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IN THE
Supreme Court of the United States

OCTOBER TERM, ~~1924~~ 1926

FRANK S. MYERS, *Appellant*,
v.
THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENT TO THE BRIEF OF GEORGE WHARTON PEPPER, *AMICUS CURIAE*, CONTAINING COMPILATION OF STATUTES RESTRICTING THE POWER OF THE PRESIDENT TO APPOINT OR REMOVE OFFICERS OF THE UNITED STATES.

GEORGE WHARTON PEPPER,
Amicus Curiae.

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EXPLANATION.

The following compilation of statutes includes statutes that provide for appointments by the President either alone or by and with the advice and consent of the Senate, but that restrict the President in his exercise of the power to appoint or remove the appointee. The compilation includes only statutes now in force and does not attempt an exhaustive but merely an approximately complete and representative list of such statutes. The inclusion of such restrictive

statutes where the statute itself fails to specify any appointing authority, is made for the reason that the power of appointment is then to be exercised by the President by and with the advice and consent of the Senate [see, 30 Op. Atty. Genl. 177, 179; 29 Op. Atty. Genl., 116 and opinions there cited, and *Scully v. United States* (1910), 193 Fed. 185, 187].

Appointees of the President are included without any attempt to limit the compilation to those appointees only who are officers within the meaning of that term as used in Article II, section 2, of the Constitution, or to distinguish between superior or inferior officers of the United States.

STATUTES IMPOSING RESTRICTIONS ON APPOINTMENTS.

A. RESIDENCE AND CITIZENSHIP REQUIREMENTS.

(a) General statutes.

1. *Consular Clerks* (§ 1704 R. S.).
2. *Federal Board for Vocational Education, Appointed Members* (39 Stat. 932, § 6).
3. *Federal Farm Loan Board, Members* (42 Stat. 1473, § 301).
4. *Foreign Service Officers* (43 Stat. 141, § 5).
5. *Postmasters* (33 Stat. 441, § 8).

(b) Statutes applicable solely to a Territory or Possession or to the District of Columbia.

6. ~~*Circuit Courts of Hawaii, Judges*~~, (31 Stat. 157, § 80, Am. 42 Stat. 119).
7. ~~*District Court for Hawaii, District Attorney*~~ (42 Stat. 120 § 86 [b]).
8. ~~*District Court for Hawaii, Judge*~~ (42 Stat. 120, § 86 [b]).
9. ~~*District Court for Hawaii, Marshall*~~ (42 Stat. 120 § 86 [b]).
10. *District Court of the Virgin Islands, Judges* (32 Stat. 1132, Am. 42 Stat. 123).
11. *District of Columbia, Civil Commissioners* (20 Stat. 103, § 2).

Amendments
to
the
constitution
of
the
United
States

12. *Municipal Court of the District of Columbia, Judges* (35 Stat. 623).
 13. *Police Court of the District of Columbia, Judges* (Pub. No. 561, 68th Cong., § 3 [a]).
 14. *Supreme Court of Hawaii, Judges* (31 Stat. 157, § 80, Am. 42 Stat. 119).

(c) Statutes applicable solely to the Army or Navy.

15. *Army Reserve Corps, Officers* (41 Stat. 775, § 32).
 16. *Naval Reserve Force, Officers* (39 Stat. 587)

B. POLITICAL AFFILIATIONS

17. *Board of General Appraisers, Members* (42 Stat. 972, § 518).
 18. *Civil Service Commission, Commissioners* (22 Stat. 403).
 19. *Federal Farm Loan Board, Members* (42 Stat. 1473, § 301).
 20. *Federal Trade Commission, Commissioners* (38 Stat. 718, § 1).
 21. *Interstate Commerce Commission, Commissioners* (41 Stat. 497, § 440).
 22. *U. S. Shipping Board, Commissioners* (41 Stat. 989, § 3 [a]).
 23. *U. S. Tariff Commission, Commissioners* (39 Stat. 795, § 700).

C INDUSTRIAL, GEOGRAPHICAL, OR GOVERNMENTAL REPRESENTATION

(a) General statutes.

24. *Advisory Committee for Aeronautics, Members* (38 Stat. 930).
 25. *Aircraft Board, Military and Naval Members* (40 Stat. 296).
 26. *Bureau of Fisheries, Commissioner* (16 Stat. 594, § 1).
 27. *Capital Issues Committee, Members* (40 Stat. 512, § 200).
 28. *Consular Service, Inspectors of Consulates* (34 Stat. 100, § 4).

29. *Federal Board for Vocational Education, Appointed Members* (39 Stat. 932, § 6).
30. *Federal Reserve Board, Appointed Members* (42 Stat. 620).
31. *Internal Revenue Collectors* (§ 3142 R S)
32. *Mississippi River Commission, Commissioners* (21 Stat 37, § 2).
33. *Railroad Labor Board, Members* (41 Stat 470, § 304)
34. *U S Shipping Board, Commissioners* (41 Stat 989, § 3 [a]).
- (b) Statutes applicable solely to a Territory or Possession or to the District of Columbia.
35. *Rent Commission of the District of Columbia, Commissioners* (42 Stat. 544, § 4).
36. *Isthman Canal Commission, Members* (32 Stat 483, § 7).
37. *Municipal Court of the District of Columbia, Judges* (35 Stat. 623).
38. *Police Court of the District of Columbia, Judges* (Pub No. 561, 68th Cong., § 3 [a])
39. *Territorial District Attorneys* (§ 1875 R S).
40. *U. S. Court for China, District Attorney* (34 Stat. 816, § 6).
41. *U. S Court for China, Judges* (34 Stat 816, § 6).

D PROFESSIONAL ABILITY.

(a) General statutes

42. *Advisory Committee for Aeronautics, Members* (38 Stat. 930).
43. *Bureau of Fisheries, Commissioner* (16 Stat 594, § 1).
44. *Bureau of Mines, Director* (37 Stat 681, § 1).
45. *California Debris Commission, Members* (27 Stat. 507).
46. *Consular Service, Inspectors of Consulates* (34 Stat. 100, § 4).
47. *Mississippi River Commission, Commissioners* (21 Stat 37, § 2).
48. *Patent Office, Examiners-in-Chief* (§ 482 R. S.).
49. *Public Printer* (14 Stat. 398, Am 18 Stat 88).

- 50 *Rio Grande Commission, Commissioners* (43 Stat 118).
- 51 *Solicitor-General* (§ 347 R S)
- 52 *Steamboat Inspection Service, Supervising Inspectors* (§ 4404 R S, Am 40 Stat 740)
- 53 *Superintendent of Indian Schools* (25 Stat 1003, § 10).
- 54 *U S. District Attorneys* (§ 767 R S)

(b) Statutes applicable solely to the Army or Navy

- 55. *Department of the Navy, Chief of the Bureau of Economics* (42 Stat 140, § 8)
- 56 *Department of the Navy, Chiefs of Bureaus* (§§ 421-426 R. S.).
- 57. *Marine Corps, Major General Commandant* (39 Stat. 609).
- 58 *National Guard, Officers* (on Federal Service) (41 Stat 784, § 49)
- 59 *Navy, Judge-Advocate-General* (21 Stat 164)
- 60 *Officers' Reserve Corps, Army* (41 Stat 775, § 32)
- 61 *Regular Army, Officers* (41 Stat 771, § 24).

E FITNESS TO PERFORM DUTIES OF OFFICE

- 62 *Board of Tax Appeals, Members* (43 Stat 336, § 900 [b])
- 63. *Steamboat Inspection Service, Supervising Inspector General* (40 Stat 739)
- 64 *Interstate Commerce Commission, Chief and Assistant Chief Inspectors of Locomotive Boilers* (36 Stat 913, § 3)
- 65 *U S Shipping Board, Commissioners* (41 Stat 989)

F. SUCCESSFUL COMPLETION OF EXAMINATION OR PERIOD OF PROBATION

- 66 *Civil Service Appointees* (22 Stat. 403)
- 67. *Consular Clerks* (§ 1705 R. S)
- 68 *Foreign Service Officers* (43 Stat 141, § 5).

G. SELECTION FROM LIMITED NUMBER OF NOMINEES

- 69. *Civil Service Appointees* (22 Stat 403).
- 70. *Railroad Labor Board* (41 Stat. 470, §§ 304, 305).

STATUTES IMPOSING RESTRICTIONS ON
REMOVALS.

Note Restrictions as to methods of removal below listed are not intended to exclude or deny the power to remove an incumbent appointed by the President by and with the advice and consent of the Senate through appointment of a successor by the President with like advice and consent (see *Wallace v United States* (1922), 257 U. S. 541, 545, *Parsons v United States* (1897), 167 U. S. 324). There are not included under this heading judges of constitutional courts who are appointed by the President but whose removal is barred under the "good behavior" clause in Article III, Section 1, of the Constitution. Variations in terms of office of original appointees, for the purpose of providing overlapping terms of office, are not included, but only the permanent terms of office are specified.

A DENIAL TO THE PRESIDENT OF ALL POWER TO
REMOVE.

(a) General statutes.

- 71 *Comptroller General of the U. S.* (42 Stat 23, 24)
Appointed by President with consent of Senate
Term of office: 15 years.
Removable by Joint Resolution of Congress.
Restriction on removal: "After notice and hearing ***
when *** permanently incapacitated or *** in-
efficient, or guilty of neglect of duty, or of mal-
feasance in office, or of any felony or conduct in-
volving moral turpitude, and for no other cause and
in no other manner except by impeachment."
72. *Court of Claims, Judges* (40 Stat 1157, § 4).
Appointed by President with consent of Senate.
Term of office: None specified.
Removal: None specified.
Restriction on removal: "hold their offices during
good behavior."

(b) Statutes relating exclusively to the District of Columbia

73. *Court of Appeals of the District of Columbia, Justices* (31 Stat 1224, § 221).
 Appointed by the President with consent of Senate.
 Term of office. None specified.
 Removal: None specified
 Restriction on removal. "shall hold office during good behavior."
74. *Municipal Court of the District of Columbia, Judges* (35 Stat 623, 41 Stat 555, 556, § 65, 41 Stat. 1312, 1313, § 13).
 Appointed by President with consent of Senate
 Term of office: 4 years and until successor is qualified.
 Removable by Supreme Court of the District of Columbia.
 Restriction upon removal: "May hear charges * * * and remove * * * from office for cause shown."
75. *Supreme Court of the District of Columbia, Judges* (31 Stat 1199, § 60).
 Appointed by the President with consent of Senate.
 Term of office. None specified.
 Removal: None specified
 Restriction on removal: "holding their offices during good behavior."

B. DENIAL TO THE PRESIDENT OF THE POWER TO REMOVE
 EXCEPT WITH THE CONSENT OF THE SENATE

Note: See also, statutes listed under "E" below

76. *Postmaster-General* (§ 388 R. S)
 Appointed by President with consent of Senate
 Term of office: "during term of the President by whom he is appointed, and for one month thereafter"
 Removable by President with consent of Senate
 Restriction on removal. None except that consent of Senate must be obtained
77. *First, Second and Third Assistant Postmasters-General* (§ 389 R. S).
 Appointed by President with consent of Senate.
 Term of office: None specified.
 Removable by President with consent of Senate.

Restrictions on removal: None except that consent of Senate must be obtained.

78. *Postmasters of the First, Second, and Third Classes* (§ 3830, R. S ; 19 Stat 80, 81, § 6).

Appointed by President with consent of Senate

Term of office 4 years.

Removable by President with consent of Senate.

Restriction on removal None except that consent of Senate must be obtained.

C. DENIAL TO THE PRESIDENT OF THE POWER TO REMOVE FOR ANY CAUSE OTHER THAN CERTAIN SPECIFIED CAUSES.

(a) General statutes

79 *Board of General Appraisers, Members* (42 Stat 972, § 518)

Appointed by President with consent of Senate.

Term of office. None specified

Removable by President alone

Restriction on removal "hold office during good behavior, but may, after hearing, be removed * * * for the following causes and no other: Neglect of duty, malfeasance in office, or inefficiency"

Note: The statute (26 Stat. 136, § 12) involved in *Shurtleff v. United States* (1903), 189 U. S 311, merely provided that the members of the Board "may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office." This statute was amended by the Act of May 27, 1908 (35 Stat 406, §3), so as to impose the above restrictions (see also, 36 Stat 98, § 28).

80 *Board of Tax Appeals, Members* (43 Stat. 336, 337, § 900).

Appointed by President with consent of Senate

Term of office: 10 years and until successor is qualified

Removable by President alone.

Restriction on removal "inefficiency, neglect of duty, or malfeasance in office, but for no other reason."

81. *Railroad Labor Board, Members* (41 Stat 470, §§ 306, 307).

Appointed by President with consent of Senate

Term of office: 5 years

Removable by President alone

Restriction on removal: "neglect of duty or malfeasance in office, but for no other cause"

- (b) Statutes relating exclusively to Army or Navy.

- 82 *Army, commissioned officers* (§ 1229 R. S ; 36 Stat. 894, Ch 22; 41 Stat 811, Art. 118).

Appointment: None specified in statutes cited, which relate to removal only. Appointments in Regular Army are made by President with consent of Senate. In Reserve Corps and branches of the service other than the Regular Army, appointments are usually required to be made by the President alone, except that general officers are appointed by the President with the consent of the Senate.

Term of office: None usually specified.

Removable by President or by general court martial.

Restriction on removal: In war time, no restriction on President; in time of peace, President may at any time drop from the rolls any officer absent from duty three months without leave, or absent in confinement in a prison or penitentiary for three months after final conviction.

- 83 *Navy, commissioned officers* (§§ 1229 and 1624, Art 36, R. S.).

Appointment: None specified in statutes cited, which relate to removal only. Appointments in Navy are usually required to be made by President with consent of Senate.

Term of office: None usually specified.

Removable by President or general court martial.

Restriction on removal: In time of peace only by sentence of general court martial.

D. DENIAL TO THE PRESIDENT OF THE POWER TO REMOVE FOR CERTAIN CAUSES EXCEPT AFTER NOTICE AND OPPORTUNITY TO DEFEND.

Note: Statutes under this heading are of two classes. First, there are those statutes which provide for removal "for cause." No Federal statute with a like provision has been construed by the courts so far as counsel is aware, but the State courts regard statutes providing for removal "for cause" as requiring the removing authority to give notice and opportunity to defend before the removal (see, for example, *Haight v. Love* (1876) 39 N. J. L. 14, *affd.* 39 N. J. L. 476, *State v. Frazier* (N. D. 1921), 182 N. W. 545; *Street Commissioners v. Williams* (1903), 96 Md. 232, *Andrews v. Police Board* (1900), 94 Me. 68; *Ham v. Board of Police* (1886), 142 Mass. 90; see also, *United States v. Shurtleff* (1903), 189 U. S. 311, 314). Second, there are those statutes which provide certain specified causes for removal, as for example "inefficiency, neglect of duty, or malfeasance in office." Such statutes are construed as permitting removal for causes other than those specified unless the statutes provide in terms to the contrary. Removal for the specified causes, however, may be had only after notice and opportunity to defend (*Reagan v. United States* (1901), 182 U. S. 419; *Shurtleff v. United States* (1903), 189 U. S. 311). Therefore both classes of the above statutes constitute a limitation upon the President to the extent that he is required to give notice and opportunity to defend before removal and cannot remove at pleasure.

(a) General statutes.

84. *Consular Clerks* (§§ 1704, 1705, R. S.)
 Appointed by President.
 Term of office: None specified.
 Removal authority not specified.
 Restriction on removal: "for cause * * * submitted to Congress at session first following such removal."
85. *Federal Farm Loan Board, Members* (39 Stat. 360, § 3, Am 42 Stat. 1473, § 301).
 Appointed by President with consent of Senate.

- Term of office: 8 years.
Removable by President alone.
Restriction on removal: "for cause"
86. *Federal Reserve Board, Members* (except ex-officio)
(42 Stat. 620, § 10)
Appointed by President with consent of Senate.
Term of office: 10 years.
Removable by President alone.
Restriction on removal: "for cause"
87. *Federal Trade Commission, Commissioners* (38 Stat 717, 718).
Appointed by President with consent of Senate.
Term of office: 7 years
Removable by President alone.
Restriction upon removal: "inefficiency, neglect of duty, or malfeasance in office"
88. *Interstate Commerce Commission, Commissioners* (24 Stat. 383, § 11, Am 41 Stat 497, § 440).
Appointed by President with consent of Senate.
Term of office: 7 years.
Removable by President.
Restriction on removal: "for inefficiency, neglect of duty, or malfeasance in office."
89. *U. S. Tariff Commission, Commissioners* (39 Stat 795, § 700)
Appointed by President with consent of Senate.
Term of office: 12 years.
Removable by President alone.
Restriction upon removal: "inefficiency, neglect of duty, or malfeasance in office."
90. *U. S. Shipping Board, Commissioners* (41 Stat 989, § 3)
Appointed by President with consent of Senate.
Term of office: 6 years.
Removable by President alone.
Restriction upon removal: "inefficiency, neglect of duty, or malfeasance in office."
- (b) Statutes relating exclusively to a Territory or to the District of Columbia.

91. *District Court for Alaska, Judges* (23 Stat. 24, Am. 31 Stat. 325, § 10).

Appointed by President with consent of Senate.

Term of office: 4 years and until successor is qualified

Removable by President alone.

Restriction on removal: "for cause."

92. *District Court for Alaska, Marshal* (23 Stat. 24, Am. 31 Stat. 325, § 10).

Appointed by President with consent of Senate.

Term of office: 4 years and until successor is qualified

Removable by President alone.

Restriction on removal: "for cause."

93. *Juvenile Court of the District of Columbia, Judge* (34 Stat. 73, § 2).

Appointed by President with consent of Senate.

Term of office: 6 years.

Removable by President. Note: Whether the consent of Senate is required is not clear. The language is as follows "The judge * * * shall be appointed by the President * * *, subject to removal by the President for cause, and by and with the advice and consent of the Senate * * *, or until his successor is appointed and confirmed."

Restriction on removal: "for cause."

94. *Police Court for the District of Columbia, Judges* (Pub. 561, 68th Cong., § 3[a])

Appointed by President with consent of Senate.

Term of office: 6 years and until successor takes office.

Removable by President alone.

Restriction on removal: "for cause"

95. *U. S. Court for China, Judge* (34 Stat. 816, § 6 and 7)

Appointed by President with consent of Senate

Term of office: 10 years.

Removable by President alone.

Restriction on removal: "for cause"

E. DENIAL TO THE PRESIDENT OF THE POWER TO REMOVE UNTIL SUCCESSOR IS CHOSEN AND QUALIFIED

96. *Governor General of the Philippine Islands* (39 Stat. 552).

Appointed by President with consent of Senate.

Term of office. None specified.

Removable by President.

Restriction on removal: "hold his office at the pleasure of the President and until his successor is chosen and qualified."

97. *Governor of Porto Rico* (39 Stat. 955).

Appointed by President with consent of Senate.

Term of office: None specified.

Removable by President.

Restriction on removal: "hold his office at the pleasure of the President and until his successor is chosen and qualified."

F REQUIREMENT OF COMMUNICATION BY PRESIDENT TO
SENATE OF REASONS FOR REMOVAL.

98. *Comptroller of the Currency* (§ 325 R. S.).

Appointed by President with consent of Senate.

Term of office: 5 years.

Removable by President.

Restriction on removal. President to communicate reasons for removal to Senate.

99. *Director of the Mint* (§ 343 R. S.).

Appointed by President with consent of Senate.

Term of office: 5 years.

Removable by President.

Restriction on removal. President to communicate reasons for removal to Senate.

GEORGE WHARTON PEPPER,
Amicus Curiae.