

10-1-1958

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Recommended Citation

Burton Raffel, *Presidential Removal Power: The Role of the Supreme Court*, 13 U. Miami L. Rev. 69 (1958)
Available at: <https://repository.law.miami.edu/umlr/vol13/iss1/6>

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PRESIDENTIAL REMOVAL POWER: THE ROLE OF THE SUPREME COURT

BURTON RAFFEL*

INTRODUCTION

The nature and extent of the President's removal powers were first given judicial formulation by the Supreme Court in 1926.¹ A postmaster first class, appointed by the President with the advice and consent of the Senate for a statutory four year term was removed by the President three months before the expiration of that term, and subsequently brought suit for lost salary. Although an 1876 statute provided that removal could only be by the President with the Senate's advice and consent, the Court held such a requirement unconstitutional, affirming in the strongest possible language that the power to remove inheres in the power to appoint and thus in the President to the absolute exclusion of Congress.² Chief Justice Taft's opinion for the majority recognized no distinctions founded on the nature and character of the office.³ He asserted that the President's broad powers of removal over any officer in the executive branch—that is, in the Chief Justice's view, over every officer appointed by the President except federal judges—were based squarely upon article II of the Constitution, and most notably on the grant to the President of "*The executive power . . . of the United States of America.*"⁴ (Emphasis added.) The decision brought forth three dissents, two of them as extended as the opinion itself, and fathered a host of notes, articles, and books, the majority of them critical.⁵

THE DEVELOPMENT OF JUDICIAL CORRECTIVES

The clamored-for correctives were supplied when, in *Humphrey's Ex'r. v. United States*,⁶ the Court explicitly disapproved Chief Justice Taft's sweeping dicta and confined the *Myers* decision to the purely executive offices

*B.A., 1948; M.A., 1949; L.L.B., 1958.

1. *Myers v. United States*, 272 U.S. 52 (1926).

2. *Id.* at 122, 161.

3. *Id.* at 134.

4. *Id.* at 116, 163-64.

5. See, e.g., Notes, 21 ILL. L. REV. 733 (1927), 2 IND. L.J. 399 (1927), 6 ORE. L. REV. 165 (1927), 11 MARQ. L. REV. 104 (1926), 12 IOWA L. REV. 185 (1927), 25 MICH. L. REV. 280 (1927), 36 YALE L. J. 390 (1927), 7 B.U.L. REV. 65 (1927), 11 MINN. L. REV. 166 (1927), 1 U. CIN. L. REV. 74 (1927), 12 CORNELL L. Q. 67 (1926), 13 VA. L. REV. 122 (1926); Hart, *The Bearing of Myers v. United States Upon the Independence of Federal Administrative Tribunals*, 23 AM. POL. SCI. REV. 657 (1929), Galloway, *The Consequences of the Myers Decision*, 61 AM. L. REV. 481 (1927), McBain, *Consequences of the President's Unlimited Power of Removal*, 41 POL. SCI. Q. 596 (1926); HART, *TENURE OF OFFICE UNDER THE CONSTITUTION* (1930), CORWIN, *REMOVAL POWER OF THE PRESIDENT* (1927).

6. 295 U. S. 602 (1935).

that were there in question.⁷ Mr. Humphrey, presidentially appointed and senatorially confirmed to a fixed term as a Federal Trade Commissioner, was held to occupy a post both quasi-legislative and quasi-judicial but in no sense executive,⁸ and thus not under the President's direct control. In establishing the Federal Trade Commission as an independent agency, Congress had clearly provided that the President's administrative role was to nominate personnel and to remove them for "inefficiency, neglect of duty, or malfeasance in office." This was held to be the sum total of his powers over the FTC; he could not remove its officers for any other cause.⁹ Mr. Humphrey, having been removed for reasons of general disagreement with the President,¹⁰ had been unconstitutionally deprived of his post and was entitled to prevail in a suit for lost salary. By modifying its 1926 formulation of presidential removal power the Court made two basic rulings: first, that Congress could establish agencies, functioning quasi-legislatively and/or quasi-judicially, which would be as entirely independent of the President as Congress thought best to make them;¹¹ second, that Congress could declare who was to have removal power as to such agencies, and the exclusive causes which could bring that power into use.¹² The primary allegiance of the FTC, as well as its primary responsibilities, was to Congress. By unmistakable statutory directive the President was forbidden to consider agencies like the FTC as part of the executive branch of the government.

Although it is basically only a negative application of the *Humphrey's* rule, the *Morgan* case¹³ is significant because the Sixth Circuit chose to find that the Tennessee Valley Authority was non-independent (contrary to many expectations) and "predominantly an administrative arm of the executive department."¹⁴ Dr. Morgan, one of the TVA directors, was removed for causes other than those mentioned in the statute and not by any procedure clearly outlined in the statute. It was therefore a matter entirely within the President's discretion and lost salary was not recoverable. Since it would have been equally possible for the court to label the

7. *Id.* at 627-28.

8. *Id.* at 628. Professor Corwin observes that "some of Justice Sutherland's dicta [in *Humphrey's*] are quite as extreme . . . as some of Chief Justice Taft's dicta were." CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 111 (3d ed. 1948). There is an interesting and revealing little story that indicates how, in going to such extremes, Justice Sutherland left even himself behind. See Corwin, *supra* at 428-29 n.83.

9. *Humphrey's v. United States*, 295 U.S. 602, 631 (1935).

10. Though it should be noted that Senate opposition to Mr. Humphrey was very strong. See 75 CONG. REC. 2790-92 (1932). See also JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 107 (1941).

11. See LANDIS, *THE ADMINISTRATIVE PROCESS* 115 (1938).

12. *Humphrey's v. United States*, 295 U.S. 602, 631-32 (1935).

13. *Morgan v. Tennessee Valley Authority*, 115 F.2d 990 (6th Cir. 1940).

14. *Id.* at 994. The most comprehensive exposition of the views of those whom the court disappointed is Larson, *Has the President an Inherent Power of Removal of his Non-Executive Employees?*, 16 TENN. L. REV. 259 (1940). In addition to the Sixth Circuit's indirect commentary on Larson's article, see the almost equally authoritative and very direct observations of Professor Corwin, *op. cit. supra* note 8, at 429 n.85.

TVA predominantly legislative, the decisions can reasonably be interpreted as support for the President in his efforts to establish consistent governmental policies.¹⁵

A recent case, falling squarely into the open space between the *Myers* and *Humphrey's* decisions, seemed to lend additional support to this "trend."¹⁶ Congress provided a statutory mandate for terminating the War Claims Commission not later than March 31, 1955, but said nothing as to either the term of office of Commissioners or their removal.¹⁷ Mr. Weiner, appointed by President Truman, was removed by President Eisenhower and sued for salary lost thereby. In a four-to-one decision, the Court of Claims held that although the work of the Commission was clearly quasi-judicial and thus within the scope of *Humphrey's* rather than of *Myers*, Congress' silence had to be interpreted as leaving the President's discretionary removal power untouched. In order to limit or bar such executive discretion, Congress' intent and its language had to be unmistakable;¹⁸ to hold otherwise would mean that, with no statutory removal procedures specified, power to remove would have been meant to remain in Congress and be exercisable only by the clumsy, slow process of impeachment. This, the court sensibly reasoned, could not have been Congress' intent. Congress' purpose in fixing a definite terminal date for the Commission's activities, the court added, was not to protect the Commissioners' tenure but rather to guard the public purse against an agency more dilatory than was desired. The dissenting judge read the *Humphrey's* case differently, finding in it the complete negation of presidential removal power over non-executive personnel, subject only to a congressional decision to grant away any, all, or none of that power. Congress' complete silence, in his view, left the President powerless to remove a quasi-judicial officer like Commissioner Wiener.¹⁹

The Supreme Court proceeded to reverse, speaking unanimously but staying well within the ambit of *Humphrey's*.²⁰ The War Claims Commission

15. *Id.* at 112-13.

16. *Wiener v. United States*, 135 Ct. Cls. 827, 142 F. Supp. 910 (1956).

17. 62 Stat. 1240, 50 U.S.C. §§ 2001-13 (1948).

18. The court found support for this holding in *Shurtleff v. United States*, 189 U.S. 311 (1903) (general appraiser without fixed term of office, and not otherwise removable, held removable by President in order to avoid life tenure not intended by Congress). It should be noted that, since it comes long before both the *Myers* and *Humphrey's* cases, much of what the Court says in *Shurtleff* is necessarily not precisely in point for decisions rendered after *Myers* and *Humphrey's*, the Court's treatment of the problem after 1926 being in all ways fuller and more complex than at any previous time. Indeed, one advocate of severely limited presidential power suggests that, in effect, *Humphrey's* overruled *Shurtleff*. Larson, *supra* note 14, at 260. See also Note, 51 HARV. L. REV. 1246 (1938). Support of a kind might also be found in *Parsons v. United States*, 167 U.S. 324 (1897). See Comment, 30 ILL. L. REV. 1037, 1043 (1936).

19. About the only support for this point of view (there being no case law of the kind) is a student Note, 9 GEO. WASH. L. REV. 703 (1941).

20. *Wiener v. United States*, — U.S. —, 2 L.Ed. 2d 1377 (1958).

was found to be quasi-judicial, and congressional silence as to any method of removal, said Mr. Justice Frankfurter, clearly meant that Congress intended there to be no removal—at least, not by the President. The whole issue of presidential removal power was declared to have been “within the lively knowledge of Congress.”²¹ The opinion suggests, obliquely, that were the Senate to have confirmed Mr. Wiener’s successor, such congressional approval would be enough to make for a different legal result. It is implied that were Mr. Wiener to have been removed for cause “involving the rectitude of a member of an adjudicatory body,” this too might have led to affirmance rather than reversal.²² These essentially unresolved suggestions serve largely to under-cut what independent sweep the opinion has, and re-emphasize how little, except the Court’s view of the War Claims Commission’s true nature, has actually been added either to the *Humphrey*’s rule or to the discussion here.

THE ROLE OF THE PRESIDENT AS ADMINISTRATOR-IN-CHIEF

Although the Supreme Court’s decision is dubious on both constitutional and practical grounds and a good many important administrative agencies whose originating statutes are as vague on the subject of removal procedures and powers as is the War Claims Act,²³ the real significance of this and all the removal power cases lies elsewhere. To understand their true meaning is to inquire into the role of the Supreme Court, in this uncomfortable by-way of judicial procedure, and that role in turn depends on an adequate understanding of the President as administrator-in-chief.²⁴ It is not always recognized that this is in fact a function of the presidency; it has been claimed for Congress²⁵ and from time to time Congress has

21. *Id.* at 1380. Justice Frankfurter goes on to note that “*Humphrey*’s case was a cause célèbre—and not least in the halls of Congress.” It might be suggested that the Justice’s memory is considerably longer than were his legislative brethren’s. Nor is any evidence of actual (let alone lively) knowledge shown.

22. *Id.* at 1382.

23. See, among others, the statutes creating the Securities and Exchange Commission, 48 Stat. 885 (1934), 15 U.S.C. § 78d(a) (1952); the Federal Communications Commission, 48 Stat. 1066 (1934), 47 U.S.C. § 154 (1952); the Federal Power Commission, 41 Stat. 1063 (1920), 16 U.S.C. § 792 (1952); the United States Tariff Commission, 39 Stat. 795 (1916), 19 U.S.C. § 1330(a) (1952); and the Home Loan Bank Board, 47 Stat. 736 (1932), 12 U.S.C. § 1437 (1952).

24. Binkley, *The President as an Institution*, 5 W. RES. L. REV. 337, 347 (1954), remarks of this presidential role that “Neither constitutional prescription nor statute has made him such, but rather usage fortified by court opinion.”

25. “We have no such thing as three totally distinct and independent departments; the others must look to the legislative for direction and support.” *McReynolds, J., Myers v. United States*, 272 U.S. 52, 183-84 (1926) (dissenting opinion).

claimed it for itself.²⁶ But, while conceding that the powers of Congress²⁷ are vast and quite probably superior (in the aggregate), it remains true that the adoption of the Constitution and the abandonment of the Articles of Confederation decisively settled that ours was to be a strong though not omnipotent executive. He was to be a "George III with the corruption left out, and also of course the hereditary feature."²⁸ There is no need to make as much as Chief Justice Taft does of the Constitution's general grant of executive power to the President. Still, it is plain that in order to have the government operate meaningfully, it must have some more or less unified source of central direction which can focus and point its actively operating energies.²⁹ For the same reason that the very nature of Court and Congress makes them unsuited for the handling of sudden emergencies, leaving residual and inevitably badly defined powers in the President,³⁰ so the job of administrative direction and coordination is not for the more divisive, slower, and clumsier-moving organs of power, but for the President.

Between the theory and the practice of effective administrative control by the President there are important discrepancies.³¹ The presidency, like our government and our society generally, has grown to be a far more complex function than the Framers ever contemplated. There is a cultural lag which must be recognized; until the establishment of the Executive Office in 1939,³² the President was, or was supposed to be, personally active in all phases of his administrative role. The Supreme Court has consistently held that the acts of the President's agents are not theirs but the President's

26. Mr. Justice McReynolds' and Mr. Justice Brandeis' dissenting opinions in *Myers* detail the historical record of such congressional claims. *Id.* at 178, 240. Senator George Wharton Pepper, appearing by the Court's request as *amicus curiae* in *Myers*, conceded arguendo that the President might exercise administrative powers more efficiently, but insisted that "constitutional liberty is more vital than government efficiency." *Id.* at 87-88.

27. See APPLEBY, *POLICY AND ADMINISTRATION* 72 (1949); Somers, *The President, the Congress, and the Federal Government Service*, in *THE AMERICAN ASSEMBLY: THE FEDERAL GOVERNMENT SERVICE* 54-55 (final ed. 1954).

28. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 16 (3d ed. 1948).

29. "[S]uccessful public administration demands not merely honesty and efficiency but also direction, . . . [and] the efficiency of the entire governmental structure, as distinguished from the efficiency of a single bureau, is scarcely possible if conflicting policies emanate from divergent sources." Jacobson, *Inherent Executive Power of Removal: A Reexamination in the Light of the New Deal*, 1 *N.J.L. REV.* 32, 55 (1935). For an incisive and very up-to-date discussion, see Somers, *supra* note 27, at 52.

30. Full discussion, with a comprehensive list of the actual use of such powers, can be found in Gibson, *The President's Inherent Emergency Powers*, 12 *FED. B.J.* 107 (1951). See also Tanenhaus, *The Supreme Court and Presidential Power*, 307 *ANNALS* 106 (1956), ROSSITER, *THE AMERICAN PRESIDENCY* 9-30 (1956), CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 182-93, 303-06 (3d ed. 1948), and Cohen & Cohen, *The Divine Right of Presidents*, 29 *NEB. L. REV.* 416 (1950).

31. See ROSSITER, *op. cit. supra* note 30, at 12.

32. 53 Stat. 561, 1423 (1939), 5 U.S.C. § 133 (1952). See Bailey, *The President and His Political Executives*, 307 *ANNALS* 24 (1956), and Merriam, *The Bureau of the Budget As Part of the President's Staff*, 307 *ANNALS* 15 (1956).

acts:³³ responsibility has thus been extended as far as authority.³⁴ Nor can the President, as *the* elected official, as the most representative and public of the people's governmental symbols evade whatever public censure may fall on his office by a retreat into collective anonymity. His capacity for blame, like his potential for national leadership, is single and indivisible.³⁵ Executive authority, as the government is now constituted, does not rest upon anything like an ordered chain of command. Aside from his personal officers, and to some extent his Cabinet, the President's administrative powers extend in two directions. First, there are the executive agencies proper, integrated with, and considered under the control of, the various departments which the Cabinet members head. Second, there are the separately created agencies — regulatory, investigatory, determinative bodies having (since the *Humphrey's* decision confirmed congressional intent) a large share of independence.³⁶

Although there is some doubt about the precise constitutionality of the administrative agency *per se*³⁷ (and a good bit more about how to classify such anomalous functions in our tri-partite scheme of things)³⁸ it would seem that *Humphrey's* was on its face eminently reasonable in saying that the President as Chief Executive had no business interfering with judgments made for the most part outside his constitutionally determined range of powers. For the Executive to dominate the decisions of Mr. Humphrey, or of Mr. Wiener, is to allow one branch of the government to invade the domain of the other two. So reasoned Mr. Justice Sutherland for the Court. Yet the discussion has not ended there; *Morgan* and *Wiener* emphasize that fact very sharply. As Mr. Justice Holmes once said, "separation of powers does not mean sealing the three divisions of our government into watertight boxes."³⁹ This is still truer of administrative agencies, for despite Justice Sutherland's dictum, the Federal Trade Commission *does* exercise a share of executive power but it is not in *any* branch of the government if we read it out of the executive.⁴⁰ While it can be conceded that the

33. *Wolsey v. Chapman*, 101 U.S. 755 (1879); *William v. United States*, 42 U.S. (1 How.) 290 (1843); *United States v. Eliason*, 41 U.S. (16 Pet.) 291 (1842); *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 496 (1839).

34. "[H]e is held primarily and often exclusively accountable for the ethics, loyalty, efficiency, frugality, and responsiveness to the public's wishes of the two and a third million Americans in the national administration." ROSSITER, *op. cit. supra* note 30, at 12.

35. As that of Congress, of course, is not. See Somers, *supra* note 27, at 56.

36. See text at note 11 *supra*.

37. See, e.g., Jaffe, Book Review, 65 YALE L.J. 1068, 1069 (1956).

38. The most apt description is that reported by Professor Corwin: "[this] headless 'fourth branch' of the government." CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 115 (3d ed. 1948).

39. *Springer v. Government of the Philippine Islands*, 277 U.S. 189, 211 (1927). (dissenting opinion).

40. Corwin suggests, with a grin, that Justice Sutherland has left the FTC "in the uncomfortable halfway condition of Mahomet's coffin, suspended 'twixt Heaven and Earth." CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 112 (3d ed. 1948). See also note 8 *supra*.

Federal Trade Commission and those agencies like it do not perform predominantly executive functions, it remains true their decisions are a vital part of, and seriously affect, the President's over-all program of government. How, for example, could a President elected upon a pledge to "clean up" the stock market accomplish anything without the cooperation of the SEC? The examples are easy to multiply. It is at least clear that for the President to control the independent administrative agencies beyond the stage of nominating personnel is today very nearly impossible.⁴¹ Principally for the reasons adopted by Justice Sutherland, Congress, and to a lesser extent the public at large, have thrown their weight behind agency independence, seeking independence of the President, if not complete independence. In dealing with the personnel of those agencies more apparently under his control (those supervised by his Cabinet), the President is faced with a congressionally erected barrier of much the same kind. These are the tenure protections that, once again, both the legislature and the people strongly support.⁴² Patronage on the national level, as President Eisenhower learned in 1953, is moribund and near to expiring.⁴³ It has been observed that "the President cannot fully control Cabinet Members because the Cabinet Members cannot fully control the Bureau Chiefs."⁴⁴ Yet the presidency is an intensely political, deeply controversial office, with goals that require the Chief Executive to constantly seek backing and advice, directly as well as indirectly, from a wide range of subordinates.⁴⁵ The principal tool left to the President for securing the loyalty, responsibility and control of the officers of the government is discretionary removal power.

41. "Large portions of the executive functions of the government have been removed from his reach on the theory that they are quasi-judicial or quasi-legislative." Somers, *supra* note 27, at 55.

42. It has even been said that "a court of equity has jurisdiction to restrain the appointing power from removing the officers from their positions if such removals are in violation of the civil service act." *Butler v. White*, 83 Fed. 578, 589 (1897). *But see* Caffey, *Federal Executive Power*, PROCEEDINGS ALA. ST. B.A. 134, 140 (1922). An excellent recent discussion and summary is Kaufman, *The Growth of the Federal Civil Service*, in THE AMERICAN ASSEMBLY: THE FEDERAL GOVERNMENT SERVICE 15 (final ed. 1954).

43. Kaufman, *supra* note 42, at 40; APPLEBY, *op. cit. supra* note 27, at 56. See also Binkley, *supra* note 24, at 350.

44. Somers, *supra* note 27, at 60, quoting a former Assistant Secretary of Agriculture, Paul Appleby.

45. See *id.* at 69. "One of the most tortured themes in the history of the United States has been the search of our Presidents for friendly and able political subordinates, and for ways of keeping them loyal to Presidential policies." Bailey, *supra* note 32, at 26. And of the many writers who have described the fundamentally political nature of government executive work, none has put the case more vividly than Cleveland, *The Executive and the Public Interest*, 307 ANNALS 37 (1956). This essay should be required reading in constitutional law courses.

Beginning with the famous "decision of 1789,"⁴⁶ the power of removal was largely concentrated in the President⁴⁷ and left almost untouched there by the rulings of the Supreme Court.⁴⁸ The Court's reluctance during the 137 years before *Myers* to pass squarely on the issue is both notorious and readily understandable.⁴⁹ More than the doctrine of separation of powers and functions is involved, although that does provide the constitutional underpinning. The Executive is by definition the active side of government; the Court is passive, contemplative, and concerned not so much with implementation as with principle. To be sure, the Court deals with the detailed rights of individuals, and to an appreciable extent its policy is the nation's practice. Politics itself, however, is an area the Court has always been scrupulously careful to avoid.⁵⁰ Had Chief Justice Jay been willing to commit the Court to the giving of advisory opinions at the President's request, judicial detachment would have been difficult to maintain. Or, had the Court ever ventured to decide for itself such political issues as the legitimacy of a foreign government or the validity of a non-citizens' claim to diplomatic status, it would inevitably have been precipitated into the political arena. It would have been forced, in defending its decisions, to take sides and become something quite different from what it has in fact come to be.

Avoiding any exposition of the constitutional nature and extent of the President's removal powers was simply another manifestation of its extreme unwillingness to interfere in what it has seen as essentially political issues. It has traditionally preferred to leave these to Congress and the President to work out between themselves on an *ad hoc* basis. On the other hand, with the exception of Chief Justice Marshall's famous dictum in *Marbury*

46. Not really a decision: it is Corwin's characterization of the House's final action on a bill proposed by Madison in 1789 to establish a Department of Foreign Affairs. Originally the opening clause provided that the principal officer was "to be removable by the President of the United States." Debate ensued and the "decision" resolved the clause to "whenever the said principal officer shall be removed from office by the President of the United States, CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 86-87 (3d ed. 1948).

47. The true interpretation of the Decision of 1789, and subsequent legislative and judicial practice, is massively contested in *Myers* by Chief Justice Taft, on one side, and the two dissenters on the other. Such finality as the appeal to history can have is afforded by CORWIN, *REMOVAL POWER OF THE PRESIDENT* (1927). See also Comment, 36 *YALE L.J.* 390, 393 (1927).

48. *Ex parte Hennen*, 38 U.S. (13Pet.) 230, 259 (1839). "Realistically, the *Myers* decision was . . . a legal recognition of a political practice." Jacobson, *supra* note 29, at 41.

49. Perhaps the most masterly evasion of the issue is the opinion of Justice Brandeis in *Burnap v. United States*, 252 U.S. 512 (1920). It has been said that President Jackson's removal of his Secretary of the Treasury, Duane, was "worth a hundred cases from the law reports." Grundstein, *Presidential Power, Administration and Administrative Law*, 18 *Geo. Wash. L. Rev.* 285, 289 (1950).

50. Which is of course not at all to deny the assertion that "the Supreme Court inevitably acts in a political context." PRITCHETT, *CIVIL LIBERTIES AND THE VINSON COURT* xiii (1954). See also the writings of Professor Fred Rodell of Yale, perhaps the leading critic of the Supreme Court.

v. *Madison*,⁵¹ the effect and probably the intention of the pre-*Myers* decisions was to endorse the de facto exercise by the President of discretionary removal power.⁵² Now and then the Court has indicated plainly that this was indeed the purpose of its consistent hands-off policy. Mr. Justice Thompson remarked in 1839 that "it was very early adopted as the practical construction of the constitution, that this power of removal was vested in the President alone."⁵³ Mr. Justice Peckham, in 1897⁵⁴ and 1903,⁵⁵ went even further in speaking for the Court, indicating what Chief Justice Taft was to later proclaim as established law: that the power of removal was inherent in the President's power to appoint.

POLITICAL RESPONSIBILITY VERSUS DETACHED EXPERTNESS

It is submitted, however, that the basic issues raised by all the removal cases from *Myers* to date are not those actually discussed by the opinions. They do not concern inherent presidential power to remove, the legislative or executive nature of a particular office, nor congressional power to determine the tenure of the posts Congress creates. The true competing values, never reached by the Court, are those of political responsibility versus detached expertness. To put the same thing differently, it is political control of federal officials versus the exercise by them of independent judgment. To weigh such values against each other, to determine which shall prevail and which shall be subordinated, is something no American court would take upon itself. How should even the highest court in the country go about determining the advantages and disadvantages of the merit system of the Civil Service structure we have developed? How could the Court decide how to preserve to the bureaucracy its jobs and yet keep it flexible enough to be responsive to its leader's political will? To indicate some of the component parts of the problem is to approve the Court's wisdom in not even

51. "The discretion of the executive is to be exercised, until the appointment has been made. But having once made the appointment, his power over the office is terminated, in all cases where, by law, the officer is not removable by him." 5 U.S. (1 Cranch) 137, 162 (1803). Chief Justice Taft and Justice McReynolds, in *Myers*, contend respectively that this definitely is and definitely is not simply dictum. I think the Chief Justice has better support, if not the better of the argument. See the cogent analysis by Grant, *Marbury v. Madison Today*, 23 AM. POL. SCI. REV. 673, 675 (1929).

52. The leading article is Donovan & Irvine, *The President's Power to Remove Members of Administrative Agencies*, 21 CORNELL L.Q. 215 (1936). The discussions cited in note 5 *supra* are often good brief analyses; perhaps the best of them is the Note, 25 MICH. L. REV. 280 (1927). For interesting comparative treatment see the discussion of the state cases in Jacobson, *supra* note 29, and Note, 6 ORE. L. REV. 165 (1927). The leading state case is *Field v. The People*, 3 Ill. 79 (1839).

53. *Ex parte Hemmen*, 38 U.S. (13 Pet.) 230, 259 (1839).

54. *Parsons v. United States*, 167 U.S. 324 (1897).

55. *Shurtleff v. United States*, 189 U.S. 311 (1903). The only advocacy of a contrary position is Justice McLean's dissent in *United States ex. rel. Goodrich v. Guthrie*, 58 U.S. (17 How.) 284, 306 (1854), and the objections of the three dissenters in *McAllister v. United States*, 141 U.S. 174 (1891). In both these cases, however, the independence of the judiciary was involved, the officers removed being territorial judges. The dissenting opinions clearly indicate the personal concern the justices felt.

alluding to it. Yet as a matter of practical necessity, someone sooner or later will have to decide whether or not administrative officers are or should be neutrals in the political jungle; whether in the light of the existence of that jungle neutrality is possible, let alone desirable.⁵⁶ It is not partisan politics which is inevitable in government, but the politics of ideas, determinations and directives. "Able men are rarely neutral in sentiment about important issues in which they share responsibility. Real neutrality would border on indifference and indifference soon becomes incompetence."⁵⁷ And, "It is politics that fashions and directs responsibility. It is hierarchy that is the formal structure and instrument of responsibility."⁵⁸ Faced with such enormous issues as hierarchy versus anarchy (many commentators have so viewed this problem of centralizing control in the President⁵⁹) the Court has done well to keep silent.

It has not kept a perfect silence, however, nor since *Myers* will it ever again be able to. What it has apparently done, and will continue to do, is take the "middle ground" urged upon it by the then Solicitor General James Beck, in the argument of *Myers*.⁶⁰ It has recognized neither an exclusive removal power in the President nor an exclusive control over removal power in Congress. Where possible, it has left the President to be bound only by what Mr. Beck called "standards of public service"; what Chief Justice Marshall in *Marbury v. Madison* called the President's conscience. It has, again as Mr. Beck suggested, established guiding lines and norms within which the President's conscience (and that of Congress as well) can operate. For this function of advice and counsel it is supremely well fitted.

Yet this is not quite all it has done; as a court it has the obligation to adjudicate individual rights and redress individual wrongs. As Chief Justice Waite wrote in 1879, "The question here presented is not one of office, but of salary."⁶¹ He dealt with a different context, but his words are profoundly applicable. It should be observed, and it is not accidental, that *Myers*, *Humphrey's*, *Morgan* and *Wiener* are all suits, not for office, but for salary.⁶² In the face of the proliferation and constantly increasing importance of administrative agencies, to decide even so narrow an issue it was necessary to work out standards by which the Court could adjudicate the salary claims of presidentially removed administrative officers.

It cannot be considered accidental that Chief Justice Taft, with his unique experience as a former President, led the Court in abandoning so

56. See note 45 *supra*.

57. Somers, *supra* note 27, at 58.

58. APPLEBY, MORALITY AND ADMINISTRATION 250-51 (1952).

59. Professor Jaffe, *supra* note 37, feels that this is essentially a political scientist's point of view, and that lawyers as a whole tend to favor the independence of the administrative agencies.

60. 272 U.S. 52, 88-98 (1926).

61. *Embry v. United States*, 100 U.S. 680, 685 (1879).

62. As were the earlier cases, which are conveniently collected and summarized by Donovan & Irvine, *supra* note 52.

much of its silence as it did in *Myers*.⁶³ However, the Court could go no further; not even ex-President Taft could engraft upon the presidency the power to dispense with senatorial confirmation of a dismissed officer's successor.⁶⁴ It has been suggested that the Court could, conceivably, go further; that it might, in an appropriate situation, reinstate a federal officer.⁶⁵ The suggestion flies in the face of a long series of Supreme Court decisions denying such officers either mandamus or quo warranto proceedings, and seems to have been made without any great expectation of anyone's ever successfully attempting to obtain reinstatement via judicial process.⁶⁶ The Court has not only never ordered reinstatement without having prior legislative authority; it has consistently refused to review the positive exercise of presidential discretion in removal cases.⁶⁷ Accordingly, where the statute provides a list of justifiable causes for removal as the Federal Trade Commission Act did, it has been suggested that the President need only name such a cause, whether or not true in fact, to have the Court decline to inquire further.⁶⁸ But the President is not and cannot be such an irresponsible officer. As ex-President Taft wrote, before becoming Chief Justice Taft, ". . . the truth is that, great as his powers are, when a President comes to exercise them he is much more concerned with the limitations upon them . . . than with personal gratification over the big things he can do."⁶⁹

CONCLUSION

It was this same basic misunderstanding of the nature of the presidency, and the effect of the Supreme Court's denial of Mr. Myers' salary claim, that led Civil Service reformers and law journal commentators to predict a revolution in the federal service.⁷⁰ Some writers were convinced that the

63. It would have been possible, even in the context of the *Myers* case, to avoid the issue as it had always before been avoided. The Court could, for example, have stopped at ruling the 1876 statute unconstitutional, deciding only that, whatever the President's removal powers, Congress as a non-executive body had no such powers at all. This was in fact decided, but the Court did not let the matter rest there. Mr. Taft's 1816 lectures on the presidency, incidentally, while in many ways anticipating *Myers*, show a distinctly more modest approach to presidential power. TAFT, *THE PRESIDENCY* (1916).

64. Note the line of cases beginning with *Blake v. United States*, 103 U.S. 227 (1880) and *United States v. Perkins*, 116 U.S. 483 (1886), in which it was determined that senatorial confirmation of a removed officer's successor waived any question of congressional objections to that removal. The effect on this doctrine of *Humphrey's*, where the Court disapproved a removal despite senatorial (as distinguished from congressional) confirmation of the removed officer's successor, is an interesting subject for speculation.

65. Comment, 21 ILL. L. REV. 733 (1927).

66. "Because of the courts' reluctance to interfere with government action taken against its employees, their protection lies largely with the president, and, to some extent, with Congress." Note, 47 COLUM. L. REV. 1161, 1188 (1947), and cases there collected. See also CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 129-30 (3d ed. 1948).

67. *Ibid.*

68. Patterson, *The President as Chief Administrator*, 22 B.U.L. REV. 1 (1942).

69. TAFT, *op. cit. supra* note 63, at 43.

70. See note 5 *supra*.

official life of the Comptroller General, in particular, was slated for an abrupt end.⁷¹ This deep concern was greatly comforted by *Humphrey's* — but the expected wave of irresponsible removals never came, and the reassurance is in fact as illusory as the concern. The Comptroller General finished out his long term of office without presidential action.⁷² The President does not function in isolation; the power of the purse alone would be enough to make Congress' watchful scrutiny a far stronger check and a more powerful threat of reprisal than anything the Court might accomplish.⁷³ It would be impossible to deny the Court the force of moral prestige, but it is submitted that in this particular area that prestige is secondary to the interacting powers of the other two branches of government.

71. See the pessimism of a then member of the professional staff of the Bureau of Municipal Research, Calloway, *supra* note 5, at 499.

72. Though President Franklin D. Roosevelt did take his time about nominating a successor.

73. "As for the Comptroller General and his Assistant, a President who summarily removes one of these officers must be not only brave and defiant but also ready for a fight to the finish. Congress does not lack retaliatory powers." McBain, *supra* note 5, at 603.