person -- the -- who otherwise complies
23 with the VRA, a person of his choice, to be the acting
24 Director of the CFPB for a period of time. So I think no
25 matter how -- even if I credit the harm for the injury --

1 potential injury to the defendant -- to the plaintiff, I
2 have equal, if not more, potential injury on the other side.
3 So I don't -- so I do not find that the plaintiff has
4 carried her burden in terms of this element of the prong
5 either -- this element of the analysis, the injury to other
6 parties and what the public interest requires.

7 As I said at the outset -- and so on the basis --
8 on -- for all the reasons I described, I do deny the motion
9 for temporary restraining order.

10 That having been said, again, the reason we are
11 here on a very short time frame is because of the nature of
12 the motion that was filed in terms of a temporary
13 restraining order and, certainly, Mr. Gupta, if you file a
14 motion for a preliminary injunction, the Court -- well,
15 I'll -- what I will do is ask you to confer with the
16 Government about a briefing schedule that you think -- that
17 you both think is appropriate and, well, once you file that,
18 I will ask the parties to confer and we can -- we may be
19 able to do that by telephone conference or whatnot, but we
20 will set a briefing schedule that hopefully the parties
21 agree with but, certainly, that is -- satisfies the Court;
22 that we will have even more robust briefing on the issues;
23 and we'll decide it within that period of time that the
24 rules permit a Court to act on a preliminary injunction.

25 Are there anything from either of the parties,

1 then?

2 MR. GUPTA: While we disagree with the Court's
3 decision, I do want to thank the Court, again, for hearing
4 and deciding this matter so promptly and for providing us
5 with such a detailed discussion of all the parties'
6 arguments. Because the Court has already had, we think,
7 extensive briefing on the legal issues, because the
8 standards for a TRO and a PI are the same and because the
9 comprehensive -- because of the comprehensive nature of the
10 Court's decision, we view this as effectively what we would
11 get if we were denied a PI. And so, you know, I do need to
12 confer with my client and decide what the next step is, but
13 I -- we may be inclined to proceed immediately to the merits
14 with a dispositive motion that would seek a permanent
15 injunction and then the denial of that for the same reasons
16 that Your Honor has given would unquestionably be
17 appealable, even if what has just occurred is not
18 effectively a denial of a PI and appealable. And so I do
19 want to confer with my clients about that and confer with
20 opposing counsel, but, you know, I think our inclination is
21 to move quicker than the rules provide. And so, you know,
22 we can do that in a formal request in writing, but I think
23 there's -- there may be no reason to, sort of, delay this
24 any longer. I think everyone agrees that this shouldn't be
25 delayed any longer. And so you know, we can waive a reply;

1 we can do other things to try to get this teed up so Your
2 Honor can decide it faster than would normally be provided
3 under the local rules.

4 THE COURT: I -- let me just address that before I
5 turn to Mr. Shumate. You know, again, I want to emphasize,
6 this is -- I think the Court ruled today because of the
7 nature of the motion before it. And, you know, I think -- I
8 don't want to pre-judge. I mean, I hear what you're saying,
9 but this is -- this was the best -- this was the Court
10 responding, I think, appropriately to the particular natures
11 -- the nature of the relief sought, a TRO. So again, I,
12 obviously, will proceed however you would like in terms of
13 proceeding to the merits. That may -- it may be quick
14 enough for you; it may not be, but I do think that -- but
15 the issues raised here by both sides are complicated. I
16 think there are constitutional issues in play here that I
17 don't believe have been necessarily fully briefed and that
18 did play a role in part of my denial of the TRO, but -- so I
19 do think -- I don't -- and I understand, like any plaintiff,
20 you want -- whether it's injunctive relief or relief, in any
21 case, you want relief, but by the same token, the Court has
22 an obligation to get this right. And so if we -- however we
23 proceed and however you choose to proceed, the Court's going
24 to make sure that we do so on a schedule that allows me to
25 get it as right as I can.

1 MR. GUPTA: Thank you, Your Honor. And that will
2 make sense. I just say one thing which is that, you know, I
3 think the standards for a TRO or a PI, what they envision
4 typically -- and in the typical case, this is right -- is
5 that the plaintiff has some way in which the plaintiff is
6 aggrieved and it's all about, you know, how does this harm
7 the plaintiff? But this is an unusual case in which
8 everyone is best served by expedition and finality and the
9 Court -- and so I, you know -- and I think the Court knows
10 that. And so we just -- we want to propose a schedule
11 that's consistent with that and work with the Government to
12 try to do that.

13 THE COURT: I very much agree with you that this
14 is an unusual case.

15 (Laughter.)

16 All right. Mr. Shumate, do you have anything for
17 the Court?

18 MR. SHUMATE: Nothing further, Your Honor.

19 THE COURT: All right, then. We'll proceed -- Mr.
20 Gupta, you'll confer with your client and we'll go from
21 there.

22 All right. Thank you, all. The parties are
23 dismissed.

24 THE DEPUTY CLERK: All rise. This court is
25 adjourned.

CERTIFICATE OF OFFICIAL COURT REPORTER

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

Dated this 29th day of November 2017.

/s/Timothy R. Miller, RPR, CRR, NJ-CCR
Official Court Reporter
United States Courthouse
Room 6722
333 Constitution Avenue, NW
Washington, DC 20001

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