

**Constitutional Law—Removal of Federal Judges—Relief Denied from Interlocutory Order of Judicial Council (Chandler v. Judicial Council of the Tenth Circuit of the United States, 382 U.S. 1003 (1966))**

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realistic approach of the Supreme Court, courts will avoid the wholesale destruction of charitable trusts while removing discrimination from areas hitherto beyond the reach of the Constitution.



CONSTITUTIONAL LAW—REMOVAL OF FEDERAL JUDGES—RELIEF DENIED FROM INTERLOCUTORY ORDER OF JUDICIAL COUNCIL.—A meeting of the Judicial Council of the Tenth Circuit of the United States reviewed the actions of Chief Judge Stephen Chandler concerning the affairs of the United States District Court for the Western District of Oklahoma. An order was issued, purportedly under authority of a federal statute,<sup>1</sup> stating that Judge Chandler, being presently unable, or unwilling, to discharge efficiently the duties of his office, was to take no action whatever in any case or proceeding then or thereafter pending before his court. Judge Chandler applied to Mr. Justice White, Circuit Judge for the Tenth Circuit, to stay the order of the Judicial Council. The application was referred to the Supreme Court which *held* that since the action was entirely interlocutory in character, the relief requested should be denied pending further proceedings. *Chandler v. Judicial Council of the Tenth Circuit of the United States*, 382 U.S. 1003 (1966).

During the middle ages, royal officials of England held their offices either "during good behavior" or "during the King's pleasure."<sup>2</sup> In addition, English judges could be disenfranchised by impeachment proceedings in the legislature or by writ of *scire facias* in the courts.<sup>3</sup> However, the English Act of Settlement,<sup>4</sup> enacted subsequent to the Puritan Revolution, was interpreted as providing that English judges held their offices "during good behavior,"<sup>5</sup> and that they could be removed only for misconduct upon address by both Houses of Parliament.<sup>6</sup> Since it appears that the writ of *scire facias* had not been employed for some time, there was no

<sup>1</sup> 28 U.S.C. §332 (1964).

<sup>2</sup> Ross, "Good Behavior" of Federal Judges, 12 U. KAN. CITY L. REV. 119, 120 (1944).

<sup>3</sup> *Id.* at 120-22. Late in the 16th century, the word "impeachment" began to acquire its present meaning of accusing a person of a high crime or misdemeanor. Yankwich, *Impeachment of Civil Officers Under the Federal Constitution*, 26 GEO. L.J. 849 (1938). On the other hand, *scire facias* was a writ requesting that authority given be repealed. BLACK, LAW DICTIONARY (4th ed. 1951).

<sup>4</sup> Act of Settlement, 1700, 12 & 13 Will. 3, c. 2.

<sup>5</sup> Ross, *supra* note 2, at 119-21.

<sup>6</sup> Act of Settlement, 1700, 12 & 13 Will. 3, c. 2; see BORKIN, THE CORRUPT JUDGE 193 (1962).

indication as to whether the Act of Settlement was intended as the exclusive remedy for the removal of judicial officers.<sup>7</sup>

Finding no real solution to the problem in English precedent, the framers of the Constitution were forced to resolve the problem unaided. As finally adopted, the Constitution provided that the "House of Representatives . . . shall have the *sole* Power of Impeachment"<sup>8</sup> and the "Senate shall have the *sole* Power to try all Impeachments."<sup>9</sup> It further provided that "all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors,"<sup>10</sup> and that "Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour."<sup>11</sup>

The main purpose of the framers of the Constitution was to supply a legislative balance on the other departments of Government. Without such an express provision, removal of judicial officers by the legislature would have been impliedly prohibited by the separation of powers doctrine.<sup>12</sup> While the President is empowered to remove executive officers,<sup>13</sup> he has no such power with regard to officers who exercise a judicial or quasi-judicial function.<sup>14</sup> In addition, the judicial branch has been granted no express power whereby it may police its own members. Since the Government of the United States can claim no powers other than those expressly granted or necessarily implied by the Constitution,<sup>15</sup> it would seem, then that congressional impeachment is the only lawful method for the removal of judges.<sup>16</sup>

The power of impeachment has been used sparingly against federal judges. In fact, impeachment proceedings have been brought against only eight judges, four of whom were convicted and removed from office.<sup>17</sup> During the impeachment trial of Justice Samuel Chase in 1805, the Senate established a precedent whereby judges

<sup>7</sup> Ross, *supra* note 2, at 120-22.

<sup>8</sup> U.S. CONST. art. I, § 2. (Emphasis added.)

<sup>9</sup> U.S. CONST. art. I, § 3. (Emphasis added.)

<sup>10</sup> U.S. CONST. art. II, § 4.

<sup>11</sup> U.S. CONST. art. III, § 1.

<sup>12</sup> Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 870, 893 (1930). "The separation of powers doctrine stands in the way of any legislative removal of executive and judicial officers, except as such removal is expressly authorized in the one form—impeachment." *Id.* at 881.

<sup>13</sup> *Meyers v. United States*, 272 U.S. 52, 164 (1926).

<sup>14</sup> *Wiener v. United States*, 357 U.S. 349 (1958).

<sup>15</sup> *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816).

<sup>16</sup> Yankwich, *supra* note 3, at 867.

<sup>17</sup> BORKIN, *THE CORRUPT JUDGE* 198-200 (1962). While impeachment proceedings were initiated against two other judges, they were never culminated. In one case the proceedings were abandoned; in the other, the judge resigned. Reinhardt, *The Impeachment Proceedings Against Judge James Hawkins Peck*, 12 U. KAN. CITY L. REV. 106, 108 (1944).

were not to be removed from their offices because of the content of their decisions or because of unusual or offensive mannerisms. Thereafter, removal would be proper solely in instances involving serious misconduct.<sup>18</sup> Later, in convicting Judge Robert Archbald, the Senate approved the doctrine that the constitutional provision limiting judges' tenure to "good behavior" is attended with the corollary that they may be removed for behavior which is "not good."<sup>19</sup> In 1936, the last impeachment of a federal judge took place when the Senate convicted Judge Halsted Ritter.<sup>20</sup> In its ruling, the Senate stated that while the accused was not guilty of the violations charged, it would still order his removal since his conduct in the matters charged had brought his office into disrepute.<sup>21</sup>

In the instant case, the Judicial Council, relying upon a statute, ordered that Chief Judge Chandler take no further action in any case or proceeding pending before his court, and that all such cases and proceedings be reassigned to the other judges of the court.<sup>22</sup> The statute referred to by the Council empowers that body to "make all necessary orders for the effective and expeditious administration of the business of the courts . . ."<sup>23</sup> Upon referral, the Supreme Court, finding the order interlocutory in character, denied Judge Chandler's application for a stay pending further proceedings by the Judicial Council. In a vigorous dissent, Justice Black, joined by Justice Douglas, stated that "the Council is completely without legal authority to issue any such order, either temporary or permanent, with or without a hearing, that no statute purports to authorize it, and that the Constitution forbids it."<sup>24</sup>

As to the statute creating the Judicial Council, the minority Justices could find no language whatever which could reasonably be interpreted as giving the Council the authority to divest district judges of their power to try cases. The purpose of the statute, said the Justices, was to vest the Judicial Council with *administrative* powers only.

Since the order of the Council was interlocutory, the Supreme Court's refusal to rule on the merits of the case was in accord with prior decisions.<sup>25</sup> As the dissenting Justices point out, the Court's

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<sup>18</sup> Blackmar, *On the Removal of Judges: The Impeachment Trial of Samuel Chase*, 48 J. AM. JUD. Soc'y 183, 184 (1965).

<sup>19</sup> ten Broek, *Partisan Politics and Federal Judgeship Impeachment Since 1903*, 23 MINN. L. REV. 185, 193 (1939).

<sup>20</sup> BORKIN, *THE CORRUPT JUDGE* 199-200 (1962).

<sup>21</sup> Yankwich, *supra* note 3, at 858.

<sup>22</sup> See *Chandler v. Judicial Council of the Tenth Circuit of the United States*, 382 U.S. 1003, 1004 (1966) (dissenting opinion).

<sup>23</sup> 28 U.S.C. § 332 (1964).

<sup>24</sup> *Chandler v. Judicial Council of the Tenth Circuit of the United States*, *supra* note 22.

<sup>25</sup> See, e.g., *Market St. Ry. v. Railroad Comm'n*, 324 U.S. 548 (1945); *Clark v. Williard*, 292 U.S. 112 (1934).

refusal to stay the order has prevented Judge Chandler from exercising the powers of his office pending further proceedings by the Council. The question presented in this proceeding was one that has been the subject of a great deal of controversy in the past.<sup>26</sup> Indeed, the problem of judicial removal of members of the judiciary will be left to public debate until conditions exist whereby the United States Supreme Court will be forced to finally resolve the issue.

The action of the Judicial Council in promulgating its order appears to extend beyond the authority of the statute upon which the order was based. It seems that the Council extended the statute's application well beyond its intended legislative purpose, for the act speaks of nothing but the use of administrative powers in controlling *the business before the courts*. Indeed, the work of the Councils in the past had been concerned with only such matters as the civil and criminal rules and sentencing procedures.<sup>27</sup> It does not appear that the Council has been authorized by the statute to assume powers expressly and *solely* granted to the Senate, and to proceed to remove judges from the bench.

Apparently the Council sought to circumvent this objection by prohibiting Judge Chandler only from hearing or deciding cases presently before him. Then, assuming that the district judges could not agree among themselves as to the assignment of cases and the division of business in the district, the Council would be empowered to assign cases to the judges.<sup>28</sup> By such a stratagem, the judge is virtually impeached, retaining only his title and right to salary.

It has long been contended that the impeachment process provided by the Constitution as applied to the judiciary is obsolete, and that such a process cannot be depended upon to provide a practical remedy in the ordinary case. Rather, the present process may be best characterized as a warning of the extreme sanction which may be applied in the extraordinary case.<sup>29</sup>

When the Constitution was adopted, the framers apparently felt that Congress would be capable of discharging the power of impeachment, and that by limiting removal of judges to the cumbersome

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<sup>26</sup> Compare Otis, *A Proposed Tribunal: Is it Constitutional?*, 7 U. KAN. CITY L. REV. 3 (1938), with McAdoo, *Alternative Method to Impeachment for Trial of Inferior Federal Judges*, Case & Com., Summer 1936, p. 9.

<sup>27</sup> ABA, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 24 (4th ed. 1961). In August, 1965, the American Bar Association's Committee on Judicial Selection, Tenure and Compensation recommended that the problem of the aged, ill or otherwise infirm judge not capable of carrying out his duties be studied. One member of that committee was Chief Judge Stephen Chandler. Graham, *Can Judges Silence a Judge?*, N.Y. Times, Jan. 16, 1966, § 4, p. 8, col. 2.

<sup>28</sup> 28 U.S.C. § 137 (1964).

<sup>29</sup> Note, 31 ILL. L. REV. 631, 635 (1937); see also Shartel, *supra* note 12, at 870-73.

impeachment process the desired independence of the judiciary could best be secured. Since 1789, however, the circumstances have been radically altered—the number of federal judges has been greatly increased, and the complexity of congressional work today would seem to make the impeachment process an inappropriate tool to realize the desired end. Concluding, therefore, that the judiciary should be given power to remove its members, it is necessary to provide a proper basis of authority for such action.

The establishment of an alternative method for the removal of federal judges can best (and perhaps *only*) be achieved by enactment of a constitutional amendment, since all of the available evidence points to the conclusion that the Constitution limits removal to one method—impeachment.<sup>30</sup> In drafting such an amendment, careful consideration should be given to the recent constitutional enactments of both California and New York relating to the creation of a special tribunal with jurisdiction limited to judicial removals.

In California, a commission composed of judges, lawyers and laymen has been created to receive and investigate complaints against judicial officers.<sup>31</sup> If the charges are substantiated, the judge's retirement for disability or removal for misconduct is recommended to the Supreme Court of California which acts as an appellate body. In reviewing the action of the commission, the court is empowered to declare such action final.

In New York, a court on the judiciary has been vested with the power of removal or retirement of a judge.<sup>32</sup> This court, composed entirely of judges, may be convened by the chief judge of the Court of Appeals on his own motion, and must be convened by him upon the request of the governor, a presiding justice of the appellate division, or by a majority of the executive committee of the state bar association. Upon notice of the proceeding for removal or retirement of a judge or justice pending before the court, the state legislature is empowered to transfer the action to itself, whereupon the court action is stayed, and the formal impeachment proceedings are commenced by the legislature. In this case, the legislative determination is exclusive and final.

It might be desirable to incorporate the advantages of both methods within the framework of a proposed amendment so that the necessary procedural safeguards, in conjunction with expeditious removal, can be assured. It seems that the commission established

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<sup>30</sup> Yankwich, *Impeachment of Civil Officers Under the Federal Constitution*, 26 GEO. L.J. 849, 865 (1938).

<sup>31</sup> CAL. CONST. art. 6, §§ 1b, 10b. As a result of complaints being filed and investigated by the commission, the resignation or retirement of a small number of judges has been induced. Burke, *Judicial Discipline and Removal, The California Story*, 48 J. AM. JUD. Soc'y 167, 170 (1965).

<sup>32</sup> N.Y. CONST. art. 6, §§ 22 (a)-(e), 23, 24 (Supp. 1965).

in California, rather than a specially convened court, would be better able, in the first instance, to investigate complaints against judges. If the charges stated in the complaint appear to have a reasonable basis, then upon the request of the commission, a court on the judiciary could be convened to try the merits of the case and reach a determination. In addition, provision could be made for removal of the cause to the legislature for the purpose of the initiation of impeachment proceedings.

It is submitted that the promulgation of such a constitutional amendment dealing with judicial removal is the preferred solution to the many problems brought to light by the instant case.



CRIMINAL LAW — DEFENDANT NOT ALLOWED CREDIT FOR TIME SERVED UNDER VOID CONVICTION IF SUBSEQUENTLY CONVICTED OF SAME OFFENSE. — Because the trial court lacked jurisdiction, petitioner's felony conviction was held void, and he was released on a writ of habeas corpus after serving one and a half years of his original sentence. Thereafter, he was retried for the same crime, and was validly convicted and sentenced once more to serve from one to three years. On appeal, the question before the reviewing court was whether the time served under his former sentence should be applied to his present term. By stipulation, it was agreed that if previous time served was ruled applicable to his present sentence, the petitioner was entitled to immediate release. The Supreme Court of New Mexico *held* that credit may not be given for a term served under a void conviction, as distinguished from a prior invalid sentence, if the petitioner is subsequently validly convicted of the same offense. *Morgan v. Cox*, 75 N.M. 472, 406 P.2d 347 (1965).

An analysis of the background against which the decision in the instant case was reached reveals little uniformity among the several states in their respective approaches to the problem of the felon who has served a portion of a prison term under a prior void conviction or invalid sentence and is subsequently validly convicted or sentenced for the same crime. However, a study of the varying decisions and statutory solutions adopted by different jurisdictions serves to awaken increased interest and sympathy for the plight of prisoners who have served time in excess of the maximum penalty established by the legislature for their crimes simply because they have "successfully" challenged their original convictions and obtained new trials.

With respect to jurisdictions applying the common-law approach to this problem, the differing positions may be divided into three