

confidence in the intelligence, ability, judgment, or loyalty of any one of them, he must have the power to remove him without delay. To require him to file charges and submit them to the consideration of the Senate might make impossible that unity and co-ordination in executive administration essential to effective action.

The duties of the heads of departments and bureaus in which the discretion of the President is exercised and which we have described are the most important in the whole field of executive action of the Government. There is nothing in the Constitution which permits a distinction between the removal of the head of a department or a bureau, when he discharges a political duty of the President or exercises his discretion, and the removal of executive officers engaged in the discharge of their normal duties. The imperative reasons requiring an unrestricted power to remove the most important of his subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him.

But this is not to say that there are not strong reasons why the President should have a like power to remove his appointees charged with other duties than those above described. The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone. Laws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control. Finding such officers to be negligent and inefficient, the President should have the power to remove them. Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control. But even in such a case he may consider the decision after its renditions, as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the law be faithfully executed.

[The Chief Justice conceded that Congress can limit the power of the president to remove inferior officers — say, by creating a Civil Service with removal only for cause. But it can do so only because article II, §2, allows Congress to “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.” Congress had not vested “in the President alone” the power to appoint Myers; hence his appointment must be considered a major one, and his removal must, constitutionally, be left to the discretion of the president.]

[Justices Holmes, Brandeis, and McReynolds dissented.]

Humphrey's Executor v. United States

295 U.S. 602 (1935)

[The Federal Trade Commission (FTC) was created in 1914 to enforce (concurrently with the Justice Department) certain provisions of the antitrust laws and to define and eliminate

“unfair methods of competition.” Proponents of the bill wanted “a nonpartisan organization, which moves absolutely free from the interference of either Congress or the President.” 51 Cong. Rec. 11235 (1914). In its early years the commission brought few major cases. President Franklin D. Roosevelt believed that his predecessors had appointed commissioners who did not believe in the legislative purposes of the Trade Commission Act. Frustrated by the FTC’s modest sense of its own role, Roosevelt wanted to install commissioners who would be more vigorous and ambitious in enforcing the act.]

Mr. Justice SUTHERLAND delivered the opinion of the Court. . . .
 William E. Humphrey . . . was nominated by President Hoover . . . as a member of the Federal Trade Commission, and was confirmed. . . . He was commissioned for a term of seven years expiring September 25, 1938; . . . On July 25, 1933, President Roosevelt addressed a letter to the commissioner asking for his resignation, on the ground “that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection,” but disclaiming any reflection upon the commissioner personally or upon his services. The commissioner replied, asking time to consult his friends. After some further correspondence upon the subject, the President on August 31, 1933, wrote the commissioner expressing the hope that the resignation would be forthcoming and saying: “You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence.” The Commissioner declined to resign; and on October 7, 1933, the President wrote him: “Effective as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission.” Humphrey never acquiesced in this action, but continued thereafter to insist that he was still a member of the commission, entitled to perform its duties and receive the compensation provided by law. [In this suit for back pay 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? [The Supreme Court answered yes.] 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?

. . . To support its contention that the removal provision of §1 . . . is an unconstitutional interference with the executive power of the President, the government’s chief reliance is *Myers v. United States*. . . . [T]he narrow point actually decided was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the court, expressions occur which tend to sustain the government’s contention, but these are beyond the point involved and, therefore, do not come within the rule of stare decisis. In so far as they are out of harmony with the views here set forth, these expressions are disapproved. . . .

The office of a postmaster is so essentially unlike the office now involved that the decision in the *Myers* case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the *Myers* case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. [T]he necessary reach of the decision goes far enough to

include all purely executive officers. It goes no farther; — much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute must be free from executive control. [T]he commission acts in part quasi-legislatively and in part quasi-judicially. . . .

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question.

The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments. . . .

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 prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.

Notes and Questions

1. While the Constitution is explicit about the president's power to appoint, it is silent about the power to remove. In *Myers*, Chief Justice Taft, sounding every bit the former president that he was, infers such authority from other provisions. What are the particular provisions on which he relies? Were you convinced?

2. Does the vesting of executive power in "a president" compel the Court's conclusion? Does the vesting clause actually give the president any authority at all? Its counterparts in articles I and III pretty clearly do *not* assign authority; rather, they just identify where the legislative and judicial power, respectively, are situated and the content of those powers is spelled out in the rest of the article. Should article II's vesting clause be read the same way? In the *Steel Seizure Case*, a majority of justices seem to have concluded that the vesting clause does not grant the president any power in itself; however, many scholars rely on it as a source of presidential authority. What about the provision requiring the president to "take Care" that the laws be faithfully executed? Does that imply, or necessitate, an unlimited power to remove?

3. What policies underlie the constitutional commitment, as understood in *Myers*, to a strongly unitary executive branch? Consider the possibility that unitariness helps ensure both coordination of a mass of legislation and political accountability — because everyone will know who is responsible if things go wrong — and also promotes expeditiousness in government — because one person can act more quickly than six. These policies played a key role in the framers' decision to reject a plural executive in favor of "a president." See *The Federalist* No. 47. But are there reasons to think that unitariness in execution of the laws may cause serious problems?