Dodd-Frank Prohibits Purely Policy-Based Dismissals of the CFPB Director, by Peter M. Shane

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In *PHH v. CFPB*, the D.C. Circuit last October held unconstitutional Congress's decision via the [Dodd-Frank Wall Street Reform and Consumer Protection Act](#) to limit the grounds upon which a president could dismiss the director of the Consumer Finance Protection Bureau. Whether or not that ruling survives, Professors Aditya Bamzai and John F. Duffy have posted [a thoughtful essay](#) speculating that the Dodd-Frank Act itself may give the next president sufficient authority to dismiss the CFPB's inaugural director, Richard Cordray. They argue that the limiting words of the statute may give the president more statutory authority than is commonly understood.

The Dodd-Frank Act specifically authorizes removal of the Director of the CFPB for "inefficiency, neglect of duty, or malfeasance in office." The enumeration of these conditions, together with the specification of a term of office—in this case, five years—is generally taken to imply that presidents may not remove the officials in question for reasons of mere policy or political disagreement. If so, then, should Director Cordray prefer to serve out his term, the next president would not have statutory authority to make him go because he disagrees with the Director's regulatory philosophy.

Professors Bamzai and Duffy offer a number of reasons why that conventional reading might not be right: These grounds for potential dismissal are not prefaced by "only." The CFPB is called, in one section of the act, an "executive agency." The scant Supreme Court precedent may permit a capacious reading of "inefficiency." Former Rep. Barney Frank (D-MA)—the "Frank" of

“Dodd-Frank” – testified some years after the statute’s enactment that the grounds for removal were not intended to protect the Director from discharge after a change in Administrations.

However tantalizing the last point may be, courts, as the authors note, would ordinarily not give a legislator’s statement of a statute’s meaning rendered three years after the statute’s enactment much, if any weight. As the Supreme Court has said, any post-enactment legislative history from “a subsequent Congress” provides “a hazardous basis for inferring the intent of an earlier [Congress],” *United States v. Price*, 361 U.S. 304, 313 (1960).

There is lurking, however, an even larger problem with the Bamzai-Duffy analysis. Section 1011(a) of Dodd-Frank does, indeed, establish the Bureau as an “executive agency.” But then, Section § 1100D(a) explicitly places the Bureau within the catalogue of “independent regulatory agenc[ies]” in the [Paperwork Reduction Act](#). For multi-headed agencies, the impact of that designation would be to give the agency more independence than would otherwise exist from the control of the Office of Management and Budget vis-à-vis approval of the agency’s information-gathering initiatives. But under the terms of Executive Order 12,866, the designation even for single-headed agencies suffices to exempt the agency’s rulemaking cost-benefit analyses from mandatory review by OMB’s Office of Information and Regulatory Affairs.

Taken together, the grounds for removal, the specification of the director’s term and the enumeration of the CFPB as an “independent regulatory agency” strongly imply that Dodd-Frank’s limits on presidential removability should be understood as signifying just what such provisions are conventionally understood to signify – a bar against discharging an official on grounds of policy disagreement or party affiliation.

In reality, Congress has not been especially careful in wording the limitations on the removability of independent administrators. For example, members of the [Merit Systems Protection Board](#) may be removed by the President “only for inefficiency, neglect of duty, or malfeasance in office.” Yet members of the [Consumer Product Safety Commission](#) “may be removed by the President for neglect of duty or malfeasance in office but for no other cause.” By way of contrast, members of the [Competitiveness Policy Council](#) “may be removed only for malfeasance in office.” It seems implausible that Congress wanted to keep in office members of the Competitiveness Policy Council who were neglecting their duties or that members of the Merit Systems Protection Board were intended to be less insulated from removal than members of the Consumer Product Safety Commission.

Although statutory textualists may feel compelled to try and construe these formulations differently, it is doubtful that members of Congress focused on these formulations in any nuanced way. They are best read primarily as expressions of a prohibition on presidential removal except for some form of good cause. Strikingly, the Supreme Court has accepted that members of the Securities and Exchange Commission cannot “be removed by the President except under the . . . standard of ‘inefficiency, neglect of duty, or malfeasance in office,’” even though the SEC’s organic statute actually contains no explicit limits on their removability at all. *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 487 (2010). In short, an independent administrator’s insulation from policy-based removal does not seem tied to the precise wording of a statutory “removal-for-cause” provision.

The availability of “inefficiency” as a permissible ground for removal, in addition to neglect or malfeasance, may imply some range of presidential removal power on the basis of actions that might be wasteful, but not actually unlawful. Presumably that ground would be limited to some form of operational inefficiency, e.g., spending significant discretionary funds on office parties in exotic locales. Otherwise, the purpose of protecting officials from policy-based dismissal would be defeated.

In his opinion for the majority in *PHH v. CFPB*, Judge Kavanaugh assumed that the lack of presidential power to remove the Director at-will would deprive the president of all supervisory or directive power over the agency. That is not accurate.

Presidents for over 20 years have directed independent agencies to participate in OMB programs of information sharing and regulatory planning under [Exec. Order No. 12,866](#), without apparent legal or even political objection. That is because independent agencies are still subject to the so-called Written Opinions Clause of Article II.

What presidents may not demand of a CFPB Director is policy agreement, as long as the Director implements policies in good faith compliance with the law. Although Professors Bamzai and Duffy have well identified a series of uncertainties in the law, section 1011(b)(3) of Dodd-Frank—entitled “Removal for Cause”—is properly construed in that spirit.

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