UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 37 | Number 2 Article 12

2-1-1959

Constitutional Law -- President's Power to Remove Non-Executive Officeholder

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The War Claims Commission was established[1] to adjudicate claims for compensating internees, prisoners of war, and religious organizations who suffered personal injury or property damage at the hands of hostile governments during World War II. The creating statute[2] contained no provision for removal of members of the Commission by the President. Myron Wiener was appointed to the Commission by President Truman and removed by President Eisenhower who wanted it staffed with personnel of his own selection. Wiener brought an action in the Court of Claims to recover the salary he would have received from the date of his removal until the dissolution of the Commission alleging that the President had no authority to remove him. The Court of Claims dismissed the action stating that absent *express congressional limitation* the President has power to remove an official who exercises quasi-judicial or quasi-legislative functions.[3] The Supreme Court reversed[4] on the ground that no removal power exists unless it could fairly be said that *Congress had conferred* such power on the President.

The controversy surrounding the scope of the President's power of removal has a history dating back to the first Congress.[5] The Supreme Court was first called on to decide whether or not Congress could *limit* this power in the case of *Myers v. United States*.[6] Myers had been appointed a first class postmaster for a term of four years pursuant to an act of Congress which provided for his removal "by and with the advice and consent of the Senate."[7] Even though the President had not consulted the Senate, the Supreme Court sanctioned his action in removing Myers on the ground that the removal was an executive act which Congress could not appropriate by requiring its advice and consent. The Court went on to state by way of dictum that the President's illimitable power of removal extended to administrative officers performing quasi-judicial as well as executive functions.[8]

In 1935, in the case of *Humphrey's Executor v. United States*,[9] the Supreme Court once again was called on to decide if Congress could *limit* the President's power to remove officers appointed with the advice

[1] War Claims Act, 1948, 62 STAT. 1240, 50 U.S.C.A. §§ 2001-16 (Supp. 1958).
[2] *Ibid.*
[3] Wiener v. United States, 135 Ct. Cl. 827, 142 F. Supp. 910 (1956).
[4] Wiener v. United States, 357 U.S. 349 (1958).
[5] *Id.* at 351. See Myers v. United States, 272 U.S. 52 (1926), for a review of this history.
[6] 272 U.S. 52 (1926).
[7] 19 STAT. 80 (1876), 39 U.S.C. § 31 (1952).
[8] Myers v. United States, 272 U.S. 52, 135 (1926).
[9] 295 U.S. 602 (1935).

and consent of the Senate. Humphrey had been appointed to the Federal Trade Commission pursuant to a statute which provided in part that "any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."[10] President Roosevelt removed him 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."[11] After Humphrey's death his executor brought an action in the Court of Claims to recover his salary as a Federal Trade Commissioner from the time of his removal until his death. The Court of Claims certified two questions[12] to the Supreme Court: 1) whether the Federal Trade Commission Act in providing for removal of commissioners for specified causes limited the President's removal power to the causes enumerated, and, 2) if so, whether such limitation was constitutional. The Court answered both questions affirmatively.

In resolving the first interrogatory the Court could point to no provision in the statute expressly stating that Congress intended to so limit the President's removal power. As a result the Court, apparently conceding that such power exists,[13] was obliged to infer what Congress intended in this matter. In doing so the Court found that "the fixing of a *definite term* subject to *removal for cause,* unless there be some counter vailing provision or circumstance indicating the contrary . . . is enough to establish the legislative intent that the term is not to be curtailed in the absence of such cause."[14] While this finding would have sufficed to dispose of the first question, the Court also concluded that this intent was "made clear by a consideration of the character of the commission and the legislative history which accompanied and preceded the passage of the act."[15]

In answering the second question the Court rejected the dictum in the *Myers* case[16] and distinguished that case on the ground that the office of postmaster is merely a unit of the executive branch and hence inherently subject to the President's power of removal, whereas a

[10] 38 STAT. 717 (1914), 15 U.S.C. § 41 (1952).
[11] 295 U.S. at 618.
[12] *Id.* at 619.
[13] That the power of removal is an incident to the power of appointment is a principle of longstanding recognition. *Ex parte* Hennen, 38 U.S. (13 Pet.) 230 (1839).
[14] 295 U.S. at 623. In finding a congressional intent to restrict the President's power of removal the Court was confronted with a prior decision, Shurtleff v. United States, 189 U.S. 311 (1903), where it was held that a statute should not be construed as limiting this power in the absence of plain and unambiguous language. That case was distinguished, however, on the ground that the statute under which Shurtleff was appointed provided no term of office so that a denial of the President's removal power would have given him the right to tenure for life or until found guilty of some act specified in the statute.
[15] *Id.* at 624.
[16] *Id.* at 631-32.

Federal Trade Commissioner's duties are quasi-judicial and quasi-legislative which must be performed free from executive influence and control.[17] The basis of this distinction rests on the fundamental doctrine of the separation of powers between the three branches of the federal government.[18] Thus, after *Humphrey's,* the law seems to have been that with respect to officials charged with purely executive duties the President's power of removal is illimitable, but where an appointee's work is quasi-judicial or quasi-legislative Congress can limit the President's power of removal.[19]

The principal case lends itself to two possible interpretations: (1) that the President has complete power to remove members of quasi-judicial or quasi-legislative bodies (hereafter referred to as independent agencies) except where limited by Congress; or (2) that the President has no power to remove members of such bodies except where conferred by Congress. The first interpretation arises out of the Court's approach to the problem. Just as in the *Humphrey's* case, the Court seems to have concerned itself with whether or not Congress intended to *limit* the President's power of removal. This approach, from which a tacit admission that such power exists might be inferred,[20] is made manifest by the fact that the Court looked to the history of the act creating the War Claims Commission, failure of congressional explicitness, and tenure —found in the relatively short life expectancy of the Commission—and concluded that "Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President."[21] Because of the striking resemblance between the Court's approaches in the two cases, both might very well be interpreted as standing for the same proposition.

Viewed in this light, however, the *Wiener* decision represents a broadening of the doctrine of the *Humphrey's* case, for in *Wiener* there were fewer factors indicating a congressional intention to restrict the President's power of removal. One of the two factors, causes for removal, which the Court in the latter case indicated would be sufficient to establish the requisite legislative intent, was conspicuously missing from the instant case. The remaining factor, tenure of office, was sup-

[17] *Id.* at 627-28.
[18] *Id.* at 629-30.
[19] The *Humphrey's* case left for future judicial determination cases falling within the field of doubt between it and the *Myers* case. One such case arose in 1940, Morgan v. TVA, 115 F.2d 990 (6th Cir. 1940). The President removed Morgan from the board of directors of TVA but not pursuant to the statute which provided for the removal by the President of any member of the board who made appointments on the basis of anything other than merit and efficiency. Morgan's duties were found to be predominantly executive and his removal was upheld.
[20] However, the Court might obviate this inference by attributing this approach to an attempt on its part to ascertain whether or not Congress had *conferred* removal power on the President.
[21] Wiener v. United States, 357 U.S. 349, 356 (1958).

plied by the Court's finding of tenure in the relatively short period during which the War Claims Commission was to operate.[22] Moreover, the legislative history of the act less convincingly demonstrated Congress' intent. The Court was able to point to but a single act on the part of Congress evincing its intent. The House Bill placed the administration of the Commission in the hands of the Federal Security Administrator, an arm of the Executive. The Senate rewrote the bill to establish a Commission "with jurisdiction to receive and adjudicate [claims] according to law."[23]

While this interpretation of the decision would not be a declaration of total separation of powers in the area involving independent agencies created by Congress, it would seem to represent a stride in that direction. Conceivably, separation may eventually be achieved through erosion, on a case by case basis, of the factors relied upon by the Court in the *Humphrey's* case in arriving at Congress' intent.

Perhaps the more reasonable interpretation to ascribe to the principal case is the second one which arises out of the Court's discussion of *Humphrey's*. It cited *Humphrey's* as having drawn a sharp line of cleavage between officials of the Executive Department and officials of independent agencies, and apparently regarded that case as standing for the proposition that the President's power to remove officials of these agencies "exists only if Congress *may fairly be said to have conferred it.*"[24] [Emphasis added.]

This latter interpretation would enable the courts to dispose of contested removals such as the one presented in the principal case by simply ascertaining two things: (1) that the President had removed a member of an independent agency, and (2) that Congress could not fairly be said to have conferred upon him the power to make such removal. Having found these two things it would follow that the removal was invalid. Viewed in this light the principal case represents a very considerable extension of the *Humphrey's* case and effects a total separation of powers in the area of the President's power to remove members of independent agencies. It has the desirable effects of placing both Congress and the President on notice as to where each stands on the matter of removal and of clarifying the confusion which apparently still exists in this area. In addition, it would greatly curtail employment of the spoils system, withdraw the ominous "Damocles' sword of removal" from over independent agencies, encourage more selective appointments, and conduce to a more efficient and impartial performance of an agency's functions. These things in turn would facilitate the creation of a group

[22] *Id.* at 352.
[23] *Id.* at 354.
[24] *Id.* at 353. Although the principal case did not mention it, the *Shurtleff* case would seem to be nullified by this interpretation. See note 15 *supra.*

of experts ready to exercise their trained judgments on the multitude of complex problems constantly brought before them. Thus, assuming that there should be a separation of powers, the decision in the principal case seems to be desirable regardless of which interpretation is placed on it. Under the first interpretation the decision represents a stride toward separation; under the second, total separation is achieved.

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Corporations—Non-Profit Corporations Engaging in Commercial Enterprises

The doctrine of ultra vires in general corporation law has undergone considerable statutory revision in recent years.[1] The scope of this Note is to survey briefly the application of this doctrine to the narrower field of non-profit corporations, as such application appears in the comparative paucity of case law.

In the recent Georgia case of *Church of God of the Union Assembly v. Carmical*,[2] the defendant church, incorporated generally to promote the interests of religion, was engaging in the auction business in competition with plaintiff auctioneer. The court denied an injunction against the church's conducting the business, holding that the plaintiff lacked sufficient interest to complain about the alleged ultra vires act. The point was made that the court was conceding, not holding, that the business activity was ultra vires. While this case does not reach the question of whether a non-profit corporation may or may not operate a business for profit, it serves to point up the problem inherent in considering the powers which may be exercised by this class of corporate entities.

Generally speaking, the problem of whether to allow or enjoin business activity by a non-profit corporation has presented itself to the courts in three situations: (1) where such activity is expressly prohibited by the corporation's charter; (2) where it is not contemplated by the charter; and (3) where it is provided for in the charter, but such a provision is beyond statutory authorization.

In *State ex rel. v. Southern Junior College*,[3] there was an express provision in the charter that the corporation should *not* possess the power to engage in any kind of trading operation. In an action brought by the state on relation of citizens engaged in the printing business, it was held that the prohibitory clause prevented the college from operating

[1] BALLANTINE, CORPORATIONS § 108 (Rev. ed. 1946). For a typical statement of the ultra vires rule as it is found in modern statutes, see N.C. GEN. STAT. § 55-18 (Supp. 1957).

[2] 104 S.E.2d 912 (Ga. 1958).

[3] 166 Tenn. 535, 64 S.W.2d 9 (1933).