



CARDOZO

Benjamin N. Cardozo School of Law

LARC @ Cardozo Law

Online Publications

Faculty Scholarship

12-14-2018

Plus Ça Change: A Century-Old Removal For Cause

Michael E. Herz

Benjamin N. Cardozo School of Law, herz@yu.edu

Follow this and additional works at: <https://larc.cardozo.yu.edu/faculty-online-pubs>



Part of the [Administrative Law Commons](#), [Constitutional Law Commons](#), [Legal History Commons](#), [Legal Profession Commons](#), and the [President/Executive Department Commons](#)

Recommended Citation

Herz, Michael E., "Plus Ça Change: A Century-Old Removal For Cause" (2018). *Online Publications*. 44. Available At <https://larc.cardozo.yu.edu/faculty-online-pubs/44>

This Article is brought to you for free and open access by the Faculty Scholarship at LARC @ Cardozo Law. It has been accepted for inclusion in Online Publications by an authorized administrator of LARC @ Cardozo Law. For more information, please contact larc@yu.edu.

Plus Ça Change: A Century-Old Removal For Cause

Author : Michael E Herz

Date : December 14, 2018

Aditya Bamzai, [Taft, Frankfurter, and the First Presidential For-Cause Removal](#), 52 *U. Rich. L. Rev.* 691 (2018).

Lots of ink has been spilled over when Congress can give federal officials for-cause protection. One would think that a necessary antecedent to that discussion would be a determination of exactly what for-cause protection entails. What is ["inefficiency, neglect of duty, or malfeasance in office"](#)? Yet no one knows; the debate over the permissibility of that restriction proceeds in blissful uncertainty as to its scope.

The reason no one knows is that (almost) no President has ever tried to fire someone for specified shortcomings amounting to "cause." Until reading [Professor Bamzai's](#) article, I would not have included the parenthetical "almost." In the best-known instances of a president removing an official with for-cause protections—*Shurtleff*, *Myers*, *Humphrey's Executor*, *Wiener*—the president did not claim cause existed; he took the position that cause was not necessary. It is often [asserted](#), with only the tiniest of hedges, that no president has ever fired anyone after a hearing and for cause. But it turns out that at the very end of his term President Taft did just that. This article is the engaging account of that overlooked event.

Part I sets the scene. Bamzai begins with an overview of very familiar terrain, describing the caselaw on the legal status of independent agencies. Readers engaged enough to be reading the Administrative Law section of Jotwell will find little new here. Bamzai then turns to a useful history of tariffs. Before the income tax, the tariff was entrenched because it was the government's main source of revenue. But the details were a focus of constant political battles, and administration was difficult.

Tariff administration is plagued by two sorts of inescapable challenges. One is classification: the [is-a-tomato-a-fruit-or-a-vegetable?](#) or [what's-a-"bound diary"?](#) problem. The other is valuation: to know the amount of tax due, one has to know the value of the item imported, and the importer has every incentive to understate that value. To help resolve such disputes, in 1890 Congress established the Board of General Appraisers. The Board heard appeals from determinations made by individual collectors. Members of the Board were appointed by the president by and with the advice and consent of the Senate, were subject to bi-partisanship requirements, and could "be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office." The statute did not fix a term of years for the appointment.

This setup led to the first big removal case when, in 1899, President McKinley fired Board Member Ferdinand Shurtleff without explanation. Shurtleff sued, losing in the Court of Claims and the Supreme Court. [The decision](#) was once the leading Supreme Court case on removal; [Myers](#) relies on it, and [Humphrey's Executor](#) works hard to distinguish it. Invoking a background principle of presidential discretion in removals, the Court reasoned that the statutorily specified reasons for removal were not exclusive—no *expressio unius* for this Court!—and the president remained free to remove at will. Congress responded by amending the statute to specify that Board members could be fired for the three enumerated reasons "and no other."

Part II turns to the actual firing. In August 1912, Taft created a three-member "committee of inquiry" to look into whether the Board members were doing an adequate job. One of its members was none other than [Felix Frankfurter](#), then a twenty-nine-year-old neophyte attorney in the Department of War. Though not specified in its official instructions, the Committee had a particular target, one [Thaddeus Sharretts](#). After months of investigation, a number of what we would today call off-line communications, and a public hearing, the Committee produced a report

recommending the removal of Sharretts and Roy Chamberlain.

Regarding Sharretts, the concerns were ethical. The Committee found that he had used “his official power to compel personal favors,” requesting that a particular train make a special stop so he could get back to New York City from his weekend place in Maryland, perhaps for a quid pro quo. (This is another aspect of this story with [contemporary resonance](#).) In addition, Sharretts seemed to have had made rulings that would be precedentially useful to his son, who practiced before the Board.

Chamberlain’s shortcomings were different: in an assessment one would not want one’s children to see, the Committee concluded that he was “totally useless to the Board,” had no “natural aptitude for [the] kind of work” the Board conducted, did not write his own opinions, and had through excessive drinking “brought scandal upon the Board.”

On March 3, [Taft wrote to each](#), dismissing Sharretts for “malfeasance in office” and Chamberlain for “neglect of duty and inefficiency.” The next day, he left office and Woodrow Wilson became president. Neither ex-Board Member sued; President Wilson did not revisit the matter; and that was that.

Part III considers the aftermath of these little-known events and some lessons. One of the best parts of documentaries or films “based on true events” is the “where are they now?” screens at the conclusion. They certainly would be if this were filmed. William Howard Taft becomes Chief Justice and authors *Myers*, the single strongest judicial statement of presidential removal authority. Felix Frankfurter seems to head in the other direction—a civil service enthusiast, he goes on to write [Wiener](#). The fate of Sharretts and Chamberlain is not revealed (though Wikipedia [reports](#) that the latter concluded his days as a grocer—a calling for which one hopes he *did* have a “natural aptitude”—in Bradford, PA). And the Board of General Appraisers? It goes on to greater glory as the [Court of International Trade](#).

The normative payoff here is modest, as Bamzai acknowledges, but the incident provides useful and rare evidence indicating what qualifies as “cause.” Past practice matters, and, lo and behold, here it is! In this instance, the shortcomings and misconduct identified fall within the core and least controversial understandings of “cause.” Bamzai calls this a “crucial data point”; I am not sure I would go quite that far. First, it is *only* a data point, and one that involved no judicial determination. Second, one could read this story to support a narrow understanding of presidential authority, under which a President can fire an official with for-cause protection only for quite substantial shortcomings. However, precisely because those grounds existed here, the incident reveals nothing about whether the players thought more minor misconduct, or mere policy differences, were *impermissible* grounds for removal. (If the charges were trumped up, that would support a modest inference that Taft, Frankfurter, et al. thought that policy disagreement, for example, was not “cause,” but nothing Bamzai writes supports that conclusion.)

With regard to process, it is notable that Sharretts and Chamberlain were provided relatively full procedures, including a hearing. But, again, we do not know if this was perceived as legally required. Moreover, given the enormous doctrinal developments in the intervening century—to put it anachronistically, Sharretts and Chamberlain had a property interest in their employment because of the for-cause protection, but due process was provided, as per [Mathews](#) and [Loudermill](#)—what people thought about process a century ago is not that important.

In any event, Bamzai’s article is enjoyable and eye-opening. And, as with any good work of history, the whole story does make one think of [William Faulkner](#).

Cite as: Michael E Herz, *Plus Ça Change: A Century-Old Removal For Cause*, JOTWELL (December 14, 2018) (reviewing Aditya Bamzai, *Taft, Frankfurter, and the First Presidential For-Cause Removal*, 52 *U. Rich. L. Rev.* 691 (2018)), <https://adlaw.jotwell.com/plus-a-change-a-century-old-removal-for-cause/>.