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Administrative Law - Power of the President to Remove a Director of the Tennessee Valley Authority

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Notes

ADMINISTRATIVE LAW—POWER OF THE PRESIDENT TO REMOVE A DIRECTOR OF THE TENNESSEE VALLEY AUTHORITY—The President of the United States ousted Arthur E. Morgan from his position as Chairman of the Board of the Tennessee Valley Authority. Morgan instituted the present action challenging the power of the President to remove him without cause.[1] *Held,* for defendant. No provision of the Tennessee Valley Authority act was intended to limit the removal power of the President. *Morgan v. Tennessee Valley Authority,* 28 F. Supp. 732 (D.C. Tenn. 1939).

The Constitution contains no provision which expressly vests in the President the power to remove subordinates from office;[2] this power is implied as a corollary[3] of the power to appoint.[4] In the absence of constitutional[5] or statutory restrictions, the President may remove any officer whom he has appointed.[6] Furthermore, in *Myers v. United States*[7] the Supreme Court held that Congress cannot restrict the power of the President to remove purely executive officers. Thus, limitations on the President's removal power involve: (1) a problem of statutory con-

1. It was admitted by counsel for defendant that Morgan was not removed for any specific ground laid down in the statute. Morgan v. Tennessee Valley Authority, 28 F. Supp. 732, 733 (D.C. Tenn. 1939).

2. U.S. Const. Art II, § 4, contains the only express provisions for removal: "The President, Vice-President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

3. "The power of removal is incident to the power of appointment. . . ." Myers v. United States, 272 U.S. 52, 122, 47 S. Ct. 21, 71 L. Ed. 160 (1926).

4. U. S. Const. Art. II § 1: "The executive Power shall be vested in a President of the United States of America. . . ." § 2 ". . . and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Counsels, 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. . . ." § 3 " . . . he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States."

5. Although judges of the federal courts are appointed by the President (see note 5, supra), he cannot remove them because of the provisions of U.S. Const. Art. III, § 1: ". . . The Judges, both of the Supreme, and inferior Courts, shall hold their Offices during good Behaviour. . . ."

6. "In the absence 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." Ex parte Hennen, 38 U.S. 230, 259, 10 L. Ed. 138 (1839); Parsons v. United States, 167 U.S. 324, 17 S. Ct. 880, 42 L. Ed. 185 (1897); Myers v. United States, 272 U.S. 52, 47 S. Ct. 21, 71 L. Ed. 160 (1926).

7. 272 U.S. 52, 47 S. Ct. 21, 71 L. Ed. 160 (1926).

struction to determine whether there was a legislative intent to limit the power of the President; and (2) a determination of the nature of the office affected in order to ascertain if such a limitation is constitutionally valid.[8] The court avoided the vexing task of classifying the varied powers of the much-litigated T. V. A. by basing its decision on the first and admittedly[9] narrower point.

Prior to the *Myers*[10] case, the Supreme Court followed the path of least constitutional resistance whenever the President's removal power was contested. Thus, the court circumvented a statute which specified court martial as the sole method of removing army chaplains by holding that the consent of the Senate, implied from its confirmation of a successor, somehow validated presidential removal of a chaplain.[11] Similar statutory juggling permitted the removal of a United States attorney appointed under a statute which established a four year term of office and contained no provision for removal.[12] In *Shurtleff v. United States*[13] the Supreme Court did not find a sufficiently clear and explicit intention to limit the President's power in a statute which contained no stated term of office.[14]

The court in *Humphrey's Ex'r v. United States,*[15] although holding that the intention could be implied, retained the proposition that the background of the statute and the inferences drawn from its provisions must show an undoubted intention to take away the excutive's general power of removal.[16]

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8. Humphrey's Ex'r v. United States, 295 U.S. 602, 55 S. Ct. 869, 79 L. Ed. 1611 (1935).

9. ". . . it is apparent that the precise question here for decision is narrower than that considered in any of the cases herein referred to [*Myers* and *Humphrey's* cases] . . . ." Morgan v. Tennessee Valley Authority, 28 F. Supp. 732, 736 (D.C. Tenn. 1939).

10. Myers v. United States, 272 U.S. 52, 47 S. Ct. 21, 71 L. Ed. 160 (1926).

11. Blake v. United States, 103 U.S. 227, 26 L. Ed. 462 (1881).

12. Parson v. United States, 167 U.S. 324, 17 S. Ct. 880, 42 L. Ed. 185 (1897).

13. 189 U.S. 311, 23 S. Ct. 535, 47 L. Ed. 828 (1903).

14. The presence in the *Humphrey's* case of a stated term of office distinguished it from the *Shurtleff* case. Although the statutes involved in both cases contained identical provisions for removal—"may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office"—the court argued that Congress could not have intended to give Shurtleff, an appraiser, the right to hold office for life or until found guilty of some act specified in the statute, but that, because of the quasi-legislative and quasi-judicial nature of Humphrey's office, the evident intention of Congress was to make it safe from Presidential control for the term stated in the act.

15. Humphrey's Ex'r v. United States, 295 U.S. 602, 55 S. Ct. 869, 79 L. Ed. 1611 (1935).

16. "But if the intention of Congress that no removal should be made during the specified term except for one or more of the enumerated causes

In view of the above, there appears to be ample ground for the present holding that an attempted legislative limitation was not shown by "express provision, or by the clearest implication."[17] The statute establishing the T. V. A. contains no express limitations. Section 4,[18] providing for the removal of board members by concurrent resolution of Congress, and Section 6,[19] requiring the President to remove any member of the board who establishes political qualifications in the appointment of employees, are the provisions of the statute from which an intention to protect from presidential removal might be inferred. However, the legislative history of the act does not reveal a considered purpose on the part of Congress to free the T. V. A. from presidential control.[20] This background likewise negatives the idea that Section 4[21] was intended as an assumption by Congress of the entire general removal power instead of merely a reservation of a supplemental power. Nor can it be said that Section 6,[22] which imposes a *duty* on the President, clearly and explicitly implies an intention to restrict the removal power.

Should the court's present construction of the statute be erroneous, it will be necessary to decide whether the T. V. A. is a purely-executive instrumentality, or whether it belongs to that vague fourth branch of the government established by the

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were not clear upon the face of the statute, as we think it is, it would be made clear by a consideration of the character of the commission and the legislative history which accompanied and preceded the passage of the act. . . ." Humphrey's Ex'r v. United States, 295 U.S. 602, 623, 55 S. Ct. 869, 79 L. Ed. 1611 (1935).

17. Morgan v. Tennessee Valley Authority, 28 F. Supp. 732, 737 (D.C. Tenn. 1939).

18. 48 Stat. 60 (1939), as amended by 49 Stat. 1075, 1076, 1080 (1935), 16 U.S.C.A. § 831c (f) (Supp. 1938): ". . . The board shall select a treasurer and as many assistant treasurers as it deems proper, which treasurer and assistant treasurers shall give such bonds for the safe-keeping of the securities and moneys of the said Corporation as the board may require: *Provided,* that any member of said board may be removed from office at any time by a concurrent resolution of the Senate and the House of Representatives."

19. 48 Stat. 63 (1933), 16 U.S.C.A., § 831e (Supp. 1938): "In the appointment of officials and the selection of employees for said Corporation, and in the promotion of any such employees of officials, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency. Any member of said board who is found by the President of the United States to be guilty of a violation of this section shall be removed from office by the President of the United States, and any appointee of said board who is found by the board to be guilty of violation of this section shall be removed from office by said board."

20. See the following sections of the T. V. A. Act, 48 Stat. 58 (1933), 16 U.S.C.A. § 831 et seq. (Supp. 1938): §§ 2 (a), 2 (b), 2 (e), 4 (k), 5 (i), 5 (n), 6, 7 (b), 9 (a), 9 (b), 13, 14, 16, 17, 23, 24.

21. See note 19, supra.

22. See note 20, supra.

Humphrey's[23] decision—the quasi-legislative and quasi-judicial administrative bodies. In view of the wide field of activities covered by the Authority, such a decision would obviously require a clearer definition of those terms than can be found in the *Humphrey's* case.

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BANKRUPTCY—APPEALS—ALLOWANCE OF APPELLATE COURT—JUDGMENT INVOLVING LESS THAN $500—An appeal from an order of the district court directing the trustee in bankruptcy to furnish a transcript of certain testimony was taken without the allowance of the appellate court. *Held,* that the appeal was properly taken, as Section 24(a) of the Bankruptcy Act[1] limits the cases where allowance of the appellate court is required to those involving money alone and in a lesser amount than $500. *Stein v. Elizabeth Trust Co.,* 104 F. (2d) 777 (C.C.A. 3rd, 1939).

Prior to the Chandler Amendment appellate procedure was both awkward and dangerous.[2] In all orders in *proceedings* in bankruptcy, as distinguished from controversies arising in bankruptcy proceedings,[3] it was necessary in taking an appeal to obtain the allowance of the appellate court, except in the three instances listed under Section 25(a).[4] In *controversies* arising in

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23. Humphrey's Ex'r v. United States, 295 U.S. 602, 55 S. Ct. 869, 79 L. Ed. 1611 (1935).

1. Bankruptcy Act of 1898, § 24(a), as amended by Act of June 22, 1938, c. 575, 52 Stat. 854, 11 U.S.C.A. § 47(a) (Supp. 1938): "The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia . . . are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy . . . . Provided further, That when *any* order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court." (Italics supplied.)

2. Under the old Act appellate jurisdiction was governed by two sections: Section 24(a) dealt with controversies and Sections 24(b) and 25(a) dealt with proceedings. In the new Act Section 24(a) covers both. Act of June 22, 1938, c. 575, 52 Stat. 854, 11 U.S.C.A. § 47(a) (Supp. 1938).

3. The distinction between the two is that *proceedings* in bankruptcy include only matters internal to the bankruptcy administration, while *controversies* arising in bankruptcy proceedings relate to issues arising between the trustee as the general representative of the bankrupt estate and third parties claiming the right to keep property outside the bankruptcy administration. See Childs v. Ultramares Corp., 40 F. (2d) 474 (C.C.A. 2nd, 1930), and cases therein cited.

4. Collier, Bankruptcy (Gilbert, 4 ed. 1937) 514, §§ 727-728.

Section 25(a) formerly provided: "That appeals, as in equity cases, may be taken in bankruptcy proceedings . . . in the following cases, to-wit, (1) from a judgment adjudging or refusing to adjudge the defendant a