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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 615

MYRON WIENER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. pp. 1a–11a) is reported at 142 F. Supp. 910.

JURISDICTION

The judgment of the Court of Claims, dismissing the petition filed in that court, was entered on July 12, 1956 [1] (R. 47). By order of the Chief Justice, dated

[1] The judgment was amended on October 2, 1956, so as to allow recovery on a Government counterclaim for certain expenses previously advanced petitioner by the Government. However, in a subsequent order dated December 7, 1956, the Court of Claims vacated its prior amending order and, pursuant to petitioner's motion, separated the counterclaim from the matters involved in the instant petition.

October 3, 1956, the time within which to file a petition for a writ of certiorari was extended to and including December 8, 1956. The petition was filed on December 8, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

Whether the President, in his discretion, may remove a member of the War Claims Commission.

STATUTES INVOLVED

The War Claims Act of 1948 (62 Stat. 1240, 50 U. S. C. App. 2001, *et seq.*) as amended by the Act of October 15, 1949, 63 Stat. 881, provides in part:

> SEC. 2. (a) There is hereby established a commission to be known as the War Claims Commission (hereinafter referred to as the "Commission") and to be composed of three persons to be appointed by the President, by and with the advice and consent of the Senate. At least two of the members of the Commission shall be persons who have been admitted to the bar of the highest court of any State, territory, or the District of Columbia. The members of the Commission shall receive compensation at the rate of $14,000 a year. The terms of office of the members of the Commission shall expire at the time fixed in subsection (d) for the winding up of the affairs of the Commission.
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> * * * * *
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> (c) The Commission may prescribe such rules and regulations as may be necessary to enable it to carry out its functions, and may delegate functions to any member, officer, or employee of the Commission. The Commission

shall give public notice of the time when, and the limit of time within which, claims may be filed, which notice shall be published in the Federal Register. The limit of time within which claims may be filed with the Commission shall in no event be later than two years after the date of enactment of this Act.[2]

(d) The Commission shall wind up its affairs at the earliest practicable time after the expiration of the time for filing claims, but in no event later than three years after the expiration of such time.

STATEMENT

The undisputed facts may be briefly summarized as follows:

On June 8, 1950, President Truman, with the advice and consent of the Senate, appointed petitioner to be a member of the War Claims Commission. Thereafter, on December 10, 1953, having refused to resign at the request of President Eisenhower, petitioner was informed by letter that, in the national interest, the President felt compelled to complete the administration of the War Claims Act with personnel of his own choosing and that he was, therefore, removing petitioner from the office of a War Claims Commissioner (R. 43).

On August 20, 1954, Wiener filed a petition in the Court of Claims in which he alleged that his removal from the office of War Claims Commissioner was illegal and that he was entitled to the salary he would have earned ($8,254.00) had he not been removed from

[2] By Joint Resolution of April 5, 1951 (65 Stat. 28), the date of March 31, 1952, was fixed as the final date for filing claims.

office.[3] The Court of Claims, Judge Whitaker dissenting, dismissed the petition.

ARGUMENT

Petitioner apparently recognizes that the President may, in his discretion, remove any executive official whose nomination and appointment are made by him. *Parsons* v. *United States,* 167 U. S. 324; *Shurtleff* v. *United States,* 189 U. S. 311; *Myers* v. *United States,* 272 U. S. 52; *Humphrey's Executor* v. *United States,* 295 U. S. 602; *Morgan* v. *Tennessee Valley Authority,* 115 F. 2d 990 (C. A. 6), certiorari denied, 312 U. S. 701; see *Ex Parte Hennen,* 13 Pet. 230, 259. However, relying on the Court of Claims' characterization of the War Claims Commission as a quasi-legislative and quasi-judicial agency,[4] petitioner suggests that the

[3] Prior thereto, on February 3, 1954, petitioner had filed suit in the nature of *quo warranto* proceedings in the United States District Court for the District of Columbia against the successor incumbent members of the War Claims Commission (Civil Action No. 447–54). A hearing was had on the respondents' motion to dismiss or in the alternative for summary judgment, and on March 30, 1954, the action was dismissed in accordance with the court's opinion of March 25, 1954, upholding the President's removal of petitioner as legal. An appeal was taken, but inasmuch as the War Claims Commission was abolished on July 1, 1954, all of its functions and personnel being transferred to a newly established Foreign Claims Settlement Commission under the terms of Reorganization Plan No. 1 of 1954 (68 Stat. 1279), the appeal was dismissed as moot by stipulation of the parties (R. 45).

[4] We need not here take issue with the Court of Claims' description of the War Claims Commission as a "quasi-legislative" and "quasi-judicial" agency since, as that court properly held, in the absence of a congressional purpose to limit the power of removal, such a characterization is irrelevant to the problem of removal. It is appropriate to note, however, that the War Claims Com-

President has no removal power with respect to such agencies other than that which Congress has seen fit expressly to grant him. Petitioner also urges that the absence of specific causes of removal in the War Claims Act evidences a Congressional intent that none should be available to the appointing authority. Both of these arguments, properly rejected by the Court of Claims, find no support in the whole line of precedents in this area of the law, including the *Humphrey* case, *supra.* Review by this Court is unnecessary.

1. The Court, in the *Myers* case, *supra,* held that the removal power was an integral part of the executive power vested in the President. The Court's conclusion is best summed up in its own language (272 U. S. at 163–4):

> Our conclusion on the merits, sustained by the arguments before stated, is * * * 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 im-

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mission was engaged in administering a claims program similar to those carried on by a number of agencies clearly within the executive departments. Claims programs involving the same techniques of operations and the performance of virtually identical functions are carried out by the Veterans Administration (compensation and pension claims), the Department of Labor (federal employees' compensation claims) and the Department of Justice (Japanese relocation claims).

> plication 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.

Up until now, this particular construction of the Constitution has never been seriously challenged. Long before *Myers,* the issue in all of the removal cases had been, not the existence of the Presidential power of removal, but the Constitutional right of the Congress to interfere with or limit its exercise—an issue not reached in this case since the War Claims Act of 1948 contains no such limitation. And the startling contention of petitioner that Congress might by silence alone deprive the President of the right to remove officers appointed by him finds no support in *Humphrey* or in any of the cases preceding that decision. To the contrary, this Court has consistently held that a statute would not be interpreted as attempting to limit the power of removal in the absence of clear and express language to that end. *Parsons* v. *United States, supra,* p. 4; *Shurtleff* v. *United States, supra,* p. 4.[5]

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[5] "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. * * * 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" (*Shurtleff*, 189 U. S. at 315, 316).

Humphrey's case, *supra,* p. 4, is not opposed; indeed, that ruling reemphasized the well-established principle that, absent Congressional limitation, the removal power of the President is absolute. There, the applicable statute provided that "Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." 38 Stat. 717, 15 U. S. C. 41. Humphrey was removed by the President without attempt to rest the removal upon any of the grounds specified in the statute. This Court, finding in the legislative history of the Federal Trade Commission Act and in the nature and functions of the Commission a clear Congressional aim that the Commission should be independent of the executive authority, held that the President's power of removal was limited to the causes enumerated in the statute. There is nothing in *Humphrey* to suggest that the President has such removal power with respect to quasi-legislative and quasi-judicial agencies *only* as Congress sees fit to grant him expressly, or that where no causes for removal are listed the power to remove is entirely eliminated.[6]

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[6] See the following excerpts from the *Humphrey* opinion:

"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.*" 295 U. S. at 621. [Emphasis added.]

"*We conclude that the intent of the act is to limit the executive power of removal* to the causes enumerated, * * *." 295 U. S. at 626. [Emphasis added.]

"If Congress is without authority to prescribe causes for removal of members of the trade commission and *limit executive*

2. Throughout the long debate upon the War Claims Act and the extensive hearings before both houses of Congress,[7] there was not the slightest expression of any purpose by any member of either House to limit in any way the executive power of removal.[8] If such were the purpose, it would seem reasonable to expect that Congress, with knowledge of the *Humphrey* case, and having before it the clear expressions of this court in *Parsons* and *Shurtleff* that any intention to limit the President's power of removal should be explicitly expressed, would have expressed its purpose somewhere in the Act. See *e. g.* Budget and Accounting Act of 1921, 42 Stat. 23, 31 U. S. C. 43 (Comptroller General); Railway Labor Act, 44 Stat. 579, 45 U. S. C. 154 (National Mediation Board); National Labor Relations Act, 49 Stat. 451, 29 U. S. C. 153 (a) (National Labor Relations Board); Subversive Activities Control Act of 1950, 64 Stat. 997, 50 U. S. C. 791 (a) (Subversive Activities Control Board).

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power of removal accordingly, * * *." 295 U. S. at 629. [Emphasis added.]

Congressional "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*." 295 U. S. at 629. [Emphasis added.]

[7] The House hearings were published by the 80th Congress under the title "Enemy Property Commission." The Senate hearings were published under the title "War Claims Commission."

[8] If any concern of this nature was expressed, it was that Congress feared that the War Claims Commission might seek to perpetuate itself (94 Cong. Rec. 552, 566).

Total silence on the part of Congress in the War Claims Act of 1948 on an issue as far reaching as the President's power of removal cannot be construed, we submit, as a congressional purpose to limit that power. As the court below stated (Pet. App. 9a):

> The Supreme Court found in the *Humphrey* case a Congressional intent, shown by the statutory language and the legislative history, to limit the President's power. That decision no doubt tempered the strict doctrine stated in the *Shurtleff* case. But it did not discard it to the extent that a court should conclude that the President's power had been abrogated even though there was no evidence at all, or substantially no evidence, that Congress so intended. There is no evidence whatever of any such intent in relation to the statute under construction in the instant case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Court of Claims is correct and that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
PAUL A. SWEENEY,
SEYMOUR FARBER,
Attorneys.

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