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## THE REMOVAL POWER OF THE PRESIDENT AND INDEPENDENT ADMINISTRATIVE AGENCIES

*“Beyond the cabinet there stretched the Executive Branch of the Government—an endless thicket of vested usage and vested interest, apportioned among a number of traditional jurisdictions. . . . This was, in the popular understanding, the government of the United States. . . .”\**

REGINALD PARKER†

The President's constitutional position as the chief executive has been outlined elsewhere.<sup>1</sup> We shall now attempt to delineate his powers in relation to the other administrative officers and agencies.

George Washington started the practice of consulting with the “principal Officer in each of the executive Departments,”<sup>2</sup> which soon came to be called “the President's Cabinet.”<sup>3</sup> This term, however, as well as the institution behind it is of no legal relevance. Presidents may consult with anybody if they so desire and they may have a permanent adviser, like President Wilson's Colonel House, or an entire “brain trust” of advisers, on or off the governmental payroll, without violating any written or unwritten law. On the other hand, the President need not seek anybody's advice, either from the cabinet or any of its individual members.<sup>4</sup> Unlike under foreign constitutions, there are no matters that must be

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\* SCHLESINGER, THE COMING OF THE NEW DEAL 520-21 (1959).

† Professor of Law, Willamette University.

1. Parker, *The President as The Head of the Executive-Administrative Hierarchy: A Survey*, 8 J. PUB. L. 437 (1959). FENNO, THE PRESIDENT'S CABINET (1959).

2. U.S. CONST. art. II, § 2.

3. CORWIN, THE PRESIDENT: OFFICE AND POWERS 82-3 (4th ed. 1957); THE CONSTITUTION AND WHAT IT MEANS TODAY 20-1, 104 (11th ed. 1954); FENNO, *op. cit. supra* note 1; LASKI, THE AMERICAN PRESIDENCY, AN INTERPRETATION 70-110 (1940); SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 62-3 (1943); KELLY AND HARBISON, THE AMERICAN CONSTITUTION, ITS ORIGIN AND DEVELOPMENT 184 (1948); MILTON, THE USE OF PRESIDENTIAL POWER 29 (1944); Grundstein, *Presidential Power, Administration and Administrative Law*, 18 GEO. WASH. L. REV. 285 (1950).

4. Thus the Opinions of the Attorney General are interpretations of the law not binding on the President but merely persuasive by their usual objectivity, elaborateness, and the fact that they come from the highest enforcement officer of judicial law. See Toepfer, *Some Legal Aspects of the Duty of the Attorney General to Advise*, 19 U. OF CIN. L. REV. 201 (1950).

disposed of by the President only upon advice or consent of the cabinet. In short, the cabinet's functions are political and not capable of legal cognition. This makes legally tenable Professor Schlesinger's terse observation that "American Presidents fall into two types: those who like to make decisions and those who don't"<sup>5</sup> but rather delegate matters to their officers.

This, however, does not mean that our constitutional system "knows only 'one executive power,'" as Professor Corwin thinks.<sup>6</sup> On the contrary, the federal government is not organized as an ideal hierarchy.<sup>7</sup> The American President is at the helm of "his" government in a rather restricted sense.

Even where the Constitution clothes the President with a function of supremacy, as in the case of his position as the commander of the army and navy, the extent of his power is sometimes doubtful.<sup>8</sup> More often, however, the grant of presidential power stems from a statute.<sup>9</sup> In that case the enabling statute must be analyzed to determine his authority.<sup>10</sup> And if, as is now the rule rather than the exception, a statute vests functions in an administrative body or officer other than the President, that agency and not the President is the bearer of the powers concerned. It is the National Labor Relations Board and not the President that holds union elections and decides (subject to judicial control, not relevant here) which labor practices are unfair,<sup>11</sup> and it is the Postmaster General, rather

5. SCHLESINGER, *THE COMING OF THE NEW DEAL* 527 (1959).

6. CORWIN, *op. cit. supra* note 3, at 84; *Cole v. Young*, 226 F.2d 337, 339-40 (D.C. Cir. 1955). *But see* WALDO, *THE ADMINISTRATIVE STATE*, 112 (1948); SCHLESINGER, *op. cit. supra* note 5, at 511-73.

7. Aside from outright dictatorships, such an ideal hierarchy hardly exists anywhere. The term "hierarchy" derives from the organization of the Church, but even under canon law, a priest, for instance, may not be removed from office without specific legal grounds as set forth in *Codex Iuris Canonici* can. 2147-67. In other words, even here subordinate organs cannot be freely interfered with from above.

8. *Compare* *Fleming v. Page*, 50 U.S. (9 How.) 603 (1850) (President's powers are that of a military commander in the strict sense), *with In re Yamashita*, 327 U.S. 1 (1946) (President may convene a military commission to punish war criminals). *See also* Mason, *Inter Arma Silent Leges: Chief Justice Stone's Views*, 69 HARV. L. REV. 806 (1956); PARKER, *op. cit. supra* note 1, at 448-53.

9. *E.g.*, §§ 206-10 of the Labor Management Relations Act, 61 Stat. 155 (1947), 29 U.S.C. §§ 176-80 (1958) (national emergency strikes); Selective Service Act, 62 Stat. 625 (1948), 50 U.S.C. App. § 468 (1958) (seizure of manufacturing plants failing to produce goods for the Atomic Energy Commission); Tariff Act and Trade Agreement Extension Act, 19 U.S.C. §§ 1001, 1364 (1958) (proclamation of tariffs); Federal Aviation Act, 72 Stat. 782, 795 (1958), 49 U.S.C. §§ 1461, 1486 (1958) (licensing of foreign air carriers).

10. *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309 (1958); *Chicago & Southern Airlines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); *Carl Zeiss, Inc. v. United States*, 76 F. 2d 412 (C.C.P.A. 1935); *Schmidt Pritchard & Co. v. United States*, 167 F. Supp. 272 (Cust. Ct. 1958). *See also* *Cole v. Young*, 226 F.2d 337 (D.C. Cir. 1955).

11. NLRA §§ 9-11, 61 Stat. 143 (1947), 29 U.S.C. §§ 159-61 (1958).

than the chief executive, who determines what books are so "vile" as to exclude them from the mails.<sup>12</sup> The President "takes care" that the law is enforced<sup>13</sup> but not that it be changed; and he may direct law enforcement only when he is so authorized.<sup>14</sup> Legally speaking, he has no overall administrative authority.

Of course, to his statutory or constitutional law enforcing authority must be added—quite aside from his psychological leadership as the nation's political pacemaker—the President's most powerful way of indirectly forcing his will upon the administrative branch of government: his power of appointment and removal. The former, limited by the necessity of the consent of the Senate, assures the President to a reasonable extent that only persons who share his views on major questions will hold executive posts and that dissenters will not be reappointed. It requires no further discussion here. The latter works as a permanent, implicit warning against the appointee to conform to the wishes of the chief of state.

However, the presidential removal power is not unlimited. While it is now established that, unlike the power to appoint, it is not subject to the consent of the Senate,<sup>15</sup> it yet exists only where the removal does not violate positive law. The terms of a cabinet member as well as of many other agency heads are not statutorily established. It is therefore correct to say that they hold their offices at the President's pleasure.<sup>16</sup> The chiefs and members of some other agencies, on the other hand, hold office for a period of time that is fixed by statute. Can it be said then, that unless the incumbent violates his official duties or commits a crime—in short, if he does not "behave" in the sense of the old laws that have established the tenure of English and American judges<sup>17</sup>—he has a right to stay in office until his term expires? The Supreme Court answered this question in the affirmative in the case of *Humphrey's Executors v. United States*.<sup>18</sup> This decision rested largely on the quasi-judicial and quasi-legislative nature of the Federal Trade Commission involved in the particular lawsuit. This is unfortunate, not only because "quasi-judicial" is a term of uncertain meaning, but mainly because the heads of the old-

12. 64 Stat. 451 (1950), 39 U.S.C. § 259 (1958). Cf. *Summerfield v. Sunshine Book Co.*, 221 F.2d 42 (D.C. Cir.), cert. denied, 349 U.S. 921 (1955).

13. U.S. CONST. art. II, § 3.

14. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Schmidt, Pritchard & Co. v. United States*, 167 F. Supp. 272 (Cust. Ct. 1958); L. C. PARKER, *op. cit. supra* note 1.

15. *Myers v. United States*, 272 U. S. 52 (1926).

16. *Ibid.*

17. 13 Will. 3, c. 2 (1701); 1 Geo. 3, c. 23 (1760); 1 BLACKSTONE, COMMENTARIES. 267; U. S. CONST. art. III, § 1.

18. 295 U.S. 602 (1935). See also *Wiener v. United State*, 357 U.S. 349 (1958).

line departments perform duties that are just as quasi-judicial or legislative as that of "independent" agencies.<sup>19</sup> Yet the case of *Wiener v. United States*<sup>20</sup> has extended the *Humphrey*<sup>21</sup> rule to quasi-judicial agencies whose members have no fixed statutory term. *Wiener* settles some questions concerning the removability without cause of agency heads, but it raises and leaves unanswered other problems. A brief analysis of what seems to be the present status of the law seems apposite.

The *Humphrey* case<sup>22</sup> held that the FCT:

is an administrative body created by Congress . . . to perform . . . specified duties as a legislative or as a judicial aid. . . . Its duties . . . must be free from executive control. In administering the provisions of the statute in respect to 'unfair methods of competition' . . . the commission acts in part quasi-legislatively and in part quasi-judicially. . . . We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character just named. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies . . . cannot well be doubted; and that authority includes . . . power to fix the period during which they shall continue, and to forbid their removal . . . in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude . . . against the latter's will.<sup>23</sup>

The case involved a commissioner whose seven-year term had not expired. The decision rests in part on the power of Congress to establish such a term.

*Wiener*<sup>24</sup> quotes *Humphrey* with approval and reiterates the latter's strong dictum that the rule does not apply to "purely executive" officers. The "President's inherent power to remove a postmaster, obviously an executive official," cannot be doubted.<sup>25</sup>

But *Wiener* goes a considerable step beyond *Humphrey*. In the *Humphrey* case a statutorily fixed tenure of office was involved. The Court could have rested its holding simply on this fact, quite regardless of the "quasi-judicial" or "purely executive" functions of the official in-

19. See *infra*, text at note 31.

20. 357 U.S. 349 (1958).

21. 295 U.S. 602 (1935).

22. *Ibid.*

23. *Id.* at 628-29.

24. *Wiener v. United States*, 357 U.S. 349 (1958).

25. *Id.* at 351.

volved. Mr. Wiener, on the other hand, was a member of a so-called War Claims Commission which was to "adjudicate according to the law"<sup>26</sup> claims of former war prisoners, camp internees, and other persons and organizations who had suffered damage at the hands of the enemy during World War II. The Commission was intended to be of a short duration. After its life had been extended two times, it was abolished in 1954. "This limit on the Commission's life was the mode by which the tenure of the Commissioners was defined, and Congress made no provision for removal of a Commissioner."<sup>27</sup>

Does, then, the *Wiener* rule mean that every agency member of a quasi-judicial agency with an undefined duration has lifetime tenure? Weighty authority so states, thus applying *Wiener* to the FCC and the FPC.<sup>28</sup> It can be doubted, however, whether the rule stemming from a case where "Congress provided for a tenure defined by the relatively short period of time during which the War Claims Commission was to operate"<sup>29</sup> could be applied to *permanent* agencies.

Justice Frankfurter, speaking for a unanimous Court, makes one thing clear: the quasi-judicial independence of an agency, which precludes presidential removal, is a purely statutory matter. Congress could have either validly chosen to vest the War Claims Commission's functions in the Federal Security Administrator, "indubitably an arm of the President," as was originally planned,<sup>30</sup> or it could have created a commission whose members were to serve at the President's pleasure.<sup>31</sup>

In other words, an agency may decide cases and it may have to follow a quasi-judicial procedure in so deciding, but it need not be an independent agency within the meaning of *Humphrey* and *Wiener*. Thus the Attorney General, the Postmaster General, the Secretary of Agriculture, the Federal Security Administrator—to name but a few examples—are required to employ court-like procedures in certain cases,<sup>32</sup> just as much

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26. *Id.* at 350; War Claims Act of 1948 §3, 62 Stat. 1241 (1948), 50 U.S.C. App. § 2002 (1958).

27. *Wiener v. United States*, 357 U.S. 349, 350 (1958).

28. 1 DAVIS, ADMINISTRATIVE LAW TREATISE 22, n.18 (1958).

29. *Wiener v. United States*, 357 U.S. 349, 352 (1958).

30. *Id.* at 354.

31. Brown, *The Supreme Court, 1957 Term*, 72 HARV. L. REV. 77, 165-66 (1958).

32. *Marcello v. Bonds*, 349 U.S. 302 (1955) (Attorney General must accord due process to deportee even though APA's hearing provisions do not apply); *Reilly v. Pinkus*, 338 U.S. 269 (1949), (Postmaster General's mail fraud order must be based upon due process including the right to cross examine experts); *Morgan v. United States*, 298 U.S. 468 (1936) (full hearing to precede rate making under Packers and Stockyards Act, 42 Stat. 166 (1921), 7 U.S.C. § 211 (1958)); *Ferenz v. Folsom*, 237 F.2d 46 (3d Cir. 1956), *cert. denied*, 352 U.S. 10006 (1957) (typical quasi-judicial procedure before Secretary of Health, Welfare and Education under the Social Security Act, 42 U.S.C. § 405 (1958)).

as, say, the NLRB, the FTC or the late War Claims Commission. Yet the former are not, whereas the latter are "independent" agencies whose heads have job security. This, of course diminishes the importance of the *Wiener* rule: the party claimant or respondent is not constitutionally protected against a congressional choice of this or that type of agency. He is merely protected against presidential, political interference *if* Congress has chosen an independent agency for the adjudication of his right.

If, contrary to the above interpretation, the *Wiener* holding extends to every adjudicatory agency whose head and members have no statutorily limited tenure, what, then is the *differentia specifica* against "purely executive" agencies, such as the Postmaster General or the Attorney General, who, as we have seen, must adjudicate rights "according to law" just as much as their independent brethren? Why could the latter but not the former be removed despite their quasi-judicial functions? It has been suggested that the distinction depends on the relative proportion of the agency's adjudicatory work load: if it constituted only a "relatively insignificant portion" of the agency's work, the agency heads would not enjoy the benefit of the *Wiener* decision.<sup>33</sup> That could lead to nice questions. Surely, it cannot be denied that the rendition of a quasi-judicial social security decision<sup>34</sup> constitutes something more than an insignificant portion of the workload of the Department of Health, Welfare, and Education. Yet it can hardly be doubted that its chief was not meant to fall within the *Wiener* rule.<sup>35</sup>

The holding in *Humphrey* is rationalized also upon the fact that the FTC acted "in part quasi-legislatively" in addition to acting quasi-judicially.<sup>36</sup> This is not mere dictum; it applied to the late Mr. Humphrey as well as any other Federal Trade Commissioner. Thus, *if* the *Wiener* rule must be applied not only where an agency is inherently short-lived, like the War Claims Commission, but also where it is of an indefinite duration, like the FPC, it would make apparently no difference that a large or maybe the major portion of the agency's work consists of rule making rather than decision making. Professor Davis's suggestion that *Wiener* "does not necessarily reach such an agency as the SEC, whose functions are not only quasi-judicial . . ."<sup>37</sup> would be persuasive

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33. Brown, *The Supreme Court, 1957 Term*, 72 HARV. L. REV. 77, 166 (1958). See also 1 DAVIS, ADMINISTRATIVE LAW TREATISE 22, n.18 (1958) (*Wiener* decision, note 29 *supra*, "does not necessarily include such an agency as the SEC, whose functions are not only quasi judicial . . .").

34. *E.g.*, *Ferez v. Folsom*, note 32 *supra*.

35. *Wiener v. United States*, 357 U. S. 349 (1958).

36. Text accompanying note 23 *supra*.

37. See note 28 *supra*.

only if the SEC's work was not to a large extent quasi-legislative. An article by the Solicitor of this agency seems to prove the contrary.<sup>38</sup>

Moreover and most important, the rationale that demands judicial independence does not apply to the legislature. Judges who try individual cases involving a defendant's or accused's life, liberty or property must, by our standards of justice, be removed from outside influence; and this should be true of (administrative) quasi-judges, too. However, this certainly is not and never was true of legislators, who have always been subjected to the influence of all sorts of extraneous sources, be it the White House or lobbyists' groups. It is difficult to see why an agency about to be engaged in the enactment of a regulation, i.e., in "quasi-lawmaking," should not listen to the advice or protestations of this or that group of parties interested.<sup>39</sup>

There are "purely executive" officials (that is, those whose duties are neither adjudicatory nor rule making) who have statutory terms, like certain postmasters,<sup>40</sup> U. S. Marshals,<sup>41</sup> or—to mention an agency head—TVA directors.<sup>42</sup> No answer can be gleaned from the *Myers*<sup>43</sup> decision as to whether such officials are freely removable despite their statutory tenure. That case involved the presidential removal of a postmaster of the first class whose term was to last four years pursuant to the following statute: "Postmasters of the first . . . class shall be appointed by the President . . . by and with the advice and consent of the Senate, and shall hold their offices for four years *unless sooner removed* or suspended according to law. . . ."<sup>44</sup> (Italics supplied.) The true issue was not "the President's inherent power to remove a postmaster, obviously an executive official," as Justice Frankfurter's dictum in the *Wiener* case seems to suggest.<sup>45</sup> Rather, it presented the question of the validity of a statute forbidding the removal of first class postmasters without the consent of the Senate. That Mr. Myers could be removed at all prior to the expira-

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38. Foster, *Application of the Administrative Procedure Act to the Statutes Administered by the Securities and Exchange Commission*, in THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 213 (1947). See also Timbers and Garfinkel, *Examination of the Commission's Adjudicatory Process: Some Suggestions*, 45 VA. L. REV. 817 (1959).

39. For two excellent writings exploding the myth that regulation-making agencies should live in an ivory tower, see Armstrong, Book Review, 14 READING GUIDE, June 1959, p. 46 (U. of Va. L. School); Armstrong, *Congress and the Securities and Exchange Commission*, 45 VA. L. REV. 795 (1959). And see Note, *Ex Parte Contacts With the Federal Communications Commission*, 73 HARV. L. REV. 1178 (1960).

40. 39 U.S.C. § 31 (1958) (four years unless sooner removed).

41. 28 U.S.C. § 541 (c) (1958) (four years).

42. 16 U.S.C. § 831a (a) (1958) (nine years).

43. *Myers v. United States*, 272 U.S. 52 (1926).

44. See note 40 *supra*.

45. *Wiener v. United States*, 357 U.S. 349, 351 (1958).

tion of four years was not disputed, because the above-quoted statute expressly so ordained;<sup>46</sup> and the Court decided merely that a senatorial consent requirement would be unconstitutional. In other words, dictum going beyond this notwithstanding, Mr. Myers had had no true statutory tenure but merely a maximum term.

*Morgan v. TVA*,<sup>47</sup> however, went farther. Here the statute gave TVA members, such as the plaintiff, a nine-year term of office;<sup>48</sup> and it provided for two methods of removal: one by concurrent resolution of both houses of Congress and the other by the President for cause (namely, for injecting political considerations in appointing or promoting subordinates).<sup>49</sup> The plaintiff was removed by the President "for stated cause" but concededly not "for any specific ground laid down in the statute."<sup>50</sup> The appellate court ruled that the TVA board members being executive officials did not fall under *Humphrey*,<sup>51</sup> but that yet the TVA Act did not so expressly curtail the President's "inherent" removal power as to make it necessary to determine whether such a curtailment could be constitutionally enacted.<sup>52</sup> In short, the statute did not *expressly* say that TVA directors may not be removed for other reasons than the one stated in the law, and the court refused to apply the maxim *expressio unius est exclusio alterius*. A weak support for this reasoning could be adduced from the fact that the statute made the removal for the one specifically stated cause mandatory ("shall be removed")<sup>53</sup> whereas it said nothing about possible discretionary removals. This reasoning amounts to an unconvincing tour de force. In any case it does not answer the question whether Congress may by *express* language make an executive officer irremovable during good behavior.

Neither *Humphrey*<sup>54</sup> nor *Wiener*<sup>55</sup> actually prevented the President from removing even a quasi-judicial officer. Rather, these cases merely rendered the Government liable for the official's unpaid salary under the general rules of damages. These rules include, it would seem, the rule of avoidable consequences, whereby a plaintiff is not entitled to lost wages if he earned or could have earned the equivalent amount else-

46. *Myers v. United States*, 272 U.S. 52, 107-108 (1926).

47. 115 F.2d 990 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941).

48. See note 42 *supra*.

49. 16 U.S.C. §§ 831c (f), 831e (1959).

50. *Morgan v. TVA*, 28 F. Supp. 732, 733 (E. D. Tenn. 1939), *aff'd* 115 F. 2d 990 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941).

51. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

52. *Morgan v. TVA*, note 50 *supra*.

53. 16 U.S.C. § 831e (1959).

54. See note 51 *supra*.

55. See note 35 *supra*.

where. High ranking Government officials usually have no difficulty in finding another equally lucrative position. And so the amount recoverable, if any, for a wrongfully ousted official may amount to a mere trifle rather than serve as a deterrent for the administration to interfere with independent agencies.<sup>56</sup>

The recent case of *Vitarelli v. Seaton*,<sup>57</sup> on the other hand, holds a wrongfully dismissed Government employee "entitled to the reinstatement which he seeks" in his injunction suit.<sup>58</sup> If this means what it says, then it should be likewise applicable to officers of cabinet rank and heads of agencies.

According to the Administrative Procedure Act § 11, trial examiners are "removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission . . .";<sup>59</sup> and § 5, first sentence, makes it clear that the presence of a good cause for a trial examiner's removal must be determined in a quasi-judicial hearing.<sup>60</sup>

Trial examiners may conduct hearings, whenever (a) neither the agency itself nor one of its members presides at the hearing and (b) the enabling statute, as judicially construed, requires that a case be determined "on the record after opportunity for an agency hearing,"<sup>61</sup> in other words, when a quasi-judicial hearing is necessary,<sup>62</sup> quite regardless of whether the agency itself may be regarded as "quasi-judicial" and "independent" or not. Thus the Postmaster General is an old-line cabinet member removable at the President's pleasure; but his subordinate trial examiner, who hears mail fraud or obscenity cases,<sup>63</sup> is irremovable and hence independent nearly like a judge. The trial examiner's independence is, as matter of fact, enhanced by the fact that his superior—the agency—may not lightly overrule his findings but rather must accord them great weight.<sup>64</sup> This situation—the existence of the independent

56. Mr. Humphrey was dead at the time of the lawsuit. *Humphrey* case, note 51 *supra*. Mr. Wiener had first brought a quo warranto proceeding, which, however, was dismissed as moot by stipulation of the parties. *Wiener v. United States*, 357 U.S. 349, 351 n. 1 (1958).

57. 359 U.S. 535 (1959).

58. *Id.* at 546.

59. 60 Stat. 244 (1946), 5 U.S.C. § 1010 (1958).

60. 60 Stat. 239 (1946), 5 U.S.C. § 1004 (1958) (Government officials "other than examiners appointed pursuant to section 11" are not entitled to due process hearings in matters involving their tenure of office).

61. *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); APA § 7 (a) (3), 60 Stat. 241 (1946), 5 U.S.C. § 1006 (a) (3) (1958).

62. *But see* *Marcello v. Bonds*, 349 U.S. 302 (1955) (statute may exempt agency from trial examiner requirement).

63. *E.g.*, *Grove Press, Inc. v. Christenberry*, 175 F. Supp 488 (S.D.N.Y. 1959), 73 HARV. L. REV. 583 (1960); *Greene v. Kern*, 178 F. Supp 201 (D.N.J. 1959).

64. *Universal Camera Co. v. NLRB*, 340 U.S. 474, 496 (1951); *Continental Can*

quasi-judge within the not independent agency—shows most clearly the vagueness of the conception “independent agency.”

We may summarize the preceding points by saying that, while judges are *constitutionally* independent,<sup>65</sup> agencies are not. Some agencies, however, have been statutorily endowed with independence in the sense that their members are removable only for cause. The validity of such statutory grants has been upheld in cases where the agency was, at least “largely,” engaged in court-like (“quasi-judicial”) procedures; but it has been doubted where the agency’s task was devoted to “purely administrative” rather than quasi-judicial tasks. Even non-independent agencies, however, whose heads are freely removable, may have trial examiners to fulfill the agency’s quasi-judicial functions (if the agency has any) on the trial level. These trial examiners are statutorily irremovable.<sup>66</sup>

Little remains to be said concerning the term—a term rather than a concept—“regulatory agency,” which is used by many authors. If the phrase is to embrace any agency that “regulates” anything, it is inherently meaningless, for it would describe an attribute common to all governmental authorities. If it means an agency that issues regulations (rules), the term is not very significant either, for there is hardly any administrative agency that has not at least the authority to make procedural rules,<sup>67</sup> quite apart from the fact that important “regulatory” measures may under our system of law be taken by rule of individual decision.<sup>68</sup> Most of the federal agencies’ actions tend to affect “business” or “business and labor,” wherefore a designation of some agencies but of not of others as “regulatory” in this sense is likewise multifarious and hence useless. An equation, finally, of “regulatory” with “independent” agency<sup>69</sup> is nonsensical because, as we have seen, not only is the term “independent agency” vague and of little usefulness, but also would it include, for instance, the Tax Court or the above-discussed War Claims Commission, which to call “regulatory” would divest that word of its immanent connotation as a simile to “policy making.” This, however, does not mean that it is suggested to use the word “regulatory” to de-

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Co. v. United States, 272 F.2d 312, 316 (2d Cir. 1959).

65. U.S. CONST. art III, § 1.

66. Though not as a matter of constitutional law. See note 62 *supra*.

67. 1 Stat. 28 (1789), 5 U.S.C. § 22 (1958).

68. SEC v. Chenery Corp., 332 U.S. 194 (1947); NLRA § 14 (c) (1), as amended, 73 Stat. 541 (1959), 29 U.S.C.A. § 164 (c) (1) (NLRB may “by rule of decision or by published rules . . .” decline to assert jurisdiction).

69. *E.g.*, FORKOSCH, A TREATISE ON ADMINISTRATIVE LAW 10-12 (1956); LOEWENSTEIN, VERFASSUNGSRECHT UND VERFASSUNGSPRAXIS DER VEREINIGTEN STAATEN 245, 356 (1959).

scribe policy making agencies, inasmuch as this would include more than ninety per cent of all the agencies. Rather, the term should be discarded altogether.

Lastly, there are authorities that are not agencies in the popular meaning of the word but rather bureaus within other agencies, such as the Director of Internal Revenue in the Treasury Department, the FBI in the Department of Justice, the Bureau of Land Management in the Department of the Interior, or the Wage and Hour Division in the Department of Labor. Whether these bureaus are "agencies" within the meaning of a given statute must be determined in the light of that statute. The Administrative Procedure Act in § 2 (a) treats them as agencies for the purposes of that act whenever they are vested with final authority under a given set of laws<sup>70</sup> as, e.g., the Administrator of the Wage and Hour Division under the FLSA<sup>71</sup> or the Bureau of Land Management under a presidential Reorganization Plan.<sup>72</sup> Here again the independence of these semi-agencies is a mere comparative one, in that it rests on the width of discretion they have in administering the law and the mode of appointment and tenure of their heads.

#### CONCLUSION

The founding fathers no doubt conceived the administrative-executive branch of the federal government as a monolithic pyramidal structure with the chief executive at the apex. History developed otherwise, however. The administrative and executive branch of the government is divided into agencies of different size and functions. Some of them are politically tied to the President's will. Others are independent from the President to a varying degree. All agencies enjoy the right to regulate their own procedure and many of them are engaged in quasi-legislative tasks embracing all walks of life. Many agencies that are engaged in individual decision making must follow a formalized quasi-judicial procedure. Some of the agencies performing quasi-judicial tasks are fairly independent from the President while many others are either old-line agencies (Cabinet members) or agencies within agencies. Moreover, the hearing of quasi-judicial cases is regularly assigned to trial examiners whose statutory independence is greater than that of their—"independent" or "non-independent"—agency heads.

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70. "'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States . . ." APA § 2 (a), 60 Stat. 237 (1946), 5 U.S.C. § 1001 (a) (1958).

71. FLSA § 4 (a), 52 Stat. 1061 (1938), 29 U.S.C. 204 (a) (1958).

72. 1946 Reorg. Plan No. 3 § 403 (b), 60 Stat. 1100 (1946), 11 Fed. Reg. 7876 (1946).

In other words, our administrative system has grown without a centralized plan but rather individually to fit the needs of this or that type of agency.

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