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CONSTITUTIONAL LAW-PRESIDENTS POWER TO REMOVE FEDERAL OFFICERS

CONSTITUTIONAL LAW—PRESIDENT'S POWER TO REMOVE FEDERAL OFFICERS—The Federal Trade Commission Act provided that, "Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." [1] The President, in removing a commissioner who had been appointed with the consent of the Senate for a seven-year term, disclaimed any reflection upon the commissioner personally or upon his services, but stated that the removal was made because ". . . I do not feel that your mind and my

[1] U. S. C. tit. 15, sec. 41, p. 252.

mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it best for the people of this country that I should have a full confidence." [2] *Held*, that the Act limited the power of the President to remove a commissioner to the causes named; and that such a restriction on the power of the President to remove a commissioner is valid under the Constitution of the United States. *Rathbun v. United States*, (U. S. 1935) 55 Sup. Ct. 869.

To sustain the power of the President to remove a Federal Trade Commissioner, counsel for the Government relied upon the two earlier cases of *Shurtleff v. United States* [3] and *Myers v. United States*.[4] In the *Shurtleff* case the Supreme Court had held that the provision in the Custom Administrative Act that general appraisers appointed by the President "may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office" did not operate to deny to the President the right to remove a general appraiser for causes other than those stated in the statute.[5] In the present case the Court considered the situation to be "plainly and wholly different," the statute fixing a term of seven years, while no definite term had been specified for general appraisers.[6] The limitation on the removal power of the President was held to be not only clearly expressed upon the face of the statute, but it was held to be made clear by a consideration of the character of the commission and the legislative history which accompanied and preceded the passage of the Act. The *Shurtleff* case was thus distinguished on the basis of legislative intent, a favorite judicial device for accomplishing a desired result.[7] The scope of the decision in the *Myers* case was not clear. The Court there held that the exercise

[2] Quoted, (U. S. 1935) 55 Sup. Ct. 869 at 870.

[3] 189 U. S. 311, 23 Sup. Ct. 535 (1903). For a brief summary of the argument of counsel in the present case, see 2 U. S. LAW WEEK, index p. 841 (May 7, 1935). No reference is made in the opinion to McAllister v. United States, 141 U. S. 174, 11 Sup. Ct. 949 (1891). The case might, however, have been distinguished on the ground of statutory construction. See dissenting opinion of Mr. Justice McReynolds in Myers v. United States, 272 U. S. 52 at 224-225, 47 Sup. Ct. 21 at 61 (1926).

[4] 272 U. S. 52, 47 Sup. Ct. 21 (1926).

[5] The Court had refused to limit the removal by the President to the grounds specified in the statute, rejecting the maxim *expressio unis est exclusio alterius* as applied to the facts of the case. As no definite term was specified in the statute in that case, the result would have been, the Court stated, to give the appraiser the right to hold office during his life or until found guilty of some act specified in the statute.

[6] The Court did not rely upon the dictum in Marbury v. Madison, 1 Cranch (5 U. S.) 137, 2 L. ed. 60 (1803), to the effect that an officer appointed for a definite term has a right to hold office and may not be removed by the President. Neither did it refer to Parsons v. United States, 167 U. S. 324, 17 Sup. Ct. 880 (1897), where that dictum was overruled.

[7] Though the removal was by the head of a department, the case of United States v. Perkins, 116 U. S. 483, 6 Sup. Ct. 449 (1886), would appear to be authority for the construction placed upon the statute in the present case. In the absence of statutory provisions to the contrary, the power of removal is inherently an executive power and incident to the power of appointment. Ex parte Hennen, 13 Peters (38 U. S.) 230, 10 L. ed. 138 (1839); Parsons v. United States, 167 U. S. 324, 17 Sup. Ct. 880 (1897); Burnap v. United States, 252 U. S. 512, 40 Sup. Ct. 374 (1920).

by the President of the power to remove a postmaster is not subject to the advice and consent of the Senate and that this power cannot constitutionally be made subject to this limitation by act of Congress. Mr. Justice McReynolds, dissenting in that case, thought the result would be that members of all administrative boards and commissions would hold their places "subject to the President's pleasure or caprice." [8] Some writers considered this too broad a construction of the decision and believed that control over quasi-judicial tribunals was for future decision.[9] In the present case the Court has now limited the doctrine of the *Myers* case to the removal of executive officers; any statements of earlier opinions which might include other than executive officers within the scope of that decision are rejected as dicta. Members of the Federal Trade Commission, a body which exercises quasi-legislative and quasi-judicial functions, are held not to be subject to the same exclusive and illimitable power of removal by the President as are postmasters.[10] The result in the present case is desirable. The nonpartisan character of such agencies as the Interstate Commerce Commission and the Federal Trade Commission should not be impaired. Because of the quasi-judicial nature of their work such agencies should be free from partisan influence.[11] The distinction drawn by the Court between an executive and a quasi-judicial or quasi-legislative office might be inferred from the principle of the

[8] 272 U. S. 52 at 181-182, 47 Sup. Ct. 21 at 47 (1926). In a dictum in the majority opinion in the Myers case, the Court indicated that members of agencies such as the Federal Trade Commission were subject to removal by the President where he disagreed on grounds of policy. The Court said: "there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised." 272 U. S. 52 at 135 (1926).

[9] 25 MICH. L. REV. 280 (1927).

[10] The Court again considered the so-called "decision of 1789," the Congressional debate of that year precipitated by the bill introduced by Mr. Madison to establish an executive Department of Foreign Affairs. While the bill provided that the principal officer was "to be removable from office by the President of the United States," this was changed to read "whenever the principal officer shall be removed from office by the President of the United States." In the Myers case the court attached great weight to this debate, treating it as a recognition of the sole power of the President in the matter. In the present case the Court dismissed these debates on the ground that the President's power of removal was not considered in respect of other than executive officers. For this debate see 1 ANNALS OF CONGRESS 574-608 (1789).

[11] The Haney, Lewis, and Culbertson cases during the Coolidge administration illustrate the possibility of executive interference with administrative commissions. See ROGERS, THE AMERICAN SENATE, 46-48 (1926). On the curbing of the removal power of the President as a blow at the spoils system, see dissenting opinion of Mr. Justice Brandeis in the Myers case, 272 U. S. 52 at 276-285, 47 Sup. Ct. 21 at 79-82 (1926). Commentators on that case expressed the fear that the decision was a blow at civil service reform. 13 VA. L. REV. 122 (1926); Galloway, "The Consequences of the Myers Decision," 61 AM. L. REV. 481 (1927).

separation of governmental powers.[12] No suggestion of such a Constitutional basis for the distinction is made by the Court.[13] As the distinction between an executive and a quasi-judicial or quasi-legislative office is not clear, the result of the decision will be that further litigation will be necessary to determine the control of the President over particular offices. In the present case no reference was made to the extensive argument made by Chief Justice Taft in the *Myers* case that the removal power resulted from the President's power as Chief Executive. Though the Court would probably answer that the principle does not apply to a quasi-legislative or quasi-judicial office, the convincing refutation of this argument by the dissenting opinions in the *Myers* case justified the Court in making no reference to it in the present case.[14]

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[12] While a distinction on the basis of "superior" and "inferior" offices would find more of a constitutional basis, it would have tended to reach a contrary result, this not being an "inferior" office. In his dissenting opinion in the Myers case, Mr. Justice Brandeis suggested that the control of the President over high political offices might be admitted, even though it was denied in the case of inferior offices. 272 U. S. 52 at 240-244, 47 Sup. Ct. 21 at 66-68 (1926). This distinction had also been recognized by Chief Justice Marshall in Marbury v. Madison, 1 Cranch (5 U. S.) 137, 2 L. ed. 60 (1803).

[13] For cases in which such distinction seems to have been inferred in connection with the appointing power, see Ex parte Hennen, 13 Pet. (38 U. S.) 230 at 258, 10 L. ed. 138 at 152 (1839); Ex parte Siebold, 100 U. S. 371 at 397-398, 25 L. ed. 717 at 726-727 (1879). Also see Shartel, "Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution," 28 MICH. L. REV. 485 at 509-511 (1930).

[14] In the dissenting opinion of Mr. Justice Holmes this argument was referred to as mere "spider's webs inadequate to control the dominant facts." 272 U. S. 52 at 177, 47 Sup. Ct. 21 at 85 (1926).