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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 667

SAMUEL F. RATHBUN, AS EXECUTOR OF THE ESTATE of William E. Humphrey, deceased

v.

THE UNITED STATES

ON CERTIFICATE FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The Court of Claims rendered no opinion.

JURISDICTION

The certificate of the Court of Claims was filed January 26, 1935 (R. 16). The jurisdiction of this Court rests on Section 3 (a) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939.

QUESTIONS PRESENTED

The questions certified read as follows:

1. Do the provisions of Section 1 of the Federal Trade Commission Act, stating that "any commis-

sioner 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?

STATUTE INVOLVED

The statute involved is the Federal Trade Commission Act of 1914, c. 311, 38 Stat. 717 (U. S. C., Title 15, Secs. 41, 42), which provides in part as follows:

> * * * That a commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the Commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. 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. * * *
>
> SEC. 2. That each commissioner shall receive a salary of $10,000 a year, payable in the same manner as the salaries of the judges of the courts of the United States. * * *

STATEMENT

The material facts as disclosed by the certificate may be summarized as follows (R. 1–15):

The plaintiff, who is the duly appointed executor of the last will and testament of William E. Humphrey, deceased, brought suit in the Court of Claims to recover the sum of $3,043.06, together with interest thereon, which sum he alleges was due to the deceased for salary as a Federal Trade Commissioner from October 8, 1933, to February 14, 1934 (R. 1–15). The executor alleged that on January 26, 1925, the deceased was nominated as a Federal Trade Commissioner for a term expiring September 25, 1931, and that this nomination was confirmed by the United States Senate (R. 2). That on June 30, 1931, the deceased received a re-

cess appointment as a Federal Trade Commissioner for a term expiring September 25, 1938, and that on January 27, 1932, pursuant to his nomination to such office he was confirmed by the United States Senate as a Federal Trade Commissioner for a term expiring September 25, 1938 (R. 2). Following these various recess appointments and confirmed appointments, the deceased at the appropriate times took the required oaths of office and entered upon the exercise of the duties of a Commissioner of the Federal Trade Commission (R. 2–3).

Between July 19, 1933, and October 7, 1933, an exchange of communications took place between the President of the United States and the deceased, wherein the President requested that the deceased resign his position as a Federal Trade Commissioner, stating that the request was made "without any reflection at all upon you personally, or upon the service you have rendered in your present capacity", and stating, among other reasons for requesting the resignation, that he felt "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" (R. 4), and "I think it best for the people of this country that I should have a full confidence" (R. 6). The deceased was unwilling to resign, and the President of the United States on October 7, 1933, acting in his discretion, removed the deceased from his office as a Federal Trade Commissioner (R. 8).

On October 27, 1933, George C. Mathews was appointed by the President as a Federal Trade Commissioner to fill the vacancy created by the removal of the deceased (R. 10). On January 31, 1934, the nomination of George C. Mathews as a Federal Trade Commissioner was confirmed by the United States Senate (R. 12). The deceased, subsequent to October 7, 1933, was not permitted to perform any of the duties of a Federal Trade Commissioner by the Federal Trade Commission, which recognized the validity of the President's order of removal, nor did he receive any salary beyond that date (R. 9, 13). The deceased duly protested the legality of his removal, and addressed a number of letters evidencing his protest to the Federal Trade Commission, the Secretary of the Federal Trade Commission, the Chief of Accounts and Personnel, and the Disbursing Clerk of the Federal Trade Commission (R. 8–12). From October 7, 1933, until his death on February 14, 1934, the deceased was without employment in any other capacity, and was ready and willing to perform the duties of a Federal Trade Commissioner, and at all times held himself in readiness for that purpose (R. 13).

The petition alleged that the attempted removal of the deceased by the President of the United States was illegal and void and was insufficient to deprive him of his rights to the powers, privileges, and emoluments of the office of a Federal Trade Commissioner (R. 12).

The United States filed a demurrer to the petition, and, without ruling upon the demurrer, the Court of Claims certified to this Court the questions herein presented (R. 15).

SUMMARY OF ARGUMENT

I

In *Shurtleff* v. *United States,* 189 U. S. 311, this Court held that the Customs Administrative Act of 1890, which provided that a member of the Board of General Appraisers could be removed by the President for inefficiency, neglect of duty or malfeasance in office, did not confine the President's removal power to those causes alone. The language contained in the Federal Trade Commission Act is identical with that used in the Customs Administrative Act and in a number of other statutes. In order to establish a limitation on the removal power of the President, Congress amended the Customs Administrative Act to provide expressly that a removal could be made for one of the stated causes and for no other. The same limitation occurs in several other statutes. There is nothing in the language or the legislative history of the Federal Trade Commission Act to indicate that Congress intended to depart from the meaning established in the *Shurtleff* case. In *Myers* v. *United States,* 272 U. S. 52, this Court was apparently agreed that the rule of construction in the *Shurtleff* case is applicable to the Federal Trade Com-

mission Act. A departure from this construction would raise a serious constitutional question.

II

If the Federal Trade Commission Act should be interpreted to limit the removal power of the President to the causes stated, it is an unconstitutional interference with the executive power of the President. No sound distinction can be drawn in this respect between the case at bar and the *Myers* case. 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. There is nothing in the nature and functions of the Federal Trade Commission to justify a departure from the *Myers* case. The functions of a so-called legislative and quasi-judicial character which the Commission performs are in no essential respects different from those committed to the heads of departments.

ARGUMENT

I

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

The first question certified by the court below is whether the provision of Section 1 of the Federal Trade Commission Act stating that "any commissioner may be removed by the President for inef-

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ficiency, neglect of duty, or malfeasance in office'' restricts or limits the power of the President to remove a Commissioner except upon one or more of the causes named. While this Court has never passed upon the provision of the Federal Trade Commission Act whose meaning is here in question, the Court has in *Shurtleff* v. *United States,* 189 U. S. 311, determined the meaning of identical language contained in a similar statute.[1]

Shurtleff was a general appraiser of merchandise, appointed pursuant to the Act of June 10, 1890, c. 407, 26 Stat. 131. That Act provided that there should be created a board of general appraisers of merchandise consisting of nine members, not more than five of whom should belong to the same political party, and that any of these appraisers could be removed from office at any time for inefficiency, neglect of duty, or malfeasance in office.

In 1899 President McKinley removed Shurtleff from the office of general appraiser of merchandise without specifying any reasons therefor. Shurtleff thereafter brought suit for his salary, stating that his removal was illegal, inasmuch as it was not predicated upon any of the grounds for removal set forth in the statute. The question which this Court

[1] The same language is to be found in the Acts creating the Interstate Commerce Commission (Feb. 4, 1887, c. 104, Sec. 11, 24 Stat. 379, 383), the United States Shipping Board (Sept. 7, 1916, c. 451, Sec. 3, 39 Stat. 728, 729), and the United States Tariff Commission (Sept. 8, 1916, c. 463, Sec. 700, 39 Stat. 756, 795). See *Myers* v. *United States*, 272 U. S. 52, 262, note 30 (c).

was called upon to determine was stated by it to be, "can the President exercise the power of removal for any other causes than those mentioned in the statute; in other words, is he restricted to a removal for those causes alone or can he exercise his general power of removal without such restriction?" In holding that the specification in the statute of certain causes of removal did not limit the general power of the President to remove in his discretion, the Court said (189 U. S., at 317):

> In making removals from office it must be assumed that the President acts with reference to his constitutional duty to take care that the laws are faithfully executed, and we think it would be a mistaken view to hold that the mere specification in the statute of some causes for removal thereby excluded the right of the President to remove for any other reason which he, acting with a due sense of his official responsibility, should think sufficient.

The language employed in the Federal Trade Commission Act in respect of the presidential power of removal is identical with that used in the Act creating the office from which Shurtleff, as this Court held, was lawfully removed.

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. The argument was advanced in the *Myers* case that

through a long course of practice Congress had imposed restrictions on the removal power of the President. In considering this argument, Chief Justice Taft pointed out that in view of the rule of the *Shurtleff* case, wherever Congress used language like that employed in the Customs Administrative Act it did not purport to limit the President to removal for the causes specified. The Chief Justice said (272 U. S., at pp. 171–172):

> Since the provision for an Interstate Commerce Commission, in 1887, many administrative boards have been created whose members are appointed by the President, by and with the advice and consent of the Senate, and in the statutes creating them have been provisions for the removal of the members for specified causes. Such provisions are claimed to be inconsistent with the independent power of removal by the President. This, however, is shown to be unfounded by the case of *Shurtleff* v. *United States,* 189 U. S. 311 (1903). * * * This is an indication that many of the statutes cited are to be reconciled to the unrestricted power of the President to remove, if he chooses to exercise his power.

On this question of construction there was no disagreement in the *Myers* case. The opinion of Mr. Justice Brandeis, dissenting, is even more explicit in stating that under the rule of the *Shurtleff* case the Federal Trade Commission Act does not limit the power of removal to the causes specified.

In analyzing statutory provisions concerning removal, Mr. Justice Brandeis refers (p. 262, n. 30) to that class of provisions which authorize removal for "Inefficiency, neglect of duty, malfeasance in office, not restricting, however, under *Shurtleff* v. *United States,* 189 U. S. 311, the President's power to remove for other than the causes specified", citing the Acts creating the Interstate Commerce Commission, the Board of General Appraisers, the Federal Trade Commission, the United States Shipping Board, and the United States Tariff Commission. In neither of the other two opinions announced in the *Myers* case was this application of the rule of construction controverted.

There are, moreover, special reasons why the rule of construction in the *Shurtleff* case is controlling with respect to the Federal Trade Commission Act. That case was decided in 1903. The Federal Trade Commission Act was enacted in 1914, containing language identical with that which had been construed in the *Shurtleff* case. It is a cardinal principle of statutory interpretation that the meaning of words in a statute must be determined in the light of judicial interpretation given to such words in similar previous legislation. 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. *Hecht* v. *Malley,* 265 U. S. 144, 153; *United States* v. *Mer-*

riam, 263 U. S. 179, 187; *Heald* v. *District of Columbia,* 254 U. S. 20, 23; *Hackfeld & Co.* v. *United States,* 197 U. S. 442, 451; *Kepner* v. *United States,* 195 U. S. 100, 124; *Northern Pacific R. R. Co.* v. *Musser-Sauntry Co.,* 168 U. S. 604, 608; *The "Abbotsford",* 98 U. S. 440.[2]

This construction of the intent of Congress in the Federal Trade Commission Act is confirmed by consideration of the language used by it in comparable legislation. In 1908, five years after the decision in the *Shurtleff* case, the Customs Administrative Act 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.[3] It is unnecessary to determine whether that construction correctly reflected the intention of Congress in 1890 when the original Act was passed. In the case at bar the correctness of the decision in the *Shurtleff* case, as applied to the statute there involved, has

[2] Similarly, where a statute of one jurisdiction is adopted by another, its previous construction by the courts of the former will be regarded as incorporated at the time of adoption. *Marlin* v. *Lewallen,* 276 U. S. 58, 62–63; *James* v. *Appel,* 192 U. S. 129, 135; *Robinson & Co.* v. *Belt,* 187 U. S. 41, 47–48; *Willis* v. *Eastern Trust and Banking Co.,* 169 U. S. 295, 307–308.

[3] See 42 Cong. Rec. 5036 (Statement of Mr. Payne, in charge of the bill).

not been challenged. The significant fact is that Congress was aware of the construction given to the Act by this Court and, in order to change that declared meaning, changed the terms of the Act.

Not only in the Act of 1908 amending the Customs Administrative Act, but in a number of other statutes as well, Congress has attempted by explicit language to limit the removal power to specified causes and no others. Of these statutes, one was enacted before the Federal Trade Commission Act and the remainder after that Act. They include the Acts creating a Commissioner of Mediation and Conciliation (July 15, 1913, c. 6, Sec. 11, 38 Stat. 103, 108); the Board of Tax Appeals (June 2, 1924, c. 234, Sec. 900 (b), 43 Stat. 253, 336); the Railroad Labor Board (Feb. 28, 1920, c. 91, Sec. 306 (b), 41 Stat. 456, 470); the United States Coal Commission (Mar. 4, 1923, c. 248, Sec. 1, 42 Stat. 1446); the Board of Mediation (May 20, 1926, c. 347, Sec. 4, 44 Stat. 577, 579); and the National Mediation Board (June 21, 1934, c. 691, Sec. 4, 48 Stat. 1193).

It thus appears that the *Shurtleff* case established a rule of construction of a phrase frequently employed with respect to removals (page 8, footnote 1, *supra*); that the same phrase was later used in a similar context in the Federal Trade Commission Act; and that a different phrase aptly chosen to express a different intent has been used both before and since the enactment of that Act. The existence of the rule of construction is, in such

circumstances, controlling in interpreting the language used.

The plaintiff seeks to avoid the rule of the *Shurtleff* case upon three grounds. He contends, first, that the language of the Federal Trade Commission Act differs from that of the Customs Administrative Act, in that the Federal Trade Commission Act provides that each Commissioner shall "continue in office" for the term specified. This contention is unfounded. The language relied upon, even if it were significant, is inapplicable, for it 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,* 252 U. S. 512, 515.

The plaintiff contends, in the second place, that the *Shurtleff* case is inapplicable because the Customs Administrative Act, unlike the Federal Trade Commission Act, provided no fixed term of office, and an unconfined removal power furnished a means of limiting the tenure. But no such limitation of the case has ever been suggested by this Court. On the contrary, the case has been recog-

nized as authority for the proposition that irrespective of tenure, the enumeration by Congress of certain grounds for removal does not constitute an intention to limit the power of the President to removal for those causes alone. *Myers* v. *United States,* 272 U. S. 52, 171, 262. This established construction does not deprive the enumeration of purpose and effect. 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, as this Court has held and as the plaintiff recognizes, 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:

> It may be said, however, that there is some use for the provision for removal for the causes named in the statute. A removal for any of those causes can only be made after notice and an opportunity to defend, and therefore, if a removal is made without such notice, there is a conclusive presumption that the officer was not removed for any of those causes, and his removal cannot be regarded as the least imputation on his character for integrity or capacity. Other causes for removal may, however, exist, and be demanded by the interests of the service, in order that the office may be better conducted, although the officer may not be proved guilty

> of conduct coming within the statute as a cause for removal.[4] * * *

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.,* decided April 1, 1935, Nos. 479–490.

That the decision in the *Shurtleff* case rested not on the nature of the tenure but on the language employed in the statute appears from the opinion in that case (189 U. S. at 318):

> But we are not shut up to the necessity of finding some other and more plausible reason for the use of this language or else to adopt the meaning contended for by the appellant. The right of removal, as we have already remarked, would exist as inherent in the power of appointment unless taken away in plain and unambiguous language. This has not been done, and although language has been used from which we might speculate or guess that possibly Congress did intend the meaning contended for by appellant, yet it has not in fact expressed that meaning in words plain enough to call upon the courts to determine that such intention existed.

The plaintiff contends, finally, that the rule of the *Shurtleff* case is inapplicable because the Federal Trade Commission was created as an inde-

[4] The suggestion in *Reagan* v. *United States*, 182 U. S. 419, that notice and hearing are required in removals from offices with fixed tenure, cannot be regarded as authoritative in view of the *Myers* case.

pendent, nonpartisan, administrative agency. 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.

Prior to the Customs Administrative Act of 1890, cases of contested appraisals were submitted to merchant appraisers for redetermination. The Act of 1890 abolished the institution of merchant appraisers but recognized the need of a disinterested tribunal to pass upon such controversies, to which the United States was a party. 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 (C. C. A. 4th); 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. Congress provided in unmistakable terms for other safeguards designed to achieve that independence. 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 independent body. Compare, for example, the Acts creating the United States Employees' Compensation Commission (Sept. 7, 1916, c. 458, 39 Stat. 742), the Federal Radio Commission (Feb. 23, 1927, c. 169, 44 Stat. 1162), the Federal Power Commission (June 23, 1930, c. 572, 46 Stat. 797),

The Federal Home Loan Bank Board (July 22, 1932, c. 522, Sec. 17, 47 Stat. 725, 736), the Securities and Exchange Commission (June 6, 1934, c. 404, Sec. 4, 48 Stat. 885); and the Federal Communications Commission (June 19, 1934, c. 652, Sec. 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 indepedence 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 estab-

lished meaning; and that, therefore, as this Court was agreed in the *Myers* case, the answer to the first question certified should be "No."

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. It might properly be rejected even if the case were less clear than it is. Compare *Bratton* v. *Chandler,* 260 U. S. 110, 114; *United States* v. *Standard Brewery,* 251 U. S. 210, 220; *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 401; *Harriman* v. *Interstate Commerce Commission,* 211 U. S. 407, 422, and *Knights Templars' Indemnity Company* v. *Jarman,* 187 U. S. 197, 205. In the case at bar, such a construction "should not be made in the absence of compelling language." *Missouri Pacific Railroad Company* v. *Ault,* 256 U. S. 554, 559.

II

IF SECTION 1 OF THE FEDERAL TRADE COMMISSION ACT CONFINES THE POWER OF REMOVAL TO THE CAUSES STATED THEREIN, IT IS AN UNCONSTITUTIONAL INTERFERENCE WITH THE EXECUTIVE POWER OF THE PRESIDENT

Only if the first question is answered in the affirmative does it become necessary to answer the second question. If the Court should be of the opinion that Section 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.

The power of the President to remove officers appointed by him with the advice and consent of the Senate was fully considered in the *Myers* case, *supra,* 272 U. S. 52. It was there held that the attempt of Congress to require the participation of the Senate in the removal of postmasters by the President was an invalid interference with the executive power reposed in the President by the Constitution. In the case at bar, the nature of the interference by Congress and the office in question are not the same as in the *Myers* case. But neither of these differences alters the principle laid down in that case. The implications, and indeed the expressions, in the opinion of the Chief Justice show that the conclusion of the Court was regarded as governing a case like the one at bar.

With reference to provisions which specify causes for which the President may remove, the Chief Justice, after referring to the rule of the *Shurtleff* case as applicable to the Interstate Commerce Act and similar legislation, continued (272 U. S., at 172):

> There are other later acts pointed out in which, doubtless, the inconsistency with the independent power of the President to remove is clearer, but these cannot be said really to have received the acquiescence of the executive branch of the Government.

Thus the Court disposed of the argument based on such statutes not by distinguishing them from the Act there in question, but by noting that their validity had not been assumed by the Executive.

The conclusion that 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 is manifestly sound. 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. It was precisely because consent to removal was implied in consent to the appointment of a successor that the validity of the former requirement was for many years not drawn in question. 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. Consequently the enumeration of exclusive grounds for removal is in some respects a more substantial usurpation of the executive power than was the provision requiring Senatorial approval which was held invalid in the *Myers* case.

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.

But even where, as in the Federal Trade Commission Act, Congress has specified three grounds for removal, a limitation to one or more of these grounds is a substantial interference with the constitutional duty of the President to "take care that the laws be faithfully executed." 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 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.

There is nothing in the nature and functions of a Federal Trade Commissioner to require a different result from that reached in the *Myers* case. On this point the conclusion of the Court in that case is not left to inference. The Chief Justice said (p. 135):

> Then there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.

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.[5]

The Federal Trade Commission is not a judicial tribunal. As was said by this Court in *Federal Trade Commission* v. *Eastman Kodak Company,* 274 U. S. 619, 623:

> The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers. *National Harness, etc.,*

[5] The following are recent examples of requests for information addressed to the heads of departments:

71st Congress, 3d session.—S. Res. 355, 74 Cong. Rec. 315 (Secretary of Labor); S. Res. 366, *id.*, p. 1043 (Secretary of

> *Association* v. *Federal Trade Commission* (C. C. A.), 268 Fed. 705, 707; *Chamber of Commerce* v. *Federal Trade Commission* (C. C. A.), 280 Fed. 45, 48. It has not been delegated the authority of a court of equity. * * *

Thus the Commission does not have the power of a court to execute its orders; they must be enforced by the Circuit Courts of Appeals. We need not

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the Treasury); S. Res. 377, *id.*, p. 6163 (Secretary of Agriculture); S. Res. 394, *id.*, p. 2739 (Postmaster General); S. Res. 430, *id.*, p. 7109 (Secretary of Labor); S. Res. 494, *id.*, p. 7104 (Secretary of the Treasury).

72d Congress, 1st session.—S. J. Res. 108, 75 Cong. Rec. 8360 (Secretary of Agriculture); S. Res. 123, *id.*, p. 1172 (Secretary of Commerce); S. Res. 124, *id.*, p. 1172 (Secretary of Agriculture); S. Res. 128, *id.*, p. 1413 (Postmaster General, Secretaries of the Treasury, War, Agriculture, Commerce and Interior); S. Res. 150, *id.*, p. 2862 (Secretary of War); S. Res. 220, *id.*, p. 12748 (Secretary of Commerce); S. Res. 276, *id.*, p. 15348 (Secretary of the Treasury); S. Res. 281, *id.*, p. 15675 (Secretary of Agriculture).

72d Congress, 2d session.—S. Res. 376, 76 Cong Rec. 5310 (Secretary of Agriculture).

73d Congress, 1st session.—S. Res. 65, 77 Cong. Rec. 2656 (Secretary of Agriculture).

73d Congress, 2d session.—S. Res. 121, 78 Cong. Rec. 177 (Secretary of Agriculture); S. Res. 138, *id.*, p. 1054 (Secretary of Labor); S. Res. 205, *id.*, p. 4574 (Secretary of Agriculture); S. Res. 209, *id.*, p. 4579 (Secretary of the Treasury).

74th Congress, 1st session.—S. Res. 17, 79 Cong. Rec. 138 (Secretary of Agriculture); S. Res. 41, *id.*, p. 420 (Secretary of Agriculture); S. Res. 64, *id.*, p. 3655 (Department of Justice); S. Res. 67, *id.*, p. 1450 (Secretary of Labor).

In some of these instances it was believed that the information was already available; in others further investigation was thought necessary.

consider, therefore, whether the President's power to remove a judge of a court not established under Article III of the Constitution may be restricted by Congress. Compare *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 Company,* 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 Peters 497; use of the mails, *Houghton* v. *Payne,* 194 U. S. 88; practices at stockyards, *Tagg Bros. & Moorhead,* 280 U. S. 420; trading in grain futures, *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1.

To ignore the extent to which these functions have been conferred upon the regular executive departments is to ignore much of the development of administrative law in this country. 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. The power to remove heads of departments was in fact the foundation upon

which the result in the *Myers* case was rested. 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. Such attempts, which could not fail to create uncertainty and confusion, have no justification in fact or in law.

We submit, therefore, that if the Court should find it necessary to consider the second question certified, it should be answered in the negative.

CONCLUSION

The first question certified should be answered in the negative. If, however, it is answered in the affirmative, the second question should be answered in the negative.

Respectfully submitted.

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