



## **Recommendation 76-1**

### **Exception from Mandatory Retirement for Certain Presidential Appointees**

(Adopted June 3-4, 1976)

The Civil Service Retirement Act subjects Federal employees to mandatory retirement at age 70 and upon completion of 15 years service, 5 U.S.C. § 8335 (1970). Under 5 U.S.C. § 8335(c), the President has broad discretionary power to exempt employees from mandatory retirement.

This recommendation takes no position as to whether as a matter of personnel administration a policy of mandatory retirement for Federal employees at age 70, coupled with authority to make exceptions in appropriate cases, is desirable. However, as applied to those officers of the Executive branch who are appointed by the President with the advice and consent of the Senate the provisions of section 8335 are awkward and inappropriate. Such officers serve either for an indefinite term at the pleasure of the President, for a definite term but nevertheless at the pleasure of the President, see, e.g., 28 U.S.C. § 541, § 561; or for definite terms under statutes which limit the President's removal power in order to preserve the officers' independence from Executive direction and control.

Where the officers serve at pleasure, the provisions of section 8335 impose a restraint, albeit minor, on the President's appointment power, and are unnecessary to his supervisory responsibility over the execution of the laws. However, they may have occasional value, where the officer's term is otherwise indefinite, in compelling consideration of the continued suitability of a longtime incumbent. Where the officer serves at pleasure but for a definite term, even this advantage largely disappears. Where the officers do not serve at pleasure, as in the case of the members of the independent regulatory commissions, the application of section 8335 is inconsistent with the goal of agency independence and a potential source of embarrassment to the officer, the agency and the President.

### **Recommendation**

Congress should amend 5 U.S.C. § 8335 (d), which contains exceptions to the mandatory retirement provisions, to add a new exception for employees appointed by the President with the advice and consent of the Senate to serve for a definite term of years.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### **Citations:**

41 FR 29653 (July 19, 1976); separate statement at 41 FR 30319 (July 23, 1976)

\_\_ FR \_\_\_\_ (2012)

4 ACUS 47

**Note:** This recommendation has become moot as a result of sec. 5, Pub. L. 95-256.

### **Separate Statement of Kenneth Culp Davis**

The theory behind the recommendation is that presidential influence on formal adjudication is harmful. Yet no single case was brought to the attention of the Conference in which such influence had been found to have been harmful.

Even if the theory could be supported with facts, Congress clearly should not act on the recommendation without considering a question the Conference did not consider: Which are more important—the dozens of cases per year that could be affected by adoption of the recommendation, or the tens of thousands per year decided in executive departments under cabinet officers who serve at the will of the President and are therefore subject to direct presidential influence?

I could join in a recommendation reaching tens of thousands of cases and neglecting dozens, but I cannot join in a recommendation reaching dozens and neglecting tens of thousands.

Furthermore, I think the arrangement Congress has provided for the tens of thousands is working satisfactorily, and many other questions about the administrative process are far more deserving of attention both by the Conference and by Congress.