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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 52

MYRON WIENER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the United States Court of Claims, dated July 12, 1956 (R. 13-22), is reported at 135 C. Cls. 827.

JURISDICTION

The judgment of the United States Court of Claims was entered on July 12, 1956 (R. 13). A motion to amend the judgment, filed on August 13, 1956, was granted on October 2, 1956 (R. 28). On October 3, 1956, by order of the Chief Justice, the time for filing the petition for a writ of certiorari was extended to and including December 8, 1956 (R. 29). The petition for a writ of certiorari, filed on December 8, 1956, was granted on January 21, 1957 (R. 30). The jurisdiction of this Court rests on 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

The statute creating the War Claims Commission provides that the Commissioners' term of office shall expire at the time established for the winding up of the affairs of the Commission. The statute does not specify any grounds for the removal of a Commissioner by the President. Petitioner, a former War Claims Commissioner removed by the President, sues to recover the salary alleged to have accrued after his dismissal. The questions presented are:

1. Whether a War Claims Commissioner was an executive officer subject to the President's unlimited removal power.

2. Whether, assuming that petitioner was not an executive officer, the War Claims Act of 1948 limited the President's removal power.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Constitution of the United States provides in pertinent part:

> Article I.
>
> SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.
>
> * * * * *
>
> Article II.
>
> SECTION 1. The executive Power shall be vested in a President of the United States of America.
> * * *

SECTION 2. * * *

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he 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.

* * * * *

SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

* * * * *

Article III.

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and

in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * * * *

2. In December 1953, Section 2 of the War Claims Act of 1948, 62 Stat. 1240, as amended by the Acts of May 27, 1949 (63 Stat. 112), October 15, 1949 (63 Stat. 880), August 16, 1950 (64 Stat. 449), and April 5, 1951 (65 Stat. 28), 50 U.S.C. App. 2001, provided in pertinent part as follows:

Sec. 2. (a) There is hereby established a commission to be known as the War Claims Commission (hereinafter referred to as the "Commis-

sion") and to be composed of three persons to be appointed by the President, by and with the advice and consent of the Senate. At least two of the members of the Commission shall be persons who have been admitted to the bar of the highest court of any State, Territory, or the District of Columbia. The members of the Commission shall receive basic compensation at the rate of $14,000 per annum. The terms of office of the members of the Commission shall expire at the time fixed in subsection (e) of this section for the winding up of the affairs of the Commission.

* * * * *

(c) The Commission may prescribe such rules and regulations as may be necessary to enable it to carry out its functions, and may delegate functions to any member, officer, or employee of the Commission. The Commission shall give public notice of the time when, and the limit of time within which, claims may be filed, which notice shall be published in the Federal Register. The limit of time within which claims may be filed with the Commission shall in no event be later than March 31, 1952. The Commission shall take immediate action to advise all persons entitled to file claims under the provisions of this Act administered by the Commission of their rights under such provisions, and to assist them in the preparation and filing of their claims.

* * * * *

(e) The Commission shall wind up its affairs at the earliest practicable time after the expiration of

the time for filing claims, but in no event later than three years after the expiration of such time.

3. Other pertinent statutory provisions may be found in the Statutory Appendix (hereinafter referred to as "Stat. App".), copies of which have been filed with the Clerk.

STATEMENT

1. *The War Claims Commission.* The fundamental issue involved in this case is whether the President had the power to remove petitioner, a member of the former War Claims Commission,[1] from his office. Under the decisions of this Court, the answer to this question largely depends on "the character of the office" involved.[2] It therefore appears essential to give a short account of the nature and functions of the War Claims Commission.

Pursuant to the Trading with the Enemy Act of 1917, as amended, 40 Stat. 411, 50 U.S.C. App. 1-40 (Stat. App. 3-49), the assets of Germany and Japan, and of their residents, located in the United States, were seized by the Government during World War II. In 1948 the value of those assets was estimated at nearly $300,000,000.[3] The surrender and post-surrender conditions imposed upon the Axis powers, subsequently ratified in bilateral agreements concluded with those countries,

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[1] The War Claims Commission, established by the War Claims Act of 1948, Section 2, 62 Stat. 1240, 50 U.S.C. App. 2001 was abolished as of July 1, 1954, by Reorganization Plan No. 1 of 1954, 19 F.R. 3985, 68 Stat. 1279, 22 U.S.C. (Supp. IV) 1621 (Stat. App. 154).

[2] *Humphrey's Executor* v. *United States,* 295 U.S. 602, 631-632.

[3] *War Claims Commission,* Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, 80th Cong., 2d Sess. (hereafter referred to as "*War Claims Commission*"), p. 13.

provided that these assets would be retained by the Allies to be used on account of reparations.[4]

The War Claims Act of 1948, 62 Stat. 1240 (Stat. App. 73-89), is the result of congressional efforts to make those German and Japanese assets available for the payment of certain reparation claims. The bill, H.R. 4044, as passed by the House of Representatives,[5] prohibited the return of the German or Japanese assets to their owners and granted some benefits to civilians interned by Japan. The internee program was to be administered by the Federal Security Administrator, and payments were to be made out of appropriated funds. Title II of the House bill provided for the establishment of a War Claims Commission consisting of three Commissioners to be appointed by the President. The sole function of this Commission was to submit to the President for transmission to Congress a comprehensive report and recommendation with respect to war claims, especially those based on the maltreatment of prisoners of war, and their payment out of the assets vested in the Alien Property Custodian. The Commission was to cease to exist one year after a majority of its members first appointed first took office, but the President could fix an earlier expiration date.

Hearings on H.R. 4044 were held before a Senate

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[4] Report of the War Claims Commission, H. Doc. 580, 81st Cong., 2d Sess., pp. 27-33. See, *e.g.*, the Final Act of the Paris Conference on Reparation, Art. 6, T.I.A.S. 1655, pp. 13-14 (Stat. App. 161), providing specifically that Germany's external assets would not be returned to her but charged against reparation claims. For the subsequent agreements, see Peace Treaty with Japan, Chapter V, Arts. 14, 16, T.I.A.S. 2490, pp. 14, 19 (Stat. App. 171, 175); Convention with Germany on the Settlement of Matters Arising out of the War and Occupation, dated October 23, 1954, Chapter 6, Art. 3, T.I.A.S. 3425, p. 1554 (Stat. App. 164).

[5] *War Claims Commission, supra,* fn. 3, pp. 1-5.

Committee during the early part of 1948, *i.e.*, two and a half years after the cessation of the hostilities. It was felt then that the time for making studies had passed, and that the claims of American prisoners of war and internees against Germany and Japan based upon the violation of the Geneva Convention should and could be determined immediately.[6] Since such claims were in the nature of reparations, they were to be paid out of the German and Japanese funds held by the Alien Property Custodian and not out of funds provided by the American taxpayer.[7] The claims were to be determined by the War Claims Commission, which was to receive a status analogous to that of the Mixed Claims Commission established after World War I,[8] although it was to be staffed only with American Commissioners.[9]

The Act, as agreed upon in the Conference Committee, followed in substance the Senate amendments (H. Rept. 2439, 80th Cong., 2d Sess., p. 10). It provided for the creation of a War Claims Fund in the Treasury of the United States comprised of the net proceeds of the German and Japanese assets vested in the Alien Property Custodian.[10] Four categories of claimants were to be compensated from this fund: first, the employees of Government contractors who had been

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[6] *War Claims Commission, supra,* fn. 3, pp. 73, 82, 83, 97, 115-116.

[7] *War Claims Commission, supra,* fn. 3, pp. 73, 80, 91, 111, 134, 203, 204; S. Rept. 1742, 80th Cong., 2d Sess., pp. 7-8; 94 Cong. Rec. 8752.

[8] Cf. Settlement of War Claims Act of 1928, 45 Stat. 254 (Stat. App. 53ff).

[9] *War Claims Commission, supra,* fn. 3, pp. 97, 129; 94 Cong. Rec. 8752.

[10] Sections 12, 13, 62 Stat. 1246, 1247, 50 U.S.C. App. 2011, 2012 (Stat. App. 86).

detained by the enemy;[11] second, other civilians interned by the Japanese;[12] third, prisoners of war or their survivors;[13] and fourth, religious organizations which had assisted the members of the armed forces of the United States.[14] The claims of the employees of Government contractors were to be administered by the Federal Security Administrator;[15] the other three types of claims, *i.e.,* those of civilian internees, prisoners of war, and religious organizations, were to be determined by the War Claims Commission created by Section 2 of the Act.[16]

The Commission was composed of three Commissioners appointed by and with the advice and consent of the Senate.[17] The term of each of the Commissioners

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[11] Section 4, 62 Stat. 1241, 50 U.S.C. App. 2003 (Stat. App. 74-76).

[12] Section 5, 62 Stat. 1242, 50 U.S.C. App. 2004 (Stat. App. 76-79).

[13] Section 6, 62 Stat. 1244, 50 U.S.C. App. 2005 (Stat. App. 80-83). Originally, prisoner of war claims were limited to those based on the violation by an enemy government of its duty to furnish prisoners of war the quantity of food to which they were entitled under the Geneva Convention. The Act of April 9, 1952, 66 Stat. 47, authorized in addition the filing of claims based on inhumane treatment and the violation of the Geneva Convention relating to the labor of prisoners. The scope of the section was extended to prisoners of the Korean War by the Act of August 21, 1954, 68 Stat. 759, 761, *i.e.,* after petitioner's removal (December 10, 1953, Fdg. 4, R. 24) and the abolition of the War Claims Commission (*supra,* fn. 1).

[14] Section 7, 62 Stat. 1245, 50 U.S.C. App. 2006 (Stat. App. 83). The scope of Section 7 was considerably broadened by the Act of April 9, 1952, 66 Stat. 47, 48.

[15] Section 4, 62 Stat. 1241, 50 U.S.C. App. 2003 (Stat. App. 74). Reorganization Plan No. 19 of 1950, 15 F.R. 3178, 64 Stat. 1271, transferred the functions of the Federal Security Administrator under this section to the Department of Labor.

[16] 62 Stat. 1240, 50 U.S.C. App. 2001 (*supra,* pp. 4-5).

[17] At least two Commissioners had to be admitted to the bar of any State, Territory, or of the District of Columbia.

was to expire "at the time fixed * * * for the winding up of the affairs of the Commission", *viz.*, not later than three years after the expiration of the time for the filing of claims, which originally expired two years after the enactment of the statute,[18] *i.e.*, on July 3, 1950. The Joint Resolution of April 5, 1951, 65 Stat. 28, extended the filing time to March 31, 1952. The Commission had the usual authority to prescribe the rules and regulations necessary to carry out its functions.[19] The Act of August 16, 1950, 64 Stat. 449,[20] conferred upon the Commission the power to issue administrative subpoenas and to invoke the aid of the federal courts in the case of the failure or refusal of a witness to comply with such subpoena.

The functions of the Commission were to determine the claims of internees, prisoners of war, and religious organizations. If a claim was denied in full or in part, the claimant was entitled to a hearing before the Commission or its representative. According to the last report filed by the War Claims Commission, only 12,691 claimants out of a total of 497,849 (or approximately 3%) availed themselves of that privilege.[21] The Commission's award was "final and conclusive on all questions of law and fact and not subject to review by any other official of the United States or by any court by mandamus or otherwise * * *."[22]

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[18] Section 2(c), 62 Stat. 1240, 50 U.S.C. App. 2001(c), now 50 U.S.C. App. 2001(b).

[19] Section 2(c), 62 Stat. 1240, 50 U.S.C. App. 2001(c), now 50 U.S.C. App. 2001(b).

[20] Paragraph 2(d) added by the Act of August 16, 1950, was redesignated Paragraph 2(c) by the Act of August 21, 1954, 68 Stat. 759, 50 U.S.C. App. (Supp. IV) 2001(c) (Stat. App. 74).

[21] War Claims Commission, Ninth Semi-annual Report, pp. 6, 8.

[22] Section 11, 62 Stat. 1246, 50 U.S.C. App. 2010 (Stat. App. 85).

In addition, the Commission was charged, as originally provided in the House bill (*supra,* p. 7), with the preparation by March 31, 1950, of a report to the President for submission to Congress containing factual data on additional types of war claims and recommendations for further legislation.[23] This report was submitted to the President on March 31, 1950, and transmitted to the Congress in due course. H. Doc. 580, 81st Cong., 2d Sess. Although the Act did not provide for the preparation of any further reports of this type,[24] the Commission, on January 16, 1953, submitted a Second Study Report to the President.[25] As the result of the review of this report by the Administration in the early part of 1954, the President on April 29, 1954, transmitted to Congress the Reorganization Plan No. 1 of 1954.[26] This plan,[27] approved by Congress on June 20, 1954, abolished the War Claims Commission as of July 1, 1954, and transferred its functions, as well as those of the International Claims Commission of the United States,[28] to the newly created Foreign Claims

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[23] Section 8, 62 Stat. 1245, 50 U.S.C. App. 2007 (Stat. App. 84-85). Originally this report was due on March 31, 1949. The Act of May 27, 1949, 63 Stat. 112, extended the deadline by a year. This postponement was caused by the circumstance that the Commission was activated only in the Fall of 1949.

[24] Under Section 9, 62 Stat. 1246, 50 U.S.C. App. 2008 (Stat. App. 85), the Commission had to submit the customary periodic reports concerning its operations.

[25] H. Doc. 67, 83rd Cong., 1st Sess.

[26] *Settlement of Claims by the Foreign Claims Settlement Commission of the United States and its Predecessors from September 14, 1949 to March 31, 1955* (hereafter referred to as *"Settlement of Claims"*), p. 13.

[27] 19 F.R. 3985, 68 Stat. 1279, 22 U.S.C. (Supp. IV) 1621 (Stat. App. 154). See also H. Doc. 381, 83rd Cong., 2d Sess.

[28] The International Claims Commission of the United States had been established in the Department of State by the Act of March 10, 1950, 64 Stat. 12, 22 U.S.C. 1621-1627 (Stat. App. 93). It had

Settlement Commission of the United States (Fdg. 8, R. 24).

2. *Petitioner's service as War Claims Commissioner.* The original three War Claims Commissioners took office on September 14, 1949.[29] Following the death of Commissioner Lewis in November 1949,[30] President Truman, on February 28, 1950, nominated petitioner to be a member of the War Claims Commission (96 Cong. Rec. 2497). The nomination was confirmed by the Senate on June 2, 1950 (96 Cong. Rec. 8007). Petitioner took office on June 8, 1950 (Fdg. 3, R. 23-24).

On December 10, 1953, President Eisenhower removed petitioner from office on the ground that he regarded it "as in the national interest to complete the administration of the War Claims Act of 1948, as amended, with personnel of * * * [his] own selection" (Fdg. 4, R. 24).[31] The following day, the President gave recess appointments to Whitney Gillilland, Pearl Carter Pace, and Raymond T. Armbruster as members of the War Claims Commission (Fdg. 5, R. 24). The nominations of the three were sent to the Senate in February 1954 (Fdg. 7, R. 24) but had not been confirmed by July 1, 1954, when the War Claims Commission was abolished pursuant to Reorganization Plan No. 1 of 1954, which had been transmitted to Con-

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jurisdiction to determine claims under the Yugoslav Claims Agreement of 1948, and the Convention of October 11, 1950, between the United States and the Republic of Panama. *Settlement of Claims, supra,* fn. 26, p. 6.

[29] War Claims Commission, First Semi-annual Report, p. 2.

[30] *Ibid.*

[31] On the same day, President Eisenhower removed Commissioner Georgia L. Lusk. There was a vacancy on the Commission caused by the death of its Chairman, Daniel E. Cleary (Complaint, par. 6, R. 4).

gress on April 29, 1954. On July 23, 1954, the President nominated Whitney Gillilland to be Chairman, and Pearl Carter Pace and Henry J. Clay [32] to be Commissioners, of the Foreign Claims Settlement Commission. The Senate confirmed those nominations on August 6, 1954.[33]

3. *The quo warranto proceedings.* On February 3, 1954, petitioner instituted quo warranto proceedings in the United States District Court for the District of Columbia against Whitney Gillilland, Pearl Carter Pace, and Raymond T. Armbruster, the President's appointees to the War Claims Commission (Fdg. 11, R. 25). The theory of this action was that petitioner's term of office ran until the winding up of the affairs of the Commission (*supra,* pp. 10-11), that the President lacked power to dismiss him prior to the expiration of this term of office, that petitioner's removal from office was therefore null and void, and that respondents for lack of vacancies had not been appointed validly to the War Claims Commission (Fdg. 11, R. 25). Upon respondents' motion to dismiss, or in the alternative for summary judgment, the District Court ruled that "the War Claims Commissioners held their office at the pleasure of the President, the War Claims Act contains no limitation upon or prohibition of the exercise of the executive power of removal conferred upon the President of the United States",[34] and dismissed the action (Fdg. 11, R. 25).

The abolition of the War Claims Commission by

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[32] Mr. Clay had been the Acting Chairman of the International Claims Commission of the United States (*supra,* p. 11). *Settlement of Claims, supra,* fn. 26, p. 9.

[33] *Settlement of Claims, supra,* fn. 26, p. 3.

[34] Appendix, *infra,* pp. 86-87.

virtue of Reorganization Plan No. 1 of 1954 (*supra,* p. 11) mooted petitioner's appeal before it could be heard. The parties consequently dismissed the appeal by stipulation, without, however, providing for the reversal or vacating of the District Court's judgment of dismissal (Fdg. 11, R. 25-26).

4. *The proceedings below.* After the dismissal of the appeal in the quo warranto proceedings, petitioner instituted this action in the Court of Claims. Here, he seeks to recover his compensation as a War Claims Commissioner from December 10, 1953, the day of his removal, to June 30, 1954, the last day before the War Claims Commission was abolished (R. 1-6). The action in the Court of Claims was based—as were the proceedings in the District Court—on the theory that the President did not have the power to remove petitioner during his "term of office". In its answer (R. 9-12), the Government pleaded that the President had the power to remove the petitioner from office, and that the final judgment in the District Court, which had not been vacated, was res judicata on the issues raised and determined in the Court of Claims proceedings.[35]

The Court of Claims dismissed the complaint (R. 13-21). The majority opinion, per Madden, J., held that the President had the power to remove petitioner because, although in the court's opinion the functions performed by the War Claims Commission were of a legislative and judicial—and not of an executive—nature, Congress had not limited the President's removal power. The court pointed out that, in the absence of any statutory provisions concerning removal, petitioner

[35] The pertinent parts of the record of the District Court proceedings were introduced in evidence in the court below in order to prove the plea of res judicata.

was either freely removable by the President or subject only to "cumbersome, time-consuming and rarely used method of impeachment" (R. 19). The majority did not believe that Congress intended the latter. If Congress actually had desired to curtail the President's powers of removal, it certainly would "have provided him with a limited power which would relieve Congress of the intolerable burden of an impeachment proceeding" (R. 20). The opinion also interpreted petitioner's "term of office" as designed, "not to protect the members of the Commission in their tenure, but to protect the Treasury and the public against the perpetuation of an agency which was meant to be temporary" (R. 20).

Whittaker, J., dissented on the ground that, if the War Claims Commission was a part of the judicial or legislative branches of the Government, the President could not remove petitioner unless the power to do this were conferred upon him by Congress in express words (R. 21-22).

SUMMARY OF ARGUMENT

A

A constitutional usage which goes back to the very first year in which the Constitution became effective establishes that the President has the unlimited power to remove all the "officers of the United States" appointed by him, subject only to constitutional or statutory restrictions with respect to non-executive officers.

The President's removal power rests essentially on three considerations: first, the canon of construction well known to the Founding Fathers that the power to appoint carries with it the power to remove; second, the President's constitutional duty to take care that

the laws be faithfully executed—a duty which cannot be performed if the President is unable to control the officers who carry out the laws; and third, the postulate of executive unity—*i.e.*, that the President is the head of the entire executive branch. The latter two considerations negate any power of Congress to curtail the President's power to remove officers in the executive branch (*Myers* v. *United States*, 272 U.S. 52). On the other hand, in the case of non-executive officers, the President's removal power is based merely on the rebuttable rule of construction that the power to appoint such officers implies the power to discharge them. Congress therefore may limit the President's power to remove those officers, either expressly or by clear implication (*Humphrey's Executor* v. *United States*, 295 U.S. 602). The circumstance that an officer is not in the executive branch thus does not mean that the President lacks the power to discharge him in the absence of congressional authorization, but only that Congress may curtail the power of removal flowing from the power of appointment.

While there has been some disagreement on the question as to whether Congress could limit the President's removal power, the basis of the Decision of 1789—*viz.*, that the power of removal is incident to the President's power of appointment—never has been questioned seriously. Indeed, as early as the 1830's, it was accepted as the practical construction of the Constitution even by those who opposed President Jackson's personnel policies. The President repeatedly has exercised the power to remove non-executive officers (*e.g.*, judges of territorial courts) and has been upheld by this Court.

Petitioner's theory that the President needs congressional authorization for the removal of non-executive officers thus not merely misconceives the settled law, but also conflicts with a constitutional usage which has been accepted as the correct interpretation of the Constitution for nearly 170 years.

B

Petitioner was an officer in the executive branch of the Government and accordingly subject to the President's unlimited removal power.

1. The War Claims Commission was not an arm of Congress. *Humphrey's Executor* v. *United States,* 295 U.S. 602, is concerned with independent regulatory commissions—*i.e.,* with agencies which administer incomplete or skeleton legislation and which actually perform the last step in the legislative process. The War Claims Commission, in contrast, dealt with a statute complete in its policy aspects. The enforcement of such a statute is confided exclusively to the executive branch, and the officers engaged in this task are subject to the President's unlimited removal power.

2. Nor did petitioner exercise any part of the judicial power of the United States. The distinctive element of the judicial power is the determination of actual controversies in proceedings of a traditional judicial nature; it is not simply the determination of legal questions or the adjudication of claims. The latter two functions have been performed habitually by the other two branches. The determination whether a person is entitled to the benefits under a statute or treaty does not constitute the resolution of a contro-

versy; a dispute arises only after a claim has been rejected. Indeed, it has been held that determinations such as those performed by the War Claims Commission are "entirely alien to the legitimate functions of a judge" and have "no analogy" to the general powers of a court. Moreover, the overwhelming majority of the claims presented to the War Claims Commission involved claims against foreign governments based upon the violation of international law. They therefore were not of a justiciable nature, because our courts do not sit in judgment over the acts of a foreign government outside the United States.

3. The determination of claims of American citizens against foreign countries, the principal business of the War Crimes Commission, is of a peculiarly executive nature. An individual has no standing to prosecute a claim against a foreign sovereign except to the extent that his government espouses it. The War Claims Act making alien property funds available for the satisfaction of American claimants against Germany and Japan constituted such an act of diplomatic protection. The determination of individual claims by the War Claims Commission thus constituted an important aspect of the foreign relations power. The latter power is vested in the two political branches—legislative and executive—to the exclusion of the judicial one. And, as between the two political branches, the executive normally has primacy. *E.g., United States* v. *Curtiss-Wright Corp.,* 299 U.S. 304.

Congress has been fully aware of the executive nature of the War Claims Commission. This appears from the circumstance that it was intended to receive a status analogous to that of the Mixed Claims Com-

mission. In addition, some functions comparable to those performed by the War Claims Commission were assigned to an establishment of an unquestionably executive nature (the Federal Security Agency). The circumstance that Congress ratified Reorganization Plan No. 1 of 1954 abolishing the War Claims Commission also indicates that Congress understood the Commission to be of an executive nature, because under the Reorganization Act of 1949 the President's reorganization powers were limited to agencies in the executive branch of the Government.

C

Congress has not limited the President's removal power either expressly or by implication. To the contrary, it is the import of the statutory plan that the President was expected to exercise the removal power.

1. The unmodified judgment in the quo warranto action establishes, under ordinary principle of res judicata and collateral estoppel, that Congress did not limit the President's removal power. This judgment is binding upon petitioner because the real parties in interest are identical in the two cases. The circumstance that petitioner's appeal was dismissed for mootness does not detract from the binding effect of the District Court's judgment in the absence of an order vacating the judgment or dismissing the proceedings. *United States* v. *Munsingwear,* 340 U.S. 36.

2. The War Claims Act did not expressly limit the President's removal power. In *Humphrey,* this Court based the limitation of the President's removal power on the fact that the statute specified certain grounds for dismissal and held that this enumeration was ex-

clusive under the *expressio unius* rule. The War Claims Act does not contain any corresponding provisions. The clause that petitioner's term of office would expire at the time fixed for the winding up of the Commission does not limit the President's removal power. Clauses of that type consistently have been construed as a limitation upon the term of office, not as a grant of irremovability for that period of time.

3. The clear implication of the statutory plan is, not that Congress intended to curtail the President's removal power, but rather that Congress must have contemplated his exercise of that power. The circumstance that a board is set up as a separate agency means merely that its members are not to be the subordinates of a department head—not that they are to be exempt from presidential control. With respect to the Federal Trade Commission, involved in *Humphrey,* the membership of the Commission is bi-partisan in composition, its decisions are subject to judicial review, and the Commissioners are subject to removal by the President for inefficiency, neglect of duty, or malfeasance in office. A holding in this case that the President could not remove petitioner means that an agency such as the War Claims Commission—which was not bi-partisan, whose decisions were not subject to judicial review, which could dispose of a fund amounting to nearly $300,000,000, and whose rulings touch on extremely sensitive areas in the field of foreign relations—would be subject only to the practically unusable impeachment power of Congress. The result would be to invite irresponsibility.

Moreover, it is hardly likely that Congress intended to grant to petitioner a position superior

to that of the members of the Interstate Commerce and Federal Trade Commissions, and the National Labor Relations, Civil Aeronautics, and the Subversive Activities Control Boards, the members of which are removable for cause by the President. In addition, in each of the three statutes enacted after *Humphrey* establishing regulatory commissions, Congress limited the President's removal power in terms. The failure of Congress to do so in enacting the War Claims Act further indicates that no such curtailment was intended.

4. The decision in this case will have no bearing on the tenure of members of the Federal Power, Federal Communications, Securities and Exchange, and Tariff Commissions, as well as the tenure of the District Judges in Hawaii and Puerto Rico.

ARGUMENT

Petitioner, Appointed by the President to the Office of War Claims Commissioner under the War Claims Act of 1948, Was Properly Removed from that Office by Action of the President

As shown below (pp. 22-43), this Court's decisions and a consistent constitutional practice since 1789 confirm the President's unlimited power to remove all officers appointed by him (*Myers* v. *United States,* 272 U. S. 52), subject only to constitutional or statutory restrictions with respect to non-executive officers (*Humphrey's Executor* v. *United States*, 295 U. S. 602). It follows, therefore, that petitioner's removal was proper if, as we shall demonstrate (pp. 43-68), petitioner was an officer in the executive branch of the Government. On the other hand, assuming *arguendo* that petitioner was not an officer in the executive branch,

we shall also demonstrate (pp. 68-81) that in the instant case (unlike *Humphrey, supra*) Congress had not placed any limitations on the President's removal power. Quite the contrary, the statutory plan indicates that Congress must have contemplated the President's exercise of that power (pp. 81-82).

A. Under This Court's Decisions and According to a Consistent Constitutional Practice since 1789, the President Has Unlimited Power to Remove All Officers Appointed by Him, Subject Only to Constitutional or Statutory Restrictions with Respect to Non-executive Officers.

1. *The Constitution and the Decision of 1789*

Article II, Section 2, of the Constitution (*supra*, pp. 2-3) specifies that, unless otherwise provided in the Constitution, the President, by and with the consent and advice of the Senate, has the power to appoint the "Officers of the United States",[36] but the Congress may vest the appointment of inferior officers in the President alone, the courts of law, or in the department heads. There is, however, no corresponding provision relating to the authority to remove officers.

This omission became apparent when, during the early weeks of its first session, the First Congress sought to organize the departments of the newly established government. Then the question arose as to whether the President had, or should be granted, the authority to remove the department heads. Congress determined that, under the Constitution, such authority rested in the President alone. The detailed and searching debates which led to the "Decision of 1789", which constitutes the authentic and virtually contempora-

[36] For the sake of brevity and convenience, we shall use in this brief the term "officer of the United States" as limited to those officers who are appointed by the President, by and with the advice and consent of the Senate, except for judges of constitutional courts.

neous interpretation of the Constitution by the First Congress, composed of many of the members of the Constitutional Convention, have been described often enough.[37] Hence, we need not burden this brief with a detailed exposition of those discussions. It will suffice to mention only the basic considerations, expounded in the three major speeches by James Madison,[38] which caused Congress to conclude that the Constitution vested the power of removal in the President alone.

The epitome of Mr. Madison's arguments is contained in his speech of June 22, 1789 (1 Ann. Cong. 581-582):

> * * * I therefore shall only say, if there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is just that which separates the Legislative, Executive, and Judicial powers. If there is any point in which the separation of the Legislative and Executive powers ought to be maintained with greater caution, it is that which relates to officers and offices. The powers relative to offices are partly Legislative and partly Executive. The Legislature creates the office, defines the powers, limits its duration, and annexes a compensation. This done, the Legislative power ceases * * *. We ought always to consider the Constitution with an eye to the principles upon which it was founded. * * * [39]

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[37] See, *e.g.*, *Parsons* v. *United States*, 167 U.S. 324, 328-330; *Myers* v. *United States*, 272 U.S. 52, 111-132.

[38] June 16, 1789 (1 Ann. Cong. 461-465); June 17, 1789 (1 Ann. Cong. 495-501); and June 22, 1789 (1 Ann. Cong. 581-582).

[39] The doctrine of the separation of powers, which underlies so many of the problems of this case, stems in large part from Montesquieu's Discourse on the Constitution of England (*Spirit of Laws*, Book XI, ch. 6). The profound influence of Montesquieu's writings on the Constitutional Convention is well borne out by the fre-

Earlier in the debate Madison had given three specific reasons in support of the thesis that the Constitution had vested the removal power in the President alone, and that he did not share it with the Senate. He relied on the general rule of construction pursuant to which "the power of removal resulted by a natural implication from the power of appointing" (1 Ann. Cong. 496). This, however, does not compel the conclusion that the Senate, which has the power to advise and consent to appointments, has the same authority with respect to removals. For, as Madison pointed out, the participation of the Senate in the appointment of officers of the United States constitutes such an exception to the basic constitutional principle of the separation of powers [40] that it must be construed strictly and may not be extended beyond the very letter of the Constitution by the process of implication (1 Ann. Cong. 462, 463, 496-501).[41]

Apart from his reliance on the canon of construc-

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quent references to him during the discussions. See the index in Farrand, *The Records of the Federal Convention*, 1787 (Rev. Ed. 1937), Vol. IV, p. 183; cf. Sharp, *The Separation of Powers*, 2 U. of Chicago Law Review 385, 419.

[40] For other objections to this participation based on the same considerations, see also Farrand, *ibid.*, Vol. II, pp. 538-539, and 1 Ann. Cong. 557. There are indications that the purpose of the senatorial part in the appointment of officers was less to check on unwise appointments than to insure the appointment of officials from smaller states. Farrand, *ibid.*, Vol. III, p. 99; *Myers* v. *United States*, 272 U.S. 52, 110-111, 119-120.

[41] During the debates in the Senate on the bill, Senator (subsequently Chief Justice) Ellsworth stated that the power to advise and consent was not a part of the power to appoint. According to the diary of John Adams, then presiding over the Senate, Senator Ellsworth said "the President, not the Senate, appoint; they only consent and advise". C. F. Adams, *The Works of John Adams*, Vol. III, p. 409. For another version of that speech, see Bancroft, *History of the Constitution of the United States*, Vol. 2, p. 192; and *Myers* v. *United States*, 272 U.S. 52 at 122-123.

tion that the power to appoint implies the power to remove, Madison expressed two further considerations. He pointed out that, inasmuch as the President had the responsibility for the faithful execution of the laws under Art. II, Section 3, of the Constitution (*supra,* p. 3),[42] he necessarily had to have the authority to remove those officials whom he did not trust (1 Ann. Cong. 462-465, 496-501).[43] Moreover, he referred to the "great principle of unity and responsibility in the Executive department, which was intended for the security of liberty and the public good" (1 Ann. Cong. 499) and warned of the consequences which would result if Government officers defying the President could join "in cabal with the Senate" (1 Ann. Cong. 462), thus preventing their removal and reducing the power of the President "to a mere vapor" (1 Ann. Cong. 462, 497-500).[44]

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[42] The "take care" clause is but a paraphrase of the cardinal executive function to carry the laws into effect. The earlier drafts of the Constitution used language such as "general authority to execute the National laws" (I Farrand, *ibid.*, 21, 63), "power to carry into effect the national laws" (I Farrand, *ibid.*, 66-67), "to carry into execution the national laws" (I Farrand, *ibid.*, 226, 230, 236), "general authority to execute the federal acts" (I Farrand, *ibid.*, 244), "the execution of all laws passed" (I Farrand, *ibid.*, 292). One of the drafts in the Committee of Detail read "to attend to the Execution of the Laws of the United States" (II Farrand, *ibid.*, 158). The clause was ultimately reported out of that Committee substantially in its present form (II Farrand, *ibid.*, 185).

[43] Mr. Madison suggested that the wanton removal of a meritorious official might constitute a ground for the impeachment of the President (1 Ann. Cong. 498). He also indicated the President's inability to remove an unreliable officer might have far more serious consequences than his inability to obtain senatorial advice and consent to the appointment of a qualified one (1 Ann. Cong. 496-497). See *Myers* v. *United States,* 272 U.S. 52, 121-122.

[44] Madison also exploded the notion that the several Senators responsible only to the states from which they were elected were better guardians of liberty and freedom than the President who is responsible to the whole community (1 Ann. Cong. 499).

The House of Representatives accepted the arguments of Mr. Madison and of his associates and, by a considerable margin,[45] passed the Act establishing the Department of Foreign Affairs in a form indicating that the power to remove the Secretary of Foreign Affairs was vested in the President by virtue of the Constitution and not by congressional grant.[46] In the Senate, however, a tie required Vice President Adams to cast his vote in favor of the "Decision". It is reported that Adams never had the shadow of a doubt of its soundness.[47]

Nor did Madison ever recede from the Decision of 1789. He reaffirmed it expressly in the Helvidius Letters,[48] thus demonstrating that the President's re-

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[45] 31 to 19 (1 Ann. Cong. 585).

[46] Act of July 27, 1789, Section 2, 1 Stat. 29.

A week later, in connection with the establishment of the Treasury Department, Mr. Madison discussed the office of Comptroller of that department (1 Ann. Cong. 611-614). He felt that this official did not perform purely executive functions but that he ought to be considered "something in the light of an arbitrator between the public and individuals" (1 Ann. Cong. 612), hence, that the properties of his office "partake of a Judiciary quality" (1 Ann. Cong. 611). Madison therefore felt that this type of official should not hold his office at the sole pleasure of the Executive, but that in order to insure his impartiality he should be given such tenure as to be responsible and dependent on the public generally. He therefore proposed that the Comptroller's office should be limited to a term of years. This would not affect the President's removal power; on the other hand, it would give the Senate the opportunity to deny reconfirmation to a Comptroller who permitted the President to interfere with his functions. It will be noted that Mr. Madison did not suggest that the President's removal power be limited, but that it be neutralized by limiting the duration of the term of the Comptroller's office. Mr. Madison's recommendations were not adopted by Congress; the statute organizing the Treasury Department (1 Stat. 65) did not specify a definite term of office for the comptroller.

[47] C. F. Adams, *The Works of John Adams*, Vol. I, p. 450; see also the letter of John Adams to James Lovell, dated September 1, 1789, *ibid.*, Vol. VIII, pp. 493-495.

[48] *Letters and Other Writings of James Madison*, Vol. I, p. 619.

moval power is not based on any notion of inherent executive powers which Madison had repudiated in those letters.[49] And in 1834, when the Decision of 1789 was under attack in the Senate,[50] Madison in his "eighty-fourth year, and with a constitution crippled by disease" [51] rallied to its defense stating:

> The claim, on *constitutional* ground, to a share [of the Senate] in the removal as well as appointment of officers, is in direct opposition to the uniform practice of the Government from its commencement. It is clear that the innovation would not only vary, essentially, the existing balance of power, but expose the Executive, occasionally, to a total inaction, and at all times to delays fatal to the due execution of the laws. [Emphasis in original.] [52]

The removal power was sparingly exercised during the administration of the first six Presidents. The large number of political dismissals by President Jackson, however, placed the problem of the President's removal power again in the public spotlight.[53] It is significant that many of those who opposed President Jackson's actions concluded either that the Decision of 1789 constituted the correct interpretation of the Constitution, or that it could not be challenged any longer after nearly half a century of established

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[49] *Ibid.*, pp. 607-654.

[50] See *Myers* v. *United States,* 272 U.S. 52, 150-151, and *infra,* p. 28.

[51] *Letters and Other Writings of James Madison,* Vol. IV, p. 366.

[52] Letter from James Madison to Edward Coles dated October 15, 1834, *Letters and Other Writings of James Madison,* Vol. IV, pp. 366, 368.

[53] Story, *Commentaries on the Constitution of the United States* (5th ed.), Vol. 2, Section 1543. See 272 U.S. at 149-150.

constitutional practice. *Myers* v. *United States,* 272 U.S. 52, 148-152. In Chancellor Kent's view, "[t]hat the President [Andrew Jackson] grossly abuses the power of removal is manifest";[54] nevertheless, in his Commentaries, he took the position that the issue "may now be considered as firmly and definitely settled, and there is good sense and practical utility in the construction".[55] Mr. Justice Story, too, pointed to the large increase in the number of removals under President Jackson, and, leaving it up to the reader to determine whether the Decision of 1789 constituted "any aberration from the true constitutional exposition of the power of removal", stressed that "it will be difficult, and perhaps impracticable, after forty years' experience, to recall the practice to the correct theory".[56] In 1834 Daniel Webster stated on the floor of the Senate that, although he disapproved of the removal of Secretary of the Treasury Duane, and considered it an abuse of power, "yet the power of removal does exist in the President, according to the *established* construction of the constitution" and, hence, "its exercise cannot be justly said to be an assumption or usurpation" (10 Debates in Congress, 1664, emphasis added).[57]

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[54] Letter from Chancellor Kent to Daniel Webster, dated January 21, 1830, Fletcher Webster, *Private Correspondence of Daniel Webster*, Vol. 1, pp. 486, 487. See 272 U.S. at 148-149.

[55] Kent, *Commentaries*, Vol. 1, p. 310. See 272 U.S. at 149.

[56] Story, *Commentaries on the Constitution of the United States* (5th ed.), Vol. 2, Sections 1543, 1544. See 272 U.S. at 149-150.

[57] The following year, however, Mr. Webster took the position that, although the Decision of 1789 had been established as the "settled construction of the constitution" and that it was the duty of Congress "to act upon the case accordingly, for the present," Congress had the power to regulate "the condition, duration, qualification, and tenure of office, in all cases where the constitution has made no express provision on the subject". 11 Debates in Congress, 470. See 272 U.S. at 150-152.

After the termination of the Jacksonian era, Whig Attorney General Legaré similarly took the position that the question of the President's removal power was no longer *res integra* and that it was too late to dispute the issue settled in 1789 (4 Op. Att. Gen. 1 (1842)). During the following twenty years, this opinion was accepted by his successors regardless of whether they served under a Democrat or a Whig.[58]

Beginning with *Matter of Hennen,* 13 Pet. 230, 259-260, decided in 1839, this Court has accepted the Decision of 1789—*viz.,* that the power of removal was vested in the President alone because the power to remove is an incident of the power of appointment as the "settled usage and practical construction of the constitution * * *". See also *Blake* v. *United States,* 103 U.S. 227, 231-233.

2. *Congress cannot limit the President's power to remove officers in the executive branch of the Government*

a. *Congressional attempts during the Civil War and Reconstruction periods to curtail the President's removal power.*—The Decision of 1789 was concerned directly only with the issue whether the President could remove officers without the advice and consent of the Senate. It did not deal necessarily with the contention made by Daniel Webster [59] that Congress could regulate the duration and tenure of office in all those cases where the Constitution had made no express provision on the subject.

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[58] Attorney General (later Mr. Justice) Clifford, 4 Op. Att. Gen. 603, 608-610 (1847); Attorney General Crittenden, 5 Op. Att. Gen. 288, 290 (1851); Attorney General Cushing, 6 Op. Att. Gen. 4, 6 (1853).

[59] See fn. 57, *supra.*

This latter problem came to the fore during the Civil War and Reconstruction periods, when, beginning with the Currency Act of February 25, 1863, 12 Stat. 665, Congress passed a series of statutes, including the Act of July 12, 1876, 19 Stat. 78, 80, 81, relating to the offices of postmasters of the first, second, and third classes, which required senatorial advice and consent for the removal of certain officers. The most important and famous legislation was the Tenure of Office Act of March 2, 1867, 14 Stat. 430, passed during the disputes between President Johnson and the Congress. Under that statute, all officers appointed by and with the advice and consent of the Senate held office until their successors had qualified in a like manner. Cabinet members were to hold their offices for the term of the President who had appointed them and for one month thereafter, subject to removal by and with the advice of the Senate.

President Johnson vetoed the act on the ground that it conflicted with the well-settled interpretation of the Constitution of the United States.[60] While Congress overrode the veto, the inconsistency of the Tenure of Office Act with the traditional operation of the Constitution was recognized as soon as the split between the President and Congress came to a close with the expiration of President Johnson's term. Congress immediately relaxed the Tenure of Office Act (Act of April 5, 1869, 16 Stat. 6). President Grant's first annual mes-

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[60] Richardson, *Messages and Papers of the Presidents*, Vol. 6, pp. 492, 498. In *Parsons* v. *United States*, 167 U.S. 324, 340, the Court held: "The continued and uninterrupted practice of the Government from 1789 was thus broken in upon and changed by the passage of this act * * *".

sage recommended the complete repeal of the Act on the grounds the framers of the Constitution could not have intended to confer upon the Senate the power to retain anyone in office against the will of the President, that the faithful and efficient administration of the Government could not be maintained if the President had to work with officials in whom he could not confide, and that officials who knew that their superiors did not trust them were not likely to render faithful service.[61]

In spite of the urgings of President Grant, it took nearly 20 years before the Tenure of Office Act, or more specifically R.S. 1767-1772, into which that Act as amended had been codified, was finally repealed (Act of March 3, 1887, 24 Stat. 500). The pertinent committee report (H. Rept. 3539, 49th Cong., 2d Sess.) significantly stated as the reason for the repeal:

> * * * the law will then stand as it stood from the foundation of the Government up to 1867, when, in a time of great party excitement, the said legislation was enacted, which, to say the least, was unusual, and tended to embarrass the President in the exercise of his constitutional prerogative.

The repeal of the Tenure of Office Act and of R.S. 1767-1772 prevented a determination of their constitutionality by this Court. *Parsons* v. *United States,* 167 U.S. 324, 339-341. This Court, however, consistently held that, in the absence of a clear statutory provision to the contrary,[62] the President's power to appoint im-

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[61] Richardson, *Messages and Papers of the Presidents,* Vol. 7, pp. 27, 38. See also 2 Blaine, *Twenty Years of Congress,* 273-274, 449-456.

[62] *Shurtleff* v. *United States,* 189 U.S. 311, 315-316.

plied the power to remove [63] not merely executive officers but also judges of legislative courts. *McAllister* v. *United States,*[64] 141 U.S. 174 (Territorial Court), *Shurtleff* v. *United States,* 189 U.S. 311 (Board of General Appraisers of Merchandise).[65]

b. *The decision in Myers* v. *United States, 272 U.S. 52.*—The question whether Congress could limit the President's removal power was presented to this Court nearly forty years after the abrogation of the Tenure of Office Act in connection with the unrepealed Act of July 12, 1876 (*supra,* p. 30), pursuant to which postmasters of the first to third classes could be discharged by the President only by and with the advice and consent of the Senate. In 1920, one Myers, the Postmaster of Portland, Oregon, was removed from office by direction of the President, who had not obtained senatorial approval of this action. Myers sued for his salary in the Court of Claims, claiming that his removal was ineffective in the absence of the advice and consent of the Senate. The Court of Claims dismissed his petition on the ground of laches. This Court affirmed on the ground that the 1876 Act unconstitutionally attempted

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[63] *United States* v. *Allred,* 155 U.S. 591, 595; *Keim* v. *United States,* 177 U.S. 290, 293-294; *Reagan* v. *United States,* 182 U.S. 419, 426; *Shurtleff* v. *United States,* 189 U.S. 311, 316; *Burnap* v. *United States,* 252 U.S. 512, 515; *Norris* v. *United States,* 257 U.S. 77, 81.

[64] In 1851 Attorney General Crittenden had ruled that the President's removal power extended to territorial judges (5 Op. Att. Gen. 288). This Court, however, did not pass on the merits of the resulting controversy. See *United States ex rel. Goodrich* v. *Guthrie,* 17 How. 284.

[65] The Board of General Appraisers was renamed the "United States Customs Court" without change of its jurisdiction, function or of the status, powers and duties of its members. Act of May 28, 1926, 44 Stat. (Pt. II) 669; see also *Ex parte Bakelite Corp.,* 279 U.S. 438, 458.

to limit the President's power to remove officers appointed by him with the advice and consent of the Senate.

The majority opinion written by Chief Justice Taft [66] carefully re-examined the Decision of 1789, and traced its full acceptance by the executive and the judicial branches throughout the history of the Republic to the very eve of the decision.[67] The opinion showed that the President's power to appoint officers of the United States carries with it the power to remove them and that the Senate's power to advise and consent to appointments does not extend to removals, not only because the participation of that body in the appointment of officers constitutes an exception to the basic constitutional scheme of the separation of powers, but also because the power to remove is an incident of the power to appoint and not of the power to advise and consent (272 U.S. at 122).[68] In addition, the Court held that under the "take care" clause of the Constitution the President is responsible for the faithful execution of the laws and that Congress could not interfere with the President's performance of this duty by curtailing his control over the federal personnel (272 U.S. at 177, 162-164).

The Court pointed out that, where Congress seeks to limit the evils of spoils and patronage in the area of inferior officers, it may do so by the simple method of

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[66] For the share of Mr. Justice Stone in the editing of this opinion, see Mason, *Harlan Fiske Stone: Pillar of the Law*, pp. 222-231.

[67] Cf. President Coolidge's Message of February 13, 1924, 65 Cong. Rec. 2335 (272 U.S. at 170). *Myers* was argued on December 5, 1923, reargued April 13 and 14, 1925, and decided October 25, 1926 (272 U.S. at 52).

[68] Chief Justice Taft thus accepted the argument of his predecessor Ellsworth (*supra*, fn. 41).

vesting the appointment in the President alone or in the department heads (272 U.S. 162, 164). The decision left open the question of whether Congress could control the removal of the judges of legislative courts (272 U.S. at 157-158). It also considered the problem touched upon by Mr. Madison in the discussion of the tenure of the Comptroller of the Treasury, *i.e.,* that of executive officers having adjudicative duties.[69] With respect to such officials, the opinion stated that, while the President could not properly interfere with their decisions, he could consider their rulings as a reason for their removal on the ground that they had not intelligently or wisely exercised their discretion, for otherwise the President "does not discharge his own constitutional duty of seeing that the laws be faithfully executed" (272 U.S. at 135).

There were three dissents. Mr. Justice Holmes felt that the arguments drawn from the doctrine of the separation of powers were "spider's webs inadequate to control the dominant facts," especially the fact of congressional power over the existence and duration of the office involved (272 U.S. at 177).[70] The dissenting opinion of Mr. Justice McReynolds reasoned that, since the Constitution does not in terms confer the removal power on the President, any attempt to derive it by implication from his specifically delegated powers actually relied upon inherent prerogative powers of the executive and accordingly violated the basic theory of the republican form of government (272 U.S. at 178-239).

Mr. Justice Brandeis agreed with the Court's holding

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[69] See fn. 46, *supra.*

[70] Cf. his dissent in *Springer* v. *Philippine Islands,* 277 U.S. 189, 209.

that, in the absence of legislation to the contrary, the President alone has the power to remove officers of the United States (272 U.S. at 241).[71] He felt, however, that the rationale of the Decision of 1789, involving political cabinet members and other high-ranking officers, had no bearing on the President's power over inferior officers such as postmasters. Since the Constitution permitted Congress to place limitations upon the President's removal power by placing their appointment in the department heads, he could not see any reason why Congress could not exempt such officers from the realm of spoils and patronage by making their removal dependent upon senatorial consent. The dissent also sought to demonstrate that the legislation requiring senatorial consent for the dismissal of inferior officers (*supra,* p. 30) actually constituted a forerunner of the merit system and of the civil service legislation (272 U.S. at 240-295).

3. *The President has full power to remove non-executive officers in the absence of constitutional or statutory limitations*

a. *The decision in Humphrey's Executor* v. *United States, 295 U.S. 602.*—Under the Constitution, the President's power of appointment is not limited to the officers of the executive branch, but extends to all officers of the United States for whose appointment the Constitution does not make any other provision. The rule that the President's removal power is plenary is based on three grounds: the canon of construction that the power to appoint includes the power to remove, the President's duty to take care that the laws be faithfully

[71] Mr. Justice Brandeis was the author of the Court's opinion in *Burnap* v. *United States,* 252 U.S. 512, *supra,* fn. 63.

executed, and the postulate of executive unity.[72] The latter two considerations, of course, do not support the President's power to remove non-executive officers. As to those, his power to dismiss rests only on the rebuttable canon of construction that the power to appoint includes the power to remove.[73] *Humphrey's Executor* v. *United States,* 295 U.S. 602, addressed itself to that problem.

The members of the Federal Trade Commission are appointed for a term of seven years. They may be removed by the President for inefficiency, neglect of duty, or malfeasance in office (Federal Trade Commission Act, Section 1, 38 Stat. 717, 15 U.S.C. 41). During the early months of his first administration, President F. D. Roosevelt requested Federal Trade Commissioner Humphrey to resign because he felt that the President's and the Commissioner's minds did not "go along together on either the policies or the administering of the Federal Trade Commission" and because the President felt that it would be best if he could have "full confidence" in the Commissioners of the several agencies. *Humphrey's Executor* v. *United States,* 295 U.S. at 619. When Commissioner Hum-

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[72] *Supra,* pp. 24-25. For the great weight placed by Chief Justice Taft on the latter consideration, see, *e.g.,* his letter to Thomas W. Shelton dated November 9, 1926: "I am very strongly convinced that the danger to this country is in the enlargement of the powers of Congress, rather than in the maintenance in full of the executive power. Congress is getting into the habit of forming boards who really exercise executive power, and attempting to make them independent of the President after they have been appointed and confirmed. This merely makes a hydra-headed Executive, and if the terms are lengthened so as to exceed the duration of a particular Executive, a new Executive will find himself stripped of control of important functions, for which as the head of the Government he becomes responsible, but whose action he cannot influence in any way". Mason, *Harlan Fiske Stone: Pillar of the Law,* p. 231.

[73] See *supra,* p. 24.

phrey refused to withdraw, the President removed him from the Commission without assigning any reasons for this action.[74]

The Court held that the President lacked the power to do so. It inferred a congressional intent to render the Commissioners independent of executive authority from the legislative history of the Federal Trade Commission Act, the bi-partisan composition of the Commission, the provision for a definite term of years, and the statutory specification of the grounds for removal.[75] This, the Court concluded, in turn required that the President's removal power had to be limited to the grounds specified in the statute, because a person who holds his office at the pleasure of another cannot maintain an attitude of independence. (295 U.S. at 623-626, 629).

The Court next determined that Congress had the power to isolate the Commission from the Executive in spite of the then recently decided *Myers* case. It held that *Myers* could not be considered controlling in view of the essential differences between the offices of a postmaster and that of a Federal Trade Commis-

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[74] In *The Independent Regulatory Commissions*, 52 Political Science Quarterly 1, 7, Professor Lindsay Rogers discloses that President Roosevelt had considered following the statute and specifying causes for Mr. Humphrey's removal. His legal advisers counseled the "gentler course" of removal without cause in the belief that the *Myers* decision authorized such action.

[75] The Court distinguished *Shurtleff* v. *United States*, 189 U.S. 311, which had held with respect to a General Appraiser of Merchandise, a position later renamed Customs Judge (*supra*, fn. 65) that the enumeration of specific grounds of removal does not necessarily prevent dismissal by the President for other causes on the dicta in the *Shurtleff* case that, if the President had no general removal powers, the office of a general appraiser would have life tenure. This argument, of course, does not apply to a Federal Trade Commissioner whose term is limited to seven years. See *supra*, p. 36.

sioner. Myers was an officer performing duties clearly within the executive department and, hence, "subject to the exclusive and illimitable power of removal by the Chief Executive" (295 U.S. at 627). A Federal Trade Commissioner, on the other hand, does not administer the conventional type of statute which gives the officer charged with its enforcement full guidance as to his duties. He has to "carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed", and the "filling in and administering the details embodied by that general standard" is not in the nature of an executive office but involves quasi-legislative and quasi-judicial functions (295 U.S. at 628).

Moreover, the Federal Trade Commission has the power to make investigations and to report on them to Congress,[76] and to act as master in chancery in certain judicial proceedings instituted by or under the direction of the Attorney General[77] (295 U.S. at 621, 628). The Court held that the Commission acts as an agency of the legislative and judicial departments of the Government to the extent that it exercised the latter two functions (295 U.S. at 628).

The Court concluded that the main duties of the Commissioners[78] were to implement legislative stand-

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[76] The Court found that many such investigations had been made and that some had served as the basis of legislation (295 U.S. at 621).

[77] This power has been invoked rarely. Cushman, *The Constitutional Status of the Independent Regulatory Commissions*, 24 Cornell Law Quarterly 163, 185-186.

[78] The duties of the Commission under Section 6(d) to conduct an investigation at the direction of the President were held to be "so obviously collateral to the main design of the act as not to detract from the force of this general statement as to the character of that body". 295 U.S. at 628, footnote.

ards and to act as agents to the legislative and judicial department, that consequently they did not exercise any part of the executive power vested in the President, that their functions were of a quasi-judicial and quasi-legislative character, and that in those circumstances the rationale of the *Myers* decision—which prevents Congress from limiting the President's control over "purely executive" officers—was inapplicable. Congress thus had the power to restrict the President's removal power over officers who occupy positions similar to those of a Federal Trade Commissioner.[79]

The result of the decision is that the scope of the President's removal power depends on the "character" of the office. The power is illimitable as to officers who perform executive functions; as to those who have a status similar to that in *Humphrey,* Congress may circumscribe the President's removal authority (295 U.S. at 631-632).[80]

b. *The President's power to remove non-executive officers does not require congressional authorization.*— The main thrust of petitioner's brief is the proposition that the President has only such power to remove non-

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[79] The Court was influenced by the consideration that, if the President's power to remove the members of the regulatory commissions was illimitable, the members of the Court of Claims, by the same token, would serve at the President's pleasure (295 U.S. at 629). See, however, the express reservation in *Myers* with respect to the judges of legislative courts (*supra*, p. 34). The Court had held only two years earlier that Congress had the power to reduce the salaries of the judges of that legislative court. *Williams* v. *United States*, 289 U.S. 553.

[80] This Court has denied review of decisions of the Court of Appeals and of the Court of Claims based on this distinction. See *Morgan* v. *Tennessee Valley Authority*, 115 F. 2d 990 (C.A. 6), certiorari denied, 312 U.S. 701; *Farley* v. *United States,* 134 C. Cls. 672, certiorari denied, 352 U.S. 891. See also *Bailey* v. *Richardson*, 182 F. 2d 46, 55 (C.A.D.C.), affirmed by an equally divided Court, 341 U.S. 918; *Carey* v. *United States,* 132 C. Cls. 397.

executive officers as has been conferred upon him by Congress.[81] Such thesis is not supported by any ruling of this Court. It seeks to overthrow a constitutional practice which a century and a quarter ago Chancellor Kent, Mr. Justice Story, and Senator Daniel Webster considered too well established to be open to re-examination.[82]

Petitioner's theory that in the absence of statutory authorization the President has no power to remove non-executive officers is professedly based on the doctrine of the separation of powers, *i.e.*, that the executive department shall not intrude into the affairs of the other two branches. The Constitution through its system of checks and balances, however, has entrusted the President with the authority to appoint *all* officers of the United States for whom the Constitution has not provided otherwise, not only those of the executive branch. The President thus has the power to select most non-executive officers; removal authority stems from the same constitutional plan and is no more incongruous than his unquestionable power to appoint.

The Great Debate of 1789 shows clearly that the Founding Fathers were well aware of the canon of construction that the power to appoint implies the power to remove (1 Ann. Cong. 491, 496, *supra*, p. 24).[83] The Decision of 1789 rested upon it to a large extent (*supra*, p. 24). By the time of

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[81] We assume that petitioner stresses this point so heavily because he recognizes that Congress has not sought to curtail the President's power to remove the members of the War Claims Commission. See *infra*, pp. 72-82.

[82] *Supra*, pp. 27-28.

[83] We have shown, *supra*, pp. 24, 33, that the Senate's functions to advise and consent do not constitute a part of the power to appoint.

President Jackson, the political branches of the Government had fully accepted that Decision, and even during the disputes of the reconstruction era it was recognized that the President's power to appoint entailed the power to remove unless Congress provided to the contrary (*supra,* pp. 30-31). The 1839 decision in *Matter of Hennen,* 13 Pet. 230, 259, accepted the Decision of 1789. This ruling has been followed consistently, ordinarily using the formula that the power to remove is, in the absence of a statutory provision to the contrary, an incident of the power to appoint. *Blake* v. *United States,* 103 U.S. 227, 231; *United States* v. *Allred,* 155 U.S. 591; *Keim* v. *United States,* 177 U.S. 290, 293-294; *Reagan* v. *United States,* 182 U.S. 419, 426; *Shurtleff* v. *United States,* 189 U.S. 311, 316; *Burnap* v. *United States,* 252 U.S. 512, 515; *Norris* v. *United States,* 257 U.S. 77, 81; *Myers* v. *United States,* 272 U.S. 52, 119; *Hargett* v. *Summerfield,* 243 F. 2d 29, 31 (C.A.D.C.), certiorari denied, 353 U.S. 970.

This Court has explicitly upheld the removal of non-executive officers by the President in the absence of statutory authorization. *McAllister* v. *United States,* 141 U.S. 174 (territorial judge)[84]; *Shurtleff* v. *United States,* 189 U.S. 311 (member of board which subsequently was renamed United States Customs Court, *supra,* fn. 65).[85]

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[84] While the opinion seems to rely on the suspension provisions of the Tenure of Office Act, R.S. 1768 (141 U.S. 174, 186-190), this Court pointed out in *Parsons* v. *United States,* 167 U.S. 324, 339-343, that the Tenure of Office Act constituted a limitation on the President's power of removal or suspension, not a source thereof.

[85] *United States ex rel. Goodrich* v. *Guthrie,* 17 How. 284, involved the removal of a territorial judge. The court denied mandamus to the judge because his right to the office was anything but clear. See

Contrary to petitioner's arguments, the *Humphrey* decision (*supra,* pp. 35-39) does not constitute a departure from this unbroken line of constitutional practice. *Humphrey* leaves unaffected the rule that the President's power to appoint non-executive officers implies his power to remove them. It merely concludes that Congress has the power to limit the President's authority to remove non-executive officers because the inference to be drawn from the President's functions under the "take care" clause and from the postulate of executive unity does not extend to them. The stress placed by this Court on demonstrating that Congress had clearly limited the President's removal power, carefully distinguishing but not overruling *Shurtleff* v. *United States,* 189 U.S. 311, shows that there was no intent to abandon the rule, then of 146 years standing, that the power to appoint normally implies the power to remove. Had that been the import of *Humphrey,* as suggested by petitioner, it would have sufficed to demonstrate that Humphrey had not been an executive officer and that Congress had not authorized the President to remove him. Under the *Humphrey* decision, the President does not require any statutory authorization in order to remove a non-executive officer; he has that power, unless Congress restricts it.[86]

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the pertinent opinion of Attorney General Crittenden, 5 Op. Att. Gen. 288, 291, ruling that the President had the power to remove a territorial judge but that in view of the nature of that office "caution and circumspection should be used".

[86] Donovan & Irvine, *The President's Power to Remove Members of Administrative Agencies,* 21 Cornell Law Quarterly 215, 248 (it may be noted that the authors of this article were Humphrey's counsel in this Court); Cushman, *The Constitutional Status of the Independent Regulatory Commissions,* 24 Cornell Law Quarterly 13, and 163, 197.

There thus exists a constitutional custom recognized by this Court, and going back to the very year in which the Constitution became effective, establishing that, in the absence of a statutory provision to the contrary, the President may remove any non-executive officer of the United States appointed by and with the advice and consent of the Senate, excepting judges of the constitutional courts. Such constitutional usage is entitled to the greatest respect and may be overturned only upon a conviction that it is clearly incompatible with the supreme law of the land. *Ex parte Quirin,* 317 U.S. 1, 41, 42; *Inland Waterways Corp.* v. *Young,* 309 U.S. 517, 525; *United States* v. *Midwest Oil Co.,* 236 U.S. 459, 473; *Field* v. *Clark,* 143 U.S. 640, 691.

B. Petitioner Was an Executive Officer Subject to the Unlimited Removal Power of the President

In the preceding portion of the brief, we have outlined the law governing the President's removal power. We have shown that, in view of the President's duties to take care that the laws be faithfully executed and of the postulate of executive unity, the President's power to remove executive officers is not subject to congressional control and that the President's power to appoint non-executive officers carries with it the authority to remove them in the absence of congressional provisions to the contrary. In this portion of the brief (pp. 43-68), we shall show that petitioner was an executive officer and that hence the President's removal power was illimitable. Then, in the concluding portion of our brief (pp. 68-82), we shall demonstrate, assuming *arguendo* that petitioner was not an executive officer, that his removal was nevertheless proper.

Our position that petitioner's duties were of an executive character—opposed to that of the Court of Claims (R. 14-17) [87]—is based on three considerations. First, petitioner administered a "complete" statute; he did not engage in the formulation of general standards, or act as an agent of the legislature or the judiciary. Second, the determination whether a claimant is entitled to benefits under a statute or a treaty does not necessarily constitute the determination of actual cases or controversies—the criterion of the judicial power under the Constitution. Third, the functions of the War Claims Commission were to determine the claims, based upon the violation of international law, of American citizens and nationals against foreign countries; this task constitutes an aspect of the foreign relations power which is of a preeminently executive nature.

1. *The War Claims Commission was not an arm of Congress.*

a. *The rationale of Humphrey is inapplicable to non-regulatory agencies.*—According to *Humphrey's Executor* v. *United States,* 295 U.S. 602, the availability of the President's unlimited removal power depends on the "character" of the office involved, *viz.,* whether it is executive in nature, or similar to that held by Humphrey. We shall demonstrate here that petitioner's office differed from that of a Federal Trade Commissioner in at least one crucial aspect: petitioner had to enforce a statute which gave him full guidance. Humphrey, on the other hand, had to administer a statute which contained

[87] The Government may of course seek to support the judgment below on alternative grounds advanced below. See *United States* v. *American Ry. Express Co.,* 265 U.S. 425, 435; *Langnes* v. *Green,* 282 U.S. 531, 538-539; *Jaffke* v. *Dunham,* 352 U.S. 280, 281.

broad standards and left it to the Federal Trade Commission to fill in and to implement those standards.

The decision of this Court in *Myers* was based on the postulate of the separation of powers, *viz.*, that Congress may not interfere with the President's constitutional function to "take care that the laws be faithfully executed". The *Humphrey* decision does not reject the principle of separation; to the contrary, it professes to reaffirm it (295 U.S. at 629-630), but uses it as an argument for the proposition that the President's removal power is not unlimited with respect to an official "who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President" (295 U.S. at 628). According to the Court, Humphrey was a member of "a commission, which is not only wholly disconnected from the executive department, but which * * * 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" (295 U.S. 630). Cf. *Springer* v. *Philippine Islands,* 277 U.S. 189.

Humphrey thus is based on the peculiarities of the statutes which, mainly resting on the commerce power, establish so-called independent regulatory commissions. The special nature of this type of legislation has been penetratingly analyzed in Mr. Justice Jackson's discussion in *Federal Trade Commission* v. *Ruberoid Co.,* 343 U.S. 470, 483-489 (dissenting opinion),[88] of "the fundamental principles which determine the position of

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[88] This portion of Mr. Jackson's opinion, it should be noted, does not represent any departure from the views of the majority in the *Ruberoid* case.

the administrative process in our system".[89] In the complex area of the regulation of modern business, Congress cannot spell out every detail and make every choice of policy (343 U.S. at 484, 486). It therefore enacts incomplete or skeleton legislation, which requires the intervention of an administrative body to reduce the conflicting abstract policies to concrete regulation (343 U.S. at 485-487). This particular type of administrative activity, *i.e.*, the completion and perfection of the legislative process by implementing and particularizing the policies and standards of a regulatory statute, does not constitute the execution of the laws in the constitutional sense. It actually involves the delegation of the last step of the legislative function to the regulatory agency; and it would appear appropriate that Congress, if it so chooses, may exempt such agency from exclusive executive control. On the other hand, the administration of a "literal" statute which is "complete in policy aspects and ready to be executed as law" constitutes an executive function "confided exclusively to the President and * * * subject to his control" (343 U.S. at 488).

The War Claims Act, as we shall next show, fell into the latter category.

b. *The duties of the War Claims Commissioners did not incluude the formulation of general policies.*—The awards of the War Claims Commission were not part

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[89] Cf. *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 108-109. Humphrey's own counsel recognized that most administrative agencies and commissions are of an executive nature and that the scope of *Humphrey's Executor* v. *United States, supra,* is limited to the regulatory commissions. Donovan & Irvine, *The President's Power to Remove Members of Administrative Agencies,* 21 Cornell Law Quarterly 215, 241-247.

of a program of control or regulation. Instead, the Commission only determined whether certain individuals were entitled to the benefits provided for them by the War Claims Act of 1948.[90] The statute provided all the necessary standards; it was in this sense self-executing. The members of the Commission did not have to "exercise a grant of unexpended legislative power to weigh what the legislature wants weighed, to reduce conflicting abstracting policies to a concrete net remainder of duty or right" (343 U.S. at 487).

The principal duties of the Commissioners were set forth in Sections 5 to 8 of the Act (Stat. App. 76-85). Under Section 5 (Stat. App. 76-79), the Commission was to award to certain civilian internees or to their survivors detention benefits at the rate of $60 for each calendar month of internment and compensation benefits on the basis of a weekly wage of $37.50. The provisions of this section are minutely detailed and do not require any elaboration.

Under Section 6, as originally enacted (Stat. App. 80), prisoners of war (or their survivors) were to receive $1 a day for every day on which an enemy government failed "to furnish him the quantity or quality of food to which he was entitled as a prisoner of war under the terms of the Geneva Convention of July 27,

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[90] The Court of Appeals for the District of Columbia Circuit so held recently with respect to the functions of the successor to the War Claims Commission, the Foreign Claims Settlement Commission. *American & European Agencies, Inc.* v. *Gillilland,* C.A. D.C. No. 13447, decided June 27, 1957, slip opinion, p. 5, pending on petition for a writ of certiorari, No. 502, this Term. For the distinctions between regulatory agencies and those conferring benefits, see also Chamberlain, Dowling, Hays, *The Judicial Function in Federal Administrative Agencies,* pp. 2-7, 8; *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), p. 263.

1929", relating to the Treatment of Prisoners of War (47 Stat., Pt. II, 2021). The standard established by Article 11 of that Convention (47 Stat., Pt. II, 2034) is explicit. It provides that "The food ration of prisoners of war shall be equal in quantity and quality to that of troops at base camps." The application of that rule, as evidenced by War Claims Commission Decisions Nos. 2 and 4,[91] was simple and did not involve the "filling in and administering the details embodied by * * * [a] general standard" (*Humphrey's Executor* v. *United States,* 295 U.S. 602, 628).

In 1952 (*i.e.,* after petitioner had been in office for nearly two years), Congress (*supra,* p. 12) enlarged the jurisdiction of the Commission under Section 6 to pass on claims of prisoners of war based upon violation of Title III, Section III, of the Geneva Convention relating to the labor of prisoners of war (47 Stat., Pt. II, 2041) and upon "inhumane" treatment defined as including but not limited to the violation of Arts. 2, 3, 7, 10, 12, 13, 21, 22, 54, 56, or 57 of the Geneva Convention (47 Stat., Pt. II, 2031, 2032, 2034-2035, 2037-2038, 2049, 2050). Title III, Section III, of the Geneva Convention (Arts. 31 and 32) establishes precisely the types of labor to which prisoners of war may not be subjected, and the term "inhumane" treatment has been defined in the Act so well by the reference to the various provisions of the Convention that little, if anything, was left to the Commission to elaborate further on that term.

Under Section 7 (Stat. App. 83-84), as originally enacted, religious organizations were to be reimbursed for "expenditures incurred or for payment of the fair

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[91] *Settlement of Claims, supra,* fn. 26, pp. 425, 429.

value of supplies used, by such organization * * * for the purpose of furnishing shelter, food, clothing, hospitalization, medicines and medical services, and other relief in the Philippines to members of the armed forces of the United States or to civilian American citizens * * *." The Act of April 9, 1952, 66 Stat. 47, enlarged the scope of this section by providing that such organizations also should be compensated for the loss and damage sustained as the result of the war to its property and facilities connected with its educational, medical, or welfare work. Here again, Congress had fully expended its legislative power. Nothing was left to the Commission but to execute the law; there was no need for it to exercise legislative discretion as to policy in completing and perfecting the legislative process.[92]

Section 8 of the Act (Stat. App. 84-85) charged the Commission with the duty of reporting to Congress on the advisability of further war claims legislation by March 31, 1950 (*supra,* p. 11). In preparing and submitting this report, the Commission may have acted as an agent of Congress. However, it will be noted that this statutory duty was performed and terminated in

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[92] Petitioner (Pet. Br. 13) argues that Section 7 constitutes "skeleton legislation" because it utilizes concepts such as "fair value of supplies" and "fair and equitable postwar replacement costs." Actually, however, Section 7(d) provides that in the determination of the fair equitable post war replacement value the Commission "shall utilize but not be limited to the factual information and evidence contained in the records of the Philippine War Damage Commission; the technical advice of experts in the field; the substantiating evidence submitted by the claimants and any other technical and legal means * * *". The basic considerations governing the Commission's action, are thus set forth in the statute itself. In any event, the functions of the Commission under Section 7 constituted so small a segment of its entire operations that they cannot be utilized to determine its general character. See fn. 94, *infra.*

March 1950, *i.e.*, several months before petitioner took office. The Commission, it is true, submitted a supplemental report in January 1953. This second report, however, was not prepared pursuant to a statutory duty. In this respect, the Commissioners acted as volunteers.[93]

The War Claims Commission thus was not a regulatory agency; its primary function was executive, *i.e.*, to carry into effect a well defined statute, not to exercise any unexpended legislative power; and it ceased being an agent of Congress, if it ever had been one, once it had submitted the report required to be prepared pursuant to Section 8.[94]

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[93] The Court of Claims also alluded to the circumstance that the Commission submitted the conventional periodical reports on its activities directly to Congress (R. 17.) We submit that this factor is not of sufficient weight to detract from the force to be given to the general function of the Commission. *Humphrey's Executor* v. *United States*, 295 U.S. 602, 628, footnote; *Morgan* v. *Tennessee Valley Authority*, 115 F. 2d 990, 993 (C.A. 6), certiorari denied, 312 U.S. 701; cf. *supra*, fn. 78.

[94] The Court of Claims also suggested that the Commission might be considered "an agent of Congress in discharge of the congressional obligation 'to pay the Debts of the United States' " (R. 15). However, the internee and prisoner of war claims were not claims against the United States but against foreign governments, and the determination and collection of such claims lies peculiarly within the executive branch (*infra*, pp. 59-65). The claim of the religious organizations constituted only 10,278 of the nearly 500,000 claims filed with the War Claims Commission, *i.e.*, about 2 per centum (War Claims Commission, Ninth Semi-annual Report, p. 6, Table 1). Thus they cannot detract from the general character of the functions of the Commission. See fn. 93, *supra*.

2. *The War Claims Commission did not exercise any power of the judicial branch*

The court below took the position that the determination of claims, the preponderant business of the War Claims Commission, was "wholly judicial" in character (R. 16). While the court recognized that such duties are frequently conferred on executive agencies, their performance of such duties was, in the court's view, merely "incidental or ancillary to the discharge of their executive duties" (R. 16).[95]

We shall show that the determination of claims constitutes by no means a judicial monopoly. To the contrary, the judicial power of the United States does not normally extend to the preliminary determination of whether a person has a claim to benefits under a statute, and Congress persistently has allocated this task to administrative agencies.

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[95] In so holding, the court (R. 15) attached significance to the subpoena power held by the War Claims Commission. However, when Congress conferred this power upon the Commission by the Act of August 16, 1950 (64 Stat. 449), *i.e.*, some two months after petitioner had taken office (*supra*, p. 12), it was fully aware of the circumstance that a similar power was held by purely executive officers such as the Veterans Administration and the Civil Service Commission (cf. S. Rep. 1892, 81st Cong., 2d Sess.). Subpoena powers have been granted freely to cabinet officers and to agencies clearly within the executive branch of the Government. *E.g.*, Attorney General and any immigration officer, Immigration and Nationality Act of 1952, Section 235, 66 Stat. 198, 8 U.S.C. 1225; Secretary of Agriculture, 7 U.S.C. 499m, 511n, 1603; Secretary of the Army, Act of August 21, 1935, Section 4, 49 Stat. 671, 33 U.S.C. 506; Secretary of the Treasury, Act of July 18, 1956, Section 302, 70 Stat. 575, 21 U.S.C. 198; Secretary of Labor and Wage and Hours Administrator, Fair Labor Standards Act, Section 9, 52 Stat. 1065, 29 U.S.C. 209; Administrator of Veterans Affairs, 38 U.S.C. 11a, 131, 445, 696(j); Civil Service Commission, 5 U.S.C. (Supp. IV) 632, 118k(d); Railway Retirement Board (an "independent agency in the Executive Branch"), 45 U.S.C. 228j, 362(a).

The distinctive function of the judicial branch of the Government under Article III of the Constitution (*supra,* pp. 3-4) is the determination of concrete cases and controversies[96]—not merely the interpretation of the law or the determination of questions of law and fact. The latter two functions are exercised constantly by the other two branches. This has been recognized from the earliest days of the Republic.

During the debates preceding the Decision of 1789 (*supra,* pp. 22-26), James Madison denied that the power to interpret the Constitution was limited to the judiciary and upheld the authority of Congress to do the same (1 Ann. Cong. 500, 501). Conversely, when in 1793 the President asked the Supreme Court for advice on the interpretation of the Constitution, treaties, and the law of nature and nations in connection with the country's relations with France, this Court refused to comply with this request, pointing out that under the Constitution the President had the authority to call on the heads of the departments for their opinions.[97]

We have already shown that Madison realized that some officers of the executive branch, such as the Comptroller of the Treasury, would be called upon to adjudicate claims. Madison urged that, in order to insure their impartiality, such officers should be subject not merely to the President's removal power, but also to senatorial control by the device of giving them a limited term of years so that the Senate could examine

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[96] This coincides with Montesquieu's definition of the judicial power as providing for the punishment of criminals and the determination of the disputes that arise between individuals. See *supra,* fn. 39.

[97] *Correspondence and Public Papers of John Jay,* Vol. 3, 486-489; see also *The Writings of George Washington* (Sparks Ed., 1836), Vol. 10, pp. 359, 542-545.

their conduct in office whenever they would come up for reconfirmation (1 Ann. Cong. 611-614). See *supra,* p. 26, fn. 46.

The statutory benefits accorded to veterans are a typical instance of claims which can be determined only after an inquiry into questions of law and fact. Still their adjudication has been entrusted to the executive since the very first Congress (1 Stat. 95). The second Congress, it is true, provided that the evidence in such cases should be taken before judges. It felt, however, that the disposition of such claims was not a judicial function and directed that the evidence be reviewed by the Secretary of War and transmitted to Congress for final determination (Act of February 28, 1793, 1 Stat. 324-325).[98] Significantly, the rule that the courts have no jurisdiction in mandamus proceedings to reexamine a reasonable interpretation of a statute performed by an officer as part of his official duties was first formulated in connection with the rejection of a pension claim. *Decatur* v. *Paulding,* 14 Pet. 497, 515.

Murray's Lessee, et al., v. *Hoboken Land and Improvement Co.,* 18 How. 272, explains that many administrative officials determine questions of law and fact but that this by itself does not constitute the exercise of judicial power. The Court said (at p. 280):

> That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those admin-

[98] On the constitutional flaws of a statutory plan which subjects judicial action to executive and legislative review, see *Hayburn's Case,* 2 Dall. 409; *United States* v. *Ferreira,* 13 How. 40, 49-50; *Gordon* v. *United States,* 117 U.S. 697; *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.,* 333 U.S. 103, 113-114.

> istrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense, the act of the President in calling out the militia under the act of 1795, 12 Wheat. 19, or of a commissioner who makes a certificate for the extradition of a criminal under a treaty, is judicial. But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. *United States* v. *Ferreira,* 13 How. 40. It is necessary to go further, and show not only that the adjustment of balances due from accounting offices may be, but from their nature must be, controversies to which the United States is a party, within the meaning of the second section of the third article of the constitution.[99]

Congress itself, of course, has exercised adjudicatory functions from the very beginning in connection with private legislation.

The distinctive function of the judicial branch thus is not the adjudication of questions of fact and law, nor the interpretation of law. It is, under the Constitution, the determination of a concrete case or controversy in adversary conventional judicial proceedings. *Tutun* v. *United States,* 270 U.S. 568, 576-577; *Muskrat* v. *United States,* 219 U.S. 346, 356-360; see also *United Public Workers* v. *Mitchell,* 330 U.S. 75, 90. Insofar as the judicial power is concerned, therefore, the scope of the *Humphrey* decision is limited to tribunals which, although they may be established under provisions other than Article III of the Constitution, perform functions like those of Article III courts—*i.e.,* to the various

[99] Cf. *Levin* v. *United States,* 128 Fed. 826, 830 (C.A. 8).

legislative courts, such as the territorial courts (see 295 U.S. at 629).

The characteristic functions of the War Claims Commission—the determination whether claimants were entitled to benefits under the War Claims Act—were not of this nature. Indeed, as we shall see (*infra,* p. 58), they have been described as "entirely alien to the legitimate functions of a judge".

a. *The War Claims Commission did not determine controversies in adversary proceedings.*—There is an essential difference between the submission of a claim to an administrative agency for the determination of whether the claimant is entitled to benefits under a statute or a treaty [100] and the filing of a complaint in court. The latter is indicative of a controversy, of the denial of a claimed right. The former constitutes a demand, the normal expectation being that the agency will honor the request, and that it never will develop into a controversy.[101]

The typical function of an administrative agency conferring benefits thus lies in the pre-controversy stage. A controversy possibly subject to judicial determination arises only in those instances in which the agency denies a claim.[102] Such instances were rela-

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[100] See *supra,* p. 47. See also *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), p. 263.

[101] *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), p. 35.

[102] On the question of whether and to what extent a claimant is entitled to a judicial remedy upon the rejection of his claim, see *Babcock* v. *United States,* 250 U.S. 328, 331; *Tutun* v. *United States,* 270 U.S. 568, 576; *Lynch* v. *United States,* 292 U.S. 571, 582. Cf. *Z. & F. Assets Corp.* v. *Hull,* 311 U.S. 470; *American & European Agencies, Inc.* v. *Gilliland,* decided June 27, 1957 (C.A.D.C.), No. 13447, slip opinion, p. 5, pending on petition for a writ of certiorari, No. 502, this Term.

tively rare in the history of the War Claims Commission. The last report published by the Commission discloses that only about 2.5 per centum of the claimants availed themselves of the administrative appeal procedure open to those whose claims had been denied in full or in part [103] (War Claims Act Section 11, Stat. App. 85-86). The filing of a claim thus is not indicative of an existing controversy, nor does it justify the inference that one is likely to occur in the future.

United States v. *Ferreira,* 13 How. 40, is the leading case clarifying the essential difference between the filing of a claim for benefits and the institution of judicial proceedings. In the Treaty of 1819 by which Spain ceded Florida to the United States, the latter agreed to compensate Spanish officers and inhabitants for injuries suffered by them as the result of the operation of the American Army in Florida. In 1849, Congress authorized the district judge for the Northern District of Florida to receive and adjudicate certain of the claims arising under the Treaty of 1819. The Government took an appeal to this Court from an award in favor of one Ferreira. The appeal was dismissed for lack of jurisdiction on the ground that the district judge did not act in a judicial capacity when he entertained Ferreira's claim.

The decision rested on two grounds. The first was based on the consideration that the district judge's award was subject to review by the Secretary of the Treasury, and that constitutional judges may not render decisions subject to the review or alteration by ad-

[103] As of March 13, 1954, a total of 497,849 claims had been received, and 12,691 appeals were filed. War Claims Commission, Ninth Semi-annual Report, pp. 6, 8.

ministrative action.[104] The other one, pertinent here, rested on the recognition that the proceedings, being typical claims proceedings (13 How. at 47-48), were not of a judicial nature.

The Court excepted to the absence of a suit, of "parties in the legal acceptance of the term", and of process (13 How. at 46); in other words, of the lack of conventional adversary proceedings. The Court, speaking through Chief Justice Taney, continued:

> * * * and no one is authorized to appear on behalf of the United States, or to summon witnesses in the case. The proceeding is altogether *ex parte;* and all that the judge is required to do is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain * * *.

and again (at p. 49):

> The claimant had nothing to do, but to present his claim to the judge with vouchers and evidence to support it. The District Attorney had no right to enter an appearance for the United States, so as to make them a party to the proceedings * * *.

The Court stressed that, while the power conferred upon the district judge and the Secretary of the Treasury might be called judicial in the colloquial sense because it involved judgment and discretion, it was the very kind of authority commonly conferred upon commissioners and executive officers. It was, however, not judicial "in the sense in which judicial power is

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[104] 13 How. 49-51. See also *Hayburn's Case,* 2 Dallas 409; *Gordon* v. *United States,* 117 U.S. 697; *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.,* 333 U.S. 103, 113-114.

granted by the Constitution to the courts of the United States" (p. 48).

The Court further stated (p. 51):

> [t]he *duties to be performed are entirely alien* to the *legitimate functions of a judge* or court of justice, *and have no analogy* to the general or special powers ordinarily conferred on judges or courts to secure the due administration of the laws * * *. (Emphasis added.)

In the Court's view, the function of determining such claims could have been assigned only to an officer of the United States appointed by the President by and with the advice and consent of the Senate, and Congress could not by law designate the person to fill the office.

Chief Justice Taney's analysis of the nature of the function of claims commissioners is directly in point here. We submit that petitioner—like the court in *Ferreira*—did not perform any judicial or even quasi-judicial functions, but that his duties were "entirely alien" and had "no analogy" to any legitimate judicial function.

b. *The issues before the War Claims Commission were not of a justiciable nature.*—We have shown that the determination of whether or not a person is entitled to benefits under a statute or a treaty is not normally a judicial function. Moreover, the vast majority of the claims presented to the Commission were not of a justiciable character.

Nearly 98% of the Commission's business consisted of claims based upon the violation of international law by foreign countries outside the boundaries of the

United States.[105] It is, however, well established that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory". *Underhill* v. *Fernandez,* 168 U.S. 250, 252. This ruling has been confirmed in a continuous line of decisions. *American Banana Co.* v. *United Fruit Co.,* 213 U.S. 347, 357-358; *Oetjen* v. *Central Leather Co.,* 246 U.S. 297, 302-303; *Ricaud* v. *American Metal Co.,* 246 U.S. 304, 309; *Shapleigh* v. *Mier,* 299 U.S. 468, 471; *United States* v. *Belmont,* 301 U.S. 324, 327; *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.,* 333 U.S. 103, 111; *Bernstein* v. *Van Heyghen Frères Société Anonyme,* 163 F. 2d 246, 248-249 (C.A. 2), certiorari denied, 332 U.S. 772.[106] See also *Z. & F. Assets Corp.* v. *Hull,* 311 U.S. 470, 490-493 (concurring opinion of Justices Black and Douglas). Nearly 98% of the Commission's business, therefore, consisted of claims which could not be adjudicated by the courts and which for all practical purposes would have been remediless in the absence of the War Claims Act.

3. *The War Claims Commission performed purely executive functions*

The War Claims Commission had jurisdiction over two basic classes of claims—claims of American internees and prisoners of war based on the violation of

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[105] See *supra,* fn. 94.

[106] The *Underhill decision* (168 U.S. at 252) points out that the lack of a judicial remedy does not leave the citizen helpless. He may obtain redress "through the means open to be availed of by sovereign powers as between themselves". See also *Shapleigh* v. *Mier,* 299 U.S. 468, 471, pointing to the availability of an International Claims Commission. This remedy, however, is executive, not judicial, in nature. See *infra,* pp. 62-65.

international law by the Axis powers, and claims of certain religious organizations. Only the latter constituted claims against the United States, and since these demands were based largely on considerations of equity and gratitude,[107] the United States was under no obligation to provide a judicial remedy.[108] Moreover, the claims of the religious organizations represented only a little more than 2 per centum of the business of the War Claims Commission.[109] The Commission thus derived its "true character" from the function around which nearly 98% of its activities centered,[110] *i.e.*, the determination of claims of American civilians and soldiers against foreign countries based on the violation of international law.

a. *The functions of the War Claims Commission related to the foreign relations power.*—As just noted, the claims presented to the War Claims Commission were not based upon acts of the United States, but rather were based upon the violation of international law by enemy governments.[111] However, since "[n]o nation treats with a citizen of another nation except

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[107] If these organizations had had claims of a legal nature, they could have obtained relief before the Army Claims Service or in the Court of Claims, Cf. *Soriano* v. *United States*, 352 U.S. 270.

[108] See *Lynch* v. *United States*, 292 U.S. 571, 582, and the authorities there cited. Indeed, in view of the gratuitous nature of these claims, judicial tribunals would have found it impossible to find any legal rights or legal obligations which they could enforce. Cf. the argument of Representative Lea at 94 Cong. Rec. 567.

[109] See *supra*, fn. 94.

[110] *Humphrey's Executor* v. *United States*, 295 U.S. 602, 628, footnote.

[111] 94 Cong. Rec. 8752; see 95 Cong. Rec. 8840, relating to the closely related International Claims Settlement Act (Stat. App. 93ff). See also H. Rept. 1632, 82d Cong., 2d Sess., explaining the 1952 Amendment of the Act (*supra*, p. 49).

through his government," [112] no individual claimant has standing to prosecute such claims except to the extent that his own government "assumed the responsibility of presenting his claim, and made it its own in seeking redress in respect of it." *Boynton* v. *Blaine,* 139 U.S. 306, 323; *Z. & F. Assets Corp.* v. *Hull,* 311 U.S. 470, 478; cf. Borchard, *The Diplomatic Protection of Citizens Abroad,* pp. 356ff.[113] "For wrongs of that order the remedy to be followed is along the channels of diplomacy." *Shapleigh* v. *Mier,* 299 U.S. 468, 471.

The decision of Congress to make the funds vested in the Alien Property Custodian available for the payment of the claims of American citizens and nationals [114] against the Axis powers, therefore, constituted an act of diplomatic protection, an exercise of the foreign relations powers of the United States. This congressional purpose is fully evidenced by the statement of Senator Magnuson on the floor of the Senate that the War Claims Commission was to "be set up similar to the Mixed Claims Commission which was created after World War I".[115] The War Claims Commission accordingly was entrusted with the performance of an

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[112] *Frelinghuysen* v. *Key,* 110 U.S. 63, 71.

[113] See also *supra,* fn. 106.

[114] Nearly one half of the prisoners of war claims were presented by Filipinos (War Claims Commission, Ninth Semi-annual Report to Congress, p. 6). These claimants had been nationals of the United States at the time the wrong was committed; hence, they were entitled to the diplomatic protection of the United States. *Barber* v. *Gonzales,* 347 U.S. 637, 639, fn. 1.

[115] 94 Cong. Rec. 8752. *War Claims Commission, supra,* fn. 3, pp. 91, 97, indicates that, in establishing the War Claims Commission, the Senate Subcommittee relied on the precedent and practice of these Mixed Claims Commissions. The unfortunate experience with these commissions (cf. *Z. & F. Assets Corp.* v. *Hull,* 311 U.S. 470, 480-485) may have motivated Congress to establish a commission composed only of American members.

important aspect of the foreign relations power of the United States.

b. *In performing functions related to the foreign relations power, the War Claims Commission was a part of the executive branch, as Congress was aware.*— It is well established that the conduct of foreign relations has been allocated to the two political [116] branches of the Government, the executive and the legislative, to the exclusion of the judicial one. *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302; *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111; *Wilson* v. *Girard*, 354 U.S. 524, 530. It follows that the War Claims Commission could not have constituted a part of the judicial branch or performed functions analogous to those commonly performed by the judiciary. And, even as between the two political branches, it is recognized that the executive ordinarily enjoys primacy in the field of foreign relations.

The Constitution has been understood in this way from the very beginning. On April 24, 1790, Thomas Jefferson, then Secretary of State, gave the following official opinion:

> * * * The transaction of business with foreign nations is Executive altogether. It belongs, then, to the head of that department except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly.[117]

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[116] *Humphrey's Executor* v. *United States*, 295 U.S. 602, 624, excepts from its application officers whose duties are of a political nature. See also *Myers* v. *United States*, 272 U.S. 52, 132-134.

[117] *The Writings of Thomas Jefferson* (Memorial Ed.), Vol. 3, pp. 15, 16. See also the similar remarks of Madison in the House of Representatives during the Great Debate of 1789, 1 Ann. Cong. 463-464, 496; Crosskey, *Politics and the Constitution of the United States*, Vol. 1, pp. 417-418.

Ten years later, on March 7, 1800, during the debate involving the extradition of Jonathan Robbins, John Marshall stated in the House of Representatives, of which he was then a member:

> * * * The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. * * *
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> The Executive is not only the Constitutional department, but seems to be the proper department to which the power in question may most wisely and most safely be confided.
>
> The department which is entrusted with the whole foreign intercourse of the nation * * * [118]

It is noteworthy that this statement, limited to the conduct of foreign affairs, did not arouse antagonism such as that brought on by Hamilton's assertion in the Pacificus letters that the executive powers of the President were not limited to those enumerated in Article II.[119] On the contrary, it persuaded a large portion of the Republican opposition to support the administration, and obtained a vote of 61 to 35 in a House almost evenly divided on a party basis.[120] See also the report of February 15, 1816, by the Senate Committee on Foreign Relations, particularly that part quoted in *United States* v. *Curtiss-Wright Corp.,* 299 U.S. 304, 319.

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[118] 10 Ann. Cong. (6th Cong.) 613-614.

[119] Cf. the Helvidius Letters, Madison, *Letters and Writings,* Vol. 1, pp. 607-654.

[120] Beveridge, *The Life of John Marshall,* Vol. 2, pp. 473-475. The shrinkage of the Senate's role in the negotiation of treaties, in which it has an express place under the Constitution, has often been told. See Corwin, *The President—Office and Powers* (1948 Ed.), pp. 253ff.

It is unnecessary to recall in detail that the Court has repeatedly reaffirmed, in recent years, the conceptions underlying Jefferson's and Marshall's declarations. "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. * * * the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations * * *". *United States* v. *Curtiss-Wright Corp.,* 299 U.S. 304, 319-320. See also *United States* v. *Belmont,* 301 U.S. 324, 330; *United States* v. *Pink,* 315 U.S. 203, 222-223, 229-230; *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.,* 333 U.S. 103, 109.

An agency established squarely in the field of foreign relations therefore is presumptively of an executive nature. Such an agency may be contrasted with the Federal Trade Commission, which was involved in *Humphrey.* The legislative nature of the latter agency is based upon the theory that it exercises "an unexpended grant of legislative power".[121] But *United States* v. *Curtiss-Wright Corp., supra,* at 315-322, teaches that the field of foreign relations is governed by entirely different standards concerning the delegation of powers. Because of these differences, the implementation of a statute such as the War Claims Act should be deemed to constitute essentially an executive operation, at least in the absence of a clear showing of a contrary Congressional purpose.

As a practical matter, the determination of claims of American citizens against foreign nations has traditionally been committed to administrative officers or

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[121] See *supra,* p. 47.

agencies. For example, Attorney General Cushing's report on the Office and Duties of the Attorney General, 6 Op. Att. Gen. 326, mentions (at p. 337) that the "Attorney General has himself been called on to act as a commissioner to adjudicate claims under treaty, as in the case of the convention of indemnities between the United States and the Republic of Peru (August 8, 1841)". And a permanent statute (the Act of February 27, 1896, 29 Stat. 28, 32, 31 U.S.C. 547), provides that, where the United States collects funds as the result of its sponsorship of claims of its citizens against foreign governments, the Secretary of State shall determine the amounts due the several claimants.

Moreover, the statutory plan of the War Claims Act of 1948 indicates the congressional awareness of the executive character of the War Claims Commission. This appears from the fact that the Commission was given a status analogous to that of the Mixed Claims Commission,[122] which certainly related to the executive conduct of foreign affairs. *Z. & F. Assets Corp.* v. *Hull,* 311 U.S. 470, 489. Even more conclusive is the circumstance that under Section 4 of the Act (Stat. App. 74-76) the adjudication of the claims of certain types of civilian internees was entrusted first to the Federal Security Administrator and later to the Secretary of Labor.[123] If Congress had felt that the adjudication of war claims was not an executive matter, it certainly would not have provided for the administration of parts of the Act by an agency indisputably executive in nature.[124]

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[122] See *supra,* pp. 8, 61.

[123] See *supra,* p. 9 and fn. 15.

[124] Little weight can be given to the debates on the War Claims Act in the House of Representatives (Pet. Br. 24-25). According to

The post-legislative history of the Act is equally revealing. In the year following the enactment of the War Claims Act, the debates relating to the International Claims Settlement Act of 1949 (64 Stat. 12, 22 U.S.C. 1621ff, Stat. App. 93ff) demonstrate that Congress was fully aware of the executive character of such commissions. Section 3 of the Act (Stat. App. 93) established the International Claims Commission of the United States, a sister commission to the War Claims Commission, in the Department of State. The reason for this allocation as stated repeatedly by Representatives Richards, a ranking member of the House Committee of Foreign Affairs, and Ribicoff, the sponsor of the bill, was that under the Constitution "foreign settlements in protection of the rights of citizens or nationals of the United States are made by the executive department of this Government" (95 Cong. Rec. 8847) and that "the determination of all claims of this sort is the function of the executive department and not the function of the court" (95 Cong. Rec. 8845; see also 95 Cong. Rec. 8836, 8847, 8851, 8979-8980).

The same inference is to be drawn from the congressional approval of Reorganization Plan No. 1 of 1954, which merged the War Claims Commission with the International Claims Commission into the Foreign Claims Settlement Commission (*supra,* pp. 11-12). Since, under Section 7 of the Reorganization Act of 1949 (63 Stat. 205, 5 U.S.C. 133z-5), the President's

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the House bill, the Commission would have been charged merely with the preparation of a report; no provision was made for the payment of the ordinary prisoner of war and internee claims. Representative Gearhart, it is true, offered an amendment to the bill providing for the payment of claims through the federal courts. This amendment, however, was ruled out as not germane to the purposes of the bill, after it had been pointed out that the claims were not of a justiciable character (94 Cong. Rec. 566-569).

reorganization powers are limited to the establishments in the executive branch of the Government, the ratification of the Reorganization Plan indicates recognition by Congress that the War Claims Commission had been of an executive nature. Moreover, the International Claims Commission, the agency with which the War Claims Commission was merged, was established in the Department of State and concededly was executive in character.

Contrary to petitioner's suggestion (Pet. Br. 33-34), the failure of the Senate to confirm President Eisenhower's nominees to the War Claims Commission (*supra,* pp. 12-13) is not evidence of any senatorial disapproval of the petitioner's removal. The Senate may very well have held up the confirmations in view of the pendency of Reorganization Plan No. 1 of 1954, pursuant to which the War Claims Commission was to be abolished as of July 1, 1954 (*supra,* pp. 11-12, 66). The relative speed with which the Senate confirmed the Foreign Claims Settlement Commissioners [125] would tend to show that the Senate had considered their nominations [126] and withheld action until the Reorganization Plan became effective.

To sum up: the War Claims Commission was established in the executive branch of the Government and exercised a part of the foreign relations power, a peculiarly executive function.[127] The President's power to

[125] They were nominated on July 23 and confirmed on August 6, 1954 (*supra,* p. 13). Compare with this the more than three months which elapsed between petitioner's nomination and confirmation (*supra,* p. 12).

[126] It will be remembered that two of the Foreign Claims Settlement Commissioners were the President's nominees to the War Claims Commission.

[127] Petitioner thus was one of "those who exercise the President's own powers, whether of statutory or constitutional origin." Corwin, *supra,* fn. 120, at p. 111; *id.* at 114.

remove its members, therefore, could not be limited by Congress.

C. Even Assuming That Petitioner Was a Non-executive Officer, His Removal Was Nevertheless Proper Since Congress Did Not Limit the President"s Power to Remove War Claims Commissioners

We have sought to show that petitioner's office was within the executive branch of the Government, and that the President's removal power consequently could not be limited by the Congress. Petitioner, however, was properly removed even if we assume, *arguendo,* that he did not hold an executive office.

As we have demonstrated (*supra,* pp. 39-43), the President has the power to remove non-executive officers in the absence of congressional action to the contrary. Congress has not limited the President's removal power in connection with the War Claims Commission. This has been established by the unmodified judgment in the quo warranto proceedings. That judgment, moreover, is plainly correct, since the applicable statutes do not limit—either expressly or impliedly—the President's removal power. To the contrary, should it be assumed that the President may remove a non-executive officer only if Congress confers removal authority upon him, the plain inference of the statutory plan is that the President was expected to exercise such authority and that the cumbersome impeachment procedure was not to be the only means of discharging petitioner.

1. *The unreversed judgment in the quo warranto proceedings establishes that Congress did not limit the President's power to remove petitioner*

The quo warranto proceedings instituted by petitioner were dismissed on the ground that the "War

Claims Act of 1948 contains no limitation upon or prohibition of the exercise of the executive power of removal conferred upon the President of the United States" (App., *infra,* pp. 86-87). The judgment which was based upon this opinion (App., *infra,* p. 88) never has been vacated or otherwise modified, although the appeal was dismissed as moot by stipulation. In these circumstances, under ordinary principles of res judicata and collateral estoppel, the determination of the District Court precludes petitioner from claiming now that Congress had limited the President's power to remove the War Claims Commissioners.[128] See *United States* v. *Munsingwear,* 340 U.S. 36.

The issue of whether or not Congress had limited the President's removal power is common to the quo warranto proceedings and to the one at bar. While the causes of action are based upon different demands [129] so that the former judgment does not operate as a complete bar to the institution of these proceedings,[130] the issues actually litigated and determined in the District Court cannot be relitigated here. "Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel". *Commissioner* v. *Sunnen,* 333 U.S. 591, 598; *Cromwell* v. *County of Sac,*

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[128] This contention was not passed upon by the Court of Claims, although the defense was raised in the Government's answer (R. 12) and brief (p. 4). See fn. 35, *supra.* The contention is of particular significance in view of this Court's practice of avoiding constitutional questions when a non-constitutional ground is available. See, *e.g., Rescue Army* v. *Municipal Court of Los Angeles,* 331 U. S. 549, 568-573.

[129] The District Court action involved the Commissioners' right to hold office; in these proceedings, petitioner claims his salary (*supra,* pp. 13-14).

[130] *Cromwell* v. *County of Sac,* 94 U. S. 351, 352; *Commissioner* v. *Sunnen,* 333 U. S. 591, 597.

94 U.S. 351, 352; *Southern Pacific R. Co.* v. *United States,* 168 U.S. 1, 48-49; *United States* v. *International Building Ass'n,* 345 U.S. 502, 504-505; and see *Yates* v. *United States,* 354 U.S. 298, 335-336.

The circumstance that the *nominal* parties in the two proceedings are not identical does not defeat the operation of the rules of res judicata and collateral estoppel. *Sunshine Coal Co.* v. *Adkins,* 310 U.S. 281, 402. As this Court pointed out in *Chicago, R. I. & P. Ry.* v. *Schendel,* 270 U.S. 611, 620: "Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different * * *; and parties nominally different may be, in legal effect, the same". Although the quo warranto proceedings were brought in the name of the United States, they were not a suit by the United States, but an action filed by the petitioner adversary to the interests of the United States. *United States ex rel. Goodrich* v. *Guthrie,* 17 How. 284, 302; *United States* v. *Morris,* 10 Wheat. 246, 301-302; *First Federal Savings & Loan Ass'n* v. *Loonis,* 97 F. 2d 831, 834 (C.A. 7), certiorari granted, 305 U.S. 564, dismissed on motion of petitioners, 305 U.S. 666. Conversely, the defendants in the quo warranto proceedings represented the interests of the United States, and were in turn represented by the Department of Justice (App., *infra,* p. 86).[131] The United States thus was a true defendant in the quo warranto proceed-

[131] "[F]or it must be admitted that the secretary of the treasury [the defendant in mandamus proceedings brought *ex relatione*] can have no relation whatever, and is clothed with no powers and sustains no obligation incident to the present controversy, except as he is the representative of the United States, or the guardian or custodian of their interests, committed to his charge". *United States ex rel. Goodrich* v. *Guthrie,* 17 How. 284, 302.

ings. *United States* v. *Allied Oil Co.*, 341 U.S. 1, 5. In any event, there was privity between the nominal defendants and the United States.[132]

The unmodified judgment of the District Court thus estops petitioner from relitigating the issue of whether or not Congress had limited the President's removal power. This result is not affected by the circumstances that the quo warranto proceedings—after the District Court's judgment—became moot as the result of the abolition of the War Claims Commission, and that the parties consequently stipulated for the dismissal of the appeal. The dismissal did not provide for the vacating of the District Court's judgment, which therefore retained its binding effect.

As this Court held in *United States* v. *Munsingwear, supra,* 340 U.S. at 38-40, the dismissal of appellate proceedings for reason of mootness neither justifies the creation of an exception to the salutary rule that every judgment is binding until it has been set aside, nor does such dismissal estop the appellee from relying on the judgment. The proper procedure in this situation is to reverse or vacate the judgment or to remand it with directions to dismiss. A litigant who does not avail himself of these remedies must be considered to have acquiesced in the continued operation of the judgment as a merger, bar, or estoppel.[133] The Court's opinion concludes (p. 41):

[132] *Sunshine Oil Co.* v. *Adkins,* 310 U.S. 381, 402-403; *Tait* v. *Western Maryland Ry. Co.,* 289 U.S. 620; *Bruszewski* v. *United States,* 181 F. 2d 419 (C.A. 3), certiorari denied, 340 U.S. 865; *Adriaanse* v. *United States,* 184 F. 2d 968 (C.A. 2), certiorari denied, 340 U.S. 932; *Williams* v. *United States,* 134 C. Cls. 763.

[133] The Court expressly disapproved of decisions such as *Gelpi* v. *Tugwell,* 123 F. 2d 377 (C.A. 1), which seemed to imply that mootness by itself destroyed the binding effect of a judgment. 340 U. S. at 39.

> The case is therefore one where the [petitioner], having slept on its rights, now asks us to do what by orderly procedure it could have done for itself. The case illustrates not the hardship of res adjudicata but the need for it in providing terminal points for litigation.

That holding is fully applicable here.

2. *Congress did not expressly limit the President's power to remove members of the War Claims Commission*

We have shown that petitioner is estopped by the judgment of the District Court from relitigating the question as to whether Congress has limited the President's power to remove members of the War Claims Commission. However, even if we assume *arguendo* that this issue were still open to him, the concurrent decisions of the District Court and of the Court of Claims on this point are plainly correct on their merits.

In the *Humphrey* case, 295 U.S. 602, this Court held that, by fixing a definite term of office and by providing for removal for cause, Congress clearly had indicated its intent that the incumbent was not to be removed during the term for any cause other than the enumerated ones (295 U.S. at 623, 632). The salient difference between the Federal Trade Commission Act involved in *Humphrey* and the War Claims Act is that the latter does not specify any causes for removal. This renders inapplicable here the basic argument in *Humphrey—viz.,* that the enumeration of certain grounds for dismissal is exclusive and, by operation of the *ex-*

pressio unius rule, prohibits discharges for any other reason (295 U.S. 622-623).[134]

The mere circumstance that the statute provides for a term equal to that of the life of the Commission does not mean that petitioner could not be removed during this term except by way of impeachment. The established import of the fixing of a term of office is that the officer has to be reappointed by the President and reconfirmed by the Senate at the end of the term, not that he may not be discharged during that period. The development of this doctrine began with the Debate of 1789. Then James Madison suggested that the Comptroller of the Treasury "should hold his office during —— years, unless sooner removed by the President" because "by this means the Comptroller would be dependent upon the President, because he can be removed by him; he will be dependent upon the Senate, because they must consent to his election for every term of years * * *." (1 Ann. Cong. 612; see also *supra,* p. 26, fn. 46).

Later rulings similarly recognize that the purpose of the specification of a term of office thus is to insure periodic senatorial scrutiny of the conduct of

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[134] Note in this connection *Morgan* v. *Tennessee Valley Authority,* 115 F. 2d 990 (C.A. 6), certiorari denied, 312 U.S. 701. The statute establishing the Tennessee Valley Authority provides that the members of the board of directors of the Tennessee Valley Authority may be removed at any time by a concurrent resolution of the Senate and the House of Representatives and that the President shall remove any member who has been found guilty of appointing or promoting officials or employees for political reasons rather than on the basis of merits and efficiency. The court held that the methods of discharge expressly provided for by the statute were not intended to be exclusive and that the President had the authority to remove a director on the ground that he had raised unfounded charges against his colleagues.

an office holder, even where such specification is not accompanied by a clause such as "unless sooner removed by the President". Thus, in 1851, in connection with the removal of Chief Justice Goodrich of the Territorial Court of Minnesota, who according to statute held office for four years, Attorney General Crittenden ruled: "The law intended no more than that these officers should certainly, at the end of that term, be either out of office, or subjected again to the scrutiny of the Senate upon a renomination" (5 Op. A.G. 288, 291). While this Court did not pass on the merits of Judge Goodrich's removal,[135] it held subsequently in *McAllister* v. *United States,* 141 U.S. 174, that a territorial judge could be removed by the President before the expiration of his term.

The decision in *Parsons* v. *United States,* 167 U.S. 324, 338-342, finally established the terse formula that provisions for a term of office are in the nature of a limitation, not of a grant.[136] This was acknowledged even by the dissenting opinion of Mr. Justice Brandeis in the *Myers* case. As the Justice there stated: "It is settled that, in the absence of a provision expressly providing for the consent of the Senate to a removal, the clause fixing the tenure will be construed as a limitation, not as a grant; and that, under such legislation, the President, acting alone, has the power of removal" (272 U.S. at 241).

In other words, where the statute merely fixes a term and does not otherwise specify the President's removal

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[135] See *United States ex rel. Goodrich* v. *Guthrie,* 17 How. 284.

[136] The rules governing the interpretation of the meaning of a specified term of office thus were developed largely in connection with the offices of territorial judges, *i.e.,* of officials whom petitioner would classify as not purely executive (Pet. Br. 32-33).

power, the import of the term is merely that the officer cannot remain in office for a period in excess of the term, unless reappointed. He has, however, no assurance that he will hold office that long.[137] This interpretation of the meaning of a term of office has been reaffirmed only recently in two decisions of the Court of Claims. *Carey* v. *United States,* 132 C. Cls. 397; *Farley* v. *United States,* 134 C. Cls. 672, certiorari denied, 352 U.S. 891.

The reference in the *Humphrey* decision to Humphrey's term of office does not indicate any departure from this consistent interpretation. Instead, the express purpose of the reference was to distinguish the case from *Shurtleff* v. *United States,* 189 U.S. 311. Shurtleff, a member of the Board of General Appraisers (of Merchandise),[138] served under a statute which expressly permitted his removal by the President for inefficiency, neglect of duty, or malfeasance in office—*i.e.,* for reasons identical with those enumerated in Section 1 of the Federal Trade Commission Act (*supra,* p. 36). This Court had held in *Shurtleff* "that the

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[137] *Marbury* v. *Madison,* 1 Cranch 137, it is true, contains a famous dictum that the President had no power to remove a justice of the peace of the District of Columbia during his term of office (p. 162). This aspect of *Marbury* v. *Madison,* however, has been disapproved, if not overruled, by this Court in *Parsons* v. *United States,* 167 U.S. 324, 335-336, and *Myers* v. *United States,* 272 U.S. 52, 139-144. In any event, that dictum may be based upon the peculiar dual status of the courts established by Congress for the District of Columbia. Compare in this respect *Williams* v. *United States,* 289 U.S. 553, with *Donoghue* v. *United States,* 289 U.S. 516, and see the discussion of *Marbury* v. *Madison* in *McAllister* v. *United States,* 141 U.S. 174, 188-189; *Parsons* v. *United States,* 167 U.S. 324, 335-336; *Myers* v. *United States,* 272 U.S. 52, 143. Note also *National Insurance Co.* v. *Tidewater Co.,* 337 U.S. 582, for the unique status of the courts in the District of Columbia.

[138] See *supra,* fn. 65.

mere specification in the statute of some causes for removal * * * [did not exclude] the right of the President to remove for any other reason which he, acting with a due sense of his official responsibility, should think sufficient" (189 U.S. at 317). In reaching this conclusion, this Court rested in part on the argument that, if the General Appraisers were removable only for cause, they would in effect hold office for life (because the law presumes good behavior), and that Congress could not be deemed to have intended such a result (189 U.S. at 316).

In other words, in *Shurtleff,* the presumption against life terms militated against the operation of the *expressio unius* rule. This consideration, however, was held inapplicable in *Humphrey* because the terms of the Federal Trade Commissioners were limited to seven years; the statutory grounds for removal therefore were considered exclusive. 295 U.S. at 621-623. Nothing in *Humphrey* even remotely suggests that a fixed term of office, apart from the specification of causes for removal and other factors (*infra,* pp. 77-82), gives a Presidential appointee the right to stay in that office throughout the term unless impeached. On the contrary, the *Humphrey* decision is fully in accord with the well settled doctrine that such a provision will be construed as a limitation, not as a grant.

The statutory language that petitioner's term was to expire at the time fixed for the winding up of the affairs of the Commission [139] thus did not curtail the President's power of removal.

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[139] In *Humphrey,* the Court also relied to some extent on the emphatic statutory language that the commissioners should "continue in office" (295 U.S. at 623-624). Section 2 of the War

3. *The implication of the statutory plan is that Congress did not limit the President's removal power but rather contemplated the President's exercise of that authority.*

In *Humphrey,* the Court found that the congressional intent to limit the President's removal power was not only "clear upon the face of the statute", but also was "made clear by a consideration of the character of the commission and the legislative history" of the Federal Trade Commission Act (295 U.S. at 624). No such implication may be drawn from the War Claims Act. On the contrary, the statutory plan indicates that Congress could not have intended to exempt the War Claims Commissioners from all control except by impeachment, and that it must have envisaged their removal by the President.

a. *The War Claims Act did not curtail the President's removal power by implication.*—This Court's decisions recognize that the congressional intent to limit the President's power must appear plainly either in the statutory language or by necessary implication (*e.g., Shurtleff* v. *United States,* 189 U.S. 311, 315-316). Here no such inference may be drawn from the statutory plan or the legislative history.

In *Humphrey,* this Court inferred the "clear" congressional intent to make the Federal Trade Commissioners nonremovable, except for cause, from the legislative history of the Act, the bi-partisan structure,

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Claims Act (*supra,* pp. 4-5) does not use this positive language; it states that the commissioner's term of office shall expire at the time fixed for the winding up of the affairs of the Commission, the implication being merely that the terms should not exceed the life of the Commission.

and the requirement of complete impartiality. Here, the legislative history is silent on this point; there is no statutory requirement of bi-partisanship; and under the statutory plan, impartiality and responsibility can be secured better by keeping the Commissioners under executive control than by subjecting them exclusively to the practically unused impeachment procedure.

The fact that the War Claims Commission was set up as a separate establishment and not within an existing department merely shows that Congress conferred upon the Commissioners the privilege of reporting directly to the President, and not through a cabinet member.[140] It does not evidence a congressional intent to exempt the Commissioners from presidential control. Temporary commissions frequently have been set up as separate agencies purely for fiscal reasons. They can be abolished when the task is done without adding to the permanent staff of any existing permanent departments or agencies (see 95 Cong. Rec. 8836). On the other hand, practical politics being what they are, commissionerships have no doubt occasionally been created for reasons of patronage, especially where, as here, there is no statutory requirement of bipartisanship (see 95 Cong. Rec. 8853).[141] The fact that one Congress establishes a commission which the then President may

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[140] With respect to petitioner's argument that the establishment of a commission is indicative of a congressional intent to provide for a permanent and irremovable body of experts (Pet. Br. 19, 35), see Representative Gearhart's sarcastic remarks about "experts" seeking to perpetuate themselves in office. 94 Cong. Rec. 566.

[141] The important role played by patronage in the actual working of our political system as a frequently crucial tool in the system of checks and balances between the executive and legislative branches cannot be ignored. See in this connection Mason, *Harlan Fiske Stone: Pillar of the Law,* p. 228.

fill with persons whom he trusts is not indicative of an intent to deprive the next President of the authority to staff the Commission with personnel in whom he has confidence.

In *Humphrey* this Court placed its decision (at least in part) on the need for safeguarding impartiality of decision by the Federal Trade Commissioners. Here, on the other hand, presidential supervision would have guaranteed greater responsibility of decision than freedom from executive (which in this case would have meant *all*) control. The effect of *Humphrey* left the Federal Trade Commissioners subject to executive removal for inefficiency, neglect of duty, or malfeasance in office (*supra,* p. 36), Here, a ruling that Congress by implication had limited the President's removal power would mean that he could not have removed the War Claims Commissioners for any reason. And this in spite of the circumstances that there was no bi-partisan composition of the Commission, that the decisions of the Commissioners were not subject to judicial review,[142] that they had the power to dispose of a fund of nearly $300,000,000,[143] and that their rulings would touch on sensitive areas in the field of international relations.[144] The Commissioners in which such significant powers are vested thus would be subject only

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[142] War Claims Act, Section 11 (Stat. App. 85).

[143] See *supra*, p. 6.

[144] For the extent to which the decisions of international claims commissioners may involve the national honor and good faith, see the *La Abra Silver Mining Co.* incident described in *Frelinghuysen* v. *Key,* 110 U.S. 63; *Boynton* v. *Blaine,* 139 U.S. 306; *La Abra Silver Mining Co.* v. *United States,* 175 U.S. 423, 458. See also *Z. & F. Assets Corp.* v. *Hull,* 311 U.S. 470, 487. For the examples of the potential international implications of the decisions of the War Claims Commission, see *Settlement of Claims, supra*, fn. 26, pp. 424ff.

to the cumbersome and almost impossible control by way of impeachment which has been characterized realistically as not providing "an effective way of enforcing even minimum standards of efficiency and honesty".[145] These temptations increase immeasurably where the Commissioners and the President do not belong to the same political party, *i.e.,* where the restraints of party loyalty and the desire not to embarrass the President are lacking. To grant the removal power to the President and to subject the Commissioners to his supervision thus would enhance, rather than jeopardize, responsibility and impartiality in the decisions of such a commission.[146]

The argument that Congress has limited the President's removal power by implication, also overlooks the actual drafting practice of Congress. The three statutes which established regulatory commissions since the *Humphrey* decision all provide expressly that the President may remove the Commissioners only for cause.[147] Congress thus is well aware of the rule that the President has the power to remove non-executive officers unless the statute limits his authority. In these

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[145] Cushman, *The Constitutional Status of the Independent Regulatory Commissions*, 24 Cornell Law Quarterly 13 and 163, 178.

[146] The role played by the Commission's staff in passing on the great bulk of uncontested claims (*supra*, p. 10) should not be overlooked either. Here the main protection of the claimants' rights are to be found in the operation of the merit civil service system and in the Administrative Procedure Act (Section 11, 5 U.S.C. 1010) protecting the status of trial examiners.

[147] National Labor Relations Act of 1935, 49 Stat. 451, as amended by the Labor Management Relations Act, 1947, Section 3, 61 Stat. 139, 29 U.S. 153; Civil Aeronautics Act, Section 201(a), 52 Stat. 980, as amended, 49 U.S.C. 421; Internal Security Act of 1950, Section 12(a), 64 Stat. 997, 50 U.S.C. 791.

circumstances, the failure of Congress to limit the President's removal authority indicates an intention that he exercise that power without any restrictions.

From the statutory plan of the War Claims Act, it certainly is not "clear" that Congress sought to deny to the President the power to remove the members of the War Claims Commission. Instead, the congressional drafting technique and the absence of provisions permitting removal for cause, of judicial review, and of bi-partisan composition of the Commission, support the contrary inference—*viz.*, that the President has the power to remove the Commissioners if he feels that the national interest requires it.[148]

b. *Congress by implication authorized the President to remove the members of the War Claims Commission.* —For the reasons already stated, it is our position that the President had the authority to remove petitioner even if we should assume *arguendo,* first, that petitioner was not an executive officer and, second, that the President could remove such officers only where authorized by Congress. In *Humphrey,* 295 U.S. at 624, this Court recognized that Congress may limit the President's removal power by clear implication. It follows conversely that the removal power also may flow by clear implication from the statutory plan and the character of the commission.

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[148] See in this connection the discussion in *Shurtleff* v. *United States,* 189 U.S. 311, 317-318, demonstrating that a summary removal of an officer without cause for political reasons "cannot be regarded as the least imputation on his character for integrity or capacity", and that the removal power is limited by "the responsibility of the President under his oath of office, to so act as shall be for the general benefit and welfare".

We have already shown previously that Congress could not have intended to subject merely to its impeachment power an official who can dispose of a fund of $300,000,000 in a sensitive area of international relations without safeguards of judicial review and of bipartisan composition of the commission. Moreover, it is hardly likely that Congress intended to confer greater immunity upon the members of this relatively unimportant temporary commission than upon the members of agencies such as the Interstate Commerce Commission, the Federal Trade Commission, the National Labor Relations Board, the Civil Aeronautics Board, and the Subversive Activities Control Board. Members of the latter agencies are subject to removal for cause by the President.[148]

The plain inference to be drawn from the failure to confer upon the President in terms the power to remove petitioner for cause, is not that petitioner is not removable at all, but that the President may remove him if he feels, under his oath of office, that the general welfare requires such action.[150]

4. *The decision in this case will have no bearing on the tenure of members of other commissions and of the judges of certain legislative courts*

Petitioner argues that, if the President has the power to remove him, he could by the same token freely re-

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[149] Interstate Commerce Act, Secs. 11, 24, as amended, 49 U.S. 9, 11; Federal Trade Commission Act, Sec. 1, 38 Stat. 717, 15 U.S.C. 41; Labor Management Relations Act, 1947, Sec. 3, 61 Stat. 139, 29 U.S.C. 153; Civil Aeronautics Act, Sec. 201(a), 52 Stat. 980, as amended, 49 U.S.C. 421; Internal Security Act of 1950, Sec. 12(a), 64 Stat. 997, 50 U.S.C. 791.

[150] Cf. *Shurtleff* v. *United States,* 189 U.S. 311, 317-318. See also fn. 148.

move the members of the Federal Power, Federal Communications, Securities and Exchange, and Tariff Commissions, and even the judges of the District Courts of Hawaii and Puerto Rico, because the statutes providing for the offices of those officers and judges, like the War Claims Act, provide for a limited term of office without any specification of the President's power of removal (Pet. Br. 8, fn. 10). We do not believe that this case affords a proper occasion to determine the status and tenure of those officers and judges, particularly if this Court should sustain our contention that petitioner is an executive officer.

In any event, the decision will have no bearing on the tenure of the members of the Tariff Commission in view of their unique dual status as advisors to the President and to Congress (*United States* v. *Bush & Co.*, 310 U.S. 371, 379). The same considerations apply to the positions of the District Judges of Hawaii and Puerto Rico. It is well established that the removal of legislative judges is governed by special rules and considerations (*Myers* v. *United States,* 272 U.S. 52, 157-158, *supra,* p. 34).[151] Even a ruling by this Court that petitioner, although not an executive officer, was removable by the President would not determine the

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[151] The import of the provision in 28 U.S.C. 134(a) that these judges hold office for terms of six and eight years, respectively, *and until their successors are appointed and qualified,* may well be that the Senate could render nugatory any attempted removal by the President by refusing to confirm a successor. Senatorial confirmation of a successor, however, has been considered the legal equivalent to the Senate's advice and consent to a removal. *Blake* v. *United States,* 103 U.S. 227, 236-237; *Parsons* v. *United States,* 167 U.S. 324, 341; *Wallace* v. *United States,* 257 U.S. 541, 545-547. In those circumstances, these judges would not serve at the pleasure of the President alone.

status of the remaining three commissions (F.P.C., F.C.C., and S.E.C.).[152] See, *e.g., supra,* pp. 44-50, 72-73, 77-80.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below should be affirmed.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
EARL E. POLLOCK,
Assistant to the Solicitor General.
PAUL A. SWEENEY,
HERMAN MARCUSE,
Attorneys.

OCTOBER 1957.

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[152] These three commissions, whose basic statutes do not contain provisions such as involved in *Humphrey,* were established during the interval between the *Myers* and *Humphrey* decisions. See Commission on the Organization of the Executive Branch of the Government (Hoover Commission, 1949), Task Force Report, Appendix N (Committee on Independent Regulatory Commissions), p. 14. It is significant that the National Labor Relations Act, passed shortly after *Humphrey,* permits the President to remove the Board members only for cause. Section 3, 49 Stat. 451, 29 U.S.C. 153.

It is also significant that Congress failed to implement the recommendations made in 1949 by the Hoover Commission that, on the ground that the members of these three commissions were removable at the pleasure of the President, legislation should be enacted to assimilate their status to that of the other regulatory commissions (Hoover Commission Reports (1949), Rept. No. 12, *The Independent Regulatory Commissions,* pp. 6-7). Legislation to that effect was introduced in Congress in 1949 (S. Rept. 1158, 81st Cong., 1st Sess., p. 275), but died in committee. See the indices to Vols. 95 and 96 of the Congressional Record with respect to S. 2059, H.R. 5173. It will be noted that these bills limiting the President's removal power to instances of inefficiency, neglect of duty, or malfeasance in office did not include the War Claims Commission.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 447-54

THE UNITED STATES OF AMERICA, ON RELATION OF MYRON WIENER, PETITIONER,

v.

RAYMOND T. ARMBRUSTER, WHITNEY GILLILAND, PEARL CARTER PACE, c/o WAR CLAIMS COMMISSION, WASHINGTON, D. C., RESPONDENTS

Washington, D. C.,
Thursday, March 25, 1954.

The above-entitled action came on for hearing on motion to dismiss or in alternative for summary judgment on petition for writ in nature of quo warranto, before the HON. EDWARD M. CURRAN, United States District Judge, at 11:20 a.m.

APPEARANCES:

On behalf of the Petitioner: I. H. Wachtel, Esq., James G. Ross, Esq., and Charles H. Mayer, Esq.

On behalf of the Respondents: Edward H. Hickey, Bruce H. Zeiser, and Andrew P. Vance, Attorneys, Department of Justice.

RULING OF THE COURT

The Court: The Act of Congress establishing the War Claims Commission, in Section 2 (a) provides that the terms of office of the members of the Commission shall expire at the time fixed in subsection (d), which counsel on both sides have conceded is subsection (e), for the winding up of the affairs of the Commission.

Subsection (e) provides that the Commission shall wind up its affairs at the earliest practicable time after the expiration of the time for filing claims, but in no event later than three years after the expiration of such time.

Now, that merely means that the terms of office shall either expire after the expiration of the time for filing claims, or not later than three years after the expiration of such time. The Act, therefore, in establishing the War Claims Commission did not provide a fixed term of office for the Commissioners. Although the War Claims Commissioners held their office at the pleasure of the President, the War Claims Act of 1948 contains no limitation upon or prohibition of the exercise of the executive power of removal conferred upon the President of the United States.

The Act of the President in removing the relator as a member of the War Claims Commission is valid and constitutional.

The motion to dismiss is granted and the writ in the nature of quo warranto is quashed.

Counsel for the respondents will prepare the proper order.

(Whereupon, the foregoing proceedings were concluded.)

CERTIFICATE OF OFFICIAL COURT REPORTER

I, Margaret A. Deeds, one of the official reporters of the United States District Court for the District of Columbia, hereby certify that the foregoing is the official transcript of the Ruling of the Court in the above-entitled proceedings.

Dated this 25th day of March, 1954.

(s) MARGARET A. DEEDS,
Official Court Reporter.

Filed March 30, 1954, Harry M. Hull, Clerk.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 447-54

THE UNITED STATES OF AMERICA, ON RELATION OF MYRON WIENER, PETITIONER,

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RAYMOND T. ARMBRUSTER, WHITNEY GILLILLAND, PEARL CARTER PACE, c/o WAR CLAIMS COMMISSION, WASHINGTON, D. C., RESPONDENTS

ORDER

This cause having come on for hearing on March 25, 1954 upon respondents' motion to dismiss or in the alternative for summary judgment, and the Court having considered the pleadings with exhibits and memoranda filed by the parties and the argument of counsel, and the Court having rendered an oral opinion, it is by this Court this 30 day of March, 1954

ORDERED that the motion to dismiss the action be and the same is hereby granted, and the action is dismissed with prejudice; and it is further

ORDERED that the writ in the nature of quo warranto be and the same is hereby quashed.

(S.) EDWARD M. CURRAN,
Judge.

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