

IN THE MATTER OF
ITT CONTINENTAL BAKING COMPANY, INC., ET AL.

Docket 8860. Order, April 11, 1973.

Order denying request for a ruling of disqualification, and denying renewed motion to intervene by Consumers Federation of America, Consumers Union of the United States, Inc., and Federation of Homemakers, Inc. Response by Commissioner MacIntyre. Separate Statement by Commissioner Jones.

RESPONSE BY COMMISSIONER EVERETTE MACINTYRE TO THE
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

On March 29, 1973, Victor H. Kramer, Esquire, and Larry P. Ellsworth, Esquire, counsel for Consumers Federation of

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America, Consumers Union of the United States, Inc., and Federation of Homemakers, Inc. filed a motion requesting my disqualification from participation in this proceeding. The motion is based upon the allegation that I am not independent of undue influence from the President of the United States. This allegation in turn is based upon the premise that since I, at the present time, am serving pursuant to the terms of an Executive Order number 11704, issued February 28, 1973, providing for my exemption from the application of the mandatory separation provision of the Civil Service Retirement Act (5 U.S.C. § 8335), until February 28, 1974, I am not free from undue influence and therefore capable of rendering independent judgment in the discharge of my duties and responsibilities.

It is further alleged that I am serving at the pleasure of the President of the United States and therefore subject to undue influence and pressure from him.

My response to those allegations is simply this. I deny that they have any factual foundation and I reject any thought, allegation or contention totally that I am now, or have at any time in the past, been subjected to undue influence or pressure from the President of the United States or anyone else connected with the White House. Moreover, I reject and refute any notion, allegation or contention that I would have succumbed to any undue influence or pressure from the President of the United States or anyone connected with the White House if such had been exerted or otherwise evidenced regarding my conduct in the discharge of my duties as a member of the Federal Trade Commission.

I am not aware, during my experience as a member of the Federal Trade Commission, of communications from the White House regarding decisions or other actions I participated in or was about to participate in at the Federal Trade Commission. In fact, my experience is in accord with the advice once provided by an Assistant to the President in a memorandum to members of the White House staff to the effect that there should be no such communication between them and members of the independent regulatory agencies, such as the Federal Trade Commission. The memorandum to which I refer is one that was directed to members of the White House staff under date of May 21, 1969, from an Assistant to the President who had some responsibilities regarding recommendations of nominations of persons for membership on such agencies. There it was stated "the Commissioners of these agencies have quasi-judicial responsibilities for individual cases coming before their agencies on rates,

license renewals, route awards, and so forth. Obviously, any executive interference in this quasi-judicial function would be highly improper." Copies of that memorandum were provided members of the independent regulatory agencies and I attach a photocopy of the same (see Appendix A).

My views concerning the propriety and need for preserving my independence as a member of the Federal Trade Commission are well-known. Likewise, are well-known my views that there should be no intermeddling by persons in one agency of the government into the affairs of another agency of the government. That applies especially to these so-called independent regulatory agencies.

On February 26, 1973, Victor H. Kramer, Esquire, wrote and asked me for the privilege of putting to me several questions regarding my selection by the President of the United States as a nominee to be a member of the Federal Trade Commission. I agreed to have him ask me a number of questions. On March 8, 1973, he appeared at my office and did ask me a number of questions. In that connection it should be noted that he asked no question concerning the issuance of any Executive Order which exempted me from the application of the mandatory separation provision of the Civil Service Retirement Act (5 U.S.C. § 8335).

Although movants challenged the legality of the action of the President of the United States in issuing executive orders exempting members of independent regulatory agencies from the application of the mandatory separation provision of the Civil Service Retirement Act (5 U.S.C. § 8335), they do not account for the many executive orders which have been agencies from the application of that law.¹

In conclusion, I wish to reiterate that I reject the notion, allegation and contention that I am subject to any undue influence or pressure from the White House and that I am improperly serving as a member of the Federal Trade Commission.

¹ Since the automatic provision became effective, January 24, 1942, many members of independent regulatory agencies have served under executive orders exempting them from the application of the mandatory separation provision. Some of these exemptions have applied to members of the Federal Trade Commission during the Administrations of President Franklin D. Roosevelt and President Harry S. Truman. Indeed, during the Administration of President Truman a majority of all members of the Federal Trade Commission were serving after they had passed the age of 70 and were exempted from the application of the provision of law in question. More recently, members of other independent regulatory agencies have been so exempted.

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Moreover, I shall not recuse myself or otherwise refrain from participating as a member of the Federal Trade Commission in response to the motion which was filed by Victor H. Kramer, Esquire, et al., on March 29, 1973.

April 4, 1973

APPENDIX A

THE WHITE HOUSE
WASHINGTON
May 21, 1969

MEMORANDUM FOR THE WHITE HOUSE STAFF

Subject: Contacts between the White House and the Independent Regulatory Agencies

The independent regulatory agencies include:

Civil Aeronautics Board
Federal Communications Commission
Federal Maritime Commission
Federal Power Commission
Federal Trade Commission
Interstate Commerce Commission
Securities and Exchange Commission

This memorandum discusses some important points you should bear in mind with regard to these agencies.

Contacts between the White House and the regulatory agencies are very sensitive on two grounds: (1) The Congress has a special relationship with these agencies, viewing them in part as instruments of the Congress in its constitutional power to regulate interstate and foreign commerce; (2) the Commissioners of these agencies have quasi-judicial responsibilities for individual cases coming before their agencies on rates, license renewals, route awards, and so forth. Obviously, any executive interference in this quasi-judicial function would be highly improper.

In spite of these sensitivities, matters often arise which do require official or informal contacts with the Commissioners or the staffs of these agencies. The following guidelines are provided for any exposure you may have to these agencies or problems pending before them. They also apply in those cases where other agencies of the executive branch act in a regulatory or quasi-judicial role.

1. Any expression of interest or any attempt to influence the

outcome of any case pending is illegal. These cases are typically extremely complicated, and it is very dangerous to make judgments on the basis of limited information as to how the White House should like to see any case resolved. You should in no way express interest to these agencies in the outcome of pending cases and in no way attempt to influence the Commissioners or hearing examiners in their decisions on any case pending before their agencies.

2. It is important to remember that the cases that come before these agencies are often extremely important to the parties concerned and involve large amounts of money. They are, therefore, very closely watched for any evidence of improper procedure or influence. It is important to avoid even the mere *appearance* of interest or influence.

3. You may, of course, listen to comments and views on such cases when they are volunteered to you. However, such visits or the submission of written briefs should not be encouraged — better still, they should be sidestepped and avoided wherever possible.

4. Inquiries about the status of cases pending before these agencies should not be made. Instead, the inquirer should be advised to contact the agency directly.

5. The policies and findings of these agencies often interact heavily with the policies of the executive branch of Government. Transportation policy, for instance, is affected heavily by the policies of the ICC and the CAB. There is, therefore, occasion for White House staff contact with these agencies. However, for the reasons cited above, you should keep my office informed of any contact you may have with these agencies. Please call Dan Hoigren or Tom Whitehead *in advance* to assure appropriateness of such contacts.

/s/ Peter M. Flanigan
Assistant to the President

SEPARATE STATEMENT OF COMMISSIONER JONES

Petitioners urge the single most serious issue which could be raised with respect to the integrity of the Commission's actions and decisions in their motions seeking the disqualification of Commissioner MacIntyre. They argue that the President's action in purporting to exempt Commissioner MacIntyre from the compulsory retirement provisions of the Civil Service Retirement Act (5 U.S.C. § 8335 (1970)) for one year periods has converted Commissioner MacIntyre's status on the Commission

from that of a quasi-judicial official serving for a fixed 7-year term removable only for cause to that of an official serving strictly at the pleasure of the President. They argue further that Commissioner MacIntyre's acquiescence in the need for these exemptions necessarily deprives him of the environment of independence which the Congress intended Commissioners to have when it provided for them to serve for a fixed term. This view of the Congressional intent was confirmed by the Supreme Court in its decisions in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) and *Wiener v. United States*, 357 U.S. 349 (1958).

No issue is raised by the petition of actual undue influence. The issue raised goes solely to the legality of the circumstances under which Commissioner MacIntyre finds himself - circumstances, I might add, over which he has no control. If Commissioner MacIntyre's status on the Commission is governed by the terms of the Federal Trade Commission Act (15 U.S.C. 41 (1970)), then he is sitting entirely lawfully on the Commission since no action has been taken to remove him on the only grounds provided by that Act for his removal, namely "inefficiency, neglect of duty, or malfeasance of office." Paradoxically, Commissioner MacIntyre would have no way to test out this view of the law since the President is apparently asserting another view but at the same time has chosen not to apply it in Commissioner MacIntyre's case. By so acting, the President has in one sense removed any realistic incentive for Commissioner MacIntyre to raise the issue. Even his resignation would not provide him with a vehicle to resolve the issue.

In effect, therefore, petitioners are the only parties who can raise this issue and have it resolved by the courts since as members of the public they are entitled to a fair and impartial hearing of the issues in this case by a body duly constituted as Congress intended quite apart from whether they may or may not have the type of interest in this proceeding to be granted the right to intervene.¹

The question of whether the Commission is a duly constituted body as created by Congress depends squarely on a resolution of the issue raised by petitioners as to whether the status of Commissioners upon reaching their seventieth year is governed

¹ The Commission has previously denied these petitioners the right to intervene as parties based on their claimed status as persons whose interests could be injured by the Commission's disposition of the issues in this case.

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by Section 41 of the Federal Trade Commission Act or by Section 8335 of the Civil Service Retirement Act (5 U.S.C. 8335 (1970)). I believe that no Commissioner should be forced to serve on the Commission upon reaching his seventieth birthday under the present circumstances of legal uncertainty surrounding their legal rights. This issue must be resolved. I do not believe it can be resolved by the Commission and hence I am concurring in the Commission's denial of this Petition since it is critical to the independence of the agency as it was originally conceived of by Congress. I am hopeful that the Court of Appeals will in fact hear and determine this issue. April 11, 1973

ORDER (1) DENYING REQUEST FOR A RULING OF DISQUALIFICATION, AND (2) DENYING RENEWED MOTION TO INTERVENE

On March 29, 1973, counsel for Consumers Federation of America, Consumers Union of the United States, Inc., and Federation of Homemakers, Inc., filed with the Secretary of the Commission a document entitled "Renewed Motion . . . to Intervene as Parties; and Motion Requesting Disqualification of Commissioner MacIntyre from Participation in This Proceeding" and a memorandum in support thereof.

In their papers, movants request Commissioner MacIntyre to withdraw from participation in this proceeding or, in the alternative, that the Commission determine that he is disqualified from participation in this proceeding. The ground asserted is that Commissioner MacIntyre is subject to alleged "undue influence from the President of the United States" arising out of the issuance by the President of Executive Orders exempting Commissioner MacIntyre from the mandatory separation provision of the Civil Service Retirement Act, 5 U.S.C. § 8335 (1970). Additionally, movants seek to have the Commission reconsider its order of February 16, 1973, which denied at that time their request for status as intervening parties in this proceeding. The basis for seeking reconsideration of that Order is their view that Commissioner MacIntyre was disqualified from participating in that ruling.

On April 4, 1973, Commissioner MacIntyre circulated to other members of the Commission, and filed for the public record, a statement denying that he has been subject to any improper influence and declining to withdraw from this proceeding. On April 9, 1973, movants filed with the Commission a response to Commissioner MacIntyre's statement.

The Commission has considered the documents submitted by moving organizations and Commissioner MacIntyre's statement in response. Upon such consideration, the Commission

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finds no basis in law or fact for the relief requested. Accordingly,

It is ordered, That the motion to disqualify Commissioner MacIntyre in this proceeding be, and it hereby is, denied.

The Commission further finds no reason to reconsider its decision of February 16, 1973, denying intervention. Accordingly,

It is further ordered, That movants' renewed motion to intervene as parties be, and it hereby is, denied.

Commissioner MacIntyre did not participate in the Commission's consideration and disposition of the above motions. Chairman Engman did not participate in the denial of the renewed motion to intervene for the reason that he was not a Commissioner at the time the original ruling on intervention was made. Commissioner Jones filed a separate statement.