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November 29, 2017: The Acting Director and the Rule of Law

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Title: The Acting Director and the Rule of Law

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11/29/2017—If the rule of law is to mean anything, and it is not clear that it any longer does, there must be instances in which the law commands things people don't like. So it should have been with Senator Elizabeth Warren and the question of who is the acting Director of the Consumer Financial Protection Bureau. It is clear that President Trump is about to dismantle everything that agency was supposed to stand for, but that is the consequence of electing him. As President, he has certain powers, constitutional and statutory. One of those statutory powers is generally appointing acting Directors of Agencies upon resignation of the Director. The issue here is purely statutory, since there is no constitutional authority to appoint acting Directors. Senator Warren claims that the current Deputy becomes acting Director because of language creating the Agency that the Deputy is acting Director in the "absence or unavailability of the Director." But that language could not apply since there is no Director. The Director has resigned. So, the President is free to use his default powers. If the statute meant to deny the President this authority, it was not written clearly. That language looks like simple housekeeping in case the Director has a cold or is abroad. All of this actually shows something else. We are used to making policy not in Congress but in Administrative Agencies. This gives enormous authority to people who are not themselves elected and are not really bound by statutory standards. That means policy depends on Presidential appointment. You cannot really have independence from elections in making policy in the long run. Nor should you. Even the Fed will change because Trump did not reappoint Yellen. I guess we should consider law, as Justice Scalia might say, so that policy will not instantly change when we lose an election.