



Donald Trump Evicted Elizabeth Warren from the Consumer Financial Protection Bureau

Think of the agency as a rent-controlled apartment.

11:50 AM, JAN 03, 2018 | By RONALD L. RUBIN



Elizabeth Warren. Photo credit: Aaron P. Bernstein/Bloomberg.



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Republicans' first victory of 2018 will likely be Judge Timothy J. Kelly's denial of the plaintiff's motion for a preliminary injunction in *English v. Trump* following a hearing on the Friday before Christmas.

The case began over Thanksgiving weekend when Richard Cordray, the Consumer Financial Protection Bureau's first director, promoted his chief of staff Leandra English to deputy director. The soon-to-be Ohio gubernatorial candidate then announced his resignation would take effect at the end of the day and declared English acting director until the Senate confirmed a new one. Two hours later, President Trump ignored Cordray's self-serving misinterpretation of the Federal Vacancies Reform Act and appointed Mick Mulvaney acting director. Front-page headlines proclaimed a federal agency with two heads, one suing the president to remove the other.

Why were Democrats so determined to fill the temporary job? Massachusetts Senator Elizabeth Warren, who had first proposed a CFPB-like agency as a law professor in 2007, offered the same disingenuous rationale English's lawyers argued in court: Congress intended the CFPB to be independent from political influences when it created the agency through the 2010 Dodd-Frank Act; since Mulvaney was director of the Office of Management and Budget, he could not be independent.

The seemingly reasonable argument rests on two false premises: the political neutrality of Cordray's handpicked acting director and the myth of CFPB independence. In 2010, the Democratic House of Representatives, filibuster-proof Senate, and president did not intend to create a regulatory agency independent from politics, just an agency independent from Republicans.

One-party agencies are unconstitutional, so Democrats could not be so explicit. They knew President Obama would appoint the bureau's first director and influence the hiring of its senior management team, a task he ultimately delegated to then-presidential assistant Warren. Therefore, Democrats could achieve their goal by structuring the "independent" agency to prevent control from switching parties without the rare political dominance they enjoyed in 2010. Three provisions in the Dodd-Frank Act would exclude Republicans from the CFPB whenever they regained the House, Senate, or presidency.

First, the bureau's funding was guaranteed through Federal Reserve Bank profits rather than taxpayer dollars. Bypassing the congressional appropriations process prevented a Republican House from reining in the bureau by cutting its budget. Republicans retook the House in the 2010 midterm elections, and for the next seven years the CFPB thwarted every attempt at meaningful congressional oversight. Meanwhile, Cordray used more than \$100 million of the bureau's budget and fines collected from nearly defenseless businesses to pay consultants, landlords, and contractors who happened to be Democratic fundraisers and cronies.

Second, the president could not fire the CFPB director during a five-year term without cause— "inefficiency, neglect of duty, or malfeasance in office." Federal agencies with such independence from the leader of the executive branch had been constitutional since a shortsighted 1935 Supreme Court decision, but almost all of them were commissions, and the few led by single directors lacked the CFPB's

sweeping powers. In October 2016, a panel of three judges on the D.C. Circuit Court of Appeals ruled the “for cause” limitation on the president’s ability to fire a CFPB director unconstitutional. Cordray avoided dismissal by appealing the decision to the full court before Trump’s inauguration. The court, dominated by four 2013-14 Obama appointees, spent 2017 deliberating as developments reshuffled the political beneficiaries of its decision.

The third provision allowed the director to remain in his or her post indefinitely until the Senate confirmed a replacement. In 2010, Senate filibuster rules enabled 41 senators to block a confirmation vote on most presidential nominees. Since the president could not fire the director, confirmation would be a nearly insurmountable obstacle to a Republican replacing a Democratic CFPB director. This relatively obscure Dodd-Frank provision explains Cordray’s desperate attempt to make English acting director.

Ironically, Democrats tripped on the confirmation hurdle first. By the time President Obama nominated Cordray on July 18, 2011, Republicans had gained a solid 47-senator filibuster in the 2010-midterm elections and were demanding changes to the CFPB’s structure. Rather than compromise, on January 4, 2012, Obama used a legally suspect recess appointment to make Cordray acting director (a 2014 Supreme Court decision later confirmed the appointment’s unconstitutionality). On July 16, 2013, with the end of Cordray’s temporary two-year term looming and Democrats threatening to eliminate the filibuster, Republicans surrendered and the Senate confirmed him to a new five-year term.

On November 21, 2013, Democrats eliminated the filibuster for most presidential nominees—a move they would regret when Republicans regained the Senate majority in the 2014-midterm elections, and the White House two years later. The 2016 elections would allow President Trump to nominate, and the Senate to

confirm, a Republican CFPB director no later than 2018. Against all odds, Democrats were about to lose control of their “independent” agency. Their last hope was to overcome Republicans’ razor-thin Senate majority and block Trump nominees until 2018, regain control of the Senate in the midterm elections, and continue blocking until the 2020 presidential election. The plan only worked if the status quo was a Democratic acting director—that’s the *real* reason for Cordray’s Thanksgiving Hail Mary pass.

New Yorkers will recognize the CFPB story as the classic narrative of a rent-controlled apartment. Democrats passed a law that made it nearly impossible to evict the bureau’s director, illegally installed a family member, and pocketed his under-the-table kickbacks for years. Like many rent-controlled tenants, Cordray tried to transfer his rights to another relative by making her a co-occupant before he passed on. President Trump, a savvy New York City landlord, understood the game and moved Mulvaney into the empty director’s office first. Senator Warren’s reverence for the CFPB’s independence will end the moment the agency is officially independent from her.

Ronald L. Rubin was an enforcement attorney at the Consumer Financial Protection Bureau and chief adviser on regulatory policy at the House Financial Services Committee.

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