

Dual Office Holding and Conflicts in Appointive Powers

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NOTES

DUAL OFFICE HOLDING AND CONFLICTS IN APPOINTIVE POWERS

Introduction

Recent events in New York¹ have brought sharply into focus certain questions relative to dual office holding, the right to retain a given office on accrual of eligibility to assume another office and conflicts in appointive power between executive and legislative branches of state government, particularly in respect to the filling of vacancies in elective offices. It has been thought appropriate to discuss the legal character of public office holding, the concept of dual office holding and conflicts in appointive powers, especially in so far as they are reflected in statutory provisions providing for vacancy filling.

Legal Character of Public Office Holding

A public office has not generally been regarded as the private property of the incumbent.² It is not held by contract or grant³ but is regarded rather as a public trust,⁴ to be administered for the benefit and in the interest of the people. It follows that rights in a public office are limited⁵ and not absolute.⁶ Thus, an officer for a term has no claim for salary for the remainder thereof after he has been removed for cause.⁷

¹ Reference is made to the retention of his post as Attorney General of New York by U.S. Senator Jacob K. Javits beyond the commencement of his congressional term on January 3, 1957.

² See *Wetzel v. McNutt*, 4 F. Supp. 233 (S.D. Ind. 1933); *Walton v. Davis*, 188 Ga. 56, 2 S.E.2d 603 (1939); *Smith v. Thompson*, 219 Iowa 888, 258 N.W. 190 (1934); *State ex rel. Garland v. Guillory*, 184 La. 329, 166 So. 94, 101 (1935) (dictum).

³ See *Grenshaw v. United States*, 134 U.S. 99 (1890); *Condon v. Metropolitan Dist.*, 130 Conn. 473, 35 A.2d 840 (1944); *State ex rel. Garland v. Guillory*, *supra* note 2; *State ex rel. Goren v. Barthalow*, 150 Ohio St. 499, 83 N.E.2d 393 (1948).

⁴ See *Wetzel v. McNutt*, *supra* note 2; *Smith v. Thompson*, *supra* note 2; *Middlesboro v. Kentucky Util. Co.*, 284 Ky. 833, 146 S.W.2d 48 (1940); *In re Opinion of the Justices*, 303 Mass. 631, 22 N.E.2d 49 (1939); *In re Olsen*, 211 Minn. 114, 300 N.W. 398 (1941).

⁵ See *Malkin v. Chicago*, 6 Ill. App. 2d 151, 127 N.E.2d 145 (1955); *Cowan v. State ex rel. Scherck*, 57 Wyo. 309, 116 P.2d 854 (1941).

⁶ See *Reese v. Dempsey*, 48 N.M. 417, 152 P.2d 157 (1944).

⁷ *Weinstein v. United States*, 74 F. Supp. 554 (Ct. Cl. 1947); *Scott v. Crump*, 106 Mich. 288, 64 N.W. 1 (1895); *Fairless v. Cameron County Water Imp. Dist. No. 1*, 25 S.W.2d 651 (Tex. Civ. App. 1930).

The right to resign a public office is well recognized⁸ though, like the right to hold office, it is not absolute.⁹ Accordingly a resignation submitted merely in order to avoid performance of some specific duty¹⁰ or to thwart litigation will be treated as ineffective.¹¹

Likewise, the state may place various restrictions on the retention of public office. Thus, the privilege of continuance in office is terminable in the event of physical or mental disability where a statute so provides¹² though such disability does not ipso facto create a vacancy in the absence of statute.¹³ Conviction of a crime has been held a ground for removal.¹⁴ In this connection, there is authority for the proposition that removal may follow even where defendant is acquitted of charges against him.¹⁵

In Montana, the seeking by an elective officer of another elective office while continuing to hold the first was at one time declared by statute to result in an automatic vacancy in the first office.¹⁶ The constitutionality of this statute was upheld except insofar as it made a distinction between individuals holding office for a term longer than two years and those elected for a term of two years or less.¹⁷ This statute, however, was later repealed. Likewise, one may be removed from office for serving on a political committee or as manager of a political campaign where a statute so provides.¹⁸ Vacancy may result also from participation in private activities inconsistent with public office holding, such as engaging in business for a public utility corporation.¹⁹

Dual Office Holding

At common law it was the rule that acceptance by a public officer of a second incompatible office terminates ipso facto the tenure of the

⁸ See *Rockingham County v. Luten Bridge Co.*, 35 F.2d 301 (4th Cir. 1929); *Sadler v. Jester*, 46 F. Supp. 737 (N.D. Tex. 1942); *Cassedy v. Wilkins*, 137 Misc. 748, 244 N.Y. Supp. 445 (Sup. Ct. 1930); *People ex rel. Rosenberg v. Keating*, 112 Colo. 26, 144 P.2d 992 (1944); *People ex rel. McCarthy v. Barrett*, 365 Ill. 73, 5 N.E.2d 453 (1936).

⁹ See *People ex rel. McCarthy v. Barrett*, *supra* note 8; *Commonwealth ex rel. Wootton v. Berninger*, 255 Ky. 451, 74 S.W.2d 932 (1934).

¹⁰ *People ex rel. Rosenberg v. Keating*, *supra* note 8.

¹¹ *State ex rel. Wilson v. Bush*, 141 Tenn. 229, 208 S.W. 607 (1919).

¹² See, e.g., *Sullivan v. Whitney*, 25 N.Y.S.2d 762 (Sup. Ct. 1941).

¹³ See, e.g., *State v. Pidgeon*, 8 Blackf. 132 (Ind. 1846).

¹⁴ See *Bryson v. State*, 96 Okla. Crim. 49, 248 P.2d 253 (1952).

¹⁵ *Evans v. Monaghan*, 306 N.Y. 312, 118 N.E.2d 452 (1954); *People ex rel. Wood v. Department of Health*, 144 App. Div. 628, 129 N.Y. Supp. 255 (1st Dep't 1911) (per curiam), *aff'd*, 202 N.Y. 610, 96 N.E. 1127 (1911); see *Finck v. Bliss*, 205 Misc. 775, 129 N.Y.S.2d 64 (Sup. Ct. 1954).

¹⁶ *Laws of Mont. 1937*, c. 116, § 1-7; repealed, *Laws of Mont. 1943*, c. 27, § 1.

¹⁷ *Mulholland v. Ayers*, 99 P.2d 234 (Mont. 1940).

¹⁸ See *Ekern v. McGovern*, 154 Wisc. 157, 142 N.W. 595 (1913).

¹⁹ See *Boone v. State*, 170 Ala. 57, 54 So. 109 (1911).

acceptor in the first office.²⁰ It has not been found feasible to construct a sufficiently broad and comprehensive definition of the term "incompatible" to cover all possible situations that may arise. Courts have generally contented themselves with the application of certain criteria to individual fact patterns. Among the circumstances that may render two offices incompatible are inconsistency of function²¹ or subordination of one office to the other.²² Ultimately, the determination of the existence or non-existence of incompatibility between any two public offices must await the arrival of specific cases viewed against the background of then prevailing conditions.

Federal Constitutional Provision

The origins of the provision in the Federal Constitution against dual office holding can be traced back at least as far as the Act of Settlement.²³ It was therein enacted "that no person who has an office or place of profit under the King, or receives a pension from the crown, shall be capable of serving as a member of the house of commons."²⁴ Subsequently this statute was repealed²⁵ and replaced by an enactment of somewhat less stringent character.²⁶ That the problem was not thereby solved in England can be seen by the fact that further legislation was necessary, culminating in the Civil List Act of 1782.²⁷

The Articles of Confederation incorporated a provision to the effect that a delegate to Congress should be ineligible to hold any office under the United States ". . . for which he, or another for his benefit receives any salary, fees or emolument of any kind."²⁸

Various proposals with regard to dual office holding were considered by the Constitutional Convention which met at Philadelphia

²⁰ See *State v. Bus*, 135 Mo. 325, 36 S.W. 636 (1896); *State v. Mayor of Jersey City*, 63 N.J.L. 96, 42 Atl. 782 (1899); *State ex rel. Kingsbury v. Brinkerhoff*, 66 Tex. 45, 17 S.W. 109 (1886); *Rex v. Patteson*, 4 B. & Ad. 9, 110 Eng. Rep. 358 (K.B. 1832); *Millard v. Thatcher*, 2 T.R. 81, English Ruling Cas. 320 (1787).

²¹ See *Macrum v. Board of Supervisors*, 141 Misc. 358, 252 N.Y. Supp. 546 (Sup. Ct. 1931), *aff'd sub. nom.*, *Macrum v. Hawkins*, 235 App. Div. 370, 257 N.Y. Supp. 287 (2d Dep't 1932), *rev'd on other grounds*, 261 N.Y. 193, 184 N.E. 817 (1933); *People ex rel. Bagshaw v. Thompson*, 55 Cal. App. 2d 147, 130 P.2d 237 (1942); *Baker v. Dixon*, 295 Ky. 279, 174 S.W.2d 410 (1943); *Russell v. Worcester County*, 323 Mass. 717, 84 N.E.2d 123 (1949); *Kobylarz v. Mercer*, 130 N.J.L. 44, 31 A.2d 208 (1943).

²² *Tappan v. Helena Federal Sav. & Loan Ass'n*, 196 Ark. 1023, 104 S.W.2d 458 (1937); *Knuckles v. Board of Educ.*, 272 Ky. 431, 114 S.W.2d 511 (1938); *Gaw v. Ashley*, 195 Mass. 173, 80 N.E. 790 (1907); *Attorney Gen. ex rel. Moreland v. Detroit*, 112 Mich. 145, 70 N.W. 450 (1897).

²³ 12 & 13 WILL. 3, c. 2 (1700).

²⁴ *Ibid.*

²⁵ 4 ANNE c. 8 (1705).

²⁶ 6 ANNE c. 7 (1707).

²⁷ 22 GEO. 3, c. 82 (1782).

²⁸ ARTICLES OF CONFEDERATION art. V, cl. 2.

in 1787 before the language presently in force was agreed upon. Among the suggestions that were rejected by the convention, one would have prohibited Congressmen from occupying state offices²⁹ and another would have made members of Congress ineligible for federal office for one year after the expiration of their term.³⁰ The clause eventually adopted reads as follows:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.³¹

There are seen to be three distinct prohibitions in this provision. The first is that a Congressman cannot be appointed to a federal civil office until the term during which such office was created has expired, if he was a member of Congress during that term. Secondly, a Congressman cannot be appointed to a federal civil office until the term during which the emoluments of such office were increased has expired, if he was a member of Congress during that term. Thirdly, no federal officeholder is eligible to Congress while he continues to hold the federal office.

Interesting devices have at times been employed to circumvent this enactment. Thus in 1909 President Taft expressed his intention to appoint Senator Knox as Secretary of State. It was pointed out that Knox would be constitutionally ineligible to the office since the compensation thereof had been increased during his term in the Senate. Congress therefore passed an act reducing the salary involved to the level prevailing before the increase and Senator Knox was thereafter appointed to the Cabinet.³² It is to be observed that the dual office holding clause does not bar Congressmen from holding state office during the term for which they have been elected. For example, Senator La Follette retained his position as Governor of Wisconsin until January, 1906, notwithstanding the fact that the Senate, after his election thereto, had met in special session the preceding March.³³ It is interesting to note that there is no constitutional provision against dual federal office holding in general. There is however a statutory provision prohibiting dual lucrative offices to federal officers and employees.³⁴

²⁹ LIBRARY OF CONGRESS, FORMATION OF THE UNION 287, 803.

³⁰ *Ibid.*

³¹ U.S. CONST. art. I, § 6, cl. 2.

³² I WILLOUGHBY, THE CONSTITUTION OF THE UNITED STATES 607 (2d ed. 1929).

³³ *Id.* at 606.

³⁴ 28 STAT. 205 (1894), 5 U.S.C. § 62 (1952).

State Constitutional and Statutory Provisions

Many states embody provisions against dual office holding in their Constitutions.³⁵ Typically the provisions apply to judges and members of the legislature. Characteristic of such an enactment with regard to state judges is that of Wisconsin.³⁶ In 1944 suit was brought under this provision to bar a Wisconsin state judge from candidacy in a primary election for the Republican nomination for United States Senator. The court held that the jurisdiction to pass on the qualifications of its members vested by the Federal Constitution in the Senate³⁷ was exclusive and not subject to review elsewhere.³⁸

In the face of such a limitation on their application, it is to be seen that state provisions of this character are not fully effective to accomplish the purpose for which they are intended.

New York

The New York Constitution contains two major provisions with respect to dual office holding. One declares that acceptance by a member of the Legislature of office under the United States or in the state or municipal governments ipso facto vacates his seat in the Legislature.³⁹ Under the second provision, votes cast for a judge in an election for a post other than judicial are void.⁴⁰

There is no general statutory enactment in New York covering dual office holding.⁴¹ Statutes of limited application dealing with the problem include the Second Class Cities Law,⁴² the Village Law,⁴³ the Civil Service Law⁴⁴ and the New York City Charter.⁴⁵

³⁵ *E.g.*, ILL. CONST. art. 4, § 3; IND. CONST. art. 2, § 9; IOWA CONST. art. 3, §§ 21, 22; N.J. CONST. art. 4, § 5; OHIO CONST. art. 2, § 4.

³⁶ Wisc. CONST. art. 7, § 10.

³⁷ "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide." U.S. CONST. art. I, § 5, cl. 1.

³⁸ State *ex rel.* Wettengel v. Zimmerman, 249 Wisc. 237, 24 N.W.2d 504 (1946).

³⁹ N.Y. CONST. art. 3, § 7.

⁴⁰ N.Y. CONST. art. 6, § 19. Expressly excluded from this provision are justices of the peace and police justices.

⁴¹ The general statutory provision dealing with the occurrence of vacancies is Public Officers Law Section 30.

⁴² N.Y. SECOND CLASS CITIES LAW § 19.

⁴³ N.Y. VILLAGE LAW § 42.

⁴⁴ N.Y. CIV. SERV. LAW § 42.

⁴⁵ N.Y.C. CHARTER § 895. See *Hulbert v. Craig*, 124 Misc. 273, 207 N.Y. Supp. 710 (Sup. Ct.), *aff'd mem.*, 213 App. Div. 865, 209 N.Y. Supp. 850 (1st Dep't), *aff'd mem.*, 241 N.Y. 525, 150 N.E. 539 (1925).

In *Childs v. Moses*,⁴⁶ the Park Commissioner was appointed by the Mayor of New York to the City Planning Commission, both of which were unsalaried posts. It was held that such an appointment did not violate the dual office holding provision of the City Charter, so as to vacate the first office, since the charter elsewhere provided⁴⁷ that a Park Commissioner was not to be ineligible to hold another unsalaried office.⁴⁸

Conflict in Appointive Power between Legislative and Executive Branches of State Government

It is a fact of American history that legislative and executive branches of colonial governments grew up in conflict one with the other. As a corollary of the prevailing hostility to the British monarch, colonial assemblies sought to deprive the executive of as much power as possible. This clash continued beyond colonial times virtually to the present day and accounts in great measure for existing restrictions on the power of the American governor.⁴⁹

This tendency is clearly seen with regard to limitations imposed on the appointive power of the state executive and his power to remove officers and fill vacancies. In the first place some of the most important officials are elected and thus largely independent of the Governor.⁵⁰ Further, most major appointments and removals must be made with the advice and consent of the upper house of the Legislature.⁵¹ Moreover, some states vest initial appointive power in the Legislature, as in the case of judges.⁵²

In New York the pattern is similar to that prevailing in other states. There are four statewide elective offices—Governor, Lieutenant Governor, Attorney General and Comptroller.⁵³ The general appointive power is vested by the New York Constitution in the Governor acting with the advice and consent of the Senate.⁵⁴ Thirteen of the nineteen state departments are directly subject to the appointive power of the Governor.⁵⁵ In at least one significant instance initial

⁴⁶ 265 App. Div. 353, 38 N.Y.S.2d 704 (1st Dep't 1942), *aff'd without opinion*, 290 N.Y. 828, 50 N.E.2d 235 (1943).

⁴⁷ N.Y.C. CHARTER § 531.

⁴⁸ *Childs v. Moses*, 265 App. Div. 353, 38 N.Y.S.2d 704 (1st Dep't 1942), *aff'd without opinion*, 290 N.Y. 828, 50 N.E.2d 235 (1943).

⁴⁹ See MACDONALD, *STATE AND LOCAL GOVERNMENT IN THE UNITED STATES* 96 (1955); NETTELS, *THE ROOTS OF AMERICAN CIVILIZATION* 558 (1938).

⁵⁰ See COUNCIL OF STATE GOVERNMENTS, *BOOK OF THE STATES* 153 (Table 1) (1956).

⁵¹ *Ibid.*

⁵² See MACDONALD, *STATE AND LOCAL GOVERNMENT IN THE UNITED STATES* 139 (1955).

⁵³ See CALDWELL, *THE GOVERNMENT AND ADMINISTRATION OF NEW YORK* 77 (1954).

⁵⁴ N.Y. CONST. art. 5, § 4.

⁵⁵ See CALDWELL, *op. cit. supra* note 53, at 91-92.

appointive power is vested in the Legislature. For example, the Education Law provides for the election of members of the Board of Regents by that body.⁵⁶

The right to fill vacancies in public office is another important phase of the appointive power. Vacancies are generally filled either by the Governor acting alone or with the advice and consent of the Senate, or by the Legislature. Where provision is made for the filling of vacancies by the Governor, with the advice and consent of the Senate, it is generally stipulated that such vacancies are to be filled by the Governor alone, if the Legislature is not in session.⁵⁷ In the case of vacancies in the statewide elective offices of Comptroller and Attorney General appointments are made by the Legislature if in session, otherwise by the Governor.⁵⁸

An important consideration is the period for which officers, appointed by various means to fill vacancies, are to hold office. A distinction must be drawn between initially elective offices and those which are appointive in the first instance. Where an office is made elective by the Constitution, the term of office of one appointed to fill a vacancy therein extends until the commencement of the political year next succeeding the first annual election after the vacancy occurs.⁵⁹ In the case of elective offices not required to be such by the Constitution, one appointed to fill a vacancy holds office until commencement of the first political year after which the vacancy can be filled by election.⁶⁰

It is further provided that where a vacancy occurs before September 20th of any year in an office authorized to be filled at a general election, such vacancy shall be filled at the next general election held thereafter unless the Constitution otherwise provides,⁶¹ or unless the post has previously been filled at a special election. This provision is not applicable to the offices of Governor or Lieutenant Governor.⁶² Where a vacancy occurs in an office originally appointive, the interim appointment is made by the same officer or authority entitled to make an appointment for a full term, and tenure of the one appointed is for the balance of the unexpired term.⁶³

If the initial appointment was required to be made by the Governor with the advice and consent of the Senate, and the Legislature is in session at the time of the vacancy, it may be filled in the same manner for the balance of the term.⁶⁴ If, under such circumstances,

⁵⁶ N.Y. EDUC. LAW § 202.

⁵⁷ *E.g.*, N.Y. CONST. art. 6, §§ 4, 6, 16.

⁵⁸ N.Y. PUB. OFFICERS LAW § 41.

⁵⁹ *Id.* § 38.

⁶⁰ *Ibid.*

⁶¹ As it does, for example, in the case of Comptroller and Attorney General. See N.Y. CONST. art. 5, § 1.

⁶² N.Y. PUB. OFFICERS LAW § 42.

⁶³ *Id.* § 38.

⁶⁴ *Id.* § 39.

the Legislature is not in session at the time of the occurrence of the vacancy, it may be filled by the Governor for a term which will expire either on the appointment and qualification of a successor or, in any event, twenty days after the commencement of the next session of the Senate.⁶⁵

To the degree that certain state offices fall wholly or partly outside the Governor's appointive power it is clear that governmental efficiency is likely to suffer. It can readily be appreciated that this dichotomy in appointive and vacancy filling power provides a potential source of friction between the executive and legislative branches in our state government.

The most recent illustration of difficulty in this area involved the former Attorney General of this State, Jacob K. Javits. At the state-wide election in November, 1954, Mr. Javits was elected to the office of Attorney General for a four year term commencing January 1, 1955, scheduled to terminate on January 1, 1959. In 1956 he accepted the Republican nomination for the United States Senate and was elected to that office in November, 1956. His term of office in Congress began on January 3, 1957 but the Republican-dominated New York Legislature which, if in session, has authority to fill vacancies in the Office of Attorney General,⁶⁶ was not scheduled to meet until January 9, 1957.⁶⁷ The Attorney General, therefore, retained his office until the Legislature met. Only then did he tender his resignation and allow himself to be sworn in to the Senate. The Legislature then filled the vacancy by appointing a Republican, Louis Lefkowitz, presumably for the remainder of the unexpired term.⁶⁸

Mr. Javits, of course, was not guilty of violation of any dual office holding provisions whether state or federal, since the only office he held prior to the ninth of January, was that of Attorney General. It is true, however, that Mr. Javits, for a period of six days, deprived the most populous state in the union of one-half of its representation in the United States Senate. While the time element involved was small it should be remembered that there is nothing presently in the law that would have prevented Mr. Javits from retaining his state post for the remainder of the term and thereafter exercise his privilege of taking the oath in the Senate.

It is felt that the type of problem illustrated in this instance can best be solved by legislation. A full solution can be reached only by a

⁶⁵ *Ibid.*

⁶⁶ *Id.* § 41.

⁶⁷ "The political year and legislative term shall begin on the first day of January; and the legislature shall every year, assemble on the first Wednesday after the first Monday in January." N.Y. CONSR. art. 13, § 9.

⁶⁸ This is so since Article 5, Section 1, of the New York Constitution provides as follows:

" . . . No election of a Comptroller or an Attorney-General shall be had except at the time of electing a governor. . . ." N.Y. CONST. art. 5, § 1.

combination of federal and state enactments. The following specific changes in the law are therefore recommended:

(1) A federal statute requiring the acceptance or rejection of federal elective office immediately on accrual of eligibility therefor in the absence of sickness or other legitimate disability.

(2) A state statute or constitutional provision declaring a vacancy in the office of one to whom a right to take a second incompatible office has accrued and which second office has not been declined.

(3) A state statute or constitutional provision vesting the power to fill vacancies in elective state offices in one authority regardless of whether the Legislature is in or out of session.⁶⁹

Unless some such effective safeguards are provided to cover these gaps in the existing law relative to filling vacancies in public offices, a recurrence of difficulties such as occurred in the Javits and La Follette cases is to be anticipated.



THE DEFENSE OF ENTRAPMENT IN THE FEDERAL COURTS

Introduction

Within the past two decades, a defense formerly interposed rarely has been pleaded with increasing frequency in the federal courts. Due to the tremendous growth of federal police legislation enacted during this period, it has become a recognized fact that a few unlawful practices are encouraged and condoned by a large class of citizens. As a result, federal police officers have found it necessary to resort to various artifices in order to enforce the law and punish its violation. Nevertheless, the primary duty of a law enforcement officer is to prevent, not to punish crime.¹ Therefore, where the criminal design does not originate with the accused but is conceived in the mind of a government official, the accused may validly claim the defense of entrapment.

The classic and most frequently cited definition of entrapment is that formulated by Supreme Court Justice Roberts in the case of

⁶⁹ In the close of the legislative session, the Legislature passed a bill [A. Int. No. 2830] providing that if a vacancy occurs in the offices of Attorney General or Comptroller, while the Legislature is not in session, the duties of the office will be filled by a deputy until the Legislature can meet and appoint a successor.

¹ See *Newman v. United States*, 299 Fed. 128, 131 (4th Cir. 1924); *Butts v. United States*, 273 Fed. 35 (8th Cir. 1921).