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Could President Biden Appoint an Acting CFPB Director Under the FVRA?
Not if he fires Director Kraninger first

by *Brian Johnson*

In June 2020, the U.S. Supreme Court issued its decision in *Seila Law v. CFPB*, holding that the Dodd–Frank Wall Street Reform and Consumer Protection Act, which made the Consumer Financial Protection Bureau (CFPB) director removable by the President only for inefficiency, neglect, or malfeasance, violates the separation of powers embodied in the U.S. Constitution. As a remedy, the Court severed the director's removal protection from the other provisions of Dodd–Frank that establish the CFPB and define its authority, meaning that the President may remove the director from office for any reason (or none at all).

Conventional wisdom holds that if former Vice President Joe Biden becomes President next year, he will remove current CFPB director Kathy Kraninger from office, even though her statutory term does not expire until December 2023. The President would then be expected to name and seek Senate confirmation of a nominee to succeed her. But what would happen in the interim between Kraninger's removal and the confirmation of her successor? Conventional wisdom again holds that President Biden would name an acting director to run the CFPB. However, it is far from clear that he would succeed in doing so.

The President might attempt to use a recess appointment to fill the vacancy, but such an appointment must be made during a recess of the Senate, and the Senate could prevent him from doing so by simply remaining in session. If a recess appointment cannot be made, there are two statutory mechanisms provided by Congress for maintaining CFPB operations when there is no director. The first is found in Section 1011 of Dodd–Frank, which provides that in the "absence or unavailability" of the director, the CFPB's deputy director shall serve as acting director. The second is the Vacancies Act, as amended by the Federal Vacancies Reform Act of 1998 (FVRA), which provides an alternative means by which the President may appoint an eligible government employee to temporarily perform the nondelegable functions and duties of a vacant advice-and-consent position in an executive agency.

Recall that in November 2017, Director Richard Cordray resigned from the CFPB to run for governor of Ohio, and President Trump invoked the FVRA in naming Office of Management and Budget director Mick Mulvaney as acting director of the CFPB. Leandra English, whom director Cordray appointed as deputy director of the CFPB on the same day he resigned from office, sued Mulvaney and the President, arguing that the FVRA did not apply when another statute expressly designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity and that she was entitled to run the agency as acting director under Section 1011 of Dodd–Frank.

The DOJ's Office of Legal Counsel (OLC) and the CFPB's own general counsel disagreed with English's argument, asserting that the existence of Section 1011 meant only that the FVRA was not the *exclusive* means by which an acting director could serve, and the President could use the FVRA to designate an acting director following Cordray's resignation. English sought a preliminary injunction and temporary restraining order preventing Mulvaney's appointment, which a federal district court denied. English initially appealed the decision, but later dismissed her lawsuit and resigned from the CFPB. Consequently, Mulvaney served for just over a year as acting director of the CFPB until the Senate confirmed Kraninger as director.

So could President Biden similarly appoint an acting director of the CFPB using the FVRA?

No.

At least not according to several notable observers. Consider Ben Miller-Gootnick, who published "Boundaries of the Federal Vacancies Reform Act," a note in the *Harvard Journal of Legislation* that won the American Bar Association's 2019 Gellhorn-Sargentich prize for administrative law and systematically examines the FVRA to find that the law covers vacancies created by an outgoing officer's voluntary resignation—like Cordray's resignation—but not those vacancies created by the President through firings. To summarize:

- Text and structure of the FVRA. Section 3345(a) of the FVRA dictates that the Act only applies when an officer "dies, resigns, or is *otherwise unable* to perform the functions and duties of the office." The central interpretive question, therefore, is whether "otherwise unable" includes presidential removal. Standard canons of statutory construction suggest a reading that extends "otherwise unable" only to vacancies of the same type as those specifically listed, which most naturally means other unexpected vacancies, not vacancies created by the official with the power to fill them.

- Historical context: Three contextual clues in the adoption of the FVRA further clarify Congress's semantic choices. First, Congress was aware in 1998 of 34 existing agency succession statutes that used broad language to cover any vacancy in office, but it did not use that general language to cover any vacancy with the FVRA and instead listed a subset of vacancies, not including removal, the Act would apply to. Second, examination of the preceding Vacancies Act, which Congress replaced with the FVRA, also suggests that Congress intended the "otherwise unable" language to be read narrowly. Third, Congress had constructive judicial notice that courts would construe the FVRA strictly and narrowly unless it gave the President a clear grant of replacement authority, but Congress did not give the President such a grant and instead retained an enumerated list.

- Legislative history: The FVRA's legislative history has been seriously misconstrued. Proponents of applying the FVRA to firings often cite a seemingly supportive floor statement made by Senator Fred Thompson (R-TN), but analysis of the statement has glossed over the facts that: (1) the statement does not clearly state that the Senator believed the Act applied to firings; (2) Senator Robert Byrd (D-WV), often called the conscience of the Senate, immediately offered a contradictory interpretation; and (3) both Senators' remarks came *after* the House had already passed the bill, suggesting that the statements are far less probative than many observers suggest. Additionally, the Senate committee report's silence on the FVRA's reach indicates Congress did not understand the Act to make major changes to that provision. And finally, behind-the-scenes haggling around the FVRA further dilutes the value of its legislative history.

- Subsequent interpretations of the FVRA: The OLC has three times addressed the FVRA's scope. Importantly, none of the three OLC opinions squarely considers whether the FVRA applies to a vacancy created by removal: the first opinion, issued in 1999, is a general FAQ document, and the other two opinions issued in 2017 and 2018 concerned vacancies arising from the resignations Cordray and Attorney General Jeff Sessions, respectively. While each OLC

> memo speculates that the FVRA might be applied to firings, such speculation is based entirely on Thompson's floor statement, self-referential citations to the 1999 and 2017 OLC memos, and a policy argument about congressional intent.[1] The OLC's speculative statements cannot alone transform the meaning of the FVRA's text, and they are contradicted by case law stating that if a Senate-confirmed official refuses to resign, the President could use his authority to fire the official, but that act *would make the FVRA inapplicable*.[2]

While Miller-Gootnick's research and analysis is thorough, his conclusion is not novel. In fact, the observation that the FVRA does not apply to vacancies created by removal was the basis of a recent lawsuit against the Trump Administration. In April 2018, the Democracy Forward Foundation and VoteVets filed a complaint in the U.S. District Court for the District of Columbia challenging President Trump's appointments of Robert Wilkie and Peter O'Rourke as acting Secretaries of Veterans Affairs following the alleged dismissal of Secretary David Shulkin. The complaint, as later amended, argued:

> Under the Federal Vacancies Reform Act of 1998 …, the President may bypass the default order of succession, but only if the previous officeholder dies, resigns, or is otherwise unable to serve in the office—not if the previous officeholder is fired. On March 28, 2018, President Trump unceremoniously fired the Secretary of Veterans Affairs, Dr. David J. Shulkin, by tweet. The President did not, therefore, have legal authority under the FVRA to fill the vacant Secretary position with an acting officer of his choice. O'Rourke's appointment as acting Secretary was unlawful.
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> By disregarding statutory provisions addressing when an individual may be designated to act as an officer in a Senate-confirmed position, the President has also avoided all Congressional checks on his power to fill such positions, and in so doing has violated the Appointments Clause of the Constitution.

The complaint also asserted:

> Former Secretary Shulkin did not "die" or "resign." Nor was he "unable to perform the functions and duties of the office." He was ready and willing to continue serving as Secretary of Veterans Affairs. Instead, he was fired by the President. The President therefore lacked the power to appoint Wilkie or O'Rourke as acting Secretary.
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> Congress passed the FVRA to eliminate the "threat to the Senate's advice and consent power" posed by permitting the President to appoint acting officials at will. . . . The President's appointment of Wilkie and O'Rourke in violation of the terms of the FVRA circumvents Congress's power over the appointment process entirely.
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> Because Wilkie was not, and O'Rourke is not, the lawful acting Secretary, any action that either official took or takes in the future "shall have no force or effect," and "may not be ratified" by a subsequent Secretary.[3]

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[1] For instance, in *Designating an Acting Director of the Bureau of Consumer Financial Protection*, the OLC speculates that the FVRA could "potentially" apply to periods of unavailability longer than a sickness, such as one resulting from the officer's removal.

[2] See *United States v. Valencia*, No. 5:17-cr-00882 (W.D. Tex. Nov. 27, 2018): "Had Sessions chosen to refuse to resign the President could have exercised his authority to fire him, which would make the statute inapplicable. As Sessions did resign voluntarily, the FVRA, which applies when the previous officeholder 'dies, resigns, or is otherwise unable to perform the functions and duties of the office' … does apply."

[3] The complaint was voluntarily dismissed without prejudice following the confirmation of Robert Wilkie to serve as the Secretary of Veterans Affairs.

Other observers have similarly articulated the rational basis supporting the conclusion that the FVRA does not apply to vacancies created by removal. For instance, Preet Bharara and Donald B. Verrilli Jr., among others, issued a task force report for the Brennan Center for Justice arguing that if the FVRA applies "when the president terminates a [presidential appointment with Senate confirmation] official," then the law is "prone to abuse," since "[t]his provides an avenue for a president to circumvent the confirmation process by firing officials and continuously appointing acting officers instead of nominating a permanent replacement." Similarly, University of Texas law professor Steve Vladek wrote:

> There are strong prudential and contextual arguments militating in the other direction [i.e., against a broad reading of the FVRA as encompassing *all* vacancies]—including that the purpose of the FVRA is to give the president flexibility to deal with unexpected vacancies, not to create vacancies himself and then sidestep existing succession schemes. Indeed, if [the FVRA applies to vacancies created by removal], then the president would have the power not only to *create* vacancies in every executive branch office, but to fill them on a temporary basis with individuals who were never confirmed by the Senate either to that specific position, or, in some cases, at all.

The conventional wisdom surrounding what will happen with the CFPB next year may be mistaken. There is a growing body of analysis recognizing that the FVRA does not apply to vacancies created through removal. If this analysis is correct, it means that if Joe Biden removes Kraninger from office, he will lack statutory authority to appoint an acting director to run the CFPB. Instead, the deputy director of the CFPB will serve as the acting director pursuant to Section 1011 of Dodd–Frank. Further, any unlawful attempt by the President to invoke the FVRA for purposes of an appointment would generate a strong and likely protracted legal challenge, and any and all actions taken by an unlawfully appointed acting director would also be subject to legal challenge since they would have no force or effect.

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