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THE PRESIDENT'S POWER TO REMOVE MEMBERS OF ADMINISTRATIVE AGENCIES

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The division of power between the three branches of the Federal Government makes it uncertain how far Congress can legislate to create an administrative body which is independent of the President. If the executive power of the President carries with it the unrestrictable right to remove any officer of the United States the independence of the administrative expert is a mere illusion.

"Indeed, it is utterly impossible not to feel, that, if this unlimited power of removal does exist, it may be made, in the hands of a bold and designing man, of high ambition and feeble principles, an instrument of the worst oppression, and most vindictive vengeance . . . It would convert all the officers of the country into the mere tools and creatures of the president. A dependence so servile on one individual, would deter men of high and honorable minds from engaging in the public service . . ."¹

In 1926 the Supreme Court of the United States decided in the *Myers* case² that the Congress could not restrict the power of the President to remove a postmaster of the first class. In 1935 the Court held in the *Humphrey* case³ that the President had acted without authority in arbitrarily removing from office a member of the Federal Trade Commission.

In the earlier case, the Court sustained the unrestrictable power of the President to remove "purely executive" officers, for a postmaster "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 aide he is."⁴ In the

¹2 STORY ON THE CONSTITUTION (3rd ed. 1858) p. 401. In *Humphrey's Executor v. United States*, 295 U. S. 602, 629, 55 Sup. Ct. 869, 874, 79 L. ed. 908, 914 (1935) (also known as the Rathbun case), the Supreme Court observed that "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."

²*Myers v. United States*, 272 U. S. 52, 47 Sup. Ct. 21, 71 L. ed. 160 (1926).

³*Humphrey v. United States*, *supra* note 1.

⁴*Id.* at 627.

Humphrey case, however, the Court upheld the power of Congress to impose reasonable restrictions and limitations upon the power of the President to remove officers of the United States whose functions are exclusively quasi-judicial and quasi-legislative.

Most officers, however, are not so readily susceptible of exact classification as "purely executive" or as exclusively quasi-legislative and quasi-judicial. The great majority of administrative bodies, commissions and experts perform executive as well as quasi-legislative or quasi-judicial functions.⁵ The general power of the Congress to assure the independence of such administrative bodies therefore has not been determined specifically by the decisions in the *Myers* and the *Humphrey* cases.

The purpose of this article is to present a brief resumé of the present status of the law relative to the removal power of the President and to indicate the application of established legal principles to the various federal administrative agencies.

I. PRESENT STATE OF THE LAW

A. *Constitutional Provisions.* The Constitution does not specifically empower the President to remove officers of the United States. It does, however, vest all executive power in the President and this includes the duty to "take Care that the Laws be faithfully executed."⁶ The power to remove "purely executive officers" of the United States may be based on this general grant of power.⁷

The Constitution also provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" certain officers of the United States.⁸ In spite of this language it has been determined that in the case of officers appointed by the President, by and with the advice and consent of the Senate, the Senate exercises no portion of the appointing power.⁹ As a matter of statutory construction the power to remove flows from the power to appoint. Accordingly it is said that when not otherwise limited by statute the President

⁵See *infra* Part II, p. 234, *et seq.*

⁶Art. II, § 1, cl. 1, and § 3.

⁷*Myers v. United States*, 272 U. S. 52, 117 (1926).

⁸The President derives his power of appointment from the CONSTITUTION, Art. II, § 2, cl. 2, which provides that the President "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 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."

⁹*Myers v. United States*, 272 U. S. 52, 122, 125 (1926).

having the sole power of appointment has the exclusive power of removal.¹⁰

It thus appears that the President has a dual power of removal: (1) In the exercise of his executive power he may remove executive officers; (2) Unless restricted by the Constitution or by statute he may remove any officer whom he has appointed, whether or not they are executive officers.

The extent of the removal power of the President must be read in the light of the powers of Congress. The Constitution vests all legislative power in the Congress which is expressly empowered "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."¹¹

On its face this express delegation to Congress of all legislative power suggests that Congress can dictate the nature and tenure of any office which it creates. The Congress obviously has the power under the Constitution to create an administrative office. If the functions of that office require the exercise of independent action, then Congress has the express power to pass all "necessary and proper" laws to safeguard that independence even from the President. In so far as Congress places reasonable restrictions on the President's power to remove administrative experts whose functions are not purely executive, there is no conflict with the executive power.¹²

B. Construction of the Constitution by the First Congress. The First Congress of the United States considered the question of the removal power of the President under the Constitution.¹³ Its views are of peculiar significance since many of its leaders had been members of the Constitutional Convention.

The question concerning the removal power arose under the following circumstances. A bill to create an executive department, to be known as the Department of Foreign Affairs, was introduced in the House by James Madison. The bill in its original form provided that the Secretary of Foreign Affairs was "to be removable from office by the President." Some members of Congress objected that this clause

¹⁰*Ex parte Hennen*, 13 Pet. 230 (U. S. 1839); *Parsons v. United States*, 167 U. S. 324 (1897); *Myers v. United States*, 272 U. S. 52, 119, 122, 126, 161 (1926).

¹¹Art. I, § 1, and § 8, cl. 18.

¹²*Humphrey v. United States*, 295 U. S. 602, 632, 55 Sup. Ct. 869, 874, 79 L. ed. 908, 916 (1935).

¹³*Myers v. United States*, 272 U. S. 52, 109, 136 (1926). For an excellent analysis of the views of the members of the First Congress on the removal power see CORWIN ON THE PRESIDENT'S REMOVAL POWER (1927) pp. 10-23.

implied an attempt by the legislature to confer upon the President a constitutional power which he already possessed. Others contended he had no such power. An amendment was thereupon offered to change this language to read "whenever the said principal officer shall be removed from office by the President of the United States."¹⁴ The bill as amended was passed by both houses of Congress.¹⁵

It has been urged that this action by the First Congress (known as the Decision of 1789) and the debates which led to it, expressed the sense of Congress that with respect to all officers of the United States except judges the Constitution gave to the President a power of removal which could not be restricted by the legislature.¹⁶

An examination of the debates shows, however, that the views of many of the leaders of Congress were influenced by the fact that the Secretary of Foreign Affairs was to be a political officer, who would be truly an agent of the President, and whose functions were to be purely

¹⁴1 ANNALS OF CONGRESS (1834) col. 578.

¹⁵See CORWIN, *op. cit. supra* note 13, at 12-13. There is no complete record of the proceedings in the Senate. The vote on the passage of the bill was a tie, the deciding vote was cast by the Vice President, John Adams. Senator Edmonds made the following analysis of the proceedings in the House of Representatives (III IMPEACHMENT OF ANDREW JOHNSON (1868) pp. 84, 85):

"Of the 54 Members of the House of Representatives present, those who argued that the power of removal was, by the Constitution, in the President, were Sedgewick, Madison (who had maintained the opposite), Vining, Boudinot, Clymer, Benson, Scott, Goodhue, and Baldwin. Those who contended that the President had not the power, but that it might be conferred by law, but ought not to be, were Jackson, Stone, and Tucker.

"Those who believe that the President had not the power, and that it could not be conferred, were White, Smith of South Carolina, Livermore, and Page.

"Those who maintained that the President had not the inherent power, but that it might be bestowed by law, and that it was expedient to bestow it, were Huntington, Madison at first, Gerry, Ames, Hartly, Lawrence, Sherman, Lee and Sylvester—24 in all, speaking. Of these, 15 thought the Constitution did not confer this power upon the President, while only 9 thought otherwise. But those who thought he had the power and those who thought the law ought to confer it were 17.

"Thirty did not speak at all, and in voting upon the words conferring or recognizing the power, they were just as likely to vote upon the grounds of Roger Sherman as upon the reasons of those who merely intended to admit the power. On the motion to strike out the words 'to be removable by the President,' the ayes were 20, and the noes 34; but no guess, even, can be formed that this majority took one view rather than the other. Indeed, adding only the 8 who spoke against the inherent power, but for the provisions of law, to the 20 opponents of both, and there is a clear majority adverse to any such inherent power in the President. And when on the next day it was proposed to change the language to that which became the law, among the ayes are the names of White, Smith of South Carolina, Livermore, Page, Huntington, Gerry, Ames and Sherman, all of whom, as we have seen, were of opinion against the claim of an inherent power of removal in the President."

¹⁶See 2 STORY ON THE CONSTITUTION (3rd ed. 1858) 400; Myers v. United States, 272 U. S. 52, 114 (1926).

executive.¹⁷ In view of the emphasis thus placed upon the nature of the office of Secretary of Foreign Affairs it is clear that the First Congress did not purport to determine that the President had an arbitrary power to remove any administrative officer regardless of his function.

One week after the Decision of 1789 the nature and extent of the removal power was again before the First Congress. In connection with a bill to organize the Treasury Department, the question arose¹⁸ as to the tenure of office of the comptroller whose chief function was to pass on claims and accounts between the United States and its citizens. In contrasting this new office with that of Secretary of Foreign Affairs, Mr. Madison observed that the office of comptroller partook of the judicial quality as well as the executive. It was his view that the President's power to remove such an officer might be limited by Congress.¹⁹

¹⁷See statements of: Sedgewick, 1 ANNALS OF CONGRESS (1834) col. 522; Boudinot, 1 *Id.* col. 528; Benson, 1 *Id.* col. 505; Vining, 1 *Id.* cols. 465, 511, 512; Hartly, 1 *Id.* cols. 479-480; Lawrence, 1 *Id.* col. 485.

¹⁸For a discussion of this second debate on the question of the President's power of removal see, Corwin, *Tenure of Office and the Removal Power Under The Constitution* (1927) 27 COL. L. REV. 352, 366.

¹⁹Mr. Madison had voted in favor of the "Decision of 1789," but in discussing the Comptroller of the Treasury he declared:

"It will be necessary to consider the nature of this office, to enable us to come to a right decision on the subject; in analyzing its properties, we shall easily discover they are not purely of an Executive nature. It seems to me that they partake of a Judiciary quality as well as Executive; perhaps the latter obtains in the greatest degree. The principal duty seems to be deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and particular citizens: This partakes strongly of the judicial character, and there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the Executive branch of the Government. I am inclined to think that we ought to consider him something in the light of an arbitrator between the public and individuals, and that he ought to hold his office by such a tenure as will make him responsible to the public generally; then again it may be thought, on the other side, that some persons ought to be authorized on behalf of the individual, with the usual liberty of referring to a third person, in ease of disagreement, which may throw some embarrassment in the way of the first idea.

"Whatever, Mr. Chairman, may be my opinion with respect to the tenure by which an Executive Officer may hold his office according to the meaning of the Constitution, I am very well satisfied, that a modification by the Legislature may take place in such as partake of the judicial qualities, and that the legislative power is sufficient to establish this office on such a footing as to answer the purposes for which it is prescribed." 1 ANNALS OF CONGRESS (1834) col. 611-612.

Mr. Sedgwick disagreed with Mr. Madison as to the nature of the office of Comptroller. He said:

"He also conceived that a majority of the House had decided that all officers concerned in Executive business should depend upon the will of the President for their continuance in office; and with good reason, for they were the eyes and arms of the principal Magistrate, the instruments of execution." 1 *Id.*, col. 613.

" . . . Whatever, Mr. Chairman, may be my opinion with respect to the tenure by which an Executive officer may hold his office according to the meaning of the Constitution, I am very well satisfied, that a modification by the Legislature may take place in such as partake of the judicial qualities, and that the legislative power is sufficient to establish this office on such a footing as to answer the purposes for which it is prescribed."^{19a}

The distinction which Mr. Madison makes is significant. It is a distinction between a purely executive officer and an administrative officer performing quasi-judicial functions in an executive department of the Government. Madison believed that the Congress had no power to limit or restrict the power of the President to remove purely executive officers, whereas the executive's power of removal might be limited in order to protect the independent character of an office having quasi-judicial as well as executive functions, and even though that office is part of the executive department.

C. *Decisions of the Supreme Court.* In only two cases has the Supreme Court squarely passed upon the power of Congress to limit or restrict the removal power of the President. The first of these cases is *Myers v. United States*.²⁰ In that case Myers had been appointed a postmaster of the first class for a term of four years, pursuant to an Act of Congress which provided for his removal by the President "by

Mr. Madison in reply said:

"When I was up before . . . I endeavored to show that the nature of this office differed from the others upon which the House had decided; and, consequently, that a modification might take place, without interfering with the former distinction; so that it cannot be said we depart from the spirit of the Constitution.

"Several arguments were adduced to show the Executive Magistrate had constitutionally a right to remove *subordinate* officers at pleasure. Among others it was urged, with some force, that these officers were merely to assist him in the performance of duties, which, from the nature of man, he could not execute without them, although he had an unquestionable right to do them if he were able; but I question very much whether he can or ought to have any interference in the settling and adjusting the legal claims of individuals against the United States. The necessary examination and decision in such cases partake too much of the Judicial capacity to be blended with the Executive. I do not say the office is either Executive or Judicial; I think it rather distinct from both, though it partakes of each, and therefore some modification, accommodated to those circumstances, ought to take place."
I *Id.* col. 614.

The Congress concluded that the Comptroller was an executive officer and it was perhaps for that reason that the suggestion of Mr. Madison was not carried out.

^{19a}I *Id.*, col. 611-612.

²⁰272 U. S. 52, 47 Sup. Ct. 21, 71 L. ed. 160 (1926). The opinion of the Court was written by Chief Justice Taft. Justices Holmes, McReynolds and Brandeis each filed dissenting opinions. The opinions occupy 189 pages of the volume in which printed.

and with the advice and consent of the Senate."²¹ The President through his Postmaster General removed Myers from office before the expiration of his term without the advice and consent of the Senate. Later Myers brought suit in the Court of Claims for the salary accruing to his former office for the period between the time of his removal and the expiration of his term. The Court of Claims rendered judgment against Myers on the ground of laches. On appeal to the Supreme Court the judgment was affirmed on the ground that the removal had been properly made.²²

The precise holding of the Court²³ was that the act of removal was an executive act and that Congress could not appropriate to the Senate an executive power by requiring the assent of the Senate to the removal of executive officers. But the opinion of the Court was not confined to this narrow issue. In unmistakable language Chief Justice Taft, who had once been President himself, expressed the view that the President's power to remove an administrative officer of the Government could not be limited or restricted by Congress. The following quotation from the opinion makes clear that, contrary to the view expressed by Madison,²⁴ the Chief Justice believed that the President's illimitable

²¹Act of July 12, 1876, c. 179 § 6, 19 STAT. 80, 81.

²²The government conceded at the argument that the Court of Claims decision on the question of laches was erroneous. The Court found no valid distinction could be made between "superior" and inferior officers. "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." 272 U. S. 134, and see 158-161.

²³The Court summarized its views at pages 163 and 164 as follows:

"Our conclusion on the merits, sustained by the arguments before stated, is that Article II grants to the President 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 II 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 officers; 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 II, which blend action by the legislative branch, or by part of it, in the work of the executive, are limitations to be strictly construed and not to be extended by implication; that the President's power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice of the Senate, but that such incident does not by 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 differences with the Senate or Congress to take care that the laws be faithfully executed."

²⁴See *supra* note 19.

power of removal extended to administrative officers performing quasi-judicial as well as executive functions. The opinion declares that:

"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 can not 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 office 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."²⁵

In view of the recent opinion of the Court in *Humphrey's Executor v. United States*,²⁶ it may well be doubted whether this *dictum* correctly expresses the law. In the *Humphrey* case it appeared that William E. Humphrey had been appointed a Federal Trade Commissioner pursuant to Section 1 of the Federal Trade Commission Act, which provided in part that "any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." On October 7, 1933, President Roosevelt removed Humphrey from office without assigning any cause for removal and without affording him an opportunity to be heard. After the death of Humphrey his executor brought suit in the Court of Claims to recover Humphrey's salary as a Federal Trade Commissioner from the time of his removal from office until his death. The Court of Claims certified two questions to the Supreme Court:

"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 Supreme Court answered each question in the affirmative.²⁷

²⁵272 U. S. 52, 135.

²⁶295 U. S. 602, 55 Sup. Ct. 869, 79 L. ed. 908, decided May 27, 1935. The opinion is written by Mr. Justice Sutherland. Mr. Justice McReynolds concurred in the decision and declared that his views are stated in his dissenting opinion in the Myers case, 272 U. S. 178.

²⁷The Government urged that the case of *Shurtleff v. United States*, 189 U. S. 311 (1903), was decisive of the first question. In that case the President had removed Shurtleff, a general appraiser of merchandise, without assigning any cause

In response to the second question the Court held that the power of the President to remove a Federal Trade Commissioner had been constitutionally restricted by Congress, and that consequently a Federal Trade Commissioner could be removed only after notice and hearing for the causes stated in the statute.

The *Myers* case was distinguished upon the ground that a postmaster is a "purely executive officer" who is properly subject to the domination of the President, whereas a Federal Trade Commissioner performs quasi-legislative and quasi-judicial functions and is in no sense an executive officer. The fundamental doctrine of a division of power between the executive, legislative and judicial branches of the Government was held to be inconsistent with an unrestrictable executive power of removal over officers performing exclusively quasi-legislative and quasi-judicial functions. The Court pointed out that the power to remove is the power to dominate. It held that the President had no power under the Constitution to dominate and control officers performing functions which were not executive in nature. In concluding its opinion, the Court stated:

"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 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 pre-

for his action. *Shurtleff* held office under a statute, which, like the Federal Trade Commission Act, provided that the President might remove for "inefficiency, neglect of duty, or malfeasance in office." The statute, however, did not specify the tenure of the office. The Court sustained the power of the President to remove *Shurtleff* without notice or hearing and without cause named on the ground the statute did not exclude removal for any other cause. In the *Humphrey* case, however, the Supreme Court distinguished the *Shurtleff* case on the ground that under the Federal Trade Commission Act the tenure of office was for a definite term of years, whereas, in the Act involved in the *Shurtleff* case no term of office was specified by statute. As a result an appraiser of merchandise would hold office under this statute for life, except for removal by impeachment. The Supreme Court in the *Shurtleff* case declared that it was inconceivable that Congress intended such a result. For that reason it refused to apply the normal rule of construction expressed in the maxim *expressio unius est exclusio alterius* to the exceptional circumstances in that case.

In the *Humphrey* case the Court also pointed out that Congress intended the Federal Trade Commission to be an impartial body composed of trained experts and performing predominantly quasi-legislative and quasi-judicial duties independent of the executive authority except in its selection of members. 295 U. S. 624, 625, 55 Sup. Ct. 872, 873, 79 L. ed. 912.

scribed 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."²⁸

The Court thus avoids any specific discussion of the question of the power of the President to remove an officer performing quasi-judicial or quasi-legislative as well as substantial executive duties. Since the great majority of our administrative boards have both executive and quasi-legislative or quasi-judicial functions it is to be regretted that the question of their independence from executive control has not been determined. The opinion of the Court is of some aid, however, in predicting what the decision will be when a case presenting this issue arises.²⁹

The *Myers* case has been confined to "purely executive officers." In using this phrase the Court in the *Humphrey* case has apparently adverted to the distinction drawn by James Madison between a "purely executive officer" (Secretary of Foreign Affairs) and an officer in an executive department performing quasi-judicial as well as executive duties (Comptroller of the Treasury).³⁰ The distinction suggested by Madison seems sound if the doctrine of a division of power between the executive, legislative and judicial branches of the Government is to be adhered to. That the President has the power to remove and thereby dominate and control political executive officers and officers who in effect act as his executive agents seems beyond question. But when the Congress clothes an office with quasi-judicial as well as executive functions there is not the same need for unlimited executive control. The proper exercise of a quasi-judicial or quasi-legislative duty is dependent upon the officer's freedom from interference and immunity from arbitrary removal. And even though such an officer also may have executive functions it would seem "reasonable and proper" for Congress to protect his independence of action by imposing reasonable limitations upon the President's power to remove.

²⁸295 U. S. 602, 631-632, 55 Sup. Ct. 869, 875, 79 L. ed. 908, 916.

²⁹See *infra* Part II, page 229, for a discussion of application of the principles of the removal power to various administrative commissions, courts and boards.

³⁰*Supra* note. 19. In this connection the Court observed that "Mr. Madison quite evidently thought that, since the duties of the office (Comptroller) were not purely of an executive nature but partook of the judiciary quality as well, a different rule in respect of executive removal might apply." *Humphrey v. United States*, 295 U. S. 602, 631, 55 Sup. Ct. 869, 875, 79 L. ed. 908, 915 (1935).

Any analysis of the President's power to remove administrative officers requires an examination of several other Supreme Court decisions and the re-appraisal of them in the light of the *Humphrey* opinion.

The first of these cases is *Marbury v. Madison*.³¹ President Adams, with the advice of the Senate, had appointed Marbury a justice of the peace of the District of Columbia for a statutory term of five years.³² Marbury's commission was signed by John Adams near the end of his term as President, and it was sealed by his Secretary of State, John Marshall. Before the commission was delivered to Marbury, Jefferson became President. He promptly ordered his Secretary of State, James Madison, not to deliver the commission. Thereupon Marbury moved the Supreme Court of the United States for a rule on the Secretary of State to show cause why mandamus should not issue requiring Madison to deliver the commission.

President Jefferson had made no attempt to remove Marbury from office. It was conceded at the bar, however, that if the President or his subordinates had the power to remove Marbury from office at will the refusal to deliver the commission was tantamount to a removal from office and in that event no case or controversy would be presented for decision. The question of the President's power of removal, therefore, arose only in connection with the issue thus made between counsel as to whether Marbury had such a right to his office as entitled him to mandamus to compel delivery of the commission. In determining this question Chief Justice Marshall said:

"Where an officer is removeable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removeable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed.

The discretion of the executive is to be exercised, until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases where, by law, the officer is not removeable by him. The right to the office is *then* in the person appointed, and he has the absolute unconditional power of accepting or rejecting it.

"Mr. Marbury, then, since his commission was signed by the President, and sealed by the secretary of state, was appointed;

³¹1 Cranch 137 (U. S. 1803).

³²The conclusion reached by the Chief Justice, namely that the specification of a definite term of office restricted the power of the President to remove a Justice of the Peace, has not been followed in subsequent cases involving officers having other functions. See *Parsons v. United States*, 167 U. S. 324 (1897), *infra* note 35.

and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country."³³

In the *Myers* case, Chief Justice Taft declared that this statement of Marshall was *obiter dictum*,³⁴ adding that "If his language was more than a dictum, and was a decision, then the *Parsons* case³⁵ overrules it." In the *Humphrey* case, Justice Sutherland is content to point out that the opinion in *Marbury v. Madison* presents the view of Marshall that the President's power to remove a justice of the peace may be restricted since there is a clear distinction between such an officer and one whose acts are the acts of the President.³⁶ The emphasis which the Court has most recently placed upon the nature of the office in determining the President's power of removal suggests that Chief Justice Marshall's decision is to be reconciled with the *Myers* case upon the ground that *Marbury v. Madison* involved an officer performing judicial functions, whereas the *Myers* case involved a postmaster who was clearly an executive officer.³⁷

³³1 Cranch 162.

³⁴272 U. S. 52, 141-143 (1926). The argument to the effect that the statement of Chief Justice Marshall was germane to the decision in *Marbury v. Madison* is forcefully stated in the dissenting opinion of Mr. Justice McReynolds in *Myers v. United States*, at 215-218.

³⁵*Parsons v. United States*, 167 U. S. 324 (1897), arose under REV. STAT. § 769 (1873), which provides that district attorneys shall be appointed for a term of four years. Parsons was appointed a district attorney with the consent of the Senate. The President removed him before his term had expired and nominated a successor, who was confirmed by the Senate before the expiration of the term of Parsons. After four years from the date of his commission Parsons brought suit in the Court of Claims for his salary to the end of his term of office. The Court of Claims entered judgment for the United States. On appeal the judgment was affirmed by the Supreme Court. It was pointed out that while the Tenure of Office Act and the modifying Act of 1869 were in force all questions respecting the validity of an executive removal would have been set at rest by the subsequent action of the Senate in confirming the appointment of a successor before the expiration of the term of the removed official. The Supreme Court concluded that the repeal of the Tenure of Office Act and the Act of 1869 was inconsistent with the contention of Parsons that after the repeal he had rights superior to those which he would have had if the Acts had remained in force. The actual decision therefore throws no light upon the question of the President's power of removal.

³⁶295 U. S. 602, 631, 55 Sup. Ct. 869, 875, 79 L. ed. 908, 915.

³⁷See *Reagan v. United States*, 182 U. S. 419 (1901). The power of removal also was discussed at length in *Ex parte Hennen*, 13 Pet. 230 (U. S. 1839). That case involved the right of a United States District Court Judge to remove from office a clerk of the District Court. This right was upheld on the ground that such officers were removable at will by the one exercising the power of appointment. On the question of the power of removal, Mr. Justice Thompson stated: "In the absence

The later case of *United States v. Perkins*³⁸ suggests that the President's removal power may be limited by Congress by the simple expedient of vesting the appointment of an officer in the head of a department or a court of law.³⁹ That case arose under Section 1229 of the Revised Statutes, which provided in effect that no officer in the naval service could be removed in time of peace except pursuant to sentence of a court-martial. Perkins, a naval cadet engineer appointed by the Secretary of the Navy, was removed by that official otherwise than pursuant to court-martial. The Court held that the removal was illegal.

The decision specifically holds that Congress may restrict or limit the removal power of the head of a Department. However, the language of the Court goes much further. For example, the Court quoted with approval the following language from the opinion of the lower court:

"We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed."⁴⁰

This language suggests that the limitations placed by Congress upon the removal power of the head of a department are equally binding upon the President. It is difficult to reconcile this suggestion with the proposition stated in the *Myers* case that the power to remove an executive officer is an executive power of the President. The executive power is possessed by the President alone. If Congress may not directly restrict the President's power to remove executive officers there seems no reason to assume that Congress may encroach upon executive power by indirection.

The true test of the power of Congress to limit the executive's power would seem to depend not upon the source of the appointing power but upon the nature of the office. In other words, the test is whether the office which the Congress has created is "purely" an executive office, or whether the nature and function of the office require that it be

of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment."

³⁸116 U. S. 483 (1886).

³⁹This view is restated by Chief Justice Taft in *Myers v. United States*, 272 U. S. 52, 173-174 (1926).

⁴⁰116 U. S. 483, 485, *aff'd*, 20 Ct. Cl. 438 (1885).

reasonably secure from the domination of the President.⁴¹

From the foregoing decisions the following seem to be established:

1. In the absence of constitutional or statutory limitation, the power of removal is incident to the power of appointment.⁴²
2. The power to remove purely executive officers is an essential part of the executive power.⁴³
3. Congress may not appropriate the President's power over executive officers by requiring the assent of the Senate to their removal.⁴⁴
4. Congress may impose reasonable limitations upon the power of the President to remove officers who have quasi-legislative and quasi-judicial duties.⁴⁵

⁴¹The decision in the Humphrey case, *supra* note 1, seems likewise to confine the application of the rule of statutory construction adopted in *Blake v. United States*, 103 U. S. 227 (1880), to purely executive offices and the armed forces of the United States. That case involved a suit to recover the salary alleged to be due Blake as Post Chaplain in the Army. It was urged on behalf of the United States that Blake had been properly removed by the appointment, by and with the consent of the Senate, of his successor. The Fifth Section of the Act of July 17, 1866, 14 STAT. 92, provided that "no officer in the military or naval service shall, in time of peace, be dismissed from the service, except upon and in pursuance of the sentence of a court-martial to that effect." The Court held that this statute was only intended to restrict the power of removal when exercised by the President acting alone and was not intended to restrict the power of the President and the Senate together to remove such officers. It was therefore held that the appointment and confirmation of a successor to Blake operated as a proper removal. While the case was decided on a question of statutory construction, it suggests the question whether any limitation may be placed upon the power of the President and Senate to remove an officer by the appointment of a successor.

The Blake case has been followed by a number of precisely similar cases: *Keyes v. United States*, 109 U. S. 336 (1883); *Mullan v. United States*, 240 U. S. 240 (1891); *Wallace v. United States*, 257 U. S. 541 (1922). See also *Parsons v. United States*, 167 U. S. 324 (1897).

In the Humphrey case the record disclosed that the successor to Humphrey had been nominated and appointed by the President with the advice and consent of the Senate. The Court did not comment on this fact. Since the case arose on a certified question the fact of the appointment of a successor was not strictly in issue before the Supreme Court. On principle, however, it would seem that where Congress has lawfully restricted the President's removal power the intention of Congress may not be defeated by the President acting with the advice and consent of the Senate. The power to restrict is a power of Congress. It is not a power inherent in the Senate. Consequently the Senate would seem to have no constitutional power to defeat the intention of Congress to protect an officer from arbitrary removal.

⁴²*Supra* page 216 and note 10.

⁴³*Supra* pages 217 and 220; *Myers v. United States*, 272 U. S. 52 (1926).

⁴⁴*Supra* page 221, and *Myers v. United States*, 272 U. S. 52 (1926).

⁴⁵*Supra* page 223; *Humphrey v. United States*, 295 U. S. 602, 55 Sup. Ct. 869, 79 L. ed. 908 (1935).

5. As to officers who perform quasi-legislative or quasi-judicial functions and who also perform executive duties, it is reasonable to conclude that Congress may place upon the President's power of removal such limitations as are necessary and proper to make it possible for such officers properly to discharge the independent functions of their office.⁴⁶

6. A purely executive officer holding office for a specified term of years may be removed at will by the President.⁴⁷ This result has been reached on the theory that Congress did not intend to restrict the President's power. This rule of construction as applied to executive officers is to be distinguished from the rule adopted by Chief Justice Marshall in the case of *Marbury v. Madison*. That case suggests that the President may not remove a judicial officer holding office for a definite term of years.⁴⁸

7. If Congress vests the power of appointment in the head of a department or a court of law it may restrict the power of such head of a department or court of law to remove the officer so appointed.⁴⁹

8. The power of Congress to vest the appointment of inferior officers in the heads of departments or in courts of law would seem to give it no peculiar added power to restrict or limit the removability of any executive officer by the President.⁵⁰

9. Where, as in the *Humphrey* case, Congress may constitutionally limit or restrict the removal power of the President, the nomination and confirmation of a successor to the officer removed will not act as a legal ouster.⁵¹

II. APPLICATION OF THE LAW

We come now to a consideration of those statutes which restrict or limit the power of the President to remove the members of legislative courts and administrative agencies.⁵² In determining whether Congress

⁴⁶*Supra* page 224.

⁴⁷*Parsons v. United States*, 167 U. S. 324 (1897); *Myers v. United States*, 272 U. S. 52 (1926).

⁴⁸*Supra* pages 225 and 226.

⁴⁹*United States v. Perkins*, 116 U. S. 483 (1886).

⁵⁰*Supra* page 227.

⁵¹*Supra* note 41.

⁵²In the *Humphrey* case, *supra* note 1, the Court specifically limited its opinion to members of the Federal Trade Commission, and similar bodies, such as the Interstate Commerce Commission and Court of Claims. It did not purport to give a general opinion denying the power of the President to remove all members of boards, commissions and administrative bodies. The opinion does, however, suggest the principle of law which should control in determining the extent of the power of Congress to restrict or limit the President's power of removal.

has exceeded its constitutional powers in enacting these restrictive provisions, it is pertinent to apply the principles summarized above. In each case there will be presented the same two questions which in the *Humphrey* case were certified to the Supreme Court. These questions are:

- (1) Did Congress intend by the statute to limit or restrict the removal power of the President?
- (2) Is the restriction or limitation valid under the Constitution of the United States?

The first of these questions involves statutory interpretation;⁵³ the second question involves constitutional construction.

A. *Court of Claims and Customs Courts.*⁵⁴ The Court of Claims, the Court of Customs and Patent Appeals, and the United States Customs Court are among the most important of the statutory or legislative courts. Not being constitutional courts,⁵⁵ they do not exercise the judicial power conferred by Article III of the Constitution. The duties and jurisdiction of these Courts are limited to hearing, reviewing and determining certain specified types of legal controversies.⁵⁶ While these functions were formerly⁵⁷ entrusted by Congress to an executive branch of the Government, they are now clearly judicial in character.

The judges of these three Courts are appointed by the President, by and with the advice and consent of the Senate, to "hold their offices during good behavior."⁵⁸ This language as applied to a judicial office indicates an intention by Congress to restrict the power of the Presi-

⁵³The intent of Congress is to be derived from the language of the entire statute and not merely those provisions which mention the causes of removal. The opinion in the *Humphrey* case shows that the Court analyzed the various duties of the Federal Trade Commission as provided in the Act. The Committee Reports of Congress, its debates, the history and derivation of the particular body, and such other matters are aids which should be investigated in each instance to determine the intent of Congress and the exact meaning of the statute. Cf. *Humphrey v. United States*, 295 U. S. 602, 624-625, 55 Sup. Ct. 869, 872-873, 79 L. ed. 908, 912 (1935).

⁵⁴10 STAT. 612 (1855), 28 U. S. C. A. c. 7 (1926) (Court of Claims); 36 STAT. 105 (1904), 28 U. S. C. A. c. 8 (1926) (Court of Customs and Patent Appeals); 46 STAT. 737, 19 U. S. C. A. § 1516-1518 (1930) (United States Customs Court).

⁵⁵*Williams v. United States*, 289 U. S. 553 (1933); *Ex parte Bakelite Corporation*, 279 U. S. 438 (1929).

⁵⁶*Supra* note 54.

⁵⁷Many of the duties now performed by the U. S. Customs Court (formerly named the Board of General Appraisers) were originally performed by general appraisers acting under the direction of the Secretary of the Treasury. Cf. *Shurtleff v. United States*, 189 U. S. 311 (1903). Before the Act of February 25, 1855, c. 122, creating the Court of Claims, the Treasury Department handled claims against the United States.

⁵⁸10 STAT. 612 (1855), 28 U. S. C. A. § 241 (1926); 46 STAT. 762, 28 U. S. C. A. § 301 (b) (1930); 46 STAT. 737, 19 U. S. C. A. § 1518 (1930).

dent to remove these judges. The acts creating and extending the jurisdiction of these courts also show that Congress intended that their duties should be judicial in nature.

The desire of Congress to place these courts outside the pale of executive interference was fulfilled by the opinion in the *Humphrey* case. In the *Humphrey* case the Solicitor General conceded that the members of the Federal Trade Commission were in the same category as Interstate Commerce Commissioners and judges of the Court of Claims. In commenting on this concession, the Court stated:

"We think it plain under the Constitution that the illimitable power of removal is not possessed by the President in respect of offices of the character of those just named."⁵⁹

While the *Humphrey* case involved a member of the Federal Trade Commission, the above quotation is persuasive *dictum* that the Court specifically intended its decision to apply to "judges of the legislative Court of Claims, exercising judicial power."⁶⁰ As the duties of the judges of the Court of Customs and Patent Appeals and the United States Customs Court are strictly judicial in nature and as the statutes pertaining to removal are identical with the statute relative to the Court of Claims, it necessarily follows that the President's power to remove judges of these latter two courts has been properly restricted by Congress.

B. *Territorial Courts.*⁶¹ The District of Columbia, the territories and possessions of the United States are under the immediate control of

Prior to the Myers case, *supra* note 2, the statute relating to the Board of Appraisers (United States Customs Court) provided that the members "shall hold their office during good behavior, but may, after due hearing, be removed by the President for the following causes and no other: neglect of duty, malfeasance in office, or inefficiency." 42 STAT. 972 (1922), 19 U. S. C. A. § 405 (1926). The section was so worded in order to get around the decision of *Shurtleff v. United State*, *supra* note 27. The Tariff Act of 1930, § 651 (a), repealed this section and in § 518 (19 U. S. C. A. § 1518) provided only that the members "shall hold their office during good behavior." This is persuasive evidence of congressional intent to assure, if it could be done in spite of the Myers and *Shurtleff* cases, that the judges of the United States Customs Court would be outside the control or removal power of the President.

⁵⁹295 U. S. 602, 629, 55 Sup. Ct. 869, 874, 79 L. ed. 908, 914.

⁶⁰*Ibid.*

⁶¹See *infra* note 70 for names of such courts. While not strictly territorial courts, for sake of brevity, the inferior courts of the District of Columbia are also here discussed. The United States Courts of Appeals and the Supreme Court of the District of Columbia are constitutional courts. *O'Donoghue v. United States*, 289 U. S. 516, 538 (1933). However, the inferior courts in the District, like territorial courts, are subject to control of Congress under the power conferred on Congress to regulate the District of Columbia. U. S. CONST., Art. I, § 9, cl. 12. The principles of removal of judges of territorial courts apply to such inferior courts.

Congress. This supervisory power arises from the constitutional provision vesting in Congress the power "to dispose of and make all needful regulations respecting the territory or other property belonging to the United States."⁶² It is by virtue of this power and "of the national sovereignty" that Congress is empowered to create territorial courts. Such courts are not invested with any of the judicial power mentioned in Article III of the Constitution.⁶³ They are legislative, not constitutional, courts. Their functions, however, are clearly judicial in scope and nature.

Territorial courts owe their creation and existence to Congress. The tenure, pay and duties of the office of judge of a territorial court depend upon Congress alone. With such power over the existence and nature of territorial courts, it is reasonable to infer that Congress has the right to place reasonable limitations upon the President's removal power of judges of territorial courts.⁶⁴

In the *Myers* case the Supreme Court seems to concede impliedly that its opinion does not extend to a denial of the authority of Congress to limit the power of the President to remove territorial judges.⁶⁵ Any doubts which the Court entertained in that case apparently have been removed by the principle established in the *Humphrey* case.

Since territorial courts perform judicial rather than executive functions the *Humphrey* case is decisive of the power of Congress to insure their independence by the imposition of reasonable limitations upon the President's removal power.⁶⁶

How far Congress has exercised its power to limit the President's right to remove territorial judges is a question of interpretation of the statutes relating to each territorial court. All of the statutes provide

⁶²U. S. Const., Art. IV, § 3, cl. 2.

⁶³*American Insurance Co. v. Canter*, 1 Pet. 511 (U. S. 1828); *Clinton v. Englebrecht*, 13 Wall. 434 (U. S. 1871); *Hornbreckle v. Toombs*, 18 Wall. 648 (U. S. 1873); *McAllister v. United States*, 141 U. S. 174 (1891); *Romeu v. Todd*, 206 U. S. 358 (1907). See also discussion of such courts in *Ex parte Bakelite Corporation*, *supra* note 55; *O'Donoghue v. United States*, *supra* note 61; *Williams v. United States*, *supra* note 55.

⁶⁴*Cf.* dissenting opinion of Mr. Justice Holmes in *Myers v. United States*, 232 U. S. 52, 177 (1926). See also, *Humphrey v. United States*, 295 U. S. 602, 629, 55 Sup. Ct. 869, 874, 79 L. ed. 908, 914 (1935), where the Court states that the authority of Congress to create quasi-legislative or quasi-judicial agencies independent of executive control cannot well be doubted.

⁶⁵272 U. S. 52, 155-158.

⁶⁶The Court of Claims is a legislative court exercising judicial functions. *Williams v. United States*, *supra* note 55. Territorial courts are also legislative courts with judicial functions. As the *Humphrey* case is specifically applicable to the Court of Claims, it is authority for the validity of Congressional restrictions on the President's removal power of judges of territorial courts.

that the President shall appoint the judges of the territorial courts. In one instance the removal power is given to someone other than the President.⁶⁷ In two instances the statutes do not state where the removal power lies.⁶⁸ In conformity with the general principle of statutory construction discussed above, the removal power in these instances is vested in the appointing officer, subject to such reasonable restrictions as Congress prescribes.⁶⁹ As to most territorial courts the statutes provide that the officer of the court can be removed by the President "for cause."⁷⁰

⁶⁷Municipal Court of the District of Columbia, D. C. CODE (1929) Tit. 18, § 191, provides: "a term of four years and until his successor is duly appointed and qualified" for judges of the Municipal Court. § 41 provides that the Supreme Court of the District of Columbia, sitting in general term, "may hear charges of misconduct against any judge of the Municipal Court and remove him from office for cause shown." This statute is one of the few where Congress has placed the removal power in someone other than the appointor. See also, Comptroller General of United States, *infra* page 238. Such a statute is constitutional when applied to an officer whose functions are exclusively judicial or legislative. Thus the removal power of executive officers must be in the President but the removal of judicial or quasi-judicial officers may be in the judiciary or in the legislative branch or in any other body.

⁶⁸Supreme Court of the Philippine Islands, 39 STAT. 555 (1916), 48 U. S. C. A. § 1073 (1926) (no term of office or method of removal provided); District Court of Hawaii, 31 STAT. 158 (1900), 48 U. S. C. A. § 643 (1926) (hold office for six years "unless sooner removed by the President"); District Court of the United States for Puerto Rico, 39 STAT. 965 (1917), 48 U. S. C. A. § 863 (1926): judges appointed for four years and serve until successor is appointed and qualified. The same section provides for the appointment of a district attorney and marshal by the President, with the consent of the Senate, for a four year term "unless sooner removed by the President." The provision for the removal of district attorneys and marshals but none for the judge of the Court is of some weight in ascertaining whether it was the intention of Congress to restrict the power of the President to remove the judge.

⁶⁹*Myers v. United States*, 272 U. S. 52 (1926); *Humphrey v. United States*, 295 U. S. 602, 55 Sup. Ct. 869, 79 L. ed. 908 (1935).

⁷⁰District Court of Alaska, 31 STAT. 329 (1900), 48 U. S. C. A. § 112 (1926); Juvenile Court of the District of Columbia, D. C. CODE (1929) Tit. 18, § 252, and Police Court of the District of Columbia, D. C. CODE, Tit. 18, § 151 (judges appointed for six year term "subject to removal by the President, for cause"); formerly Justices of the Peace of the District of Columbia, Act of June 7, 1878, c. 162, § 1, 20 STAT. 100.

No restrictions of any kind are made as to the judges of the Supreme Court of the Philippine Islands, *supra* note 68; district attorney and marshal of District Court for Puerto Rico, *supra* note 68; judges, district attorney and marshal District Court of the Panama Canal Zone, 42 STAT. 1005 (1922), as amended, 44 STAT. 924 and 47 STAT. 817, 48 U. S. C. A. § 1353 (1933) (appointed for four year term "unless sooner removed by the President"); District Court of Hawaii, *supra* note 68.

An interesting question arises where the statute provides for the appointment for a definite term of years but neither expressly gives the removal power to the President nor places any other restrictions on removal.⁷¹ Such a statute is open to two possible constructions: (1) the officer or judge shall continue in office for the term specified subject to removal by the President at will; or (2) during the term specified the officer can be removed only by impeachment.

Where the officer performs executive functions it is reasonable to interpret such a statute as giving to the President the power to remove at will.⁷² And where the officer's duties are executive as well as quasi-judicial or quasi-legislative such interpretation is probably correct. But where the functions of the office are not executive in nature, but are judicial or quasi-judicial or quasi-legislative, it would seem more consistent with the intention of Congress to interpret the statute as intending continuance in office for the term of years specified subject only to removal by impeachment.⁷³

In *Marbury v. Madison*,⁷⁴ Chief Justice Marshall concluded that the appointment of a justice of the peace in the District of Columbia for a term of years prohibited the President from removing him during his term. In *United States v. Parsons*⁷⁵ it was held that a United States

⁷¹District Court of Puerto Rico, *supra* note 68 (four year term "until successor is appointed and qualifies"). However, in the past there were a number of such instances. *McAllister v. United States*, 141 U. S. 174, 185-186 (1891). As by future legislation Congress may enact similar statutes, a discussion of the problem is pertinent.

⁷²*Parsons v. United States*, 167 U. S. 324 (1897) (district attorney); 4 Op. Atty. Gen. 603, 610 (1847) (surgeon in navy); 4 Op. Atty. Gen. 1 (1842) (navy officer).

⁷³*Marbury v. Madison*, 1 Cranch 137 (U. S. 1803); Cf. *McAllister v. United States*, *infra* note 78. But see 5 Op. Atty. Gen. 288 (1851) (territorial judge appointed for five years).

See also the dissenting opinion of Justice McLean in *United States ex rel. Goodrich v. Guthrie*, 17 How. 284 (U. S. 1855). A suit for a mandamus was brought by a territorial judge against the Secretary of the Treasury to require payment of his salary after his removal from office by the President. The judge had been appointed for a term of four years, pursuant to a statute which stated no grounds for removal. The Court dismissed the case on the ground that mandamus was not the proper remedy. Justice McLean in dissenting considered the removability of such officer by the President. He stated at page 310: "It is argued that, as the President is bound to see the laws faithfully executed, the power to remove unfaithful or incompetent officers is necessary. This may be admitted to be a legitimate argument, as commonly applied to executive officers. . . . But however strongly this may refer to the political officers of the Government, how can it apply to the judicial office?"

⁷⁴1 Cranch 137 (U. S. 1803). See the discussion of this case, *supra* page 225.

⁷⁵167 U. S. 324 (1897). See discussion of this case, *supra* note 35.

district attorney, appointed to office for a term of four years, might be removed at any time during his term and a successor appointed in his stead, with the consent of the Senate. The first case concerned an officer performing judicial or quasi-judicial functions; the second, an executive officer. While it has been suggested⁷⁶ that the *Parsons* case overrules *Marbury v. Madison*, it is believed that the cases may be reconciled on the ground that a different rule of construction applies to a statute creating a quasi-judicial office than to a statute pertaining to an office "purely executive" in character.⁷⁷ In view of the functional distinction between a district attorney and a justice of the peace, it is doubtful whether the *Parsons* case could by mere implication overrule *Marbury v. Madison*. It is believed that the rule announced in the latter case is still sound law, and that consequently a territorial judge holding office for a term of years may not be removed by the President during his term in the absence of a statute conferring upon the President the right to remove.⁷⁸

C. *Consular Courts*.⁷⁹ To carry out the provisions of treaties between the United States and certain foreign countries Congress has established consular courts within these countries.⁸⁰ Ministers and consuls of the United States when acting as consular courts have judicial authority and functions. Such courts have jurisdiction in their respec-

⁷⁶*Myers v. United States*, 272 U. S. 52, 143 (1926). See also part of dissenting opinion of Justice McReynolds, *id.* at 216-221, 226, disagreeing with the majority as to *Marbury v. Madison* containing *dichum* or being overruled by the *Parsons* case.

⁷⁷See *Humphrey v. United States*, 295 U. S. 602, 631, 55 Sup. Ct. 869, 875, 79 L. ed. 908, 915 (1935), pointing out that Mr. Madison made a distinction between judicial and executive officers. See also discussion of this point, *supra* page 226.

⁷⁸In *McAllister v. United States*, 141 U. S. 147 (1891), the majority of the Court held that territorial judges were not judges of the courts of the United States and hence could be suspended pursuant to REV. STAT. § 1768 (1873). A successor was appointed and confirmed while the judge was suspended. The opinion of the Court specifically declares that its decision is in conformity with *Marbury v. Madison*. The minority (Justices Field, Gray and Brown) dissented on the ground that REV. STAT. § 1768 did not apply to territorial courts, and the judges thereof appointed for a term of years could not be removed during their term. The entire court, therefore, believed that the specification of a definite term of years would prohibit the removal of territorial judges by the President.

⁷⁹Consular courts now exist in China, Siam, Turkey, Morocco, Muscat, Egypt, Persia, Ethiopia, Navigator Islands and the former Ottoman Empire. See Department of State Appropriation Act of 1936, p. 6, Public No. 22, 74th Cong., 1 Sess., March 22, 1935.

⁸⁰The consular courts in Japan, established by the Treaties of June 17, 1857 and July 29, 1858, were abolished by the Treaty of November 22, 1894, Art. 18, 29 STAT. 853. Because of conventions and treaties the United States no longer

tive localities over all criminal offenses by citizens of the United States and others.⁸¹

Congress has not placed limitations upon the removal of Ministers and consuls by the President.⁸² It is doubtful whether under the Constitution the Congress could do so. While Ministers and consuls have judicial functions when acting as consular courts, the primary duties of these officers are predominantly executive in nature. They act under the direction of the Department of State. Their judicial duties may properly be described as incidental. Such offices are to be distinguished from the administrative officers performing important judicial or legislative functions. Consequently, any material limitation upon the power of the President to remove Ministers and consuls would encroach upon the executive power.

In the single instance of the United States Court for China, Congress has endeavored to create an independent judicial consular court.⁸³ The judge of this court is appointed by the President with the consent of the Senate for a term of ten years "unless sooner removed by the President for cause."⁸⁴ The limitation placed upon the removal of the judge was not inadvertent since the statute also provides that the tenure of other officers of the court "shall be at the pleasure of the President."

The functions of this Court are judicial and are unconnected with the international or diplomatic affairs. It exercises jurisdiction formerly conferred on the consular courts of China and appellate jurisdiction of

exercises jurisdiction through consular courts in Tripoli, Tunis, Samoan Islands and Madagascar. See Historical Note to 22 U. S. C. A. § 141 (1926).

United States consuls also can exercise limited consular court jurisdiction in uncivilized countries or countries not recognized by treaties. 12 STAT. 78 (1860), 22 U. S. C. A. § 180 (1926).

⁸¹20 STAT. 131 (1878), 12 STAT. 72 (1860), 22 U. S. C. A. § 142, 143 (1926). When a consul is sitting alone the jurisdiction is limited. *Id.* § 150, 151, 153. Appeals to and original hearings by the minister are authorized. *Id.* § 165, 166.

⁸²Consular clerks, however, are appointed by the President, and may be removed "for cause . . . submitted to Congress at the session first following such removal." REV. STAT. § 1704, 1705 (1873). Under the principles of *Myers v. United States*, 272 U. S. 52 (1926), this restriction is probably unconstitutional.

⁸³34 STAT. 814 (1906), 22 U. S. C. A. c. 3 (1926). The Court for China formerly made its reports to the Secretary of State. By EXECUTIVE ORDER 6166, June 10, 1933, promulgated pursuant to 47 STAT. 1517 (1933), providing for reorganization of executive agencies, the President transferred the United States Court for China, together with the District Court for the Canal Zone and the District Court for the Virgin Islands, to the Department of Justice. It is doubtful whether the United States Court for China is an executive agency in spite of the attempt of the President to so classify it. Even if it is, the judge of the Court would certainly seem not to be a "purely" executive officer. The principles of *Humphrey v. United States*, *supra* note 1, would prevent his removal at will by the President.

⁸⁴34 STAT. 816 (1906), 22 U. S. C. A. § 199 (1926).

small cases which consuls in China still decide.⁸⁵ The judicial character of the judge of this court is further illustrated by the fact that appeals from the court lie to the United States Circuit Court of Appeals for the Ninth Circuit.⁸⁶

The functions of the judge of the court being judicial in nature, the restriction that the judge may be removed for cause is a valid constitutional limitation.

*D. Board of Tax Appeals.*⁸⁷ The sixteen members of the Board of Tax Appeals are appointed by the President with the consent of the Senate for terms of twelve years each "solely on ground of fitness to perform the duties of the office."⁸⁸ They are removable "by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other reason."⁸⁹ Congress has thus clearly manifested an intention definitely to restrict the President's power to remove members of this Board.

The Board has jurisdiction to review *de novo* on petition by the taxpayer proposed deficiencies of income, estate or gift taxes by the Commissioner of Internal Revenue.⁹⁰ While the Board of Tax Appeals is technically not a court,⁹¹ its jurisdiction, powers and functions are clearly judicial in character.

The Board of Tax Appeals statute raises the unusual question of the effect upon the removal power of designating an administrative agency as part of the executive branch of the Government. Part of the func-

⁸⁵34 STAT. 814 (1906), 22 U. S. C. A. § 191-193 (1926). In one aspect part of the jurisdiction is administrative in that the court carries out certain provisions of treaties with China.

⁸⁶34 STAT. 815 (1906), 22 U. S. C. A. § 194 (1926).

⁸⁷43 STAT. 336 (1924), 44 STAT. 106, 26 U. S. C. A. c. 5 (B) (1935); Revenue Act of 1924, § 900, amended by Revenue Act of 1926, § 1000.

⁸⁸Revenue Act of 1926, § 1000, amending Revenue Act of 1924, § 900. This section also provides for terms of the first members and contingencies as to length of term where vacancies are filled.

⁸⁹§ 902 of the Revenue Act of 1924, as amended, provides that a member removed in accordance with the statute shall not be permitted at any time to practice before the Board. Because of this penalty it is believed that the courts would be inclined to require an actual "public hearing" provided for by the statute and rather strict proof that the member was in fact inefficient, neglectful of his duty or misbehaved himself in office in a grievous manner.

⁹⁰Revenue Act of 1924, § 900(e) and Sec. 904, as amended by Revenue Act of 1926, § 1000. Gift Tax Act of 1932, § 513, as amended by Revenue Act of 1934, § 501. The Board also has jurisdiction to determine additional deficiency or overpayments if they exist. For limitations on the Board's jurisdiction, see PAUL AND MERTENS, LAW OF FEDERAL INCOME TAXATION (1935) c. 33, § 43.01, *et seq.*

⁹¹Old Colony Trust Co. v. Commissioner, 279 U. S. 716 (1929).

tions of the Board were formerly performed by the Committee on Appeals and Review, a division of the Bureau of Internal Revenue. It was felt by Congress that taxpayers would be better satisfied if proposed deficiencies were reviewed by a board independent of the Commissioner of Internal Revenue. In view of this fact the statute creating the Board of Tax Appeals states that it is an "independent agency in the executive branch of the Government."⁹²

As discussed previously, when an administrative agency or board exercises quasi-legislative or judicial functions Congress may limit the removal power of the President.⁹³ The fact that such an agency or board is part of the executive branch of the Government does not prevent Congress from placing reasonable limitations on the President's power. The statutory designation of the Board of Tax Appeals as "an independent agency in the executive branch of the Government," therefore, is not controlling. The test still is whether the duties and functions of the office require that it be reasonably secure from the domination of the executive. A consideration of the entire statute shows clearly that Congress intended the Board of Tax Appeals to be an administrative agency performing judicial functions independent of the other officials of the Bureau of Internal Revenue and independent of the control of the President. The removal restriction of the statute consequently appears to be constitutional.

*E. Comptroller General of the United States.*⁹⁴ The administrative courts considered above perform judicial or quasi-judicial functions. We now come to an office having solely quasi-legislative duties.

Before the establishment of the General Accounting Office the functions of auditing and settling accounts were performed by the Comptroller of the Treasury.⁹⁵ By the Act of June 10, 1921 the General Accounting Office was established as "independent of the executive departments and under the control and direction of the Comptroller

⁹²Revenue Act of 1924, § 900(k) and § 900, as amended by Revenue Act of 1926, § 1000. The use of the word "independent" indicates Congress intended that the Board was not to be subject to executive control, although it may be argued that its use was merely to make the Board independent of the Commissioner. A similar provision is in the statutes creating the National Mediation Board, *infra* note 119, and the Railroad Retirement Board, *infra* note 107. *Cf.* also, National Bituminous Coal Commission, *infra* page 245.

⁹³See discussion of this point *supra* page 223. *Humphrey v. United States*, 295 U. S. 602, 55 Sup. Ct. 869, 79 L. ed. 908 (1935).

⁹⁴42 STAT. 20 (1921), 31 U. S. C. A. § 41 (1926).

⁹⁵REV. STAT. § 271 (1873), as amended, REV. STAT. § 236 (1873). See 20 Op. Atty. Gen. 677 (1893) for history of the office of auditor since 1789.

General of the United States."⁹⁶ The act created the offices of Comptroller General and Assistant Comptroller General of the United States. These officers are appointed by the President, with the advice and consent of the Senate, to hold office for fifteen years, and

" . . . may be removed at any time by joint resolution of Congress after notice and hearing, when, in the judgment of Congress the Comptroller General or Assistant Comptroller General has become permanently incapacitated or has been inefficient, or guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude, and for no other cause or in no other manner except by impeachment."⁹⁷

In creating these offices Congress clearly intended to restrict definitely the President's removal power. In fact, Congress proposed to keep the removal power in itself, the President sharing in it only when he signs a joint resolution of removal.⁹⁸ A consideration of the nature of the office and of the need of an independent auditor to check expenditures and accounts of all Federal officers and agencies, should determine whether Congress has acted both wisely and constitutionally in attempting to retain in itself the sole power of removal.

The need of an auditor independent of the executive was recognized from the beginning of our Government.⁹⁹ The restraint which the

⁹⁶42 STAT. 23 (1921), 31 U. S. C. A. § 41 (1926).

⁹⁷42 STAT. 24 (1921), 31 U. S. C. A. § 43 (1926). This section also provides that either officer so removed is ineligible for reappointment, and upon reaching seventy years of age shall be retired. The Comptroller General is not eligible for reappointment.

⁹⁸A Bill was introduced in President Wilson's last administration to establish the General Accounting Office. It provided for the removal of the Comptroller General by a concurrent resolution of Congress. Such resolutions are not signed by the President. JEFFERSON'S MANUAL (1931) §§ 389, 390. President Wilson vetoed this Bill because he thought this restriction on his removal power was unconstitutional. VETO MESSAGE TO HOUSE OF REPRESENTATIVES, 59 CONG. REC. 8609-8610 (1920). See Powell, *The President's Veto of the Budget Bill* (1920) 9 NAT. MUNIC. REV. 538, for a criticism of this veto. The House overrode the veto, but Congress adjourned before the Senate could act upon it.

Substantially the same Bill was introduced and passed in the succeeding Congress and signed by President Harding on June 10, 1921. The Act provides that the removal of the Comptroller General must be by a joint resolution. Such resolutions must be signed by the President to be effective. JEFFERSON'S MANUAL (1931) §§ 389, 390. Congress can override the President's veto. The effect of the Act, therefore, is that the Comptroller General and the Assistant Comptroller General can be removed only by the joint efforts of both Congress and the President, unless, of course, Congress overrides a presidential veto of the joint resolution.

⁹⁹See 1 CONGRESSIONAL DEBATES (1789-90) col. 636, 638; 1 U. S. H. DOCS., 24th Cong., 1st Sess., p. 399 (1835); Message of President Taft on Commission of Economy and Efficiency, June 27, 1912, H. Doc. No. 854, 62nd Cong., 2d Sess.

Comptroller General, by his accurate and efficient administration, has placed on wasteful or unauthorized expenditures fully justifies the creation of the office. It is also clear that his effectiveness is in part at least due to his freedom from executive interference.

The functions of the Comptroller General are primarily to determine whether disbursements are being or have been made in accordance with law.¹⁰⁰ No monies ordinarily can be expended without his approval and signature.¹⁰¹ He is also authorized to make investigations at the request of the President or Congress in regard to such disbursements.¹⁰²

The power to raise revenue and to appropriate money is a legislative power. As an incident to this power Congress may pass such laws as are necessary and proper to insure that disbursements of money will be made in accordance with its legislative mandates. Congress has determined that this cannot be done effectively if the duties of the office of Comptroller General are performed by one under the control of the branch of the Government which spends the money. It therefore has provided that the auditor shall be responsible to Congress as its agent.

The functions of the office are quasi-legislative. The Comptroller General acts as the agent of Congress. In the *Humphrey* case the Court specifically stated that the *Myers* decision "affirming the power of the President alone to make the removal, is confined to purely executive officers."¹⁰³ Where, therefore, Congress has created an office whose functions are in no way executive but are quasi-legislative, Congress may retain the removal power or give to the President such a share in the removal power as it sees fit. Under the principles of the *Humphrey*

¹⁰⁰42 STAT. 20 (1921), 31 U. S. C. A. c. 2 (1926).

¹⁰¹42 STAT. 24 (1921), 31 U. S. C. A. § 76 (1926).

¹⁰²42 STAT. 25 (1921), 31 U. S. C. A. § 53 (1926). The duty to make investigations at the request of Congress is merely one of the minor purposes of the office. Such a subordinate duty does not make the officer in any sense part of the executive branch of the Government. Cf. *Humphrey v. United States*, 295 U. S. 602, 628 (1935), where the Court points out in a footnote to its opinion that a similar duty in the Federal Trade Commission Act is so obviously collateral to the main design of the Act as not to detract from the force of the statement that the Commission is a quasi-legislative or quasi-judicial body.

¹⁰³*Humphrey v. United States*, 295 U. S. 602, 631-632, 55 Sup. Ct. 869, 875 (1935). It is interesting to note that Solicitor General Beck in his brief, page 100, in the *Myers* case argued that the Comptroller General could be removed at will by the President in spite of the restrictions in the statute. Later, when no longer Solicitor General, Mr. Beck candidly admits that upon further study of the functions of the General Accounting Office, he reached the conclusion that the Comptroller General is an agent of the legislature, independent of the executive, and not removable under the principle of the *Myers* decision. See BECK, OUR WONDERLAND OF BUREAUCRACY (1933) 188-190.

case the Comptroller General or Assistant Comptroller General seem to be immune from executive removal.

F. *Administrative Commissions, Boards and Agencies.*¹⁰⁴ As our Government has grown the complexity of modern society has demanded that the Federal Government assume more and more governmental activities. The result is that today there are innumerable Federal agencies, boards, commissions and bureaus performing almost every conceivable administrative function. The need of the administrative expert is obvious in such a centralization of authority. The *Humphrey* case states the fundamental basis of the authority of Congress to create independent administrative agencies:

“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, and to forbid their removal except for cause in the meantime.”¹⁰⁵

It may be said that most administrative agencies or experts perform executive functions in carrying out the laws which the President has the general duty to enforce.¹⁰⁶ Either by provisions of statutes or by

¹⁰⁴Lists of many of these agencies are set forth in the footnotes to this discussion. The mushroom birth and occasional death of such agencies in recent years renders it practically impossible to make a full or accurate list. Only those now existing are herein discussed. See *infra* note 108. To attempt to analyze each administrative agency to determine whether Congress intended it to be independent of the executive branch of the Government, or to determine whether its functions are executive, quasi-judicial or quasi-legislative, or a combination of two or more, is beyond the scope of this article.

¹⁰⁵*Humphrey v. United States*, 295 U. S. 602, 629, 55 Sup. Ct. 869, 874, 79 L. ed. 908, 914 (1935).

¹⁰⁶(A) As to the following agencies Congress has specifically stated that the members may be removed at the pleasure of the President: Civil Service Commission, 22 STAT. 403 (1883), 5 U. S. C. A. § 632 (1926) (no specific term of years is stated); War Finance Corporation, 40 STAT. 507 (1918), 15 U. S. C. A. § 333 (1926) (not appointed with advice of Senate; now dissolved); Commissioner of Fisheries, 43 STAT. 1046 (1925), 16 U. S. C. A. § 741 (1926); Comptroller of the Currency, 13 STAT. 99 (1864), 12 U. S. C. A. § 2 (1926) (5 year term “unless sooner removed by the President, upon reasons to be communicated by him to the Senate”); *semble*, Director of the Mint, 17 STAT. 424 (1873), 31 U. S. C. A. § 251 (1926); Tennessee Valley Authority Board, 48 STAT. 59, 16 U. S. C. A. § 831a (“shall have a term of office expiring nine years. . .”); United States Tariff Commission, 46 STAT. 696, 19 U. S. C. A. § 1330 (1930), but see *infra* note 108.

(B) As to the following agencies the statute merely prescribes a term of a specified number of years: Directors of Reconstruction Finance Corporation, 47 STAT. 5, 15 U. S. C. A. § 603 (1932); formerly Federal Radio Commission, Act of Feb. 23,

implication the members of most of these agencies are removable at will by the President.¹⁰⁷

Congress has endeavored in several instances definitely to create commissions or boards, independent of executive control, having at least in part quasi-judicial or quasi-legislative functions.¹⁰⁸ The prin-

1927, c. 169, 44 STAT. 1162; Federal Communications Commission, 48 STAT. 1066, 47 U. S. C. A. § 154b (1934); Federal Power Commission, 46 STAT. 797, 16 U. S. C. A. § 792 (1930); U. S. Shipping Board, 47 STAT. 408, 46 U. S. C. A. § 804 (1932); Federal Board of Vocational Education, 39 STAT. 932 (1917), 20 U. S. C. A. § 17 (1926); Federal Home Loan Bank Board, 47 STAT. 736, 12 U. S. C. A. § 1437 (1932); United States Employees' Compensation Commission, 38 STAT. 748 (1916), 5 U. S. C. A. § 778 (1926).

(C) As to the following agencies not even a term of office is specified: Administrator of Federal Emergency Relief Administration, 48 STAT. 55, 15 U. S. C. A. § 723a (1933); Director of National Bureau of Standards, 32 STAT. 829 (1903), 15 U. S. C. A. § 274 (1926); Office of National Archivist, 48 STAT. 1122, 40 U. S. C. A. § 231 (1934); Central Statistical Board, Public No. 219, 74th Cong., 1st Sess. July 25, 1935; Commissioner of Education, 14 STAT. 434 (1867), 20 U. S. C. A., c. 1, § 2 (1926); Administrator of Veterans' Bureau, 43 STAT. 608 (1924), 38 U. S. C. A. § 425 (1926) (this Act also provides that the Veterans' Bureau "is established as an independent Bureau under the President").

See also *infra* note 107.

¹⁰⁷As to the following agencies the statute states only that the members "shall hold their offices for a term of" a certain number of years: Securities and Exchange Commission, 48 STAT. 885, 15 U. S. C. A. § 78d (1934); Social Security Board, Public No. 273, § 701, 74th Cong., 1st Sess., August 14, 1935; Administrator of Federal Housing Administration, 48 STAT. 1246, 12 U. S. C. A. § 1702 (1934); Railroad Retirement Board, Public No. 399, § 6 (a), 74th Cong., 1st Sess., August 29, 1935 ("established as an independent agency in the executive branch of the Government"); Federal Deposit Insurance Corporation, directors, 48 STAT. 969, 12 U. S. C. A. § 264b (1934); formerly, the Federal Farm Board, 46 STAT. 11, 12 U. S. C. A. § 1141a (1929). Possibly also Federal Farm Loan Board, 39 STAT. 360 (1916), 12 U. S. C. A. § 654 (1926) (six year term "unless sooner removed for cause by the President"). The duties of this board were probably executive. By EXECUTIVE ORDER 6084, March 27, 1933, its duties were transferred to the Farm Credit Administration, an executive agency. It thereby became obsolete.

As a matter of statutory construction, the phrase, "shall hold office" for a certain term of years, as applied to this type of governmental agency would not mean that the officer hold the office for the term specified subject only to removal by impeachment. Possibly, however, if some of these commissions administer their quasi-judicial or quasi-legislative duties independently of the President, as does the Interstate Commerce Commission and the Federal Trade Commission, it might be held that the phrase "shall hold office" is a valid restriction upon the right of the President to remove.

¹⁰⁸Federal Trade Commission, see *Humphrey v. United States*, *supra* note 1; Interstate Commerce Commission, *infra* page 243; National Mediation Board, *infra* note 119; National Labor Relations Board, *infra* page 244; Federal Reserve Board, *infra* page 246; Board of Tax Appeals, *supra* page 237; National Bituminous

ciples of the *Humphrey* and other cases previously discussed are pertinent in determining how far Congress has restricted the President's removal power of members of such agencies, and whether such restrictions are valid constitutional limitations.

(1) *Interstate Commerce Commission*. The removal provisions of the Interstate Commerce Commission Act are identical with those contained in the Federal Trade Commission Act.¹⁰⁹ The principal functions of the Interstate Commerce Commission are clearly quasi-legislative and quasi-judicial in character.¹¹⁰ While some of the functions of the Interstate Commerce Commission seem to be executive in nature, these functions are so obviously collateral and subordinate to the quasi-legislative and quasi-judicial functions of the Commission as to make it clear that the Commission is not "purely executive" within the meaning of the *Humphrey* case.¹¹¹

Coal Commission, *infra* page 245; formerly the Board of General Appraisers, *supra* note 58; formerly Railroad Labor Board, 41 STAT. 456, 470 (1920); formerly the United States Coal Commission, 42 STAT. 1023 (1922), amended by 42 STAT. 1446 (1923); formerly United States Shipping Board, 39 STAT. 728, 729 (1916), 46 U. S. C. A. § 804 (1926) (six year term: "any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office"). United States Tariff Commission as it existed before the amendment of June 13, 1930 (46 STAT. 696, 19 U. S. C. A. § 1330), provided twelve year terms of office and that "any member may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." 39 STAT. 795 (1916), 19 U. S. C. A. § 91 (1926). The duties of the office are to make investigations for Congress, its committees, and the President. It is solely a fact finding body (34 Op. Atty. Gen. 77 (1924)), and it acts mainly as an agent of Congress. As such an agent of Congress the limitations on the President's removal power would be constitutional.

¹⁰⁹Interstate Commerce Commissioners are appointed for seven year terms, and they may be removed by the President "for inefficiency, neglect of duty, or malfeasance in office." 24 STAT. 383 (1887), 49 U. S. C. A. § 11 (1926), amended by Public No. 208, July 16, 1935, 74th Cong., 1st Sess.

¹¹⁰24 STAT. 382 (1887), 49 U. S. C. A. §§ 12-16, 46-47 (1926).

"The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights . . ." Interstate Commerce Commission v. B. & O. R. R. Co., 145 U. S. 263, 276 (1892).

¹¹¹In *Humphrey v. United States*, 295 U. S. 602, 628 (1935), a footnote to the opinion points out that the duty of the Federal Trade Commission to make investigations of alleged anti-trust violations is obviously collateral to the main design of the Act and does not detract from the holding that its functions are quasi-legislative and quasi-judicial. The administrative duties of the Interstate Commerce Commission pertaining to carriers are comparable in their nature to those of the Federal Trade Commission relating to unfair trade practices.

As pointed out in discussing the Court of Claims above,¹¹² the Supreme Court intended that its opinion in the *Humphrey* case should be applicable to members of the Interstate Commerce Commission. The *Humphrey* case is assurance to the members of that commission that the Chief Executive can remove them only after notice and hearing for inefficiency, neglect of duty, or malfeasance in office.

(2) *National Labor Relations Board*.¹¹³ The statute relating to the removal of members of the National Labor Relations Board provides that its members are appointed by the President, with the consent of the Senate, for a term of three years. They "may be removed by the President for inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no other cause."¹¹⁴ Are these restrictions on the President's power of removal constitutional? Again we must look to the nature and functions of the office for the answer.

The duties of the Board generally are to enforce collective bargaining and to prevent any unfair labor practice affecting interstate commerce.¹¹⁵ The Board after investigation and a hearing may issue an order to cease and desist from such unfair labor practice and to take such affirmative action as will effectuate the policy of the National Labor Relations Act.¹¹⁶ Appeals from such orders of the Board to a Circuit Court of Appeals are provided for.¹¹⁷

The functions as to labor practices and collective bargaining of the Board are analagous to those provisions of the Federal Trade Commission Act which authorize the Commission to prevent methods of unfair competition and to enforce the provisions of the Clayton Act. Under the *Humphrey* case such activities are quasi-legislative and quasi-judicial in character.¹¹⁸ The statutory restrictions on the Presi-

¹¹²*Supra* page 231.

¹¹³Public Act No. 198, § 2, July 5, 1935, 74th Cong., 1st Sess. This board is derived from the National Labor Relations Board established by Public Resolution No. 44 (Labor Disputes Act), 73rd Cong., 1st Sess., which authorized such a board to enforce Section 7(a) of the National Industrial Recovery Act.

¹¹⁴*Id.* § 3.

¹¹⁵*Id.* §§ 7 and 8. This article does not pretend to discuss the constitutional limitations placed upon the jurisdiction of the Board, or the constitutionality of the Act creating the Board.

¹¹⁶*Id.* § 10.

¹¹⁷*Ibid.* If an order is not obeyed, the Board may petition a Circuit Court of Appeals to review and enforce it. In like manner a party against whom an order is issued may appeal. The findings of fact of the Board are conclusive if supported by evidence.

¹¹⁸*Supra* page 223 and note 27. See also Federal Trade Commission Act, 38 STAT. 719 (1914), as amended 43 STAT. 939, 15 U. S. C. A. § 45 (1926).

dent's right to remove members of the National Labor Relations Board are therefore very probably constitutional.¹¹⁹

(3) *National Bituminous Coal Commission*. The National Bituminous Coal Commission is established pursuant to an Act to regulate the bituminous coal industry.¹²⁰ In general it applies to a single industry the broad principles which the National Industrial Recovery Act attempted to apply to all industry affecting interstate commerce. The five members of the commission are appointed by the President with consent of the Senate for four year terms and are removable "by the President for inefficiency, neglect of duty or malfeasance in office."¹²¹ The Act also provides that the Commission "is hereby established in the Department of the Interior." However a study of the Act does not reveal that the Secretary of Interior or his Department has any supervision over the Commission.

The Commission has the duty to organize district boards, to formulate a code of fair competition for the bituminous coal industry, by appeal or on its own initiative to review and modify orders and prices

¹¹⁹The National Mediation Board (48 STAT. 1193, 45 U. S. C. A. § 154 (1934)) is also a new Board established to assist relations between industry and labor. Its principal function is to "use its best efforts, by mediation" to bring carriers and their employees to an agreement in labor disputes. 45 U. S. C. A. § 155. The Board can interpret the agreement. If the Board cannot bring the conflicting interests to arbitrate, no change in wages or labor conditions is supposed to take place for thirty days. The Board can appoint arbitrators until an agreement is reached. *Id.* § 155. A binding judgment is entered on an arbitration agreement. *Id.* § 159. The Board makes reports to Congress. *Id.* § 154. While the functions of the Board are difficult to classify, its major duties seem to be probably quasi-legislative.

Congress intended the Board to be independent. The statute relating to the appointment and removal of members is worded like that establishing the National Labor Relations Board. However, it also is designated "as an independent agency in the executive branch of the Government." 45 U. S. C. A. § 154. The designation is not controlling. See discussion as to similar phrase in statute creating Board of Tax Appeals, *supra* page 237.

Congress created this Mediation Board to establish an agency to assist in settling strikes. It believed such a board could operate more effectively if free from executive control. Because the functions of the Board are merely to try to assist in settling railroad disputes, it is difficult to determine whether Congress has acted within its constitutional powers in placing restrictions on the President's removal power. While Congress probably acted properly, if a test of the statute should ever arise the decision may be influenced by the effectiveness of the Board and whether it has conducted its functions independently of the Executive.

¹²⁰The Commission is to be established pursuant to § 2(a) of the Bituminous Coal Conservation Act of 1935, commonly known as the Guffey Coal Bill. Public No. 402, 74th Cong., 1st Sess., August 30, 1935. The Act ceases in four years, *id.* § 21. The taxing provisions of § 3 became effective on November 1, 1935. *Id.* § 20.

¹²¹*Id.* § 2(a). § 2 of the Senate Bill did not contain this limitation on removal. S. 1417, 74th Cong., 1st Sess. (1935).

promulgated by the local boards and generally to administer and enforce the Act.¹²² The orders of the commission may be enforced and reviewed by a Circuit Court of Appeals.¹²³ Unlike the National Industrial Recovery Act the Code to be formulated does not require approval by the President.

The functions of the Commission seem to be quasi-legislative and quasi-judicial in nature. While the duties are not so clearly non-executive as those of the Federal Trade Commission or the Interstate Commerce Commission, the Commission does not perform purely executive functions. Although not free from doubt, it is believed that the rule of the *Humphrey* case makes the limitations of the Act on the President's power to remove the members of the Commission valid constitutional restrictions.¹²⁴ Because of the doubtful constitutionality of parts of the Act and the four year statutory existence for the Commission, it may well be that a judicial test of the removal provisions of this Act will never arise.¹²⁵

(4) *Federal Reserve Board*. The Banking Act of 1935,¹²⁶ amending the Federal Reserve Act, probably has assured the independence of the governors of the Federal Reserve Board. The seven members of the Board now have terms of fourteen years each "unless sooner removed for cause by the President."¹²⁷

The intent of Congress to make the Board independent of the executive and not subject to his influence is further shown by the recent amendment that after February 1, 1936 the Secretary of the Treasury and the Comptroller of the Currency will no longer be members of the Board.¹²⁸

¹²²*Id.* Part I, Part II and §§ 5(a), 6(b) and § 16-18.

¹²³*Id.* § 6(b) (c) (d). Findings of fact supported by substantial evidence are conclusive.

¹²⁴The fact that the Commission is stated to be part of the Department of Interior and that it is a minor reincarnation of the defunct N. R. A., a purely executive agency, are factors which may make inapplicable the principles of the *Humphrey* case.

¹²⁵Part of the Act has been declared unconstitutional. *Carter v. Carter Coal Co.*, U. S. L. Week, Dec. 3, 1935, at 233 (D. C. Sup. Ct.), *cert. granted* Dec. 23, 1935. But other cases held the act constitutional. *R. C. Tway Coal Co. v. Glenn*, U. S. L. Week, Nov. 19, 1935, at 193, 219 (D. C. Ky.), *cert. granted* Dec. 23, 1935.

¹²⁶Public No. 305, 74th Cong., 1st Sess., August 23, 1935, amending Federal Reserve Act, 12 U. S. C. A. c. 3 (1926).

¹²⁷*Id.* § 203(a), amending § 10 of the Federal Reserve Act. The amendments of the Act of June 16, 1932, c. 89, § 6(a), provided that the governors "shall hold office for a term of 12 years from expiration of the term of his predecessor". Before that the Act read as it now does, 12 U. S. C. A. §§ 241, 242 (1926).

¹²⁸*Ibid.* The salaries and expenses of the Board are paid from funds collected by assessments for these purposes on the member banks. 12 U. S. C. A. § 243 (1926).

The Federal Reserve Act and the Banking Act of 1935 contain the legislative standards for the Board to follow in carrying out the banking and monetary policies of Congress.¹²⁹ It is the function of the Board to effectuate these policies within such limitations as the needs of banks and finance vary from day to day. Such duties appear to be quasi-legislative in nature. The complicated monetary structure of our country makes it "necessary and proper" for Congress as an incident to its banking, revenue and monetary powers to provide for a Board to carry out its policies independent of possible domination by a President for political purposes. In view of this need for independence, it is believed that Congress can and has constitutionally limited the right of the President to remove the Governors of the Federal Reserve Board.¹³⁰

III. CONCLUSION

It is thus seen that Congress may create Governmental agencies independent of the President's control through the power of removal. Congress does this in the exercise of the exclusive legislative power granted to it and under the authority to make all laws necessary and proper to carry out these powers. However, in creating such agencies, Congress must legislate so as not to disturb the division of powers contemplated by the Constitution.

In determining whether this division of powers has been disturbed by legislation in creating new agencies of Government, it is essential to consider the nature of these agencies. If their functions are purely executive, members of such agencies must remain subject to the control of the Chief Executive, and Congress cannot interfere with the exercise of his functions by attempting to restrict the power of the President to remove executive agents from office.

¹²⁹The Federal Reserve Board exercises general supervision over Federal Reserve Banks. 38 STAT. 262 (1913), 12 U. S. C. A. § 248 (j) (1926). It must approve rediscount rates established by the directors of each Reserve Bank before they are put into effect. *Id.* § 248 (b). It also defines the classes of loans which the law, in general terms, provides Reserve Banks may make. *Id.* § 371. It passes on salaries of officers and employees of Reserve Banks. *Id.* 248 (1). Also it may require one Reserve Bank to lend to another which is short of funds. 47 STAT. 160, 12 U. S. C. A. § 347 (1934). In general, through its guidance, the Board exercises great influence over the credit, interest rates and financial structure of the country in accordance with the principles enacted by Congress.

¹³⁰Mr. J. W. B. Smith, connected with the Federal Reserve Board, in an article on *The Banking Act of 1935* (1935) 21 A. B. A. J. 610, 611 states that as the Humphrey case was decided while hearings were taking place on the Banking Bill of 1935, which changed the removal provisions of the prior Act, it is direct authority for the constitutionality of the restrictions on the President's power to remove Governors of the Federal Reserve Board.

On the other hand, if the Congress appoints officers to act as its own agents, or if it creates new administrative bodies whose chief functions are judicial, quasi-judicial or quasi-legislative in nature, then the Congress may restrict the removal power of the President and thereby insure the independence of such officers and agencies. In so doing the legislature does not infringe upon the executive power.

And even where the agencies perform substantial executive functions as well as important duties of a quasi-judicial or quasi-legislative nature, there is authority to support the view that Congress may impose reasonable restrictions on the removal power of the President.

The constitutional division of powers requires, on the one hand, that Congress shall not interfere with the prerogative of the President to control purely executive officers, and, on the other hand, that the President through the exercise of his removal power shall not interfere with the lawful acts of Congress in creating administrative offices having quasi-legislative or quasi-judicial functions.