The original documents are located in Box 51, folder "President - Power to Remove Appointees from Office (1)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

clude holidays, or very brief temporary adjournments,[5] while by an act of Congress, if the vacancy existed when the Senate was in session, the *ad interim* appointee, subject to certain exemptions, may receive no salary until he has been confirmed by the Senate.[6]

Ad Interim Designations.—To be distinguished from the power to make recess appointments is the power of the President to make temporary or *ad interim* designations of officials to perform the duties of other absent officials. Usually such a situation is provided for in advance by a statute which designates the inferior officer who is to act in place of his immediate superior. But in the lack of such provision both theory and practice concede the President the power to make the designation.[7]

The Removal Power

The Myers Case.—Save for the provision which it makes for a power of impeachment of "civil officers of the United States," the Constitution contains no reference to a power to remove from office, and until its decision in *Myers* v. *United States*,[1] October 25, 1926, the Supreme Court had contrived to side-step every occasion for a decisive pronouncement regarding the removal power, its extent, and location. The point immediately at issue in the *Myers* case was the effectiveness of an order of the Postmaster General, acting by direc-

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[5] 23 *Ops. Atty. Gen.* 599 (1901); 22 *Ops. Atty. Gen.* 82 (1898). A "recess," however, may be merely "constructive," as when a regular session succeeds immediately upon a special session. It was this kind of situation that gave rise to the once famous *Crum* incident. *See* 3 W. Willoughby, *The Constitutional Law of the United States* (New York: 2d ed. 1929), 1508–1509.

[6] 5 U.S.C. § 56. In an opinion issued on July 14, 1960 (41 *Ops. Atty. Gen.* 463), the Attorney General ruled (1) that when the Senate adjourns temporarily, as, for example, from July 3 to August 8, 1960, during the second session of the 86th Congress, the President may grant recess appointments to persons whose nominations to vacancies existing at the time the Senate was in session had been submitted to, but not acted upon by the Senate; and (2) that the commission of the officers thus appointed would continue until the end of the session of the Senate which follows the final adjournment *sine die* of the second session of the 86th Congress, probably the end of the first session of the 87th Congress. Although the reconvening of the Senate on August 8 was not the "next session" within the meaning of the Constitution, the President, consistently with 5 U.S.C. § 56, was obligated to submit to the Senate within 40 days after August 8, the names of the recess appointees; but the salaries of the latter would be payable for the duration of their constitutional term or until the Senate had voted not to confirm.

[7] *See* the following *Ops. Atty. Gen.*: 6:358 (1854); 12:32, 41 (1866); 25:258 (1904); 28:95 (1909); 38:298 (1935).

[1] 272 U.S. 52 (1926).

tion of the President, to remove from office a first-class postmaster, in the face of the following provision of an act of Congress passed in 1876: "Postmasters of the first, second, and third classes shall be appointed and may be removed 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." [2]

A divided Court, speaking through Chief Justice Taft, held the order of removal valid, and the statutory provision just quoted void. The Chief Justice's main reliance was on the so-called "decision of 1789," the reference being to Congress' course that year in inserting in the act establishing the Department of State a proviso which was meant to imply recognition that the Secretary would be removable by the President at will. The proviso was especially urged by Madison, who invoked in support of it the opening words of Article II and the President's duty to "take care that the laws be faithfully executed." Succeeding passages of the Chief Justice's opinion erect on this basis a highly selective account of doctrine and practice regarding the removal power down to the Civil War which was held to yield the following results: "That article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed; that article II excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices; that Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate's consent; that the provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, in the work of the executive, are limitations to be strictly construed and not to be extended by implication; that the President's power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice of the Senate, but that such incident does not by implication extend to removals the Senate's power of checking appointments; and finally that to hold otherwise would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed." [3]

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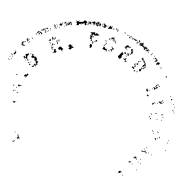
[2] 19 Stat. 78, 80.

[3] 272 U.S., 163–164.



The holding in the *Myers* case boils down to the proposition that the Constitution endows the President with an illimitable power to remove all officers in whose appointment he has participated with the exception of judges of the United States. The motivation of the holding was not, it may be assumed, any ambition on the Chief Justice's part to set history aright—or awry.[4] Rather it was the concern which he voiced in the following passage in his opinion: "There is nothing in the Constitution which permits a distinction between the removal of the head of a department or a bureau, when he discharges a political duty of the President or exercises his discretion, and the removal of executive officers engaged in the discharge of their other normal duties. The imperative reasons requiring an unrestricted power to remove the most important of his subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him."[5] Thus spoke the former President Taft, and the result of his prepossession was a rule which, as was immediately pointed out, exposed the so-called "independent agencies," the Interstate Commerce Commission, the Federal Trade Commission, and the like, to presidential domination.

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[4] The reticence of the Constitution respecting removal left room for four possibilities, *first*, the one suggested by the common law doctrine of "estate in office," from which the conclusion followed that the impeachment power was the only power of removal intended by the Constitution; *second*, that the power of removal was an incident of the power of appointment and hence belonged, at any rate in the absence of legal or other provision to the contrary, to the appointing authority; *third*, that Congress could, by virtue of its power "to make all laws which shall be necessary and proper," etc., determine the location of the removal power; *fourth*, that the President by virtue of his "executive power" and his duty "to take care that the laws be faithfully executed," possesses the power of removal over all officers of the United States except judges. In the course of the debate on the act to establish a Department of Foreign Affairs (later changed to Department of State) all of these views were put forward, with the final result that a clause was incorporated in the measure which implied, as pointed out above, that the head of the department would be removable by the President at his discretion. Contemporaneously, and indeed until after the Civil War, this action by Congress, in other words "the decision of 1789," was interpreted as establishing "a practical construction of the Constitution" with respect to executive officers appointed without stated terms. However, in the dominant opinion of those best authorized to speak on the subject, the "correct interpretation" of the Constitution was that the power of removal was always an incident of the power of appointment, and that therefore in the case of officers appointed by the President with the advice and consent of the Senate the removal power was exercisable by the President only with the advice and consent of the Senate. For an extensive review of the issue at the time of *Myers*, *see* Corwin "The President's Removal Power Under the Constitution," in 4 *Selected Essays on Constitutional Law* (Chicago: 1938), 1467.

[5] 272 U.S., 134.

Unfortunately, the Chief Justice, while professing to follow Madison's leadership, had omitted to weigh properly the very important observation which the latter had made at the time regarding the office of Comptroller of the Treasury. "The Committee," said Madison, "has gone through the bill without making any provision respecting the tenure by which the comptroller is to hold his office. I think it is a point worthy of consideration, and shall, therefore, submit a few observations upon it. It will be necessary to consider the nature of this office, to enable us to come to a right decision on the subject; in analyzing its properties, we shall easily discover they are of a judiciary quality as well as executive; perhaps the latter obtains in the greatest degree. The principal duty seems to be deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and particular citizens: this partakes strongly of the judicial character, and there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the government." [6] In *Humphrey's Executor* v. *United States*,[7] the Court seized upon "the nature of the office" concept and applied it as a much needed corrective to the *Myers* holding.

The Humphrey Case.—The material element of this case was that Humphrey, a member of the Federal Trade Commission, was on October 7, 1933, notified by President Roosevelt that he was "removed" from office, the reason being their divergent views of public policy. In due course Humphrey sued for salary. Distinguishing the *Myers* case, Justice Sutherland, speaking for the unanimous Court, said: "A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the *Myers* case finds support in the theory that such an office is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aide he is . . . . It goes no farther; much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.

"The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute . . . . Such a body cannot in any proper sense be char-

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[6] *Annals of Congress* 611–612 (1789).

[7] 295 U.S. 602 (1935). The case is also styled *Rathbun, Executor* v. *United States*, Humphrey having, like Myers before him, died in the course of his suit for salary.

acterized as an arm or eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. . . . 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 of those just named, [the Interstate Commerce Commission, the Federal Trade Commission, the Court of Claims]. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause 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 of independence against the latter's will. . . .

"The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office; the *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute."[8]

The Wiener Case.—Curtailment of the President's power of removal, so liberally delineated in the *Myers* decision, apparently was not to end with the *Humphrey* case. Unresolved by the latter was the question whether the President, absent a provision expressly delimiting his authority in the statute creating an agency endowed with quasi-judicial functions, remained competent to remove members serving thereon. To this query the Court supplied a negative answer in *Wiener* v. *United States*.[9] Emphasizing therein that the duties of the War

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[8] 295 U.S., 627–629, 631–632. Justice Sutherland's statement, quoted above, that a Federal Trade Commissioner "occupies no place in the executive department" was not necessary to the decision of the case, was altogether out of line with the same Justice's reasoning in *Springer* v. *Philippine Islands*, 277 U.S. 189, 201–202 (1928), and seems later to have caused the author of it much perplexity. *See* R. Cushman, *The Independent Regulatory Commission* (New York: 1941), 447–448. As Professor Cushman adds: "Every officer and agency created by Congress to carry laws into effect is an arm of Congress. . . . The term may be a synonym; it is not an argument." Id., 451.

[9] 357 U.S. 349 (1958).

Claims Commission were wholly adjudicatory and its determinations, final and exempt from review by any other official or judicial body, the Court unanimously concluded that inasmuch as the President was unable to supervise its activities, he lacked the power, independently of statutory authorization, to remove a commissioner serving thereon whose term expired with the life of that agency.

Other Phases of Presidential Removal Power.—Congress may "limit and restrict the power of removal as it deems best for the public interests" in the case of inferior officers.[10] But in the absence of specific legislative provision to the contrary, the President may remove at his discretion an inferior officer whose term is limited by statute,[11] or one appointed with the consent of the Senate.[12] He may remove an officer of the army or navy at any time by nominating to the Senate the officer's successor, provided the Senate approves the nomination.[13] In 1940 the President was sustained in removing Dr. E. A. Morgan from the chairmanship of TVA for refusal to produce evidence in substantiation of charges which he had levelled at his fellow directors.[14] Although no such cause of removal by the President is stated in the act creating TVA, the President's action, being reasonably required to promote the smooth functioning of TVA, was within his duty to "take care that the laws be faithfully executed." So interpreted, it did not violate the principle of administrative independence set forth in *Humphrey* v. *United States*.[15]

The Presidential Aegis: Demands for Papers

Presidents have more than once had occasion to stand in a protective relation to their subordinates, assuming their defense in litigation brought against them [1] or pressing litigation in their behalf,[2] refusing a call for papers from one of the Houses of Congress which might be used, in their absence from the seat of government, to their disadvantage,[3] challenging the constitutional validity of legislation which he

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[10] *United States* v. *Perkins*, 116 U.S. 483 (1886).

[11] *Parsons* v. *United States*, 167 U.S. 324 (1897).

[12] *Shurtleff* v. *United States*, 189 U.S. 311 (1903).

[13] *Blake* v. *United States*, 103 U.S. 227 (1881); *Quackenbush* v. *United States*, 177 U.S. 20 (1900); *Wallace* v. *United States*, 257 U.S. 541 (1922).

[14] *Morgan* v. *TVA*, 28 F. Supp. 732 (D.C.E.D. Tenn. 1939), *aff'd.*, 115 F. 2d 990 (C.A. 1940), *cert. den.* 312 U.S. 701 (1941).

[15] *See United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947); *Ex parte Curtis*, 106 U.S. 371 (1882); and 39 *Ops. Atty. Gen.* 145 (1938).

[1] 6 *Ops. Atty. Gen.* 220 (1853); *In re Neagle*, 135 U.S. 1 (1890).

[2] *United States* v. *Lovett*, 328 U.S. 303 (1946).

[3] 2 J. Richardson (comp.), *Messages and Papers of the Presidents*, (Washington: 1897), 847.

hold it void. For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public.

Reversed.

HUMPHREY'S EXECUTOR *v.* UNITED STATES.*

CERTIFICATE FROM THE COURT OF CLAIMS.

No. 667. Argued May 1, 1935.—Decided May 27, 1935.

1. The Federal Trade Commission Act fixes the terms of the Commissioners and provides that any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. *Held* that Congress intended to restrict the power of removal to one or more of those causes. *Shurtleff* v. *United States*, 189 U. S. 311, distinguished. Pp. 621, 626.
2. This construction of the Act is confirmed by a consideration of the character of the Commission—an independent, non-partisan body of experts, charged with duties neither political nor executive, but predominantly quasi-judicial and quasi-legislative; and by the legislative history of the Act. P. 624.
3. When Congress provides for the appointment of officers whose functions, like those of the Federal Trade Commissioners, are of legislative and judicial quality, rather than executive, and limits the grounds upon which they may be removed from office, the President has no constitutional power to remove them for reasons other than those so specified. *Myers* v. *United States*, 272 U. S. 52, limited, and expressions in that opinion in part disapproved. Pp. 626, 627.

* The docket title of this case is: *Rathbun, Executor,* v. *United States.*

The *Myers* case dealt with the removal of a postmaster, an executive officer restricted to executive functions and charged with no duty at all related to either the legislative or the judicial power. The actual decision in the *Myers* case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate he is. That decision goes no farther than to include purely executive officers. The Federal Trade Commission, in contrast, is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. To the extent that it exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the Government. Pp. 627–628.

4. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. P. 629.
5. The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. P. 629.
6. Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office. 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 the present decision that such power does not extend to an office

such as that here involved, there shall remain a field of doubt, such cases as may fall within it are left for future consideration and determination as they may arise. P. 631.

7. While the general rule precludes the use of congressional debates to explain the meaning of the words of a statute, they may be considered as reflecting light upon its general purposes and the evils which it sought to remedy. P. 625.

8. Expressions in an opinion which are beyond the point involved do not come within the rule of *stare decisis*. P. 626.

CERTIFICATE from the Court of Claims, propounding questions arising on a claim for the salary withheld from the plaintiff's testator, from the time when the President undertook to remove him from office to the time of his death.

Mr. Wm. J. Donovan, orally (*Messrs. Henry Herrick Bond* and *Ralstone R. Irvine* were with him on the brief) for Humphrey's Executor.

It is our position that § 1 of the Act evidences, under the rule *expressio unius,* the purpose of Congress to limit the power of the President to remove except for the causes stated, and then only with notice and hearing.

There is an important distinction between this Act and the one in *Shurtleff* v. *United States,* in that this Act specifies the tenure of office. The failure of the Customs Administrative Act so to specify was cited in the earlier case as a controlling reason why this Court would not impute an intention of Congress to limit the President's power of removal. This Court pointed out that in the absence of such a limitation, the incumbent would hold office during life. The reason which this Court gave for its construction of the language in that Act is therefore entirely absent in § 1 of the Federal Trade Commission Act.

Congress specifically provided that the Federal Trade Commissioners shall "continue in office for their respective terms." The Government contends that this

language applies only to the first Commissioners and that the phrase is an expression of style without legal significance. It does seem to me that the fair intendment of that phrase was to apply not to a particular category of Commissioners but to all Commissioners who would serve, and this fact of continuance in office with a fixed tenure is a fundamental distinction between this case and the *Shurtleff* case.

An examination of the debates taking place during the consideration of the Federal Trade Commission Act will show that the *Shurtleff* case was never mentioned. The Customs Administrative Act was never referred to. As a matter of fact, the debates in Congress and the reports of the committees bearing upon the Federal Trade Commission Act show that the phrase "inefficiency, neglect of duty and malfeasance in office" was taken directly from the Interstate Commerce Act, which was passed sixteen years before the *Shurtleff* case was decided.

The Government says that the Federal Trade Commission and the Board of General Appraisers are not so unlike in nature as to call for a departure from the construction given in the *Shurtleff* case to the words in question, and that the two agencies are, in fact, strikingly similar in the relevant essentials of organization and functions.

However true that statement may be as to the present set-up of the Customs Court, it certainly is not an accurate statement of the situation as it existed at the time of the *Shurtleff* case; the legislative history of that Act shows this.

The Act of 1851 created 4 additional appraisers, whose duty it was to go from port to port to aid local appraisers in maintaining uniform appraisements throughout the country. They were removable at will by the President and were subordinate to and were regulated by the Secretary of the Treasury. The Customs Administrative Act,

1890, merely added to the functions previously performed by the general appraisers, the function of acting as a board of three to re-determine valuations made by a single appraiser. They were described in the Senate as taxing officers who had only the functions of such taxing officers—a purely executive office. The general appraisers were not to constitute an independent body. They were still subject to regulation by the Treasury; and the debates indicate no purpose to make their office more permanent in its nature than it had been before.

It was not until 1908 that the Board of General Appraisers was set up as an independent body, and it was not until 1926 that it was set up as a Court of Customs. Now, in contrast with the function of the general appraisers at the time of the *Shurtleff* case, that of the Federal Trade Commissioners is totally different.

As appears from the debates leading to the adoption of the Federal Trade Commission Act, it was intended to make this Commission independent of the Chief Executive. This Commission took over the duties of the Commissioner of Corporations. The duties of the Commissioner of Corporations were to inquire into the interstate activities of corporations and combinations and to report to the President.

In enacting the Federal Trade Commission Act, the proponents of the bill expressly declared that the President's domination of the Commissioner of Corporations had made that office ineffective for the purposes for which it was created. This is made clear in the report to the House by the author of the bill and chairman of the subcommittee of the House Interstate and Foreign Commerce Committee that had prepared it. He pointed out that in order to give dignity and standing to the Commission the bill was designed to confer upon it independent power and authority, and to do that it removed entirely from the control of the President and the Secretary of Com-

merce the investigations conducted by the Bureau of Corporations or the Commissioner of Corporations.

Again, the chairman of the Senate Interstate Commerce Commission, and the report of his Committee to the Senate, indicate the purpose to keep it free from the executive department of the Government and more particularly the office of the Attorney General. Sen. Rep. No. 597, 63d Cong., 2d Sess.

Up to now, I have been attempting to arrive at the intention of Congress by an examination of the debates and by an examination of the language of § 1, in which the words of limitation are used. But an examination of the Act in its entirety indicates that Congress intended the Commission to be free from the domination of the President because the duties and function of the Federal Trade Commission are inconsistent with an unrestricted power of removal in the President.

When acting as a Master in Chancery, it is clear that the Federal Trade Commission is acting as an agency of the Federal Court. Giving the President the unrestricted power of removal of the Federal Trade Commissioners would confer upon him the power to dominate that agency. Even when acting as a Master in Chancery, it should report a form of decree that is pleasing to him. However much it may be urged that such power should exist in the case of executive officers, it certainly was not the intention that such power should exist to control an agent of the court.

Under § 6 of the Act, the Federal Trade Commission has the duty to make certain investigations at the instance of Congress, to report its findings to Congress, to make special and annual reports to Congress and to submit recommendations for additional legislation. In making these reports, the Commission acts as an agency of Congress. This work undertaken by the Federal Trade Commission as a direct agent of Congress is perhaps the

most important single function performed by the Commission. The value of this work is directly dependent upon the maintenance of the Commission as an independent body.

The Government says that the power of removal is an executive function. They go to the point of asserting that this is unrestricted.

We say that the *Myers* case did not undertake to decide this question and that the Congress has the power to enact legislative standards for removal as well as for appointment, such standards to be applied by the President in the exercise of his executive power.

All legislative power given to the Federal Government is vested in the Congress. In this instance it has seen fit, in the Federal Trade Commission Act, to deal with unfair methods of competition in Commerce. This Court has held that it has the power to deal with such acts. It has also attempted to create an agency to aid the legislature in the preparation of legislation. There can be no doubt of the power of the legislative body to create such agencies as are necessary properly to advise it of facts that may be in aid of legislation. Consequently, there can be no doubt in this case that Congress had the right to create the Federal Trade Commission. This Court has held that it has that right. Since Congress has the right to legislate in this field, the Constitution specifically gives the Congress the power to pass all laws that are necessary and proper to carry out its purpose. Congress has believed that the success of the Federal Trade Commission Act is dependent upon maintaining the Commission as an independent body. To achieve this result they have attempted to place restrictions upon the President's power to remove without cause.

And, in limiting this power of removal, Congress has not infringed upon the constitutional powers of the President. Here it does not seek to participate in the execu-

tive power of removal. The executive act of removal remains in the President. Congress has merely enacted a legislative standard.

The fact that the Congress has repeatedly limited the President's freedom of choice in making nominations of executive officers has often been pointed out to this Court. These restrictions or limitations have been of different kinds and different forms. See dissenting opinion of Mr. Justice Brandeis in the *Myers* case, *supra*.

The enactment of a legislative standard to be met by appointees of the President has always been regarded both by the courts and the President as a legislative and not an executive function. No court has ever held that the enactment of such a legislative standard to be followed by the President in making nominations is an invalid limitation upon the appointing power of the Executive. And this in spite of the fact that the power of appointment is expressly vested in the President. The power of removal is not expressly vested. It is implied from his power as an executive and more particularly from his express power of appointment. Surely an implied power is no greater than one expressly conferred. It would seem that as Congress may limit the class from which appointments shall be made so also it could define the causes for removals.

The sole question determined in the *Myers* case was that Congress could not compel the President to *share* with the Senate his power to remove executive officers. The power of removal is exclusively an executive function and Congress of course has no authority to appropriate to itself a power given exclusively to the President.

This fundamental distinction between the *Myers* case and the enactment of a legislative standard which the President must follow in the exercise of his exclusive power of removal was expressly recognized by counsel for

the United States in the argument in the *Myers* case. Solicitor General Beck, pages 88 to 98.

In this case the Government changes its position and says: "A limitation of the grounds of removal is at least as substantial an interference with the executive power as is a requirement that the Senate participate in the removal." This is not so. If the Senate participates it can prevent removal regardless of the merit of the case. But where, as here, the President alone has the power to remove, any legislative standard must be reasonable in view of the nature and function of the office affected.

In the *Myers* case, this Court reviewed at length the debates in the First Congress in connection with the "Decision of 1789." It found that those debates and that decision constituted a declaration by Congress that the President and not the legislature had the power to remove an executive officer. We submit that a further examination of those debates will disclose that the extent to which Congress may restrict the President's power to remove other than purely executive officers is dependent upon the nature and function of the office involved.

From these debates it is clear that a very definite factor in the minds of many sponsors of the bill before the first Congress was the fact that the nature and function of the office of the Secretary of Foreign Affairs were politically executive. With respect to such an executive officer it was their view that the President and not the Congress had the power of removal.

The significance of the distinction is this: While Congress has power to create an executive political office, control of that office should be in the hands of the President in order not to circumscribe the power of the President to control his agents. But in the case of an office such as the Federal Trade Commission, the nature of which

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is not political, the function of which is quasi-judicial and quasi-legislative, in order to safeguard its independence of political domination it is necessary and proper to enact legislative standards which the President must follow.

This distinction between such executive officers and other officers of the Government was expressly recognized by James Madison who was the leader in the debate in 1789. 1 Annals of Congress, Col. 611–612, 613, 614. See *Marbury* v. *Madison,* 1 Cranch 137, 161; *Matter of Hennen,* 13 Pet. 230, 260; *U. S. ex rel. Goodrich* v. *Guthrie,* 17 How. 284; *McAllister* v. *United States,* 141 U. S. 174; *United States* v. *Perkins,* 116 U. S. 483; *Blake* v. *United States,* 103 U. S. 227; *Wallace* v. *United States,* 257 U. S. 541; *Shurtleff* v. *United States,* 189 U. S. 311; *Reagan* v. *United States,* 182 U. S. 419; *Embry* v. *United States,* 100 U. S. 680; *McElratt* v. *United States,* 102 U. S. 426.

The assumption made in the *Shurtleff* case, *supra,* that Congress can compel the President to afford notice and hearing if he chooses to remove for causes stated in the statute, is a refutation of the Government's argument that the President's power cannot be limited in any respect. Once you concede the validity of the restriction of notice and hearing, the rest is a matter of degree. The question is whether the restriction is necessary and proper to achieve the legislative purpose of Congress. I submit that the value of the Federal Trade Commission is dependent upon its independence of executive control. Otherwise it would be in the status of the Bureau of Corporations, the essential weakness of which was executive control. To insure that independence, it is necessary and proper to provide that Commissioners should be removed only for inefficiency, neglect of duty or malfeasance in office. And such a restriction, as Mr. Madison suggests, is within the spirit of the Constitution.

Solicitor General Reed, with whom *Assistant Attorney General Sweeney* and *Messrs. Paul A. Sweeney* and *M. Leo Looney, Jr.,* were on the brief, for the United States.

Section 1 of the Federal Trade Commission Act does not deprive the President of the power to remove a Commissioner except for inefficiency, neglect of duty, or malfeasance in office. *Shurtleff* v. *United States,* 189 U. S. 311, determined the meaning of identical language contained in a similar statute. The same language is to be found in the Acts creating the Interstate Commerce Commission (Feb. 4, 1887, c. 104, § 11, 24 Stat. 379, 383), the United States Shipping Board (Sept. 7, 1916, c. 451, § 3, 39 Stat. 728, 729), and the United States Tariff Commission (Sept. 8, 1916, c. 463, § 700, 39 Stat. 756, 795).

The opinions in *Myers* v. *United States,* 272 U. S. 52, make it clear that the rule of construction announced in the *Shurtleff* case is controlling with respect to the Federal Trade Commission Act. See 272 U. S., at pp. 171–172, 262, n. 30.

The Federal Trade Commission Act was enacted in 1914, containing language identical with that which had been construed in the *Shurtleff* case. In adopting the language used in the earlier Act, Congress must be considered to have adopted also the construction given by this Court to that language and to have made it a part of the enactment.

Five years after the decision in the *Shurtleff* case, the Customs Administrative Act, there involved, was amended to provide that a General Appraiser could be removed for inefficiency, neglect of duty, or malfeasance in office, "and no other" cause. C. 205, 35 Stat. 403, 406. The history of this amendment reveals that it was adopted in order to change the meaning of the Act as previously construed by this Court.

In a number of other statutes as well, Congress has attempted by explicit language to limit the removal power

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to specified causes and no others. They include the Acts creating a Commissioner of Mediation and Conciliation (c. 6, § 11, 38 Stat. 103, 108); the Board of Tax Appeals (c. 234, § 900 (b), 43 Stat. 253, 336); the Railroad Labor Board (c. 91, § 306 (b), 41 Stat. 456, 470); the United States Coal Commission (c. 248, § 1, 42 Stat. 1446); the Board of Mediation (c. 347, § 4, 44 Stat. 577, 579); and the National Mediation Board (c. 691, § 4, 48 Stat. 1193).

In the Federal Trade Commission Act, the provision that each Commissioner shall "continue in office" for the term specified, is used only with reference to the "first Commissioners." As to their "successors," the Act provides simply that they "shall be appointed for terms of seven years." The phrase "continue in office," applying as it does only to the original appointees, is obviously an expression of style without legal significance. The term prescribed is not a grant of tenure but a limitation. *Parsons* v. *United States,* 167 U. S. 324; *Burnap* v. *United States,* 262 U. S. 512, 515.

The specification of certain grounds for removal may serve to indicate a policy regarding the holding of office, guiding but not limiting the President's discretion in exercising the removal power. In addition, the specification has the effect of requiring notice and hearing if an officer is removed for one of the causes designated. *Shurtleff* v. *United States,* 189 U. S. 311, 317.

Statutes not infrequently enumerate powers which are not intended to be exclusive. *Springer* v. *Philippine Islands,* 277 U. S. 189, 206; *Continental Illinois National Bank & Trust Co.* v. *Chicago, R. I. & P. Ry. Co.,* 294 U. S. 648.

It is true, as the legislative history of the Act indicates, that the Commission was intended to be or to become an experienced and informed body, free from certain of the handicaps that were deemed to inhere in departmental

organization. But there is nothing in the language or the legislative history of the Act to suggest that these purposes were thought to require a limitation of the removal power to the causes named. Nor are the Federal Trade Commission and the Board of General Appraisers so unlike in nature as to call for a departure by the Court from the construction given in the *Shurtleff* case to the words in question. The two agencies are, in fact, strikingly similar in the relevant essentials of organization and functions.

The Act of 1890 provided for "general appraisers," from whose decisions appeals lay to a board consisting of three of the general appraisers; and from the decisions of the board an appeal could be taken to a circuit court. The general appraisers were authorized to administer oaths and to cite persons to appear before them. Not more than five of the nine general appraisers could be members of the same political party. The board of general appraisers has been characterized as a tribunal clothed with judicial power to determine the classification of imported goods and the duties which should be imposed thereon. *United States* v. *Kurtz*, 5 Ct. Cust. App. 144, 146; *Marine* v. *Lyon*, 65 Fed. 992, 994; compare *United States* v. *Lies*, 170 U. S. 628, 636. The nature of its functions is revealed by the fact that in 1926 the name of the board of general appraisers was changed to the United States Customs Court. Act of May 28, 1926, c. 411, 44 Stat. 669.

The independence which Congress sought for the Federal Trade Commission does not depend upon an implied limitation of the removal power such as that contended for by the plaintiff. The Commission was left free from the continuing supervision of a departmental head; its membership was required to represent more than one political party; and the terms of its members were arranged to expire at different times. In later Acts creating similar commissions, these factors alone have apparently been deemed sufficient to secure the objective of an inde-

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pendent body. Compare, for example, the Acts creating the United States Employees' Compensation Commission (c. 458, 39 Stat. 742); the Federal Radio Commission (c. 169, 44 Stat. 1162); the Federal Power Commission (c. 572, 46 Stat. 797); The Federal Home Loan Bank Board (c. 522, § 17, 47 Stat. 725, 736); the Securities and Exchange Commission (c. 404, § 4, 48 Stat. 885); and the Federal Communications Commission (c. 652, § 4, 48 Stat. 1066). Each of these Acts provides that not more than a bare majority of the members of the Commission shall belong to the same political party; and each provides that the members of the Commission shall have overlapping terms. In none of these Acts did Congress impose any limitation on removal. The effect of this omission is that the power of removal is unrestricted, since the power to remove, at least in the absence of constitutional or statutory provision, is an incident of the power to appoint. *Parsons* v. *United States,* 167 U. S. 324; *Burnap* v. *United States,* 252 U. S. 512, 515; *Wallace* v. *United States,* 257 U. S. 541, 544. Whatever the reason for the omission in these Acts, it is clear at all events that it was not regarded as nullifying the other safeguards of independence which are included in these Acts as in the Federal Trade Commission Act.

It is submitted, therefore, that it is a settled rule of construction that the mere statutory enumeration of causes for which an appointee may be removed does not confine the exercise of the President's power to removal for one or more of those causes; that there is nothing in the language or history of the Federal Trade Commission Act to suggest that Congress departed from this established meaning.

The construction for which the plaintiff contends not only is at variance with the applicable decisions of this Court, but raises constitutional questions of a serious nature. In the case at bar such a construction "should

not be made in the absence of compelling language." *Missouri Pacific R. Co.* v. *Ault*, 256 U. S. 554, 559.

If the Court should be of the opinion that § 1 of the Federal Trade Commission Act deprives the President of the power to remove a Commissioner except for one or more of the causes stated, we submit that the provision is unconstitutional. *Myers* v. *United States*, 272 U. S. 52, 172.

A statute limiting the President's removal power to removal for certain causes is as unwarranted an interference with the executive power as is a statute requiring participation by the Senate in a removal. Participation by the Senate in removal is closely allied with the necessity of securing its advice and consent for the appointment of a successor to the officer removed. In fact, Senatorial approval of a subsequent appointment is regarded as tantamount to approval of the removal. *Wallace* v. *United States*, 257 U. S. 541; 258 U. S. 296. No such merging of Senatorial functions characterizes the requirement that the President may remove for certain causes only. The power of the President to remove an officer in whom he does not have adequate confidence is effectively thwarted, and the consent of the Senate to the appointment of a qualified successor is of no avail.

If Congress can provide that the President may remove only for inefficiency, neglect of duty, or malfeasance in office, it presumably could provide that he might remove only for malfeasance in office or only for neglect of duty. The result would be that the President would have no power, even with the aid of the Senate, to remove an admittedly inefficient officer in the executive branch of the Government.

Faithful execution of the laws may require more than freedom from inefficiency, neglect of duty, or malfeasance in office. Particularly in the case of those officers entrusted with the task of enforcing new legislation, such

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as the Securities Act of 1933, which embodies new concepts of federal regulation in the public interest, faithful execution of the laws may presuppose wholehearted sympathy with the purposes and policy of the law, and energy and resourcefulness beyond that of the ordinarily efficient public servant. The President should be free to judge in what measure these qualities are possessed and to act upon that judgment. *Myers* v. *United States*, 272 U. S. 52, 135.

The so-called legislative functions performed by the Federal Trade Commission do not differ in nature from those performed by the regular executive departments. Reports to Congress on special topics are made by the Commission; but such reports are likewise made by the heads of departments.

The Federal Trade Commission is not a judicial tribunal. *Federal Trade Comm'n* v. *Eastman Kodak Co.*, 274 U. S. 619, 623. We need not consider, therefore, whether the President's power to remove a judge of a court not established under Art. III of the Constitution may be restricted by Congress. Cf. *McAllister* v. *United States*, 141 U. S. 174.

The so-called quasi-judicial functions of the Commission are not different from those regularly committed to the executive departments. Functions so committed include the determination of a wide range of controversies respecting such important matters as immigration, *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329; internal revenue and customs duties, *Blair* v. *Oesterlein Machine Co.*, 275 U. S. 220; *Louisiana* v. *McAdoo*, 234 U. S. 627; public-land claims, *United States* v. *Hitchcock*, 190 U. S. 316; pension claims, *Decatur* v. *Paulding*, 14 Pet. 497; use of the mails, *Houghton* v. *Payne*, 194 U. S. 88; practices at stockyards, *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420; trading in grain futures, *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1.

It cannot be questioned that the head of a department, however numerous or important may be his functions of this kind, is subject to removal by the President without limitation by Congress, under the decision in the *Myers* case, *supra*. An attempt to distinguish, in respect of the President's removal power, between various administrative agencies would logically require distinctions also between the same agency at different times.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Plaintiff brought suit in the Court of Claims against the United States to recover a sum of money alleged to be due the deceased for salary as a Federal Trade Commissioner from October 8, 1933, when the President undertook to remove him from office, to the time of his death on February 14, 1934. The court below has certified to this court two questions (Act of February 13, 1925, § 3 (a), c. 229, 43 Stat. 936, 939; 28 U. S. C. § 288), in respect of the power of the President to make the removal. The material facts which give rise to the questions are as follows:

William E. Humphrey, the decedent, on December 10, 1931, was nominated by President Hoover to succeed himself as a member of the Federal Trade Commission, and was confirmed by the United States Senate. He was duly commissioned for a term of seven years expiring September 25, 1938; and, after taking the required oath of office, entered upon his duties. On July 25, 1933, President Roosevelt addressed a letter to the commissioner asking for his resignation, on the ground " that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection," but disclaiming any reflection upon the commissioner personally or upon his services. The commissioner replied, asking time to con-

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"You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence."

The commissioner declined to resign; and on October 7, 1933, the President wrote him:

"Effective as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission."

Humphrey never acquiesced in this action, but continued thereafter to insist that he was still a member of the commission, entitled to perform its duties and receive the compensation provided by law at the rate of $10,000 per annum. Upon these and other facts set forth in the certificate, which we deem it unnecessary to recite, the following questions are certified:

"1. Do the provisions of section 1 of the Federal Trade Commission Act, stating that 'any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office,' restrict or limit the power of the President to remove a commissioner except upon one or more of the causes named?

"If the foregoing question is answered in the affirmative, then—

"2. If the power of the President to remove a commissioner is restricted or limited as shown by the foregoing interrogatory and the answer made thereto, is such a restriction or limitation valid under the Constitution of the United States?"

The Federal Trade Commission Act, c. 311, 38 Stat. 717; 15 U. S. C. § § 41, 42, creates a commission of five

members to be appointed by the President by and with the advice and consent of the Senate, and § 1 provides:

"Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. . . ."

Section 5 of the act in part provides:

"That unfair methods of competition in commerce are hereby declared unlawful.

"The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce."

In exercising this power, the commission must issue a complaint stating its charges and giving notice of hearing upon a day to be fixed. A person, partnership, or corporation proceeded against is given the right to appear at the time and place fixed and show cause why an order to cease and desist should not be issued. There is provision for intervention by others interested. If the commission finds the method of competition is one prohibited by the act, it is directed to make a report in writing stating its findings as to the facts, and to issue and cause to be served a cease and desist order. If the order is disobeyed, the commission may apply to the appropriate circuit court of

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Section 6, among other things, gives the commission wide powers of investigation in respect of certain corporations subject to the act, and in respect of other matters, upon which it must report to Congress with recommendations. Many such investigations have been made, and some have served as the basis of congressional legislation.

Section 7 provides:

"That in any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require."

First. The question first to be considered is whether, by the provisions of § 1 of the Federal Trade Commission Act already quoted, the President's power is limited to removal for the specific causes enumerated therein. The negative contention of the government is based principally upon the decision of this court in *Shurtleff* v. *United States*, 189 U. S. 311. That case involved the power of the President to remove a general appraiser of merchandise appointed under the Act of June 10, 1890, 26 Stat. 131. Section 12 of the act provided for the appointment by the President, by and with the advice and con-

sent of the Senate, of nine general appraisers of merchandise, who "may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office." The President removed Shurtleff without assigning any cause therefor. The Court of Claims dismissed plaintiff's petition to recover salary, upholding the President's power to remove for causes other than those stated. In this court Shurtleff relied upon the maxim *expressio unius est exclusio alterius*; but this court held that, while the rule expressed in the maxim was a very proper one and founded upon justifiable reasoning in many instances, it "should not be accorded controlling weight when to do so would involve the alteration of the universal practice of the government for over a century and the consequent curtailment of the powers of the executive in such an unusual manner." What the court meant by this expression appears from a reading of the opinion. That opinion—after saying that no term of office was fixed by the act and that, with the exception of judicial officers provided for by the Constitution, no civil officer had ever held office by life tenure since the foundation of the government—points out that to construe the statute as contended for by Shurtleff would give the appraiser the right to hold office during his life or until found guilty of some act specified in the statute, the result of which would be a complete revolution in respect of the general tenure of office, effected by implication with regard to that particular office only.

"We think it quite inadmissible," the court said (pp. 316, 318), "to attribute an intention on the part of Congress to make such an extraordinary change in the usual rule governing the tenure of office, and one which is to be applied to this particular office only, without stating such intention in plain and explicit language, instead of leaving it to be implied from doubtful inferences. . . . We cannot bring ourselves to the belief that Congress ever

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These circumstances, which led the court to reject the maxim as inapplicable, are exceptional. In the face of the unbroken precedent against life tenure, except in the case of the judiciary, the conclusion that Congress intended that, from among all other civil officers, appraisers alone should be selected to hold office for life was so extreme as to forbid, in the opinion of the court, any ruling which would produce that result if it reasonably could be avoided. The situation here presented is plainly and wholly different. The statute fixes a term of office, in accordance with many precedents. The first commissioners appointed are to continue in office for terms of three, four, five, six, and seven years, respectively; and their successors are to be appointed for terms of seven years—any commissioner being subject to removal by the President for inefficiency, neglect of duty, or malfeasance in office. The words of the act are definite and unambiguous.

The government says the phrase "continue in office" is of no legal significance and, moreover, applies only to the first commissioners. We think it has significance. It may be that, literally, its application is restricted as suggested; but it, nevertheless, lends support to a view contrary to that of the government as to the meaning of the entire requirement in respect of tenure; for it is not easy to suppose that Congress intended to secure the first commissioners against removal except for the causes specified and deny like security to their successors. Putting this phrase aside, however, the fixing of a definite term subject to removal for cause, unless there be some countervailing provision or circumstance indicating the contrary, which here we are unable to find, is enough to establish the legislative intent that the term is not to be curtailed in the absence of such cause. But if the intention of

Congress that no removal should be made during the specified term except for one or more of the enumerated causes were not clear upon the face of the statute, as we think it is, it would 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 commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts "appointed by law and informed by experience." *Illinois Central R. Co.* v. *Interstate Commerce Comm'n,* 206 U. S. 441, 454; *Standard Oil Co.* v. *United States,* 283 U. S. 235, 238–239.

The legislative reports in both houses of Congress clearly reflect the view that a fixed term was necessary to the effective and fair administration of the law. In the report to the Senate (No. 597, 63d Cong., 2d Sess., pp. 10–11) the Senate Committee on Interstate Commerce, in support of the bill which afterwards became the act in question, after referring to the provision fixing the term of office at seven years, so arranged that the membership would not be subject to complete change at any one time, said:

"The work of this commission will be of a most exacting and difficult character, demanding persons who have experience in the problems to be met—that is, a proper knowledge of both the public requirements and the practical affairs of industry. It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience."

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The report declares that one advantage which the commission possessed over the Bureau of Corporations (an executive subdivision in the Department of Commerce which was abolished by the act) lay in the fact of its independence, and that it was essential that the commission should not be open to the suspicion of partisan direction. The report quotes (p. 22) a statement to the committee by Senator Newlands, who reported the bill, that the tribunal should be of high character and " independent of any department of the government. . . . a board or commission of dignity, permanence, and ability, independent of executive authority, except in its selection, and independent in character."

The debates in both houses demonstrate that the prevailing view was that the commission was not to be " subject to anybody in the government but . . . only to the people of the United States "; free from " political domination or control " or the " probability or possibility of such a thing "; to be " separate and apart from any existing department of the government—not subject to the orders of the President."

More to the same effect appears in the debates, which were long and thorough and contain nothing to the contrary. While the general rule precludes the use of these debates to explain the meaning of the words of the statute, they may be considered as reflecting light upon its general purposes and the evils which it sought to remedy. *Federal Trade Comm'n* v. *Raladam Co.*, 283 U. S. 643, 650.

Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the Congressional intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority, *except in its selection,* and free to exercise its judgment without the leave or hindrance

of any other official or any department of the government. To the accomplishment of these purposes, it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.

We conclude that the intent of the act is to limit the executive power of removal to the causes enumerated, the existence of none of which is claimed here; and we pass to the second question.

Second. To support its contention that the removal provision of § 1, as we have just construed it, is an unconstitutional interference with the executive power of the President, the government's chief reliance is *Myers* v. *United States,* 272 U. S. 52. That case has been so recently decided, and the prevailing and dissenting opinions so fully review the general subject of the power of executive removal, that further discussion would add little of value to the wealth of material there collected. These opinions examine at length the historical, legislative and judicial data bearing upon the question, beginning with what is called " the decision of 1789 " in the first Congress and coming down almost to the day when the opinions were delivered. They occupy 243 pages of the volume in which they are printed. Nevertheless, the narrow point actually decided was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the court, expressions occur which tend to sustain the government's contention, but these are beyond the point involved and, therefore, do not come within the rule of *stare decisis.* In so far as they are out of harmony with the views here set forth, these expressions are disapproved. A like situation was

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presented in the case of *Cohens* v. *Virginia,* 6 Wheat. 264, 399, in respect of certain general expressions in the opinion in *Marbury* v. *Madison,* 1 Cranch 137. Chief Justice Marshall, who delivered the opinion in the *Marbury* case, speaking again for the court in the *Cohens* case, said:

"It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

And he added that these general expressions in the case of *Marbury* v. *Madison* were to be understood with the limitations put upon them by the opinion in the *Cohens* case. See, also, *Carroll* v. *Lessee of Carroll,* 16 How. 275, 286–287; *O'Donoghue v. United States,* 289 U. S. 516, 550.

The office of a postmaster is so essentially unlike the office now involved that the decision in the *Myers* case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the *Myers* case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. Putting aside *dicta,* which may be followed if sufficiently persuasive but which are not controlling, the necessary reach of the decision goes far enough to include

all purely executive officers. It goes no farther;—much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of "unfair methods of competition"—that is to say in filling in and administering the details embodied by that general standard—the commission acts in part quasi-legislatively and in part quasi-judicially. In making investigations and reports thereon for the information of Congress under § 6, in aid of the legislative power, it acts as a legislative agency. Under § 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government.*

* The provision of § 6 (d) of the act which authorizes the President to direct an investigation and report by the commission in relation to alleged violations of the anti-trust acts, is so obviously collateral to the main design of the act as not to detract from the force of this general statement as to the character of that body.

If Congress is without authority to prescribe causes for removal of members of the trade commission and limit executive power of removal accordingly, that power at once becomes practically all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution. The Solicitor General, at the bar, apparently recognizing this to be true, with commendable candor, agreed that his view in respect of the removability of members of the Federal Trade Commission necessitated a like view in respect of the Interstate Commerce Commission and the Court of Claims. We are thus confronted with the serious question whether not only the members of these quasi-legislative and quasi-judicial bodies, but the judges of the legislative Court of Claims, exercising judicial power (*Williams* v. *United States*, 289 U. S. 553, 565–567), continue in office only at the pleasure of the President.

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 of those just named. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause 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 of independence against the latter's will. The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in

the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. James Wilson, one of the framers of the Constitution and a former justice of this court, said that the independence of each department required that its proceedings "should be free from the remotest influence, direct or indirect, of either of the other two powers." Andrews, The Works of James Wilson (1896), vol. 1, p. 367. And Mr. Justice Story in the first volume of his work on the Constitution, 4th ed., § 530, citing No. 48 of the Federalist, said that neither of the departments in reference to each other "ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers." And see *O'Donoghue* v. *United States, supra,* at pp. 530–531.

The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.

In the light of the question now under consideration, we have reëxamined the precedents referred to in the *Myers* case, and find nothing in them to justify a conclusion contrary to that which we have reached. The so-called "decision of 1789" had relation to a bill proposed by Mr. Madison to establish an executive Department of Foreign Affairs. The bill provided that the principal officer was "to be removable from office by the President of the United States." This clause was changed to read "whenever the principal officer shall be removed

from office by the President of the United States" certain things should follow, thereby, in connection with the debates, recognizing and confirming, as the court thought in the *Myers* case, the sole power of the President in the matter. We shall not discuss the subject further, since it is so fully covered by the opinions in the *Myers* case, except to say that the office under consideration by Congress was not only purely executive, but the officer one who was responsible to the President, and to him alone, in a very definite sense. A reading of the debates shows that the President's illimitable power of removal was not considered in respect of other than executive officers. And it is pertinent to observe that when, at a later time, the tenure of office for the Comptroller of the Treasury was under consideration, Mr. Madison quite evidently thought that, since the duties of that office were not purely of an executive nature but partook of the judiciary quality as well, a different rule in respect of executive removal might well apply. 1 Annals of Congress, cols. 611–612.

In *Marbury* v. *Madison, supra,* pp. 162, 165–166, it is made clear that Chief Justice Marshall was of opinion that a justice of the peace for the District of Columbia was not removable at the will of the President; and that there was a distinction between such an officer and officers appointed to aid the President in the performance of his constitutional duties. In the latter case, the distinction he saw was that "their acts are his acts" and his will, therefore, controls; and, by way of illustration, he adverted to the act establishing the Department of Foreign Affairs, which was the subject of the "decision of 1789."

The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office; the *Myers* decision, affirming the power of the President

alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.

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.

In accordance with the foregoing, the questions submitted are answered.

Question No. 1, Yes.
Question No. 2, Yes.

MR. JUSTICE MCREYNOLDS agrees that both questions should be answered in the affirmative. A separate opinion in *Myers* v. *United States*, 272 U. S. 178, states his views concerning the power of the President to remove appointees.

MOBLEY *v.* NEW YORK LIFE INSURANCE CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 751. Argued May 6, 1935.—Decided May 27, 1935.

1. Repudiation of a contract by one of the parties to it, to be sufficient in any case to entitle the other to treat the contract as absolutely and finally broken and recover damages as upon total breach, must at least amount to an unqualified refusal, or declaration of inability, substantially to perform. P. 638.
2. A refusal by a life insurance company to pay a monthly disability benefit to an insured, based merely upon an honest, but mistaken.

Crowell v. Com'r, 6 Cir., 62 F.2d 51, 53; Tracy v. Com'r, 6 Cir., 53 F.2d 575, 579; Insurance & Title Guarantee Co. v. Com'r, 2 Cir., 36 F.2d 842, 845.

We said in the Crowell case that "readily realizable market value may well be considered the best, if not a conclusive, measure of value. If such standard of value exists, it is, under the regulation, to be applied. It is not, however, an exclusive standard, the nonexistence of which compels a determination of no value." [62 F.2d 52.]

[4] We think there was substantial testimony to support the Board's conclusion. It found that in 1928 McKee sold 4,981 shares and Rutledge 470 shares of Class B stock at $12.66 a share. This indicates of course that the trust agreement of April, 1928, did not force the B shares out of the market. The B shares, as found by the Board, had a market, though limited somewhat to officers and employees.

The decision of the Board of Tax Appeals is affirmed.

MORGAN v. TENNESSEE VALLEY AUTHORITY.

No. 8427.

Circuit Court of Appeals, Sixth Circuit.

Dec. 6, 1940.

1. United States ⇐35

The President has inherent power to remove executive officers appointed by President and confirmed by Senate, without consent of the Senate, even though officer is appointed for a fixed term, and even though the act creating the office provided for removal but for stated causes.

2. United States ⇐35

Curtailment by Congress of President's inherent power to remove executive officers appointed by him is not to be implied without clear indication of the legislative purpose.

3. United States ⇐35

The provisions of Tennessee Valley Authority Act authorizing removal of Authority director by President for violating a command to make all appointments and promotions on basis of merit and efficiency without consideration of political tests or qualifications, and authorizing Congress to remove Authority director with or without cause, do not limit President's inherent power to remove officers appointed by him for other causes than those specifically stated in such act. Tennessee Valley Authority Act §§ 2(b), 3, 4(f) (j), 14, 17, 16 U.S.C.A. §§ 831a(b), 831b, 831c(f) (j), 831m, 831p.

4. United States ⇐35

The Tennessee Valley Authority board of directors exercises predominantly an "executive function" or "administrative function", though in executing such executive or administrative functions the board is obliged to enact by-laws, which is a "legislative function", and to make decisions, which is a "judicial function", and hence power of President to remove members of the board is not limited to specific causes enumerated in Tennessee Valley Authority Act. Tennessee Valley Authority Act §§ 2(b), 6, 16 U.S.C.A. §§ 831a(b), 831e.

See Words and Phrases, Permanent Edition, for all other definitions of "Administrative Function", "Executive Function", "Judicial Function" and "Legislative Function".

Appeal from the District Court of the United States for the Eastern District of Tennessee, Northern Division; George C. Taylor, Judge.

Action by Arthur E. Morgan against the Tennessee Valley Authority and others to determine whether the President of the United States had power to remove complainant from membership of the board of directors of defendant authority. From a judgment dismissing bill of complaint, 28 F.Supp. 732, the complainant appeals.

Affirmed.

E. H. Cassels, of Chicago, Ill. (Len G. Broughton, of Knoxville, Tenn., and Richard H. Merrick, of Chicago, Ill., on the brief), for appellant.

Melvin H. Siegel, of Washington, D. C., and Wm. C. Fitts, Jr., of Knoxville, Tenn. (Francis M. Shea, of Washington, D. C., and Joseph C. Swidler and Charles J. McCarthy, both of Knoxville, Tenn., on the brief), for appellees.

Before SIMONS, ALLEN and HAMILTON, Circuit Judges.

SIMONS, Circuit Judge.

The appellant was removed by the President of the United States from his position as a member and chairman of the Board of Directors of the Tennessee Valley Authority, and denies the power of the President so to do. His suit for salary and for a declaratory judgment that his removal was unlawful, brought in a Tennessee court and transferred to the court below, was dismissed for failure to state a claim upon which relief could be granted. 28 F.Supp. 732.

Prior to his removal, and since the organization of the Tennessee Valley Authority, the appellant was a duly qualified member of its Board of Directors, designated by the President as its chairman, and appointed for a stated term expiring nine years after the approval of the Act, as provided by Title 16, U.S.C.A., § 831a(b). He was removed prior to the expiration of the term, following conferences between the President and the directors, but not in pursuance of § 831e, which in mandatory phrasing hereinafter recited, provides for removal of a member of the Board by the President for violating a command to make all appointments and promotions on the basis of merit and efficiency without consideration of political tests or qualifications. The appellant has continuously objected to his removal, and has held himself out as ever ready and willing, if permitted, to continue in the performance of his duties as a member and chairman of the Board. He contends that, by its terms, the T.V.A. Act provides specifically for but two methods of removal, one by the President for causes not here involved, and the other by Congress with or without cause, and that the two methods are exclusive, notwithstanding the holding in Myers v. United States, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160, that the power to remove executive officers appointed by the President, is conferred upon him by the Constitution and so may not be abrogated by statute, because the Tennessee Valley Authority is an independent agency of the government exercising quasi-legislative functions with the members of its Board of Directors responsible to Congress and not to the President, and having been appointed for a fixed term, may not be removed prior to its expiration, as held in Humphrey's Executor v. United States, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611.

The appellant's contention requires consideration of the two provisions of the Act which deal with removal of directors from office, and of the nature and function of the Authority. Section 4(f), 16 U.S.C.A. § 831c(f), provides: "The board shall select a treasurer and as many assistant treasurers as it deems proper, which treasurer and assistant treasurers shall give such bonds for the safe-keeping of the securities and moneys of the said corporation as the board may require: Provided, That any member of said board may be removed from office at any time by a concurrent resolution of the Senate and the House of Representatives."

Section 6, 16 U.S.C.A. § 831e provides: "In the appointment of officials and the selection of employees for said Corporation, and in the promotion of any such employees or officials, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency. Any member of said board who is found by the President of the United States to be guilty of a violation of this section shall be removed from office by the President of the United States, and any appointee of said board who is found by the board to be guilty of a violation of this section shall be removed from office by said board."

Urging upon us his construction of § 4 (f), the appellant contends that Congress has thereby reserved to itself exclusive discretionary power to remove a director of the Tennessee Valley Authority, and has imposed upon the President only a mandatory duty to remove for stated causes by the provisions of § 6. He argues that in providing for removal by a concurrent resolution of both Houses of Congress, § 4(f) indicates a deliberate intention by the Congress to set up a mode of removal which expressly excludes the President, since if it had desired the President's participation in removal, it would have required a joint resolution, and that by reservation to itself of the power of removal without participation by the President it intended to provide the only method of removal, except insofar as a specific duty to remove was imposed on the President by § 6. The maxim, expressio unius, requires, he insists, a construction of § 4 that its reservation of the power of remov-

al excludes all other powers to remove and likewise that the conferring of a mandatory authority upon the President by § 6 impliedly excludes the grant of discretionary authority. In addition, it is urged that the plain intent of the Congress, gathered from the Act as a whole, is completely to exclude any discretionary power of the President to remove, so that the Congress may implement its own policies thereby as distinct from any executive policy, and that in addition to relying upon a technical rule of statutory construction, the appellant may properly rely upon the higher rule that a statute is to be interpreted by the meaning it has as a whole.

The indicia in the Act which demonstrate the intention of the Congress to reserve to itself exclusive power of discretionary removal, are asserted to include the provision of a fixed term of nine years for directors; § 3, 16 U.S.C.A. § 831b, making civil service laws inapplicable to officers and employees of the Authority, and permitting the board to remove appointees in its discretion and to base appointment and promotion on merit and efficiency; the creation by the Act of an independent corporation which would have the initiative of a private enterprise, thus negativing any idea of an organization within an executive department, and subject to executive control. The nine year term, it is asserted, was provided in order to prevent a political reorganization of the Authority in any one Presidential term, or a complete change of personnel within the normally expected incumbency of any single President.

[1] The Myers case, however, notwithstanding vigorous dissent by three of the members of the court, recognized the inherent power of the President discretionarily to remove appointees confirmed by the Senate without the consent of the Senate, even though appointed for a fixed term, and even though the Act creating the office provided for removal but for stated causes. As interpreted in the Humphrey case, or as narrowed thereby, the illimitable power of discretionary removal is confined to purely executive officers. The court recognized, however, that between what was decided in the Humphrey case and what was held in the Myers case, there still remains a field of doubt, and that cases falling within it must be left for future consideration and determination as they arise.

[2, 3] The first question that confronts us then, in the interpretation of § 4(f), is whether it manifests an intent that the mode of removal there provided, excludes any other method of removal. If a reservation of exclusive power to remove is to be deduced therefrom, it must be by implication, for the section contains no express declaration that the method for removing members of the Board there provided, excludes any other mode of removal. It must be noted that the Act was passed subsequent to the Myers decision which sustained the discretionary power to remove, inherent in the President, and prior to the announcement of the Humphrey decision which set limits upon that power. It is not to be assumed that the Congress was in any doubt as to a power to remove residing in the President as a necessary incident to his power to appoint. Earlier cases had recognized the concept, Parsons v. United States 167 U.S. 324, 17 S.Ct. 880, 42 L.Ed. 185; Shurtleff v. United States, 189 U.S. 311, 23 S.Ct. 535, 536, 47 L.Ed. 828. Sanctioning it, the court, in the latter of the two citations, had held, "To take away this power of removal in relation to an inferior office created by statute, although that statute provided for an appointment thereto by the President and confirmation by the Senate, would require very clear and explicit language. It should not be held to be taken away by mere inference or implication." And again, "The right of removal would exist if the statute had not contained a word upon the subject. It does not exist by virtue of the grant, but it inheres in the right to appoint, unless limited by constitution or statute. It requires plain language to take it away."

Thus it may be observed that notwithstanding maxims of statutory construction which, in some circumstances, are helpful in arriving at the intent of the legislature, curtailment by the Congress of an inherent power of the President, assuming its constitutional validity, is not to be implied without clear indication of the legislative purpose. But were we to search for grounds of support for the implication now urged upon us, we should fail. The Congress was aware of the Myers decision and its rationalization, for it had aroused wide interest; the prevailing opinion had been an exhaustive review of the constitutional history of the government in relation to appointments and removal; and the three dissenting opinions had been vigorous and complete in urging an oppos-

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ing view. Had it been the intention of the Congress to curtail the removal power of the President, it may be assumed that the Congress would not have been at a loss for a formula unequivocally expressing such purpose. When, in the enactment of the Budget and Accounting Act of 1921 (42 Stat. 20, 31 U.S.C.A. § 1 et seq.), it was designed to place the office of Comptroller General beyond the Presidential power of removal, it found no difficulty in expressing that intent. In providing for the removal of the Comptroller, or his assistant, if incapacitated, inefficient, guilty of neglect of duty, of malfeasance in office, or other stated grounds, it added to the provision the all-embracing clause, "and for no other cause and in no other manner except by impeachment." 31 U.S.C.A. § 43. While this case was still pending in the court below, the President sent to the Senate the nomination of James P. Pope as successor to the appellant as a member of the Board of Directors of the Authority. So one House of the Congress, at least, demonstrated lack of legislative purpose to reserve exclusive power of removal, by confirming the appointment, and this not inadvertently for the question was raised whether vacancy existed. 84 Cong. Rec., 76th Cong., 1st sess., 140-142, 236-238.

When we examine the entire T.V.A. Act, 16 U.S.C.A. § 831 et seq., for support of the construction urged upon us, the appellant has no better case. There are undoubtedly provisions, such as those requiring reports to the Congress (§ 4(j)), and for the accumulating of data useful to the formulation of subsequent legislative policy (§ 14, 16 U.S.C.A. § 831m), either for T.V.A. or other projects, which indicate the intent of the Congress to keep in close touch with the development of the activity entrusted to the Authority, yet they are no more determinative of the present problem than the many provisions in the Act which impose supervisory duties upon the President. He was authorized in the first instance to appoint the members of the Board; to designate its chairman and to fix the original terms of office; to designate the dwelling houses to be used by the members of the Board; to approve of the disposal of real property; to direct other government agencies to render assistance; to lease nitrate plant No. 2 and Waco quarry; and to transfer governmental property to the Authority to enable it to execute its purposes. The Authority was required to file its annual report with the President and he was to approve the percentage of gross receipts from the sales of power to be paid to the states of Alabama and Tennessee, as well as the allocation of costs of the various dams to navigation, flood control, national defense, fertilizer production and power.

Not the least of the provisions indicating the imposition of duty upon the President to supervise the performance by the Authority of the powers entrusted to it, are § 6, hereinbefore considered, and § 17, 16 U.S.C.A. § 831p, wherein the President was expressly authorized to conduct investigations in respect to dams owned by the government in the Tennessee River Basin, as to whether "there has been any undue or unfair advantage given to private persons, partnerships, or corporations, by any officials or employees of the Government, or whether in any such matters the Government has been injured or unjustly deprived of any of its rights." It is in the performance of the requirements of § 17 that the President undertook the investigation which resulted in the appellant's removal.

Finally, it must be said that if § 4(f) is to be given the construction now urged for it, doubt exists as to its constitutional validity. Springer v. Philippine Islands, 277 U.S. 189, 48 S.Ct. 480, 72 L.Ed. 845; Myers v. United States, supra. We are not required to resolve the doubt since we do not read § 4(f) as reserving to the Congress the exclusive power to remove civil officers performing purely executive or administrative functions, and as will presently appear our conclusion is that the directors of the Tennessee Valley Authority are such officers. The clearly recognizable statutory scheme was to provide an alternative method of discretionary removal in § 4(f), and to direct the President, by clear mandate, to remove for the causes recited in § 6.

[4] The final contention of the appellant is that even though § 4(f) does not reserve to the Congress exclusive right of removal, save only as qualified by § 6, the Authority exercises quasi-legislative powers, and the President is, therefore, without power to remove its members during the terms for which they were appointed, by reason of the decision in the Humphrey case. It requires little to demonstrate that the Tennessee Valley Authority exercises predominantly an executive or administrative function. To it has been en-

trusted the carrying out of the dictates of the statute to construct dams, generate electricity, manage and develop government property. Many of these activities, prior to the setting up of the T.V.A., have rested with the several divisions of the executive branch of the government. True, it is, that in executing these administrative functions, the Board of Directors is obliged to enact by-laws, which is a legislative function, and to make decisions, which is an exercise of function judicial in character. In this respect its duties are, in no wise, different, except perhaps in degree, from the duties of any other administrative officers or agencies, or the duties of any other Board of Directors, either private or public. Whatever their character, they are but incidental to the carrying out of a great administrative project. The Board does not sit in judgment upon private controversies, or controversies between private citizens and the government, and there is no judicial review of its decisions, except as it may sue or be sued as may other corporations. It is not to be aligned with the Federal Trade Commission, the Interstate Commerce Commission, or other administrative bodies mainly exercising clearly quasi-legislative or quasi-judicial functions—it is predominantly an administrative arm of the executive department. The rule of the Humphrey case does not apply.

The judgment of dismissal is affirmed.

MANDLES et al. v. GUARDIAN LIFE INS. CO. OF AMERICA (two cases).

Nos. 2128, 2129.

Circuit Court of Appeals, Tenth Circuit.

Nov. 19, 1940.

1. Courts ⇐351½

On motion to dismiss complaint, the allegations of complaint, well pleaded, are admitted and constitute the facts on review.

2. Insurance ⇐146(3)

A policy, meaning and scope, is construed strictly against the draftor, and in the event of ambiguity appearing on its face, the ambiguity will be construed in favor of the insured.

3. Insurance ⇐146(3)

The rule that in event of ambiguity appearing on face of policy, ambiguity will be construed in favor of the insured, should not be used to create ambiguity in order to permit application of the rule.

4. Insurance ⇐146(1)

The test which should govern the interpretation of words or language employed in a policy is one that is employed in the common speech of men, and they are to be given their plain literal meaning in their ordinary sense.

5. Insurance ⇐146(1)

In construing a policy, the intention of the parties as established by the written contract, when construed in the light of the object and purposes obviously intended, is controlling.

6. Insurance ⇐635

In action by beneficiary to recover double indemnity on life policy, it was incumbent on beneficiary to allege facts sufficient to show that the loss was a peril insured against, or that the loss was within the coverage of the policy.

7. Insurance ⇐515

Where life policy provided for double indemnity if death resulted directly and independently of all other causes from bodily injuries effected solely through external, violent, and accidental means, but excluded liability if death resulted "directly or indirectly from bodily or mental infirmity," death from septicemia of insane insured who complained of being annoyed by voices and went to window to call police and thrust her arm through window pane, receiving cuts which became infected, resulted directly or indirectly from mental infirmity precluding recovery of double indemnity.

See Words and Phrases, Permanent Edition, for all other definitions of "Directly or Indirectly from Bodily or Mental Infirmity".

Appeals from the District Court of the United States for the District of Colorado; J. Foster Symes, Judge.

Actions by Henry Mandles and another as executors of the estate of Fannie J. Frankle, deceased, and by Max Mandles against the Guardian Life Insurance Company of America to recover double indemnity on life policy. The two cases

WIENER *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 52. Argued November 18, 1957.—Decided June 30, 1958.

Petitioner was a member of the War Claims Commission created by Congress "to receive and adjudicate according to law" claims for compensating internees, prisoners of war and religious organizations who suffered personal injury or property damage at the hands of the enemy in connection with World War II. The Commission's determinations were to be "final" and "not subject to review by any other official of the United States or by any court." The Commissioners' terms were to expire with the life of the Commission, and there was no provision for removal of a Commissioner. Appointed by President Truman and confirmed by the Senate, petitioner was removed by President Eisenhower before the expiration of the life of the Commission, on the ground that the Act should be administered "with personnel of my own selection." Petitioner sued in the Court of Claims to recover his salary as a Commissioner from the date of his removal to the last day of the Commission's existence. *Held:* The President had no power under the Constitution or the Act to remove a member of this adjudicatory Commission, and the Court of Claims erred in dismissing petitioner's suit. Pp. 349–356.

135 Ct. Cl. 827, 142 F. Supp. 910, reversed.

I. H. Wachtel argued the cause and filed a brief for petitioner.

Solicitor General Rankin argued the cause for the United States. With him on the brief were *Assistant Attorney General Doub, Paul A. Sweeney* and *Herman Marcuse.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a suit for back pay, based on petitioner's alleged illegal removal as a member of the War Claims Commission. The facts are not in dispute. By the War Claims

Act of 1948, 62 Stat. 1240, Congress established that Commission with "jurisdiction to receive and adjudicate according to law," § 3, claims for compensating internees, prisoners of war, and religious organizations, §§ 5, 6 and 7, who suffered personal injury or property damage at the hands of the enemy in connection with World War II. The Commission was to be composed of three persons, at least two of whom were to be members of the bar, to be appointed by the President, by and with the advice and consent of the Senate. The Commission was to wind up its affairs not later than three years after the expiration of the time for filing claims, originally limited to two years but extended by successive legislation first to March 1, 1951, 63 Stat. 112, and later to March 31, 1952, 65 Stat. 28. 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.

Having been duly nominated by President Truman, the petitioner was confirmed on June 2, 1950, and took office on June 8, following. On his refusal to heed a request for his resignation, he was, on December 10, 1953, removed by President Eisenhower in the following terms: "I regard it as in the national interest to complete the administration of the War Claims Act of 1948, as amended, with personnel of my own selection." The following day, the President made recess appointments to the Commission, including petitioner's post. After Congress assembled, the President, on February 15, 1954, sent the names of the new appointees to the Senate. The Senate had not confirmed these nominations when the Commission was abolished, July 1, 1954, by Reorganization Plan No. 1 of 1954, 68 Stat. 1279, issued pursuant to the Reorganization Act of 1949, 63 Stat. 203. Thereupon, petitioner brought this proceeding in the Court of Claims for recovery of his salary as a War Claims Commissioner

from December 10, 1953, the day of his removal by the President, to June 30, 1954, the last day of the Commission's existence. A divided Court of Claims dismissed the petition, 135 Ct. Cl. 827, 142 F. Supp. 910. We brought the case here, 352 U. S. 980, because it presents a variant of the constitutional issue decided in *Humphrey's Executor* v. *United States*, 295 U. S. 602.*

Controversy pertaining to the scope and limits of the President's power of removal fills a thick chapter of our political and judicial history. The long stretches of its history, beginning with the very first Congress, with early echoes in the Reports of this Court, were laboriously traversed in *Myers* v. *United States*, 272 U. S. 52, and need not be retraced. President Roosevelt's reliance upon the pronouncements of the Court in that case in removing a member of the Federal Trade Commission on the ground that "the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection" reflected contemporaneous professional opinion regarding the significance of the *Myers* decision. Speaking through a Chief Justice who himself had been President, the Court did not restrict itself to the immediate issue before it, the President's inherent power to remove a postmaster, obviously an executive official. As of set purpose and not by way of parenthetic casualness, the

*An earlier *quo warranto* proceeding initiated by petitioner was dismissed; an appeal from this judgment was dismissed as moot by stipulation of the parties. The Government's contention that that judgment estops petitioner from relitigating certain issues in the present proceeding does not, in the special circumstances presented on this record, call for consideration on the merits. It was not urged, as in the particular situation it should have been, as a "ground why the cause should not be reviewed by this court." Rule 24 (1) of the Revised Rules of the Supreme Court of the United States. In thus disposing of the matter, we do not mean to imply any support on the merits of the Government's claim.

Court announced that the President had inherent constitutional power of removal also of officials who have "duties of a quasi-judicial character . . . whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control." *Myers* v. *United States, supra,* at 135. This view of presidential power was deemed to flow from his "constitutional duty of seeing that the laws be faithfully executed." *Ibid.*

The assumption was short-lived that the *Myers* case recognized the President's inherent constitutional power to remove officials, no matter what the relation of the executive to the discharge of their duties and no matter what restrictions Congress may have imposed regarding the nature of their tenure. The versatility of circumstances often mocks a natural desire for definitiveness. Within less than ten years a unanimous Court, in *Humphrey's Executor* v. *United States,* 295 U. S. 602, narrowly confined the scope of the *Myers* decision to include only "all purely executive officers." 295 U. S., at 628. The Court explicitly "disapproved" the expressions in *Myers* supporting the President's inherent constitutional power to remove members of quasi-judicial bodies. 295 U. S., at 626–627. Congress had given members of the Federal Trade Commission a seven-year term and also provided for the removal of a Commissioner by the President for inefficiency, neglect of duty or malfeasance in office. In the present case, Congress provided for a tenure defined by the relatively short period of time during which the War Claims Commission was to operate—that is, it was to wind up not later than three years after the expiration of the time for filing of claims. But nothing was said in the Act about removal.

This is another instance in which the most appropriate legal significance must be drawn from congressional failure of explicitness. Necessarily this is a problem in prob-

abilities. We start with one certainty. The problem of the President's power to remove members of agencies entrusted with duties of the kind with which the War Claims Commission was charged was within the lively knowledge of Congress. Few contests between Congress and the President have so recurringly had the attention of Congress as that pertaining to the power of removal. Not the least significant aspect of the *Myers* case is that on the Court's special invitation Senator George Wharton Pepper, of Pennsylvania, presented the position of Congress at the bar of this Court.

Humphrey's case was a *cause célèbre*—and not least in the halls of Congress. And what is the essence of the decision in Humphrey's case? It drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers, and those who are members of a body "to exercise its judgment without the leave or hindrance of any other official or any department of the government," 295 U. S., at 625–626, as to whom a power of removal exists only if Congress may fairly be said to have conferred it. This sharp differentiation derives from the difference in functions between those who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference. "For it is quite evident," again to quote *Humphrey's Executor,* "that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." 295 U. S., at 629.

Thus, the most reliable factor for drawing an inference regarding the President's power of removal in our case is the nature of the function that Congress vested in the War Claims Commission. What were the duties that Congress confided to this Commission? And can the inference fairly be drawn from the failure of Congress to

provide for removal that these Commissioners were to remain in office at the will of the President? For such is the assertion of power on which petitioner's removal must rest. The ground of President Eisenhower's removal of petitioner was precisely the same as President Roosevelt's removal of Humphrey. Both Presidents desired to have Commissioners, one on the Federal Trade Commission, the other on the War Claims Commission, "of my own selection." They wanted these Commissioners to be their men. The terms of removal in the two cases are identic and express the assumption that the agencies of which the two Commissioners were members were subject in the discharge of their duties to the control of the Executive. An analysis of the Federal Trade Commission Act left this Court in no doubt that such was not the conception of Congress in creating the Federal Trade Commission. The terms of the War Claims Act of 1948 leave no doubt that such was not the conception of Congress regarding the War Claims Commission.

The history of this legislation emphatically underlines this fact. The short of it is that the origin of the Act was a bill, H. R. 4044, 80th Cong., 1st Sess., passed by the House that placed the administration of a very limited class of claims by Americans against Japan in the hands of the Federal Security Administrator and provided for a Commission to inquire into and report upon other types of claims. See H. R. Rep. No. 976, 80th Cong., 1st Sess. The Federal Security Administrator was indubitably an arm of the President. When the House bill reached the Senate, it struck out all but the enacting clause, rewrote the bill, and established a Commission with "jurisdiction to receive and adjudicate according to law" three classes of claims, as defined by §§ 5, 6 and 7. The Commission was established as an adjudicating body with all the paraphernalia by which legal claims are put to the test of proof, with finality of determination "not subject to

review by any other official of the United States or by any court by mandamus or otherwise," § 11. Awards were to be paid out of a War Claims Fund in the hands of the Secretary of the Treasury, whereby such claims were given even more assured collectability than adheres to judgments rendered in the Court of Claims. See S. Rep. No. 1742, 80th Cong., 2d Sess. With minor amendment, see H. R. Conf. Rep. No. 2439, 80th Cong., 2d Sess. 10–11, this Senate bill became law.

When Congress has for distribution among American claimants funds derived from foreign sources, it may proceed in different ways. Congress may appropriate directly; it may utilize the Executive; it may resort to the adjudicatory process. See *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423. For Congress itself to have made appropriations for the claims with which it dealt under the War Claims Act was not practical in view of the large number of claimants and the diversity in the specific circumstances giving rise to the claims. The House bill in effect put the distribution of the narrow class of claims that it acknowledged into Executive hands, by vesting the procedure in the Federal Security Administrator. The final form of the legislation, as we have seen, left the widened range of claims to be determined by adjudication. Congress could, of course, have given jurisdiction over these claims to the District Courts or to the Court of Claims. The fact that it chose to establish a Commission to "adjudicate according to law" the classes of claims defined in the statute did not alter the intrinsic judicial character of the task with which the Commission was charged. The claims were to be "adjudicated according to law," that is, on the merits of each claim, supported by evidence and governing legal considerations, by a body that was "entirely free from the control or coercive influence, direct or indirect," *Humphrey's Executor* v. *United States, supra,* 295 U. S., at 629, of

either the Executive or the Congress. If, as one must take for granted, the War Claims Act precluded the President from influencing the Commission in passing on a particular claim, *a fortiori* must it be inferred that Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.

For such is this case. We have not a removal for cause involving the rectitude of a member of an adjudicatory body, nor even a suspensory removal until the Senate could act upon it by confirming the appointment of a new Commissioner or otherwise dealing with the matter. Judging the matter in all the nakedness in which it is presented, namely, the claim that the President could remove a member of an adjudicatory body like the War Claims Commission merely because he wanted his own appointees on such a Commission, we are compelled to conclude that no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it. The philosophy of *Humphrey's Executor*, in its explicit language as well as its implications, precludes such a claim.

The judgment is

Reversed.

utes do away with the fellow servant rule in the case of personal injuries to railway employees. *Second Employers' Liability Cases*, 223 U. S. 1, 49. The question, therefore, is how far the Act of 1920 should be taken to extend.

It is true that for most purposes, as the word is commonly used, stevedores are not "seamen." But words are flexible. The work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 62. We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship. The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business. If they should be protected in the one case they should be in the other. In view of the broad field in which Congress has disapproved and changed the rule introduced into the common law within less than a century, we are of opinion that a wider scope should be given to the words of the act, and that in this statute "seamen" is to be taken to include stevedores employed in maritime work on navigable waters as the plaintiff was, whatever it might mean in laws of a different kind.

Judgment affirmed.

MYERS, ADMINISTRATRIX, *v.* UNITED STATES.

272 U.S. 52 (1926)

APPEAL FROM THE COURT OF CLAIMS.

No. 2. Argued December 5, 1923; reargued April 13, 14, 1925.—Decided October 25, 1926.

1. A postmaster who was removed from office petitioned the President and the Senate committee on Post Offices for a hearing on any charges filed; protested to the Post Office Department; and

three months before his four year term expired, having pursued no other occupation and derived no compensation for other service in the interval, began suit in the Court of Claims for salary since removal. No notice of the removal, nor any nomination of a successor had been sent in the meantime to the Senate whereby his case could have been brought before that body; and the commencement of suit was within a month after the ending of its last session preceding the expiration of the four years. *Held* that the plaintiff was not guilty of laches. P. 107.

2. Section 6 of the Act of July 12, 1876, providing that "Postmasters of the first, second and third classes shall be appointed and may be removed 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," is unconstitutional in its attempt to make the President's power of removal dependent upon consent of the Senate. Pp. 107, 176.
3. The President is empowered by the Constitution to remove any executive officer appointed by him by and with the advice and consent of the Senate, and this power is not subject in its exercise to the assent of the Senate nor can it be made so by an act of Congress. Pp. 119, 125.
4. The provision of Art. II, § 1, of the Constitution that "the Executive power shall be vested in a President," is a grant of the power and not merely a naming of a department of the government. Pp. 151, 163.
5. The provisions of Art. II, § 2, which blend action by the legislative branch, or by part of it, in the work of the Executive, are limitations upon this general grant of the Executive power which are to be strictly construed and not to be extended by implication. P. 164.
6. It is a canon of interpretation that real effect should be given to all the words of the Constitution. P. 151.
7. Removal of executive officials from office is an executive function; the power to remove, like the power to appoint, is part of "the Executive power,"—a conclusion which is confirmed by the obligation "to take care that the laws be faithfully executed." Pp. 161, 164.
8. The power of removal is an incident of the power to appoint; but such incident does not extend the Senate's power of checking appointments, to removals. Pp. 119, 121, 126, 161.
9. The excepting clause in § 2 of Art. II, providing, "but Congress may by law vest the appointment of such inferior officers

as they may think proper in the President alone, in the courts of law or in the heads of departments," does not enable Congress to regulate the removal of inferior officers appointed by the President by and with the advice and consent of the Senate. Pp. 158–161.

10. A contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of the Constitution were actively participating in public affairs, acquiesced in for many years, fixes the meaning of the provisions so construed. P. 175.

11. Upon an historical examination of the subject, the Court finds that the action of the First Congress, in 1789, touching the Bill to establish a Department of Foreign Affairs, was a clean-cut and deliberate construction of the Constitution as vesting in the President alone the power to remove officers, inferior as well as superior, appointed by him with the consent of the Senate; that this construction was acquiesced in by all branches of the Government for 73 years; and that subsequent attempts of Congress, through the Tenure of Office Act of March 2, 1867, and other acts of that period, to reverse the construction of 1789 by subjecting the President's power to remove executive officers appointed by him and confirmed by the Senate, to the control of the Senate, or lodge such power elsewhere in the Government, were not acquiesced in, but their validity was denied by the Executive whenever any real issue over it arose. Pp. 111, 164–176.

12. The weight of congressional legislation as supporting a particular construction of the Constitution by acquiescence, depends not only upon the nature of the question, but also upon the attitude of the executive and judicial branches of the government and the number of instances in the execution of the law in which opportunity for objection in the courts or elsewhere has been afforded. P. 170.

13. The provisions of the Act of May 15, 1820, for removal of the officers therein named "at pleasure," were not based on the assumption that without them the President would not have that power, but were inserted in acquiescence to the legislative decision of 1789. P. 146.

14. Approval by the President of acts of Congress containing provisions purporting to restrict the President's constitutional power of removing officers, *held* not proof of Executive acquiescence in such curtailment, where the approval was explicable by the value of the legislation in other respects—as where the restriction was in a rider imposed on an appropriation act. P. 170.

15. *Marbury* v. *Madison*, 1 Cranch 137, considered, in connection with *Parsons* v. *United States*, 167 U. S. 324, and *held* not authoritative on the question of removal power here involved. Pp. 139–144, 158.

The questions, (1) Whether a judge appointed by the President with the consent of the Senate under an act of Congress, not under authority of Art. III of the Constitution, can be removed by the President alone without the consent of the Senate; (2), whether the legislative decision of 1789 covers such a case; and (3), whether Congress may provide for his removal in some other way, present considerations different from those which apply in the removal of executive officers, and are not herein decided. Pp. 154–158.

This Court has recognized (*United States* v. *Perkins*, 116 U. S. 483) that Congress may prescribe incidental regulations controlling and restricting the heads of departments in the exercise of the power of removal; but it has never held, and could not reasonably hold, that the excepting clause enables Congress to draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of that clause and to infringe the constitutional principle of the separation of governmental powers. P. 161.

Assuming the power of Congress to regulate removals as incidental to the exercise of its constitutional power to vest appointments of inferior officers in the heads of departments, certainly so long as Congress does not exercise that power, the power of removal must remain where the Constitution places it,—with the President, as part of the executive power, in accordance with the legislative decision of 1789. P. 161.

Whether the action of Congress in removing the necessity for the advice and consent of the Senate, and putting the power of appointment in the President alone, would make his power of removal in such case any more subject to Congressional legislation than before, is a question not heretofore decided by this Court and not presented or decided in this case. P. 161.

Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate's consent. P. 164.

58 Ct. Cls. 199, affirmed.

APPEAL from a judgment of the Court of Claims rejecting a claim for salary. Appellant's intestate, Frank S. Myers, was reappointed by the President, by and with the advice and consent of the Senate, as a postmaster of the first class. The Act of July, 1876, § 6, c. 179, 19 Stat. 80, provides that such postmasters shall hold office for four years, unless sooner removed or suspended according to law, and provides that they may be removed by the President "by and with the advice and consent of the Senate." Myers was removed, before the expiration of his term, by an order of the Postmaster General, sanctioned by the President. The removal was not referred to the Senate, either directly or through nomination of a successor, during the four year period. Judgment of the Court below that Myers could not claim salary for the part of that period following the removal, was based on the view that there had been laches in asserting the claim. The appeal was argued and submitted by counsel for the appellant, on December 5, 1924. On January 5, 1925, the Court restored the case for reargument. It invited the Honorable George Wharton Pepper, United States Senator from Pennsylvania, to participate as *amicus curiae*. The reargument occurred on April 13, 14, 1925.

In view of the great importance of the matter, the Reporter has deemed it advisable to print, in part, the oral arguments, in addition to summaries of the briefs.

Oral[1] argument of *Mr. Will R. King*, for appellant.

[1] NOTE.—This and the other oral arguments are perforce condensed in these reproductions, retaining, however, so far as practicable, the phraseology, as well as the substance. Senate Document No. 174 (69th Cong., 2d sess.), issued December 13, 1926 (Govt. Printing Office) contains not only the oral arguments as taken down by a stenographer (with no doubt some amendments of form), but also the record in the case, the briefs used on the reargument, and the opinions. The oral arguments of Senator Pepper and Solicitor General Beck were also printed (G. P. O.), in May, 1925, as a document of the Department of Justice.

In the 136 years that have passed since the Constitution was adopted, there has come before this Court for the first time, so far as I am able to determine, a case in which the Government, through the Department of Justice, questions the constitutionality of its own act. As to that, I have no criticism to offer; I think it is but proper. We find the Solicitor General appearing as a representative of the Executive Department of the Government. And we have Senator Pepper, as *amicus curiae*, who, as I take it from his brief, represents another branch, the Legislative branch, of the Government. I appear as counsel for the appellant, who brought this suit in the first instance. It is gratifying to feel that all interests are properly represented.

Frank S. Myers, now deceased, and for whom the administratrix is substituted as a party, was postmaster at Portland, Oregon, for a number of years, four years the full term, and was then reappointed in 1917. About three years and a half after he entered upon the duties of his office, he was summarily removed by the Postmaster General, and afterwards, as stated by some telegram from the Postmaster General, it was concurred in by the President. It was treated as a removal by the President in the first instance. After receiving word of his removal, without any charges having been preferred against him, he protested; and he continued that protest throughout the entire period. The record will disclose that there was no lack of diligence on his part in objecting to his removal.

The suit was finally brought for the recovery of his salary in the Court of Claims. The Court of Claims has rendered a statement of findings, to which we take no exception; it is a very fair statement. And this Court will find stated in the appellant's brief, the statement of facts, quoted substantially as stated by the Court of Claims. Fortunately, there is no disagreement upon the question of facts, nor was there before the Court of

Claims. The Court of Claims, after fully considering the matter, decided they were with us on the facts, but against us on one question only, and that was the question of laches. That is to say, they attempted to bring this case within two or three decisions of this Court; and I will not take up the time of the Court to discuss those in detail, further than to call attention to the fact that there is a distinction between this case and all of the cases that have been cited. In fact, the lower court's own statement of its findings of facts would necessitate, if that were the only question involved, a judgment in favor of the appellant. The statements of facts are set out in the complaint, to the effect that this plaintiff was removed from office; he protested against the removal; he accepted no other employment; he continued to contest it up until the last moment expired for his successor to be appointed, and the name of his successor was not sent to the Senate. The Senate adjourned without a successor having been appointed; and then six or seven weeks afterward, he brought this suit.

The effect of the decision in this case is to hold that he is guilty of laches for not bringing the suit within the time required, the Court citing cases which we deem inapplicable.

If the conclusion of the Court of Claims is well founded, it would have been necessary for the appellant to have brought a suit immediately, or within a reasonable time, after each pay-day; he would have had to bring a suit every month. He brought his suit before the time expired in which the President could have sent to the Senate the name of his successor; several months before. Then, after the Senate had adjourned, and the time had expired in which the name could have been sent to the Senate, six or seven weeks . . . or less than eight weeks . . . he filed a supplemental complaint claiming his salary up to that time . . . in fact, he brought the

suit within seven weeks, when all is considered, of the expiration of the term.

The Government gives the man the right of action for wrongful dismissal; but if the application made by the Court of Claims is sound, he has a right without a remedy.

The only question before the Court, as I take it, under the admitted facts, is as to the constitutionality of the act which inhibits the President from removing an official, within this particular class designated by the statute, without the consent of the Senate. That the statute contains in effect a prohibition of the removal by the President of a postmaster of the first class without the consent of the Senate, I take it there is no dispute. The statute prohibits removal without it having been submitted to the Senate. I do not mean that it was necessary to send over a notice that he expected to remove this postmaster; and I will concede that sending the name of the appointee to succeed Mr. Myers would have been sufficient. But that was not done.

The Constitution of the United States specifies that the President may nominate for certain offices. Then it follows that with the provision that for all inferior officers appointment may be provided for by Congress, and may be delegated either to the President alone, to the heads of departments, or to the courts. The powers of the President of the United States are enumerated powers. Prior to the Constitutional Convention, all these powers were among the States. But when the Convention met, they decided upon having a head Executive. They delegated to him certain powers. Those powers are expressed in the Constitution. And there it is provided that the appointment of inferior officers may be delegated by Congress to the President alone, to the courts of law, or the heads of departments. It has been decided by this Court—I think unequivocally—that when it is delegated to the departments, Congress has the

power to provide that the removals can only be made by and with the consent of the Senate. *United States* v. *Perkins*, 116 U. S. 483.

The Court of Claims had held in that case that where Congress delegated the power to the head of a department, Congress had implied power to place restriction as to removal by the head of that department, and to require that it must receive the consent of the Senate. And the only difference between that case and this is that in that case the power was not delegated to the President. It was delegated to the head of an Executive Department. There is nothing in counsel's brief to indicate why there should be a distinction—so far as I can reason it out—between a delegation of power to the head of an Executive Department and the delegation of power to the President.

In the first instance, the whole delegation is vested in Congress, as it was before we had a Constitution; and the Constitution enumerates and specifies the particular offices to which the President might appoint, and makes the exception that the inferior officers shall be under the control of Congress.

With these few remarks, I believe I have stated the issues in this case, and will now leave the rest of the discussion in the opening to Senator Pepper, reserving the rest of my time for the closing.

Extract from brief of *Messrs. Will R. King* and *Martin L. Pipes*, for the appellant.

The defense of laches is untenable. *Norris* v. *United States*, 257 U. S. 77; *Nicholas* v. *United States*, 257 U. S. 71; *Arant* v. *Lane*, 249 U. S. 367; *id.*, 55 Ct. Cls. 327.

Forbidding removal of postmasters of the first class without the consent of the Senate is constitutional. Discussing the Act of June 8, 1872, c. 335, 17 Stat. 284; the Tenure of Office Act, April 5, 1869, 14 Stat. 430; 17 Stat. 284; *Parsons* v. *United States*, 167 U. S. 324; *Shurtleff* v. *United States*, 189 U. S. 314.

There is nothing in the Constitution relating to the President's power of removal. Under Art. II, § 2, cl. 2, Congress could vest power of both appointment and removal of postmasters in the Postmaster General. It would seem that, if it has the power to withhold from the President the power of appointment of a postmaster, it would also have the power, in the creation of the office, to limit the effect of an appointment made by the authority of an act of Congress, and therefore to limit the power of removal.

The power of appointment of postmasters, is not derived from the Constitution *directly*, but from a law of Congress, passed in pursuance of a power granted Congress by the Constitution. And since the power of the President in such case is derived from Congress, it would clearly seem to follow that the Congress can attach such conditions to the appointment as it sees fit. As to officers other than inferior officers mentioned in the section, of course the power of appointment, by and with the consent of the Senate, is a power vested in the President by the Constitution. Discussing *Porter* v. *Coble*, 246 Fed. 244.

Since the President's power of appointment of inferior officers is not absolute, but qualified and contingent upon the action of Congress, it follows that the power of removal, incident to the power of appointment, is also qualified and contingent upon the action of Congress; also that when Congress acts, and the contingency takes place, it is the act of Congress, in pursuance of the powers conferred by the Constitution, that vests both the power of appointment and the power of removal; and whether the act of Congress vests the power in the head of a department or in the President, *the power exists only by virtue of the act of Congress, and not directly by force of any constitutional provision.*

How can it be said that Congress "may vest" a power as to inferior officers if it has already been vested by the

Constitution? The plain meaning is that Congress is given plenary power to establish offices not created by the Constitution and to prescribe all the incidents and elements of the offices, including the authority to vest the power of appointment and of removal where it may deem proper, with the only limitation (if it be a limitation) that the appointing power must be in a court of law, a head of a department, or the President.

Since the power to remove is not mentioned in the Constitution, it follows that the President's power to remove an inferior officer is derived only from the recognized rule that the power to remove is incident to the power to appoint. That the President's power to remove does not exist in the President by virtue of the presidential office, is apparent from the fact that this power has always existed and been recognized in the heads of departments, where Congress has often placed it. It is so now in the case of fourth-class postmasters. The question is set at rest by *Eberlein* v. *United States,* 257 U. S. 82. See also *United States* v. *Perkins,* 116 U. S. 483.

Congress has by the Budget Law recently sustained its constitutional power to vest the power of appointment in the President and yet to reserve to Congress the power of removal,—this after a debate on the very question. The offices of Comptroller General and Assistant Comptroller General were created, who are to be appointed by the President, but removed for causes specified by joint resolution of Congress or by impeachment "and in no other manner." This act was signed by the President, June 11, 1921. If that law be constitutional, then the law here involved is constitutional.

Appointments exclusively within the jurisdiction of the Executive are specifically designated in Art. II. *Expressio unius est exclusio alterius.* It will be observed that the officers placed within the exclusive jurisdiction

of the President are to be nominated; the other refers to appointment. To nominate is to suggest and must first come from the Chief Executive, while to appoint requires the joint action of the two departments.

See Story, Constitution, 2d ed., §§ 1534, 1535, 1539-40; *United States* v. *Germaine,* 99 U. S. 510; *United States* v. *Perkins,* 116 U. S. 483.

The debates in Congress on the subject in 1789, and the few years following, together with such adjudications as appear on the subject, determined but one question (if anything), and that, as stated in *Ex parte Hennen,* 13 Pet. 259; *McElroth* v. *United States,* 102 U. S. 426; *United States* v. *Perkins, supra,* and other cases of similar import, was the power of the Executive to remove an official without the consent of the Senate *in the absence of any provision in the Constitution or statutes on the subject.* Whatever may be said of the congressional action in 1789, it must be conceded that for more than a half century, wherever and whenever the subject has been before Congress, the latter has, by its enactments, declared in favor of that interpretation of the Constitution, making valid any and all restrictions that it has seen proper to place upon the removal by the President, whether by the direct or implied consent of the Senate, or by compliance with forms of prescribed procedure under the civil service, or other laws.

Congress has the right to exercise all powers essential to the making of the provision of the Constitution respecting postoffices and post roads effective. *In re Rapier,* 143 U. S. 110.

Prerogatives of the President consist only of that which is clearly delegated, or incident to those enumerated, to the Executive. The silence of the Constitution upon the subject, in view of the historical conditions from which the Constitution emanated, and the evils which it sought to remedy, could more properly be said

to imply that in all circumstances Congress, and only that branch of the Government, should have control of the subject. Taft, Our Chief Magistrate and His Powers, p. 144.

The office of Comptroller General serves as an excellent example of the wisdom of the framers of the Federal Constitution in leaving the creation of the so-called inferior officers, together with the authority for their appointment and for their removal, by such one of the authorities as may be there designated, to the wisdom of Congress, as conditions might develop.

It would seem to be clear from a mere recital of the duties performed by the accounting officers since the days of the Continental Congress, that such duties are not executive, but judicial in their nature, and no more deprive the President of his duty to take care that all laws are enforced than do the District Courts of the United States which are likewise created by statute. This was clearly recognized by Madison (Debates in Congress, Annals, VI, 636), in the debate on the bill which became the Act of September 2, 1789, establishing the accounting offices. *Id.*, p. 638. The accounting officers were placed in the Treasury Department, over the protests of James Madison and others, where they continued to remain until the Budget and Accounting Act of June 10, 1921, made them independent of all of the executive departments. While they were administratively within the Treasury Department, it has been recognized throughout the history of the United States, that, until within the last three or four years, their discretion was not subject to the control of either their immediate superior, or the President.

The office of the Commissioner of Patents affords illustration of another important *inferior office*, of a class that the Constitution did not intend should come exclusively under the Executive respecting his power of removal. *Butterworth* v. *Hoe*, 112 U. S. 67.

The President has no power to interfere with accounting officers in the performance of their duties. 1 Ops. Atty. Gen. 629; *id.*, 471; *id.*, 705, 706; 2 Ops. Atty. Gen. 509. The absolute independence of the accounting officers from control in their decisions by executive officials was recognized by Postmaster Kendall (whose authority was then as the Postmaster General's now), in his annual report of December 4, 1835. Ex. Doc. No. 2, 1st sess., 24th Cong., 399, 400. The Senate Committee summed the matter up in a report dated January 27, 1835. Sen. Doc. No. 422, 1st sess., 23d Cong.

Throughout the history of this Government, the President, Secretaries of the Treasury, and heads of Departments, with few exceptions, have disclaimed any authority over the accounting officers of the United States. See *United States* v. *Lynch*, 137 U. S. 280.

President Taft clearly recognized, in his message of June 27, 1912, transmitting the recommendations of the Commission of Economy and Efficiency, that there must be checks on the usurpation of power by the executive departments. House Doc. No. 854, 62d Cong., 2d sess.

Oral argument of *Senator Pepper*, as *amicus curiae*.

There are two questions before the Court which I shall discuss as clearly and briefly as I can.

With respect to the matter of laches, I submit that if an officer of the United States, claiming to have been illegally removed, who has protested continuously during the whole of the session to which his removal might have been reported; who has kept himself free from other employment and received no compensation from any other source; for whose successor no provision was made either by the President alone, or by the President with

the advice and consent of the Senate; who then brings his suit within six or seven weeks after the perfection of the cause of action—if he is to be denied a right of recovery on the ground of laches, the Government is handing to him with one hand the privilege of suing for the salary on the theory of unjustifiable removal, and with the other hand withdrawing the possibility of recovery, because the course of conduct which in that event would be prescribed for him is one which it would have occurred to few people to pursue.

I come now to the question on the merits.

The Solicitor General all but concedes that the language of the act under discussion evidences the intent of Congress that the Senate's consent shall be essential to removal as well as to appointment. The situation which confronts the Court then is this:

The Congress, in the exercise of an undoubted legislative power to create the office in question, creates it; prescribes the duties of the office; fixes the salary; specifies the term; and declares that the Senate shall have something to say with respect to removal, if removal is attempted. And the question is whether the Executive, having exercised his Constitutional right to appoint, with the advice and consent of the Senate, to the office which Congress has thus created, may ignore that part of the statute which specifies the conditions under which there may be a removal. The Congress in creating the office has declared that the responsibility of removal shall be the joint responsibility of the Executive and the Senate. May the Executive act under the statute, in so far as it creates the office, and may he ignore that portion of the statute which prescribes the conditions and circumstances under which a removal may take place?

I wish to emphasize as earnestly as I may that the issue in this case is not an issue between the President and the Senate. Except in newspaper headlines, there is no

such controversy. This is an issue between executive power and legislative power; and the question is where the Constitution has vested the power to prescribe terms of removal—whether in the Congress, as I contend, or in the President, as I think the Solicitor General must contend.

Here we have a constitutional "no man's land." It lies between the recognized lines of executive prerogative and of legislative power. The question is, who may rightfully occupy it? And the decision of this Court in this case will be of enormous significance in helping to clear up the question as to who may enter in and possess that area which up to date has been debatable.

The Act of 1876 is in no sense a bit of isolated or eccentric legislation. With the aid of one of the most efficient of Government agencies, the legislative counsel for the Senate, I have collated, as exhaustively as has been possible within the limits of the time for preparation, the statutes now upon the books, which in some degree undertake to place limitations upon the Presidential power or right of removal, if such a power or right exists.

Laying aside the case of officers whose tenure is prescribed by the Constitution, the Justices of this Court, and the federal judges generally, and turning to other officers for whose term or tenure the Constitution makes no provision, I suggest that the Court must choose between three theories. One is the theory that the power of removal is an executive power; that it is inseparably incident to the power of appointment; and that, since the Constitution places the limitation of Senatorial consent only upon the power of appointment, the inference is that the power of removal is left untrammeled and free. That, I take it, is the position which the Government must take here. It is the position which the Solicitor General took at the previous argument. It is a proposition the consequences of which, I think, he shrinks

from recognizing now; but in the last analysis it must be upon that proposition that the appellee must base its case.

Then there is the second proposition: that if the power of removal is a reciprocal of the power of appointment, then, since the Constitution has insisted that there shall be joint responsibility with the Senate in the case of appointment, the inference is that there is an intention that there shall be joint responsibility in the case of removal. There is very respectable authority in the books for that view; but for myself I confess that it seems to me to be unsound.

The third proposition is that which I venture to press upon your Honors: that the act of removing an officer is itself an executive act, but that prescribing the conditions under which that act may be done is the exercise of a legislative power, inseparably incident to the legislative power to create the office, to prescribe the duties of the office, to fix the salary, and to specify the term.

I am contending that it is only the act of removal that is executive in its character; and that prescribing the terms under which the removal may take place is a legislative act; a thing to be performed by Congress in the exercise of powers expressly granted, and under the power to pass all laws "necessary to carry the foregoing powers into effect," etc.

What is "*the* executive power" that is vested in the President? Not the vague executive prerogative which was resident in kings at the date of the adoption of our Constitution. It is the executive power which this instrument grants to him.

It is said, however, that this whole question has been settled by practice and by constitutional history in this country. I enter a flat denial. I think there has been a great misconception of what the testimony of history is in this matter. I call attention to the fact that when

you are discussing the origins of the Constitution, and debates in the Constitutional Convention, so far from finding material from which any inference can be drawn of the sort that the Solicitor General seeks to draw, the data are at least equivocal or even the basis of a contrary inference.

In the Constitutional Convention, Madison and others were in favor of vesting the power of appointment in the President alone, without the concurrence of the Senate. Pinckney and others were in favor of vesting the power of appointment in the Senate alone. Oliver Ellsworth was of opinion that the initiative of appointments should be with the Senate, and that the President should have only the power to negative. The report of Rutledge's committee, which was the conciliatory committee intended to reconcile the different views, brought in on the 6th of August, was to the effect that the making of treaties and the making of important appointments should be by the Senate.

Then came the compromise; and the compromise was that the Executive should make appointments, by and with the advice and consent of the Senate.

When you turn to contemporaneous exposition, absolutely the only utterance on the subject of removal that I can find in the interval between the action of the Constitutional Convention and ultimate ratification of the instrument by the States, is the utterance in No. 77 of The Federalist, usually attributed to Hamilton, which is to the effect that the assent of the Senate to removals will be necessary, as it is necessary to the appointments. I have cited in my brief a very interesting Illinois case (*Field* v. *The People*, 3 Ill. 79,) in which the court, after an examination of the authorities, gives reasons for believing that it was only upon a representation that the President would not have the power of removal that the Constitution could have been rati-

fied by the States; that if it had been supposed that the President had the power of removal, as an executive prerogative which the legislature could not curb, the Constitution never would have become effective as the fundamental law of the land.

When you come to the debates in the First Congress, of 1789, there is found no basis for the statement that those debates settled this question in favor of the presidential right of removal. I appeal to the record, because when this great tribunal declares the law we all bow to it; but history remains history, in spite of judicial utterances upon the subject.

When you turn to what actually took place in the Senate and in the House, you find that the issue which was before that Congress was an act to create a Department of Foreign Affairs, and to provide for the office of a Secretary of Foreign Affairs, to be appointed by the President, by and with the advice and consent of the Senate, and to be removed by the President.

A great controversy was aroused in the Senate and the House over the presence of the phrase "to be removed by the President." In the House an amendment prevailed, which was afterward accepted by the Senate, which side-stepped the question, after prolonged debate, by providing that if and when the Secretary of Foreign Affairs should be removed by the President of the United States, temporarily such-and-such things should happen to the records and books of the Department. That was upon a division following a debate, where, if you compare the way in which people voted with the way in which they spoke in the course of the debate, you find that no inference at all can be drawn from their vote as to whether they were voting that the President had the power of removal and needed not that it be conferred, or that he had it not and that Congress must confer it upon him; or that the President had not the power and that the Congress could not confer it upon him.

The most interesting analysis that I know of on the effect of debates and votes in a Congress is that contained in the judgment of Senator Edmunds, in the impeachment proceedings of President Johnson; where he analyzed the votes in the Senate and the House in that First Congress and came to the conclusion that you can not even guess as to what was the opinion of those who voted respecting the question at issue.

It will be remembered that in the First Congress there was a tie vote in the Senate. Only ten States were represented in the Senate at that time, there being twenty Senators. There was a tie vote, and John Adams, who was in the chair, cast the deciding vote and broke the tie, which carried the decision in favor of the measure as the House had amended it.

Now, I suggest that you can not draw any inference at all from those debates or from that vote, excepting that many of those who participated were believers in the power of the legislature; that many of those who participated were believers in the prerogative of the President; and that a clean-cut decision was obscured by a compromise.

When you come to the subsequent legislative history of this question, you will find the same difficulty in drawing historical inferences. The great confidence in President Washington contributed largely to such acquiescence as there was in those days in the theory of presidential power. Story testifies to it, as do many others of our great jurists. Jefferson made a great many removals; but he had both Houses of Congress with him, and no issue arose. The succeeding Presidents, Madison, Monroe, and John Quincy Adams, raised no issue with the Congress; although the Benton report made in 1820 showed apprehensions on the part of some statesmen that trouble was ahead if the existence of an executive prerogative was recognized.

Then came Jackson's administration and his removal of his Secretary of the Treasury because he would not obey the President in his direction to remove the Government deposits from the United States Bank. And as a result of that removal there took place a memorable debate in the Senate. The Senate was hostile to the Administration. The debate is notable for the remarkable arguments of Webster, Clay, and Calhoun. Those men have been quoted, and I admit in one or two instances referred to by former Justices of this Court in opinions, as having been advocates of the Executive prerogative of removal. Not so. Webster, after having made an argument to that effect, said that on reflection he had come to the conclusion that those who in 1789 claimed that this was a legislative power had the best of the argument, and that he would acquiesce merely for the time being in the passage of a law requiring the President to furnish Congress with his reasons for removals.

Clay took precisely the ground which I am taking here, that the act of removal is an executive act, but that the power to determine the conditions under which removal may be made is a great legislative power and is resident in the Congress.

Calhoun, in a great argument, went even further, and held that it was a power which was resident in the legislature alone and doubted whether it could be in any sense committed to the Executive.

I have supposed that under our system of government Congress can not confer executive power upon the President; that if it is a question of executive power you look to the Constitution. But I have supposed that the acts done by the Executive in the discharge of his duty faithfully to execute the laws, are such acts as those laws prescribe, and that where the Congress which makes the law declares that it is of the substance of the law that only such-and-such things shall be done in the execution of

it, that declaration is binding upon the Executive—not because it is clipping his power, but because it is a valid exercise of the power of Congress to declare how the incumbency of the office may be terminated. Let me illustrate:

Marbury v. *Madison* we think of always for the notable decision that this Court may declare an act of Congress unconstitutional. May I remind your Honors that, not by way of *obiter dictum,* but involved in the substance of the decision, was a decision by the great Chief Justice and the Court that an officer who had been appointed for a term was irremovable during that term by the President, except through the process of impeachment? That was a case in which Marbury and others had been named as justices of the peace of the District of Columbia by the President. Commissions had been signed by the President, had been sealed by the Secretary of State, and were in the office of the Secretary of State. An act of Congress conferred on this Court—or purported to—original jurisdiction to issue a mandamus; and in this case a petition was filed for a mandamus to the Secretary of State to compel him to deliver the commissions.

This Court decided, first, that when the commission had been signed and sealed and was in the office it was the property of the office-holder and must be delivered; second, that the duty to deliver it was not a political duty involving discretion, but was a ministerial duty which could be enforced by mandamus; that mandamus was the appropriate remedy at common law, but that this Court could not issue the mandamus because the attempt to enlarge its original jurisdiction was unconstitutional.

Some people have tried to get rid of that decision by a wave of the hand; by saying, "Oh, well, everything in it was *dictum* except the decision that there was no jurisdiction."

But the decision that there was no jurisdiction was reached only by declaring the act of Congress unconstitutional; and this Court never would have declared the act of Congress unconstitutional if they could have disposed of the case on the ground that this was an appointment which was revocable by the Executive, and that if they were to issue the writ to compel the delivery of the commission, the next day the President could recall it. Marshall so thought; and he said with admirable clearness that as long as the commission is unsigned or unsealed and in the hands of the President it is revocable, and therefore the officeholder has no rights and there can be no mandamus; but that the instant the duty to deliver it becomes ministerial, at that moment the duty must be performed, and it is a mere question of who is to compel the performance, because the appointee has tenure for his term. It is an interesting fact, may it please Your Honors, that in 1803 you have that significant utterance of Marshall's, too rarely commented upon in subsequent cases.

The Solicitor General in striving to find a middle ground between the alternative that there is a prerogative power of removal in the President and the proposition for which I contend, that the power to prescribe conditions of removal is legislative and inheres in Congress—the Solicitor General in attempting to find a middle ground and to save some laws that are on the statute books seems to me to concede my case.

A concession, for example, that Congress may declare a legislative policy respecting how an office is to be administered and for what causes the incumbent is to be removed is an end of the argument that the President must have a free hand if he is effectively to enforce the laws. It will not do to say that the President must have a free hand in the matter of determining when and how he shall remove and at the same time to say that Congress

may whittle away his freedom by prescribing the causes for which he may remove and the circumstances under which he may do it. To concede any power in the premises to Congress seems to me to be wholly inconsistent with the theory of a prerogative resident in the Executive, derived from the Constitution, in virtue of which he controls the officers of the United States. And with respect to them, I beg leave to say that the officers, incumbents of offices established by law, are officers of the United States; they are officers of the Government; they are officers of the people. They are not servants of the President.

I wish to call attention to that portion of section 2 of Article II of the Constitution which, after dealing with the manner of appointment of ambassadors, other public ministers, consuls, justices of this Court, and all other officers whose offices may be established by law, proceeds thus:

"But the Congress may by law vest [in the case of such inferior officers as may be from time to time established, the appointment either] in the President alone, in the courts of law, or in the heads of Departments."

I take it that "inferior officers" is a broad term and covers all officers not specified in the Constitution, and not heads of Departments. Certainly a postmaster is an inferior officer.

And I take it that if the Congress, under the Constitution, might have lifted the appointing power in this case out of the President altogether and vested it in the Postmaster General, then Congress has clearly the right, in vesting it in the President, to prescribe the terms upon which that vesting shall take place and how the power of removal shall be exercised. In the *Perkins* case, 116 U. S. 483, this Court decided that the power to vest the appointment in the head of a Department carried with it the power to prescribe conditions, including those affect-

ing removal. And it would be a distorted application of the prerogative theory of Executive power to say that Congress may vest the appointment of an officer elsewhere than in the President and retain control over the removal, but, having chosen to vest it in the President, may not annex conditions which concern the circumstances of removal.

Think of the psychology of this matter. In the long run, is it safer to vest this tremendous prerogative of terrorizing officers into conduct of the sort acceptable to the Executive through fear of removal, in the Executive; or can the power most safely be lodged, in accordance with age-old precedents, with the legislature? Of course, the legislature may abuse it, just as they abused it in the Tenure of Office Act. That was most unwise legislation passed confessedly to embarrass the President. But it was not unconstitutional.

It is said, however, that "It will be a cruel injustice if you hold the President accountable for enforcing the laws, but leave it in the power of the legislature to embarrass him in this way." But you are not going to hold the President accountable for failure to enforce an impossible law. The responsibility of creating a workable law is the responsibility of Congress; and attaching to the office conditions of removal which make it unworkable is a responsibility for which Congress must face the people.

Forensic argument and prophecy can build a great structure of calamity to result from denying to the President power to discipline people by terrorizing them through threat of removal. But you can equally well imagine acts of executive tyranny if you do concede the power. It is a question respecting the place most safely to lodge this great power.

The story, in English constitutional history, of the phrase "advice and consent" is coincident with the

whole story of the rise and development of English parliamentary government. I find the phrase first used back in the eighth century, in 759, when a Northumbrian king does such-and-such things with the "advice and consent" of his wise men. It comes down through Magna Charta. It comes down through all the ages. And when in 1787 it became necessary, as between those who were championing a strong Executive and those who were championing the legislature, to find a middle ground, it was provided, in the language of old English law, that such-and-such things should be done by the President "with the advice and consent of the Senate."

I accordingly close by urging Your Honors to set this controversy at rest once and for all by determining that the power to control removals is neither in the President nor in the Senate, but that, in accordance with the age-long traditions of English constitutional history, it resides in the Congress of the United States, where the Constitution has placed it.

Extract from brief of *Senator Pepper.*[1]

The Constitution puts the Justices of the Supreme Court and all of the Federal Judges in a class by themselves. They hold office during good behavior, and are removable only by impeachment. As to all other officers, whether named in the Constitution or not, there is absolute silence on the subject of removal. With respect to them the Court is confronted by three possible theories of removal. (These are stated in the oral argument, *ante*, p. 67.)

It is said that the Executive can not effectively execute the laws unless he has an unrestricted power of removal.

[1] Senator Pepper also filed a supplemental brief, prepared by Mr. Frederic P. Lee, Legislative Counsel of the Senate, giving a classified citation of existing statutes restricting the power of the President to appoint or remove officers. (See Sen. Doc. 174, 69th Cong., 2d sess.)

To argue thus is to beg the question. The laws which he is to execute are the laws made by Congress. The Constitution makes no vague grant of an executive prerogative, in the exercise of which the President may disregard legislative enactments. The executive power vested in him is only that which the Constitution grants to him. 9 Op. At. Gen. 516.

Whether or not a certain office shall be created is a legislative question. The duties of the official, the salary which he is to receive, and the term during which he is to serve, are likewise matters for legislative determination. Provision for filling the office is in its nature legislative, and so is provision for vacating it. The fact that the Constitution makes a specific provision in connection with the filling of the office works no change in the nature of the provision for vacating it. The actual removal is an executive act; but if it is legal it must be done in execution of a law—and the making of that law is an act of Congress. If the Constitution were silent in regard to appointment as it is silent in regard to removal, legislative action would be decisive in both cases. From the mere fact, however, that it is deemed wise to give to the Executive a limited power of appointment, no inference ought to be drawn that he is intended to have an unlimited power of removal.

The language of the second section of Article II of the Constitution is nicely chosen. The President is given the *power,* with the advice and consent of the Senate, to make treaties. Elsewhere he is similarly given the power to fill up vacancies during the recess of the Congress. But the executive right to make nominations and appointments to office when the Congress is in session is not described as a *power* at all. "He shall nominate, and by and with the advice and consent of the Senate, shall appoint." That which is laid upon him is an executive *duty.* His business is to effectuate the legislation of Con-

gress. From the existence of the duty no inference should be drawn of the grant of the power.

The power of control through fear is a dangerous power to lodge in the hands of any one person. It is far less likely to be abused when it is exercisable only by the vote of a large body of men than if it represents merely the determination of a single will. The case of the Comptroller General is a case in point.

At the present time the well-deserved public confidence in the President is equalled by the unpopularity of Congress. It must never be forgotten, however, that English-speaking people have found it wise to place their trust in the legislature, subject only to constitutional restraints. McElroy, Life of Grover Cleveland, Vol. I, pp. 166–168.

I find nothing in the record of the debates in the Constitutional Convention of 1787 from which it can be inferred that there was anything like a consensus of opinion respecting the exercise of the power of removal. It is clear that none of the members of the Constitutional Convention who took part in the debates desired the President to wield the powers which at that time were exercisable by the King of England. In the second place, it must be borne in mind that in the Constitutional Convention, Madison and others urged that the President alone, and without the consent of the Senate, should make appointments to office. See V, Elliott's Debates, p. 329. Others, like Roger Sherman and Pinckney, thought that the power of appointment should be in the Senate alone. *Ib.* pp. 328, 350. Oliver Ellsworth had suggested that nominations be made by the legislative branch, and that the Executive should have power to negative the nominations. In the report of Rutledge's Committee, made August 6th, it was provided that the Senate should have the power to make treaties and appoint ambassadors and Judges of the Supreme Court, and that the legislative branch should appoint a treasurer by

ballot. Finally, a compromise was reached under which it took the joint action of the Executive and the Senate to appoint as provided in Sec. 2, Art. II of the Constitution. No inference can be drawn, from a compromise reached under these circumstances, that it was the intention of the framers that the President alone should have the power of removal. If that inference were permissible, a similar inference might be drawn that the removal should be by the Senate alone. In the third place, it seems clear that it was not the intention of the framers of the Constitution that officers of the United States should be the officers or servants of the President. The mingling of the powers of the President and the Senate was strongly opposed in the Convention. See IV, Elliott's Debates, p. 401. Finally, it cannot successfully be contended that the power of removal was commonly vested in governors of States by then existing state constitutions. I, Congressional Debates, Pt. I, p. 490.

Nor can it be successfully contended that during the period when the issue of ratification was before the States the existence of any such power was conceded by the friends of the new instrument. I find no exposition of the intent of the framers of the Constitution during the period of ratification except that in No. 77 of the Federalist, attributed to Alexander Hamilton, which was to the effect that "the consent of the Senate would be necessary to displace as well as appoint." See *Field* v. *The People*, 2 Scam. 165.

When the first Congress met only ten States were represented in the Senate, which was composed of twenty members. Of these precisely one-half had been members of the Constitutional Convention. They were Oliver Ellsworth, William S. Johnson, Robert Morris, William Patterson, George Read, John Langdon, Caleb Strong, William Few, Richard Basset, and Pierce Butler. Of the fifty-four members of the House of Representatives who voted, eight had been members of the Constitutional Convention, namely, Baldwin, Carroll, Clymer, Fitzsimmons, Gerry, Gilman, Madison, and Sherman.

The first Congress had before it a bill to establish a Department of Foreign Affairs, at the head of which should be an officer to be called the Secretary of the Department of Foreign Affairs, "who shall be appointed by the President by and with the advice and consent of the Senate, and to be removable by the President." So far as the proceedings in the Senate are concerned, there is no complete record of the debate. We know that the vote on the passage of the bill was a tie, and that the deciding vote was cast by the Vice-President, John Adams. Our information respecting the views of individual Senators can be drawn only from the fragmentary notes of Mr. Adams. See Edmunds, Impeachment of Andrew Johnson, Vol. III, p. 84. Of the ten Senators who had sat in the Convention, six by voice or vote upheld the President's power and four opposed it. See Works of John Adams, Vol. III, pp. 407–412.

It is even more difficult to draw any certain inference from the proceedings in the House. In that body, when the bill was in committee of the whole, a resolution was offered to strike out so much of the bill as vested the power of removal in the President. On this question the yeas were twenty and the nays thirty-four. This vote, if considered without reference to the debates or to the subsequent parliamentary history of the measure, would tend to support the inference that a decisive majority was in favor of giving to the President the unrestricted right to remove a cabinet officer. It would of course throw no light whatever upon the question whether the President would have had any such right to removal if the Congress had not conferred it upon him. But the vote must be analyzed both in the light of the debates and in the light

of the subsequent fate of the bill; for when the bill came from the committee of the whole into the House an amendment was proposed to another portion of the bill making a certain disposition of the records of the office, "whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy." It was thereupon declared that if this amendment prevailed it would be followed by a motion to strike out the substantive grant to the President of the power of removal as it had appeared in the bill when introduced. The amendment did prevail by a vote of yeas thirty-one and nays nineteen. The bill was finally passed in the House by a vote of yeas twenty-nine and nays twenty-two. When reference is made to the expressed views of the members of the House, as found in the debates, the analysis made by Senator Edmunds will be found in point. Impeachment of Andrew Johnson, vol. III, pp. 84–85.

The difficulty of drawing any certain inference from the votes and debates above summarized is a little relieved by the fact that on August 7, 1789, there was passed an act for the government of the Northwest Territory, which provided that the President should nominate and by and with the advice and consent of the Senate appoint officers where offices had been appointed by the Congress, and that the President should have the power of removal where Congress could remove. This recognition of a power of removal in Congress is inconsistent with the contention that the power of removal is exclusively an executive prerogative. Nor can any argument in favor of an executive power of removal be drawn from the course of subsequent legislation. In the Act of February 13, 1795, 1 Stat. 415, the proviso would appear to be a legislative attempt to construe the constitutional provision giving to the President the power to fill up vacancies and reserving to the Congress control over the appointment in case of vacancies. Congress may or may not have had in mind vacancies caused by removals.

In 1801 Jefferson removed many officers by executive acts, but the Senate and the House were overwhelmingly of his political faith. So that no question arose. The Presidents who succeeded him, Madison, Monroe, and John Quincy Adams, forced no issues with the Congress upon the subject of removals. It is to be noted, however, that on May 15, 1820, an act was passed providing that district attorneys, collectors of the customs, naval officers, etc., should be appointed for four years, but removable from office at pleasure. At whose pleasure is not stated. Presumably, the President's pleasure is meant. This act shows that the President and the Congress were of opinion that the Congress may by law fix the duration of the occupancy of an office by assigning him a term. From the power to specify a term it is easy to deduce a power in Congress to provide for the manner in which the incumbent of the office may be removed.

In 1826 a select committee of the Senate, of which Benton was chairman, and having among its members Van Buren and Hayne, submitted a report and certain bills, one of which was a bill to prevent the President from dismissing military and naval officers at his pleasure. The bill was not passed at that time, but a similar measure became law at a later date, to wit, on July 13, 1866.

In Washington's time there was enormous popular confidence in the President. In Jefferson's time there was political harmony between him and the Congress. In the days of his three successors no issues were forced. But when Andrew Jackson took office the question of the extent of executive power occupied a large share of the attention of Congress. His removal of Duane was followed by condemnatory resolutions of the Senate with a bill to repeal the first and second sections of the Act of May 15, 1820, and to limit the terms of service of certain

civil servants. The object of this measure was to limit executive patronage. It passed the Senate. Webster, Clay, and Calhoun expressed their views at length. Extracts from what these great men said in debate will show that it is altogether inaccurate to quote them as champions of the executive power of removal. Webster, Cong. Deb. No. 11, pt. I, pp. 458–470; Clay, *id.*, pp. 513–524; Calhoun, *id.*, pp. 553–563.

Webster was clearly of opinion that those who in 1789 argued in favor of the presidential power of removal had the worst of the argument, and that it should then have been decided that the power of removal was exercisable only by the President and the Senate. He regarded legislative practice as having mistakenly recognized the power to regulate the matter of removals as executive, but for the time being would be satisfied with a requirement that the President when removing should state his reasons to the Senate.

Clay held the view which in the instant case I am pressing upon the Court, namely, that since the legislative authority creates the office, defines its duties, and prescribes its duration, the same authority may determine the conditions of dismissal.

Calhoun was of opinion that the power to regulate removals was exercisable by Congress alone. What is here said with regard to the position of Webster is said with confidence, although I am not unmindful of the fact that in *Parsons* v. *United States,* 167 U. S. 324 (1896), the Court attributed to Mr. Webster a view which I venture to suggest was inferred from an isolated statement in the debate divorced from the context in which it was used.

In 1867 Congress passed the Tenure of Office Act over President Johnson's veto; and when, in disregard of the act, he undertook to dismiss Mr. Stanton, he was impeached by the House and tried by the Senate. The vote

for conviction stood yeas thirty-five, nays nineteen. He was therefore acquitted, the requisite two-thirds not having voted to convict. See views expressed in their opinions by Senators Sherman and Edmunds. III Impeachment of President Johnson, pp. 3, 5, 6; *Id.*, pp. 83, 84.

By the Act of April 5, 1869, which amended the Tenure of Office Act by ridding it of its most obnoxious features, the President might make removals but was required "within thirty days after the commencement of each session . . . to nominate persons to fill all vacancies." As a practical proposition, this placed it in the power of the Senate alone to obstruct removals (although Congress had imposed upon the Senate no responsibility respecting them) by withholding consent to the appointment of the successor unless actually satisfied with the reasons for the preceding removal. Against this limitation President Grant filed his protest, President Hayes urged repeal; and President Garfield denounced the senatorial usurpation.

During the recess of Congress, President Cleveland removed 643 officers, and within thirty days after the assembling of Congress sent to the Senate his nominations of persons to be appointed as successors to the removed officials. One of the removed officials was a federal attorney. The act under which he had been appointed did not undertake to vest the power of removal elsewhere than in the President. The case was therefore unlike the instant case. Before acting upon the nomination of his successor, the Senate Committee on the Judiciary requested the Attorney General to submit information and papers relating not only to the qualifications of the nominee but to the removal of his predecessor. The Attorney General, by direction of the President, refused to comply with the request. A heated controversy ensued. After vehement debate a resolution was passed—32 to 25—censuring the Attor-

ney General and, by implication, the President. The incident ended, however, somewhat in opera bouffe fashion by the discovery that the term of the removed official had expired before the Senate had passed its resolution of inquiry. There was therefore nothing to do but to confirm the appointment of the successor.

It was as a sequel to this conflict that what was left of the Tenure of Office Act was repealed, the repealing measure being signed by the President on March 3, 1887. As already pointed out, however, this repeal had no effect upon the Act of July 12, 1876, which is the act with which we are concerned in the instant case. While the joint operation of the Acts of 1869 and of 1887 leaves the President free to remove other members of his cabinet, the Postmaster General and postmasters of the first, second, and third class are removable only by and with the advice and consent of the Senate.

The act of removal is an executive act but the power to frame the law of which the act of removal is an execution is a legislative power and is vested in the Congress. If the Congress creates an office, prescribes its duties, the qualifications of the incumbent, and the salary paid to him, but makes no provision on the subject of removal, the inference is that the removal is intended to be at the President's discretion. If the Congress similarly creates the office and specifies in affirmative words grounds upon which the President may remove, it is nevertheless to be inferred that he may still remove at discretion because only negative words can displace this inference. If the creating act gives a term to the appointee, it might still be inferred, in the absence of other provisions, that the President may remove at discretion; but this proposition is inconsistent with the view expressed by Chief Justice Marshall in *Marbury* v. *Madison,* 1 Cr. 137. If the creating act specifies causes of removal and superadds a provision that there shall be removal for no other causes,

the inference is of an intention to limit executive removals to that extent. Probably the same inference should be drawn where the statute provides that the incumbent is to hold "during good behavior." If the statute creating the office provides that the President may remove only after affirmative action by another body, e. g., by a court-martial, the possibility of executive removal is to this extent limited. If the creating act (as in the instant case) provides that removal shall be the joint responsibility of the President and the Senate, the President may not remove without the consent of the Senate. If the creating act provides that removal can take place only after action by both Houses of Congress, this also is a constitutional use of legislative power.

The decisions of this Court are not in conflict with any of the positions above summarized. *Marbury* v. *Madison,* 1 Cr. 137; *Matter of Hennen,* 13 Pet. 230; *United States* v. *Guthrie,* 17 How. 284; *United States* v. *Perkins,* 116 U. S. 483; *Parsons* v. *United States,* 167 U. S. 324; *Shurtleff* v. *United States,* 189 U. S. 311; *Wallace* v. *United States,* 257 U. S. 541.

The cases above cited are believed to be the only decisions of this Court in which the question at issue has been touched upon. It is undeniable that the historical summaries contained in the several opinions tend to conclusions favorable to the contention now made on behalf of the appellant. For the reasons heretofore given, and with the greatest possible deference, it is suggested that these summaries may well be supplemented by a further consideration of the whole subject in a case which happily comes before the Court for decision at a time far removed from the transaction which gave rise to it and when the Court is unembarrassed by any pending conflict of opinion between the legislature and the Executive.

As to the argument *ab inconveniente,* two observations may be made: first, that constitutional liberty is more

vital than governmental efficiency; and, second, that the inconveniences which can result from the legislative regulation of removals are imaginary rather than real.

Oral argument of *Solicitor General James M. Beck*, for the United States.

The Government recognizes that it can not sustain this judgment on the ground of *laches*. Unless, therefore, the Act of July 12, 1876, be unconstitutional, the judgment must be reversed.

I therefore address myself to this great constitutional question—a question which has repeatedly been submitted to this Court, but which the Court up to the present hour has found it unnecessary to decide; a question of great delicacy, because it affects the relative powers of two great departments of the Government.

If I understand the distinguished Senator's contention, it is this: that the President's power of removal is not a constitutional power; that he derives nothing from the Constitution, under which the "executive Power" was vested in the President of the United States; nothing by reason of the solemn obligation imposed upon him by that Constitution to "take care that the laws be faithfully executed"; nothing by the oath which the Constitution exacts from him that he will support, maintain, defend, and preserve the Constitution of the United States; that his only power in this vital matter of administration of removing officers is derived from the inaction of Congress, which has plenary power over the subject of removals from office. It seems to me an amazing proposition.

Senator Pepper would sustain the law on the ground that Congress was not obliged to create the position of postmaster of Portland, Oregon; and therefore could create it upon such terms as it pleased, and if so, those conditions are beyond judicial review. In other words, Con-

gress can provide—as it has provided in the statute under consideration—that the postmaster at Portland, Oregon, should serve during the pleasure of the Senate. If this be true, then the Executive power of removal, hitherto supposed to be granted by the Constitution to the President, is no longer in the President, but when Congress creates the office it may reserve Executive powers to the Senate.

If appellant's argument be a sound one, Congress, in creating the offices of the Government, can do so under conditions which would transfer governmental power from the Executive to the Legislature. If so, where does the power to alter the Constitution's distribution of powers end? Thus there could be created two executive departments, one the executive department of the Constitution, which would be shorn of its powers and its halls like the poet's "banquet hall deserted," which the President would tread alone with "all but him departed," and the other, a congressional executive department, which would function independently of the President and be responsible only to Congress and removable only by Congress.

But if Congress has this power, then it has equally the power to delegate to any part of itself the executive power or function of removal. In the statute now under consideration, Congress has not itself assumed the power to control the removal of this postmaster. It has delegated it, primarily, to the President of the United States, but, ultimately, to the Senate. Under this theory, it could delegate the ultimate decision as to removals to the President, the Vice-President, as presiding officer of the Senate, and the Speaker of the House. Thus would be revived the triumvirate of Rome, for there would be three great officers of the State, sharing that which is vital in the practical administration of the Government, the removal of unworthy or inefficient officials from the public service.

The Constitutional Convention rejected a triumvirate when they refused to have an Executive of three individuals.

It is not necessary in this case to determine the full question as to this power of removal. This Court can say that this particular Act is unconstitutional, without denying to the Congress the power to create legislative standards of public service, which have a legitimate relation to the nature and scope of the office, and the qualifications of the incumbent.

I do not concede that a law, which thus subjects the power of removal to congressional conditions, is constitutional; but it is not necessary to decide that in this case. For this law differs, *toto caelo*, from a law which prescribes a standard of service. It declares no public policy with respect to any attribute of an office. There is no legislative standard of efficiency; it is a mere redistribution of power—a giving to one branch of Congress some of the power which belongs to the President.

The President's right of removal is not an implication of the Constitution, but a fair interpretation of its language; an interpretation that has had the sanction and confirmation of unbroken usage.

The great defect that called the Constitution into being was that under the Confederation all judicial, executive, and legislative powers were vested in the Congress of the Confederation. And it was because the Continental Congress exercised executive power that there came the tragedy of the Revolution, and especially the dark and terrible days of Valley Forge, when Washington's little army starved in a land of plenty, because of a headless Government that had no Executive, but which, under the guise of a legislative tribunal, attempted to exercise both legislative and executive powers. The result was that, when the Constitution was formed, quite apart from the teachings of Montesquieu as to the distribution of power

as a safeguard of liberty, the one thing that they were anxious to create was a strong, independent Executive, who, carrying out the laws of Congress, would yet have sufficient inherent strength to preserve his department against the creation of a parliamentary despotism.

In the debates of the Constitutional Convention, it must be admitted that there is very little to be found on this subject. They did discuss the question of removal, so far as the office of President is concerned, because he could not remove himself; and so far as the judiciary is concerned, they intended to give the judges a life tenure and necessarily made some provision for removal for extraordinary reasons. They did assert—and this is the answer to Senator Pepper's charge of executive absolutism—a power in the legislature, to be traced to the old Anglo-Saxon reliance upon the legislature as the ultimate safeguard of liberty, that if the President, in the exercise of his executive functions, wilfully failed in his duty—if he tolerated dishonest, inefficient, or disloyal men in the Executive Department—he or any other officer of the State could be impeached by the House of Representatives, tried by the Senate, and removed from office. But with that exception, there was no suggestion in the debates with respect to the power of removal.

At that time, in the science of government, according to the custom of the nation from which we drew our institutions in great part, and according to the custom of every country, so far as I know, the power to appoint and the power to remove had always been regarded as executive functions.

[In answer to interrogations from the Bench:] No one questions that the Congress, if it vests in the Postmaster General the appointment of a postmaster, can restrain the Postmaster General from removing his subordinate. Congress has control over those upon whom it confers

the mere *statutory* power of appointment. But it has no such power as against the President; because the President's power is not statutory; it is constitutional. In my judgment, the President can remove any one in the Executive Department of the Government. The employees of the judicial branch of the Government and the special and direct employees of the Congress, like the Sergeant at Arms, are not officers of the executive branch of the Government, and therefore are not within the grant of executive power to the President. That is one theory. The other theory is the one I first suggested, that the executive power is even more comprehensive. But it is not necessary for me to press the argument that far.

As Mr. Madison showed in the first great debate on this subject, the power to remove is not a mere incident and is not solely attributable to the power to appoint. It has a much broader basis.

To assume that the only source of the power to remove is the power to appoint is to put the pyramid on its apex; whereas you put the pyramid on its base when you say that the power to remove is part of that which, in sweeping and comprehensive and yet apt phrase, is denominated the "executive power," coupled with the explanation that the executive power is to "take care that the laws be faithfully executed," a mandate of tremendous significance and import.

The Constitution, in addition to this division of the Government into three great branches, draws this significant distinction between the grant of legislative power and the grant of executive power: In the grant of legislative power, it said (and it never uses a word idly): "All legislative powers *herein granted* shall be vested in a Congress." And when you come to look at the "powers herein granted," you will search in vain for any suggestion of a power to remove by the Congress.

The most one can say is that, under the general power, the omnibus clause of the legislative grant, namely, the power to make laws "for carrying into execution the foregoing powers," there is the implied power to create offices, and according to the theory advanced by opposing counsel, the resultant power to step over the dead line into the Executive Department and assume the right of removal.

When you come to the executive branch of the Government, it is significant that the framers omitted the words "herein granted." Why? They could specify the nature of and classify the legislative powers with reasonable precision. But the executive power was something different. And therefore they simply said "the executive power," not "the executive powers." It was not only in the singular number; but it was intended to describe something that was very familiar to them, and about which they did not believe men could disagree; and therefore they said, remembering the innumerable ills of the old Confederation, "the executive power."

It was not granted to an Executive Department. That is, again, a very significant thing. They might have limited it. But they said: "The executive power shall be vested in a President of the United States"—distinguishing him from all other servants of the Executive Department, and making him the repository of this vast, undefined grant of power called "the executive power." Then they went on to say what that power was—not in any way attempting to classify or enumerate it; but they simply gave its objective, and that was "to take care that the laws be faithfully executed."

It was common sense in the days of the Fathers, when our country was a little one; it is common sense today, when we are the greatest nation in the world; when we have, as I say, 800,000 employees of the State—that the President can not take care that the laws are faithfully executed, unless he has the power of removal, and the

summary power of removal, without any interference or curb upon him. And that has been shown again and again in our history.

But the Constitution did not stop there. There is a clause to which very little significance has been attached in the discussion on this question, but which I submit has great significance. It says that the President shall "commission" officers. There was special significance in the minds of the framers when, in this broad grant of "executive power," they said that the President should commission. Thus there are four steps—nomination; confirmation; appointment; commission. Nomination implies in its very essence the power of removal. It is the power to select at all times and at all places the best man for a position. In the matter of an existing office, the power to nominate includes the power, if necessary, to remove an existing incumbent, to make way for a better man.

Then comes the one qualification of the Constitution: That as to all offices which the Congress may think sufficiently important, no one can be appointed except with the advice and consent of the Senate. It is significant that, while the power of appointment is subject to the confirmation of the Senate, nowhere is there a suggestion in the Constitution that in the conceded power of removal, as an executive power, any such limitation has been put upon it. The power of appointment required local information. At all events, it was a matter in which the framers might well say that the ambassadors of the States desired to be consulted. But when a man has been taken from his locality and has become a part of the federal machinery; when he has been for one or more years under the supervision of the President, who knows best whether that man is faithfully or unfaithfully discharging his duties? How can the Senate know?

From those grants of power; from the nature of the Government; from the division into three different de-

partments; from the sweeping grant of executive power; from the power to nominate; from the duty of taking care that the laws be faithfully executed; from the power to commission, importing a continuation of that confidence which the President, in the very text of the commission, reposes in the appointee—from all those things, I assert that it is a just interpretation of the Constitution, and not a mere implication, that the power to remove is a part of the executive power granted to the President.

This question was discussed very ably about 136 years ago. Mr. Webster, who, in his antipathy to President Jackson, did take advanced ground in that direction—but not going to the great lengths of Senator Pepper—still recognized the tremendous force of the judgment that was reached in the First Congress of the United States. What was the result of that debate? The House of Representatives sustained Mr. Madison. The Senate equally divided; but Vice President Adams in the chair voted for the law in the form that would sustain the President's prerogative. And George Washington, the first President of the United States, the presiding officer of the Constitutional Convention, added his concurrence to the view thus expressed, and would have acted upon it if he had had any occasion to exercise the power of removal.

The first Congress of the United States, which one might almost call an adjourned session of the Constitutional Convention, so determined it. And from that day until it was challenged in Jackson's time, a period of nearly half a century, there never was a question as to the power of the President, nor any attempt by Congress to regulate or curb it. That great controversy was determined in Jackson's favor. And then the question never arose again until the "tenure of office" acts in President Johnson's administration, and these acts resulted—if I may use a pragmatical argument—in one of the most discreditable chapters in the history of this country. And

now, more than a half century later, as a part of the "irrepressible conflict" between the Congress and the Executive, Congress again raises the question in its most offensive form in the Comptroller General act.

If you take my middle ground, that Congress may guide and direct the discretion of the President by such statutory qualifications as are properly inherent in the nature of an office, but without disturbing the power of removal as the Constitution vested it, Congress can not destroy the independence of the Executive. But if you take Senator Pepper's view and that of his colleague, the power of Congress to put the President in a strait-jacket is unlimited.

This is a grave question. The men who framed the Constitution honestly believed that we could never succeed through a legislative despotism. I am quite willing to concede also that they believed that our nation could not endure an executive despotism. I am not contending for an executive absolutism; but I am protesting against a legislative absolutism.

The CHIEF JUSTICE. Mr. Beck, would it interrupt you for me to ask you to state specifically what your idea is in regard to the middle ground to which you referred? What kind of a method did you mean?

Mr. BECK. Well, I instanced one case, Mr. Chief Justice. I will try to give two or three illustrations: Take, for example, the kind of law I first cited, a law that says that an office is created and that the President shall appoint somebody to the office, and that he shall be removable for inefficiency and dishonesty. That largely leaves the President's prerogative untouched.

The CHIEF JUSTICE. Do you mean that he still would retain the power of absolute removal without having any such cause as that mentioned in the statute?

Mr. BECK. Exactly. And he would apply the legislative standard that had been given to him, *viz*, whether the incumbent was inefficient or dishonest.

Suppose the Congress creates an office and says that it shall only be filled by a man learned in the law; and suppose it further provides that, if a man ceases to be a member of the bar, he shall be removed. I am not prepared to say that such a law can not be reconciled with the Constitution. What I do say is that, when the condition imposed upon the creation of the office has no reasonable relation to the office; when it is not a legislative standard to be applied by the President, and is not the declaration of qualifications, but is the creation of an appointing power other than the President, then Congress has crossed the dead line, for it has usurped the prerogative of the President.

The power to suspend, within the interpretation of the Constitution, is only part of the power to remove. No one contends now that impeachment is the only way. There has never been since the first Congress a contention that, unless Congress affirmatively requires the consent of the Senate to a removal, the Senate concurrence is necessary. You need not determine in this case whether Congress may not reasonably regulate and control or guide the discretion of the President as to the act of removal, so long as it does not impair his essential power of removal. I do not want to question any part of the great prerogative of the President by conceding, or by inviting this Court to say, that there is any power of control which would prevent the President, in a case properly within his discretion, from exercising the power of removal in the teeth of an act of Congress.

The *amicus curiæ* argues that the genius of our race requires that the last hope of the people shall be reposed in the legislative branch of the Government. I reply that such last hope is reposed in neither the legislative branch, nor the executive. It is reposed in the Constitution of the United States, which has seen fit to divide the powers in such a way that neither of these three great departments can monopolize the powers of government.

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The Constitution preserved such equilibrium; it takes away from the President the temptation to remove any important official without cause, because the moment he appoints a successor the Senate must be consulted. Moreover, Congress has its power over the purse strings. It has the power of impeachment. It can abolish the office altogether. It can fully legislate as to the nature of offices, which it creates, but it can not create an office upon conditions which change the fundamental nature of our Government.

If it is within the power of Congress to create offices in such a way and by such methods as to redistribute the powers of government, then the Constitution will, sooner or later, become, by Congressional usurpation, a house of cards.

Our form of government is a magnificent edifice, erected by a hundred and thirty-six years of patient sacrifice and labor. It has its "cloudcapped towers;" its "gorgeous palaces;" its "solemn temples"—and this great Court is such a temple. But if the Court should sustain appellant's contention, this noble edifice of constitutional liberty might one day become an "insubstantial pageant faded," and posterity might then say that it was not the work of supremely great men, but of muddled dreamers, for it would be of "such stuff as dreams are made of."

Extract from the brief of *Solicitor General Beck* and *Mr. Robert P. Reeder,* Special Assistant to the Attorney General, for the United States.

The statute can be held unconstitutional without assuming the absolute power of the President to remove any executive officer. It may, in creating the office, limit the duration of the term thereof.

In the present case, no legislative standard is prescribed and no general policy laid down, except that the President may not exercise his executive function of removal except with the consent of the Senate. This necessarily associates the Senate with the President in the exercise of a purely executive function. Such a law does not regulate the power of removal.

There may be a middle ground between absolute power in the President to remove and absolute power in Congress to control removal. The power of removal may be subject to such general laws as do not destroy the exercise by the President of his power of removal, but allow its exercise subject to standards of public service. If this "middle ground" does not commend itself to the Court, then the broader question becomes whether the power of removal is a constitutional prerogative of the President and, as such, can not be regulated by Congress.

On this theory, Congress may undoubtedly control the power to regulate the removal, when exercised *by any other official,* to whom the power of appointment has been delegated (for they owe their power of appointment solely to Congress,) and unquestionably the Congress can grant to other officials—such as the heads of departments—the power of appointment upon any conditions as to the power of removal by them that it thinks proper. The power of the President, however, is not *statutory,* but *constitutional.* As it is indisputable that the removal of a civil servant is essentially an executive power, it must follow that, as executive power is vested in a President, the power of removal inheres in him as a part of his prerogative, except where such power is expressly limited by the Constitution. It cannot now be seriously contended that the removal by the President of civil officers, who are his subordinates, must await the slow process of impeachment.

From the beginning of the Government removal has been recognized as essentially an executive function. In no sense is it either judicial or legislative. The only question, therefore, is whether Congress by reason of its

legislative power can control the exercise by the President of his executive power of removal; and that power of removal does not depend upon any implication of the Constitution but upon the well-considered delegation of powers in the Constitution itself. A cursory examination of the constitutions of many modern States discloses that, with one or possibly two exceptions, no power of removal is expressly given and that it is invariably treated by necessary implication as a function of the executive. This Court has often recognized that the power to remove is a necessary incident to the power to appoint, and that it is an executive power.

There seems to be but one explanation for the failure of the Constitutional Convention to discuss the question of removal (except in respect of the President and the judges); they regarded it as axiomatic that the power to remove was an executive power and that it was included within the grant of "executive power" to the President and the special grant that he should "take care that the laws be faithfuly executed." Under the Articles of Confederation, the Congress had the power of removal, but the Virginia Plan contemplated the transfer of such "executive rights" to the national executive. The Virginia Plan was the Constitution in embryo. That constitution, as finally developed by the Committee on Style, commenced with three separate articles, which were intended to carry out the division of powers, then so generally recognized. The various powers respectively assigned to each of the trinity were classified with admirable precision in the three Articles; and the attempt to keep them separate and distinct, except in so far as the Constitution expressly interblended them, is clear. There is, however, a very significant difference between the first sections of Art. I and Art. II, respectively. Art. I, § 1, provides: "All legislative Powers *herein granted* shall be vested in a Congress of the United States." Art. II, § 2, provides: "*The*

executive Power shall be vested in a President." It does not use the words "herein granted," nor does it speak of a class of powers as the preceding section, but it speaks of the "executive power;" and the executive power, as understood at that time in the science of government, always included both the power to appoint and the power to remove.

No attempt was made to specify the various kinds of executive power, as was done in respect of the legislative. Remembering the impotence of the Confederation because of its lack of an executive, the Framers desired to give to the President the fullest "executive power," except where they limited it; but, without defining, they indicated the nature of that power by several sweeping phrases. Upon him was the great obligation to "take care that the laws be faithfully executed" and he "shall commission all the officers of the United States."

To grant a commission was a prerogative of the Executive,—in England the "Crown,"—as distinguished from the legislature. Every officer of the State in England at that time received his commission directly or indirectly from the King. The Framers departed from this model by the requirement that the Senate should consent to the appointments. But, having consented, the function of the Senate ends, and the commission of every high federal official comes to him not from Congress, which created the office, but from the President. The commission recites that the President "reposing special trust and confidence" does appoint—and "authorizes and empowers—to execute and fulfill the duties of the office." This is something more than a clerical detail; and, reading it in connection with the British theory that the executive and not the legislature was the fountain head of political preferment, it means that it is the President who commissions. Even after the Senate has consented to the

appointment, the President may still refuse to deliver the commission and invite the Senate to concur in another selection.

If Congress can require the concurrence of the Senate in the removal of officers of the Army and the Navy as against the President's power of removal, then the President's power as Commander in Chief is potentially as weak as was that of Washington when he commanded the American Army, between 1775–1781, and the officers and soldiers of the States came and went at the pleasure of those States.

In three respects only did the Constitution limit the executive power of the President: *viz.*, the declaration of war, the making of treaties, and in the making of appointments.

A clear distinction is made between nomination, appointment, and commission—three stages, in only one of which does the Senate participate. To nominate is to select the best man for a given position. Charged with the responsibility to the people for faithful execution of the laws, the President must have the power to select the human agencies through whom he discharges his duties, if he is to meet the responsibility. The only constitutional limitation upon the President's power of selection is that he cannot appoint the higher officers until he has first obtained the advice and consent of the Senate. This restriction, being an exception to a general grant, must be limited to the fair meaning of the words used. Nowhere is there a suggestion that the President's power to remove, which the Constitution takes for granted as a part of the executive power, must likewise be effected with the advice and consent of the Senate. To justify this exception, it is necessary to read words into the Constitution which are not there.

It can not be argued that the Framers of the Constitution did not take into account the possibility that removals

would be necessary. Where they intended a servant of the State to have a life tenure they said so. Only judicial officers were thus to serve. They knew that the President would necessarily discharge his duties through many civil servants. The very form of the Government was a great experiment. It all depended upon the wisdom of those who should conduct its operations. It is quite obvious that they must have recognized that the selection of civil servants would inevitably be attended by many errors in judgment. With all this in mind, it seems inconceivable that they could have intended that no officer should be removed except with the consent of the Congress—often not in session—or that their careful restriction of the senatorial power of confirmation to the appointment of public servants should apply also to the very different question of a removal of those servants. There was substantial reason why they should thus qualify the power of appointment, for intercommunication between the constituent States was very inconsiderable; and if the patronage of the Government was to be distributed, no President would have the local knowledge to select the men from various localities. But after appointment, the President became the best judge as to whether the retention of an official was in the interests of the public service.

There remains, however, the final clause, which, if it stood alone, would justify the implication of the President's power to remove; for Article II, § 3, provides that the President "shall take care that the laws be faithfully executed." If he fail in this duty, he may be impeached. Apart from impeachment, the people may refuse to give him another term of office. His reputation is vitally concerned in the ability to do those things which this grave responsibility requires. It would be a cruel injustice to the President to hold him responsible for the faithful execution of the laws, if he has no control

over the human agencies whom he must, of necessity, employ for this purpose.

While this Court did not find it necessary in *Parsons* v. *United States,* 167 U. S. 324, to base its decision upon the constitutional rights of the President, its review of the history of the subject shows that the overwhelming weight of authority is in favor of the President's power to remove from office, so that it seems clear that, if necessary, the Court would have then held that an act depriving the President of this power was unconstitutional. A contemporaneous legislative exposition of the Constitution acquiesced in for a long term of years fixes the construction to be given to its provisions. *Stuart* v. *Laird,* 1 Cr. 299; *Briscoe* v. *Bank of Ky.,* 11 Pet. 257; *Burrow-Giles Co.* v. *Sarony,* 111 U. S. 53; *Ames* v. *Kansas,* 111 U. S. 449; *Cooper Mfg. Co.* v. *Ferguson,* 113 U. S. 727; *United States* v. *Philbrick,* 120 U. S. 52; *United States* v. *Hill,* 120 U. S. 169; *Robertson* v. *Downing,* 127 U. S. 607; *Schell's Exrs.* v. *Fauche,* 138 U. S. 562; *Field* v. *Clark,* 143 U. S. 649; *Ex parte Grossman,* 267 U. S. 87. Blaine, Twenty Years of Congress, II, p. 270.

[The brief then reviews at length the arguments in the first Congress touching the President's power of removal, citing: Annals of Congress; Life and Works of John Adams, III, 407–412; Journal of William Maclay, 109–118; Letters, Madison to Patton, March 24, 1834; Madison to Edward Coles, October 15, 1834; Madison to Adams, October 13, 1835.]

The law which was then enacted received the approval of George Washington, the President who had presided over the deliberations of the Constitutional Convention, and the principles which it recognized were thereafter accepted without question for generations and until, in the fiery passions of the Civil War, the enemies of Andrew Johnson sought to cripple him. In its legislation

Congress recognized that the President's power to make removals arose from the Constitution itself and not from any federal legislation.

Presidents of the United States have repeatedly made removals from office without asking for the consent of the Senate. For example, Adams, when Vice President, in 1789 cast the deciding vote in recognition of the President's power, showing the opinion which he had formed during the debate in the Senate. In May, 1800, as President, he acted upon this opinion by summarily discharging Pickering from the position of Secretary of State after the Secretary had refused to resign. Life and Works of John Adams, IX, p. 55. Jackson, in 1833, dismissed Duane, as Secretary of the Treasury. Sumner, Andrew Jackson, p. 354. Later many Attorneys General advised their official chiefs of the power of the President to make removals from office. Legare, in 1842, 4 Op. At. Gen. 1; Clifford, in 1847, 4 Op. At. Gen. 609; Cushing, in 1851, 5 Op. At. Gen. 223; Devens, in 1878, 15 Op. At. Gen. 421. Jackson, on February 10, 1835, declined to comply with a resolution of the Senate requesting the charges which caused the removal of an official from office. Messages of the Presidents, III, p. 133. Johnson vetoed the Tenure of Office Act on March 2, 1867, upon the ground that it was unconstitutional. *Id.,* VI, p. 497. Grant, December 6, 1869, recommended total repeal of that Act. *Id.,* VII, p. 38. Cleveland, March 1, 1886, denied the right of the Senate to require his reasons for removing officials. *Id.,* VIII, p. 379. Wilson, in the last year of his administration, vetoed the bill for a national budget because in § 303 it provided that a Comptroller General and an Assistant Comptroller General should be appointed by the President with the advice and consent of the Senate, but that they should be removable only by concurrent resolution of both Houses of Congress for specified causes or by impeachment. Cong. Rec., June 4, 1920, pp.

8609, 8610. President Coolidge took a strong position upon the power of the President to remove an officer of the Government without the consent of the Senate and the impropriety of Senatorial interference in favor of or against his exercise of that power. Cong. Rec., vol. 65, pp. 2245, 2335, 2339.

Mr. Will R. King, for the appellant, closed the argument.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This case presents the question whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate.

Myers, appellant's intestate, was on July 21, 1917, appointed by the President, by and with the advice and consent of the Senate, to be a postmaster of the first class at Portland, Oregon, for a term of four years. On January 20, 1920, Myers' resignation was demanded. He refused the demand. On February 2, 1920, he was removed from office by order of the Postmaster General, acting by direction of the President. February 10th, Myers sent a petition to the President and another to the Senate Committee on Post Offices, asking to be heard, if any charges were filed. He protested to the Department against his removal, and continued to do so until the end of his term. He pursued no other occupation and drew compensation for no other service during the interval. On April 21, 1921, he brought this suit in the Court of Claims for his salary from the date of his removal, which, as claimed by supplemental petition filed after July 21, 1921, the end of his term, amounted to $8,838.71. In August, 1920, the President made a recess appointment of one Jones, who took office September 19, 1920.

The Court of Claims gave judgment against Myers, and this is an appeal from that judgment. The Court held that he had lost his right of action because of his delay in suing, citing *Arant* v. *Lane,* 249 U. S. 367; *Nicholas* v. *United States,* 257 U. S. 71, and *Norris* v. *United States,* 257 U. S. 77. These cases show that when a United States officer is dismissed, whether in disregard of the law or from mistake as to the facts of his case, he must promptly take effective action to assert his rights. But we do not find that Myers failed in this regard. He was constant in his efforts at reinstatement. A hearing before the Senate Committee could not be had till the notice of his removal was sent to the Senate or his successor was nominated. From the time of his removal until the end of his term, there were three sessions of the Senate without such notice or nomination. He put off bringing his suit until the expiration of the Sixty-sixth Congress, March 4, 1921. After that, and three months before his term expired, he filed his petition. Under these circumstances, we think his suit was not too late. Indeed the Solicitor General, while not formally confessing error in this respect, conceded at the bar that no laches had been shown.

By the 6th section of the Act of Congress of July 12, 1876, 19 Stat. 80, 81, c. 179, under which Myers was appointed with the advice and consent of the Senate as a first-class postmaster, it is provided that

"Postmasters of the first, second and third classes shall be appointed and may be removed 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."

The Senate did not consent to the President's removal of Myers during his term. If this statute, in its requirement that his term should be four years unless sooner removed by the President by and with the consent of the

Senate, is valid, the appellant, Myers' administratrix, is entitled to recover his unpaid salary for his full term, and the judgment of the Court of Claims must be reversed. The Government maintains that the requirement is invalid, for the reason that under Article II of the Constitution the President's power of removal of executive officers appointed by him with the advice and consent of the Senate is full and complete without consent of the Senate. If this view is sound, the removal of Myers by the President without the Senate's consent was legal and the judgment of the Court of Claims against the appellant was correct and must be affirmed, though for a different reason from that given by that court. We are therefore confronted by the constitutional question and can not avoid it.

The relevant parts of Article II of the Constitution are as follows:

"Section 1. The executive Power shall be vested in a President of the United States of America. . . .

"Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

"He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

"The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

"Section 3. He shall from time to time give to the Congress information of the State of the Union and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

"Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors."

Section 1 of Article III, provides:

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior. . . ."

The question where the power of removal of executive officers appointed by the President by and with the advice and consent of the Senate was vested, was presented early in the first session of the First Congress. There is no express provision respecting removals in the Constitution, except as Section 4 of Article II, above quoted, provides for removal from office by impeachment. The subject

was not discussed in the Constitutional Convention. Under the Articles of Confederation, Congress was given the power of appointing certain executive officers of the Confederation, and during the Revolution and while the Articles were given effect, Congress exercised the power of removal. May, 1776, 4 Journals of the Continental Congress, Library of Congress Ed., 361; August 1, 1777, 8 Journals, 596; January 7, 1779, 13 Journals, 32–33; June 1779, 14 Journals, 542, 712, 714; November 23, 1780, 18 Journals, 1085; December 1, 1780, 18 Journals, 1115.

Consideration of the executive power was initiated in the Constitutional Convention by the seventh resolution in the Virginia Plan, introduced by Edmund Randolph. 1 Farrand, Records of the Federal Convention, 21. It gave to the Executive "all the executive powers of the Congress under the Confederation," which would seem therefore to have intended to include the power of removal which had been exercised by that body as incident to the power of appointment. As modified by the Committee of the Whole this resolution declared for a national executive of one person, to be elected by the legislature, with power to carry into execution the national laws and to appoint to offices in cases not otherwise provided for. It was referred to the Committee on Detail, 1 Farrand, 230, which recommended that the executive power should be vested in a single person, to be styled the President of the United States; that he should take care that the laws of the United States be duly and faithfully executed, and that he should commission all the officers of the United States and appoint officers in all cases not otherwise provided by the Constitution. 2 Farrand, 185. The committee further recommended that the Senate be given power to make treaties, and to appoint ambassadors and judges of the Supreme Court.

After the great compromises of the Convention—the one giving the States equality of representation in the

Senate, and the other placing the election of the President, not in Congress as once voted, but in an electoral college, in which the influence of larger States in the selection would be more nearly in proportion to their population—the smaller States, led by Roger Sherman, fearing that under the second compromise the President would constantly be chosen from one of the larger States, secured a change by which the appointment of all officers, which theretofore had been left to the President without restriction, was made subject to the Senate's advice and consent, and the making of treaties and the appointments of ambassadors, public ministers, consuls and judges of the Supreme Court were transferred to the President, but made subject to the advice and consent of the Senate. This third compromise was effected in a special committee, in which Gouverneur Morris of Pennsylvania represented the larger States and Roger Sherman the smaller States. Although adopted finally without objection by any State in the last days of the Convention, members from the larger States, like Wilson and others, criticized this limitation of the President's power of appointment of executive officers and the resulting increase of the power of the Senate. 2 Farrand, 537, 538, 539.

In the House of Representatives of the First Congress, on Tuesday, May 18, 1789, Mr. Madison moved in the Committee of the Whole that there should be established three executive departments—one of Foreign Affairs, another of the Treasury, and a third of War—at the head of each of which there should be a Secretary, to be appointed by the President by and with the advice and consent of the Senate, and to be removable by the President. The committee agreed to the establishment of a Department of Foreign Affairs, but a discussion ensued as to making the Secretary removable by the President. 1 Annals of Congress, 370, 371. "The question was now taken and carried, by a considerable majority, in favor

of declaring the power of removal to be in the President." 1 Annals of Congress, 383.

On June 16, 1789, the House resolved itself into a Committee of the Whole on a bill proposed by Mr. Madison for establishing an executive department to be denominated the Department of Foreign Affairs, in which the first clause, after stating the title of the officer and describing his duties, had these words: "to be removable from office by the President of the United States." 1 Annals of Congress, 455. After a very full discussion the question was put: shall the words "to be removable by the President" be struck out? It was determined in the negative—yeas 20, nays 34. 1 Annals of Congress, 576.

On June 22, in the renewal of the discussion, "Mr. Benson moved to amend the bill, by altering the second clause, so as to imply the power of removal to be in the President alone. The clause enacted that there should be a chief clerk, to be appointed by the Secretary of Foreign Affairs, and employed as he thought proper, and who, in case of vacancy, should have the charge and custody of all records, books, and papers appertaining to the department. The amendment proposed that the chief clerk, 'whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy,' should during such vacancy, have the charge and custody of all records, books, and papers appertaining to the department." 1 Annals of Congress, 578.

"Mr. Benson stated that his objection to the clause 'to be removable by the President' arose from an idea that the power of removal by the President hereafter might appear to be exercised by virtue of a legislative grant only, and consequently be subjected to legislative instability, when he was well satisfied in his own mind that it was fixed by a fair legislative construction of the Constitution." 1 Annals of Congress, 579.

"Mr. Benson declared, if he succeeded in this amendment, he would move to strike out the words in the first clause, 'to be removable by the President' which appeared somewhat like a grant. Now, the mode he took would evade that point and establish a legislative construction of the Constitution. He also hoped his amendment would succeed in reconciling both sides of the House to the decision, and quieting the minds of gentlemen." 1 Annals of Congress, 578.

Mr. Madison admitted the objection made by the gentleman near him (Mr. Benson) to the words in the bill. He said: "They certainly may be construed to imply a legislative grant of the power. He wished everything like ambiguity expunged, and the sense of the House explicitly declared, and therefore seconded the motion. Gentlemen have all along proceeded on the idea that the Constitution vests the power in the President; and what arguments were brought forward respecting the convenience or inconvenience of such disposition of the power, were intended only to throw light upon what was meant by the compilers of the Constitution. Now, as the words proposed by the gentleman from New York expressed to his mind the meaning of the Constitution, he should be in favor of them, and would agree to strike out those agreed to in the committee." 1 Annals of Congress, 578, 579.

Mr. Benson's first amendment to alter the second clause by the insertion of the italicized words, made that clause to read as follows:

"That there shall be in the State Department an inferior officer to be appointed by the said principal officer, and to be employed therein as he shall deem proper, to be called the Chief Clerk in the Department of Foreign Affairs, *and who, whenever the principal officer shall be removed from office by the President of the United States,* or in any other case of vacancy, shall, during such va-

cancy, have charge and custody of all records, books and papers appertaining to said department."

The first amendment was then approved by a vote of thirty to eighteen. 1 Annals of Congress, 580. Mr. Benson then moved to strike out in the first clause the words "to be removable by the President," in pursuance of the purpose he had already declared, and this second motion of his was carried by a vote of thirty-one to nineteen. 1 Annals of Congress, 585.

The bill as amended was ordered to be engrossed, and read the third time the next day, June 24, 1789, and was then passed by a vote of twenty-nine to twenty-two, and the Clerk was directed to carry the bill to the Senate and desire their concurrence. 1 Annals of Congress, 591.

It is very clear from this history that the exact question which the House voted upon was whether it should recognize and declare the power of the President under the Constitution to remove the Secretary of Foreign Affairs without the advice and consent of the Senate. That was what the vote was taken for. Some effort has been made to question whether the decision carries the result claimed for it, but there is not the slightest doubt, after an examination of the record, that the vote was, and was intended to be, a legislative declaration that the power to remove officers appointed by the President and the Senate vested in the President alone, and until the Johnson Impeachment trial in 1868, its meaning was not doubted even by those who questioned its soundness.

The discussion was a very full one. Fourteen out of the twenty-nine who voted for the passage of the bill, and eleven of the twenty-two who voted against the bill took part in the discussion. Of the members of the House, eight had been in the Constitutional Convention, and of these, six voted with the majority, and two, Roger Sherman and Eldridge Gerry, the latter of whom had refused to sign the Constitution, voted in the minority. After

the bill as amended had passed the House, it was sent to the Senate, where it was discussed in secret session, without report. The critical vote there was upon the striking out of the clause recognizing and affirming the unrestricted power of the President to remove. The Senate divided by ten to ten, requiring the deciding vote of the Vice-President, John Adams, who voted against striking out, and in favor of the passage of the bill as it had left the House.* Ten of the Senators had been in the Constitutional Convention, and of them six voted that the power of removal was in the President alone. The bill having passed as it came from the House was signed by President Washington and became a law. Act of July 27, 1789, 1 Stat. 28, c. 4.

The bill was discussed in the House at length and with great ability. The report of it in the Annals of Congress is extended. James Madison was then a leader in the House, as he had been in the Convention. His arguments in support of the President's constitutional power of removal independently of Congressional provision, and without the consent of the Senate, were masterly, and he carried the House.

It is convenient in the course of our discussion of this case to review the reasons advanced by Mr. Madison and his associates for their conclusion, supplementing them, so far as may be, by additional considerations which lead this Court to concur therein.

First. Mr. Madison insisted that Article II by vesting the executive power in the President was intended to grant to him the power of appointment and removal of executive officers except as thereafter expressly provided in that Article. He pointed out that one of the chief

* Maclay shows the vote ten to ten. Journal of William Maclay, 116. John Adams' Diary shows nine to nine. 3 C. F. Adams, Works of John Adams, 412. Ellsworth's name appears in Maclay's list as voting against striking out, but not in that of Adams—evidently an inadvertence.

purposes of the Convention was to separate the legislative from the executive functions. He said:

"If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers. If there is any point in which the separation of the Legislative and Executive powers ought to be maintained with great caution, it is that which relates to officers and offices." 1 Annals of Congress, 581.

Their union under the Confederation had not worked well, as the members of the convention knew. Montesquieu's view that the maintenance of independence as between the legislative, the executive and the judicial branches was a security for the people had their full approval. Madison in the Convention, 2 Farrand, Records of the Federal Convention, 56. *Kendall* v. *United States,* 12 Peters 524, 610. Accordingly, the Constitution was so framed as to vest in the Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish, the judicial power. From this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires. Madison, 1 Annals of Congress, 497. This rule of construction has been confirmed by this Court in *Meriwether* v. *Garrett,* 102 U. S. 472, 515; *Kilbourn* v. *Thompson,* 103 U. S. 168, 190; *Mugler* v. *Kansas,* 123 U. S. 623, 662.

The debates in the Constitutional Convention indicated an intention to create a strong Executive, and after a controversial discussion the executive power of the Government was vested in one person and many of his important functions were specified so as to avoid the

humiliating weakness of the Congress during the Revolution and under the Articles of Confederation. 1 Farrand, 66–97.

Mr. Madison and his associates in the discussion in the House dwelt at length upon the necessity there was for construing Article II to give the President the sole power of removal in his responsibility for the conduct of the executive branch, and enforced this by emphasizing his duty expressly declared in the third section of the Article to "take care that the laws be faithfully executed." Madison, 1 Annals of Congress, 496, 497.

The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this Court. *Wilcox* v. *Jackson,* 13 Peters 498, 513; *United States* v. *Eliason,* 16 Peters 291, 302; *Williams* v. *United States,* 1 How. 290, 297; *Cunningham* v. *Neagle,* 135 U. S. 1, 63; *Russell Co.* v. *United States,* 261 U. S. 514, 523. As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible. Fisher Ames, 1 Annals of Congress, 474. It was urged that the natural meaning of the term "executive power" granted the President included the appointment and removal of executive subordinates. If such appointments and removals were not an exercise of the executive power, what were they? They certainly

were not the exercise of legislative or judicial power in government as usually understood.

It is quite true that, in state and colonial governments at the time of the Constitutional Convention, power to make appointments and removals had sometimes been lodged in the legislatures or in the courts, but such a disposition of it was really vesting part of the executive power in another branch of the Government. In the British system, the Crown, which was the executive, had the power of appointment and removal of executive officers, and it was natural, therefore, for those who framed our Constitution to regard the words "executive power" as including both. *Ex Parte Grossman*, 267 U. S. 87, 110. Unlike the power of conquest of the British Crown, considered and rejected as a precedent for us in *Fleming* v. *Page*, 9 How. 603, 618, the association of removal with appointment of executive officers is not incompatible with our republican form of Government.

The requirement of the second section of Article II that the Senate should advise and consent to the Presidential appointments, was to be strictly construed. The words of section 2, following the general grant of executive power under section 1, were either an enumeration and emphasis of specific functions of the Executive, not all inclusive, or were limitations upon the general grant of the executive power, and as such, being limitations, should not be enlarged beyond the words used. Madison, 1 Annals, 462, 463, 464. The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed, and the fact that no express limit was placed on the power of removal by the Executive was convincing indication that none was intended. This is the same construction of Article II as that of Alexander Hamilton quoted *infra*.

Second. The view of Mr. Madison and his associates was that not only did the grant of executive power to the President in the first section of Article II carry with it the power of removal, but the express recognition of the power of appointment in the second section enforced this view on the well approved principle of constitutional and statutory construction that the power of removal of executive officers was incident to the power of appointment. It was agreed by the opponents of the bill, with only one or two exceptions, that as a constitutional principle the power of appointment carried with it the power of removal. Roger Sherman, 1 Annals of Congress, 491. This principle as a rule of constitutional and statutory construction, then generally conceded, has been recognized ever since. *Ex parte Hennen*, 13 Peters 230, 259; *Reagan* v. *United States*, 182 U. S. 419; *Shurtleff* v. *United States*, 189 U. S. 311, 315. The reason for the principle is that those in charge of and responsible for administering functions of government who select their executive subordinates need in meeting their responsibility to have the power to remove those whom they appoint.

Under section 2 of Article II, however, the power of appointment by the Executive is restricted in its exercise by the provision that the Senate, a part of the legislative branch of the Government, may check the action of the Executive by rejecting the officers he selects. Does this make the Senate part of the removing power? And this, after the whole discussion in the House is read attentively, is the real point which was considered and decided in the negative by the vote already given.

The history of the clause by which the Senate was given a check upon the President's power of appointment makes it clear that it was not prompted by any desire to limit removals. As already pointed out, the important purpose of those who brought about the restriction was to lodge in the Senate, where the small States had equal

representation with the larger States, power to prevent the President from making too many appointments from the larger States. Roger Sherman and Oliver Ellsworth, delegates from Connecticut, reported to its Governor: "The equal representation of the States in the Senate and the voice of that branch in the appointment to offices will secure the rights of the lesser as well as of the greater States." 3 Farrand, 99. The formidable opposition to the Senate's veto on the President's power of appointment indicated that, in construing its effect, it should not be extended beyond its express application to the matter of appointments. This was made apparent by the remarks of Abraham Baldwin, of Georgia, in the debate in the First Congress. He had been a member of the Constitutional Convention. In opposing the construction which would extend the Senate's power to check appointments to removals from office, he said:

"I am well authorized to say that the mingling of the powers of the President and Senate was strongly opposed in the Convention which had the honor to submit to the consideration of the United States and the different States the present system for the government of the Union. Some gentlemen opposed it to the last, and finally it was the principal ground on which they refused to give it their signature and assent. One gentleman called it a monstrous and unnatural connexion and did not hesitate to affirm it would bring on convulsions in the government. This objection was not confined to the walls of the Convention; it has been subject of newspaper declamation and perhaps justly so. Ought we not, therefore, to be careful not to extend this unchaste connexion any further?" 1 Annals of Congress, 557.

Madison said:

"Perhaps there was no argument urged with more success or more plausibly grounded against the Constitution under which we are now deliberating than that founded

on the mingling of the executive and legislative branches of the Government in one body. It has been objected that the Senate have too much of the executive power even, by having control over the President in the appointment to office. Now shall we extend this connexion between the legislative and executive departments which will strengthen the objection and diminish the responsibility we have in the head of the Executive?" 1 Annals of Congress, 380.

It was pointed out in this great debate that the power of removal, though equally essential to the executive power, is different in its nature from that of appointment. Madison, 1 Annals of Congress, 497, *et seq.;* Clymer, 1 Annals, 489; Sedgwick, 1 Annals, 522; Ames, 1 Annals, 541, 542; Hartley, 1 Annals, 481. A veto by the Senate—a part of the legislative branch of the Government—upon removals is a much greater limitation upon the executive branch and a much more serious blending of the legislative with the executive than a rejection of a proposed appointment. It is not to be implied. The rejection of a nominee of the President for a particular office does not greatly embarrass him in the conscientious discharge of his high duties in the selection of those who are to aid him, because the President usually has an ample field from which to select for office, according to his preference, competent and capable men. The Senate has full power to reject newly proposed appointees whenever the President shall remove the incumbents. Such a check enables the Senate to prevent the filling of offices with bad or incompetent men or with those against whom there is tenable objection.

The power to prevent the removal of an officer who has served under the President is different from the authority to consent to or reject his appointment. When a nomination is made, it may be presumed that the Senate is, or may become, as well advised as to the fitness of the nomi-

nee as the President, but in the nature of things the defects in ability or intelligence or loyalty in the administration of the laws of one who has served as an officer under the President, are facts as to which the President, or his trusted subordinates, must be better informed than the Senate, and the power to remove him may, therefore, be regarded as confined, for very sound and practical reasons, to the governmental authority which has administrative control. The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.

Oliver Ellsworth was a member of the Senate of the First Congress, and was active in securing the imposition of the Senate restriction upon appointments by the President. He was the author of the Judiciary Act in that Congress, and subsequently Chief Justice of the United States. His view as to the meaning of this article of the Constitution, upon the point as to whether the advice of the Senate was necessary to removal, like that of Madison, formed and expressed almost in the very atmosphere of the Convention, was entitled to great weight. What he said in the discussion in the Senate was reported by Senator William Patterson, 2 Bancroft, History of the Constitution of the United States, 192, as follows:

"The three distinct powers, legislative, judicial and executive should be placed in different hands. 'He shall take care that the laws be faithfully executed' are sweeping words. The officers should be attentive to the President to whom the Senate is not a council. To turn a man out of office is an exercise neither of legislative nor of judicial power; it is like a tree growing upon land that has been granted. The advice of the Senate does not make the appointment. The President appoints. There

are certain restrictions in certain cases, but the restriction is as to the appointment and not as to the removal."

In the discussion in the First Congress fear was expressed that such a constitutional rule of construction as was involved in the passage of the bill would expose the country to tyranny through the abuse of the exercise of the power of removal by the President. Underlying such fears was the fundamental misconception that the President's attitude in his exercise of power is one of opposition to the people, while the Congress is their only defender in the Government, and such a misconception may be noted in the discussions had before this Court. This view was properly contested by Mr. Madison in the discussion (1 Annals of Congress, 461), by Mr. Hartley (1 Annals, 481), by Mr. Lawrence (1 Annals, 485), and by Mr. Scott (1 Annals, 533). The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide; and, as the President is elected for four years, with the mandate of the people to exercise his executive power under the Constitution, there would seem to be no reason for construing that instrument in such a way as to limit and hamper that power beyond the limitations of it, expressed or fairly implied.

Another argument advanced in the First Congress against implying the power of removal in the President alone from its necessity in the proper administration of the executive power, was that all embarrassment in this respect could be avoided by the President's power of suspension of officers, disloyal or incompetent, until the Senate could act. To this, Mr. Benson, said:

"Gentlemen ask, will not the power of suspending an officer be sufficient to prevent mal-conduct? Here is some

inconsistency in their arguments. They declare that Congress have no right to construe the Constitution in favor of the President, with respect to removal; yet they propose to give a construction in favor of the power of suspension being exercised by him. Surely gentlemen do not pretend that the President has the power of suspension granted expressly by the Constitution; if they do, they have been more successful in their researches into that instrument than I have been. If they are willing to allow a power of suspending, it must be because they construe some part of the Constitution in favor of such a grant. The construction in this case must be equally unwarrantable. But admitting it proper to grant this power, what then? When an officer is suspended, does the place become vacant? May the President proceed to fill it up? Or must the public business be likewise suspended? When we say an officer is suspended, it implies that the place is not vacant; but the parties may be heard, and, after the officer is freed from the objections that have been taken to his conduct, he may proceed to execute the duties attached to him. What would be the consequence of this? If the Senate, upon its meeting, were to acquit the officer, and replace him in his station, the President would then have a man forced on him whom he considered as unfaithful; and could not, consistent with his duty, and a proper regard to the general welfare, go so far as to entrust him with full communications relative to the business of his department. Without a confidence in the Executive department, its operations would be subject to perpetual discord, and the administration of the Government become impracticable." 1 Annals of Congress, 506.

Mr. Vining said:

"The Departments of Foreign Affairs and War are peculiarly within the powers of the President, and he must be responsible for them; but take away his controlling power, and upon what principle do you require his responsibility?

"The gentlemen say the President may suspend. They were asked if the Constitution gave him this power any more than the other? Do they contend the one to be a more inherent power than the other? If they do not, why shall it be objected to us that we are making a Legislative construction of the Constitution, when they are contending for the same thing?" 1 Annals of Congress, 512.

In the case before us, the same suggestion has been made for the same purpose, and we think it is well answered in the foregoing. The implication of removal by the President alone is no more a strained construction of the Constitution than that of suspension by him alone, and the broader power is much more needed and more strongly to be implied.

Third. Another argument urged against the constitutional power of the President alone to remove executive officers appointed by him with the consent of the Senate is that, in the absence of an express power of removal granted to the President, power to make provision for removal of all such officers is vested in the Congress by section 8 of Article I.

Mr. Madison, mistakenly thinking that an argument like this was advanced by Roger Sherman, took it up and answered it as follows:

"He seems to think (if I understand him rightly) that the power of displacing from office is subject to Legislative discretion; because, having a right to create, it may limit or modify as it thinks proper. I shall not say but at first view this doctrine may seem to have some plausibility. But when I consider that the Constitution clearly intended to maintain a marked distinction between the Legislative, Executive and Judicial powers of Government; and when I consider that if the Legislature has a power, such as is contended for, they may subject and transfer at discretion powers from one department of our Government to another; they may, on that principle,

exclude the President altogether from exercising any authority in the removal of officers; they may give [it] to the Senate alone, or the President and Senate combined; they may vest it in the whole Congress; or they may reserve it to be exercised by this house. When I consider the consequences of this doctrine, and compare them with the true principles of the Constitution, I own that I can not subscribe to it. . . ." 1 Annals of Congress, 495, 496.

Of the eleven members of the House who spoke from amongst the twenty-two opposing the bill, two insisted that there was no power of removing officers after they had been appointed, except by impeachment, and that the failure of the Constitution expressly to provide another method of removal involved this conclusion. Eight of them argued that the power of removal was in the President and the Senate—that the House had nothing to do with it; and most of these were very insistent upon this view in establishing their contention that it was improper for the House to express in legislation any opinion on the constitutional question whether the President could remove without the Senate's consent.

The constitutional construction that excludes Congress from legislative power to provide for the removal of superior officers finds support in the second section of Article II. By it the appointment of all officers, whether superior or inferior, by the President is declared to be subject to the advice and consent of the Senate. In the absence of any specific provision to the contrary, the power of appointment to executive office carries with it, as a necessary incident, the power of removal. Whether the Senate must concur in the removal is aside from the point we now are considering. That point is, that by the specific constitutional provision for appointment of executive officers with its necessary incident of removal, the power of appointment and removal is clearly provided for by

the Constitution, and the legislative power of Congress in respect to both is excluded save by the specific exception as to inferior offices in the clause that follows, *viz*, "but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." These words, it has been held by this Court, give to Congress the power to limit and regulate removal of such inferior officers by heads of departments when it exercises its constitutional power to lodge the power of appointment with them. *United States* v. *Perkins*, 116 U. S. 483, 485. Here, then, is an express provision, introduced in words of exception, for the exercise by Congress of legislative power in the matter of appointments and removals in the case of inferior executive officers. The phrase "But Congress may by law vest" is equivalent to "excepting that Congress may by law vest." By the plainest implication it excludes Congressional dealing with appointments or removals of executive officers not falling within the exception, and leaves unaffected the executive power of the President to appoint and remove them.

A reference of the whole power of removal to general legislation by Congress is quite out of keeping with the plan of government devised by the framers of the Constitution. It could never have been intended to leave to Congress unlimited discretion to vary fundamentally the operation of the great independent executive branch of government and thus most seriously to weaken it. It would be a delegation by the Convention to Congress of the function of defining the primary boundaries of another of the three great divisions of government. The inclusion of removals of executive officers in the executive power vested in the President by Article II, according to its usual definition, and the implication of his power of removal of such officers from the provision of section 2 expressly recognizing in him the power of their appoint-