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Removal of Public Officers from Office for Cause, II

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REMOVAL OF PUBLIC OFFICERS FROM OFFICE FOR CAUSE*

II.

WE have seen by the great weight of authority that removal for cause requires notice, charges and a chance to defend. It remains for us to discuss the most difficult question of all. What is the nature of this power? Is it judicial or executive in character? The importance of this question is two-fold. 1. If executive in nature, the courts have no power to review it by the writ of certiorari. If judicial, they have. 2. If judicial, the question arises, is it constitutional to confer such a power on an executive officer?

Upon the question whether the power to remove is judicial or executive, the courts are at wide variance. As would be expected states like Arkansas, Texas, Louisiana and Illinois, which hold that such a power is an arbitrary one and requires neither notice, charges nor hearing, hold also that the power is an executive power. Since, however, these states are neither in accordance with authority or reason on the main proposition, their opinion as to the nature of the power is of little importance.

Among those states that hold that charges, notice and a hearing are necessary there is a difference in opinion as to whether the power be judicial or executive.

Ohio, Wisconsin, Nebraska, Utah, Oklahoma, Connecticut and New York hold that though these things are necessary nevertheless the power is an executive one. Said the Nebraska court in *State* v. *Hay*:[30] "The power conferred upon the Governor to remove certain public officers for cause is an administrative, not a judicial function.

* Continued from 3 MICHIGAN LAW REVIEW, p. 301.

[30] 45 Neb. 323.

The limit of judicial interference in such cases is to protect public officers removable for cause only in their right to a hearing upon specific charges."

Said the Ohio court in *State ex rel Attorney General* v. *Hawkins*:[37] "The power conferred upon the governor of the State * * to remove any members of the Board of Police Commissioners is administrative and not judicial in its nature."

Oregon takes the position that whether judicial or executive, removal for cause requires notice, charges and a hearing. Said that court in *Biggs* v. *McBride*:[38] "Whether such a power (removal for cause) is so far judicial in its nature that it cannot constitutionally be vested in the chief executive, or whether it is in its nature executive, we do not at this time undertake to determine. But it is believed that under either view it must be done upon notice to the delinquent of the particular charges against him and an opportunity be given to be heard in his defense."

Colorado, Michigan, Georgia, and Minnesota hold that removal for cause is a judicial function. Said the Minnesota court in *The State* v. *Common Council*:[39] "Neither is there anything better settled * * * than that proceedings, in all cases where the amotion from office is for cause, upon notice and hearing, are adversary and judicial in their nature and may be reviewed on certiorari. We think there is practically no conflict in the authorities on this point, the only difference among them being merely as to what they will review on such a writ."

We believe the last position to be the correct one. It is a very difficult thing to draw the exact line between judicial and executive power. The Ohio court well says, "What is judicial power cannot be brought within the ring-fence of a definition." The general definitions of judicial power do not help us because they are too broad. Says Judge Cooley, "The judicial power is the power to construe and apply the law when controversies arise concerning what has been done or admitted under it." Such a definition clearly does not afford tests that will determine whether removal for cause is or is not a judicial power. There seem to be two tests, one laid down by some courts and one by others, which bear directly upon this question. One is that any power to decide upon the property or rights of the citizen under existing law, is judicial. Says the Ohio court:[40] "It may be safely conceded that power to hear and deter-

[37] 44 O. S. 98.
[38] 17 Ore. 640.
[39] 53 Minn. 238.
[40] State *v.* Hawkins, 44 O. S. 98.

mine rights of property and of persons between private individuals, is judicial and can only be conferred upon the courts." Says the Dakota court in *Territory of Dakota ex rel French* v. *Cox et al.*:[41] "In other words, the courts have exclusive power to hear and determine those matters which affect the life, liberty and property of the citizen."

If this be the test, what shall be said about removal for cause? There is no property right in an office, so it cannot be a deprivation of property, but when the law provides that removal shall be only for cause there is surely some kind of a right which the officer has. He has a right under the law to hold his office unless he be guilty of some offense which goes to his fitness to rightly perform the duties of that office. Until that cause be found to exist, he has a right which the law will protect. This is recognized by the Minnesota court[42] when it says, "While the incumbent has no vested right of property as against the State in a public office, yet the right to it has always been recognized by the courts as a privilege entitled to the protection of the law." Said the Michigan Court:[43] "Holding and exercising an office to which a person has been elected during the term for which he has been elected, is a right of which he cannot be deprived without due process of law, and this requires notice to the party, a hearing and determination."

Surely then by this test removal for cause is a judicial function. The Ohio court declared in the case cited above that the courts which considered removal for cause a judicial function "proceeded upon the ground that an incumbent has a property right in his office and that he cannot be deprived of his right without the judgment of a court." This is cited with approval by the Dakota court. They fail to recognize, however, that while under such a provision the officer may not have a property right in his office he has nevertheless some kind of a right, call it what you may, which is sacred in the eyes of the law.

The other test laid down for determining what is a judicial power, is found in the words of Mr. Freeman (in 40 Am. St. Rep. 37): "Our contention is that an action is necessarily judicial if the person to be affected thereby have a right both to notice of the proceedings and to a hearing in opposition to it before some tribunal which is not otherwise authorized to proceed." Said the Minnesota court:[44] "A judicial investigation proceeds after notice and eventuates in a

[41] 6 Dak. 501.
[42] State *v.* Common Council, 53 Minn. 242.
[43] Clay *v.* Stuart, 74 Mich. 411, 414.
[44] Home Ins. Co. *v.* Flint, 13 Minn. 244, 247.

judgment which is the final determination of the rights of the parties unless reversed by an appellate tribunal. The necessity of notice in the inception and the conclusive character of the determination are perhaps as good a test as any other, as to what proceedings are judicial." Said Justice O'Brien in his able dissenting opinion in the case of *In re Guden,*[45] "Any proceeding in which a person is entitled to make a defense and to be heard necessarily involves a judicial inquiry."

If this be the test of what is judicial power, and we believe it is, then removal for cause is judicial, for by the great weight of authority in such cases charges, notice, and a hearing are necessary. If this be the true test then the New York Court of Appeals[46] was wrong in holding not to be judicial the Governor's power of removing the sheriff "within the time for which he shall have been elected: giving to such officer a copy of the charges against him and an opportunity of being heard in his defense." We believe that Justice O'Brien was clearly in the right in his dissenting opinion when he said "The power of removal is here given with the limitation that it shall be made upon charges only, a copy of which shall be served upon the officer and an opportunity given to him to be heard in his defense. Inasmuch as the accused officer is entitled to make a defense and be heard in his own behalf before the removal can be ordered, the proceeding is judicial in nature and character."[47]

We believe therefore, that removal from office for cause is a judicial and not an executive function, and agree with Mr. Freeman when he says (40 Am. St. Rep. 46): "Perhaps the clearest and best established illustration of the fact that an act not essentially judicial may be made so by requiring it to be preceded by an investigation after due notice to the parties interested, is the class of cases arising under laws authorizing the removal of officers for cause and after the hearing of charges against them."

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[45] 171 N. Y. 529, 64 N. E. 451.

[46] In re Guden, 171 N. Y. 529, 64 N. E. 451.

[47] In Larkin *v.* Noonan, 19 Wis. 93, and in Randall *v.* The State, 16 Wis. 340, we have construed a constitutional provision almost identical with the New York constitutional provision. Says the Wisconsin court in Larkin *v.* Noonan: "Our constitution provides that the Governor may remove a sheriff upon giving him a copy of the charges against him and an opportunity of being heard in his defense. The statute provides the same thing. It is obvious that these provisions clothe the Governor with a power over the proceedings strictly analagous to that exercised by a court in the trial of a cause. * * * Testimony must be taken, weighed and considered, and although the proceeding is summary and no trial by jury is allowed, yet it conforms in many particulars to the proceedings in judicial tribunals. Hence in the hearing of causes of this nature, the Governor acts in a quasi-judicial capacity." In Randall *v.* The State in regard to the same provision the court says: "In the hearing of causes of this nature, the Governor acts in a judicial capacity."

This leads us to the second point. If judicial, is it not unconstitutional to bestow such a power upon any but judicial officers? In discussing this question we must distinguish between cases where the power is vested in local authorities like the mayor or city council and where it is vested in the Governor. In the former case there is little difficulty. It has been held by the California and other courts that the doctrine of separation of power applies only to the state central government. If we accept this theory then all difficulty is removed. But one case could be found where the right to impose the power to remove for cause upon a local officer was questioned. The Colorado court[48] felt compelled to call removal for cause administrative because "the city council is not a judicial body and it is doubtful if the Legislature could invest it with judicial powers." Later the constitution was amended conferring the power of removal for cause upon the council. Then in *Carter* v. *City of Durango*[49] the court declared the power to be quasi judicial and not executive.

The case of removal for cause by the Governor is somewhat different, for here the doctrine of the separation of powers applies with all its force. It is not strange, therefore, that several cases are often cited in support of the doctrine that this power, being judicial, cannot be conferred upon the Governor.[50]

Dullam v. *Willson* (53 Mich. 392) is the leading case in support of this view. Here the court declared void a statute vesting such a power in the Governor. This is the only instance found where an act was declared void on this ground. *Page* v. *Hardin* (8 B. Mon. 648), *State ex rel Police Commissioners* v. *Pritchard et al.* (36 N. J. L. 101), and *Honey* v. *Graham* (39 Tex. 1) only declare that in the absence of express power granted elsewhere, removal for cause is a judicial act and must be exercised by the courts. In all these cases the Governor, having no power of removal vested in him, was attempting to declare an office vacant on the ground of forfeiture. These courts held this could not be done. *Page* v. *Hardin,* often cited as an authority for the proposition that the Governor cannot be empowered to remove for cause, was in fact made the basis of the decision of a later Kentucky case wherein just such a power was upheld.[51]

Some courts overcome the difficulty by holding that a power may be judicial in nature and yet not so judicial as to be necessarily

[48] People *v.* District Court of Lake Co., 6 Col. 534.

[49] 16 Col. 534.

[50] State ex rel. Police Comm'rs *v.* Pritchard et al., 36 N. J. L. 101; Honey *v.* Graham, 39 Tex. 1; Hyde *v.* State, 52 Miss. 665; Curry *v.* Stewart, 8 Bush. 560; Page *v.* Hardin, 8 B. Mon. 648; Dullam *v.* Willson, 53 Mich. 392.

[51] South *v.* Commissioners, 86 Ky. 186.

exercised by the courts alone. Said the Kansas court in *Lynch* v. *Chase*:[52] "While the proceeding to remove for cause involves the examination of the fact and the exercise of judgment and discretion of the executive, his action is not judicial in the sense that it belongs exclusively to the courts." Said the Michigan court in *Fuller* v. *Attorney General*:[53] "To the proposition that removing bodies (State Boards) perform acts which are judicial in their nature, we readily assent. They must hear and determine when their power is limited to removal for cause. So must boards of review, auditing boards, highway and drainage boards, park boards, and in fact nearly every officer who has duties to perform, and it is true that the action of all these is subject to review in a court of justice. None of them, however, belong to the judicial department of government, nor can they be called judicial officers though they perform acts judicial in nature."

Says the Utah court in *Gilbert* v. *Board of Commissioners*:[54] "It is clear the power here conferred is judicial in its nature, because the board is required to prefer charges * * * . The term judicial is not to be received in the sense ordinarily applied to courts of justice. We think the law is well settled that the Legislature may authorize boards of this character, to perform judicial acts (removal from office after hearing), and that such acts are reviewable in certiorari."

To the same effect is the decision of the Oklahoma court in *Cameron* v. *Parker*[55] when it says, "We think from the foregoing authorities it is very plain that the hearing and removal by the Governor of the defendant was not such a hearing as would bring it within the constitutional prohibition."

There seems to be no doubt then at the present time that it is constitutional to impose upon either the state or local executive officers the power to remove for cause, nor need it be held that such a power is executive in its nature to justify such a conclusion. We believe that removal for cause is judicial in its nature, not executive, but we do not believe that this forbids the exercise of such a power by the officers of the executive departments. The doctrine of the "separation of powers," says Prof. Goodnow, "is a description of what ought to be rather than what is." It does not mean, as some suppose, that all power, executive, judicial or legislative in character must be exercised exclusively by the executive, judicial and legisla-

[52] 55 Kan. 367.
[53] 98 Mich. 96.
[54] 11 Utah 378.
[55] 2 Okla. 277.

tive departments, respectively. If this were so government would be impossible. This is not what Montesquieu meant when he expounded this famous doctrine, nor is it what the "Framers" meant when they made it the foundation of the Constitution of 1787. It can only mean that there are certain powers so inherently legislative, executive, or judicial in character that they must be exercised exclusively by their respective departments.

That removal for cause is not such a power is evident. It is quasi judicial or judicial in nature but not judicial in the sense that it comes within the inhibition of the clause "all judicial power shall be vested in the courts."

Says Mr. Bondy:[56] "Any and all powers not strictly legislative, executive or judicial and not vested by the constitution in any particular authority, the Legislature may, irrespective of whether they are legislative, executive, or judicial in their nature, either assume or delegate to the executive or judicial departments. The Legislature cannot delegate judicial power to the Governor, * * * but administrative acts of a judicial nature may be delegated to the executive departments of the government, such as the power to remove an officer for cause generally or for specified cause."

The importance of deciding that removal for cause is a quasi judicial power is as to the matter of review. In most States the common law writ of certiorari is still retained. In some States, like New York. Tennessee, Minnesota, and Michigan the common law writ has been much enlarged by statute and construction.

At common law certiorari was a writ by which the action of bodies exercising judicial power could be reviewed by the courts, to see if they were acting within their jurisdiction. It only existed where there was no right of appeal on error. At common law the court could do nothing but determine the matter of jurisdiction. It could not go into the evidence. As said, in some states now, the whole record is brought up and having determined that there was initial jurisdiction the court may examine further and see if they kept within their jurisdiction. They may review errors in law, and may examine the evidence not for the purpose of determining where the preponderance is but to see if there be any evidence at all to substantiate the charges made. On certiorari Justice Gaynor of the Supreme Court of New York declared that Governor Odell's removal of the sheriff of Kings County was void because the charges made did not confer jurisdiction. The charges were of offenses committed prior to the sheriff's entering upon the duties of his office.

[56] Studies in History, Economics, and Public Law, 5:166.

Such charges did not give jurisdiction, said Justice Gaynor, because the people have a right to elect whom they please to office, and this would be denied if one might be removed from office for offenses committed before the people elected him to his office. As said above, the Court of Appeals[57] reversed this ruling on the ground that the Governor's act, being executive and not judicial in nature, was not reviewable by certiorari. This illustrates the use of the writ. Judge O'Brien dissented, rightly we think, from the court in its opinion that the act was not judicial. He maintained that being judicial the court had a right to review it by certiorari. He disagreed, however, with Justice Gaynor in his opinion that the charges preferred did not confer jurisdiction. Judge O'Brien was of the opinion that the charges made need not be confined to offenses committed after election.

In *Conant* v. *Grogan*[58] the court had held that under such a holding "the people would be deprived of their constitutional right to elect their own officers."

Said the Michigan court in 1894 in *Speed* v. *Common Council*:[59] "We have been unable to find any authority which justifies a removal for such previous misconduct. The conduct for which an officer may be removed must be found in his acts and conduct in the office from which his removal is sought. There is no restriction upon the power of the people to elect or the appointing power to appoint, any citizen to office notwithstanding his previous character, habits or official misconduct."

In *Commonwealth* v. *Shaver*[60] it was decided that trial, conviction and sentence of a sheriff for the offense of bribing a voter previous to his election did not disqualify him.

There are recent cases, however, to the contrary, and these we believe are based upon the sounder reasoning.[61]

[61] State *v.* Bourgeois, 45 La. Ann. 1350; State *v.* Welsh (1899), 109 Ia. 19; Avery *v.*

There is one other point involved in this question. Will the writ of certiorari lie against the Governor? The question is similar to that of mandamus to the Governor upon which the courts have so widely differed. It is probable that those states which hold that a Governor as to his ministerial duties is subject to the writ of mandamus, would also hold that the writ of certiorari will lie to the Governor when he is exercising power of a judicial nature. It is likewise probable that the writ would be denied where the writ of

[57] In re Guden, 171 N. Y. 529, 64 N. E. 451.
[58] 6 N. Y. 322.
[59] 98 Mich. 360.
[60] 3 Watts & Serg. 338.
Studley (1901), 74 Conn. 272.

mandamus is denied. There is, however, a marked distinction between the nature of these two writs. It is altogether possible that a court might deny the writ of mandamus and allow the writ of certiorari. The writ of mandamus is a command; an order to do something If disobeyed the offender will be punishable for contempt of court. The writ of certiorari is but for the purpose of a review, to determine whether the Governor has kept within his jurisdiction. The latter writ has none of that element of superiority, of domineering command, of coercion, that is held by many to be so repugnant to the independence of the coördinate departments of government.

It is the function of the writ of certiorari to review just such quasi judicial acts as removal for cause. At common law the writ was generally used to review the acts of justices of the peace. The justice was then both an administrative and a judicial officer. In this country he has become a distinctly judicial officer, so for a long time it was held that certiorari would issue to only inferior judicial tribunals. Prof. Goodnow[62] has clearly pointed out how the use of the writ has grown until now it is used primarily to review the acts of executive and administrative officers, performing duties of a judicial nature.

If the Legislature wishes to confer upon the Governor an arbitrary power of removal it may do so, but if instead it makes of him a semi-judicial officer, empowered to remove only after a hearing upon specific charges, it is but reasonable to hold that the courts have a right of "certiorari" to see to it that he acts within his jurisdiction.

But two cases could be found which directly discuss this question.

The Wisconsin court allowed the writ expecting the Governor would raise the question of jurisdiction by making a motion to quash the writ in advance of a return. The Governor, however, saw fit to make return to the writ, so the question was decided on its merits. Judge Sym, however, said "The writer of this opinion allowed the writ of certiorari herein in vacation without any investigation of the merits of the petitioner's claim and with grave doubts whether this court had jurisdiction to send its process to the chief executive of the state."[63]

In *the matter of Nichols*[64] the New York Supreme Court decided "The proceedings of the Governor of the State may be reviewed by certiorari, but the writ should not be issued against him if there is another remedy." In view, however, of recent decisions there is no doubt that the court would deny the writ in a similar case.

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[62] Pol. Sc. Q. VI:493, Writ of Certiorari.

[63] State ex rel Peck *v.* Rusk, Governor, 55 Wis. 465.

[64] 6 Abb. New Cases, 474.

The conclusions arrived at, therefore, as a result of our study are as follows:

1. The courts differ as to whether power "to remove" grants an arbitrary power, but the weight of authority is to the effect that it does.

2. Courts differ as to whether power to remove "for cause" or for cause specified, is a grant of an arbitrary power of removal, but the weight of authority and the better reasoning is to the effect that it is not. Those courts that hold that it is not, differ as to whether the power is executive or judicial. Those holding that the power is executive but not arbitrary, differ as to the extent of the limitation — some, like Wisconsin,[65] holding that notice and hearing are not necessary but filing of charges is, while courts like those of Nebraska, Ohio, Utah, hold that charges, notice and hearing are necessary.

3. With no exception it is held to be constitutional to confer upon local administrative officers the power to remove for cause. Courts differ as to their reasons for so holding, some declaring that the power exercised is executive, not judicial, while others hold that the power is judicial in nature, but not in the sense used in the constitution when it speaks of "judicial power." It is believed the latter position is the correct one.

4. With the exception of Michigan (overruled in later decisions) it is held to be constitutional to impose this power upon the Governor. Most courts justify it on the ground that the power is executive, not judicial, while others justify it on the ground that though judicial in nature it does not violate the principle of the separation of powers. This is believed to be the true position.

5. The weight of authority and sound reasoning is to the effect that certiorari will issue to review proceedings of local administrative officers in removing for cause.

6. Courts differ as to what will be reviewed on a common law writ of certiorari. Some holding that the record only is brought up and the question of jurisdiction determined, while others hold that the evidence will be examined to see if errors of law affecting the party have been made or if the evidence be such as to warrant the decision.

7. On principle certiorari should issue to the Governor to review his removals for cause. Such an act of removal is judicial in nature whether exercised by local executive officers or by the Governor.

We have discussed this question purely from the legal point of

[65] 21 Wis. 496, Kennedy *v.* McGarry.

view. We have come to the conclusion that removal for cause wherever vested, is judicial in nature, that charges, notice and a hearing are necessary, that it is subject to review by certiorari.

From the point of view of political science it might be argued that this is an unfortunate conclusion, that it is necessary that there should exist in the state as in the central government somewhere, a power of summary removal, that it is essential to efficient administration that the removing body be allowed to remove with despatch. This cannot be done, it is said, if a trial is necessary, and if every removal can be held up by the court in review.

Prof. Goodnow[66] and others have taken this position. I cannot share this feeling. If the Legislature wishes to confer an arbitrary power of removal upon removing bodies it may do so, but the fact that this would be a good thing cannot in any way justify the courts in holding that a power to remove for cause is such an arbitrary power. Nor is it clear that it is a good thing for the removing body to be so empowered. That the executive charged with the responsibility of good government should have power to summarily remove unfit officials, no one questions. It is equally true, however, that officials who are fit should not be subject to removal for personal, political or fanciful reasons. Surely the executive has sufficient power of summary removal when he may prefer the charges himself, try the officer and be the sole and final judge of the sufficiency of the evidence. It in no way hampers his reasonable discretion to insist that the charges made shall not be merely personal or whimsical, nor is it a harmful limitation upon his discretion that before removing an officer appointed or elected for a fixed term, he shall give him an opportunity to be heard in his own defense.

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[66] Pol. Sc. Q. I:541.