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# Presidential Power of Removal

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## COMMENTS

### PRESIDENTIAL POWER OF REMOVAL

In the case of *Meyers v. United States*,<sup>1</sup> the United States Supreme Court settled in part a question which has remained unsettled since the establishment of our federal government, the question of the extent of the Presidential power of removal. When this decision was first rendered it was hailed as one of far-reaching importance, settling all questions as to Presidential power of removal and perhaps laying the foundation for executive tyranny, but more sober second thought has shown that it is not of so much importance, has left unsettled more questions than it settled and probably will not be the cause of executive tyranny.

The only question really settled by this decision was that the President can remove without the consent of the Senate an executive officer appointed by him with the advice and consent of the Senate, in spite of an act of Congress to the contrary.<sup>2</sup> The decision was probably the one expected by the legal profession, but now that the legal profession has it, the profession is probably in more doubt as to its correctness than before it was rendered. The decision was a six to three decision. Chief Justice Taft gave the opinion for the court. Justices McReynolds, Brandeis and Holmes dissented. The argument of the court apparently was: (1) that the power of removal is primarily an executive power and therefore by implication was granted to the President when he was vested with executive power;<sup>3</sup> and (2) that the power of removal is an incident of the power of appointment and therefore again by implication was granted to the President when he was expressly granted the power of appointment;<sup>4</sup> (3) that the power of Congress to vest the appointment of inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments"<sup>5</sup> is an exception to the general grant of power to the President; and (4) that the right of removal is essential to a proper exercise of the executive function of executing the laws.<sup>6</sup>

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<sup>1</sup> (1926), 47 Sup. Ct. 21.

<sup>2</sup> 19 Stat. 76, 80. (An act relating to postmasters of the first, second and third classes.)

<sup>3</sup> Art. II, Sec. 1 (1).

<sup>4</sup> Art. II, Sec. 2 (2).

<sup>5</sup> Art. II, Sec. 2 (2).

<sup>6</sup> Art. II, Sec. 3.

The Constitution says nothing about the Presidential power of removal. The whole doctrine is a work of implication upon the part of the Supreme Court. The court could have held that the President has no power of removal, or that he has such power but subject to Congressional control, or that he has an uncontrollable power. It decided to hold that he has an uncontrollable power at least where appointment has been with the advice and consent of the Senate. Was the court right in taking this position?

How stood authority? The weight of authority seems to have been against the position of the court. The court laid great stress upon legislative precedent, but the only precedent it could find was that of the Congressional debate of 1789<sup>7</sup> and Chief Justice Taft devoted one-half of his opinion to this debate, but as Justice Brandeis pointed out this debate was participated in only by a few and the vote was a vote by those who wanted to confer power upon the President rather than to acknowledge his power.<sup>8</sup> Later Congressional precedents were all against the position that the President's power is uncontrollable.<sup>9</sup> Justice Brandeis also showed how executive precedents were in accord with legislative precedents.<sup>10</sup> The first judicial precedent was the case of *Marbury v. Madison*.<sup>11</sup> In this case Chief Justice Marshall took the position that "as the law creating the office gave the officer the right to hold for five years, independent of the executive, the appointment was not revocable." Chief Justice Taft called this an obiter dictum, but it would seem that Justice Brandeis was right when he said that it was "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," for without this premise there would have been no excuse for the discussion of judicial review of legislation. *Ex parte Hennen*<sup>12</sup> upon which the court relied, was an ambiguous decision, but the better view of it seems to be that the court as then constituted thought the President had the exclusive power of removal un-

<sup>7</sup> 1 Stat. 23, c. 4.

<sup>8</sup> See opinion of Mr. Justice Brandeis. However, up to 1830, the action of Congress in 1789 was generally regarded as a legislative declaration in favor of the Presidential power of removal.

<sup>9</sup> *Ibid.* 12 Stat. 666; 14 Stat. 430; 17 Stat. 284, 19 Stat. 80.

<sup>10</sup> *Ibid.* While Presidents Grant, Cleveland, Wilson and Coolidge have all asserted their uncontrollable power of removal, every President since 1861, with the exception of President Garfield, has approved one or more statutes restricting the exercise of his power.

<sup>11</sup> (1801), 1 Cranch 137, 162.

<sup>12</sup> (1839), 13 Pet. 230, 259; 1 Kent. Commentaries (12th ed.) 309.

less limited by the Constitution or statute. *United States v. Perkins*<sup>13</sup> held that Congress might limit and restrict the power of removal as it deemed best when it vested the appointment of inferior officers in the heads of departments. *Parsons v. United States*,<sup>14</sup> relied upon by the majority, seemed to go no farther than to say that if Congress did not provide for the consent of the Senate to removal a mere clause fixing the tenure of office would not deprive the President of the exclusive power of removal. The same thing can be said of *Shurtleff v. United States*.<sup>15</sup> Hence from the standpoint of authority—legislative, executive and judicial—the decision in *Meyers v. United States* is without explicit support.

How stands the court's logic? Its argument that the power of removal is an executive power seems adequately met by Justice Holmes' remark that it is a "spider's web." It is no more executive than it is legislative. The power of removal, like that of appointment, comes from Congress. Justice McReynolds seems right when he said that the power of removal is executive, but prescribing the conditions of removal is legislative. If the mere vesting of executive power in the President gave him all inherent executive powers, why did the Constitution later enumerate the executive functions of the President? The majority apparently overdid the doctrine of separation of powers, which was largely emasculated by the system of checks and balances set up in the Constitution. If the power of removal is an incident of the power of appointment, why by inference should not the Senate participate in the removal when it participates in the appointment? Is this point met by the statement that "the power of removal is an incident of the power of removal, not to the power of advising and consenting?" Again, does the duty to enforce all the laws, give the President a right to violate one? The logic seems lame, and the arguments inadequate.

How stands the court's sociology? Perhaps the result is not a bad result. The decision may work well in practice. It would seem that it should promote executive efficiency, and that any danger of executive tyranny can be safeguarded by the power of impeachment, by the power of Congress to vest the appointment of inferior officers in the heads of departments, and by the power of the electorate at the polls. It may be that Congress should be confronted with the alternative of giving

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<sup>13</sup> (1886), 116 U. S. 483.

<sup>14</sup> (1897), 167 U. S. 324.

<sup>15</sup> (1903), 189 U. S. 311.

up either the power of consenting to the Presidential removal or the power of the Senate to advise and consent to Presidential appointment.

There are many questions unsettled by the decision of *Meyers v. United States*.<sup>16</sup> The Supreme Court has not told us whether the power to remove is based upon constitutional authority, or attributable to the power to appoint. If the former, would the President not still have the power of removal though the appointment of inferior officers was taken from him pursuant to the Constitution? If the power of removal is an executive power, is it to be confined to the removal of executives, or to be allowed to include quasi-legislative officers like the members of the Federal Trade Commission and of the Interstate Commerce Commission? Are territorial officers executive or legislative officers? Who are inferior officers? Are they all those officers not named in the Constitution? Suppose Congress should vest the appointment of inferior officers "in the President alone," would the President have an uncontrollable or a controllable power of removal? For an answer to these questions we shall have to wait for future decisions.

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<sup>16</sup> *Supra*.