

# Readings

## Unit 8

- Introduction—Bureaucracy: A Controversial Necessity
- Tocqueville, *Democracy in America*: “Public Officers Under the Control of the American Democracy”
- *Federalist Papers*: “Federalist No. 72”
- *Myers v. U.S.*
- *Humphrey’s Executor v. U.S.*

## Questions

1. What does Tocqueville say about the role of costume for public officers?
2. What does “Federalist No. 72” argue concerning term limits?
3. How much weight, according to Chief Justice Taft, should the Supreme Court give to legislative action by Congress during the early period of American government in which many of the founders were still participating in public affairs?
4. What evidence supports the Supreme Court’s assertion that the Federal Trade Commission is not an arm or eye of the executive?

## Introduction—Bureaucracy: A Controversial Necessity

In the middle of the twentieth century, the American government and democracy experienced several major changes: rights and liberties became major focuses of politics, moreover, law itself was increasingly made, not directly by legislatures but by administrative agencies. Technically, some administrative agencies commingle elements that the Constitution took great pains to separate. Laws regulating every aspect of American society are now made, enforced, and adjudicated—not directly by Congress, the president, and the courts—but by administrative agencies.

An agency like the National Labor Relations Board (NLRB)—the agency created by Congress to regulate unions—for example, performs aspects of all three branches of government. The NLRB creates rules that are indistinguishable from legislative enactments in that they regulate behaviors and carry the weight of law. While it has this power, the NLRB also exercises a great deal of executive power. It, like the executive branch, carries out legislative policies, particularly acts such as making prosecutorial judgments. The NLRB, furthermore, exercises judicial power in such actions as adjudicating conflicts between employers and unions.

Included in this section of readings are various Supreme Court cases in which the Court adjudicated questions of the ability of Congress to create executive agencies that could function with such extensive powers. The Court supported the deferral of legislative power to executive agencies in *Myers v. United States* (1926). The President discharged a postmaster who subsequently sued claiming that under that statute that created his position, he could only be removed with the consent of the Senate. The Supreme Court held the statute unconstitutional because, former President, now Chief Justice, William Howard Taft concluded it was unconstitutional for Congress to interfere in the president's ability to remove from a position of authority someone charged with executing the law. Nine years later the Court clarified the reach and limits of *Myers*; in *Humphrey's Executor v. United States* (1935) the Court reduced the reach of *Myers*. In this case, President Franklin Roosevelt removed a commissioner of the Federal Trade Commission, whose family (he subsequently died) sued for back pay, claiming that Congress had designed the president's removal power in such a way that he could only remove someone for a good cause. In this case, the Court upheld the limitation on the power of the executive branch and agreed with the claimant family that the Congressional limitation on the executive's removal power was constitutional. The Court, in this case, rejected the view that the president has unchecked power to remove agency officials. The case proved additionally important to the growth of the administrative state in that it supported the ability of Congress to delegate power not solely to Cabinet officials who directly serve the president, but to independent agencies as well.

The deference of Congress to the president strengthened the power that executive agencies exercise over American citizens and society, making the agencies some of the most powerful institutions of government in the twenty-first century. The readings collected in this section explore more than the Supreme Court's account of the growth of the power of executive agencies. They also explore the account offered in the *Federalist Papers* that warns of the dangers inherent in executive institutions.

# Alexis de Tocqueville, *Democracy in America*: “Public Officers Under the Control of the American Democracy”

## In “Government of the Democracy in the United States” (Volume I, Chapter XII)

*PUBLIC OFFICERS UNDER THE CONTROL OF THE AMERICAN DEMOCRACY. Simple exterior of American public officers—No official costume—All public officers are remunerated—Political consequences of this system—No public career exists in America—Results of this fact.*

PUBLIC officers in the United States are not separate from the mass of citizens; they have neither palaces nor guards nor ceremonial costumes. This simple exterior of persons in authority is connected not only with the peculiarities of the American character, but with the fundamental principles of society. In the estimation of the democracy a government is not a benefit, but a necessary evil. A certain degree of power must be granted to public officers, for they would be of no use without it. But the ostensible semblance of authority is by no means indispensable to the conduct of affairs, and it is needlessly offensive to the susceptibility of the public. The public officers themselves are well aware that the superiority over their fellow citizens which they derive from their authority they enjoy only on condition of putting themselves on a level with the whole community by their manners. A public officer in the United States is uniformly simple in his manners, accessible to all the world, attentive to all requests, and obliging in his replies. I was pleased by these characteristics of a democratic government; I admired the manly independence that respects the office more than the officer and thinks less of the emblems of authority than of the man who bears them.

I believe that the influence which costumes really exercise in an age like that in which we live has been a good deal exaggerated. I never perceived that a public officer in America, while in the discharge of his duties, was the less respected because his own merit was set off by no adventitious signs. On the other hand, it is very doubtful whether a peculiar dress induces public men to respect themselves when they are not otherwise inclined to do so. When a magistrate snubs the parties before him, or indulges his wit at their expense, or shrugs his shoulders at their pleas of defense, or smiles complacently as the charges are enumerated (and in France such instances are not rare), I should like to deprive him of his robes of office, to see whether, when he is reduced to the garb of a private citizen, he would not recall some portion of the natural dignity of mankind.

No public officer in the United States has an official costume, but every one of them receives a salary. And this, also, still more naturally than what precedes, results from democratic principles. A democracy may allow some magisterial pomp and clothe its officers in silks and gold without seriously compromising its principles.

Privileges of this kind are transitory; they belong to the place and not to the man. But if public officers are unpaid, a class of rich and independent public functionaries will be created who will constitute the basis of an aristocracy; and if the people still retain their right of election, the choice can be made only from a certain class of citizens.

When a democratic republic requires salaried officials to serve without pay, it may safely be inferred that the state is advancing towards monarchy. And when a monarchy begins to remunerate such officers as had hitherto been unpaid, it is a sure sign that it is approaching a despotic or a republican form of government. The substitution of paid for unpaid functionaries is of itself, in my opinion, sufficient to constitute a real revolution.

I look upon the entire absence of unpaid offices in America as one of the most prominent signs of the absolute dominion which democracy exercises in that country. All public services, of whatever nature they may be, are paid; so that everyone has not merely a right, but also the means of performing them. Although in democratic states all the citizens are qualified to hold offices, all are not tempted to try for them. The number and the capacities of the candidates more than the conditions of the candidatures restrict the choice of the electors.

In nations where the principle of election extends to everything no political career can, properly speaking, be said to exist. Men arrive as if by chance at the post which they hold, and they are by no means sure of retaining it. This is especially true when the elections are held annually. The consequence is that in tranquil times public functions offer but few lures to ambition. In the United States those who engage in the perplexities of political life are persons of very moderate pretensions. The pursuit of wealth generally diverts men of great talents and strong passions from the pursuit of power; and it frequently happens that a man does not undertake to direct the fortunes

## Public Officers Under the Control of the American Democracy, cont'd.

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of the state until he has shown himself incompetent to conduct his own. The vast number of very ordinary men who occupy public stations is quite as attributable to these causes as to the bad choice of democracy. In the United States I am not sure that the people would choose men of superior abilities even if they wished to be elected; but it is certain that candidates of this description do not come forward.

*ARBITRARY POWER OF MAGISTRATES 3 UNDER THE RULE OF AMERICAN DEMOCRACY. For what reason the arbitrary power of magistrates is greater in absolute monarchies and in democratic republics than it is in limited monarchies—Arbitrary power of the magistrates in New England.*

IN two kinds of government the magistrates exercise considerable arbitrary power: namely, under the absolute government of an individual, and under that of a democracy. This identical result proceeds from very similar causes.

In despotic states the fortune of no one is secure; public officers are not more safe than private persons. The sovereign, who has under his control the lives, the property, and sometimes the honor of the men whom he employs, thinks he has nothing to fear from them and allows them great latitude of action because he is convinced that they will not use it against him. In despotic states the sovereign is so much attached to his power that he dislikes the constraint even of his own regulations, and likes to see his agents acting irregularly and, as it were, by chance in order to be sure that their actions will never counteract his desires.

In democracies, as the majority has every year the right of taking away the power of the officers whom it had appointed, it has no reason to fear any abuse of their authority. As the people are always able to signify their will to those who conduct the government, they prefer leaving them to the\* own free action instead of prescribing an invariable rule of conduct, which would at once fetter their activity and the popular authority.

It may even be observed, on attentive consideration, that, under the rule of a democracy the arbitrary action of the magistrate must be still greater than in despotic states. In the latter the sovereign can immediately punish all the faults with which he becomes acquainted, but he cannot hope to become acquainted with all those which are committed. In democracies, on the contrary, the sovereign power is not only supreme, but universally present. The American functionaries are, in fact, much more free in the sphere of action which the law traces out for them than any public officer in Europe. Very frequently the object which they are to accomplish is simply pointed out to them, and the choice of the means is left to their own discretion.

In New England, for instance, the selectmen of each township are bound to draw up the list of persons who are to serve on the jury; the only rule which is laid down to guide them in their choice is that they are to select citizens possessing the elective franchise and enjoying a fair reputation.<sup>4</sup> In France the lives and liberties of the subjects would be thought to be in danger if a public officer of any kind was entrusted with so formidable a right. In New England the same magistrates are empowered to post the names of habitual drunkards in public houses and to prohibit the inhabitants of a town from supplying them with liquor.<sup>5</sup> Such a censorial power would be revolting to the population of the most absolute monarchies; here, however, it is submitted to without difficulty.

Nowhere has so much been left by the law to the arbitrary determination of the magistrate as in democratic republics, because they have nothing to fear from arbitrary power. It may even be asserted that the freedom of the magistrate increases as the elective franchise is extended and as the duration of the term of office is shortened. Hence arises the great difficulty of converting a democratic republic into a monarchy. The magistrate ceases to be elective, but he retains the rights and the habits of an elected officer, which lead directly to despotism.

It is only in limited monarchies that the law which prescribes the sphere in which public officers are to act regulates all their measures. The cause of this may be easily detected. In limited monarchies the power is divided between the king and the people, both of whom are interested in the stability of the magistrate. The king does not venture to place the public officers under the control of the people, lest they should be tempted to betray his interests; on the other hand, the people fear lest the magistrates should serve to oppress the liberties of the country if they were entirely dependent upon the crown; they cannot, therefore, be said to depend on either the one or the other. The same cause that induces the king and the people to render public officers independent suggests the necessity of such securities as may prevent their independence from encroaching upon the authority of the former or upon the liberties of the latter. They consequently agree as to the necessity of restricting the functionary to a line of conduct laid down beforehand and find it to their interest to impose upon him certain regulations that he cannot evade.

## Public Officers Under the Control of the American Democracy, cont'd.

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*INSTABILITY OF THE ADMINISTRATION IN THE UNITED STATES. In America the public acts of a community frequently leave fewer traces than the actions within a family—Newspapers the only historical remains—Instability of the administration prejudicial to the art of government.*

THE authority which public men possess in America is so brief and they are so soon commingled with the ever changing population of the country that the acts of a community frequently leave fewer traces than events in a private family. The public administration is, so to speak, oral and traditional. But little is committed to writing, and that little is soon wafted away forever, like the leaves of the Sibyl, by the smallest breeze.

The only historical remains in the United States are the newspapers; if a number be wanting, the chain of time is broken and the present is severed from the past. I am convinced that in fifty years it will be more difficult to collect authentic documents concerning the social condition of the Americans at the present day than it is to find remains of the administration of France during the Middle Ages; and if the United States were ever invaded by barbarians, it would be necessary to have recourse to the history of other nations in order to learn anything of the people who now inhabit them.

The instability of administration has penetrated into the habits of the people; it even appears to suit the general taste, and no one cares for what occurred before his time: no methodical system is pursued, no archives are formed, and no documents are brought together when it would be very easy to do so. Where they exist, little store is set upon them. I have among my papers several original public documents which were given to me in the public offices in answer to some of my inquiries. In America society seems to live from hand to mouth, like an army in the field. Nevertheless, the art of administration is undoubtedly a science, and no sciences can be improved if the discoveries and observations of successive generations are not connected together in the order in which they occur. One man in the short space of his life remarks a fact, another conceives an idea; the former invents a means of execution, the latter reduces a truth to a formula, and mankind gathers the fruits of individual experience on its way and gradually forms the sciences. But the persons who conduct the administration in America can seldom afford any instruction to one another; and when they assume the direction of society, they simply possess those attainments which are widely disseminated in the community, and no knowledge peculiar to themselves. Democracy, pushed to its furthest limits, is therefore prejudicial to the art of government; and for this reason it is better adapted to a people already versed in the conduct of administration than to a nation that is uninitiated in public affairs.

This remark, indeed, is not exclusively applicable to the science of administration. Although a democratic government is founded upon a very simple and natural principle, it always presupposes the existence of a high degree of culture and enlightenment in society.<sup>6</sup> At first it might be supposed to belong to the earliest ages of the world, but maturer observation will convince us that it could come only last in the succession of human history.

# *Federalist Papers: “Federalist No. 72”*

## **The Same Subject Continued, and the Re-Eligibility of the Executive Considered**

Friday, March 21, 1788

by Alexander Hamilton

To the People of the State of New York:

THE administration of government, in its largest sense, comprehends all the operations of the body politic, whether legislative, executive, or judiciary; but in its most usual, and perhaps its most precise signification, it is limited to executive details, and falls peculiarly within the province of the executive department. The actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public moneys in conformity to the general appropriations of the legislature, the arrangement of the army and navy, the directions of the operations of war, these, and other matters of a like nature, constitute what seems to be most properly understood by the administration of government. The persons, therefore, to whose immediate management these different matters are committed, ought to be considered as the assistants or deputies of the chief magistrate, and on this account, they ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence. This view of the subject will at once suggest to us the intimate connection between the duration of the executive magistrate in office and the stability of the system of administration. To reverse and undo what has been done by a predecessor, is very often considered by a successor as the best proof he can give of his own capacity and desert; and in addition to this propensity, where the alteration has been the result of public choice, the person substituted is warranted in supposing that the dismissal of his predecessor has proceeded from a dislike to his measures; and that the less he resembles him, the more he will recommend himself to the favor of his constituents. These considerations, and the influence of personal confidences and attachments, would be likely to induce every new President to promote a change of men to fill the subordinate stations; and these causes together could not fail to occasion a disgraceful and ruinous mutability in the administration of the government.

With a positive duration of considerable extent, I connect the circumstance of re-eligibility. The first is necessary to give to the officer himself the inclination and the resolution to act his part well, and to the community time and leisure to observe the tendency of his measures, and thence to form an experimental estimate of their merits. The last is necessary to enable the people, when they see reason to approve of his conduct, to continue him in his station, in order to prolong the utility of his talents and virtues, and to secure to the government the advantage of permanency in a wise system of administration.

Nothing appears more plausible at first sight, nor more ill-founded upon close inspection, than a scheme which in relation to the present point has had some respectable advocates, I mean that of continuing the chief magistrate in office for a certain time, and then excluding him from it, either for a limited period or forever after. This exclusion, whether temporary or perpetual, would have nearly the same effects, and these effects would be for the most part rather pernicious than salutary.

One ill effect of the exclusion would be a diminution of the inducements to good behavior. There are few men who would not feel much less zeal in the discharge of a duty when they were conscious that the advantages of the station with which it was connected must be relinquished at a determinate period, than when they were permitted to entertain a hope of OBTAINING, by MERITING, a continuance of them. This position will not be disputed so long as it is admitted that the desire of reward is one of the strongest incentives of human conduct; or that the best security for the fidelity of mankind is to make their interests coincide with their duty. Even the love of fame, the ruling passion of the noblest minds, which would prompt a man to plan and undertake extensive and arduous enterprises for the public benefit, requiring considerable time to mature and perfect them, if he could flatter himself with the prospect of being allowed to finish what he had begun, would, on the contrary, deter him from the undertaking, when he foresaw that he must quit the scene before he could accomplish the work, and must commit that, together with his own reputation, to hands which might be unequal or unfriendly to the task. The most to be expected from the generality of men, in such a situation, is the negative merit of not doing harm, instead of the positive merit of doing good.

## Federalist No. 72, cont'd.

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Another ill effect of the exclusion would be the temptation to sordid views, to speculation, and, in some instances, to usurpation. An avaricious man, who might happen to fill the office, looking forward to a time when he must at all events yield up the emoluments he enjoyed, would feel a propensity, not easy to be resisted by such a man, to make the best use of the opportunity he enjoyed while it lasted, and might not scruple to have recourse to the most corrupt expedients to make the harvest as abundant as it was transitory; though the same man, probably, with a different prospect before him, might content himself with the regular perquisites of his situation, and might even be unwilling to risk the consequences of an abuse of his opportunities. His avarice might be a guard upon his avarice. Add to this that the same man might be vain or ambitious, as well as avaricious. And if he could expect to prolong his honors by his good conduct, he might hesitate to sacrifice his appetite for them to his appetite for gain. But with the prospect before him of approaching an inevitable annihilation, his avarice would be likely to get the victory over his caution, his vanity, or his ambition.

An ambitious man, too, when he found himself seated on the summit of his country's honors, when he looked forward to the time at which he must descend from the exalted eminence for ever, and reflected that no exertion of merit on his part could save him from the unwelcome reverse; such a man, in such a situation, would be much more violently tempted to embrace a favorable conjuncture for attempting the prolongation of his power, at every personal hazard, than if he had the probability of answering the same end by doing his duty.

Would it promote the peace of the community, or the stability of the government to have half a dozen men who had had credit enough to be raised to the seat of the supreme magistracy, wandering among the people like discontented ghosts, and sighing for a place which they were destined never more to possess?

A third ill effect of the exclusion would be, the depriving the community of the advantage of the experience gained by the chief magistrate in the exercise of his office. That experience is the parent of wisdom, is an adage the truth of which is recognized by the wisest as well as the simplest of mankind. What more desirable or more essential than this quality in the governors of nations? Where more desirable or more essential than in the first magistrate of a nation? Can it be wise to put this desirable and essential quality under the ban of the Constitution, and to declare that the moment it is acquired, its possessor shall be compelled to abandon the station in which it was acquired, and to which it is adapted? This, nevertheless, is the precise import of all those regulations which exclude men from serving their country, by the choice of their fellow citizens, after they have by a course of service fitted themselves for doing it with a greater degree of utility.

A fourth ill effect of the exclusion would be the banishing men from stations in which, in certain emergencies of the state, their presence might be of the greatest moment to the public interest or safety. There is no nation which has not, at one period or another, experienced an absolute necessity of the services of particular men in particular situations; perhaps it would not be too strong to say, to the preservation of its political existence. How unwise, therefore, must be every such self-denying ordinance as serves to prohibit a nation from making use of its own citizens in the manner best suited to its exigencies and circumstances! Without supposing the personal essentiality of the man, it is evident that a change of the chief magistrate, at the breaking out of a war, or at any similar crisis, for another, even of equal merit, would at all times be detrimental to the community, inasmuch as it would substitute inexperience to experience, and would tend to unhinge and set afloat the already settled train of the administration.

A fifth ill effect of the exclusion would be, that it would operate as a constitutional interdiction of stability in the administration. By NECESSITATING a change of men, in the first office of the nation, it would necessitate a mutability of measures. It is not generally to be expected, that men will vary and measures remain uniform. The contrary is the usual course of things. And we need not be apprehensive that there will be too much stability, while there is even the option of changing; nor need we desire to prohibit the people from continuing their confidence where they think it may be safely placed, and where, by constancy on their part, they may obviate the fatal inconveniences of fluctuating councils and a variable policy.

These are some of the disadvantages which would flow from the principle of exclusion. They apply most forcibly to the scheme of a perpetual exclusion; but when we consider that even a partial exclusion would always render the readmission of the person a remote and precarious object, the observations which have been made will apply nearly as fully to one case as to the other.

What are the advantages promised to counterbalance these disadvantages? They are represented to be: 1st, greater independence in the magistrate; 2d, greater security to the people. Unless the exclusion be perpetual, there will be no pretense to infer the first advantage. But even in that case, may he have no object beyond his

## Federalist No. 72, cont'd.

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present station, to which he may sacrifice his independence? May he have no connections, no friends, for whom he may sacrifice it? May he not be less willing by a firm conduct, to make personal enemies, when he acts under the impression that a time is fast approaching, on the arrival of which he not only MAY, but MUST, be exposed to their resentments, upon an equal, perhaps upon an inferior, footing? It is not an easy point to determine whether his independence would be most promoted or impaired by such an arrangement.

As to the second supposed advantage, there is still greater reason to entertain doubts concerning it. If the exclusion were to be perpetual, a man of irregular ambition, of whom alone there could be reason in any case to entertain apprehension, would, with infinite reluctance, yield to the necessity of taking his leave forever of a post in which his passion for power and pre-eminence had acquired the force of habit. And if he had been fortunate or adroit enough to conciliate the good-will of the people, he might induce them to consider as a very odious and unjustifiable restraint upon themselves, a provision which was calculated to debar them of the right of giving a fresh proof of their attachment to a favorite. There may be conceived circumstances in which this disgust of the people, seconding the thwarted ambition of such a favorite, might occasion greater danger to liberty, than could ever reasonably be dreaded from the possibility of a perpetuation in office, by the voluntary suffrages of the community, exercising a constitutional privilege.

There is an excess of refinement in the idea of disabling the people to continue in office men who had entitled themselves, in their opinion, to approbation and confidence; the advantages of which are at best speculative and equivocal, and are overbalanced by disadvantages far more certain and decisive.

PUBLIUS.



## Myers v. U.S.

*In an 1876 act in which Congress specified terms and appointment conditions for postmasters, Congress set a four-year term of office for postmasters and declared that first-, second-, and third-class postmasters were to be appointed and removed by the President with Senatorial consent. When the Postmaster General removed Myers from a first-class postmastership in Portland, Oregon in 1917 with order of the President but without the approval of the Senate, Myers eventually sued to recover his lost salary.*

### **U.S. Supreme Court: MYERS v. UNITED STATES, 272 U.S. 52 (1926) 272 U.S. 52**

No. 2; Reargued April 13, 14, 1925; Decided Oct. 25, 1926.

[272 U.S. 52, 60] Messrs. Will R. King, of Portland, Or., and L. H. Cake, of Washington, D. C. (Martin L. Pipes, of Portland, Or., of counsel), for appellant.

Mr. George Wharton Pepper, of Philadelphia, Pa., amicus curiae.

Mr. James M. Beck, Sol. Gen., of New York City, and Rebert P. Reeder, Sp. Asst. Atty. Gen., for the United States.

[272 U.S. 52, 106]

#### **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, Or., 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. [272 U.S. 52, 107] 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, 39 S. Ct. 293; *Nicholas v. United States*, 257 U.S. 71, 42 S. Ct. 7, and *Norris v. United States*, 257 U.S. 77, 42 S. Ct. 9. 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 sixth section of the Act of Congress of July 12, 1876, 19 Stat. 80, 81, c. 179 (Comp. St. 7190), 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 [272 U.S. 52, 108] Senate is valid, the appellant, Myers' administratrix, is entitled to recover his unpaid salary for his full

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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 2 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 the given by that court. We are therefore confronted by the constitutional question and cannot avoid it.

The relevant parts of article 2 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 Officers, and he shall have Power to grant Reprieves and Pardons for Offenses 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 [272 U.S. 52, 109] 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 3 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 2, above quoted, provides for removal from office by impeachment. The subject [272 U.S. 52, 110] 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

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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 [272 U.S. 52, 117] humiliating weakness of the Congress during the Revolution and under the Articles of Confederation. 1 Farrand, 66-97.

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Mr. Madison and his associates in the discussion in the House dwelt at length upon the necessity there was for construing article 2 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 Pet. 498, 513; *United States v. Eliason*, 16 Pet. 291, 302; *Williams v. United States*, 1 How. 290, 297; *Cunningham v. Neagle*, 135 U.S. 1, 63, 10 S. Ct. 658; *Russell Co. v. United States*, 261 U.S. 514, 523, 43 S. Ct. 428. 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 cannot 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 [272 U.S. 52, 118] were not the exercise of legislative or judicial power in government as usually understood.

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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 2. 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 [272 U.S. 52, 127] the Constitution, and the legislative power of Congress in respect to both is excluded save by the specific exception as to inferior officers in the clause that follows. This is '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, 6 S. Ct. 449, 450 (29 L. Ed. 700). 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 2 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 appointment, [272 U.S. 52, 128] are a much more natural and appropriate source of the removing power.

It is reasonable to suppose also that had it been intended to give to Congress power to regulate or control removals in the manner suggested, it would have been included among the specifically enumerated legislative powers in article 1, or in the specified limitations on the executive power in article 2. The difference between the grant of legislative power under article 1 to Congress which is limited to powers therein enumerated, and the more general grant of the executive power to the President under article 2 is significant. The fact that the executive power is given in general terms strengthened by specific terms where emphasis is appropriate, and limited by direct expressions where limitation is needed, and that no express limit is placed on the power of removal by the executive is a convincing indication that none was intended.

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It is argued that the denial of the legislative power to regulate removals in some way involves the denial of power to prescribe qualifications for office, or reasonable classification for promotion, and yet that has been often exercised. We see no conflict between the latter power and that of appointment and removal, provided of course that the qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation. As Mr. Madison said in the First Congress:

'The powers relative to offices are partly legislative and partly executive. The Legislature creates the office, defines the powers, limits its duration, and annexes a compensation. This done, the legislative power ceases. They ought to have nothing to do with designating the man to fill the office. That I conceive to be of an executive nature. Although it be qualified in the Constitution, I would not extend or strain that qualification beyond the limits precisely fixed for it. We ought always to consider [272 U.S. 52, 129] the Constitution with an eye to the principles upon which it was founded. In this point of view, we shall readily conclude that if the Legislature determines the powers, the honors, and emoluments of an office, we should be insecure if they were to designate the officer also. The nature of things restrains and confines the legislative and executive authorities in this respect; and hence it is that the Constitution stipulates for the independence of each branch of the government.' 1 Annals of Congress, 581, 582.

The legislative power here referred to by Mr. Madison is the legislative power of Congress under the Constitution, not legislative power independently of it. Article 2 expressly and by implication withholds from Congress power to determine who shall appoint and who shall remove except as to inferior offices. To Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed and their compensation—all except as otherwise provided by the Constitution.

An argument in favor of full congressional power to make or withhold provision for removals of all appointed by the President is sought to be found in an asserted analogy between such a power in Congress and its power in the establishment of inferior federal courts. By article 3 the judicial power of the United States is vested in one Supreme Court and in such inferior courts as the Congress may from time to time establish. By section 8 of article 1 also Congress is given power to constitute tribunals inferior to the Supreme Court. By the second section of article 3 the judicial power is extended to all cases in law and equity under this Constitution and to a substantial number of other classes of cases. Under the accepted [272 U.S. 52, 130] construction the cases mentioned in this section are treated as a description and reservoir of the judicial power of the United States and a boundary of that federal power as between the United States and the states, and the field of jurisdiction within the limits of which Congress may vest particular jurisdiction in any one inferior federal court which it may constitute. It is clear that the mere establishment of a federal inferior court does not vest that court with all the judicial power of the United States as conferred in the second section of article 3, but only that conferred by Congress specifically on the particular court. It must be limited territorially and in the classes of cases to be heard, and the mere creation of the courts does not confer jurisdiction except as it is conferred in the law of its creation or its amendments. It is said that similarly in the case of the executive power, which is 'vested in the President,' the power of appointment and removal cannot arise until Congress creates the office and its duties and powers, and must accordingly be exercised and limited only as Congress shall in the creation of the office prescribe.

We think there is little or no analogy between the two legislative functions of Congress in the cases suggested. The judicial power described in the second section of article 3 is vested in the courts collectively, but is manifestly to be distributed to different courts and conferred or withheld as Congress shall in its discretion provide their respective jurisdictions, and is not all to be vested in one particular court. Any other construction would be impracticable. The duty of Congress, therefore, to make provision for the vesting of the whole federal judicial power in federal courts, were it held to exist, would be one of imperfect obligation and unenforceable. On the other hand, the moment an office and its powers and duties are created, the power of appointment and removal, as limited by the Constitution, vests in the executive [272 U.S. 52, 131]. The functions of distributing jurisdiction to courts and the exercise of it when distributed and vested are not at all parallel to the creation of an office, and the mere right of appointment to, and of removal from, the office which at once attaches to the executive by virtue of the Constitution.

Fourth. Mr. Madison and his associates pointed out with great force the unreasonable character of the view that the convention intended, without express provision, to give to Congress or the Senate, in case of political or other differences, the means of thwarting the executive in the exercise of his great powers and in the bearing of his great responsibility by fastening upon him, as subordinate executive officers, men who by their inefficient service

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under him, by their lack of loyalty to the service, or by their different views of policy might make his taking care that the laws be faithfully executed most difficult or impossible.

As Mr. Madison said in the debate in the First Congress:

'Vest this power in the Senate jointly with the President, and you abolish at once that great principle of unity and responsibility in the executive department, which was intended for the security of liberty and the public good. If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest will depend, as they ought, on the President, and the President on the community.' 1 Annals of Congress, 499.

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Made responsible under the Constitution for the effective enforcement of the law, the President needs as an indispensable aid to meet it the disciplinary influence upon those who act under him of a reserve power of removal. But it is contended that executive officers appointed by the President with the consent of the Senate are bound by the statutory law, and are not his servants to do his will, and that his obligation to care for the faithful execution of the laws does not authorize him to treat them as such. The degree of guidance in the discharge of their duties that the President may exercise over executive officers varies with the character of their service as prescribed in the law under which they act. The highest and most important duties which his subordinates perform are those in which they act for him. In such cases they are exercising not their own but his discretion. This field is a very large one. It is sometimes described as political. *Kendall v. United States*, 12 [272 U.S. 52, 133] Pet 524, at page 610. Each head of a department is and must be the President's alter ego in the matters of that department where the President is required by law to exercise authority.

The extent of the political responsibility thrust upon the President is brought out by Mr. Justice Miller, speaking for the court in *Cunningham v. Neagle*, 135 U.S. 1, at page 63, 10 S. Ct. 658, 668 (34 L. Ed. 55):

'The Constitution, section 3, article 2, declares that the President 'shall take care that the laws be faithfully executed,' and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and by and with the advice and consent of the Senate to appoint the most important of them and to fill vacancies. He is declared to be commander-in-chief of the Army and Navy of the United States. The duties with are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by Acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called Cabinet ministers. These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that 'he shall take care that the laws be faithfully executed.'

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The duties of the heads of departments and bureaus in which the discretion of the President is exercised and which we have described are the most important in the whole field of executive action of the government. 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. [272 U.S. 52, 135] But this is not to say that there are not strong reasons why the President should have a like power to remove his appointees charged with other duties than those above described. The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which article 2 of the Constitution evidently contemplated in vesting general executive power in the President alone. Laws are often passed with specific provision for adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control. Finding such officers to be negligent and inefficient, the President should have the power to remove them. Of course there may be duties

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so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. 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. [272 U.S. 52, 136] We have devoted much space to this discussion and decision of the question of the presidential power of removal in the First Congress, not because a congressional conclusion on a constitutional issue is conclusive, but first because of our agreement with the reasons upon which it was avowedly based, second because this was the decision of the First Congress on a question of primary importance in the organization of the government made within two years after the Constitutional Convention and within a much shorter time after its ratification, and third because that Congress numbered among its leaders those who had been members of the convention. It must necessarily constitute a precedent upon which many future laws supplying the machinery of the new government would be based and, if erroneous, would be likely to evoke dissent and departure in future Congresses. It would come at once before the executive branch of the government for compliance and might well be brought before the judicial branch for a test of its validity. As we shall see, it was soon accepted as a final decision of the question by all branches of the government.

It was, of course, to be expected that the decision would be received by lawyers and jurists with something of the same division of opinion as that manifested in Congress, and doubts were often expressed as to its correctness. But the acquiescence which was promptly accorded it after a few years was universally recognized.

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The power to remove inferior executive officers, like that to remove superior executive officers, in an incident of the power to appoint them, and is in its nature an executive power. The authority of Congress given by the excepting clause to vest the appointment of such inferior officers in the heads of departments carries with it authority incidentally to invest the heads of departments with power to remove. It has been the practice of Congress to do so and this court has recognized that power. The court also has recognized in the Perkins Case that Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal. But the court never has held, nor reasonably could hold, although it is argued to the contrary on behalf of the appellant, 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.

Assuming, then, 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 which we have been considering.

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 [272 U.S. 52, 162] make his power of removal in such case any more subject to Congressional legislation than before is a question this court did not decide in the Perkins Case. Under the reasoning upon which the legislative decision of 1789 was put, it might be difficult to avoid a negative answer, but it is not before us and we do not decide it.

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Summing up, then, the facts as to acquiescence by all branches of the government in the legislative decision of 1789 as to executive officers, whether superior or inferior, we find that from 1789 until 1863, a period of 74 years, there was no act of Congress, no executive act, and no decision of this court at variance with the declaration of the First Congress; but there was, as we have seen, clear affirmative recognition of it by each branch of the government.

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Our conclusion on the merits, sustained by the arguments before stated, is that article 2 grants to the President [272 U.S. 52, 164] 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 2 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 2, 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 difference with the Senate or Congress, to take care that the laws be faithfully executed.

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An argument *ab inconvenienti* has been made against our conclusion in favor of the executive power of removal by the President, without the consent of the Senate, that it will open the door to a reintroduction of the spoils system. The evil of the spoils system aimed at in the Civil Service Law and its amendments is in respect to inferior offices. It has never been attempted to extend that law beyond them. Indeed Congress forbids its extension to appointments confirmed by the Senate, except with the consent of the Senate. Act of January 16, 1883, 22 Stat. 403, 406, c. 27, sec. 7 (Comp. St. 3278). Reform in the federal civil service was begun by the Civil Service Act of 1883. It has been developed from that time, so that the classified service now includes a vast majority of all the civil officers. It may still be enlarged by further legislation. The independent power of removal by the President alone under present conditions works no practical interference with the merit system. Political appointments of inferior officers are still maintained in one important class, that of the first, second, and third class postmasters, collectors of internal revenue, marshals, collectors of customs, and other officers of that [272 U.S. 52, 174] kind distributed through the country. They are appointed by the President with the consent of the Senate. It is the intervention of the Senate in their appointment, and not in their removal, which prevents their classification into the merit system. If such appointments were vested in the heads of departments to which they belong, they could be entirely removed from politics, and that is what a number of Presidents have recommended. President Hayes, whose devotion to the promotion of the merit system and the abolition of the spoils system was unquestioned, said in his Fourth annual message of December 6, 1880, that the first step to improvement in the civil service must be a complete divorce between Congress and the executive on the matter of appointments and he recommended the repeal of the Tenure of Office Act of 1867 for this purpose. Messages and Papers of the Presidents, 4555-4557. The extension of the merit system rests with Congress.

What, then, are the elements that enter into our decision of this case? We have, first, a construction of the Constitution made by a Congress which was to provide by legislation for the organization of the government in accord with the Constitution which had just then been adopted, and in which there were, as Representatives and Senators, a considerable number of those who had been members of the convention that framed the Constitution and presented it for ratification. It was the Congress that launched the government. It was the Congress that rounded out the Constitution itself by the proposing of the first 10 amendments, which had in effect been promised to the people as a consideration for the ratification. It was the Congress in which Mr. Madison, one of the first in the framing of the Constitution, led also in the organization of the government under it. It was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest [272 U.S. 52, 175] weight in the interpretation of that fundamental instrument. This construction was followed by the legislative department and the executive department continuously for 73 years, and this, although the matter in the heat of political differences between the executive and the Senate in President Jackson's time, was the subject of bitter controversy, as we have seen. This court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution, when the founders of our government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions.

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We are now asked to set aside this construction thus buttressed and adopt an adverse view, because the Congress of the United States did so during a heated political difference of opinion between the then President and the majority leaders of Congress over the reconstruction measures adopted as a means of restoring to their proper status the states which attempted to withdraw from the Union at the time of the Civil War. The extremes to which the majority in both Houses carried legislative measures in that matter are now recognized by all who calmly review the history of that episode in our government leading to articles of impeachment against President Johnson and his acquittal. Without animadverting [272 U.S. 52, 176] on the character of the measures taken, we are certainly justified in saying that they should not be given the weight affecting proper constitutional construction to be accorded to that reached by the First Congress of the United States during a political calm and acquiesced in by the whole government for three-quarters of a century, especially when the new construction contended for has never been acquiesced in by either the executive or the judicial departments. While this court has studiously avoided deciding the issue until it was presented in such a way that it could not be avoided, in the references it has made to the history of the question, and in the presumptions it has indulged in favor of a statutory construction not inconsistent with the legislative decision of 1789, it has indicated a trend of view that we should not and cannot ignore. When on the merits we find our conclusion strongly favoring the view which prevailed in the First Congress, we have no hesitation in holding that conclusion to be correct; and it therefore follows that the Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so.

For the reasons given, we must therefore hold that the provision of the law of 1876 by which the unrestricted power of removal of first-class postmasters is denied to the President is in violation of the Constitution and invalid. This leads to an affirmance of the judgment of the Court of Claims.

Judgment affirmed. [272 U.S. 52, 178]

### Mr. Justice BRANDEIS, dissenting.

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Throughout the period, it has governed a large majority of all civil officers to which appointments are made by and with the advice and consent of the Senate. May the President, having acted under the statute in so far as it creates the office and authorizes the appointment, ignore, while the Senate is in session, the provision which prescribes the condition under which a removal may take place?

It is this narrow question, and this only, which we are required to decide. We need not consider what power the President, being Commander-in-Chief, has over officers in the Army and the Navy. We need not determine whether the President, acting alone, may remove high political officers. We need not even determine whether, acting alone, he may remove inferior civil officers when the Senate is not in session. It was in session when the President purported to remove Myers, and for a long time thereafter. All questions of statutory construction have been eliminated by the language of the act. It is settled that, in the absence of a provision expressly providing for the consent of the Senate to a removal, the clause fixing the tenure will be construed as a limitation, not as a grant, and that, under such legislation, the President, acting alone, has the power of removal. *Parsons v. United States*, 167 U.S. 324, 17 S. Ct. 880; *Burnap v. United States*, 252 U.S. 512, 515, 40 S. Ct. 374. But, in defining the tenure, this statute used words of grant. Congress clearly intended to preclude a removal without the consent of the Senate.

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It is not claimed by the appellant that the Senate has the constitutional right to share in the responsibility for the removal, merely because it shared, under the act of Congress, in the responsibility for the appointment. Thus the question involved in the action taken by Congress after the great debate of 1789 is not before us. The sole question is whether, in respect to inferior offices, Congress may impose upon the Senate both responsibilities, as it may deny to it participation in the exercise of either function.

In *Marbury v. Madison*, 1 Cranch, 137, 167, it was assumed, as the basis of decision, that the President, acting alone, is powerless to remove an inferior civil officer appointed for a fixed term with the consent of the Senate; and that case was long regarded as so deciding. In no [272 U.S. 52, 243] case, has this court determined that the President's power of removal is beyond control, limitation, or regulation by Congress. nor has any lower federal court ever so decided. This is true of the power as it affects officers in the Army or the Navy and the high political officers like



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heads of departments, as well as of the power in respect to inferior statutory offices in the executive branch. Continuously, for the last 58 years, laws comprehensive in character, enacted from time to time with the approval of the President, have made removal from the [272 U.S. 52, 244] great majority of the inferior presidential offices dependent upon the consent of the Senate. Throughout that period these laws have been continuously applied. We are requested to disregard the authority of *Marbury v. Madison* and to overturn this long-established constitutional practice.

The contention that Congress is powerless to make consent of the Senate a condition of removal by the President from an executive office rests mainly upon the clause in section 1 of article 2 which declares that 'the executive Power shall be vested in a President.' The argument is that appointment and removal of officials are executive prerogatives; that the grant to the President of 'the executive power' confers upon him, as inherent in the office, the power to exercise these two functions without restriction by Congress, except in so far as the power to restrict his exercise of then is expressly conferred [272 U.S. 52, 245] upon Congress by the Constitution; that in respect to appointment certain restrictions of the executive power are so provided for; but that in respect to removal there is no express grant to Congress of any power to limit the President's prerogative. The simple answer to the argument is this: The ability to remove a subordinate executive officer, being an essential of effective government, will, in the absence of express constitutional provision to the contrary, be deemed to have been vested in some person or body. Compare *Ex parte Hennen*, 13 Pet. 230, 259. But it is not a power inherent in a chief executive. The President's power of removal from statutory civil inferior offices, like the power of appointment to them, comes immediately from Congress. It is true that the exercise of the power of removal is said to be an executive act, and that when the Senate grants or withholds consent to a removal by the President, it participates in an executive act. But the Constitution has confessedly granted to Congress the legislative power to create offices, and to prescribe the tenure thereof; and it has not in terms denied to Congress the power to control removals. To prescribe the tenure involves prescribing the conditions under which incumbency shall cease. For the possibility of removal is a condition or qualification of the tenure. When Congress provides that the incumbent [272 U.S. 52, 246] shall hold the office for four years unless sooner removed with the consent of the Senate, it prescribes the term of the tenure.

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To imply a grant to the President of the uncontrollable power of removal from statutory inferior executive offices involves an unnecessary and indefensible limitation upon the constitutional power of Congress to fix the tenure of the inferior statutory offices. That such a limitation cannot be justified on the ground of necessity is demonstrated by the practice of our governments, state and national. In none of the original 13 states did the chief executive [272 U.S. 52, 248] possess such power at the time of the adoption of the federal Constitution. In none of the 48 states has such power been conferred at any time since by a state Constitution,<sup>9</sup> with a single possible exception. In a few states the Legislature has granted to the Governor, or other [272 U.S. 52, 249] appointing power, the absolute power of removal. The legislative practice of most states reveals a decided tendency to limit, rather than to extend, the Governor's power of removal. The practice of the federal government will be set forth in detail. [272 U.S. 52, 250] Over removal from inferior civil offices, Congress has, from the foundation of our government, exercised continuously some measure of control by legislation. The instances of such laws are many. Some of the statutes were directory in character. Usually, they were mandatory. Some of them, comprehensive in scope, have endured for generations. During the first 40 years of our government, there was no occasion to curb removals. Then, the power of Congress was exerted to insure removals. Thus, the Act of September 2, 1789, c. 12, 1 Stat. 65, 67, establishing the Treasury Department, provided by section 8 (Comp. St. 377), that if any person appointed to any office by that act should be convicted of offending against any of its provisions, he shall 'upon conviction be removed from office.' The Act of March 3, 1791, c. 18, 1, 1 Stat. 215 (Comp. St. 378), extended the provision to every clerk employed in the department [272 U.S. 52, 251]. The Act of May 8, 1792, c. 37, 12, 1 Stat. 279, 281, extended it further to the Commissioner of the Revenue and the Commissioners of Loans, presidential appointments. The first Tenure of Office Act, May 15, 1820, c. 102, 3 Stat. 582, introduced the 4-year term, which was designed to insure removal under certain conditions. The Act of January 31, 1823, c. 9, 3, 3 Stat. 723, directed that officers receiving public money and failing to account quarterly shall be dismissed by the President unless they shall account for such default to his satisfaction. The Act of July 2, 1836, c. 270, 26, 37, 5 Stat. 80, 86, 88, which first vested the appointment of postmasters in the President by and with the advice and consent of the Senate, directed that postmasters and others offending against certain prohibitions 'be forthwith dismissed from office,' and as to other offenses provided [272 U.S. 52, 252] for such dismissal upon conviction by any court. The Act of

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July 17, 1854, c. 84, 6, 10 Stat. 305, 306 (Comp. St. 4482), which authorized the President to appoint registers and receivers, provided that 'on satisfactory proof that either of said officers, or any other officer, has charged or received fees or other rewards not authorized by law, he shall be forthwith removed from office.'

\* \* \* \*

The assertion that the mere grant by the Constitution of executive power confers upon the President as a prerogative the unrestricted power of appointment and of removal from executive offices, except so far as otherwise expressly provided by the Constitution, is clearly inconsistent also with those statutes which restrict the exercise by the President of the power of nomination. There is not a word in the Constitution which in terms authorizes [272 U.S. 52, 265] Congress to limit the President's freedom of choice in making nominations for executive offices. It is to appointment as distinguished from nomination that the Constitution imposes in terms the requirement of Senatorial consent. But a multitude of laws have been enacted which limit the President's power to make nominations, and which through the restrictions imposed, may prevent the selection of the person deemed by him best fitted. Such restriction upon the power to nominate has been exercised by Congress continuously since the foundation of the government. Every President has approved one or more of such acts. Every President has consistently observed them. This is true of those offices to which he makes appointments without the advice and consent of the Senate as well as of those for which its consent is required.

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Checks and balances were established in order that this should be 'a government of laws and not of men.' As White said in the House in 1789, an uncontrollable power of removal in the Chief Executive 'is a doctrine not to be learned in American governments.' Such power had been denied in colonial charters, and even under proprietary [272 U.S. 52, 293] grants and royal commissions. It had been denied in the thirteen states before the framing of the federal Constitution. The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy. In order to prevent arbitrary executive action, the Constitution provided in terms that presidential appointments be made with the consent of the Senate, unless Congress should otherwise provide; and this clause was construed by Alexander Hamilton in *The Federalist*, No. 77, as requiring like consent to removals. Limiting further executive [272 U.S. 52, 294] prerogatives customary in monarchies, the Constitution empowered Congress to vest the appointment of inferior officers, 'as we think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.' Nothing in support of the claim of uncontrollable power can be inferred from the silence of the convention of 1787 on the subject of removal. For the outstanding fact remains that every specific proposal to confer such uncontrollable power upon the President was rejected. In America, as in England, the conviction prevailed then that the people must look to representative [272 U.S. 52, 295] assemblies for the protection of their liberties. And protection of the individual, even if he be an official, from the arbitrary or capricious exercise of power was then believed to be an essential of free government.

### **Mr. Justice HOLMES, dissenting.**

My Brothers McREYNOLDS and BRANDEIS have discussed the question before us with exhaustive research and I say a few words merely to emphasize my agreement with their conclusion.

The arguments drawn from the executive power of the President, and from his duty to appoint officers of the United States (when Congress does not vest the appointment elsewhere), to take care that the laws be faithfully executed, and to commission all officers of the United States, seem to me spiders' webs inadequate to control the dominant facts.

We have to deal with an office that owes its existence to Congress and that Congress may abolish to-morrow. Its duration and the pay attached to it while it lasts depend on Congress alone. Congress alone confers on the President the power to appoint to it and at any time may transfer the power to other hands. With such power over its own creation, I have no more trouble in believing that Congress has power to prescribe a term of life for it free from any interference than I have in accepting the undoubted power of Congress to decree its end. I have equally little trouble in accepting its power to prolong the tenure of an incumbent until Congress or the Senate shall have assented to his removal. The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.

# Humphrey's Executor v. U.S.

*In Humphrey's Executor v. United States, 295 U.S. 602 (1935) the Supreme Court limited the reach of Myers v. U.S. The Supreme Court distinguished between the type of governmental office, suggesting that the president had full control over the officers within purely executive offices but not in positions that "cannot in any proper sense be characterized as an arm or an eye of the executive." The Court upheld the Federal Trade Commission Act claiming that in light of the function of the agency Congress could control the president's removal power.*

## HUMPHREY'S EXECUTOR v. UNITED STATES, 295 U.S. 602 (1935)

### SUTHERLAND, J., Opinion of the Court

**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 consult [p\*619] his friends. After some further correspondence upon the subject, the President, on August 31, 1933, wrote the commissioner expressing the hope that the resignation would be forthcoming, and saying:

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 [p\*620] 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

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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 [p\*621] appeals for its enforcement. The party subject to the order may seek and obtain a review in the circuit court of appeals in a manner provided by the act.

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 consent [p\*622] 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.

## Humphrey's Executor v. U.S., cont'd.

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"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 [p\*623] intended this result while omitting to use language which would put that intention beyond doubt.

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 [p\*624] 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 nonpartisan, 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. [p\*625]

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."

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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 [p\*626] 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*. Insofar as they are out of harmony with the views here set forth, these expressions are disapproved. A like situation was [p\*627] 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 [p\*628] 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

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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. [\*] [p\*629]

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 [p\*630] the very fact of the separation of the powers of these departments by the Constitution, and in the rule which recognizes their essential coequality. 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 reexamined 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 [p\*631] 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

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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 [p\*632] 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.*

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

\* 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 antitrust 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.



