Rolled Over: How the Trump Administration is Failing to Protect Civilians and Military Service Members from Predatory Payday Lending

Zackary A. Martin

I. Introduction

The issue of payday loan industry regulation is not just of importance to the lenders within the industry and the state and federal agencies tasked with protecting borrowers; the general public has a keen interest in protection from predatory practices by payday lenders, as well. This is particularly pressing because, often, members of society that fall on the lower end of the socio-economic ladder—including members of our armed services—are the ones who suffer the consequences when industry excesses are not checked by government regulations. This Note seeks to examine efforts by the Trump Administration to roll back protections from predatory lending practices for consumers—even the special protections created for military service members under the George W. Bush Administration. This Note then proceeds to recommend how subsequent administrations, as well as Congress, should restore and expand these necessary protections.

Part II of this Note provides background information about the payday loan industry and how it was regulated prior to the Trump presidency. This includes examining the usury practices of many payday lenders, which led to calls for regulation, and two decades of regulation at the state and federal level, including enforcing the preexisting Truth in Lending Act (TILA) against payday lenders, the passage of the Military Lending Act (MLA), and the creation of the Consumer Financial Protection Bureau (CFPB). Part II will also explore efforts by the Trump Administration to cut back on consumer protections, from industry insiders vying for positions as regulators, to the CFPB's lack of financial resources and gutting of proposed regulations, and proposals to roll back special protections afforded armed service members by the MLA. Part III will examine the negative impacts unregulated payday lending can have on both military servicemembers and the public-at-large.

In Part IV, this Note recommends future administrations not follow the Trump Administration proposal to cut back enforcement efforts of the MLA. This Note also recommends that Congress extend MLA protections to all Americans. Future administrations should also return the CFPB to its pre-Trump Administration budgetary, regulatory, and independent status. Further, this Note recommends the substance of the 2017 Payday Rule be maintained, and for Congress to amend the CFPB's structure to create a board of directors as opposed to one agency head.

II. BACKGROUND

A. History of the Payday Loan Industry and Demands for Regulation

Payday lending's emergence as a booming business in the United States is a relatively recent development.[1] The industry boasts impressive financial numbers nonetheless.[2] In 2014, payday lenders extended $45 billion in loans, collecting just shy of $9 billion in fees on those loans.[3] Payday lending expansion over this time period was thanks, in part, to actions by the federal government in the 1970s and 1980s to deregulate federally insured lenders, making them effectively immune from state usury interest laws.[4] Many of the industry practices that followed not only shed light on why payday lending has become so

1. *See A Short History of Payday Lending Law*, PEW TR. (July 18, 2012), https://www.pewtrusts.org/en/research-and-analysis/articles/2012/07/a-short-history-of-payday-lending-law (noting industry grew "exponentially" from early 1990s through the first part of the 21st century) [hereinafter *A Short History*].

2. Gary Rivlin, *Money for Nothing Confessions of a Payday Lender: "I Felt Like a Modern-Day Gangster*,*"* THE INTERCEPT (June 23, 2016, 9:02 AM), https://theintercept.com/2016/06/23/confessions-of-a-payday-lender-i-felt-like-a-modern-day-gangster/.

3. *Id.*

4. *A Short History*, *supra* note 1.

lucrative, but also demonstrate the need for regulation.[5]

When payday lending first emerged in the 1980s, payday lenders claimed to be providing a "short-term financial solution for families low on cash."[6] Over time, this claim was rebuffed by industry insiders when Dan Freehan, CEO of Cash America—a payday lender with over 900 locations in 20 states[7]—explained at an industry conference in 2007: "[T]he theory in the business is you've got to get that customer in, work to turn him into a repetitive customer, long-term customer, because that's really where the profitability is."[8]

Though this may be out of step with the industry's purported mission, Freehan's empirical observation is supported by the statistic that 90% of payday lending business comes from borrowers who have taken out five or more loans per year.[9] Repeat borrowers account for such a large portion of the industry's business because payday lenders will not accept partial payments.[10] This practice results in borrowers agreeing to refinance and rollover loans on terms which include interest rates leading the borrower to owe far more than the original amount of the loan.[11]

This process, often referred to as a "debt treadmill,"[12] causes borrowers to suffer serious financial harm, struggle to pay their monthly bills, and even lose utility services.[13] Some borrowers find their only reprieve from this "debt treadmill" is to file for bankruptcy.[14] A study conducted in Texas shows payday loan borrowers are 88% more likely to file for bankruptcy than members of the general population.[15] This is likely the result of, as Professor Creola Johnson points out while lamenting rollover loans, "the payday-loan industry's business model and practices depend[ing] on ensnaring consumers via repetitive access to their bank accounts and multiple rollovers and loans."[16]

These negative outcomes led to calls for regulation, and some, like Senator Richard Durbin (D-IL), have characterized the industry as predatory.[17] "Payday lenders are legal loan sharks that offer small, short-term loans at interest rates of 100, 500, even 1,000 percent."[18]

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5. *See generally* Creola Johnson, *America's First Consumer Financial Protection Watchdog Is on a Leash: Can the CFPB Use Its Authority to Declare Payday-Loan Practices Unfair, Abusive, and Deceptive?*, 61 CATH. U. L. REV. 381 (2012) [hereinafter Johnson, *Watchdog*] (arguing for a more aggressive regulation from the CFPB).

6. *Id.* at 387–88.

7. *About Us*, CASH AM., http://www.cashamerica.com/AboutUs.aspx (last visited Sept. 22, 2018).

8. Uriah King & Leslie Parrish, *Springing the Debt Trap: Rate Caps Are Only Proven Payday Lending Reform*, CTR. FOR RESPONSIBLE LENDING, 1 (Dec. 13, 2007), https://www.responsiblelending.org/payday-lending/research-analysis/springing-the-debt-trap.pdf.

9. *Id.* at 3.

10. *See id.* at 9 (noting how "full payment on these loans is due in two short weeks").

11. Johnson, *Watchdog*, *supra* note 5, at 392.

12. *See* Elizabeth Renuart & Jean Ann Fox, *Payday Loans: A High Cost for a Small Loan in Low-Income and Working Communities*, 34 CLEARINGHOUSE REV. 589, 589–90 (2001) (coining the term).

13. Johnson, *Watchdog*, *supra* note 5, at 382.

14. *Id.* at 394.

15. *Id.*

16. *Id.* at 388.

17. 151 CONG. REC. S1824 (daily ed. Mar. 1, 2005) (statement of Sen. Richard Durbin (D-IL)).

18. *Id.*; *see also* Brittney Mayer, *8 Best Short-Term Loans for Bad Credit*, BADCREDIT.ORG (May 23, 2019), https://www.badcredit.org/how-to/short-term-loans-for-bad-credit/ (displaying short-term loans, for which borrowers with "bad credit [are] welcomed," of $100–1000 offered by Cash Advance at interest rates of 200–2290%).

B. State Regulation of the Payday Loan Industry

In the absence of overarching federal legislation regulating the payday loan industry, many states took matters into their own hands.[19] According to Pew, 15 states have "restrictive" laws that do not allow for payday loan storefronts.[20] One of the most restrictive state statutes is Georgia's, under which no payday lenders currently operate in the state.[21] Other states, like Massachusetts, make payday lending de facto illegal by having a relatively small cap on interest borrowers can charge.[22] Other states, like New York, have similarly limited the interest rates lenders may charge,[23] but still face the challenge of enforcing these laws against online vendors.[24] Thus, it is not surprising that the New York Attorney General's Office state payday lenders can only be excluded through "conspicuously aggressive enforcement."[25]

Not all Americans are adequately protected by strict payday lender regulations. For example, South Dakota does not restrict the term of the loan, or regulate the fees lenders can charge to refinance.[26] In addition, South Dakota law allows for four loan rollovers.[27] These are dreaded rollovers which lead to the financial turmoil described by Professor Johnson.[28] Such inconsistent "patchwork" legislation among the states leads to the conclusion that federal laws would provide greater uniformity.[29]

C. Using the Truth in Lending Act Against Payday Lenders

In 1968, Congress passed the Truth in Lending Act (TILA) with the express purpose of "assur[ing] a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."[30] Courts have consistently held that TILA is applicable against payday lenders—meaning lenders must comply with TILA's disclosure requirements.[31] As such, lenders must disclose loan terms, including Annual Percentage Rates (APR), and provide certain advertising disclosures.[32]

If a payday lender fails to comply with TILA requirements, borrowers may have a

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19. Lowell Ritter, *Payday Lending: Friend or Foe?*, 20 J. CONSUMER & COM. L. 146, 151 (2017).

20. *State Payday Loan Regulation and Usage Rates*, PEW TR. (Jan. 14, 2014), https://www.pewtrusts.org/en/research-and-analysis/data-visualizations/2014/state-payday-loan-regulation-and-usage-rates [hereinafter *State Payday Loan Regulation*].

21. *Id.*

22. *See* Ritter, *supra* note 19, at 152 (discussing Massachusetts' 23% small loan interest rate cap).

23. *See id.* (describing New York's 16% usury cap).

24. *See id.* (discussing how online vendors were still lending in the state even after the interest rate cap went into effect).

25. Ronald Mann & Jim Hawkins, *Just Until Payday*, 54 UCLA L. REV. 855, 880 (2007).

26. *State Payday Loan Regulation*, *supra* note 20.

27. *South Dakota State Information*, PAYDAY LOAN CONSUMER INFO., https://paydayloaninfo.org/state-information/49 (last visited Sept. 26, 2018).

28. *See* Johnson, *Watchdog*, *supra* note 5, at 392–94 (discussing the financial ruin resulting from rollover loans).

29. Ritter, *supra* note 19, at 152.

30. 15 U.S.C. § 1601(a) (2014).

31. Ritter, *supra* note 19, at 151.

32. *CFPB Examination Procedures Short-Term Small-Dollar Lending*, CONSUMER FIN. PROT. BUREAU, 3 (Sept. 2013), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/092013_cfpb_short-term-small-dollar-lending-payday_procedures.pdf.

cause of action against the lender and could recover damage awards.[33] Actions pursuant to TILA may be brought in any United States District Court, either by an individual or as a class action—though statutory damages for an individual claim are limited to $2000.[34] However, as TILA enforcement actions are a civil matter,[35] counsel is not available for those who cannot afford it.[36] This is particularly relevant because households making less than $40,000 per year are three times more likely to utilize payday loans than households making more than $50,000 per year.[37] Thus, a lack of counsel leaves most payday borrowers ill-equipped to pursue their claims in court.[38]

D. Protecting Our Armed Service Members and Passing the MLA

Against the backdrop of state law and TILA's shortcomings to curb predatory lending practices, military commanders lobbied lawmakers in the early 2000s to offer further protections for troops.[39] This was the result of a substantial number of soldiers becoming trapped on the debt treadmill.[40] A 2006 Department of Defense report examined the effects of payday loans,[41] concluding payday lending "harms the morale of troops and their families, and adds to the cost of fielding an all volunteer fighting force."[42]

At the urging of the Department of Defense, Congress took swift action, enacting the Military Lending Act (MLA) in 2007.[43] During the debate leading up to the MLA's passage, Senator Durbin described payday lenders as "legal loan sharks."[44] The MLA capped the interest rates payday lenders may offer active-duty military members and their dependents at 36%, while also proscribing many practices deemed predatory.[45]

Early returns suggested the MLA was working.[46] In 2008, the Naval-Marine Corps Relief Society—a charity designed to assist active-duty and retired service members struggling to pay off predatory loans—reported that the $1.1 million it dispersed in 2007 was down to only $250,000 in the first three quarters of 2008.[47] Furthermore, the

33. Shane M. Mendenhall, *Payday Loans: The Effects of Predatory Lending on Society and the Need for More State and Federal Regulation*, 32 OKLA. CITY U. L. REV. 299, 316 (2008).

34. *Id.* at 317–18.

35. *See* 15 U.S.C. § 1640(e) (2010) (stating "any such *civil* action") (emphasis added).

36. Michelle Chen, *One More Way the Courts Aren't Working for the Poor*, THE NATION (May 16, 2016), https://www.thenation.com/article/one-more-way-the-courts-arent-working-for-the-poor/.

37. PEW TR., PAYDAY LENDING IN AMERICA: WHO BORROWS, WHERE THEY BORROW, AND WHY 10 (July 2012), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf.

38. *See The ACLU and Rights of the Poor*, ACLU, https://www.aclu.org/other/aclu-and-rights-poor (last visited Nov. 20, 2018) (implying that those without counsel are ill-equipped for court).

39. *See* Creola Johnson, *Congress Protected the Troops: Can the New CFPB Protect Civilians from Payday Lending?*, 69 WASH. & LEE L. REV. 649, 661 (2012) [hereinafter Johnson, *Civilians*] (discussing military leaders' efforts to lobby state and federal lawmakers).

40. *Id.*

41. *Id.*

42. U.S. DEP'T OF DEF., REPORT ON PREDATORY LENDING PRACTICES DIRECTED AT MEMBERS OF THE ARMED FORCES AND THEIR DEPENDENTS 53 (Aug. 9, 2006), http://www.dtic.mil/dtic/tr/fulltext/u2/a521462.pdf [hereinafter U.S. DEP'T OF DEF. REPORT].

43. Johnson, *Civilians*, *supra* note 39, at 649.

44. 151 CONG. REC., *supra* note 17, at S1824.

45. Johnson, *Civilians*, *supra* note 39, at 649.

46. *Id.* at 664.

47. *Id.*

underlying concerns which led to the MLA's enactment were substantiated by a study which concluded "payday loan access produces a significant decline in overall job performance" of soldiers.[48] Further efforts to provide financial counseling to service members and influence banks and credit unions near military bases to offer service members low-interest loans also led to a decreased reliance on payday loans by troops.[49]

Following the 2007-2008 financial crisis, the government created a new consumer protection agency, the Consumer Financial Protection Bureau (CFPB),with the express purpose of "promot[ing] fairness and transparency for mortgages, credit cards, and other consumer financial products and services."[50] Some called for the CFPB to use its authority to extend the protections of the MLA to all Americans.[51]

E. Creation of the CFPB and the Regulations of Payday Lenders

The CFPB's creation was part of the Dodd-Frank Wall Street Reform and Financial Protection Act and the statute granted the CFPB exclusive rulemaking authority over all payday lenders.[52] The CFPB's authority includes issuing "rules, orders, and guidance implementing Federal consumer financial laws."[53] Though the agency is afforded deference in interpreting the rules it creates, Dodd-Frank also includes internal limitations on the CFPB's rulemaking authority.[54]

Some of the CFPB's earliest enforcement actions included a $10 million fine against a payday lender for illegal collection practices[55] and an action against the aforementioned Cash America,[56] which led to the company agreeing to reimburse $14 million to approximately 14,000 borrowers.[57] Despite these and other enforcement actions, many felt the CFPB lacked the teeth to truly hold payday lenders accountable.[58]

To effectuate the agency's congressional mandate, former CFPB Director Richard Cordray finalized a rule "aimed at stopping payday debt traps."[59] Explaining the need for the rule, Cordray said: "The CFPB's new rule puts a stop to the payday debt traps that have plagued communities across the country."[60] As part of its proposed regulation, the CFPB would hold payday loans to the full-payment test, requiring lenders to make an initial

48. Scott Carrell & Jonathan Zinman, *In Harm's Way? Payday Loan Access and Military Personnel Performance*, 27 REV. FIN. STUD. 2805, 2830 (2014).

49. Johnson, *Civilians*, *supra* note 39, at 664–65.

50. *Consumer Financial Protection Bureau*, FED. REG., https://www.federalregister.gov/agencies/consumer-financial-protection-bureau (last visited Feb. 9, 2019).

51. Johnson, *Civilians*, *supra* note 39, at 649.

52. Johnson, *Watchdog*, *supra* note 5, at 383, 411.

53. *Id.* at 412 (quoting Dodd-Frank Act § 1021(c)(5)).

54. *Id.*

55. *CFPB Takes Action Against ACE Cash Express for Pushing Payday Borrowers into Cycle of Debt*, CONSUMER FIN. PROT. BUREAU (July 10, 2014), https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-ace-cash-express-for-pushing-payday-borrowers-into-cycle-of-debt/.

56. *Supra* Part II.A, at 103.

57. *Our First Enforcement Action Against a Payday Lender*, CONSUMER FIN. PROT. BUREAU (Nov. 20, 2013), https://www.consumerfinance.gov/about-us/blog/our-first-enforcement-action-against-a-payday-lender/.

58. *See generally* Johnson, *Watchdog*, *supra* note 5 (describing the CFPB in her title as "America's First Consumer Financial Watchdog is on a Leash").

59. *CFPB Finalizes Rule to Stop Payday Debt Traps*, CONSUMER FIN. PROT. BUREAU (Oct. 5, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-rule-stop-payday-debt-traps/ [hereinafter *CFPB Finalizes Rule to Stop*].

60. *Id.* (quoting CFPB Director Richard Cordray).

determination of a consumer's ability to repay a loan prior to issuance.[61] Under the proposed regulation, payday lenders would still be able to offer loans under $500 without needing to comply with full-payment rule requirements, but such loans must be structured to allow the borrower to get out of debt gradually.[62]

Even though the 2017 Payday Rule was proposed after Donald Trump took office, the Obama-appointed Director of the CFPB, Richard Cordray, oversaw the Rule's drafting.[63] Upon Cordray's resignation and Mick Mulvaney's ascension to Acting Director of the CFPB[64], Mulvaney called for a rollback of the proposed rule, siding with industry insiders in litigation against the agency.[65] Under Mulvaney's leadership, the CFPB not only balked at proposed regulations, but also requested a zero dollar budget for the first quarter of 2018.[66] Mulvaney also used the CFPB's enforcement authority to propose less stringent MLA enforcement policies.[67] As Senator Sherrod Brown (D-OH) stated: "Mulvaney has proven once again he would rather cozy up with payday lenders and industry insiders than listen to consumer advocates who want to make sure hard-working Americans are not cheated by financial scams."[68]

F. The Election of Donald Trump and a Sea of Change at the CFPB

As a candidate, President Trump called for a financial regulatory plan which would "be close to dismantling Dodd-Frank."[69] Though Trump's 2016 opponent, Hillary Clinton, called his plan "reckless"[70] and claimed it would "leave middle-class families out to dry"[71]—President Trump and his supporters carried the day.[72]

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61. CFPB, CFPB FINALIZES RULE TO STOP PAYDAY DEBT TRAPS 3 (2017), https://files.consumerfinance.gov/f/documents/201710_cfpb_fact-sheet_payday-loans.pdf [hereinafter *CFPB Fact Sheet*].

62. *Id.* at 4.

63. *CFPB Finalizes Rule to Stop*, *supra* note 59.

64. Mulvaney left his role as CFPB head in December 2018, when Kathy Kraninger was confirmed as permanent Director of the CFPB. Katy O'Donnell, *Senate Confirms Trump Nominee Kraninger to Lead Consumer Bureau*, POLITICO (Dec. 6, 2018, 2:42 PM), https://www.politico.com/story/2018/12/06/senate-confirms-kraninger-cfpb-1006095. Nevertheless, this Note's Analysis and Recommendation Sections remain unchanged.

65. Stacy Cowley, *Mulvaney Sides With Payday Lenders Asking Court to Block Restrictions*, N.Y. TIMES (June 5, 2018), https://www.nytimes.com/2018/06/05/business/cfpb-payday-lenders-mulvaney.html.

66. Michael Grunwald, *Mulvaney Requests No Funding for Consumer Financial Protection Bureau*, POLITICO (Jan. 18, 2018), https://www.politico.com/story/2018/01/18/mulvaney-funding-consumer-bureau-cordray-345495.

67. Jeremy Sairsingh, *Democratic Senators Urge Mulvaney to Reconsider MLA Supervision Policy Change*, CONSUMER FIN. MONITOR (Aug. 17, 2018), https://www.consumerfinancemonitor.com/2018/08/17/democratic-senators-urge-mulvaney-to-reconsider-mla-supervision-policy-change/.

68. Renae Merle, *Mick Mulvaney Fires all 25 Members of Consumer Watchdog's Advisory Board*, WASH. POST (June 6, 2018), https://www.washingtonpost.com/news/business/wp/2018/06/06/mick-mulvaney-fires-members-of-cfpb-advisory-board/?noredirect=on&utm_term=.2047347fdc4d (quoting Sen. Sherrod Brown (D-OH)).

69. Emily Flitter & Steve Holland, *Trump Preparing Plan to Dismantle Obama's Wall Street Reform Law*, REUTERS (May 17, 2016), https://www.reuters.com/article/us-usa-election-trump-banks-idUSKCN0Y900J (quoting then-candidate Donald Trump).

70. *Id.* (quoting presidential candidate Hillary Clinton).

71. *Id.*

72. *Presidential Election Results: Donald J. Trump Wins*, N.Y. TIMES (Aug. 9, 2017, 9:00 AM),

Donald Trump was not alone in making calls for changes to Dodd-Frank. In the leadup to the 2016 election, fellow Republicans called for the elimination of the CFPB.[73] As a spokesperson for a Republican House Member stated: "Mr. Trump is right, Dodd-Frank isn't working."[74]

Against the backdrop of Republican opposition to the CFPB and Republican control of both houses of Congress,[75] many began speculating about the CFPB's fate following Donald Trump's election.[76] Though financial insiders were certainly critical of some aspects of Dodd-Frank,[77] the CFPB was noted for its popularity "in the court of public opinion,"[78] "viewed as protecting the little guys, who may otherwise not have a voice."[79] In response to concerns Trump and Republicans would "turn loose" big financial institutions,[80] including the worry of some Democrats that Senator Ted Cruz (R-TX) would reintroduce his 2015 bill to abolish the CFPB,[81] Senator Elizabeth Warren (D-MA), the "intellectual godmother of the CFPB,"[82] gave a fiery speech—defending the CFPB, citing its necessity to police financial institutions.[83]

This is not to say that opposition to the CFPB was limited to Republican leadership. Democrats, such as Representative Debbie Wasserman Shultz (D-FL), attempted to undercut CFPB proposals to regulate the payday loan industry.[84] In addition to battles within the political branches of government, financial institutions challenged the CFPB's constitutionality in the courts.[85] Arguing that the CFPB was an unaccountable bureaucracy, financial institutions sought to disband the agency.[86] Though the United States Court of Appeals for the District of Columbia, in *PHH Corp. v. CFPB*, did not give financial institutions their ultimate wish, the court did make the CFPB less immune to political pressures—striking down the "for cause" requirement to remove the CFPB Director,

https://www.nytimes.com/elections/results/president.

73. *See* Flitter & Holland, *supra* note 69 (explaining Republican criticism of Dodd-Frank).

74. *Id.* (quoting Sarah Rozier, spokeswoman for Rep. Jeb Hensarling (R-TX)).

75. *Senate Election Results: G.O.P. Keeps Control*, N.Y. TIMES (Aug. 1, 2017), https://www.nytimes.com/elections/results/senate; *House Election Results: G.O.P. Keeps Control*, N.Y. TIMES (Sept. 13, 2017), https://www.nytimes.com/elections/results/house.

76. *See, e.g.*, Robert Harrow, *Reasons Why Donald Trump Should and Shouldn't Dismantle Dodd-Frank*, FORBES (Nov. 17, 2016), https://www.forbes.com/sites/robertharrow/2016/11/17/reasons-why-donald-trump-should-and-shouldnt-dismantle-dodd-frank/#4c02a2a66583 (discussing future of the CFPB).

77. *See id.* (criticizing high overhead costs for lending making banks less willing to process loans of less than $100,000—with the effect of harming small businesses).

78. *Id.*

79. *Id.*

80. Helaine Olen, *Trump Will Tear Down Elizabeth Warren's Legacy, Too*, SLATE (Nov. 14, 2016, 1:22 PM), http://www.slate.com/articles/business/the_bills/2016/11/trump_will_tear_down_elizabeth_warren_s_legacy_too.html.

81. *Id.*

82. Peter J. Ferrara, *Elizabeth Warren's CFPB: This Is Progress?*, INV'RS BUS. DAILY (July 26, 2017), https://www.investors.com/politics/commentary/elizabeth-warrens-cfpb-this-is-progress/.

83. Olen, *supra* note 80.

84. *Id.*

85. Michelle Singletary, *Trump's Election Does Not Bode Well for the Consumer Financial Protection Bureau*, WASH. POST (Nov. 15, 2016), https://www.washingtonpost.com/business/get-there/trumps-election-does-not-bode-well-for-the-consumer-financial-protection-bureau/2016/11/15/70618360-ab48-11e6-977a-1030f822fc35_story.html?utm_term=.124d32182bd0.

86. *Id.*

enabling the President to remove the agency's director at his or her discretion.[87]

This ruling set the stage for President Trump to remove CFPB Director Richard Cordray whenever he saw fit.[88] Trump signed an Executive Order during his second week in office, claiming the Order would "be cutting a lot out of Dodd Frank."[89] Describing Dodd-Frank as "a disaster,"[90] President Trump's order promised to "empower Americans to make independent financial decisions and informed choices in the marketplace, save for retirement, and build individual wealth."[91]

In addition to the Executive Order, the Trump Administration was accused of using the Office of the Comptroller of the Currency (OCC) to "[empower] banks to engage in reckless abuse of their customers"—in part by undermining CFPB protections and giving banks a leg up on payday lenders in the small-dollar loan market[92]—though excessive rollovers meant the loans may end up costing their consumers even more in interest and fees than is customary with payday loans.[93] Congressional Republicans followed the President's lead, eliminating CFPB regulations which gave consumers greater rights to file class-action lawsuits against financial institutions.[94] However, frustrating the predictions of many before Trump took office,[95] the President did not "almost immediately dismiss Richard Cordray."[96] In fact, Republicans were dismayed that Cordray, whose term did not end until the summer of 2018, had stayed on and continued to press for aggressive consumer protection rules.[97]

This changed when Cordray announced his resignation on November 15, 2017.[98] Cordray subsequently named Leandra English, his Chief of Staff, to serve as Deputy Director—with the practical effect she would serve as Acting Director until a replacement

87. PHH Corp. v. CFPB, 839 F.3d 1, 1 (D.C. Cir. 2016).

88. *See id.*

89. Antoine Gara, *With a Stroke of the Pen, Donald Trump Aims to Wave Goodbye to the Dodd Frank Act*, FORBES (Feb. 3, 2017, 6:30 PM), https://www.forbes.com/sites/antoinegara/2017/02/03/with-a-stroke-of-the-pen-donald-trump-will-wave-goodbye-to-the-dodd-frank-act/#3a4820351148 (quoting President Donald Trump).

90. *Id.*

91. Exec. Order. No. 13,772, 82 Fed. Reg. 9965 (Feb. 3, 2017).

92. David Dayen, *Trump's Wall Street Watchdog Undercuts a Key Consumer Protection*, THE NEW REPUBLIC (Oct. 10, 2017), https://newrepublic.com/article/145239/trumps-wall-street-watchdog-undercuts-key-consumer-protection.

93. *Id.*; *see generally* Johnson, *Watchdog*, *supra* note 5, at 392–94 (discussing the negative implications of excessive rollovers).

94. Bob Bryan, *Congress Just Killed a Rule that Would Have Made It Easier for Consumers to Sue Banks — Here's Why People Are So Upset*, BUS. INSIDER (Oct. 25, 2017, 11:29 AM), https://www.businessinsider.com/gop-trump-bill-kill-obama-cfpb-arbitration-lawsuit-rule-2017-10.

95. *See* Ben Walsh & Ryan Grim, *Trump Moves Closer to Gutting Elizabeth Warren's Consumer Watchdog*, HUFFPOST (Jan. 12, 2017, 2:17 PM), https://www.huffingtonpost.com/entry/trump-consumer-financial-protection-bureau_us_5877ac9ee4b05b7a465e3262 (speculating as to who Trump may pick to replace CFPB Director Richard Cordray).

96. Megan Leonhardt, *Trump May Tap Consumer Watchdog's Biggest Opponent to Run It*, MONEY (Jan. 13, 2017), http://time.com/money/4634976/donald-trump-cfpb-richard-cordray-randy-neugebauer/.

97. Renae Merle, *Richard Cordray is Stepping Down as Head of Consumer Financial Protection Bureau*, WASH. POST (Nov. 15, 2017), https://www.washingtonpost.com/news/business/wp/2017/11/15/richard-cordray-is-stepping-down-as-head-of-consumer-financial-protection-bureau/.

98. Sylvan Lane, *Consumer Bureau Chief Announces Resignation*, THE HILL (Nov. 15, 2017, 12:04 PM), https://thehill.com/policy/finance/360488-consumer-bureau-chief-announces-resignation.

was named.[99] In a letter to CFPB staffers, Cordray claimed the appointment of English would "minimize operational disruption and provide for a smooth transition."[100] Just hours later, President Trump tapped Mick Mulvaney—a man Cordray later accused of attempting to undermine the CFPB during his time as Director[101]—to become Acting Director of the CFPB, leading to confusion as to who was in charge of the agency, English or Mulvaney.[102] The confusion was only exacerbated when both English and Mulvaney signed inner-departmental emails as "Acting Director."[103] The confusion was alleviated relatively quickly however, as English's preliminary injunction was denied in federal district court—making Mulvaney's position at the helm of the CFPB uncontested.[104]

G. Mulvaney's Changes to the 2017 Payday Rule

In what was viewed as his final major act as CFPB Director,[105] Cordray issued the first federal payday lending rule which promised to protect all Americans.[106] The CFPB's new regulation required lenders to ensure borrowers passed the agency's "Full-Payment Test"[107]—meaning they must determine up-front whether a borrower has the ability to repay the loan.[108] Additionally, the Full-Payment Test would force lenders to "respect a mandatory 30 day cooling off period"[109] after a third payday loan "in quick succession."[110] This aspect of the rule was meant to prevent multiple successive loans being issued and rolled over, "entangling those who take them in hard-to-escape spirals of ever-growing debt."[111] Alternatively, under the proposed regulations, payday lenders may offer consumers loans of less than $500 dollars which do not meet Full-Payment Rule requirements.[112] However, such loans are restricted to lower risk situations, require certain disclosures, and allow no more than three rollovers.[113] Mulvaney wasted no time

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99. Kevin McCoy, *Richard Cordray Resigns as Director of Consumer Financial Protection Bureau*, USA TODAY (Nov. 24, 2017, 4:48 PM), https://www.usatoday.com/story/money/2017/11/24/richard-cordray-resigns-director-consumer-financial-protection-bureau/893489001/.

100. *Id.* (quoting outgoing CFPB Director Richard Cordray).

101. Richard Cordray, *The Trump Administration is Trying to Undermine the CFPB. It Will Fail.*, WASH. POST (Feb. 14, 2018), https://www.washingtonpost.com/opinions/the-trump-administration-is-trying-to-undermine-the-cfpb-it-will-fail/2018/02/14/cab18f18-10d2-11e8-8ea1-c1d91fcec3fe_story.html?utm_term=.c373a46859b7.

102. Victoria Guida, *Trump Taps Mulvaney to Head CFPB, Sparking Confusion Over Agency's Leadership*, POLITICO (Nov. 24, 2017, 4:45 PM), https://www.politico.com/story/2017/11/24/richard-cordray-successor-cfpb-leandra-english-259612.

103. Katie Rogers, *2 Bosses Show Up to Lead the Consumer Financial Protection Bureau*, N.Y. TIMES (Nov. 27, 2017), https://www.nytimes.com/2017/11/27/us/politics/cfpb-leandra-english-mulvaney.html.

104. Katie Rogers & Tara Siegel Bernard, *President Wins Round in the Battle for the Consumer Bureau*, N.Y. TIMES (Nov. 28, 2018), https://www.nytimes.com/2017/11/28/us/politics/mick-mulvaney-leandra-english-consumer-bureau.html.

105. Dayen, *supra* note 92.

106. *Id.*

107. *CFPB Fact Sheet*, *supra* note 61.

108. *Id.*

109. *Id.* at 4.

110. *Id.*

111. Stacy Cowley, *Payday Lending Faces Tough New Restrictions by Consumer Agency*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/business/payday-loans-cfpb.html; *see generally* Johnson, *Watchdog*, *supra* note 5, at 392–94 (discussing the negative implications of excessive rollovers).

112. *CFPB Fact Sheet*, *supra* note 61, at 4.

113. *Id.*

scrapping Cordray's proposed regulation.[114] Mulvaney called on Republicans in Congress to do the same with other CFPB regulations[115] and strike them down.[116] Ultimately, Mulvaney himself—not Congress—took action,[117] and the CFPB put the Payday Rule on hold.[118] In addition, the agency dropped an enforcement action against online lenders accused of charging 900% interest rates.[119]

In subsequent litigation, Mulvaney sided with the Community Financial Services Association of America (CFSA)—"the leading national association representing non-bank lenders that offer small-dollar credit products and other financial services"[120]—when CFSA sought an injunction halting the Payday Rule's 2019 effective date.[121] Though the judge ultimately denied the request of the CFPB and CFSA to stay the effective date of the rule,[122] a second injunction action is pending.[123] Despite the Rule not going into effect until 2019, the grounds for the injunction, according to CFSA, is that its members' need to prepare for the pending rule led to irreparable harm.[124] The CFPB, under Mulvaney's leadership, was "widely expected to repeal or significantly weaken the rule" well before August 2019[125]—despite urges from Senate Democrats to reconsider.[126] Ultimately, the CFPB did delay the compliance date of most of the major provisions of the Pay Day Rule to November 2020, and has proposed eliminating those provisions entirely.[127]

H. Defunding of the CFPB

Acting Director Mulvaney sought not only to change the CFPB's regulatory proposals, but also significantly change its enforcement methods.[128] While former Director

114. *See* Jessica Silver-Greenberg & Stacy Cowley, *Consumer Bureau's New Leader Steers a Sudden Reversal*, N.Y. TIMES (Dec. 5, 2017), https://www.nytimes.com/2017/12/05/business/cfpb-mick-mulvaney.html (discussing shifts in policy within 48 hours of Mulvaney's assent to Acting Director).

115. *See* Bryan, *supra* note 94; *supra* Part III.A (noting Congress struck down a regulation which gave banking customers great rights to bring class action lawsuits).

116. Silver-Greenberg & Cowley, *supra* note 114.

117. Chris Arnold, *Under Trump Appointee, Consumer Protection Agency Seen Helping Payday Lenders*, NPR (Jan. 24, 2018, 10:12 AM), https://www.npr.org/2018/01/24/579961808/under-trump-appointee-consumer-protection-agency-seen-helping-payday-lenders.

118. *Id.*

119. *Id.*

120. CMTY. FIN. SERVS. AM., https://www.cfsaa.com/# (last visited Oct. 5, 2018).

121. David Baumann, *Payday Lenders Ask for Injunction to Delay Payday Lending Rule*, CREDIT UNION TIMES (Sept. 17, 2018, 2:43 PM), https://www.cutimes.com/2018/09/17/payday-lenders-ask-for-injunction-to-delay-payday/?slreturn=20180906210550.

122. *Payday Groups Denied Stay of Payday Rule Again*, CONSUMER BANKERS ASS'N BUREAU, https://www.consumerbankers.com/content/bureau-payday-groups-denied-stay-payday-rule-again (last visited Oct. 7, 2019).

123. Baumann, *supra* note 121.

124. *Id.*

125. *Id.*

126. Joseph Lawler, *Senate Democrats Warn Mick Mulvaney Against Repealing Payday Loan Rule*, WASH. EXAM'R (Mar. 27, 2018, 5:15 PM), https://www.washingtonexaminer.com/policy/economy/senate-democrats-warn-mick-mulvaney-against-repealing-payday-loan-rule.

127. *Payday Loan Protections*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/payday-rule/ (last visited Nov. 6, 2019).

128. *See generally Enforcement Actions*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/policy-compliance/enforcement/actions/ (last visited Sept. 26, 2019) [hereinafter *Enforcement*, CFPB] (listing all CFPB enforcement actions).

Cordray averaged two to four enforcement actions per month, Mulvaney brought none in his first four months at the helm of CFPB.[129] The lack of regulatory enforcement may be explained by Mulvaney's well publicized request of zero dollars in funding for the second quarter of fiscal year 2018.[130] According to Mulvaney, he was confident, "that the funds currently in the Bureau Fund are sufficient for the Bureau to carry out its statutory mandates for the next fiscal quarter while striving to be efficient, effective, and accountable."[131] It was a mere four days after this budgetary request (or lack thereof) that the CFPB dropped an important enforcement action against World Acceptance Corporation[132]—the aforementioned lender accused of charging 900% interest rates.[133]

Even Mulvaney's defenders admit that budgetary cutbacks, as well as ideological opposition, has led to the amount of enforcement actions declining[134]—though they contend the agency still pursues "clear-cut" violations while avoiding "overreach . . . in a gray area."[135] However, such claims do not seem to be supported by the empirical data.[136] In Richard Cordray's final 12 months as Director of the CFPB, the agency brought 11 enforcement actions categorized as "payday" or "small dollar" loan violations.[137] From the time Acting Director Mulvaney took office in November 2017 through October 2018—subsequent to his request for no funding in the second quarter of fiscal year 2018[138]—he only brought three such actions.[139]

I. Industry Insiders Infiltrate the CFPB

While it was Mulvaney who, upon his appointment as CFPB Acting Director, announced his intentions to reign in an agency he denounced as a regulator run-amok,[140] it was not too long into his term with the CFPB when Mulvaney himself was cited as "another example of an administrator running amok."[141] Such was said of Mulvaney after

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129. *Id.*

130. Kevin McCoy, *Trump Appointee Seeks $0 Funding for Consumer Financial Protection Bureau*, USA TODAY (Jan. 19, 2018, 12:46 PM), https://www.usatoday.com/story/money/business/2018/01/19/trump-appointee-seeks-0-funding-consumer-watchdog/1047642001/.

131. Kai Ryssdal & Sean McHenry, *Mick Mulvaney Doesn't Think the CFPB Needs More Money*, MARKETPLACE (Jan. 18, 2018, 4:22 PM), https://www.marketplace.org/2018/01/18/economy/mick-mulvaney-doesn-t-think-cfpb-needs-more-money (quoting CFPB Acting Director Mick Mulvaney).

132. Josh Keefe, *CFPB Drops Investigation into Payday Lender That Contributed to Mick Mulvaney's Campaigns*, INT'L BUS. TIMES (Jan. 23, 2018, 1:58 PM), https://www.ibtimes.com/political-capital/cfpb-drops-investigation-payday-lender-contributed-mick-mulvaneys-campaigns.

133. Arnold, *supra* note 117.

134. *See* Sarah O'Brien, *Dodd-Frank Changed Consumer Protections After the Financial Crisis — Here's How That's Shaking Out Today*, CNBC (Sept. 11, 2018, 8:17 AM), https://www.cnbc.com/2018/09/11/dodd-frank--cfpb.html (quoting Alan Kaplinsky, a partner at national law firm Ballard Spahr, who believed CFPB enforcement under Cordray "went too far").

135. *Id.*

136. *Enforcement*, CFPB, *supra* note 128.

137. *Id.*

138. McCoy, *supra* note 130.

139. *Enforcement*, CFPB, *supra* note 128.

140. Stacy Cowley, *Consumer Watchdog's Latest Budget Request: $0*, N.Y. TIMES (Jan. 18, 2018, 7:00 PM), https://www.nytimes.com/2018/01/18/business/cfpb-mick-mulvaney.html.

141. Philip Wegmann, *Mick Mulvaney is the Unelected, Unaccountable Bureaucrat We Don't Deserve*, WASH. EXAM'R (June 7, 2018, 11:24 AM), https://www.washingtonexaminer.com/opinion/mick-mulvaney-is-the-unelected-unaccountable-bureaucrat-we-dont-deserve.

he fired all 25 members of a CFPB Director advisor panel of consumer advocates and academics created under Cordray.[142] A former board member suggested the dismissals were the result of Mulvaney's attempts to quiet criticism of the more "industry-friendly" approach the CFPB had taken under his watch.[143] A Mulvaney appointee said the move was to increase diversity among the board members and cut costs.[144]

This action by Mulvaney renewed claims that he was not, in fact, seeking to protect consumers in his Acting Director role, but instead was cozying up to industry insiders.[145] Considered in a vacuum, this one decision may not be indicative of much—but Mulvaney's ties to financial industry insiders, particularly in the payday loan industry, predates his time as director.[146] Though Mulvaney denied that his past connections to industry insiders while he was a South Carolina congressman would affect his decisions at the CFPB,[147] such concerns were raised at the outset of his tenure.[148]

Despite Mulvaney's initial denials, his own candid statements calls his sincerity into question.[149] Speaking to the American Bankers Association at a conference, Mulvaney said the following: "We had a hierarchy in my office in Congress . . . [i]f you're a lobbyist who never gave us money, I didn't talk to you. If you're a lobbyist who gave us money, I might talk to you."[150] While a spokesperson for Mulvaney to try and defend his remarks[151]—others interpreted his statement as advice. If you want results, contribute directly to congressional opponents of the CFPB or to grassroots campaigns designed to undermine the agency.[152]

One empirical example of whether Mulvaney has shed his ties to payday loan insiders is his decision to drop the CFPB's action against World Acceptance Corporation.[153] Mike Calhoun, president of the Center for Responsible Lending, suggested this decision was payback for campaign contributions Mulvaney received from payday lenders while he was in Congress.[154] In response, Mulvaney attempted to claim CFPB career staff recommended the move.[155] However, on the condition of anonymity, CFPB staffers denied Mulvaney's claim.[156] They claimed the reverse was true. Mulvaney was not taking his career staffs'

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142. *Id.*

143. Ken Sweet, *Mulvaney Dissolves Group That Advised Consumer Watchdog*, STAR TRIB. (June 6, 2018, 4:45 PM), http://www.startribune.com/ap-sources-mulvaney-disbands-consumer-advisory-board/484708011/.

144. *See id.*

145. *See* Merle, *supra* note 68 (quoting Sen. Sherrod Brown (D-OH)).

146. Kevin McCoy, *Mick Mulvaney: Payday Lending Campaign Contributions Pose No Conflicts of Interest*, USA TODAY (Dec. 4, 2017, 5:32 PM), https://www.usatoday.com/story/money/2017/12/04/mick-mulvaney-payday-lending-campaign-contributions-pose-no-conflicts-interest/920056001/.

147. *Id.*

148. *Id.*

149. David A. Graham, *Mick Mulvaney Says the Quiet Part Out Loud*, THE ATLANTIC (Apr. 25, 2018), https://www.theatlantic.com/politics/archive/2018/04/mick-mulvaneys-guide-to-navigating-the-swamp/558890/.

150. *Id.* (quoting CFPB Acting Director Mick Mulvaney).

151. *Id.*

152. *Id.*

153. Keefe, *supra* note 132; *supra* Part III.C.

154. Arnold, *supra* note 117.

155. Graham, *supra* note 149.

156. Chris Arnold, *Trump Administration Plans to Defang Consumer Protection Watchdog*, NPR (Feb. 12, 2018, 5:11 AM), https://www.npr.org/2018/02/12/584980698/trump-administration-to-defang-consumer-protection-watchdog.

advice, but rather ignored their recommendation to proceed with the lawsuit.[157] Mulvaney received $67,750 from payday lenders during his time in Congress.[158]

J. The CFPB's Rollback of MLA Enforcement

The CFPB is authorized to enforce the Military Lending Act (MLA) against the same lenders subject to Truth in Lending Act (TILA) enforcement.[159] To this end, the CFPB created examination procedures to "guide examiners through reviewing for compliance with the requirements of the [MLA]."[160] Citing the "risks for servicemembers and their families"[161] and the "threat to military readiness and affect servicemember retention,"[162] the CFPB's procedures examined loans for compliance with MLA APR disclosure requirements.[163]

In August 2018, reports surfaced that Mulvaney planned on ending these examination procedures.[164] The CFPB would instead only take action against lenders after receiving a complaint alleging an MLA violation.[165] "The bureau will still take complaints from military members and those who believe they've been victims of abuse made on its website or hotlines. But it won't be supervising lenders proactively to make sure they comply."[166] The agency claimed that the move was merely an attempt to roll back the overly aggressive practices under former Director Cordray.[167]

III. ANALYSIS

A. Impact of Payday Lending on Military Members

The blowback against this policy change was swift.[168] Despite agency claims the move was only meant to rollback overly-aggressive agency enforcement under Former Director Cordray,[169] experts argued the decision could leave military members vulnerable to predatory lending practices which could lead to negative, long-term financial

157. *Id.*

158. *Payday Lenders: Money to Congress*, OPENSECRETS.ORG, https://www.opensecrets.org/industries/summary.php?ind=F1420&cycle=All&recipdetail=H&mem=Y (last visited Sept. 26, 2019).

159. Anthony Kaye, *CFPB Suspending Routine Supervisory Examinations for MLA Compliance*, CONSUMER FIN. MONITOR (Aug. 14, 2018), https://www.consumerfinancemonitor.com/2018/08/14/cfpb-suspending-routine-supervisory-examinations-for-mla-compliance/.

160. *Military Lending Act (MLA) Examination Procedures*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/policy-compliance/guidance/supervision-examinations/military-lending-act-mla-examination-procedures/ (last updated Sept. 30, 2016).

161. *Id.*

162. *Id.*

163. *Id.*

164. Emily Stewart, *The Trump Administration is Dismantling Financial Protections for the Military*, VOX (Aug. 14, 2018, 8:30 AM), https://www.vox.com/policy-and-politics/2018/8/14/17684810/military-lending-act-mick-mulvaney-cfpb-loans.

165. *Id.*

166. *Id.*

167. *Id.*

168. *See id.* (quoting Retired Army Colonel Paul Kantwill comparing the decision to removing guards from military compounds).

169. Stewart, *supra* note 164.

consequences.[170] In addition, servicemembers may accumulate so much debt they "lose their security clearances, are kicked out of the military, or even, in the most dire cases, court-martialed."[171] Such concerns are only heightened by the fact that military servicemembers are particularly vulnerable to predatory lending practices because most servicemembers are 25 or younger.[172] For instance, the military provides them their first regular paycheck, and servicemembers are both far from home and in need of credit.[173]

Not only are individual servicemembers particularly vulnerable, but the Department of Defense (DOD) found that the availability of payday loans negatively affects military readiness and morale.[174] This makes it all the more surprising that the DOD was not consulted before the CFPB's MLA enforcement policy shift.[175] In a letter sent to several United States Senators, a senior Pentagon official stated that the DOD only learned of the proposal after it was "documented in the media."[176] While Senate Democrats urged Mulvaney to reconsider his decision, perhaps Mulvaney's strongest rebuke came from leaders of military advocacy organizations:[177]

> Thanking troops for their service goes beyond empty expressions of gratitude. It requires taking action to stand with the troops when predatory lenders come trolling, to ensure they're not plunged into a lifetime of debt and bad credit. As a united front, we forcefully oppose any attempt to weaken the Military Lending Act.[178]

Even with MLA protections in place, military members still made up a disproportionate number of payday lending customers.[179] A Javaelin Strategy & Research study from 2017 indicates that 44% of active duty servicemembers received a payday loan, a statistic that is "extraordinarily high" when compared with the general public that same year, of which only 10% of "all consumers" obtained such loans. Though MLA protections may make interest rates for these loans comparable to credit cards—which decreases the incentive for military members to rely on more traditional credit options—payday loans do

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170. *Id.*

171. *Id.*

172. George Zornick, *Why Loan Sharks, Car Salesmen, and Payday Lenders Love Mick Mulvaney*, THE NATION (Sept. 13, 2018), https://www.thenation.com/article/why-loan-sharks-car-salesmen-and-payday-lenders-love-mick-mulvaney/.

173. *Id.*

174. *Id.* (arguing harm from predatory financial practices targeted at military personnel poses a national security risk because the DOD "has found that financial turmoil has a demonstrable effect on military readiness and morale").

175. Colin Dwyer, *Pentagon Was Not Notified of Proposal to Change Military Lending Act*, NPR (Sept. 11, 2018, 7:59 PM), https://www.npr.org/2018/09/11/646790785/pentagon-consumer-agency-didnt-discuss-plan-to-relax-oversight-of-military-lendi.

176. *Id.*

177. Jeremy F. Sairsingh, *Democratic Senators Urge Mulvaney to Reconsider MLA Supervision Policy Change*, NAT'L L. REV. (Aug. 17, 2018), https://www.natlawreview.com/article/democratic-senators-urge-mulvaney-to-reconsider-mla-supervision-policy-change. *See* Joyce Wessel Raezer & Dana Atkins, *Protect the Military Lending Act*, THE HILL (Sept. 20, 2018, 12:00 PM), https://thehill.com/opinion/finance/406093-protect-the-military-lending-act (strongly criticizing Mulvaney's decision—Joyce Wessel Raezer is the executive director of the National Military Family Association, and Dana Atkins is a retired lieutenant general with the U.S. Air Force and the president and CEO of the Military Officers Association of America).

178. Wessel Raezer & Atkins, *supra* note 177.

179. Al Pascual, *Why Are Payday Loans So Popular with the Military?*, AM. BANKER (July 11, 2018, 9:40 AM), https://www.americanbanker.com/opinion/why-are-payday-loans-so-popular-with-the-military.

not allow their users to build good credit as traditional credit cards or bank loans do.[180] Circumstances only promise to get worse for military members and their families if MLA protections are, indeed, undone.[181]

With active-service military members more than four times as likely to use payday lending services than the average American, it is unsurprising servicemembers, veterans, and their families filed 19,000 complaints with the CFPB in 2015 alone[182]—many of which involved the debt collection practices of the payday lending industry.[183] In its 2015 report, the CFPB touted its enforcement and outreach efforts to have a positive impact on protecting military members and their families.[184] Under Director Mulvaney's proposed changes, the CFPB would rely solely on these self-reported complaints,[185] an unrealistic expectation given the demands already placed on military members.[186] According to associations which serve military members and their families, Director Mulvaney's plan would risk military readiness, damage morale, and add an unnecessary financial burden to the military's all volunteer force.[187]

Despite the increased availability of alternatives to payday loans in the wake of the MLA's passage in 2007,[188] payday lenders still solicited military members and their families at twice the rate they targeted civilians, prompting President Obama to propose using the CFPB's authority to eliminate loopholes in the MLA in 2015.[189] With the CFPB's decreased funding[190] and number of enforcement actions,[191] many believe that payday lenders will only increase the rate at which they target military members and their families.[192] Despite the current MLA restrictions, payday lenders still very often set up shop near military bases while also advertising directly to military members[193]—with most military members reporting they first learned of payday lending options via advertisements, and 84% of those surveyed reported taking out their payday loan from a vendor within

180. *Id.* (citing Al Pascual, *How Can Military Personnel Escape the Clutches of the Pay Day Loan Trap?*, JAVELIN (July 5, 2018), https://www.javelinstrategy.com/blog/clone-are-auto-loans-next-amazon).

181. *See* Wessel Raezer & Atkins, *supra* note 177 (discussing the negative impacts of eliminating affirmative MLA protections).

182. STOP THE DEBT TRAP, STOP PAYDAY PREDATORS: PAYDAY LENDERS ARE PREYING ON VETERANS 1 (2016), http://stopthedebttrap.org/wp-content/uploads/2016/10/SPP-Veterans-Fact-Sheet-1.pdf [hereinafter STOP THE DEBT TRAP]; Holly Petraeus, *Servicemembers 2015: A Year in Review*, CFPB BLOG (Mar. 22, 2016), https://www.consumerfinance.gov/about-us/blog/servicemembers-2015-a-year-in-review/.

183. Petraeus, *supra* note 182.

184. *Id.*

185. Wessel Raezer & Atkins, *supra* note 177.

186. *Id.*

187. *Id.*

188. *Payday Loans are Not a Good Option for Military Families*, KOMO NEWS (June 12, 2019), https://komonews.com/sponsored/wafd/financial-focus-tips/payday-loans-are-not-a-good-option-for-military-families.

189. Gordon Lubold & Byron Tau, *U.S. to Expand Military Lending Act in Effort to Protect Service Members*, WALL ST. J. (July 21, 2015, 1:12 PM), https://www.wsj.com/articles/u-s-to-expand-military-lending-act-in-effort-to-protect-service-members-1437472801.

190. Grunwald, *supra* note 66.

191. *Enforcement*, CFPB, *supra* note 128 (listing the 11 actions brought against payday lenders by Cordray during his final 12 months as Director, compared with only three such actions brought by Mulvaney since November 2017).

192. Wessel Raezer & Atkins, *supra* note 177.

193. STOP THE DEBT TRAP, *supra* note 182, at 1.

walking or driving distance of their homes.[194] For example, in Texas, nearly half of zip codes with a veteran's facility have five or more payday loan storefronts.[195] Such "blatant targeting [is] easy to identify due to the abundance of payday loan stores . . . located near military bases and that ha[ve] military-sounding names."[196]

But payday loans' gravest impact on the military, according to a 2006 Department of Defense Report that ultimately led to Congress passing the MLA, is the negative effect their availability has on military readiness.[197] Independent studies by economists supported the DOD's findings:[198]

> We found that as payday loan access increases, servicemen job performance evaluations decline. And we see that sanctions for severely poor readiness increase as payday-loan access increases, as the spigot gets turned on. So that's a study that very much supports the anti-payday lending camp.[199]

Thus, it should come as no shock that the DOD's report included several specific instances of active duty military members facing on-the-job difficulties due to their entanglement in payday loans.[200] In addition to servicemembers who received disciplinary action due financial delinquency,[201] other service members had to refinance their homes, pay bank overdraft fees, were harassed by debt collectors, and some were even forced to declare bankruptcy.[202] Military leaders have cited "financial difficulties" as "the No. 1 reason [military members] lose their security clearance,"[203] while other military leaders "echoed concerns that once soldiers are trapped by payday loans, they become distracted from performing their duties as they struggle to make loan payments."[204] Military advocates fear gains made in military readiness and the help to servicemembers escaping the debt treadmill, which flowed from the MLA's enactment, will be lost under Director Mulvaney's plans to curb affirmative measures which ensure MLA loan requirements are met.[205]

B. Impact of Payday Lending on the General Public

Many of the adverse effects payday lending has on military members and their families are also felt by the general public.[206] Just as with military members, payday

194. *Id.*

195. *Id.*

196. Johnson, *Civilians*, *supra* note 39, at 668.

197. U.S. DEP'T OF DEF. REPORT, *supra* note 42, at 53.

198. *See* Stephen J. Dubner, *Are Payday Loans Really as Evil as People Say?*, FREAKONOMICS (Apr. 6, 2016, 11:00 PM), http://freakonomics.com/podcast/payday-loans/ (discussing study which found matching data on job performance and job readiness which "support[ed] the Pentagon's hypothesis").

199. *Id.* (quoting economist Jonathan Zinman).

200. U.S. DEP'T OF DEF. REPORT, *supra* note 42, at 39–42.

201. *Id.* at 40, 42.

202. *Id.* at 40–42.

203. Johnson, *Civilians*, *supra* note 39, at 672 (citing 152 CONG. REC. S6405, S6406 (daily ed. June 22, 2006) (statement of Sen. Jim Talent (R-MO)).

204. *Id.*

205. *See generally* Wessel Raezer & Atkins, *supra* note 177 (discussing the negative impacts of rolling back MLA protections).

206. *See generally* Johnson, *Civilians*, *supra* note 39 (discussing how arguments made to pass the MLA to protect military personnel are applicable to civilians).

lenders exploit current loopholes in state and federal lending protection laws to continue offering civilians risky short-term loans at high interest rates.[207] While the MLA prevents payday lenders from offering especially risky loan products to active-duty military members and their families, no such protection exists for civilian consumers.[208] These "predatory" practices include "short maturity dates, triple-digit interest rates, and multiple rollovers or refinancing or multiple loans per year."[209]

Payday lenders also target low-income neighborhoods in a similar fashion as they do areas with high active-duty military populations.[210] Studies indicate low-income consumers are much more likely to live near a payday loan store than consumers with relatively higher incomes, and payday loan stores are often clustered in minority neighborhoods.[211] Therefore, it is often the case that members of the public, exposed to increased availability of payday loans, also suffer from a lack of financial sophistication similar to many members of our armed services.[212]

Civilians' job performance is also adversely affected "due to stress from over-indebtedness and aggressive collection tactics by payday lenders."[213] Such stress-inducing collection tactics include communicating via telephone with borrowers' young children, warning them that "bad things will happen to their parents if they fail to repay" their loan.[214] Some lenders also resort to calling borrowers' employers, who are urged by lenders—and often do—terminate employees as a result of aggressive debt collecting practices.[215]

Similarly, civilians also suffer the negative economic impacts of falling behind on payday loan payments.[216] As a consequence of their long-term debt, many borrowers lack the resources to pay their monthly bills, experience disconnection of utility services, and even resort to filing for bankruptcy.[217] Civilian consumers are often deprived of the funds necessary to make ends meet each month because payday lenders increasingly require borrowers to allow lenders electronic access to consumers banking accounts.[218] It is additionally worth noting civilian borrowers lack the numerous financial protections, such as assistance with healthcare and housing costs, which similarly situated military members receive.[219] These benefits, in addition to free legal services, often allow military members to weather the blow and retaliate against the impact of predatory payday lending in ways the average consumer cannot.[220]

In addition to studies cited by Professor Johnson, scholars found a link between

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207. *Id.* at 650.
208. *Id.* at 667.
209. *Id.*
210. *Id.* at 669.
211. Johnson, *Civilians*, *supra* note 39, at 669.
212. *Id.* at 671.
213. *Id.* at 672.
214. *Id.* at 673 n.116.
215. *Id.* at 673–74.
216. Johnson, *Watchdog*, *supra* note 5, at 382.
217. *Id.*
218. *Id.* at 388.
219. Johnson, *Civilians*, *supra* note 39, at 676.
220. *See id.* at 675–77 (discussing the increased benefits and protections for military members compared with those afforded the general public).

payday loans and damaging effects, which further exacerbate existing inequality.[221] "The same communities who are susceptible to payday loans are also the same communities who experience poor health—and payday can exacerbate these underlying health vulnerabilities."[222]

For example, the majority of Minnesota counties with payday loan stores rank in the bottom-half of counties in the state when it comes to health outcomes such as premature death, individual assessments of their own health, and the number of physical/mental unhealthy days.[223] The direct correlation between payday lending and these health issues, according to studies, is the effect financial stress has on health.[224] "Continuous credit problems and unmet financial needs can contribute to chronic stress, which has negative effects on health, including cancer, hypertension, diabetes, heart disease and stroke."[225] Furthermore, the constant stress created by debt when an individual lacks sufficient income to keep up-to-date on debt payments can lead to ulcers and heart attacks.[226]

In addition to physical health, the stress created by long-term debt from payday loans has negative effects on psychological health, with researchers finding a particularly strong tie to depression, substance abuse, and even suicide.[227] In a study among males who had attempted suicide, a strong correlation between debt and depression was shown.[228] In cases where debt was a factor in the subject's suicide attempt, the severity of their debt related to the severity of their depression and suicide attempt.[229] Furthermore, though the studies cited above focused on men who attempted suicide due to financial stress, women are often the ones who bear the greatest physical and psychological health burden caused by financial insecurity.[230] Possible reasons for this increased risk are that many of the women who live in poverty head single parent households.[231] That can lead to greater stress, less social support, and a major strain caused by the unemployment of a single female parent.[232]

Finally, beyond the negative health consequences payday lending debt creates for individual borrowers, there are often "spill over" effects which damage communities more generally.[233] For example, financial stress often has a negative effect on employers because employees with higher levels of financial stress suffer from greater absenteeism and their

221. *See id.* at 669 (noting payday lenders targeting of low-income communities); *see also* HUMAN IMPACT PARTNERS & ISAIAH, DROWNING IN DEBT: A HEALTH IMPACT ASSESSMENT OF HOW PAYDAY LOAN REFORMS IMPROVE THE HEALTH OF MINNESOTA'S MOST VULNERABLE 25–33 (2016), https://www.pewtrusts.org/-/media/assets/external-sites/health-impact-project/hip-2016-payday-lending-report.pdf?la=en&hash=1D0A4C3077F21CE1EA183BC0E0DCA02DB524A25F (discussing how payday loans exacerbate inequalities and vulnerabilities).

222. HUMAN IMPACT PARTNERS & ISAIAH, *supra* note 221, at 25.

223. *Id.* at 27.

224. *Id.* at 28.

225. *Id.* at 28–29.

226. *Id.* at 29.

227. HUMAN IMPACT PARTNERS & ISAIAH, *supra* note 221, at 30.

228. *Id.*

229. *Id.* (The study included panel surveys, nationally representative epidemiological surveys, psychological autopsy studies, as well as studies of specific populations such as university students, debt management clients, and older adults.).

230. *See id.* at 31 (noting how "[t]he impacts of payday loan debt may be felt more strongly by women").

231. *Id.*

232. HUMAN IMPACT PARTNERS & ISAIAH, *supra* note 221, at 31.

233. *Id.* at 33.

productivity suffers.[234] Studies indicate roughly one-quarter of employees admit to their personal financial problems distracting them at work.[235] Additionally, access to payday loans correlates to deterioration of familial relationships, greater financial hardship, and crime within vulnerable communities.[236]

Despite these legitimate and damaging consequences, Director Mulvaney has shown "he would rather cozy up with payday lenders and industry insiders than listen to consumer advocates who want to make sure hard-working Americans are not cheated by financial scams."[237] Mulvaney has shown this by forestalling the proposed 2017 Payday Rule from taking effect. The rule would require lenders to make an initial determination as to a borrower's ability to repay any short-term loan in excess of $500.[238]

IV. RECOMMENDATION

A. Abandon Plans to Weaken the Military Lending Act

A clear reason not to follow Director Mulvaney's suggestion to abandon MLA examination procedures was that the provisions in the MLA were working.[239] Protecting military servicemembers from usury lending practices is of paramount importance—and not just purely out of moral obligation—as Department of Defense and subsequent studies show, payday loans adversely affect military readiness.[240] Eliminating protections for members of the armed forces is especially difficult to square with the current administration's emphasis on improving the conditions of active servicemembers and veterans.[241]

Maintaining the CFPB's examination procedures ensures that military members and their families have their rights under the MLA enforced via a mechanism which has already proven successful.[242] Maintaining these examination procedures would not only benefit the American people by protecting a class of citizens cherished and respected by all, but also because the MLA and its enforcement in turn helps to keep Americans safe by ensuring the troops are best prepared to serve. In light of this, public opinion regarding plans to weaken MLA protections would likely be quite negative.

B. Extend Military Lending Act Protections to All Americans

Shortly after the enactment of the MLA, scholars pointed out how many of the underlying policy rationales which supported it are also applicable to Americans

234. *Id.* at 31.
235. *Id.*
236. *Id.* at 32–33.
237. Merle, *supra* note 68 (quoting Sen. Sherrod Brown (D-OH)).
238. *CFPB Fact Sheet*, *supra* note 61.
239. *See* Johnson, *Civilians*, *supra* note 39, at 664 (citing as an example reports from a military charity that demand for assistance in paying off predatory loans had declined); *see also supra* Part II.D (evaluation of the benefits of the MLA on reducing the impacts of predatory lending on military members and their dependents).
240. *See* U.S. DEP'T OF DEF. REPORT, *supra* note 42; *see also* Carrell & Zinman, *supra* note 48 (examining data on how payday loan access affects military readiness).
241. Leo Shane III, *Trump Signs the Largest VA Budget Ever*, MIL. TIMES (Sept. 21, 2018), https://www.militarytimes.com/news/2018/09/21/trump-oks-the-largest-va-budget-ever.
242. Wessel Raezer & Atkins, *supra* note 177; Carrell & Zinman, *supra* note 48.

generally.[243] Specifically, lenders target their predatory practices towards troops and civilians who lack financial sophistication—resulting in unmanageable debt and a hinderance upon job performance.[244] The MLA provisions which were suggested to extend to civilians are the 36% interest rate cap on short-term loans and the ban on rollovers[245]—the device used to extend a payday loan's duration while compounding its interest—both leading to financial ruin for many.[246]

It would be wise to stress the benefits of the MLA protecting military members and their families when arguing for an extension of its protections to all Americans. Given that citizens similarly suffer when the excesses of the payday loan industry are unchecked, it is practical to extend the policy. An extension of the MLA would likely result in less stories of persons unable to afford their monthly bills on account of being placed on the rollover loan "debt treadmill," where the only way off for many is through filing for bankruptcy.[247]

C. Return the CFPB to its Pre-Trump Administration Budgetary Status

The aforementioned request of zero dollars for the CFPB's budget for the second quarter by Acting Director Mick Mulvaney,[248] in conjunction with the decreased rate of enforcement actions brought by Mulvaney against payday lenders when compared to his predecessor,[249] demonstrates, at least, a correlation between the CFPB's lacking budget and limited enforcement actions. Despite Mulvaney's claims that the CFPB's funds are sufficient,[250] it is a consistent principle among regulatory agencies in Washington D.C. that budget cuts lead to less aggressive enforcement efforts.[251] Returning the CFPB to its budgetary levels under President Obama, would give the agency the funds necessary to carry out its statutory mandate: to protect consumers from unfair and deceptive practices, including those deployed by some short-term lenders.

D. Maintain the Substance of the 2017 Payday Rule While Also Making the Regulations More Accessible to Consumers and Lenders

The proposed 2017 Payday Rule would require payday lenders to ensure borrowers have the ability to repay their payday loan up front, disclose certain loan information to borrowers, and limit the number of payday loans that may be issued in rapid succession.[252] Though the substance of the proposed regulation is strong, it is easy for such substance to

243. Johnson, *Civilians*, *supra* note 39, at 666.

244. *Id.*

245. *Id.* at 662–63.

246. *See* Johnson, *Watchdog*, *supra* note 5, at 392–94 (discussing the financial ruin resulting from rollover loans).

247. *Id.*

248. McCoy, *supra* note 130; *supra* Part II.B.

249. *See Enforcement*, CFPB, *supra* note 128 (showing outgoing CFPB Director Cordray brought 11 actions for violations of "payday" or "small-dollar loan" violations in his last 12 months as Director compared with only three such actions brought by Mulvaney).

250. Ryssdal & McHenry, *supra* note 131.

251. *See* Michaela Marx Wheatley, *Does a Bigger IRS Budget Mean More Aggressive Enforcement and Collections?*, OKLAHOMAN (Apr. 26, 2018, 12:15 AM), https://oklahoman.com/article/5592384/does-a-bigger-irs-budget-mean-more-aggressive-enforcement-and-collections (discussing how IRS budget cuts had led to decreased enforcement efforts).

252. *CFPB Fact Sheet*, *supra* note 61, at 3–5.

become obfuscated in a proposed regulation in excess of 1500 pages.[253] Such lengthy and cumbersome regulations lend credence to criticisms, including those offered by Mulvaney upon assuming the helm at the CFPB, that the agency was "a regulator run amok."[254]

Because Acting Director Mulvaney joined with the payday lenders in opposing the 2017 Payday Rule's implementation,[255] the Rule appears destined for the ash heap, and this Note recommends—upon the CFPB's issuance of a new rule of substantially the same character as the proposed 2017 regulation—the CFPB issue a less lengthy regulation. A less unwieldy regulation, which clarifies in what instances mechanisms like the Full-Payment Rule would apply, would make its protections more easily known and accessible to the consumers it seeks to protect. Furthermore, a less cumbersome regulation may result in less pushback from payday loan lenders—as a more straightforward rule would be easier to comply with. As both lenders and consumers would benefit from less clunky regulation, such a regulation would likely not be met with as much contention and supporters would feel less pressure to abandon any regulatory efforts.

E. Create Board of CFPB Directors to Ensure Status as an Independent Agency

The constitutional authority of any past or future CFPB Director to act as the head of an independent agency and thus, be removable only for-cause, has been called into question.[256] In *PHH Corp.*, the D.C. Circuit Court of Appeals, applying Supreme Court precedent regarding separation of powers, held the CFPB to be an unconstitutionally structured independent agency because it is headed by a single Director.[257] Though the initial *PHH Corp.* decision was overturned by the D.C. Circuit sitting en banc,[258] a federal district judge subsequently reinstated the initial trial court's decision, finding the en banc decision was improper.[259] A Fifth Circuit case also relied on similar reasoning when holding an independent agency violates separation of powers when it has a single head.[260] Administrative law experts see this issue ultimately headed for the Supreme Court,[261] which makes it noteworthy that the initial D.C. Circuit Court opinion in *PHH Corp.* was authored by now-Justice Brett Kavanaugh.[262]

To avoid all the constitutional kerfuffle, Congress could simply amend the CFPB's Enabling Act and create a multi-member Board of Directors with staggered terms—akin to the structure of the Federal Trade Commission (FTC).[263] This would make the CFPB

253. *See* CONSUMER FIN. PROT. BUREAU, PAYDAY, VEHICLE TITLE, AND CERTAIN HIGH-COST INSTALLMENT LOANS 1 (2017), https://files.consumerfinance.gov/f/documents/201710_cfpb_final-rule_payday-loans-rule.pdf (showing the proposed regulation to be 1690 pages in length).

254. Cowley, *supra* note 140.

255. David Baumann, *Payday Lenders Ask for Injunction to Delay Payday Lending Rule*, CREDIT UNION TIMES (Sept. 17, 2018, 2:43 PM), https://www.cutimes.com/2018/09/17/payday-lenders-ask-for-injunction-to-delay-payday/?slreturn=20180906210550.

256. PHH Corp. v. CFPB, 839 F.3d 1, 36 (D.C. Cir. 2016).

257. *Id.*

258. PHH Corp. v. CFPB, 881 F.3d 75, 137 (D.C. Cir. 2018) (en banc).

259. CFPB v. RD Legal Funding, LLC, 332 F. Supp. 3d 729, 785 (S.D.N.Y. 2018).

260. Collins v. Mnuchin, 896 F.3d 640, 666 (5th Cir. 2018).

261. MICHAEL ASIMOW & RONALD M. LEVIN, 2019 SUPPLEMENT TO ASIMOW & LEVIN'S STATE AND FEDERAL ADMINISTRATIVE LAW 34 (4th ed. 2019).

262. *Id.*

263. *See Commissioners*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/commissioners (last visited Feb. 9, 2019) (noting the makeup of the five-person commission, with each commissioner receiving a seven-year

better resemble other independent agencies that have not been found repugnant to the separation of powers.[264] This would allow the CFPB to maintain its independence—not becoming too susceptible to everchanging political pressures—but would also prevent prior administrations from binding their successors—a problem Justice Kavanaugh discussed when he determined the CFPB's structure was unconstitutional.[265]

V. CONCLUSION

This Note recommends the CFPB implement the substance of its protections against predatory payday lending practices laid out in the 2017 Payday Rule. Alternatively, this Note recommends Congress act to extend protections of the MLA—similar in nature to the CFPB's Payday Rule protections—to all citizens. At the very least, this Note recommends the MLA maintains its force protecting servicemembers from the pitfalls of predatory lending. Finally, this Note recommends ways in which the CFPB may make its regulations more accessible to borrowers and lenders and recommends a change in the CFPB's structure to alleviate concerns as to the agency's constitutionality as an independent agency.

By following these recommendations, the CFPB would be able to effectively protect payday borrowers, both military and civilian, while also providing clarity to regulated parties—the payday lenders themselves—as to how the industry will be regulated going forward. Only through proper federal regulation is it possible to ensure fewer Americans fall victim to the debt treadmill.

term with the requirement that no more than three of the five commissioners be from one political party).

264. *See* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (upholding the constitutionality of the FTC's structure and the for-cause removal requirement for its commissioners).

265. PHH Corp. v. CFPB, 839 F.3d 1, 35 (D.C. Cir. 2016).