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## CONSTITUTIONAL LAW-REMOVAL OF EXECUTIVE EMPLOYEES BY ACT OF CONGRESS-BILL OF ATTAINDER

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CONSTITUTIONAL LAW—REMOVAL OF EXECUTIVE EMPLOYEES BY ACT OF CONGRESS—BILL OF ATTAINDER—Respondents, three employees of the federal government,<sup>1</sup> were, among other federal officeholders, accused by Con-

<sup>1</sup> Respondent Robert Morss Lovett was employed in the Department of the Interior as Secretary of the Virgin Islands. 89 CONG. REC. 483 (1943). Respondents Goodwin B. Watson and William E. Dodd were employees of the Federal Communications Commission. 89 CONG. REC. 479, 480 (1943).

gressman Martin Dies of having engaged in subversive activities and were investigated by a special subcommittee of the House of Representatives on that charge.<sup>2</sup> Upon a report of this committee that the respondents were guilty of such activities, the House attached a rider, in section 304, to the Urgent Deficiencies Appropriation Act, 1943,<sup>3</sup> which prohibited, after November 15, 1943, the application of any appropriation to the payment of respondents' compensation, except as jurors or members of the armed forces, unless prior to November 15 they should have been reappointed by the President with the approval of the Senate. After the enactment became law, though they had not been reappointed, respondents continued to work for varying periods after November 15 without pay. They then initiated these actions for their salaries in the Court of Claims. Recovery was there allowed, some of the judges believing that Congress had not forbidden the employment of respondents but merely their payment out of general appropriations, while others held variously that section 304 was unconstitutional as an assumption of executive power in the removal of federal employees, as a bill of attainder, or as a denial of due process of law.<sup>4</sup> On appeal by the United States, *held*: section 304 is a bill of attainder within the prohibition of Article I, Section 9, Clause 3 of the Federal Constitution.<sup>5</sup> In a concurring opinion, Justice Frankfurter, joined by Justice Reed, sought to avoid the constitutional issue by reading section 304 literally to provide for the withholding of respondents' salaries but not for their discharge. *United States v. Lovett*, (U.S.1946) 66 S.Ct. 1073.

A bill of attainder is a legislative act declaring someone guilty of a crime and imposing punishment.<sup>6</sup> Enacted without any established procedures and affording the accused none of the safeguards of a judicial trial, attainders have been known historically as a cruel and oppressive means by which political majorities sought to liquidate opposition elements under the form of law.<sup>7</sup> Their experience with attainders, several of which were passed by colonial legislatures against the loyalists during the revolution, led the framers of the Constitution to forbid

<sup>2</sup> The speech of Rep. Dies is found in 89 CONG. REC. 474 et seq. (1943). H. Res. 105, 78th Cong., 1st sess. (1943), authorized the Committee on Appropriations to conduct the investigation through a special subcommittee of which Rep. Kerr of North Carolina became chairman.

<sup>3</sup> 57 Stat. L. 431 (1943).

<sup>4</sup> The holding of the Court of Claims is discussed in the principal case, *United States v. Lovett*, (U.S. 1946) 66 S.Ct. 1073 at 1075.

<sup>5</sup> "No bill of attainder or ex post facto law shall be passed."

<sup>6</sup> *Calder v. Bull*, 3 Dall. (3 U.S.) 386 at 389 (1798); *Cummings v. Missouri*, 4 Wall. (71 U.S.) 277 at 323 (1866); 2 STORY, CONSTITUTION, 5th ed., 216 (1891); 1 COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., 526 (1927). As known in England, bills of attainder provided for the death penalty, but the term as understood in the Federal Constitution has always embraced the "bill of pains and penalties" by which less drastic punishments were imposed. COOLEY, *id.*, 538. *Ex parte Garland*, 4 Wall. (71 U.S.) 333 at 377 (1866).

<sup>7</sup> The most frequently cited source for the history of bills of attainder in England is 2 WOODDESON, LAWS OF ENGLAND, pp. 621-648 (1792). See also POUND, JUSTICE ACCORDING TO LAW 19 et seq. (1914) for a general discussion.

such enactments to Congress and to the states.<sup>8</sup> After the adoption of the Constitution, courts seldom had occasion to consider whether a statute was a bill of attainder until it became necessary to interpret some of the measures which gave expression to the violent antagonisms of the Civil War.<sup>9</sup> In 1866 the Supreme Court held invalid an act of Congress,<sup>10</sup> and a provision of the Missouri Constitution<sup>11</sup> which required for the practice of certain professions an oath that the practitioner had never aided or sympathized with the rebellion. The Court decided that the effect of such enactments was to punish with the loss of their employment those guilty, as determined by the oaths, of any of the proscribed acts.<sup>12</sup> In answer to the argument advanced by the dissent in those cases that the measures simply established qualifications for the professions in question, the Court denied that the requirements of the oaths fixed qualifications reasonably related to professional competence.<sup>13</sup> These decisions formulated the proposition, sustained where subsequent statutes prescribing qualifications for various professions were challenged as bills of attainder, that a legislature might lawfully exclude persons from certain pursuits without a judicial trial when the exclusion was not imposed as a punishment but resulted from the establishment of qualifications legitimately required for the particular calling.<sup>14</sup> The issues which would have been raised in the principal case if the procedure adopted by Congress had been treated as an attempt to enforce reasonable requirements for government office were forestalled by the Court's holding that the exclusion imposed by section 304 was a punishment for subversive activities. While conceding that the enactment does not punish respondents in terms, the

<sup>8</sup> The prohibition on the states is contained in United States Constitution, Art. I, Sec. 10, Cl. 1. This history is traced in POUND, *ibid.* Sewall v. Lee, 9 Mass. 363 (1812), is a case dealing with a bill of attainder passed by Massachusetts in 1779. See also THE FEDERALIST, Hamilton ed., No. 78 (1868).

<sup>9</sup> See, however, *Gaines v. Buford*, 1 Dana (31 Ky.) 481 (1833), where a state court held a statute forfeiting lands to the state for failure of the owners to improve them invalid as a bill of attainder since there had been no such provision in the original grants from the state.

<sup>10</sup> *Ex parte Garland*, 4 Wall. (71 U.S.) 333 (1866).

<sup>11</sup> *Cummings v. Missouri*, 4 Wall. (71 U.S.) 277 (1866).

<sup>12</sup> The problem of the *Garland* case was elaborately considered with the same result in *Ex parte Law*, 15 Fed. Cas. No. 3,126, 35 Ga. 285 (1866). See also the *Test Oath Cases*, 41 Mo. 340 (1867), where the Missouri court discusses and accedes to the doctrine of the *Garland* and *Cummings* decisions. *Pierce v. Carskadon*, 16 Wall. (83 U.S.) 234 (1872), applies the rule of those decisions to slightly different facts.

<sup>13</sup> "It is evident from the nature of the pursuits and professions of the parties . . . that many of the acts, from the taint of which they must purge themselves, have no possible relation to their fitness for those pursuits and professions." *Cummings v. Missouri*, 4 Wall. (71 U.S.) 277 at 319 (1866).

<sup>14</sup> *Hawker v. New York*, 170 U.S. 189, 18 S.Ct. 573 (1898); *State v. Fourchy*, 106 La. 743, 31 S. 325 (1902); *Crampton v. O'Mara*, 193 Ind. 551, 139 N.E. 360 (1923); *Butcher v. Maybury*, (D.C. Wash. 1925) 8 F. (2d) 155. The issue whether professional requirements are imposed as punishment is also raised where such enactments are attacked simply as *ex post facto* laws, with the decisions reaching the same result. *Dent v. West Virginia*, 129 U.S. 114, 9 S.Ct. 231 (1889); *Reetz v. Michigan*, 188 U.S. 505, 23 S.Ct. 390 (1903).

majority make the valid point that if it in fact exacts a penalty for guilt legislatively determined it is none the less a bill of attainder.<sup>15</sup> This much is certain: the measure was calculated to remove respondents from office and was passed for that purpose.<sup>16</sup> Many will feel Justice Frankfurter has gone to unreasonable lengths to avoid the constitutional issues in declaring that section 304 "merely prevented the ordinary disbursal of money to pay respondents' salaries" and "did not cut off the obligation of the Government to pay for services rendered."<sup>17</sup> The majority seek support for the theory that punishment was intended from the legislative history of the measure in the House. In the resort to such words as "guilt," "indictment," "innocent" and "accused" during the debates on the appointment of the Kerr Investigating Committee and on the adoption of section 304 itself, they find clear indications of a retributive purpose on the part of the legislators.<sup>18</sup> Better evidence for their position than the words quoted by the majority, which in ordinary speech may or may not import the punishment of crime, is found in certain of the remarks of Congressman Dies in first laying before the House charges which disclose that a principal complaint against the group as members of which respondents were accused was that they or some of them had engaged in a "conspiracy" to "discredit individual Members of Congress" and to "discredit Congress as a whole."<sup>19</sup> A survey of all the debates, however, reveals as many positive averments that no question of crime or punishment was involved. The supporters of the resolution appointing the Kerr Committee, and of section 304 based on its findings, interpreted the proceeding as one for determining the fitness of those charged to serve the government in a time of national emergency and to eliminate those of doubtful loyalty. It was insistently argued that "it does not mean they are even charged with any crime,"<sup>20</sup> that the "committee has convicted no one,"<sup>21</sup> that the respondents were not being "persecuted for their ideas,"<sup>22</sup> but that the question was simply whether "the Congress of the United States feels these men are qualified to

<sup>15</sup> *Cummings v. Missouri*, 4 Wall. (71 U.S.) 277 at 325 (1866).

<sup>16</sup> This is the unmistakable tenor of all the debates on the subject in the House. 89 CONG. REC. 474 et seq., 645 et seq., 734 et seq., 4546 et seq., 4581 et seq. (1943). The report of the Kerr Committee, H. Rep. 448, 78th Cong., 1st sess. (1943), finds respondents Watson and Dodd "unfit to continue in Government employment" and respondent Lovett "unfit to continue in the employment of the United States government." The House had a precedent for its action in a similar measure taken against David Lasser, an official of the W.P.A., in a proviso [§1 (a)] to the Emergency Relief Appropriation Act, Fiscal Year 1942, 55 Stat. L. 396 (1942). See 87 CONG. REC. 5110-5113 (1941).

<sup>17</sup> Principal case at 1086.

<sup>18</sup> 89 CONG. REC. 651, 711, 741 (1943).

<sup>19</sup> 89 CONG. REC. 475 (1943). Respondent Watson was one of those specifically accused of irresponsible criticism of Congress. 89 CONG. REC. 479 (1943). The Court may have thought it unwise to distinguish this element in Congressman Dies' remarks lest it be thought openly to impugn the motives of the House.

<sup>20</sup> Speech of Rep. Curtis, 89 CONG. REC. 653 (1943).

<sup>21</sup> Speech of Rep. Keefe, id. at 4601.

<sup>22</sup> Speech of Rep. Keefe, id. at 4554.

serve and whether they are entitled to their jobs. . . ."<sup>23</sup> In view of the traditional policy of the Court to indulge every presumption in favor of the constitutionality of the legislature's action, it is the more surprising that the present measure should be declared invalid on the basis of a construction the evidence for which was plainly equivocal. It would nowhere be pretended that an undivided loyalty to the government they serve is an unreasonable qualification for federal employees, especially during wartime. In taking judicial notice of the Hatch Act (section 9A)<sup>24</sup> and other enactments<sup>25</sup> designed to prevent the employment in the federal service of persons belonging to any political party advocating the overthrow of the government, the Court in no way intimates that to establish loyalty as a requirement for federal job-holding is beyond the scope of Congressional power.<sup>26</sup> And yet application of the reasoning in the principal case would imply that the effect of this legislation is to find persons "guilty" of such political affiliation and to "punish" them by excluding them from government employment.<sup>27</sup> Judicial trial is not contemplated in the enforcement of section 9 of the Hatch Act,<sup>28</sup> and it is not unlikely that the investigation of respondents by the Kerr Committee as closely approximated judicial trial as a hearing before the Civil Service Commission or the head of an executive department. But it is not conceivable that the dismissal of an employee in the normal functioning of the executive branch as the consequence of general requirements imposed by statute would ever be said to make of such statute a bill of attainder. What this conclusion suggests is that the actual issue in the principal case is whether Congress may itself undertake to enforce qualifications it has established for federal employment by directing the dismissal

<sup>23</sup> Speech of Rep. Hendricks, *id.* at 4596.

<sup>24</sup> An Act to Prevent Pernicious Political Activities, 53 Stat. L. 1147 (1939).

<sup>25</sup> For example, the Emergency Relief Appropriation Act, Fiscal Year 1941, 54 Stat. L. 611, §15 (f) and 17 (b) (1941).

<sup>26</sup> Principal case at 1075.

<sup>27</sup> Admittedly the case of respondents is not exactly that of a federal employee discharged under §9A of the Hatch Act, for §304 purported to do more than remove them from office: until repealed it would have deprived them of the right to serve the government. It does not follow, however, that respondents' dismissal was for that reason any more a punishment. A general prohibition of the payment of respondents' compensation from any appropriation was the only effective means of securing their exclusion from government employment. See 89 CONG. REC. 646 (1943), where Rep. Hendricks indicates how David Lasser, note 16 *supra*, shortly after payment of his salary from W.P.A. funds was forbidden in 1941, was employed by the War Production Board and at an increase in pay. A further reason for the sweeping provisions of §304 is suggested by the difficulty of ascertaining when respondents should have abandoned their alleged subversive principles and thus have qualified themselves for government jobs. See in this connection the speech of Rep. Hendricks with reference to respondent Watson. 89 CONG. REC. 4599 (1943). But in *Hawker v. New York*, 170 U.S. 189, 18 S.Ct. 573 (1898), the Supreme Court upheld, against the claim that it imposed punishment as a bill of attainder, a New York statute which permanently disqualified the defendant for the practice of medicine because of a previous conviction of felony.

<sup>28</sup> 39 Op. Atty. Gen. 462 (1940); *United Federal Workers of America v. Mitchell*, (D.C. D.C. 1944) 56 F. Supp. 621.

of named individuals in a special act.<sup>29</sup> The question as to which department, as between Congress and the President, may constitutionally exercise the power to remove executive personnel, and to what extent it may do so, is thus presented in another way and as to a different class of officials than was the case in either *Myers v. United States* or *Humphrey's Executors v. United States*,<sup>30</sup> the leading decisions on the subject. The issue avoided in the instant decision could hardly be raised more directly, and certainly a decision on this question would have been of great importance.

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<sup>29</sup> Problems of the removal power are considered by Prof. Corwin in a comment on *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21 (1926), "Tenure of Office and the Removal Power under the Constitution," 27 COL. L. REV. 353 (1927). Of particular interest in connection with the principal decision is the discussion (at pp. 357 and 396) of the Budget Act of 1921 which provides that the Comptroller General shall be removed by a joint resolution of Congress.

<sup>30</sup> 272 U.S. 52, 47 S.Ct. 21 (1926); 295 U.S. 602, 55 S.Ct. 869 (1935).