

PRESIDENTIAL EXEMPTION FROM MANDATORY RETIREMENT OF MEMBERS OF THE INDEPENDENT REGULATORY COMMISSIONS

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The Civil Service Retirement Act¹ subjects federal employees to mandatory retirement, ordinarily at age seventy, and grants the President broad discretionary power to exempt employees from mandatory retirement by executive order.² The Act applies to great numbers of lower level employees, and to members of the independent regulatory commissions as well. Yet independent commissioners, unlike most federal employees, are appointed by the President under statutes which specify a term of service and make no reference to retirement.³ Consequently, the appointment of a commissioner nearing retirement age raises questions concerning which statute should govern his tenure.

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THE FOLLOWING CITATIONS WILL BE USED IN THIS ARTICLE:

W. CARY, *POLITICS AND THE REGULATORY AGENCIES* (1967) [hereinafter cited as CARY];

H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES, THE NEED FOR BETTER DEFINITION OF STANDARDS* (1962) [hereinafter cited as FRIENDLY];

DIXON, *The Independent Commissions and Political Responsibility*, 27 AD. L. REV. 1 (1975) [hereinafter cited as Dixon].

1. 5 U.S.C. §§ 8331 *et seq.* (1970).

2. *Id.* § 8335:

Mandatory separation

(a) Except as otherwise provided by this section, an employee who becomes 70 years of age and completes 15 years of service shall be automatically separated from the service.

...

(c) The President, by Executive order, may exempt an employee from automatic separation under this section when in his judgment the public interest so requires.

(d) The automatic separation provisions of this section do not apply to—

(1) an individual named by a statute providing for the continuance of the individual in the service;

(2) a Member;

(3) a Congressional employee; or

(4) an employee in the judicial branch appointed to hold office for a definite term of years.

3. *See, e.g.*, 15 U.S.C. § 41 (1970) (FTC); 49 U.S.C. § 11 (1970) (ICC).

Although the current practice is to subject independent commissioners to mandatory retirement despite their statutory terms, and thus to permit the President to decide whether to grant an exemption,⁴ its legality—and its wisdom—are open to question. The practice may unduly invade a fundamental statutory policy favoring commission independence by giving the President excessive control over the tenure of aged commissioners. Consider the potential for presidential influence over a commissioner hoping for an exemption, or possessing an exemption of indefinite duration which is presumably subject to revocation at the will of the President. In this regard, it is important to distinguish retirement exemptions from reappointment, since no one would challenge the existence of absolute presidential discretion in the reappointment decision. The approach of a reappointment decision certainly carries potential for White House influence, but that cannot be avoided as long as reappointments are permitted. And if a commissioner is reappointed, it is for a substantial period.

Furthermore, regardless of the merits of the exemption power, it is arguable that independent commissioners should not be subject to mandatory retirement at all. For example, one goal of long terms for independent commissioners is to promote the development of expertise; the separation requirement takes effect as the experience of a particular commissioner reaches its maximum.⁵

This Article examines the appropriateness of applying the mandatory retirement and presidential exemption provisions⁶ to members of the independent regulatory agencies.⁷ Although there has never been a definitive judicial resolution of the question whether statutes setting

4. See text accompanying notes 8-23 *infra*.

5. Of course, arguments based on accumulated expertise can be made against mandatory retirement for anyone. For some special considerations relevant to the commissioners, see text accompanying notes 92-95 *infra*.

6. For all employees except presidential appointees, the exemption authority has been delegated to the Civil Service Commission. Excc. Order No. 10,530, 3 C.F.R. 189 (1954-58 comp.); Exec. Order No. 10,682, 3 C.F.R. 331 (1954-58 comp.). See text accompanying notes 24-42 *infra*.

7. Analysis focuses on members of the major independent regulatory commissions (ICC, FTC, FPC, SEC, CAB, FCC, NLRB), the Civil Service Commission, and the Tax Court. The Civil Service Commission is included because of its own role in retirement and exemption functions. The Tax Court is included because its members received a number of early retirement exemptions, see Table 1 in the Appendix, and because it provides an interesting institutional comparison to the regulatory commissions. See text accompanying note 17 *infra*. The Act of August 7, 1953, ch. 352, § 1106, 67 Stat. 482, created a separate retirement system for Tax Court judges, and explicitly ended the applicability to them of the mandatory separation provisions of the Civil Service Retirement Act. See S. REP. No. 675, 83d Cong., 1st Sess. (1953). The statute has been codified at 26 U.S.C. § 7447 (1970).

the terms of independent commissioners should be read as implied exceptions to the Retirement Act, the legislative history of the Act and Supreme Court decisions in the analogous area of presidential removal of independent commissioners suggest the appropriateness of such a reading. The discussion begins with a survey of the past use of the exemption power in order to illustrate the characteristics of the practice and the potential for abuse that flows from it.

I. EXERCISE OF THE EXEMPTION POWER

A. *Presidential Appointees*

The President's power under the Retirement Act to exempt federal employees from mandatory retirement dates from 1932.⁸ Although the exemption authority for most employees has been delegated to the Civil Service Commission, the President still controls exemptions for all presidential appointees.⁹

Members of the independent commissions became subject to the Retirement Act in 1946.¹⁰ An examination of the executive orders issued since that date reveals several distinct characteristics of the exemption practice.¹¹ First, the total number of exemptions is rather low. Nearly thirty years have seen only twenty-nine exemptions for members of the major commissions and Tax Court judges, and twenty-five for other employees.

In addition, presidential usage of the exemption power has varied substantially. Most of the exemptions of independent commissioners

8. Act of June 30, 1932, ch. 314, § 204, 47 Stat. 404. See note 51 *infra*.

9. See note 6 *supra*.

10. See text accompanying notes 50-59 *infra*.

11. Tables 1 and 2, found in the Appendix of this Article, summarize the executive orders issued since members of the independent commissions became subject to the Retirement Act in 1946. Table 1 collects exemptions of members of the major regulatory commissions, the Civil Service Commission, and the Tax Court. See note 7 *supra*. Table 2 gives the titles of all other employees exempted by Executive Order from 1946 to date.

The contents of the Executive Orders have varied little over the years. The orders issued immediately following the extension of the Retirement Act in 1946 recite that the Act is just becoming applicable to the officers involved. Exec. Order No. 9780, 11 Fed. Reg. 10,645 (1946); Exec. Order No. 9895, 12 Fed. Reg. 6493 (1947). The orders routinely invoke their underlying statutory authority, and simply parallel the statute, 5 U.S.C. § 8335(c) (1970), by reciting that "in my judgment, the public interest requires" that the person be exempted. The sole exception to the otherwise uniform practice of declining to elaborate individualized reasons for an exemption occurred in the case of President Truman's personal secretary. President Nixon included some fulsome rhetoric on her indispensability, presumably for scrapbook purposes. See Exec. Order No. 11,619, 3 C.F.R. 208 (1971 comp.).

and Tax Court judges occurred in a short burst of activity under President Truman, in the years following the extension of the Retirement Act to these employees. These exemptions can be explained, at least in part, as responses to a need to avoid excessive turnover in the agencies as the statute first took effect. President Eisenhower issued only one executive order regarding an exemption, and that was to convert President Truman's indefinite extension for the Organist and Choirmaster at the Military Academy into one expiring within three months.¹² President Eisenhower is said to have firmly held the view that no retirement exemptions should be granted;¹³ the presence of his single executive order terminating one bears this out. There has been no other executive order by any President shortening or revoking an exemption.¹⁴ The next President to demonstrate a practice of exempting independent commissioners was President Nixon, who granted five exemptions, three of them to FTC Commissioner A. Everette MacIntyre. President Ford has exempted two commissioners. The presence of seven exemptions granted by two Presidents in the last five years constitutes a re-emergence of the practice which warrants consideration of its institutional implications.

One major change in the practice seems to have occurred over time. Most of President Truman's exemptions were for an indefinite period, not to extend beyond the recipient's current term of office. Some of these orders even contemplated the possibility of an entire new term for the commissioner, yet did not commit the President to an extension for the duration.¹⁵ Presidents Nixon and Ford, on the other hand, have set time limits on their exemptions, although this has not prevented repeat exemptions as in the cases of FTC Commissioner MacIntyre (three) and CAB Commissioner Whitney Gilliland (two). The change is thus from indefinite extensions to relatively short-term ones, most of them for about a year, and with an apparent possibility of renewal. Either practice, however, makes the affected commissioner seem subject to White House bidding, an untoward effect which could be reduced simply by instituting a tradition that all exemp-

12. Exec. Order No. 10,569, 3 C.F.R. 209 (1954-58 comp.).

13. Interview with Rosel H. Hyde, former Commissioner, FCC, in Washington, D.C., July 24, 1975. See note 22 *infra* and accompanying text for one minor exception to this policy.

14. Although no individual's exemption has been revoked, an order granting mass exemptions was later terminated. See note 20 *infra* and accompanying text.

15. Compare Exec. Order No. 9963, 13 Fed. Reg. 2943 (1948), and Exec. Order No. 10,034, 3 C.F.R. 227 (1949-53 comp.) (granting indefinite extensions not to exceed new term), with Exec. Order No. 10,255, 3 C.F.R. 760 (1949-53 comp.) (exempting FPC Commissioner Claude L. Draper for full new term).

tions be for the remainder of the commissioner's term, or for a definite period not subject to extension.¹⁶

The early exemptions under President Truman demonstrate other troubling institutional characteristics. First, his use of the exemption for judges of the Tax Court seems particularly inappropriate, since their primary responsibility is to adjudicate, and unlike the independent commissioners, they do not have other major policy-making responsibilities which might justify exempting a "key" individual. Although Tax Court judges now have a separate retirement system not subject to the exemption power,¹⁷ the precedent remains a troubling one for those agencies with substantial adjudicative duties. Second, the presence on an agency of several exempted members at one time increases the possibility for White House influence. Thus, for a time in 1949, three of four FTC commissioners¹⁸ and five of sixteen Tax Court judges were under exemption.¹⁹

Finally, one use of the exemption power suggests a possible means of avoiding the institutional difficulties of individualized determinations. This is the blanket exemption. In two separate instances involving special circumstances, Presidents have issued broad

16. The latter suggestion would allow for retention of a commissioner to fill a need for his expertise on a particular matter. For example, ICC Commissioner Kenneth H. Tuggle was exempted from retirement to help complete the Northeast railroad reorganization. See *Washington Post*, July 20, 1975, at G4, col. 1. A useful comparison to this suggested procedure is provided by the practice of the Civil Service Commission in restricting the duration and renewal of the exemptions it controls. See text accompanying notes 24-31 *infra*. Ample security of tenure should result under either scheme suggested in the text since it is unlikely that the President could revoke an exemption for a set period without establishing the necessary grounds for the commissioner's removal. See *Wiener v. United States*, 357 U.S. 349 (1958); *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935). Limitations on the removal power are discussed in detail in the text accompanying notes 67-88 *infra*. See also *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973). Even an indefinite exemption may provide some practical security. During the early part of the Eisenhower administration, both ICC Commissioner J. Monroe Johnson and FCC Commissioner Paul Walker were on indefinite extensions granted by President Truman. Assistant to the President Sherman Adams raised the question of revoking both exemptions, presumably to replace the men with persons more congenial to the new administration. Interview with Frederick W. Ford, former Chairman, FCC, in Washington, D.C., July 24, 1975. The idea was dropped, however, apparently at least in part because of doubts whether even an indefinite extension could be revoked without cause. *Id.* Again, the analogy would be to the removal cases. The only executive order to date which terminates an exemption is the one issued by President Eisenhower shortening the indefinite extension for the Organist and Choirmaster at the United States Military Academy. Exec. Order No. 10,569, 3 C.F.R. 209 (1954-58 comp.).

17. See note 7 *supra*.

18. Compare 45 F.T.C. II (1950) with Table 1 in the Appendix.

19. Compare 13 T.C. III (1950) with Table 1 in the Appendix.

executive orders exempting groups to whom the statute applied. The first, by President Roosevelt, exempted all presidential appointees for an indefinite period not extending beyond their current term of service, in order to avoid losing the services of a great many officers to whom the Retirement Act was just becoming applicable.²⁰ The second blanket exemption extended the terms of presidential appointees reaching the retirement age for a period of some months to allow the statutory amendments of 1956²¹ to govern their retirements.²² Thus, perhaps the President could issue an order exempting all members of the independent commissions from retirement for the duration of their then current terms.²³

B. *Federal Employees Other Than Presidential Appointees*

For all employees except presidential appointees, the Civil Service Commission controls exemptions from mandatory retirement.²⁴ Pursuant to its delegated authority, the Commission has promulgated a comprehensive rule controlling the exercise of the exemption power.²⁵ The rule contains a special provision restricting the use of the power in the case of administrative law judges,²⁶ which is apparently designed to protect the judges' independence from their employing agencies. Comparison of the Commission's controlled procedures for exemption with the President's uncontrolled exemption power is illuminating. Analogy to the President's power in this regard is provided by a statutory provision granting agencies broad discretion to reemploy retired persons instead of seeking retirement exemptions for them.²⁷

The Commission's exemption regulations state that an agency desiring to exempt an employee shall submit a recommendation to that

20. Exec. Order No. 9047, 3 C.F.R. 1084 (1938-43 comp.), *revoked*, Exec. Order No. 10,512, 3 C.F.R. 179 (1954-58 comp.).

21. Act of July 31, 1956, ch. 804, § 401, 70 Stat. 743.

22. Exec. Order No. 10,674, 3 C.F.R. 327 (1954-58 comp.).

23. 5 U.S.C. § 8335(c) (1970). This section, however, is now phrased in the singular ("may exempt an employee"), suggesting that individualized determinations must be made. As recently as the 1956 amendments, the statute referred to exemption of "any" employee, perhaps a plural term. Act of July 31, 1956, ch. 804, § 401, 70 Stat. 748. The change in phraseology occurred in the 1966 codification of title 5, and appears to have been without intentional substantive significance. Act of Sept. 6, 1966, Pub. L. No. 89-554, § 8335, 80 Stat. 571; *see* H.R. REP. No. 901, 89th Cong., 1st Sess. 3, 160 (1965).

24. *See* note 6 *supra*.

25. 5 C.F.R. § 831.503 (1975).

26. *Id.* § 831.503(b)(2).

27. 5 U.S.C. § 3323(b) (1970). *See also* FEDERAL PERSONNEL MANUAL 300-17, subch. 7 (1969); FEDERAL PERSONNEL MANUAL SUPP. 831-1, subch. S15 (1973).

effect to the Commission.²⁸ For employees other than administrative law judges, the recommendation filed by the agency head is to contain a statement that the employee is willing to remain in service, a recital of facts showing that retention would be in the public interest, the period for which exemption is desired (which may not exceed one year), and the reasons why the simpler method of retiring the employee and immediately reemploying him is not being used.²⁹ Recommendations are to be accompanied by a medical certificate showing the physical fitness of the person to continue.³⁰ The Commission will approve an exemption only prior to the automatic separation date applicable to the employee.³¹ As the regulation suggests, this power is not invoked often; the agencies simply reemploy annuitants instead.

For administrative law judges,³² the recital of facts showing that retention is in the public interest is to include a showing that the judge is responsible for a previously assigned case or cases that are unfinished because of circumstances that could not have been foreseen at the time of assignment. The period of exemption is not to exceed the lesser of a year or sufficient time to complete the pending cases, and the Commission will grant each judge only a single exemption.³³ Since these more stringent limits seem designed to protect the judges' independence from their employing agencies, the Commission's policy is relevant in examining the exemption of independent commissioners from mandatory retirement, at least insofar as the latter exercise adjudicative functions, and in a broader sense to the full extent that the commissioners are meant to be independent of White House influence.

The most important controls in the Civil Service regulation are the time limits, the rule against repeat exemptions, and the requirement for a specific showing of unusual circumstances that justify the exemption. These kinds of controls could provide an appropriate check on presidential discretion in exemption decisions. It seems unlikely, however, that substantial limits upon the discretion of the President or an agency will result from requirements for general recitals of the need to retain an employee, or for medical certificates of fitness to serve.

28. 5 C.F.R. § 831.503 (1975).

29. *Id.* § 831.503(b)(1).

30. *Id.* § 831.503(3).

31. This provision responds to 37 OP. ATT'Y GEN. 393 (1936), stating that the President had no authority to issue a proposed executive order exempting a customs employee, since the effective date of retirement had passed.

32. 5 C.F.R. § 831.503(b)(2) (1975). The regulation uses the superseded term "hearing examiner" for these officers, who are appointed pursuant to 5 U.S.C. § 3105 (1970). See 37 Fed. Reg. 16,787 (1972).

33. 5 C.F.R. § 831.503(b)(2) (1975).

The more frequently employed practice of reemployment is governed by the provision stating that "an annuitant . . . is not barred by reason of his retired status from employment in an appointive position for which he is qualified. An annuitant so reemployed serves at the will of the appointing authority."³⁴ The employing agency, not the Civil Service Commission, makes the decision to reemploy an annuitant³⁵ and then notifies the Commission of its action.³⁶ The *Federal Personnel Manual* provides that no special appointing authority is needed for reemployment because it is done under general grants of authority.³⁷ According to the *Manual*, the provision of section 3323 (b) stating that an annuitant serves at the will of the appointing authority means just that: "a reemployed annuitant may be separated at any time at the discretion of the appointing officer, regardless of type of appointment."³⁸

In only one case has an exercise of the reemployment power been challenged. In *Gamble-Skogmo, Inc. v. FTC*,³⁹ the hearing examiner in an FTC proceeding reached the date of mandatory separation after submission of the case to him, but before he had made his findings, conclusions, and recommended decision. The FTC reemployed him for two intervals amounting to forty-five days, but then allowed his employment to expire, whereupon another hearing examiner made findings and conclusions on the existing record. This was attacked as arbitrary and as a violation of due process. On review of the order the FTC issued in the case, the Eighth Circuit thought that the Commission's decision not to continue the hearing examiner's employment was within its complete discretion and not subject to judicial review.⁴⁰ The court was not persuaded by the Administrative Procedure Act's provision that the officer who receives evidence shall make the recommended decision unless he becomes unavailable to the agency,⁴¹ and would not read the APA to condition the Retirement Act by imposing

34. 5 U.S.C. § 3323(b) (1970).

35. FEDERAL PERSONNEL MANUAL 300-17, subch. 7 (1969); FEDERAL PERSONNEL MANUAL SUPP. 831-1, subch. S15 (1973).

36. *Id.* subch. S15-2 (1973), S15-7 (1974). The Commission will not approve reemployment of administrative law judges in order to protect the judges' independence from their employing agencies. See Minute 1 of the Minutes of the Civil Service Commission for December 23, 1968.

37. FEDERAL PERSONNEL MANUAL 300-17, subch. 7-3a (1969).

38. *Id.* subch. 7-3b.

39. 211 F.2d 106 (8th Cir. 1954).

40. The court was interpreting an earlier version of the reemployment statute which did not allow reemployment "unless the appointing authority determines that he is possessed of special qualifications." *Id.* at 111.

41. 5 U.S.C. § 554(d) (1970).

any duty on the agency to reemploy a retired employee,⁴² or to seek his exemption. Unfortunately, the opinion in *Gamble-Skogmo* is not an aid to analysis. The court's wooden approach is typified by its refusal to attempt an accommodation of the policies of the two statutes through recognition of a limited duty on the part of an agency either to retain its hearing examiner during the disposition of a case, or to explain why it will not do so.

The facts of *Gamble-Skogmo* suggest a potential problem in the retirement of independent commissioners. If a commissioner reaches the mandatory separation age during agency consideration of an important case, the President's decision whether to grant an exemption will not seem divorced from its impact on the case. Appearances will not be aided by the practice of offering no reasons for the grant or denial of an exemption, and it seems most unlikely that a court would attempt to impose any requirements for presidential explanation. The solution is to remove the occasion for such an unseemly exercise of discretion by a statutory amendment resolving the issue of the commissioner's tenure in advance.

II. APPLICATION OF THE RETIREMENT ACT PROVISIONS TO INDEPENDENT COMMISSIONERS

Only once has the legality of applying the President's exemption power to independent commissioners been challenged in an adjudicatory proceeding.⁴³ Consumer groups attempting to intervene in an FTC proceeding challenged Commissioner MacIntyre, then under exemption from retirement, arguing that the exemption statute should not be read to apply to independent commissioners because of its fundamental inconsistency with the intended independence of the commissions.⁴⁴ The consumers also invoked the due process cases on interest of an adjudicatory officer,⁴⁵ arguing that Commissioner MacIntyre re-

42. 211 F.2d at 112. The court held, however, that when credibility determinations are important, the decision should be made by the officer who conducted the hearing; it remanded the case for further proceedings.

43. IIT Continental Baking Co., 82 F.T.C. 1188 (1973).

44. See Renewed Motion of Consumers Federation of America, Consumers Union of the United States, Inc., and Federation of Homemakers, Inc., to Intervene as Parties; and Motion Requesting Disqualification of Commissioner MacIntyre from Participation in this Proceeding, IIT Continental Baking Co. (F.T.C., filed Mar. 29, 1973); Memorandum to the Commission in Support of Renewed Motion, IIT Continental Baking Co. (F.T.C., filed Mar. 29, 1973).

45. See generally *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927). This constitutional argument proves too much, since the federal executive branch is replete with adjudications finally decided by officers without secure tenure. Rejection of a constitu-

garded himself as serving essentially at the pleasure of the President, a presumed status that infected his decisions with considerations of personal gain or loss. The consumers further argued that even if section 8335 applied to commissioners, it should not be read to authorize short-term, renewable exemptions, which maximize a President's possible influence over a commissioner. Instead, the officers' statutory terms and the Retirement Act should be read together to minimize policy conflict by requiring that exemption, if granted, be for the remainder of a term.

Commissioner MacIntyre refused to disqualify himself.⁴⁶ He denied any undue influence from the White House, and appended a 1969 memorandum for the White House staff regarding contacts with the independent agencies,⁴⁷ which observed that the commissioners had "quasi-judicial responsibilities" for individual cases, and that, obviously, interference in this function would be highly improper. The consumer groups responded that Commissioner MacIntyre's answer failed to address the primary issue raised by their motion.⁴⁸ They had not suggested the existence of specific attempts to influence the Commissioner, but had simply argued that one cannot assume that an officer, no matter how great his personal integrity, can remain unaffected by the fact that his continued service is within the discretion of the President. It was, the consumers urged, to prevent this actual or apparent prejudice that Congress made the commissions independent. The Commission responded with an unexplained order denying the motion for disqualification.⁴⁹

Thus, in the only case involving a challenge to the legality of the exemption power as it applies to independent commissioners, the tribunal involved failed to address the central issue, the potential for undue presidential influence over a member of an independent agency. As the following analysis will show, the conclusion that it is inappropriate to apply the mandatory retirement and exemption provisions of the Retirement Act to members of independent commissions is not pre-

tional argument based on the interest cases, of course, does not prejudice arguments based on statutory policy that the situation in which Commissioner MacIntyre found himself should be avoided.

46. ITT Continental Baking Co., 82 F.T.C. 1188 (1973).

47. *Id.* at 1191.

48. Comments on Commissioner MacIntyre's Response to Amici's Motion for Disqualification, ITT Continental Baking Co. (F.T.C., filed Apr. 9, 1973).

49. ITT Continental Baking Co., 82 F.T.C. 1188, 1194-95 (1973). Commissioner Mary Gardiner Jones filed a separate statement. She thought it a serious issue whether Commissioner MacIntyre's status was governed by the Retirement Act or his statutory term, and bemoaned the status of a Commissioner serving after age seventy under circumstances of legal uncertainty. *Id.* at 1192-94.

cluded by the legislative history of the Act and is supported by case law in the analogous area of presidential removal of independent commissioners.

A. Legislative History and Analysis

The original Civil Service Retirement Act, passed in 1920, did not apply to presidential appointees.⁵⁰ The President's power to exempt covered employees from mandatory retirement dates from 1932.⁵¹ The first extension of the Retirement Act to include members of the independent commissions occurred in 1942 when, by the Act of January 24, 1942,⁵² Congress expanded the application of the Act in an all-inclusive fashion: "This Act shall apply to all officers and employees in or under the executive, judicial, and legislative branches of the United States Government, all elective and appointive officers in or under the said branches" A major purpose in so extending the Act was to provide retirement benefits for the members of Congress themselves.⁵³ A storm of public protest ensued, blasting the Congress for lining its own pockets in times of national peril. With unusual alacrity, Congress responded with the Act of March 7, 1942,⁵⁴ which added "except elective officers and heads of executive departments" to the above language in the January statute. It is clear that by this language Congress meant to exclude members of the independent commissions from the Retirement Act;⁵⁵ its reasons for doing so, how-

50. Act of May 22, 1920, ch. 195, § 1, 41 Stat. 614. The Act applied only to employees in the classified civil service, which did not include presidential appointees. See 34 OP. ATT'Y GEN. 334, 337 (1924). The Act also contained a specific exception for presidential appointees in certain named agencies whose employees were otherwise specifically included within the Act's coverage, such as the Library of Congress. See Act of May 22, 1920, ch. 195, § 1, 41 Stat. 614. This explicit exception was later dropped from the statute without legislative explanation, see Act of July 3, 1926, ch. 801, § 3, 44 Stat. 904, but for the probable reason that it was superfluous.

51. Act of June 30, 1932, ch. 314, § 204, 47 Stat. 404. The original language of the exemption was substantially similar to its present form: "The President may, by Executive Order, exempt from the provisions of this section any person when, in his judgment, the public interest so requires" See note 2 *supra* (text of current statute). The first exercise of the power was immediate. See Exec. Order No. 5872, 2 PROCLAMATIONS AND EXECUTIVE ORDERS: HERBERT HOOVER 1218-20 (G.P.O. 1974) (dated June 30, 1932).

52. Ch. 16, § 3, 56 Stat. 15. President Roosevelt soon issued Exec. Order No. 9047, 3 C.F.R. 1084 (1938-43 comp.), exempting for an indefinite period not to exceed their current term of office "[a]ll officers and employees in the Executive branch" appointed by the President.

53. See 88 CONG. REC. 456-63, 515-17, 1578-79 (1942).

54. Ch. 166, § 16(c), 56 Stat. 147.

55. Ch. 166, § 1(d), 56 Stat. 143. The statute defines "department" as "any executive department, independent establishment, or agency (including corporations) in

ever, are more obscure. Most of the legislative history of the March amendment is directed to the political advisability of excluding Congressmen from the retirement system,⁵⁶ and an excess of caution may account for exclusion of the Cabinet and agency heads as well.⁵⁷

In 1946, Congress again reversed itself and explicitly extended the Retirement Act to commissioners of the independent agencies. The statute was short and simple;⁵⁸ its stated purpose was simply "to include the heads of executive departments and independent agencies within the purview of the Civil Service Retirement Act"⁵⁹

the executive branch" At the time of the bill's passage, the House and Senate conferees pointed out this language and named several of the major independent agencies as examples of those included within the definition. 88 CONG. REC. 1727-29, 1824 (1942).

56. See *Hearings on S. 2242, S. 2247, and S. 2284 Before the Comm. on Civil Service, 77th Cong., 2d Sess. (1942)*; *Hearings on H.R. 6471 Before the Comm. on Civil Service, 77th Cong., 2d Sess. (1942)*; 88 CONG. REC. 947, 1386-90, 1440-42, 1462-69, 1576-85, 1725-30, 1822-24 (1942).

57. The debates indicate some concern for the need to remove as many "high-salaried executives," 88 CONG. REC. 1576 (1942), and "political appointees," *id.* at 1577, as possible. The amendment was tacked onto unrelated legislation to speed passage. There is an indication that the conferees went as far toward outright repeal of the January statute as parliamentary rules would allow. *Id.* at 1729, 1824.

58. Act of July 24, 1946, ch. 612, 60 Stat. 659:

AN ACT

To include the heads of executive departments and independent agencies within the purview of the Civil Service Retirement Act of May 29, 1930.

Be it enacted . . . [t]hat section 3(a) of the Civil Service Retirement Act of May 29, 1930, as amended, is amended by striking out the words "and heads of executive departments".

Sec. 2. . . . As used in this section the term "department" means any department, independent establishment, or agency (including corporations) in the executive branch of the Government.

59. *Id.* The present form of section 8335 of the Retirement Act, the mandatory retirement provision, derives from the Act of July 31, 1956, ch. 804, § 401, 70 Stat. 748. The 1956 statute applied generally to any "employee," a term defined as "a civilian officer or employee in or under the Government. . . ." Ch. 804, § 401, 70 Stat. 743. Upon the codification of title 5 in 1966, a generic definition of the term "employee" was attempted in section 2105(a). See Act of Sept. 6, 1966, Pub. L. No. 89-554, § 2105, 80 Stat. 409. The Act provides:

Employee

(a) For the purpose of this title, "employee", except as otherwise provided by this section or when specifically modified, means an officer and an individual who is—

(1) appointed in the civil service by one of the following acting in an official capacity—

- (A) the President;
- (B) a Member or Members of Congress, or the Congress;
- (C) a member of a uniformed service;
- (D) an individual who is an employee under this section;

or

- (E) the head of a Government controlled corporation;
- (2) engaged in the performance of a Federal function under au-

The legislative history of the bill is rather scant. The House Report⁶⁰ simply stated the purpose of the statute in the terms of its heading, and incorporated a letter from Civil Service Commission President Harry B. Mitchell for elaboration. In the letter, Mitchell said the proposed statute would deal with only about ninety of two million federal employees, and that even some of these were already covered because the appointees had previously been in qualifying positions. Mitchell remarked that the Tax Court had the largest number of employees not currently "protected" by a retirement system and that "[t]here seems no reason why they should be discriminated against." ICC and FCC commissioners would also be affected. Since some employees in these positions already had retirement rights, he concluded, the bill sought "to correct the inequality."⁶¹

Discussion of the bill in the House largely paralleled the thrust of the letter.⁶² Representative Jennings Randolph, Chairman of the House Committee on the Civil Service, said the bill had the unanimous

thority of law or an Executive act; and

- (3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

The statute is substantially the same today, *see* 5 U.S.C. § 2105 (1970), and the Retirement Act has since referred to this provision for its principal delineation of coverage, with some modifications not relevant here. *See* 5 U.S.C. § 8331(1) (1970).

The committee reports accompanying the original codification explain that the purpose of section 2105(a) is "to avoid the necessity of defining 'employee' each time it appears in this title. The subsection is based on a definition worked out independently by the Civil Service Commission and the Department of Labor and in use by both for more than a decade." H.R. REP. No. 901, 89th Cong., 1st Sess. 27 (1965); S. REP. No. 1380, 89th Cong., 2d Sess. 47 (1966). A literal reading of the language of section 2105(a) would suggest that perhaps the definition of employee means to exclude members of the independent commissions, on grounds that they are not subject to the supervision of anyone while engaged in their duties. The question whether independent commissioners are properly regarded as subject to "supervision" by the President is a subtle one. *See* text accompanying notes 114-33 *infra*. Of course, the commissioners are subject to the President's supervision in at least the limited sense that he has the power to remove them for cause. *See* text accompanying notes 67-88 *infra*. In any event, it seems most unlikely that section 2105 was meant to have the effect of removing members of the independent agencies from the coverage of title 5. Any such reading would violate the stated purpose of the codification of title 5, which was to restate the existing law without substantive change. H.R. REP. No. 901, 89th Cong., 1st Sess. 1-3 (1965). It would also have multiple collateral consequences such as denying the commissioners retirement benefits. Furthermore, the inclusion of the detailed definition of employee is best understood as directed to the essentially unrelated problem of deciding when state employees engaged in federally funded programs should be regarded as federal employees. *Stapleton v. Macy*, 304 F.2d 954 (D.C. Cir. 1962).

60. H.R. REP. No. 2429, 79th Cong., 2d Sess. (1946).

61. *Id.* at 2.

62. *See* 92 CONG. REC. 8254 (1946).

support of his panel, and recited the substance of the Mitchell letter. "This is remedial legislation," he said, remarking on the applicability of the statute to members of the Tax Court, the ICC, and the FCC.⁶³ Again the concern was with removing perceived discrimination against a few officials. After this momentary consideration, the House passed the statute.

In the Senate, the legislative history is even more sparse. The committee document simply indicated that the statute would apply to about ninety positions, some of them already held by employees covered by the Retirement Act, and gave the cost of the bill.⁶⁴ On the floor of the Senate, Senator Sheridan Downey briefly remarked that these were the only federal employees denied retirement benefits, and that the bill would merely grant them rights held by other federal workers.⁶⁵

Congressional attention in passing the statute thus seems to have focused exclusively upon the benefits to agency heads from extending coverage to them. There is no recorded consideration of whether the mandatory separation requirement should apply to the independent agencies, and no consideration of the implications of the presidential exemption power. The first application of that exemption power to independent commissioners occurred immediately thereafter, however.⁶⁶

B. *The Presidential Removal Power: Application of the Case Law to Exemptions from Retirement*

The President's power to grant or deny retirement exemptions is functionally similar to his power to remove commissioners from office. Accordingly, the policy reasons offered in the cases limiting the removal power, which emphasize a congressional desire to maintain agency independence, are applicable in the retirement context as well. The removal cases thus illustrate the reasons why members of independent commissions should not be held subject to the mandatory retirement provision while the President retains the discretionary power to exempt them from retirement.

The first test of the President's removal power occurred in 1926 in *Myers v. United States*.⁶⁷ Frank Myers, a postmaster, was appointed

63. *Id.*

64. S. REP. NO. 1679, 79th Cong., 2d Sess. (1946).

65. 92 CONG. REC. 9203 (1946) (remarks of Senator Downey).

66. Exec. Order No. 9780, 11 Fed. Reg. 10,645 (1946).

67. 272 U.S. 52 (1926).

by the President and confirmed by the Senate under a statute which gave him a four-year term, unless he were sooner removed with the Senate's advice and consent. President Wilson dismissed Myers without asking for the Senate's approval. In a suit for Myers's salary, the Supreme Court held that the provision of the statute restricting the President's power of removal was unconstitutional. Chief Justice Taft's majority opinion relied on the provisions of article II of the Constitution that "[t]he executive Power shall be vested in a President," and that "he shall take Care that the Laws be faithfully executed."⁶⁸ The Chief Justice reasoned that the executive power is exclusively vested in the President, and that accordingly the agents of the executive must be exclusively responsible to him. In dictum, however, he did acknowledge a possible need to modify so simplistic a view of the separation of powers:

Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.⁶⁹

Justices Holmes, McReynolds, and Brandeis dissented.⁷⁰

This endorsement of very broad presidential discretion to remove officers was severely limited in *Humphrey's Executor v. United States*,⁷¹ a case involving President Roosevelt's attempt to remove FTC Chairman William Humphrey, a Hoover nominee. Roosevelt prodded Humphrey to resign, advancing only grounds of policy differences.

68. U.S. CONST. art. II, §§ 1, 3.

69. 272 U.S. at 135.

70. *Id.* at 177, 178, 240. In the wake of *Myers*, the United States Attorney General was confronted with the argument that the Retirement Act constituted a legislative usurpation of the President's power to remove postmasters. 35 OP. ATT'Y GEN. 309 (1927). Observing that the question turned upon whether the Retirement Act operated to remove officers or merely to limit their terms of office, the Attorney General concluded that the Act performed the latter function, and thus was a legitimate exercise of congressional power. *Id.* at 312, 314.

71. 295 U.S. 602 (1935).

Humphrey declined to resign, and Roosevelt removed him. In a subsequent suit for lost salary, the Court defined the issues as whether the provision in the Federal Trade Commission Act that a commissioner could be removed for "inefficiency, neglect of duty, or malfeasance in office"⁷² meant to restrict the President's removal power to the causes stated, and whether such a restriction was constitutional. In a unanimous decision, the Supreme Court answered both questions in the affirmative.⁷³

The legislative history of the FTCA indicates a desire to arrange the commissioners' terms of office so that the membership of the Commission will not be subject to complete change at any time, and a desire to make the terms long enough to give commissioners an opportunity to acquire expertise. Congress thought it essential that the Commission be independent, and not open to suspicion of partisanship, since its duties were "neither political nor executive, but predominantly quasi-judicial and quasi-legislative."⁷⁴ The Court concluded:

Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the Congressional intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. To the accomplishment of these purposes, it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.⁷⁵

Having decided that the statute limited the power of removal to the enumerated causes, the Court then considered the constitutional question. It began by disapproving the sweeping dictum of *Myers* insofar as it had gone beyond the decided point that the President could

72. 15 U.S.C. § 41 (1970).

73. As a preliminary matter, the Court distinguished *Shurtleff v. United States*, 189 U.S. 311 (1903), in which the Court had refused to read similar language of removability to be exclusive, in light of the absence of any statutory term for the officer involved, an appraiser. 295 U.S. at 621-23. The Court in *Shurtleff* had thought it most unlikely that Congress intended life tenure for an executive officer in the absence of the most explicit language to that effect. 189 U.S. at 316, 318. In *Humphrey*, of course, there was a statutory term to limit the officer's tenure.

74. 295 U.S. at 624.

75. *Id.* at 625-26.

remove postmasters without congressional restriction. The Court characterized a postmaster as an executive officer with solely executive functions, and no legislative or judicial ones. *Myers* therefore went far enough to include "all purely executive officers,"⁷⁶ but no further. The Court characterized the FTC as divorced from the executive branch, created by Congress to carry its legislation into effect, and designed to be free from executive control. The authority of Congress to create such agencies, the Court thought, could not be doubted.⁷⁷ Limits upon the removal power were a necessary corollary since "it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will."⁷⁸

This sharp limitation of the sweeping approach of *Myers* was reaffirmed in the Court's most recent treatment of the removal issue in *Wiener v. United States*.⁷⁹ Congress had established the War Claims Commission to "adjudicate according to law" various claims arising from enemy action in World War II.⁸⁰ The Commission members were presidential appointees, and the Commission was to complete its task within three years, thus setting the tenure of the commissioners. There was no provision for their removal. Nevertheless, Commissioner Myron Wiener was removed by President Eisenhower, who asserted a need to complete the Commission's task "with personnel of my own selection."⁸¹ In another suit for lost salary, Justice Frankfurter wrote for a unanimous Court. He was undaunted by congressional silence about removal. Because of the notoriety of the *Humphrey* case, he argued, Congress could not have been unaware of the problem of the President's removal power. Congress would also have been well aware that *Humphrey* drew a sharp line between officials within the executive branch, for whom the removal power could not be restricted, and members of a body designed to be independent, for whom the removal power would exist only if Congress conferred it. "This sharp differentiation derives from the difference in function between those who are part of the Executive establishment and those whose tasks re-

76. *Id.* at 627-28.

77. The Court thought that if Congress could not limit the removal power for the FTC, it would be hard to see any limit to the removal power except for the judiciary. No distinction could be made even with regard to the Court of Claims, a legislative court exercising judicial power. *Id.* at 629.

78. *Id.*

79. 357 U.S. 349 (1958).

80. War Claims Act of 1948, 50 U.S.C. App. § 2001(d) (1970).

81. 357 U.S. at 350.

quire absolute freedom from Executive interference."⁸² Justice Frankfurter thus concluded that the most reliable way to detect congressional intent regarding the removal power in this case was to examine the nature of the functions that Congress had vested in the Commission. The legislative history established that the Commission was formed as an adjudicating body with decisions unreviewable by the executive. If one must take it for granted that the statute precluded the President from influencing the Commission on a particular claim, it would follow a fortiori that Congress did not want the commissioners to fear "the Damocles' sword of removal by the President" for no other reason than that he preferred to have persons of his own choosing.⁸³ Wiener's removal was therefore illegal.⁸⁴

The Supreme Court's approach in *Humphrey* and *Wiener* is very uncompromising. One might even fault the Court for naiveté in its view of the agencies as impartial bodies of experts enjoying "absolute" freedom from executive interference.⁸⁵ Its wariness of the removal

82. *Id.* at 353. Presumably, Justice Frankfurter did not mean to suggest that whether the officer is formally within the executive branch is determinative, as distinguished from the functions he performs. It is clear, for example, that Congress may guarantee the independence of administrative law judges in the executive branch. 5 U.S.C. § 7521 (1970); see *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128 (1953); cf. *McEachern v. United States*, 321 F.2d 31 (4th Cir. 1963).

83. 357 U.S. at 356.

84. One lower court opinion has dealt with the removal power. In *Morgan v. TVA*, 115 F.2d 990 (6th Cir. 1940), cert. denied, 312 U.S. 701 (1941), the court upheld the removal of a director of the TVA. The court could not find congressional intent to restrict the President, partially for the simple reason that the statute had been passed between *Myers* and *Humphrey*, in a period when Congress would have had the gravest doubts regarding its power to limit the President. The court thought that reading the TVA statutes to deny the President power to remove TVA directors would raise a constitutional question, even under *Humphrey*, on the possibility that a purely executive officer was being removed. To Morgan's contention that the TVA exercised quasi-legislative powers, destroying the President's illimitable power to remove its members, the court responded in dictum that the TVA exercised "predominantly" an executive or administrative function. The President enjoyed various statutory supervisory functions; moreover, the TVA's activities, which were for the most part managerial, were characteristic of a part of the executive branch. The court conceded that the directors had to enact by-laws, a legislative function, and to make decisions, which might be characterized as a judicial function. But this was no different from the duties of any other administrative officer. The court thought the TVA could not be compared to the regulatory commissions, which it characterized as mainly exercising quasi-legislative or quasi-judicial functions. The *Morgan* case thus illustrates the difficulty of neat separations of various positions in the Government by whether they are purely executive or not. Cf. *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973) (President's removal of Watergate Special Prosecutor Cox held illegal as violation of Department of Justice regulation having force of law).

85. See 357 U.S. at 353; 295 U.S. at 625-26. See discussion at text accompanying notes 114-33 *infra*.

power apparently stems from the view that officers having major adjudicative responsibilities must be independent of outside influence, and that independence can be guaranteed only through security of tenure. Although the Court could find specific legislative intent on this point in *Humphrey*, it had no difficulty in inferring such an intent simply from the functions assigned to the commissioners in *Wiener*.⁸⁶

The cases do not shed a great deal of light on what does constitute sufficient cause for removal of a commissioner, since in the last two major cases cause was not even asserted. Perhaps one can stake out some limits, however. For instance, it seems clear that *Humphrey* not only restricts the applicability of *Myers*, but also rejects its theory of the appropriate limits upon removal of an officer having duties committed to his discretion, or engaged in adjudication. The *Myers* court had argued that although a President might lack the power to overrule an officer in a particular exercise of such functions, the President could still remove him for his action afterwards.⁸⁷ *Humphrey's* premise that a commissioner's security of tenure is vital to commission independence is inconsistent with any such definition of the cause sufficient for removal. Pressure on a commissioner to accede to the President's wishes is, of course, essentially the same whether removal occurs at the time of a decision, or after a decent interval.⁸⁸ This suggests that the only grounds for removal that the Court is likely to find to be within statutory contemplation are those clearly unrelated to the merits of a particular case, such as entertaining improper ex parte contacts, habitual inefficiency, or criminal violations. If this view of the removal power is accurate, presidential exercise of the exemption power should trouble the Court greatly. It provides an opportunity for what may be in substance just the kind of removal suggested by *Myers*—for example, refusing to exempt a commissioner who reaches mandatory retirement age a short interval after a particular decision—and condemned by the rationale of *Humphrey* and *Wiener*.

86. It is possible that even the members of the FCC, FPC and SEC, whose statutory terms do not include restrictions on removal, may receive protection under *Wiener*. CARY 10. Since these agencies were formed during the interim between *Myers* and *Humphrey*, it is difficult to make any argument in favor of actual legislative intent to restrict removal, since Congress probably would have thought that it did not have the power. See *Morgan v. TVA*, 115 F.2d 990 (6th Cir. 1940), cert. denied, 312 U.S. 701 (1941) (discussed in note 84 *supra*). But the Court might strain to detect such a congressional intent, as a corollary to a demonstrated intent that these agencies enjoy a degree of independence from executive control.

87. 272 U.S. at 135. The passage referred to is quoted in text accompanying note 69 *supra*.

88. See *Wiener v. United States*, 357 U.S. 349, 356 (1958).

The Supreme Court's rationale in *Humphrey* and *Wiener* thus raises the question whether the Court might hold that application of the mandatory retirement statute to independent commissioners in effect constitutes an illegal removal because of the presence of the President's discretionary exemption power. The conclusion would be that the statutes setting the terms of these officers, and not section 8335, should govern their tenure; the process would be one of identifying and accommodating the policies of the two statutes. It is appropriate to engage in such a process because there is no indication of specific congressional intent that section 8335 override the commissioners' statutory terms.⁸⁹ The mandatory retirement provision with its power of presidential exemption took essentially its present form in 1932,⁹⁰ well before the Retirement Act was first applied to independent commissioners. And neither in the abortive 1942 attempt to extend the Retirement Act to the agency heads, nor in the successful 1946 reconsideration, was there any attention to whether the mandatory separation section should apply. The dominant legislative intent was to qualify the commissioners for pensions, an objective not necessarily inconsistent with excepting them from mandatory retirement, since their terms provide a definite terminus to their employment.

Humphrey and *Wiener* made very clear what the Court considered to be the major policies behind statutory terms for commissioners; length and certainty of tenure were emphasized as vital guarantees of commission independence.⁹¹ Application of the mandatory retirement and exemption provisions to the commissioners conflicts with this policy, because they grant the President discretion whether to continue the service of a commissioner at a time short of a full term. Furthermore, the practice followed to date of granting either indefinite or relatively short-term extensions exacerbates the problem.

The rationale of the removal cases also suggests that members of independent commissions should not be subject to mandatory retirement at all, regardless of the presence of the exemption power. Some of the policies underlying statutory terms identified by the Court in *Humphrey* and *Wiener* are plainly inconsistent with mandatory retirement. For instance, substantial terms favor the accumulation of expertise; mandatory retirement takes effect at a time when a commissioner's expertise is presumably at a maximum. Also, mandatory retirement tends to increase the number of vacancies on a commission, giving the

89. See text accompanying notes 50-66 *supra*.

90. See note 51 *supra*.

91. See 357 U.S. at 353; 295 U.S. at 626.

President the opportunity for short-term appointments to fill the unexpired portions of terms, with whatever threat to independence that poses.⁹² Reducing the frequency of vacancies would also help to prevent the bunching of nomination opportunities for a given President, and would thus help to maintain the nonpartisan flavor that Congress intended for the commissions. (Restrictions in the statutes on the number of members of one party who may be appointed⁹³ are, of course, relatively little bar to a President hoping to appoint persons in philosophical sympathy with him.)

Hence, the removal cases reveal strong policy reasons in favor of reading the statutes that set the terms of commissioners to create implied exceptions to the mandatory retirement statute. Still other policy reasons have emerged in several cases involving challenges to mandatory retirement statutes in contexts apart from the regulatory commissions.⁹⁴ While a full discussion of the mandatory retirement cases is beyond the scope of this Article, they reveal some special considerations relevant to the appropriateness of subjecting independent commissioners to mandatory retirement.

The key argument against mandatory retirement per se is that it arbitrarily ignores differences between persons of the same age. Overbroad rules may be justifiable in dealing with huge numbers of employees,⁹⁵ but they become less so when applied to a discrete class more readily amenable to individualized consideration, as in the reappointment process. The arguments in favor of mandatory retirement, principally ease of administration and easier recruitment of young employees through the lure of faster advancement, are not as persuasive in regard to a limited number of political appointments at the commission

92. Excessive turnover on the commissions is a present problem. See Goodsell & Gayo, *Appointive Control of Federal Regulatory Commissions*, 23 AD. L. REV. 291, 291-92, 300-02 (1971) (observing that many commissioners do not serve full period of their terms).

93. See, e.g., 15 U.S.C. § 41 (1970) (FTC); 49 U.S.C. § 11 (1970) (ICC).

94. See *Weisbrod v. Lynn*, 383 F. Supp. 933 (D.D.C. 1974), *aff'd*, 420 U.S. 940 (1975); *Murgia v. Board of Retirement*, 376 F. Supp. 753 (D. Mass. 1974), *prob. juris. noted*, 421 U.S. 974 (1975). These challenges have been based on the "irrebuttable presumption" doctrine which has developed over the past few years. The claim is that the irrebuttable presumption established by a mandatory retirement statute constitutes a denial of due process because the attainment of a particular age does not necessarily imply that an individual is no longer capable of adequately performing his job. See generally Bezanson, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine*, 7 IND. L. REV. 644 (1974); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974).

95. See *Murgia v. Board of Retirement*, 376 F. Supp. 753, 755-56 (D. Mass. 1974), *prob. juris. noted*, 421 U.S. 974 (1975).

level. One may hesitate before establishing routine competency hearings for employees reaching the age of retirement, upon a well-grounded fear that any such proceeding might be more demeaning than useful. But, for presidential appointees, an individualized judgment of a person's physical condition will routinely occur anyway at the time of reappointment. Of course, this becomes a more difficult judgment for commissions with relatively long statutory terms.

The policy justifications for excepting independent commissioners from mandatory retirement altogether are persuasive. Although the legislative history of the Retirement Act does not reveal any express legislative intent contrary to such a conclusion, it could be argued that Congress impliedly ratified the application of the Act to commissioners when it reenacted present section 8335 with no explicit exception for them. But legislative attention never focused on the specific problem: the 1956 amendments,⁹⁶ which followed the most recent presidential exemption of an independent commissioner by over four years,⁹⁷ were broad in scope, and the 1966 codification involved all of title 5.⁹⁸ It is inadvisable to read such a record as conclusive of the applicability question.

III. APPOINTMENT PROCESS IN LIEU OF THE MANDATORY RETIREMENT AND EXEMPTION PROCESS

Since the appointment process contemplates an individualized determination of a person's competency to serve, it is not surprising that the argument has been raised that the presidential appointment and Senate confirmation of a commissioner nearing mandatory retirement age should be treated as an implied exemption from retirement. Indeed, perhaps an exemption should be implied whenever a commissioner reaches mandatory retirement age during his statutory term, on the premise that age was a consideration in the original appointment. As an examination of the two cases addressing the question illustrates, however, this is not the position that has prevailed to date.

The first case involved District of Columbia Commissioner Melvin C. Hazen,⁹⁹ who was appointed at age sixty-nine and reappointed at age seventy-two, in neither case with a formal executive order of exemption from retirement. In response to a claim by Hazen's executors for the return of monies paid into the retirement system, the right to

96. Act of July 31, 1956, ch. 804, § 401, 70 Stat. 736.

97. Exec. Order No. 10,330, 3 C.F.R. 855 (1949-53 comp.).

98. Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378.

99. 22 COMP. GEN. 52 (1942).

which depended upon the legality of his employment, the Comptroller General concurred with the Civil Service Commission's opinion on referral that the employment after the separation date had been legal. The Comptroller General held that where "not long prior" to the time of mandatory retirement and again after that date the President took executive action to retain the officer by means of an appointment confirmed by the Senate, "no particular form of Executive order or action was required"¹⁰⁰ This reading of the Act of June 30, 1932,¹⁰¹ the lineal predecessor of the current exemption statute, is strained to say the least: the statute said that "the President may, by Executive Order, exempt" an employee. The opinion may be seen as an understandable attempt to avoid the harsh consequence of penalizing the estate of an employee who was not responsible for the failure to produce a formal executive order, but it is a most unsatisfactory precedent. The operative language is hopelessly vague—no one can be sure when a reappointment has been "not long prior" to the age of separation.

It is therefore not surprising that a correction was attempted in the next case to arise, that of ICC Commissioner William J. Patterson.¹⁰² Commissioner Patterson turned seventy in June, 1950, and ordinarily would have been retired at the end of that month. He had been appointed in 1945 for a term to expire at the end of 1952; thus the case presented the issue of whether every reappointment should be viewed as an implied executive order of exemption for the period of the term. In Commissioner Patterson's case, the Chairman of the ICC had requested an executive order exempting him for the remainder of his term, but by the retirement date none had appeared.¹⁰³ After that date, however, Commissioner Patterson simply kept working, contending that he could stay until the expiration of his term.¹⁰⁴ Commissioner Patterson was claiming under the *Hazen* case,¹⁰⁵ or presumably under the removal cases.¹⁰⁶ In July, the ICC asked the Comptroller General whether it could continue to pay the Commissioner.

100. *Id.* at 54.

101. Ch. 314, § 204, 47 Stat. 404 (quoted in pertinent part in note 51 *supra*).

102. 30 COMP. GEN. 51 (1950).

103. *Id.* at 52.

104. Washington Post, Aug. 4, 1950, at 10, col. 7.

105. In Commissioner Patterson's letter to the Comptroller General he cited the *Hazen* decision in support of his claim. 30 COMP. GEN. at 52.

106. The removal cases are discussed in the text accompanying notes 67-98 *supra*. The argument under the removal cases would have been that the mandatory separation provisions of the Retirement Act were not meant to apply to independent commissioners, leaving the statutes setting their terms to govern.

The Comptroller General's opinion observed that the Civil Service Commission administers the Retirement Act; therefore the question whether an employee has reached a retirement status "primarily is a matter for consideration by the Civil Service Commission."¹⁰⁷ The Comptroller General pointed out that he had concurred with the Commission in *Hazen* because the first relevant appointment had been eight months prior to the retirement age and there had been a reappointment after age seventy. But in *Patterson's* case the reappointment was about five and a half years prior to separation, and no presidential action had occurred subsequent to the Commissioner's attaining the age of seventy. The Comptroller General suggested that the matter be submitted to the Civil Service Commission for a determination of Commissioner *Patterson's* status, but gave the pointed hint that "under the existing facts there appears to be no proper basis for certifying . . . compensation" ¹⁰⁸ Two days later, the controversy was defused by the issuance of an executive order exempting the Commissioner for an indefinite period not to exceed his term of office.¹⁰⁹

The opinions in *Hazen* and *Patterson* are fundamentally unsatisfactory. Read together, they suggest that a presidential appointment "not long prior" to the separation date, or occurring after it, constitutes an exemption that need not be ratified by executive order, but that not every appointment of a commissioner who will reach age seventy during his term qualifies. Even assuming that the statutes fixing the terms of commissioners should not be read as implied exemptions to the mandatory retirement statute, several other difficulties remain. First, one cannot predict at what point along the continuum between the two cases a person is reappointed "not long prior" to separation. Second, it is doubtful that the age of an individual is under contemplation by the President and the Senate when the commissioner is within perhaps a year of retirement, but not when the person will reach age seventy later in the term. Perhaps appointments of persons already over retirement age necessarily constitute implied retirement exemptions, however. Third, both cases seem to presuppose that the specific term "by Executive Order" in the exemption statute can be read to mean something other than what it says. Any such gloss seems impermissible in terms of the ordinarily exclusive meaning of "Executive Or-

107. 30 COMP. GEN. at 53.

108. *Id.*

109. Exec. Order No. 10,146, 3 C.F.R. 325 (1949-53 comp.). The exemption may have been illegal. It occurred after the retirement date and purported to be retroactive, despite an earlier Attorney General's opinion, see note 31 *supra*, that there was no authority to exempt once the retirement date had passed.

der," the otherwise consistent position of the Civil Service Commission that an executive order is required for exemption,¹¹⁰ and the consistent presidential practice of issuing executive orders, a practice broken only by the apparently inadvertent omission in Commissioner Hazen's case. In three separate instances, President Truman reappointed a commissioner already under exemption, but he issued an executive order of exemption, not relying upon the reappointment and confirmation as sufficient.¹¹¹ Similarly, FTC Commissioner MacIntyre, who was last reappointed in 1968 within three years of the retirement age by President Johnson,¹¹² was later granted three separate extensions by President Nixon, who also chose not to rely upon reappointment alone.¹¹³ In sum, it does not seem wise to approach the problems of reconciling statutory policy inherent in the retirement exemption question through an analysis focusing on a case-by-case search for the implied intent of the President and the Senate at the time of appointment.

IV. EXECUTIVE CONTROL OF THE REGULATORY AGENCIES

Since the principal question regarding the appropriateness of the President's exemption power under section 8335 is whether it fosters undue presidential control of the independent agencies, it is important to place that power in the context of the commonly understood boundaries of executive control. There are at least three major types of possible control.¹¹⁴

The first is the power to appoint and to remove commissioners. Clearly, appointments can strongly influence an agency's direction and vigor. Equally clearly, the President has a legitimate interest in reviewing commissioners' performance in office for reappointment purposes. Removal, however, has not proved a useful means of executive control of the agencies, if the absence of its exercise be any guide. Substantial doubts concerning what constitutes sufficient cause for removal probably deter frequent presidential use of the power. And removal

110. File, Bureau of Retirement, Insurance, and Occupational Health, United States Civil Service Commission, Washington, D.C.

111. Exec. Order No. 9963, 3 C.F.R. 706 (1943-48 comp.); Exec. Order No. 10,034, 3 C.F.R. 227-28 (1949-53 comp.); Exec. Order No. 10,255, 3 C.F.R. 760 (1949-53 comp.).

112. Interview with A.E. MacIntyre, former Commissioner, FTC, in Washington, D.C., July 22, 1975.

113. Commissioner MacIntyre reports that the White House position was that the mandatory retirement statute applied to him, and that an executive order would be needed. *Id.* See Table 1 in the Appendix for the exemption sequence.

114. Dixon (comprehensive review of these controls and others).

is a politically hazardous step, especially if a commissioner has support in Congress.¹¹⁵

The second major means of executive control of the agencies is through the power of the Office of Management and Budget to control the budget and spending of the agencies and their requests for legislation.¹¹⁶ The President also has the power to name the chairmen of the major independent commissions.¹¹⁷ The chairmen, in turn, have important powers over agency personnel and spending.¹¹⁸

A third major method of executive control of the agencies is presidential direction of agency action. This method presents the subtlest issues of separation of powers, and most Presidents have not been quick to exercise it. There seems to be general agreement that the President has a legitimate role in reviewing the efficiency of the agencies, pursuant to his constitutional duty to see that the laws are faithfully executed.¹¹⁹ That is, the President should be interested in the presence of undue agency delay in the dispatch of its business, and in whether the agency is engaged in setting policy pursuant to its mandate. The President's powers to revivify an agency include removing its commissioners for inefficiency, changing its chairman, and changing its budgetary and legislative requests to Congress.

The debate currently centers on whether the President should go beyond considerations of agency efficiency to policy guidance, and if he should direct the agencies on policy, whether he should do so only in a general or in a specific fashion.¹²⁰ One should note at the outset that it may be difficult as a practical matter to separate questions of efficiency from those of substantive policy, especially when an agency demonstrates indecision in the face of thorny problems. Advocates of increased executive control have emphasized a need to coordinate policy where the responsibilities of independent agencies overlap with one

115. Cf. CARY 10. It may be, however, that if a President removed a commissioner for asserted malfeasance, the Supreme Court would regard the issue as an unreviewable political question. See Cushman, *The Constitutional Status of the Independent Regulatory Commissions*, 24 CORNELL L.Q. 163 (1939); Rogers, *The Independent Regulatory Commissions*, 52 POL. SCI. Q. 1, 7-8 (1937).

116. CARY 6-8, 11-12; Dixon 6-8; MacIntyre, *The Status of Regulatory Independence*, 29 FED. B.J. 1, 5-6 (1968).

117. Dixon 8.

118. Zamir, *Administrative Control of Administrative Action*, 57 CALIF. L. REV. 896, 898-99 & n.161 (1969).

119. CARY 21; FRIENDLY 148-49; J. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 32-33 (1960).

120. Compare FRIENDLY 152-58 with CARY 20; Dixon 12-13, and Redford, *The President and the Regulatory Commissions*, 44 TEXAS L. REV. 288 (1965).

another and with the executive departments.¹²¹ Enthusiasm for change should be tempered, however, with recognition that problems of coordination are not unknown within and among the executive departments already subject to full presidential control.¹²² Since Presidents have little difficulty in making their policy views known, and since consensual policy coordination among the independent agencies can occur at present, the real problem is agency refusal to cooperate. The Administration can formally intervene in agency proceedings,¹²³ and if the agency does not concur, its reasons can be articulated. This sets the stage for Congress to resolve the dispute through legislation (or more subtle means such as appropriations) if it chooses. The question, then, is whether to shift the policy initiative from the agencies that presently possess it to the President.

Arguments against increased executive control emphasize that policy guidance may not be significantly restrictive of agency discretion in application if it is at a broad level of generality, such as the need to reduce inflation or to increase competition,¹²⁴ and below this level of platitude there may not exist a well-articulated national policy that can be stated to the agencies and followed by them.¹²⁵ The net effect of executive control may therefore be simply to shift decisions from the agencies created to handle them into the White House.¹²⁶ Decisions there might be invisible to the public, and infected with considerations of partisan politics.¹²⁷ They would lack the contributions of the experienced agency staff and the benefits of full party participation as well.¹²⁸

Those who would have the White House oversee both efficiency and the basic course of agency policy generally concede that it is improper for the White House to interfere in pending adjudications.¹²⁹ This poses a difficulty with capacity to give guidance in a meaningful

121. See, e.g., J. LANDIS, *supra* note 119, at 24-33; Dixon 12-13; Redford, *supra* note 120, at 308-12.

122. L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 23 & n.33 (1965).

123. FRIENDLY 152; Dixon 9.

124. FRIENDLY 150.

125. CARY 22, 136.

126. CARY 21. The most radical suggestions for coordinating agency policymaking tend to resemble the famous Hector-Minow proposals that the adjudicative function of agencies be removed and placed in a single administrative court, so that a super agency could coordinate policy. CARY 125-27. See generally 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 1.04-4 (Supp. 1970). These proposals give short shrift to the fact that all agency functions make policy and act in an interdependent fashion.

127. 1 K. DAVIS, *supra* note 126, at § 1.04-4.

128. *Id.* § 1.03, at 23 n.19.

129. FRIENDLY 150-51.

fashion, given the propensity of agencies to set policy through adjudication. One might refine the limitation to allow guidance on legislative issues,¹³⁰ even those present in pending adjudications—for instance, a directive that competition be favored in licensing decisions.¹³¹ It would remain improper to influence adjudicative issues, such as whether a certain license should issue to a petitioner. When agencies are forming policy through a few major adjudications, this may, however, be a distinction with little practical difference.

If agencies are left to decide only specific issues and not broad policy, their expertise is largely wasted. Also, the blurring of responsibility for a given policy decision is unlikely to aid government efficiency.¹³² It is even harder to justify thoroughgoing White House control in terms of the basic purpose behind the formation of independent agencies. For these agencies must be regarded as very much the agents of Congress, exercising delegations of power that were purposely given to a separate agency and not to the executive branch.¹³³ Although the general reasons for the creation of independent agencies are well known, it seems unlikely that legislation governing a particular agency will reveal much to guide those trying to decide how much executive control is permissible. One could ask whether a given function is one meant to be exercised independently, but legislative delegations of power are customarily too vague to be enlightening in this regard. Perhaps the vagueness of the limits to presidential propriety in directing independent agency policymaking helps to explain the absence of a tradition of presidential aggressiveness in asserting such a power. Yet a statute clearly conferring a power of direction seems unwise, since it is unlikely that the difficulties the agencies have in setting policy would be cured by shifting those functions partially into the White House.

V. CONCLUSION

The independent agencies exist in a state of tension between President and Congress.¹³⁴ Ambiguities in their status probably cause practical accommodations of power, but can mask arbitrary or inefficient conduct of government. The President's power to exempt inde-

130. See generally K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 7.03 (1972) (distinguishes between adjudicative and legislative issues).

131. Cf. Redford, *supra* note 120, at 306.

132. See FRIENDLY 153.

133. CARY 20, 135-36; FRIENDLY 153-56.

134. See CARY 4.

pendent commissioners from mandatory retirement is perhaps not the weightiest hawser upon which Congress and President can haul, but there is needless uncertainty in the present situation.

The preferable resolution of the issue would be to except the independent commissioners from mandatory retirement, either by statutory interpretation or by explicit amendment to section 8335. Arguably, the statutes setting the terms of independent commissioners should be read as implied exceptions to the mandatory separation and discretionary exemption provisions of the Retirement Act. But in the absence of any definitive judicial statement on the question, Congress should amend section 8335 to exclude members of major independent agencies from its coverage. This recommendation rests on a judgment that institutional considerations underlying the statutory terms of these officers have overriding significance compared to the flexibility afforded by the current exemption practice. Also, the major policies behind mandatory retirement and presidential exemption can be achieved in satisfactory measure in the reappointment process.

An alternative recommendation, less desirable because it contains some potential intrusion upon commission independence, is that a statutory amendment restrict the presidential exemption power. Such an amendment could require that exemptions under section 8335(c) be for the remainder of a commissioner's term, or that they be for a set period not subject to renewal. Either recommendation is preferable to an amendment removing the exemption power over the commissioners and subjecting them to mandatory retirement, because the policies favoring mandatory retirement for most government employees have diminished force when applied to the commissioners. In any event, it is important that Congress resolve the question whether the mandatory retirement statute should be read to apply to the commissioners at all. Currently prevailing assumptions that the exemption practice is valid in this application seem to stem more from the absence of court challenge than from any demonstration of clarity in relevant congressional purpose.

APPENDIX

TABLE 1

EXEMPTIONS OF MEMBERS OF THE INDEPENDENT COMMISSIONS AND THE
TAX COURT,* 1946 TO DATE

President and Year	Exec. Order No.	Name	Agency	Exec. Order No. of Prior Exemption	Period of Exemption
HST 1946	9780	C.B. Aitchison	ICC	—	Indefinite to term**
	"	W.A. Ayres	FTC	—	"
	"	E.L. Davis	FTC	—	"
	"	C.L. Draper	FPC	—	"
	"	S.B. Hill	Tax Court	—	"
	"	L.A. Johnson	Tax Court	—	"
1947	9895	W.W. Arnold	Tax Court	—	Indefinite to term
	"	J.A. Tyson	Tax Court	—	"
1948	9954	J.M. Johnson	ICC	—	Indefinite to term
	9956	H.B. Mitchell	CSC	—	Seven months
	9963	S.B. Hill	Tax Court	9780	Indefinite to new term
	9966	C. Miller	ICC	—	Indefinite to term
	9983	G.S. Ferguson	FTC	—	Indefinite to term
	10,021	H.B. Mitchell	CSC	9956	Indefinite
1949	10,034	J.M. Johnson	ICC	9954	Indefinite to new term
	10,073	E. Black	Tax Court	—	Indefinite to term
	10,094	C.B. Aitchison	ICC	9780	To qualification of successor
1950	10,146	W.J. Patterson	ICC	—	Indefinite to term***
	10,198	P.A. Walker	FCC	—	Indefinite to term
1951	10,255	C.L. Draper	FPC	9780	New term (five years)
	10,315	W.E. Lee	ICC	—	Indefinite to term
1952	10,330	F. Perkins	CSC	—	Indefinite
RMN					
1970	11,568	A.E. MacIntyre	FTC	—	One year
1972	11,642	A.E. MacIntyre	FTC	11,568	One year
1973	11,704	A.E. MacIntyre	FTC	11,568, 11,642	One year
	11,756	W. Gilliland	CAB	—	Eleven months
1974	11,791	K.H. Tuggle	ICC	—	Eighteen months
GRF					
	11,824	W. Gilliland	CAB	11,756	Six months
	11,826	W. Deason	ICC	—	Eleven months

* This list includes members of the major regulatory agencies (ICC, FTC, FPC, SEC, CAB, FCC, NLRB), the Civil Service Commission, and the Tax Court. The titles of other exempted employees appear in Table 2. See note 7 *supra*.

** Exemptions with this designation in the Table were phrased in substance as follows: "for an indefinite period of time not extending beyond the expiration of his present term of office . . ." A variation, adding a proviso that "for the purposes of this order, his present term of office shall be considered as expiring upon the appointment and qualification of his successor," is found in Exec. Orders Nos. 9954, 9983, 10,034, 10,146, and 10,315. The statutes setting the terms of the FTC and ICC commissioners involved provide for their continued service until a successor has been appointed and has qualified, to prevent vacancies. 15 U.S.C. § 41 (1970), 49 U.S.C. § 11 (1970).

*** Executive Order dated August 2, 1950, and made retroactive to July 1, 1950.

TABLE 2**OTHER EMPLOYEES EXEMPTED BY EXECUTIVE ORDER, 1946 TO DATE**

President	Exec. Order No.	Title of Employee
HST	9780	Commissioner, U.S. Tariff Commission
	"	Director, FDIC
	9973	Member, National Mediation Board
	10,002	Executive Secretary, Panama Canal Commissioner, International Boundary & Water Commission
	10,215	Comptroller of Customs
	10,225	Collector of Customs
	10,229	USDA employee
	10,239	Collector of Customs
	10,273	Director, Export-Import Bank
	10,320	Commissioner, International Boundary & Water Commission
	10,333	Collector of Customs
	10,334	Organist and Choirmaster, U.S. Military Academy
	10,364	Public Printer
DDE	10,569	Organist and Choirmaster, U.S. Military Academy
JFK	11,024	Director, National Science Foundation
LBJ	11,154	Director, FBI
	11,378	Postmaster
RMN	11,619	Secretary to Former President Truman
	11,653	U.S. Marshal
	11,657	Member, Federal Farm Credit Board
	11,675	Member, Subversive Activities Control Board
	11,757	Librarian of Congress
GRF	11,847	Vice President, Export-Import Bank
	11,869	Chairman, Commission on Civil Rights
	11,909	Vice President, Export-Import Bank

