# Removal and the Creation of Independent Agencies

# Learning Objectives

## Learn the basic rule for removing appointees.

## Learn how limiting the power of the president to remove appointees leads to independent agencies.

## Learn why independent agencies are seen as the headless 4th branch of government.

# Reading Assignment

## Chapter 2 to page 64, 3. Supervision

# Issues to be addressed

## Basic rule – if you appoint them, you can remove them.

### This does not apply to Article III judges, who are protected by the constitution and can only be removed by impeachment.

### This is the basic way the president controls agencies.

#### The president can order an agency to do things, but it is the secretary of the agency who implements that order.

### How is the removal power weakened if the senate will not confirm new appointments?

## Limits on Removal

### Tenure of Office Act – 1867

#### Lincoln has been assassinated and his vice-president, Andrew Johnson is president.

#### Congress did not like Johnson and wanted to limit his powers.

#### This Act limited the right of presidents to remove cabinet members without the consent of the Senate.

##### President Andrew Johnson removed the Secretary of War

##### Was impeached, but not removed by one vote.

#### This was the last attempt by congress to limit the removal of Cabinet Officers.

### Myers v. US, 272 US 52 (1926)

#### In this pre-New Deal world, postmasters and post offices were what most people saw as the federal government. They were also patronage for senators and representatives who would recommend postmasters to the president.

#### President Wilson discharged an Oregon postmaster without cause

##### Postmaster sued for back pay under a law passed after the Tenure in Office Act that required the senate to approve appointment and removal of postmasters

#### Chief Justice and Ex-President Taft wrote the opinion, which found the Tenure in Office Act and related acts an unconstitutional limit on presidential power.

### Humphrey’s Executor v. US, 295 US 602 (1935)

#### FTC commissioners had a term of office.

#### President fired Humphrey from the FTC

#### Humphrey died and his executor sued for the pay for the rest of his term

### Myers Redux

#### Less than 10 years later, Humphrey’s Executor raises the same issue of limitations on removal of officers.

#### What is the political change over that period?

##### What powers has the court accepted that the agencies can exercise?

##### Do local postmasters exercise those powers?

##### How is a postmaster different from an FTC commissioner?

##### Why would the court want Congress to have more power over the conditions of appointment of officers exercising those powers.

##### (This has not been important in later cases)

## Independent Agencies

### Assume that an agency has 5 commissioners with six year staggered terms.

#### When a new president takes office, is he able to replace the commissioners?

#### How long might it take him to get his own people in a majority of positions?

#### How does this make the agency independent (to some extent) of presidential control?

#### Assume that the president is in office long enough to appoint all the members.

##### How are they still more independent than a cabinet secretary or other agency head who can be removed at will?

#### **Critical issue** – these independent agencies are still in the executive branch, and other than the congressional limitation on removal, congress has no more control over them than other agencies.

## Typical Characteristics of an Independent Agency

### (1) they are headed by multi-member groups, rather than a single agency head;

### (2) no more than a simple majority of these members may come from one political party;

### (3) the members of the group have fixed, staggered terms, so that their terms do not expire at the same time; and

### (4) they can only be removed from their positions for ‘‘cause”

## How Independent are Independent Agencies?

### The President usually gets to pick the chair from among the existing commissioners.

#### Does not control policy, but can influence what issues are addressed

### Not subject to OIRA (covered later)

### Can be subjected to other executive controls as determined by Congress.

### Presidential influence increases the longer a party holds the presidency.

## How could the president fire an FTC commissioner?

### In theory the president could state a cause and fire a commissioner, but it has not happened

#### It has not been an issue because they get hounded out of office if there is cause

### Does this mean that they always stay when the president in unhappy with them?

#### This is an area where the presidents have not challenged the court

#### It would be interesting to see what this court might say about congressional limits on removal, given that this is certainly against the founders notion of presidential control of agencies.

## Restrictions on the removal of inferior officers

### Morrison v. Olson (previous module)

#### The independent counsel was an inferior officer, who could be removed by the Attorney General, who could be removed by the president.

#### The court found that as long as the restriction on removal does not impede the president’s ability to carry out his constitutional duties, it is constitutional.

### Nested Boards - Free Enterprise Fund v. Public Company Accounting Oversight Board, 130 S.Ct. 3138 (2010)

#### PCAO Board members are inferior officers appointed by the SEC Commissioners who could only be removed for good cause.

#### SEC commissioners have terms of office and can only be removed for good cause by the president.

#### What if the president thinks that there is good cause to remove a PCAO board member and the SEC does not agree?

#### Does this interfere with the President’s duty to see that the laws are faithfully executed, at least in the court’s opinion?

#### If the president has never removed any commissioner for good cause, does this limitation on control really to the president’s authority?

#### Could it be that the court is really concerned about the authority of the principal officers?

### Appointments by other Branches - The US Sentencing Commission

#### Background on the Sentencing Commission

##### Started out as a way to moderate unreasonable sentences

##### Sentences were made longer and the judges lost discretion to shorten them.

###### White collar criminals did more jail time

###### First time drug offenders did a lot more time.

###### Limited and eliminated various ways to shorten a sentence (no parole)

##### End result was the opposite of the intention

#### Mistretta v. United States, 488 U.S. 361 (1989)

##### The US Sentencing Commission is an independent commission in the Judicial Branch

###### The members are Article III judges, who are appointed by the President to the commission.

###### There are no terms of office

##### The Court upheld the law allowing the president to remove them, even though this is not an executive branch agency.

## Removal Wrap Up

### Terms of office for agency heads create independent agencies.

#### These agencies must still be executive branch agencies if they do enforcement.

### What if the statute says an officer serves until removed for good cause, but does not specify a term of office?

#### Think about what would happen if they could not be removed except for cause.

#### Remember civil service?

### Can the head of a department remove inferior officers he has appointed?

#### Unless Congress creates a term of office, if you appoint someone, you can fire them.

# Evaluation questions

## Removal

### If Congress says an officer can only be removed for good cause, but does not set a term of office, how do the courts treat the president’s right of removal?

### What is the basic rule for who can remove principal and inferior officers of the U.S. who do not have a term of office?

#### What if the statute says an officer serves until removed for good cause, but does not specify a term of office?

## Independent Agencies

### How did *Humphrey's Executor* lead to independent agencies?

### What are some examples of independent agencies?

### What is the policy reason for having independent agencies?

### How do they challenge the theory of separation of powers?

### Why are independent agencies called the headless 4th branch of government?

### Which branch of government are independent agencies in?

### Why are independent agencies usually headed by commissions rather than individuals?

#### How are the terms of the members of a commission usually structured?

### When a new president is elected, can he replace his cabinet secretaries?

### Can he replace the commissioners of independent agencies?

### When can the president remove the head of an independent agency?