

## THE APPOINTMENT AND REMOVAL POWERS OF THE PRESIDENT UNDER THE NIGERIAN AND AMERICAN CONSTITUTIONS: A CRITICAL EXAMINATION

by

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### ABSTRACT

*This paper examines the constitutional powers of the President to appoint and remove public officers. The President, as Chief Executive of the Federation, has wide powers to appoint and remove public officers, not only for the executive branch but also for the other branches of government. In certain cases, the appointment and removal powers are absolute and exclusive, thereby enabling the President to appoint and remove at his own will and his discretion. However, in other more sensitive public offices, the President's appointment and removal powers are restricted by the requirement of legislative confirmation of such appointment and removal. This is a necessary incidence of checks and balances aimed at forestalling executive arbitrariness and abuse of power. The efficacy of legislative checks on presidential appointment and removal powers depends to a large extent on the independence and integrity of the legislature.*

*Keywords:* Appointment, Removal, President's Powers, Constitutions, Public Office.

### 1. INTRODUCTION

The 1999 Constitution of Nigeria confers on the President the titles of Head of State, Chief Executive of the Federation and Commander in Chief of the Armed Forces of the Federation.<sup>1</sup> As Chief Executive, the President functions as the Head of Government and takes charge of, and, responsibility for, the whole administration of government and its day to day running.<sup>2</sup> Therefore, the title "Chief Executive" does not only signify the headship of the executive branch of government, it also implies the ultimate decision maker within the Nigerian State. It declares in unmistakable terms that the President, both politically and constitutionally is the sole representative of all the people.<sup>3</sup> He is the only officer who is elected by the majority of the people<sup>4</sup> in a nation-wide election. The Chief executive is more than *primus inter pares* among the three branches of the national government that are ostensibly equal in origin and equal in title.<sup>5</sup>

Mowoe<sup>6</sup> maintains that the title Head of State has the same import as the office of Chief Executive. Commenting on the title Head of State in the United States,

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<sup>1</sup> Constitution of the Federal Republic of Nigeria (CFRN), 1999, s. 130(2).

<sup>2</sup> K. M. Mowoe, *Constitutional Law in Nigeria* (Lagos: Malthouse Press Ltd. 2003) p. 124.

<sup>3</sup> A.S. Miller, *Presidential Power in Nut-Shell*, (St. Paul Minnesota: West Publishing Co. 1977) p. 34.

<sup>4</sup> *Ibid.*

<sup>5</sup> Per Roger Taney C.J. in *Gordon v United States*, 117 U.S. 697, 701 (1864).

<sup>6</sup> Mowoe, (n. 2) at 125.

Basu stated as follows:<sup>7</sup>

*The American President is not only the head of the political system, but also of the national life; not a mere party chief but also “the majesty of the people incarnate.” He combines in himself the two English offices of the Crown and the Prime Minister – in the words of Bagehot – ‘dignified’ as well as the efficient functions.*

One of the areas where the President exercises enormous powers, as Chief executive of the Federation, is in the appointment and removal of public officers. The President’s powers in this regard, are not restricted to officers of the executive branch of government, but also extend to those of the judicial and legislative branches and independent bodies. This paper examines the scope of the constitutional powers of the President to appoint and remove public officers both under the Nigerian and American constitutional orders. The role of the legislature in providing the necessary checks and restraints on the exercise of presidential appointment and removal powers is also examined and recommendations are proffered for a more effective and beneficial exercise of these powers.

## **2. APPOINTMENT AND REMOVAL POWERS OF THE PRESIDENT UNDER THE NIGERIAN CONSTITUTION**

### **2.1 General Appointment and Removal Powers**

As a result of the enormous responsibilities of the President as Chief Executive and law enforcer, successive Nigerian Constitutions have always created certain offices and bodies, over whose appointment and removal the President exercises some degree of authority, to help him in the execution of his functions.<sup>8</sup> Thus, the 1999 Constitution of Nigeria empowers the President to appoint Ministers<sup>9</sup> and Special Advisers.<sup>10</sup> The President also appoints the Chairmen and Members of Federal Commissions and Councils.<sup>11</sup>

The Constitution further empowers the President to appoint persons to hold or to act in the offices listed below and to remove such persons so appointed from such offices.<sup>12</sup>

- (a) Secretary to the Government of the Federation,
- (b) Head of civil service of the Federation
- (c) Ambassador, High Commissioner or other principal Representative of Nigeria abroad.
- (d) Permanent Secretary in any Ministry or Head of any Extra Ministerial Department of the Government of the Federation, howsoever designated and

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<sup>7</sup> Basu’s Commentaries on the Indian Constitution, 6<sup>th</sup> Vol. E, 160. Quoted also in K. Mowoe, *Op. Cit.* at 124 – 125.

<sup>8</sup> Mowoe, (n. 2) at 126.

<sup>9</sup> CFRN, 1999, s. 147(2).

<sup>10</sup> *Ibid.*, s. 151(1).

<sup>11</sup> *Ibid.*, s. 153 – 154.

<sup>12</sup> *Ibid.*, s. 171.

(e) Any office on the personal staff of the President.

The appointments which are made into these offices are at the pleasure of the President and such appointments shall cease when the President ceases to hold office.<sup>13</sup> However, provision is made for those who were appointed from the federal or state public service into these offices to return to their previous service when the President ceases to hold office.<sup>14</sup> Obviously, this will ensure that they do not lose their employment prematurely before reaching the retirement age.

The Constitution of Nigeria restricts the President's power to appoint a person to the office of the Head of the Federal Civil Service to those who are already Permanent Secretaries or of equivalent rank in the Civil Service of the Federation or of a State.<sup>15</sup> While this provision may seek to assure members of the civil service that they could move to the highest position of their career, it is capable of shutting out more competent and innovative persons who are not within the civil service.

The President's appointment of persons into the offices of Ambassador, High Commissioner or other Principal Representative of Nigeria abroad shall have no effect unless, such appointments are confirmed by the Senate.<sup>16</sup>

Apart from ex-officio members, the President has the power to appoint the Chairman and members of the following bodies:

(a) Code of Conduct Bureau; (b) Council of State; (c) Federal Character Commission; (d) Federal Civil Service Commission; (e) Federal Judicial Service Commission; (f) Independent National Electoral Commission; (g) National Defence Council; (h) National Economic Council; (i) National Judicial Council; (j) National Population Commission; (k) National Security Council; (l) Nigeria Police Council; (m) Police Service Commission; and (n) Revenue Mobilisation Allocation and Fiscal Commission.<sup>17</sup>

The appointment of a person as chairman or member of the above bodies shall be subject to confirmation by the Senate, except in the case of the chairman or member of the Council of State, National Defence Council, National Security Council, where the President shall not be required to obtain the confirmation of the Senate.<sup>18</sup>

Again, in exercising his powers to appoint a person as chairman or member of the Independent National Electoral Commission, National Judicial Council, Federal

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<sup>13</sup> *Ibid.*, s. 171(6).

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, at s. 171(3).

<sup>16</sup> *Ibid.*, s. 171(4).

<sup>17</sup> *Ibid.*, s. 154(1).

<sup>18</sup> *Ibid.*, s. 154(2).

Judicial Service Commission or the National Population Commission, the President must consult the Council of State.<sup>19</sup>

It is significant to note that, though the President is empowered to constitute Federal Boards and Commissions by appointing their Chairmen and members, the independence of these bodies is also constitutionally guaranteed. Thus, the Constitution provides, for example, that in exercising its power to make appointments or to exercise disciplinary control over persons, the Code of Conduct Bureau, the National Judicial Council, the Federal Civil Service Commission, the Revenue Mobilisation and Fiscal Commission, the Federal Character Commission and the Independent National Electoral Commission, shall not be subject to the direction or control of any other authority or persons.<sup>20</sup> The National Population Commission is also not subject to the direction or control of any other authority or person: (a) in appointing, training or arranging for the training of enumerators or other staff of the Commission to assist it in the conduct of any population census, (b) in deciding whether or not to accept or revise the return of any officer of the said Commission concerning the population census in any area or part of the Federation, (c) in carrying out the operation of conducting the census and (d) in compiling its report of a national census for publication.<sup>21</sup>

These constitutional provisions are generally aimed at securing the independence and impartiality of these bodies by insulating them from political influence. However, some of these bodies, like the INEC, are always at the centre of political controversies. Indeed, in Nigeria, the election management body (INEC) has always been accused of corruption and partisanship by members of political parties that have lost in an election;<sup>22</sup> while election results are usually disputed and fiercely contested, even to the Supreme Court, the highest court in the land.<sup>23</sup>

## **2.2 Removal Power in Respect of Members of Federal Commissions and Councils**

Subject to section 157(3) of the Constitution,<sup>24</sup> the chairman and members of certain Federal Commissions and Councils, can only be removed by the President, acting on an address supported by two-thirds majority of the Senate, praying that they be so removed for inability to discharge the functions of the office, whether

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<sup>19</sup> *Ibid.*, s. 154(3).

<sup>20</sup> *Ibid.*, s. 158(1).

<sup>21</sup> *Ibid.*, s. 158(2).

<sup>22</sup> U. Ochulu, "INEC's Partnership Fuels Electoral Violence, Sayfayose" *The Guardian* (online) 21/2/2016 available at [http://guardian.ng/news/inecs-partnership-fuels-](http://guardian.ng/news/inecs-partnership-fuels) accessed 22/3/2017; see also M. Atebor, "Bahari Calls for Jega's Sack, Accuses INEC of Deep Corruption" *Premium Times* 7/3/2013 available at <http://www.premiumtimesng.com/news/123453-baharicalls-for-jega-s-sack-accuses-inec-deep-corruption.htm>. accessed 22/3/2017.

<sup>23</sup> Nkem Ikeke, "Taraba Election: Supreme Court declares Darius Ishaku Winner" at <http://politics.naya.com/727624-Supreme-court-declares-darius-ishaku-winner-taraba-election-htm>. accessed 22/3/2017.

<sup>24</sup> Relating to cessation of membership of National Population Commission upon a National Census Report being declared unreliable by the President and accordingly rejected.

arising from infirmity of mind or body or any other cause or for misconduct.<sup>25</sup>

The affected officers are those of the chairman and members of Code of Conduct Bureau, Federal Civil Service Commission, Independent National Electoral Commission, National Judicial Council, Federal Judicial Service Commission, Revenue Mobilisation, Allocation and Fiscal Commission, Federal Character Commission, Nigeria Police Council National Population Commission and the Police Service Commission.<sup>26</sup> This stringent condition for removal of these officers is obviously aimed at securing their tenure of office, thereby enhancing their independence and efficiency. It is also aimed at insulating these officers from politics<sup>27</sup> and arbitrary control by the President.

The Constitution further provides that “All members of the National Population Commission shall cease to be members if the President declares a National Census Report as unreliable and the report is rejected in accordance with section 213 of this Constitution”.<sup>28</sup> This provision is justified on the ground that the rejection of a National Census Report by the President amounts to an indictment of the members of the National Population Commission; for incompetence and inability to conduct an acceptable census. In consequence, most people would lose confidence in the Commission.

### **2.3 Appointment and Removal of Judicial Officers**

With regard to the Nigerian judiciary, the Constitution empowers the President to appoint the Chief Justice of Nigeria on the recommendation of the National Judicial Council, subject to confirmation by the Senate.<sup>29</sup> The President also appoints the Justices of the Supreme Court and the President of the Court of Appeal on the advice of the National Judicial Council and subject to confirmation by the Senate.<sup>30</sup> The appointment of all the other Justices of the Court of Appeal, the Chief Judge and the Judges of the Federal High Court are also made by the President on the recommendation of the National Judicial Council.<sup>31</sup> However, the confirmation of these appointments by the Senate is not required.

The security of office of a judicial officer is guaranteed by section 292(1) of the Nigerian Constitution, which provides to the effect that a judicial officer shall not be removed from his office or appointment before his age of retirement, except under certain specified circumstances. Under section 292(1)(b) of the said Constitution, the National Judicial Council (NJC) enjoys the prerogative of recommending to the President, the removal from office of Justices of the Supreme Court of Nigeria, except the Chief Justice, the President of the Court of

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<sup>25</sup> CFRN, 1999, s. 157(1).

<sup>26</sup> *Ibid.* s. 157(2).

<sup>27</sup> J.O. Ojo, *The Development of the Executive under the Nigerian Constitution 1960 – 81* (Ibadan: University Press Ltd., 1985) p. 79.

<sup>28</sup> CFRN, 1999, s. 157(3).

<sup>29</sup> *Ibid.*, s. 231(1).

<sup>30</sup> *Ibid.*, s. 231(1) & s. 250(1) respectively.

<sup>31</sup> *Ibid.* at s. 231(2) and 250(2).

Appeal, Justices of the Federal Court of Appeal, the Chief Judge and Judges of the Federal High Court. The recommendation must be based on the inability of the judicial officer to discharge the functions of his office or appointment, whether arising from infirmity of mind or of body, or for misconduct or contravention of the Code of conduct. The NJC also exercises disciplinary control over such officers.<sup>32</sup>

Clearly, the power to appoint and remove Justices and Judges of federal courts is not the exclusive prerogative of the President, to be exercised according to the dictates of his whims and caprices. The power is shared. The President cannot remove a judicial officer unless there is a recommendation to that effect by the National Judicial Council.<sup>33</sup> In the case of the Chief Justice, the President can only remove him from office, acting on an address supported by two-thirds majority of the Senate, praying that he be so removed for his inability to discharge the functions of the office or appointment (whether arising from infirmity of mind or of the body) or for misconduct or contravention of the Code of Conduct.<sup>34</sup>

The security of office of judicial officers constitutes an invaluable element of judicial independence; and the constitutional provisions relating to the appointment and removal of judicial officers are quite satisfactory in this regard. Nevertheless, the appointment process can still be abused, particularly, where extraneous issues, such as tribe, connections and sponsor, are considered in the selection and recommendation of candidates to the President, instead of competence and other objective factors.

### **3. APPOINTMENT AND REMOVAL POWERS OF THE PRESIDENT UNDER THE AMERICAN CONSTITUTION**

#### **3.1 Appointment Power**

Under the American Constitution, Article II, section 2 clauses 2 & 3, which deals with presidential appointment of public officers, provides as follows:

*The President shall nominate, and, by and with the advice and consent of the Senate, shall appoint Ambassadors, other Public Ministers and Consuls, Judges of the Supreme Court and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by laws; but the Congress may by law vest the appointment of such inferior officers, as they think proper in the President alone, in the Court of law or in the heads of departments.*

It is significant to note, from the foregoing, that, under the American Constitution

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<sup>32</sup> *Ibid.*, Third Schedule, Part 1(1) 21(d).

<sup>33</sup> *Ibid.*, s. 292(1)(b).

<sup>34</sup> *Ibid.* s. 292(1)(a)(i).

Congress has power to create offices, while the power to nominate individuals that will occupy those offices, is vested in the President. The courts have also held that although Congress creates offices, it cannot by law, designate the person to fill those offices.<sup>35</sup> Therefore, as a general proposition, the President may appoint officers, but he may not create offices; the latter is a legislative prerogative, as is implied by Art. II, section 2, of the American Constitution.<sup>36</sup> The President's power to nominate and appoint an officer represents a critical means by which he can influence the administration of the laws.<sup>37</sup> Generally, Presidents can appoint individuals who share their values and social priorities.<sup>38</sup> The President's ability to take the initiative in criminal and civil law enforcement hinges in part on the presence of officers to follow his bidding.<sup>39</sup> Through the power to appoint officers of the United States, Presidents can serve the public by ensuring accountability for the exercise of delegated authority.<sup>40</sup>

Under the Constitution, Senate's approval of the nominations of "ambassadors, other public Ministers and Consuls" constitutes a significant requirement for the validity of presidential appointments into these offices. Senate is also empowered to confirm such other officers of the United States as Congress wishes to have the Senate confirm. Congress has absolute power to make any such officer subject to confirmation.<sup>41</sup>

The appointment clause therefore represents one of the many instances in the American Constitution of blended or shared powers; the President takes the initiative by nominating persons for public offices, but is checked by the Senate's power to screen and confirmed such persons, thereby ensuring some measure of accountability.

The power of appointment is, in fact, shared between the President and Congress. Congressional power to create an office implies the power to set the qualifications for it, thereby restricting the presidential selection to those who possess the prescribed qualifications.<sup>42</sup> The Senate may therefore refuse to confirm the nomination of a person who falls short of those qualifications.<sup>43</sup>

The Constitution of America, unlike the Nigerian Constitution also vests the

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<sup>35</sup> *United States v Ferreira* 54 US (13 Hon) 39, 50 – 57 (1852). See also *Myers v United States*, 272 US 52, 128 (1926).

<sup>36</sup> Miller, (n. 3) at. 37.

<sup>37</sup> A.J. Krent, *Presidential Powers* (New York: New York University Press, 2005) p. 24.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> Miller, (n. 3) at 41 – 43.

<sup>42</sup> *Ibid.* See also *Myers v United States*, 272 US at 265 – 274, where Justice Brandies listed some of the requirements that Congress had imposed on the President's selection of nominees, to include: citizenship, being a resident of the United States, a State, a particular State, a particular District etc. See L. Fisher, *Constitutional Conflicts Between Congress and the President* 5<sup>th</sup> ed., (Kansas: University Press of Kansas, 2007) p. 26.

<sup>43</sup> Fisher, (n. 42).

President with the “power to fill up all vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the end of their next session.”<sup>44</sup>

This provision clearly seeks to prevent the Senate from thwarting a President’s administration of the law by going into recess when vacancies existed.<sup>45</sup> However, the Senate can reject the nominee when the President resubmits his name for a more permanent employment at the end of the next session. The Congress has however attempted to shape the President’s recess appointment power through legislation. For example, the Federal Vacancies Reform Act of 1998 purports to delimit how Presidents can make temporary appointments.<sup>46</sup>

### 3.2 Removal Power

There are no express provisions in the American Constitution for removal of public officers, save by impeachment.<sup>47</sup> It was generally assumed that the President could remove such officers without the approval of Senate. The first attempt at providing a legislative check of the President’s removal power was the enactment of the Tenure of office Act, 1867, which provided that no person holding a civil office to which he was appointed with the ratification of Senate could be removed by the President without the consent of the Senate. This Act was, however, repealed in 1887.

The United States Supreme Court, in *Myers v United States*,<sup>48</sup> declared subsequent related legislation as unconstitutional. In that case, President Wilson removed one Myers from his office as a first class postmaster. By an Act of Congress, postmasters of the first, second and third grades were to be appointed, with Senate approval, for a fixed term of 4 years subject to earlier removal by the President. It was, however, widely assumed that such removal would be with the consent of the Senate. Myers then sued for arrears of salary on the grounds that his removal was illegal, the consent of the Senate not having been obtained.

The Supreme Court held that: ‘The power to remove superior officers, is an incident of the power to appoint them, and is in its nature an executive power’.<sup>49</sup>

Again, in *Humphrey’s Executor v U.S.*,<sup>50</sup> Humphrey, a Federal Trade Commissioner was removed by President Roosevelt because the Commissioner’s

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<sup>44</sup> US Const. Art II s. 2 cl. 3.

<sup>45</sup> Senate in the early years of the American National history typically had recess last half of a year and the President may need to fill vacancies before Senate returns. Even today, Senate customarily recesses for at least six weeks between sessions. See Krent, (n. 37) at 35.

<sup>46</sup> 5 USC 3345 – 3349(d) (2000).

<sup>47</sup> U.S. Const., Art. II, S. 4.

<sup>48</sup> 272 U.S. 52 (1926).

<sup>49</sup> *Ibid.* at 161.

<sup>50</sup> 295 U.S. 602 (1935).

philosophy of business regulation differed greatly from his own. But under the law, the President could only remove for ‘inefficiency, neglect of duty or malfeasance;’ and the President did not adduce any of these reasons to justify the removal. Humphrey then sued for salaries.

In distinguishing the instant case from the *Myers Case*, Sutherland J. maintained that a postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. Therefore, the actual decision in the *Myers Case* finds support in the theory that such an office is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aide he is. The decision goes no farther; much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.

The Court continued:

*The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute... such a body cannot in any proper sense be characterized as an arm or eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control... We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named, (the Interstate Commerce Commission, the Federal Trade Commission, the Court of Claims). The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.*

The court therefore concluded as follows:

*The result of what we now have said is this: whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office; the Myers decision affirming the power of the President alone to make the removal, is confined to purely executive officers.<sup>51</sup>*

It was also decided in *Weiner v U.S.*,<sup>52</sup> that a War Claims Officer was not an executive officer; hence he could not be removed by the President. The Supreme Court explained that the differences between *Myers* and *Humphrey's Executor* rested mainly on functions. It said that it was ‘the difference in function between those who are part of the Executive Establishment and those whose tasks require

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<sup>51</sup> *Ibid.* at 631 – 632.

<sup>52</sup> 357 U.S. 349 (1958).

absolute freedom from Executive interference.<sup>53</sup>

#### **4. LEGISLATIVE CONTROL OF PRESIDENTIAL APPOINTMENT AND REMOVAL POWERS**

##### **4.1 Legislative Confirmation/Approval of Executive Actions**

Legislative approval of executive actions in Nigeria is one of the in-built constitutional mechanisms which enable the National Assembly to check the President's exercise of executive powers, with the view of forestalling arbitrariness and abuse. Thus, under the 1999 Constitution of Nigeria, certain powers of the President or Governor are exercisable only with the approval of either both Houses of the National Assembly or the Senate alone. Such approval would either be a condition precedent or subsequent to the validity of the executive action. Where approval is a condition precedent, it must first be obtained before the act can validly be taken. On the other hand, where it is a condition subsequent, the President is empowered first to take action and, thereafter, obtain legislative approval. However, the act becomes void unless it is approved.

The prior approval of both Houses of the National Assembly is required for the appointment of a new Vice-President in the event of a vacancy occurring in the office.<sup>54</sup> In such cases, the President shall nominate and, with the approval of each House of the National Assembly, appoint a new Vice-President.<sup>55</sup> The removal of a member of the Code of Conduct Tribunal by the President also requires the prior approval of each House of the National Assembly, supported by two-thirds majority of its members, on the ground of inability to discharge the function of his office or misconduct or contravention of the Code of Conduct.<sup>56</sup> It is important to observe that though the National Assembly is not involved in the appointment of the chairman and members of the Code of Conduct Tribunal, the President who made the appointment cannot effect any removal of the members without the approval of the National Assembly.<sup>57</sup> Therefore, legislative restraint on executive removal power is not restricted to cases where the appointment was made with the approval of the Legislature.

Another noteworthy instance where the exercise of appointment power by the President requires the prior approval of both Houses of the National Assembly relates to the determination of the number of Special Advisers and their remuneration and allowances.<sup>58</sup>

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<sup>53</sup> *Ibid.* at 353.

<sup>54</sup> CFRN, 1999, s. 146 (3) (providing that: "The office of Vice President can become vacant: (a) by reason of death or resignation, impeachment, permanent incapacity or removal in accordance with section 143 or 144 of the Constitution. (b) by his assumption of the office of the President in accordance with sub section (1) of s. 146, or (c) for any other reason").

<sup>55</sup> *Ibid.*

<sup>56</sup> CFRN, 1999, Fifth sch. para. 17(3).

<sup>57</sup> *Ibid.* at para. 15(3). The Chairman and members of the Code of Conduct Tribunal are appointed by the President in accordance with the recommendation of the National Judicial Council.

<sup>58</sup> CFRN, 1999, s. 151 (2).

However, the appointment of the following public officers by the President requires Senate's confirmation, only, subject to the provision of section 14(3) of the Constitution,<sup>59</sup> relating to the federal character principle:

- Auditor-General for the Federation;<sup>60</sup>
- Ministers of the Government of the Federation;<sup>61</sup>
- Ambassador, High Commissioner or other Permanent Representative of Nigeria abroad;<sup>62</sup>
- Chairman and members of the Code of Conduct Bureau, Federal Character Commission, Federal Civil Service Commission, Federal Judicial Service Commissions, Independent National Electoral Commission, National Defence Council, National Economic Council, National Judicial Council, National Population Commission, National Security Council, Police Service Commission, Revenue Mobilisation Allocation and Fiscal Commission.<sup>63</sup>
- Chief Justice of Nigeria,<sup>64</sup> Justices of the Supreme Court,<sup>65</sup> President of the Court of Appeal,<sup>66</sup> Chief Judge of the High Court of Federal Capital Territory, Abuja,<sup>67</sup> President of the Customary Court of Appeal of the Federal Capital Territory, Abuja,<sup>68</sup> and the Grand Khadi of the Sharia Court of Appeal of the Federal Capital Territory, Abuja.<sup>69</sup>

It is pertinent to observe that, except in few cases, presidential or gubernatorial appointees, since the coming into force of the 1999 Constitution, have always promptly received the approval of the legislative branches.<sup>70</sup> However, the appointment of Special Advisers by the President or State Governor does not require confirmation by the Senate or the State House of Assembly.<sup>71</sup>

The Auditor-General of the Federation is appointed by the President on the recommendation of the Federal Civil Service Commission, subject to confirmation by the Senate<sup>72</sup> In the same manner, the Senate or House of Assembly must also be involved in the removal of the Auditor General from office. Thus, section 87(1) of the Constitution provides that: A person holding the office of Auditor

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<sup>59</sup> This provision requires that the composition of the government of the Federation or any of its agencies and the conduct of its affairs be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity.

<sup>60</sup> CFRN, 1999, s. 86.

<sup>61</sup> *Ibid.* s. 147(2)(3).

<sup>62</sup> *Ibid.* s.171(4).

<sup>63</sup> *Ibid.* s. 153 – 154.

<sup>64</sup> *Ibid.* s. 231(1).

<sup>65</sup> *Ibid.* s. 231(2).

<sup>66</sup> *Ibid.* s. 238(1).

<sup>67</sup> *Ibid.*, s. 256(1).

<sup>68</sup> *Ibid.*, s. 266(1).

<sup>69</sup> *Ibid.*, s. 261(1).

<sup>70</sup> See A.A. Akinsanya, "The Legislature in a Presidential Democracy in Nigeria during the Fourth Republic" (2003) vi – vii *Cal. L. J.* 175 – 176.

<sup>71</sup> CFRN, 1999, s. 151(1)(3), and s. 196(1)(3).

<sup>72</sup> *Ibid.*, s. 86(1)., see similar provision in CFRN, s. 126(1) for appoint of Auditor General of the State.

General of the Federation shall be removed from office by the President acting on an address supported by two – thirds majority of the Senate praying that he be so removed for inability to discharge the functions of his office (whether arising from infirmity of mind or body or any other cause) or for misconduct.<sup>73</sup>

Akinsanya rightly submits that by involving the legislative branch in the process of appointing, and/or removing the Auditor-General, the tendency for the Chief Executive to appoint a party faithful who would collude with the Executive Branch to loot the public treasury or cover-up fraudulent practices would likely be drastically reduced, if not eliminated.<sup>74</sup> The independence of the Auditor-General is also guaranteed by the provisions of section 85(6) of the Constitution, which states emphatically that: “In the exercise of his functions under this Constitution the Auditor – General shall not be subject to the direction or control of any authority or person”.

The independence of the Auditor-General is further evidenced by the fact that he submits his reports directly to the National Assembly for consideration by its Public Accounts Committee (PAC) and not to or through the President.<sup>75</sup> There is no doubt that financial probity and prudence by the Executive Branch will be enhanced and ensured if the Reports of the Auditor-General are submitted promptly to the Legislature as required by law and the Public Accounts Committee of the legislative branch takes its duties seriously through prompt and diligent consideration of the Auditor-General’s reports.<sup>76</sup> However, the moral right of the legislature to examine the audited Accounts of Ministries and Parastatals of the executive branch as submitted to it by the Auditor-General has been called to question by the shameful conduct of some law-makers accused of financial improprieties.<sup>77</sup> The situation is further compounded by the refusal of the National Assembly to have its Accounts audited by the Auditor-General of the Federation<sup>78</sup> on the spurious ground that having a member of the Executive branch to audit the Accounts of the legislative branch is a violation of the doctrine of separation of powers enshrined in the Constitution.<sup>79</sup> Ironically, the National Assembly has itself conducted many probes and investigations into Ministries and Parastatals under the Executive Branch without any feeling that it has violated the

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<sup>73</sup> See similar provision in CFRN, s. 127(1) for removal of Auditor General of the State.

<sup>74</sup> Akinsanya, (n. 70) at 173 – 174.

<sup>75</sup> CFRN, 1999, s. 85(5) or s. 125 (5).

<sup>76</sup> The sad experience is that such Reports by the Auditor-General are always in arrears, while the appropriate Public Accounts Committees (PACs) do not take their duties seriously. See C. Nwankwo & John Ameh, “Financial Abuses: Auditor-General’s ₦686 bn Reports Pending in National Assembly Since 1999,” in *The Punch* Vol. 17 N0. 20,556, Tuesday January 5, 2010.

<sup>77</sup> Members of the Senate Committee on health were recently indicted for misappropriation of unspent budget of the Federal Ministry of Health. See *The Punch* Vol. 17 No. 20, 393 Friday May 15, 2009 at 2, where members of the House of Representatives Committee on power were also reportedly indicted by the EFCC for corruption in fraudulently awarding 156 contracts in the month of December 2008 only under the Rural Electrification Agency.

<sup>78</sup> See “Scandalous: How come the Presidency and National Assembly Accounts have never been Audited?”, in *The Nation*, Vol. 4 N0. 1251 of Wednesday, December 23, 2009.

<sup>79</sup> See Akinsanya, (n. 70).

doctrine of separation of powers. The Auditor-General has a constitutional duty to audit the Public Accounts of the Federation and of all offices and courts<sup>80</sup> without violating the doctrine of separation of powers because the said doctrine can be restricted or abridged by the Constitution itself.<sup>81</sup>

#### **4.2 Justification for Legislative Approval of Presidential Appointments**

The exercise of the President's power as chief executive requires him to seek legislative approval for most of his actions and plans. Thus, in the exercise of his appointment and removal powers, legislative approval is often required for the validity of the executive actions. The importance of legislative screening and confirmation of presidential nominees for public offices cannot be over emphasized. According to Kendall,<sup>82</sup> "parliamentary approval of executive nominees provides a check on the power of the executive and there is a scope for public scrutiny of the appointment process". It ensures that the President does not appoint his friends and cohorts into public offices in total disregard of the requirements of competence and integrity. Effective screening of presidential nominees for ministerial, judicial and other public offices would ensure that only competent persons are confirmed for appointment by the Senate.

According to Nwabueze,<sup>83</sup>: "Senate confirmation of persons nominated by the President for appointment to designated offices is designed also to safeguard public interest, and to ensure, in particular that appointment to such offices are not used to serve purely personal, partisan or sectional interest". Also justifying the need for legislative confirmation of appointments, James Madison had argued that "such a check enables the Senate (representing the legislative organ) to prevent the filling of offices with bad or incompetent men or with those against whom there is tenable objection."<sup>84</sup>

With regards to the appointment of judicial officers, legislative screening of nominees provides the requisite transparency and public scrutiny which are of paramount importance to ensure that the best available persons are appointed to judicial offices; and to enhance public confidence in the judiciary.<sup>85</sup>

Under the Nigerian Constitution, only the names of persons recommended by the National Judicial Council to the President for appointment as judicial officers could be forwarded by the President to the Senate for screening and confirmation

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<sup>80</sup> CFRN, 1999, s. 85(2).

<sup>81</sup> See *A.G. Abia State and 35 Ors. v. A.G. Federation* (2003) 1 SCNJ 131 at 187, per Iguh JSC.

<sup>82</sup> C.N. Kendall, "Appointing Judges: Australian Judicial Reform Proposal in Light of Recent North American Experience" (1997) 9 *Bond Law Review* 175 at 182.

<sup>83</sup> B.O. Nwabueze, *How President Obasanjo Subverted the Rule of Law and Democracy* (Ibadan: Gold Press Ltd. 2007) p. 110.

<sup>84</sup> Quoted in *Myers v United States* 272 U.S. 52 (1926).

<sup>85</sup> S.A. Akkas, "Appointment of Judges: A key Issue of Judicial Independence", (2004) available at <http://epublications.bond.edu.au/blr/16/iss2/8>, accessed on 12/11/2015.

of appointment. Thus, section 231(1)(2) of the Constitution of the Federal Republic of Nigeria 1999 provides that the Chief Justice of Nigeria and other Justices of the Supreme Court shall be appointed by “the President on the recommendation of the National Judicial Council, subject to confirmation of such appointment by the Senate.” This provision thus limits the President’s power of appointment to persons recommended by the National Judicial Council (NJC), as he cannot appoint persons who are not recommended by the Council.

The Nigerian constitutional procedures for appointing Supreme Court Justices are more elaborate than those of the United States Constitution, which require the President to appoint Supreme Court Justices with the advice and consent of the Senate.<sup>86</sup> The President of the United States is not bound to appoint Supreme Court Justices on the advice of a Judicial Council or in consultation with any advisory body such as the Council of States. The only requirement is to seek the advice and consent of the Senate, which is equivalent to legislative approval under the Nigerian Constitution.

It is curious to note that by “The Constitution of the Federal Republic of Nigeria, 1999 (Amendment) Bill, 2006”, which emanated from the executive, President Obasanjo wanted to do away with the requirement of limitation on his power to appoint the Chief Justice of Nigeria and other Justices of the Supreme Court. Thus, the Bill had proposed to amend section 231(1) & (2) of the 1999 Constitution by vesting the appointment of the Chief Justice of Nigeria and other Justices of the Supreme Court in the President “in consultation with the National Judicial Council, subject to confirmation by the Senate”. The amendment would have freed the President from the opinion of the National Judicial Council since he would not be bound by such opinion, thereby making him the effective authority to appoint the Justices of the Supreme Court.<sup>87</sup> The Bill was however defeated at the Senate.

In Nigeria, presidential nominees for appointment as Ministers and other public officers normally enjoy quick confirmation by the Senate, and sometimes the President may re-present a nominee whose confirmation is denied.<sup>88</sup> Though the Constitution does not limit the number of times a nominee could be presented to the Senate for confirmation, there are serious implications for the country if a

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<sup>86</sup> U.S. Const., art 11, clause 2.

<sup>87</sup> See Nwabueze, *How President Obasanjo Subverted The Rule of Law and Democracy*, *Op. Cit.* at 161.

<sup>88</sup> A former Minister for Aviation, Professor Babalola Aborisade and a former Chairman of the NDDC, Chief Onyema Ugochukwu were presented by President Obasanjo to the Senate as nominees for screening and confirmation of appointment, four times, before the confirmation was secured. See M.Affe, “Don’t Make Magu a Superstar, Ita Giwa” *Punch* (online) March, 2007. Currently, Ibrahim Magu has been nominated by the President and presented to the Senate twice for confirmation as Chairman of the Economic and Financial Crimes Commission, but rejected on both occasions.

rejected candidate is re-presented for confirmation.<sup>89</sup> Generally, it gives the impression that there are no better candidates or that the executive has a special interest in the candidate.<sup>90</sup> Worse still, it is a tacit rejection by the executive of the independence of the Legislature under the doctrine of separation of powers. It must be stressed that the Legislature, in constitutional democracy such as Nigeria, does not exist to rubber-stamp all executive actions. The President must appreciate this position in the interest of the growth and development of democratic culture in the country. It is also suggested that a limit should be placed, by law on the number of times a presidential nominee could be presented to the Senate for screening and confirmation.

The fact that majority of the members of the National Assembly belong to the same political party with the President seems to account for the ease with which the President gets his programmes and proposals through at the National Assembly. It is however important to stress that in matters of this nature, the Senate should always put aside party loyalty or leanings and carry out its functions with the sole aim of confirming the appointment of competent persons of integrity in the interest and welfare of the country.

The competence of a nominee may however be difficult to determine under the prevailing situation, where names of nominees sent by the President to the Senate are not accompanied by the corresponding portfolios intended for each nominee. Such information on the proposed portfolios of nominees would greatly enhance the performance of the Senate in screening the nominees to determine their competence, and Senate should insist on it.<sup>91</sup>

The very presence of the consent or confirmation power influences presidential selection: Presidents realize that they must nominate individuals who can gain the Senate's trust.<sup>92</sup> In Nigeria, at the moment, the Senate has on two occasions so far, rejected the President's nomination of Ibrahim Magu as the substantive Chairman of the Economic and Financial Crimes Commission, apparently on the ground of negative security report made by the Directorate of State Security (DSS) against the nominee. However, it is clear that the nominee, by his high-handed and selective handling and prosecution of the anti-corruption campaign, has failed to gain the trust of the Senate.

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<sup>89</sup> L.B. Lawal, "The Legislature Under the 1999 Constitution of Nigeria: Emerging Issues" in A.O. Popoola and E.O.I. Adodo (eds.) *Current Legal Developments in Nigeria; Essays in Memory of Professor J.D. Ojo*, (2007) p. 268 - 269.

<sup>90</sup> *Ibid.*

<sup>91</sup> See O. Oyewo, "Constitutionalism and the Oversight Functions of the Legislature in Nigeria". being a paper presented at African Network of Constitutional Law Conference on Fostering Constitutionalism in Africa, held at Nairobi in April 2007, available at <http://www.publiclaw.uct.ac.za/user/public/law/Nairobi/OyewoConstitutionalismOversightNigeria.doc>. accessed on 5/9/2015.

<sup>92</sup> Krent, (n. 37) at 25.

## 5. CONCLUSION AND RECOMMENDATIONS

The President is vested with enormous powers and discretion in the appointment and removal of public officers. However, while the President can appoint and remove certain public officers at will or at his pleasure, the appointment and removal of other public officers require legislative confirmation before they could be effective. Indeed, there are cases where the President could appoint without legislative confirmation, but could not remove without such legislative approval.

Unlike the American Constitution, the Nigerian Constitution contains elaborate and detailed provisions on the appointment and removal powers of the President. The various categories of public officers and the procedures for their appointment and removal are clearly adumbrated in the Nigerian Constitution. Thus, for example, the Nigerian Constitution expressly lists the officers who could be appointed and removed by the President at will and therefore hold office at the President's pleasure. Those whose appointment must be subjected to Senate confirmation are also expressly listed in the Nigerian Constitution. For judicial officers, their appointment process under the Nigerian Constitution starts with a recommendation by the National Judicial Commission to the President for appointment; though the President submits the recommended names as he so desires to appoint, to the Senate for screening and confirmation. The Legislature also has a role to play in the removal of judicial officers from office.

There are no express provisions on the removal power under the American Constitution, except the provision on impeachment, which is purely a legislative responsibility.<sup>93</sup> However, the American Constitution expressly assigns the power to create public offices to the Congress;<sup>94</sup> whereas, the Nigerian Constitution has no such provision; even though, the National Assembly could create public offices; for example, by enacting a law that establishes an agency, like the Niger Delta Development Commission (NDDC), and providing for offices with corresponding qualifications and the requirement of Senate's confirmation of presidential nominees for appointment into these offices.<sup>95</sup>

Nevertheless, it is clear that in both the Nigerian and American Constitutions, the appointment power, in particular, is shared between the President and the Legislature. In Nigeria, both the appointment and removal powers are shared, except, in those cases where the public officers serve at the pleasure of the President.<sup>96</sup> The requirement of legislative confirmation or approval of the exercise of presidential appointment and removal powers under the Nigerian and American Constitutions must be seen as a necessary incidence of checks and balances, aimed at forestalling arbitrariness and abuse of power and enhancing the

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<sup>93</sup> See US Const. Art II, s. 2 cl. 2 & 3.

<sup>94</sup> US Const. Art II, s. 4.

<sup>95</sup> Niger Delta Development Commission (Establishment) Act NO. 6, Cap N68 LFN, 2010..

<sup>96</sup> CFRN, 1999, s. 171.

independence and security of tenure of the public officers.

The President must be careful in selecting and nominating persons who will readily gain the trust and approval of the Legislature. On the other hand, the Legislature should be ready to act in the interest of the nation in the exercise of its power to confirm or reject presidential nominees. In this light, it becomes obvious that the efficacy of legislative checks on presidential appointment and removal powers depends to a large extent on the independence and integrity of the Legislature.