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ADMINISTRATIVE LAW - PRESIDENT'S POWER TO REMOVE

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ADMINISTRATIVE LAW — PRESIDENT'S POWER TO REMOVE — Plaintiff had been appointed to the board of directors of the Tennessee Valley Authority by the President with the advice and consent of the Senate. The statute creating this public corporation gives the President power to remove any director who appoints or promotes lower officials on the basis of anything other than merit.[1] Congress is authorized to remove a member of the board by a concurrent resolution of the two houses.[2] Plaintiff was summarily removed by the President and sued to recover his salary for the whole of the prescribed nine-year term of office. *Held*, that the plaintiff, having duties predominantly executive, could be removed by the President without cause. *Morgan v. Tennessee Valley Authority*, (C. C. A. 6th, 1940) 115 F. (2d) 990, cert. denied (U. S. 1941) 61 S. Ct. 806.

The federal Constitution states that the executive power of the United States shall be vested in a President[3] who shall appoint officials of the United States with the advice and consent of the Senate.[4] Congress, however, may vest the appointment of inferior officers in the President alone, in courts of law, or in the heads of departments.[5] Because the Constitution gives him the power to appoint, and because he must also execute laws of the land, the President, unless the Constitution otherwise provides, has exclusive power to remove those officials whom he appointed with the consent of the Senate. This doctrine was announced in the celebrated case of *Myers v. United States*[6] but was restricted by the holding in the case of *Humphrey's Executor v. United States*,[7] where the President alone removed a member of the Federal Trade Commission and the Supreme Court found that such removal was forbidden by the statute creating the office. In that case the statutory restriction on the President's power was constitutional because the office in question was in its nature quasi-legislative and quasi-judicial rather than chiefly executive. Because the absolute power of removal is based on the theory that the separation of powers requires that the President alone have control over the executive branch of our government, the Court decided that where the function of the official was not purely executive, Congress in creating the office could determine the conditions of removal. The Court ruled that in the case of officials with purely executive duties, the President's power to dismiss could not be hampered, but that where the work was purely quasi-legislative or quasi-judicial, Congress could limit the power. The disposition of cases falling between these extremes was spe-

[1] 48 Stat. L. 63, § 6 (1933), 16 U. S. C. (1934), § 831e.

[2] 48 Stat. L. 60, § 4(f) (1933), 16 U. S. C. (1934), § 831c (F).

[3] Art. II, § 1, "The executive Power shall be vested in a President. . . ."

[4] Art. II, § 2.

[5] Ibid. In these cases Congress may limit the removal power. United States v. Perkins, 116 U. S. 483, 6 S. Ct. 449 (1886).

[6] Myers v. United States, 272 U. S. 52, 47 S. Ct. 21 (1926). This case concerned the right of the President to remove a postmaster appointed with the consent of the Senate for four years. For complete discussion of this decision, see 36 YALE L. J. 390 (1927) and 25 MICH. L. REV. 280 (1927).

[7] 295 U. S. 602, 55 S. Ct. 869 (1935). Donovan and Irvine, "The President's Power to Remove Members of Administrative Agencies," 21 CORN. L. Q. 215 (1936), is an excellent discussion of the whole field.

cifically left for future judicial determination.[8] Evidently the Court is willing to resolve the right of Congress to restrict the presidential power by ascertaining whether the function of the official removed is predominantly executive or otherwise.[9] In the principal case, there were two grounds upon which the decision of the Court might properly be supported. First, as the circuit court suggests, the T.V.A. exercises, if not wholly at least predominantly, executive or administrative powers, and Congress, therefore, cannot constitutionally limit the President's right to remove.[10] Secondly, even if the plaintiff was not an administrative official, the wording of the statute itself does not preclude the President's unassisted dismissal. Although the plaintiff was appointed for a specified number of years,[11] and certain grounds for removal were stated in the statute, the Supreme Court has always recognized that the President's removal power exists unless specifically curbed.[12] In the statute establishing the T.V.A. Congress nowhere prohibited the exercise of such power, although the act was passed after the *Myers* decision announced the presence of a wide presidential discretion and before the *Humphrey's* case had narrowed its scope. The Court's reluctance to limit the presidential power is not surprising in view of the present trend of both Congress and the Court to permit presidential control in a wide degree so that the chief executive may perform effectively his ever-increasing duties.[13] The case, however, is important because it is a forward step in clarify-

[8] Humphrey's Executor v. United States, 295 U. S. 602 at 632, 55 S. Ct. 869 (1935), "To the extent that, between the decision in the *Myers* case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise."

[9] Notice the circuit court's reliance in the principal case on the predominance of the executive. Cf. Donovan and Irvine, "The President's Power to Remove Members of Administrative Agencies," 21 CORN. L. Q. 215 at 229 (1936): "As to officers who perform quasi-legislative or quasi-judicial functions and who also perform executive duties, it is reasonable to conclude that Congress may place upon the President's power of removal such limitations as are necessary and proper to make it possible for such officers properly to discharge the independent functions of their office." These writers, at page 241, note 106, stated that the statute permitted the President to remove members of the board at will!

[10] The board is to co-operate with farm organizations, develop fertilizers, improve plants and operate laboratories. 48 Stat. L. 61, § 5 (1933), 16 U. S. C. (Supp. 1939), § 831d. The corporation can exercise the right of eminent domain, purchase real estate, construct dams, construct power houses and build lines. 48 Stat. L. 60, § 4(i) (1933), 16 U. S. C. (Supp. 1939), § 831c(i). A district attorney was removed in Parsons v. United States, 167 U. S. 324, 17 S. Ct. 880 (1897); an appraiser, in Shurtleff v. United States, 189 U. S. 311, 23 S. Ct. 535 (1903).

[11] 48 Stat. L. 59, § 2(b) (1933), 16 U. S. C. (Supp. 1939), § 831a(b).

[12] Shurtleff v. United States, 189 U. S. 311 at 318, 23 S. Ct. 535 (1903), "The right of removal . . . would exist as inherent in the power of appointment unless taken away in plain and unambiguous language." 6 ORE. L. REV. 165 (1927) discusses the opinions of various state courts on this question.

[13] The fear of presidential tyranny and the corrupt use of political appointments where the president has the sole power to remove has always been counterbalanced by

ing the great number of border-line situations which remained for judicial interpretation after the *Humphrey* decision.

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the desire to make the President an efficient administrative official. Fairlee, "The Administrative Powers of the President," 2 MICH. L. REV. 190 at 201 (1903), states, "Moreover it remains true, as it was argued in 1789, that the power of removal is indispensable to the President if he is to be held responsible for the administration and execution of the laws. And in addition to developing the system of political removals, from the power of removal there has been evolved in large measure, the President's effective power of direction and supervision over the entire national administration."