To: Commission to Create a Plan to Incorporate the Probate Courts into the Judicial Branch

From: Office of Policy and Legal Analysis Staff

Date: November 1, 2021

Subject: Oversight of Registers

During the first meeting of the *Commission to Create a Plan to Incorporate the Probate Courts into the Judicial Branch* ("the Commission"), Commission members requested legislative staff research whether there is a legal impediment preventing appointed Probate Judges from overseeing the work of elected Registers of Probate. This memo summarizes the research conducted. It should be noted that this memo examines only legal barriers, and not the political or logistical considerations attendant to this issue.

Key Finding:

- There is no clear precedent in Maine suggesting a constitutional or statutory prohibition on oversight of an elected Registrar of Probate by an appointed, rather than elected judge.

Constitutional and Statutory Framework

The terms of Probate Judges and Register of Probate are established Article VI, Section 6 of the Maine Constitution, which reads as follows:

> ***Article VI Section 6. Judges and registers of probate, election and tenure; vacancies.*** *Judges and registers of probate shall be elected by the people of their respective counties, by a plurality of the votes given in, at the biennial election on the Tuesday following the first Monday of November, and shall hold their offices for 4 years, commencing on the first day of January next after their election. Vacancies occurring in said offices by death, resignation or otherwise, shall be filled by election in manner aforesaid at the November election, next after their occurrence; and in the meantime, the Governor may fill said vacancies by appointment, and the persons so appointed shall hold their offices until the first day of January next after the election aforesaid.*

Section six is followed by this note:

> *Note: Section 6 of Article VI has been repealed by Amendment which by virtue of Chapter 77 of the Resolves of the One Hundred and Third Legislature, 1967 "shall become effective at such time as the Legislature by proper enactment shall establish a different Probate Court system with full-time judges."* [1]

When the contingency described in Resolve 1967, chapter 77 is met (that is, a new Probate Court system with full-time judges is established), the Constitution will no longer require election of probate judges or registers, though elections could be required by statute.

[1] *See also* 18-C M.R.S. §1-501(1) ("Registers of probate are elected or appointed as provided in the Constitution of Maine.").

The day-to-day work of Registers of Probate is overseen and supervised by the Probate Judge in the Register's county.[2] Specifically,

1). The Probate Judge is required to "constantly inspect the conduct of the register with respect to the register's records and duties";[3]
2) A Probate Judge must provide information, in writing, to the county treasurer regarding "any breach of the register's bond to the treasurer of the county," and the treasurer is then required to bring a civil action on the bond to recover funds to pay another person who has been selected by the Probate Judge to fulfill the register's duties.[4]
3) In the event a Register of Probate is unable or unwilling to conduct the Register's duties, the Probate Judge is required to certify such inability or neglect to the county treasurer, including information regarding "the time of the commencement and termination of the inability or neglect and the name of the person who has performed the duties for that time period."[5] The treasurer must in turn pay out of the Register's salary the person who is named by the Probate Judge to perform the Register of Probate's duties.[6]

A Register of Probate may be removed from office by impeachment or by the Governor on the address of the Legislature, pursuant to Article IX, section 5 of the Maine Constitution:

> ***Section 5. Removal by impeachment or address.*** *Every person holding any civil office under this State, may be removed by impeachment, for misdemeanor in office; and every person holding any office, may be removed by the Governor on the address of both branches of the Legislature. But before such address shall pass either House, the causes of removal shall be stated and entered on the journal of the House in which it originated, and a copy thereof served on the person in office, that the person may be admitted to a hearing in that person's own defense.*

Case Law

There is limited case law regarding oversight of Registers of Probate. However, the 2005 case *York County Probate Court v. Atwood*[7] examined the limits of a probate judge's power over the Register. In that case, the York County Probate Judge was displeased with the work of the York County Register. He reassigned several of the Register of Probate's duties to a deputy register. In accordance with 18-A M.R.S. §1-508,[8] the judge certified the reassignment and submitted it to the county treasurer, who redistributed pay between the Register of Probate and deputy register accordingly. However, when the judge again reassigned duties and sent another certification, the treasurer did not act, instead seeking the input of the county commissioners. The judge sought an order from the Superior Court directing the treasurer to act. In denying this request, the court held that "once the certification is made, the judge has no further authority or role in

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[2] *See* 18-C M.R.S. §1-305 ("The register is subject to the supervision and authority of the judge of the court in which the register serves.").
[3] 18-C M.R.S. §1-507.
[4] 18-C M.R.S. §1-507.
[5] 18-C M.R.S. §1-508.
[6] 18-C M.R.S. §1-508.
[7] *York County Probate Court v. Atwood*, No. CV-03-041, 2005 WL 2759304 (Me. Super. Ct. May 10, 2005).
[8] 18-A M.R.S. §1-508 has since been repealed and replaced by 18-C M.R.S. §1-508, which has identical text.

certification"[9] and that the treasurer was within his rights to seek the counsel of the county commissioners, as "implementation of the judge's certification should not be an automatic, ministerial act."[10]

While the *Atwood* case does not anticipate a situation in which the Probate Judge is appointed, rather than elected, it does distinguish between a Probate Judge's statutory authority to oversee the work of the Register of Probate and the Probate Judge's lac of authority to actually terminate the Register. Indeed, the court stated, "It also is clear from the Constitution that the judge cannot remove a Register of Probate from office since both the judge and Register are officials whose terms of office are set by the Constitution (Me. Const. art. [VI], § 6) and, as a result, neither may be removed from office except by impeachment or address of the Legislature."[11]

Of course, should a new probate system be established that satisfies the contingency of Resolve 1967, chapter 77, then Article VI, section 6 of the Constitution will be repealed. In that event, new statutory language must be drafted to establish the manner in which the Registers of Probate are selected and removed from office. The Legislature may also wish to decide whether to continue supervision of Registers of Probate by Probate Judges at that time.[12]

Comparison: District Attorney Oversight by Attorney General

District attorneys are elected to four year terms and serve in the prosecutorial districts established by state law.[13] The Attorney General, who is chosen by joint ballot of the Legislature,[14] is directed by law to "consult with and advise the district attorneys in matters relating to their duties."[15] Furthermore, the Attorney General may choose to "act in place of or with the district attorneys, or any of them, in instituting and conducting prosecutions for crime, and is invested, for that purpose, with all the rights, powers and privileges of each and all of them."[16] The Attorney General can file a complaint for removal of a district attorney, and the Supreme Judicial Court may take action to remove that district attorney.[17]

The relationship of the Attorney General to the district attorneys in analogous in some ways to the relationship of the Probate Judge to the Register of Probate. Both the Attorney General and the Probate Judges are state officials, though the Probate Judges are paid by the various counties they serve.[18] Both are authorized to exercise a significant level of supervision over the work of the elected district attorneys and the elected Registers of Probate, respectively.

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[9] *Atwood*, 2005 WL 2759304 at *3.
[10] *Id.* at *3.
[11] *Id.* at *2.
[12] In the event a newly established probate system no longer includes dedicated Probate Judges, 18-C M.R.S. §1-305, §1-507 and §1-508 will need to be amended to specify by whom Registers of Probate are supervised.
[13] 30-A M.R.S. §251, §254.
[14] Me. Const. art. IX, §11.
[15] 5 M.R.S. §199.
[16] *Id.*
[17] 30-A M.R.S. §257.
[18] *See LeGrand v. Nadeau*, No. ALFSC-CV-15-269, 2016 WL 11509002 (Me. Super. Ct. Feb. 12, 2016) at *1 ("Probate judges are also anomalous in that they are state officers even though they are paid by the county.").

The structure of the district attorney system has changed significantly over the years. Prior to 1973, each county had what was referred to as a county attorney. However, in 1973, legislation passed that established a smaller number of prosecutorial districts. The county attorneys were replaced with district attorneys, who were assigned to prosecutorial districts and were considered state officials, though they were still locally elected.[19]

A 1975 Opinion of the Justices of the Supreme Judicial Court[20] examined whether the Governor, upon receiving a complaint from the Attorney General regarding the performance of a district attorney, must conduct a quasi-judicial hearing regarding that district attorney. The Court answered in the affirmative, noting that while individuals whose terms were established by the Constitution could be removed only in accordance with the Constitution, the same reasoning did not apply to all civil offices established by statute. The Justices also specifically addressed whether the Governor would violate separation of powers by initiating a removal proceeding of a district attorney. The court found that the determining factor was whether the official's tenure of office was provided for in the Constitution. When an official's term of office is not established by the Constitution, the court stated, "Section 5 of Article IX does not clearly and expressly mandate impeachment or address of the Legislature as the exclusive methods for the removal of all civil officers."[21]

Conclusions

The classification of Registers of Probate and Probate Judges as state verses local officials does not appear to be of significance when considering oversight of registers by judges. At present, Probate Judges, though elected, are considered state officers, while Registers of Probate, also elected, are considered local officials.[22] Yet, there is no indication that this difference, in and of itself, presents any current barrier to oversight of the Registers by the Probate Judges. A transition to a system where Registers of Probate remain elected and Probate Judges become appointed would presumably not change the classification of Registers as local officials and Judges as state officials.

A current system of supervision that may provide a useful analogy for a framework in which appointed Probate Judges oversee the work of elected Registers of Probate is the system in which the Attorney General, who is appointed by the legislature, oversees District Attorneys, who are elected at the local level but are also state officials.

As regards the constitutionality of an appointed Probate Judge supervising the Register of Probate, there is nothing in the Maine Constitution that appears to bar an arrangement in which appointed, rather than elected, Probate Judges exercise oversight of Registers of Probate. The elected or appointed nature of the Probate Judge does not appear to be dispositive.

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[19] P.L. 1973, ch. 567.
[20] *Opinion of the Justices*, 343 A.2d 196 (Me. 1975).
[21] *Id.* at 203.
[22] *LeGrand v. Nadeau, supra* note 18.

That stated, the elected nature of the *Register of Probate* is relevant in turns of the ability of the Probate Judge, whether appointed or elected, to supervise the Register. Statutory language provides mechanisms by which Probate Judges oversee the work of the Registers. They may, if aggrieved by the performance of a Register, seek to have the Register's duties and pay attenuated through the county treasurer. However, Probate Judges lack the authority to actually terminate or replace Registers. Article VI, Section 6 and Article IX, Section 5 of the Maine Constitution currently create a barrier to full judicial oversight of Registers of Probate. Article VI, Section 6 specifically describes registers and their elected nature. Article IX, Section 5 establishes the sole means by which an officer established by the constitution maybe removed from office, that is, by impeachment or by removal by the Governor upon the approval of the Legislature. Of course, syhould the Legislature elect to establish a system of full-time Probate Judges, Article VI, Section 6 of the Constitution will be repealed.

WESTLAW CLASSIC

2005 WL 2759304
Only the Westlaw citation is currently available.
Superior Court of Maine.

York County Probate Court v. Atwood
Superior Court of Maine. | May 10, 2005 | Not Reported in A.2d | 2005 WL 2759304 *(Approx. 3 pages)*

v.

James D. ATWOOD and Board of York County Commissioners,
Defendants

No. Civ.A. CV-03-041.
May 10, 2005.

Attorneys and Law Firms

Robert M.A. Nadeau, for Pl.

Gene Libby, for Def.

JUDGMENT

STUDSTRUP, J.

*1 This matter comes before the court only on count I of the substituted verified complaint. All other counts and all other actions involving these parties have now been dismissed. (For dismissal of counts II and III of this action, see this court's order dated January 13, 2005.) The sole remaining issue before the court concerns the applicability of Title 18-A M.R.S.A. § 1-508 and the relative roles and authority of the respective parties in this situation.

There originally was a question concerning the Superior Court's jurisdiction vis-à-vis this matter involving the Probate Court. However, the Supreme Judicial Court has resolved that issue stating:

> The Superior Court has the jurisdiction to consider the powers of the Judge of Probate, the Treasurer and the County Commissioners pursuant to section 1-508, and whether, and to what extent, the statute *requires* that the Treasurer act on the certification of the Judge of Probate. 14 M.R.S.A. § 5301.

York Register of Probate v. York County Probate Court, et al., 2004 ME 58, ¶ 19, 847 A.2d 395 (emphasis in the original). That Court then remanded to the Superior Court "for further proceedings consistent with this opinion."

Background

This matter comes before the court as part of the continuing saga involving the York County Probate Court-in the person of the York County Judge of Probate-and a variety of county officials including the York County Register of Probate, the County Treasurer and Board of County Commissioners. The factual background has been set forth several times before, including most recently by the Law Court, and will not be repeated in detail. It will suffice for purposes of this decision to repeat the first paragraph of the Supreme Judicial Court's background, as follows:

> In November of 2000, Diana Dennett was elected to a four-year term as York County Register of Probate, and took office in January of 2001. After months of what Probate Judge Nadeau characterized as deficiencies in Dennett's job performance, on November 1, 2001, Nadeau reassigned several of the duties of the Register to the Deputy Register, Carol Lovejoy.

SELECTED TOPICS

Concurrent and Conflicting Jurisdiction

Jurisdiction of Probate Court of Administration of Decedent Estate

Secondary Sources

§ 0:33. The probate courts—Jurisdiction and venue

2 Maine Prac., Maine Civil Practice § 0:33 (3d ed.)

...The Maine probate courts are separate courts established in each county, each with an elected judge of probate and register. Under the Maine Probate Code, enacted effective July 1, 2019, each probate c...

S 10.1.1 JURISDICTION AND VENUE

ME CLE Probate Law 10.1.1

...Maine Probate Courts have exclusive jurisdiction over formal proceedings to determine how estates of decedents, who were Maine residents at the time of their death, are to be administered, expended, an...

Jurisdiction of Federal courts, in cases of diversity of citizenship, over suit affecting probate or other matters concerning administration of decedent's estate

158 A.L.R. 9 (Originally published in 1945)

...The reported case for this annotation is Blacker v. Thatcher, 145 F.2d 255, 158 A.L.R. 1 (C.C.A. 9th Cir. 1944).

See More Secondary Sources

Briefs

Brief For Respondent

2006 WL 189694
Vickie Lynn MARSHALL, Petitioner, v. E. Pierce MARSHALL, Respondent.
Supreme Court of the United States
Jan. 20, 2006

...This case involves a dispute concerning the intended disposition of the assets of the late J. Howard Marshall II ("J. Howard"), as well as a conflict between a state probate court and a federal distric...

Brief for the Petitioner

2005 WL 3156909
Vickie Lynn MARSHALL, Petitioner, v. E. Pierce MARSHALL, Respondent.
Supreme Court of the United States
Nov. 21, 2005

...The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 392 F.3d 1118 (Appendix to Petition For Writ of Certiorari ("App.") 1-38). The opinions of the United States Distr...

Brief of Amicus Curiae Washington Legal Foundation in Support of Respondent

2006 WL 207728
Vickie Lynn MARSHALL, Petitioner, v. E. Pierce MARSHALL, Respondent.
Supreme Court of the United States
Jan. 20, 2006

...Amicus curiae Washington Legal Foundation ("WLF") respectfully submits th the judgment of the court of appeals shoul be affirmed. FN1. Pursuant to this Court's Rule 37.6, WLF states that this brief ...

> Pursuant to 18-A M.R.S.A. § 1-508 (1998), Nadeau certified this reassignment in a letter to Treasurer James Atwood. After receiving Nadeau's certification and pursuant to section 1-508, Atwood began to pay the salary of the Register of Probate, $42,558, to Lovejoy, and to pay the salary of the Deputy Register, $36,828, to Dennett. On November 27, 2002, again purportedly pursuant to section 1-508, Nadeau sent another certification to Atwood that directed him to reduce Dennett's salary by an additional $14,354.60, and to redistribute that portion of Dennett's salary among other Probate Registry employees. Atwood did not act on Nadeau's directive.

Id. at ¶ 2. The subject of the present decision is the judge's request for an order of this court, in the nature of a writ of mandamus, directing the County Treasurer to comply with the second certification. Whether such order would be appropriate depends upon a determination of the Treasurer's duties under the statute.

*2 Also for background purposes, the pending question must be considered within the context of the greater issue which has given rise to this series of litigation, namely, the nature and extent of any administrative authority or powers possessed by a Judge of Probate. Under the Probate Code, it is provided that, "The register shall be subject to the supervision and authority of the judge of the court in which such register serves." 18-A M.R.S.A. § 1-305. It also provides that, "Every judge of probate shall constantly inspect the conduct of the register with respect to his records and the duties of his office, and give information in writing of any breach of his bond to the treasurer of his county, who shall bring civil action." 18-A M.R.S.A. § 1-507. Therefore, it is clear that the Legislature has placed upon the probate judge an administrative and supervisory obligation with regard to the register and the operations of the court. What is less clear is what authority or power, if any, has been invested in these judges to enable them to meet this obligation.

As the result of the first litigation in this series, it is clear that the judge may not use his contempt powers for administrative purposes. It also is clear from the Constitution that the judge cannot remove a register from office since both the judge and register are officials whose terms of office are set by the Constitution (Me. Const. art. VII, § 6), and, as a result, neither may be removed from office except by impeachment or address of the Legislature. *Opinion of the Justices*, 343 A.2d 196 (Me.1975). But despite the fact that the judge cannot remove the register from office, section 1-508 might give the judge some leverage in administrative matters, depending on whether the judge can count on the salary adjustment being made.

Discussion

Before addressing the merits, the court must consider the defendants' argument that count I is now moot because the Register of Probate in York County did not run for re-election and is no longer in office. The court disagrees for two reasons. First, as noted by the Supreme Judicial Court, the issue is a serious one which is very likely to be repeated. The parties deserve a decision on the issue even if it would have no practical significance as far as the previous register at this time. Second, whether or not the previous register is a party, the issue of whether the treasurer is required to act upon the judge's certification remains a live issue in this case since the second set of salary adjustments have not taken place. For both reasons, the court will address the issue.

Title 18-A M.R.S.A. § 1-508 reads:

> When a register is unable to perform his duties or neglects them, the judge shall certify such inability or neglect to the county treasurer, the time of its commencement and termination, and what person has performed the duties for the time. Such person shall be paid by the treasurer in proportion to the time that he has served and the amount shall be deducted from the register's salary.

*3 The Supreme Judicial Court has already commented with regard to section 1-508 that, "[T]here is no statutory authority for a Judge of Probate or Probate Court to directly reduce or redistribute the salary of a register of probate. The statute grants that authority only to the County Treasurer." *York Register of Probate* at ¶ 19. The issue is whether the judge may accomplish the same end *indirectly* through his certification, depending upon whether the county treasurer has any discretion.

See More Briefs

Trial Court Documents

Raye v. Osgood

2007 WL 4352408
William W. RAYE, Plaintiff, v. Heidi OSGOOD and David L. White, Defendants.
Superior Court of Maine.
Oct. 04, 2007

...FN1. David L. White is named only in his capacity as the personal representative of the Estate of Diane W. Raye. Probate proceedings have been initiated in the Cumberland County Probate court, docket n...

Burdzel v. Sobus

1999 WL 34982362
Klemens BURDZEL, Jr., Plaintiff, v. Emily SOBUS and Raymond Burdzel, Defendants.
Superior Court of Maine.
Feb. 07, 1999

...KENNEBEC, ss. Pending before the court is the Defendants' Motion for Summary Judgment. FN1. At oral argument on the motion, the court granted the Plaintiff's nunc pro tunc motion for late filing of his...

Hall v. Hall

2012 WL 2335663
Jonathan S. HALL, individually and in his capacity as co-executor of the Estate of Harry A. Hall, III, Plaintiff, v. Jeffrey H. HALL and Bonnie Fraser Hall, Defendants.
Superior Court of Maine.
June 11, 2012

...This case is before the court on the defendants' Motion to Dismiss the Complaint pursuant to the Maine Rules of Civil Procedures 12(b)(1) and (6). Jonathan Hall ("Plaintiff") and Jeffrey and Bonnie Hal...

See More Trial Court Documents

In order to trigger the procedures set forth in section 1-508, someone has to determine that the register is unable to perform his duties or is neglecting those duties. Though not stated, it is implicit in the statute that this someone would be the judge, who then would make the certification to the county treasurer. To that extent, the process is within the control of the judge. However, once the certification is made, the judge has no further authority or role in the process. The judge argues that the treasurer has no discretion with regard to the certification and must make the adjustments in salary as certified. As the plaintiff argues, the statute uses the word "shall" twice, indicating that the treasurer's actions are mandatory or ministerial, without any discretionary element. However, this may depend upon the circumstances.

Ordinarily, if a register becomes unable to perform his duties or neglects them or is absent or is there is a vacancy in the office, the Probate Code anticipates that the deputy register of probate would take the register's place and act as register for all purposes. 18-A M.R.S.A. § 1-506. If there is a deputy, he is appointed by the register and has all the same authority in terms of performing the duties of the register. The deputy gives the same bond to the county as does the register. Neither ffice wold be subject to collective bargaining. The judge has the authority to appoint a register pro tempore, but only in cases where there is no deputy or where there is a vacancy in the office, as opposed to an absence from office.

Reading sections 1-506 and 1-508 together, if the judge believes the register is unable to perform his duties or neglects them, the deputy would assume those duties and the judge would certify this fact to the treasurer so that the salaries may be adjusted. This is precisely what happened in the first certification in the present case. In that situation, the provisions of section 1-508 allow the treasurer to make the adjustment without requiring the usual authorization of the county commissioners. 30-A M.R.S.A. § 173 & 102.

In the event that there is no deputy register, the judge would appoint a suitable person to fill in for the register until the register resumes his duties or another is qualified. However, the statutes do not seem to anticipate the type of reassignment of the register's duties among several other registry staff members such as was done in the present case. Unlike the deputy register, other registry employees do not have the same statutory authority to act on behalf of the register, are hired through an entirely different process, and may be working, as in York County, under a collective bargaining agreement. This is a more complex situation and much more likely to entail the exercise of the county commissioners' final authority over the operation of county offices, unless there is a County Personnel Board. 30-A M.R.S.A. § 102. Therefore, the court concludes that under these circumstances-as represented by the second certification-the county treasurer would be well within his responsibilities and discretion to at least seek guidance from the county commissioners, and implementation of the judge's certification should not be an automatic, ministerial act.

*4 In summary, the court finds the statutory procedures have been properly and appropriately followed in this case. When the judge made his determination under section 1-508 and made his certification to the treasurer indicating the deputy's assumption of many of the register's duties, the treasurer implemented that certification and made the salary adjustments. However, when the certification involved registry employees other than the deputy, the treasurer properly withheld action and sought guidance from the county commissioners.

In light of the foregoing the entry will be:

Judgment on count I for the defendants.

All Citations

Not Reported in A.2d, 2005 WL 2759304

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STATE OF MAINE
YORK, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-15-269

RENEE LEGRAND,

Plaintiff

v.

ROBERT M.A. NADEAU, York County Probate Judge, et al.,

Defendants

ORDER

Before the court are motions on behalf of York County and third party defendants Gregory Zinser and Carol Lovejoy to dismiss the cross claims and third party claims asserted in Judge Nadeau's Amended Answer. York County argues that the cross-claims against it do not belong in this action and fail to state a claim. Third party defendants Zinser, who is the York County Manager, and Lovejoy, who is the Register of Probate, contend that they have been improvidently joined under M.R.Civ.P. 14 and that the third party complaint fails to state a claim.

Oral argument was held on those motions on January 5, 2016. For the reasons set forth below, Judge Nadeau's cross claim and his third-party claims are dismissed.

Count One of Cross Claim – Court Funding

In Count One of the cross-claim contained in Judge Nadeau's Answer to the Amended Complaint, Judge Nadeau is seeking injunctive relief requiring York County to provide "funding . . . consistent with that of full time Maine judges" so as to comply with what he asserts is the County's statutory obligation to ensure that the judicial functions of the probate court will be

available and open to the public whenever other courts in Maine are open. Cross-Claim Count I, "Wherefore Clause" (a).[1]

Historically probate judges in Maine are different from other judges in that they are elected and have always served on a part-time basis. In recognition of this, the Code of Judicial Conduct provides that probate judges are excused from certain of the rules applicable to other judges. See Code of Judicial Conduct, Coverage and Effective Date, § I.B(1) (probate judges required to comply with certain canons "only while serving as a judge"); § I.B(2) (probate judges not required to comply with Rule 3.10, which provides that judges may not practice law).

It has been contemplated that at some point probate judges will become full time, but that has not yet happened. Art. VI, § 6 of the Maine Constitution provides for the election of the judges in the existing Probate Court system. In 1967 Art. VI § 6 was repealed, with the repeal to be effective "at such time as the Legislature by proper enactment shall establish a different Probate Court system with full-time judges." *See* Amendment CVI; Chapter 77, Resolves of the 103rd Legislature, 1967. In the ensuing 49 years, the Legislature has not established a different Probate Court System with full time judges.

Probate judges are also anomalous in that they are state officers even though they are paid by the county. *See Hart v. County of Sagadahoc*, 609 A.2d 282, 284 (Me. 1992). Title 4, M.R.S. § 301 states, "Judges of probate in the several counties are entitled to receive annual salaries as set forth in Title 30-A, section 2." Although there is no longer a direct reference to

[1] In that count Judge Nadeau also seeks injunctive relief to obtain litigation defense insurance, more security staff, various security features, and a larger courtroom. The court understands that the issue of litigation insurance has now been resolved because the State is providing Judge Nadeau with funding to retain outside counsel to defend the claims brought by plaintiffs. The other issues are controlled by the same principles as Judge Nadeau's general claim for more funding.

probate judge salaries in 30-A M.R.S. § 2,[2] the parties do not dispute that the salaries of probate court judges are determined as part of the county budget.

How much to pay probate judges – which is partially a function of how many court days per month they are expected to work as judges – is a non-justiciable issue. To the extent that Judge Nadeau is seeking a judicial order that his position be made full-time, that would be inconsistent with the constitutional amendment repealing Art. VI, § 6 once the Legislature establishes a Probate Court with full-time judges, which it has not done.

Judge Nadeau bases his argument on 4 M.R.S. § 303, which states

> Probate Court shall always be open in each county for all matters over which it has jurisdiction, except upon days on which by law no court is held, but it shall have certain fixed days and places to be made known by public notification thereof in their respective counties to which all matters requiring public notice shall be made returnable, except as otherwise ordered by the judge.

That statute, which has existed in some form since at least 1954, *see* R.S. 1954, c. 153 § 5, is not a statutory command that probate judges are entitled to full time status. If it were, there would be no reason to have postponed the repeal of Art. VI § 6. Read in its entirety, the statute simply gives probate judges the flexibility to schedule their cases at any time, rather than confining their work to fixed terms and preventing them from hearing evidence at any other times. *See Estate of Knapp,* 145 Me. 189, 192, 74 A.2d 217, 219 (1950).[3]

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[2] Until 1995, 30-A M.R.S § 2(1-B) specifically set the salary of the York County probate judge. For FY 1994, for example, that salary was $ 14,320. *See* P.L. 1993, c. 653 § 2. In 1993 the Legislature approved the establishment of the York County Budget Committee, and legislative approval of the York county budget was no longer required. P.L. 1993 c. 623. Thereafter 30-A M.R.S. § 2 was amended to delete any specific reference to the salary of the York County probate judge. P.L. 1995 c. 500 §1.

[3] In other contexts, language that courts "shall always be open" is intended to allow pleadings, documents, and court orders to be filed at any time. *E.g.*, M.R.Civ.P. 77(a).

To the extent that Judge Nadeau is seeking additional payment based on the contention that he needs additional court time to manage his docket, the court has no legal basis to interfere in the budgetary and political decisions made by the County. This is true whether or not those decisions are correct. Judge Nadeau has appended certain statistics as Exhibit C to his cross claim, and those statistics demonstrate that at least based on 2014 budgetary figures, he is currently the second highest paid probate judge in the state behind only the probate judge in the state's most populous county.

Indeed, the determination of a probate judge's salary meets certain of the hallmarks of a nonjusticiable "political question" – specifically

> A lack of judicially discoverable and manageable standards for resolving [the issue]; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government . . .

Baker v. Carr, 369 U.S. 186, 217 (1962). Salary and funding decisions with respect to probate judges is an issue that the political branches of government, not the courts, must resolve.

This conclusion is consistent with the decision of the U.S. Court of Claims in *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977). In that case the court concluded that a claim that Congress had illegally diminished the salaries of federal judges was not nonjusticiable under the "political question" doctrine. 556 F.2d at 1052-54. However, the court also ruled that "the initial policy determinations regarding the real compensation that judges should receive would always remain with the political branches." 556 F.2d at 1054.

Like the U.S. Constitution, the Maine Constitution contains language that judges' compensation "shall not be diminished during their continuance in office," Me. Const. Art. VI §

2. In this case Judge Nadeau is not contending that his compensation has been diminished. Instead he has admitted that the Commissioners raised his annual salary to $ 54,206. Amended Answer ¶ 8 (admitting paragraph 11 of the amended complaint). To the extent that he is seeking additional salary and court funding to provide more court days or for any other reason, count one of his cross-claim fails to state a cognizable claim.

Count Two of Cross Claim and Third Party Claim against Zinser and Lovejoy – "Interference with Supervisory Authority"

In Count Two of his Cross Claim against the County and in his Third Party Complaint against County Manager Zinser and Register of Probate Lovejoy, Judge Nadeau seeks an injunction preventing the County, Zinser, and Lovejoy from interfering with his supervision and management of the Register and her staff and requiring that he be kept informed of all matters affecting the operations of the York County Probate Court.

Looking at the factual allegations in these counts, it is apparent that they primarily concern Judge Nadeau's dissatisfaction with the Register of Probate's and the County's position that the Register, not the Probate Judge, shall manage the staff of the registry of probate. The Register is independently elected by the voters of York County, and the Legislature has specified that the Register has specific statutory duties. Me. Const. Art. VI, § 6; 18-A M.R.S. §§ 1-501, 1-503 – 1-505.

While 18-A M.R.S. § 1-305 provides in pertinent part that "[t]he register shall be subject to the supervision and authority of the judge of the court in which such register serves," nothing in the statute gives a probate judge authority to manage the register's staff. Moreover, the court is aware of no legal authority for the proposition that the County Commissioners and County

Manager cannot express their views as to the effect of collective bargaining contracts and other issues with respect to the management of the register's staff. The register of probate, unlike the probate judge, is a county officer, *see* 30-A M.R.S. § 1(3), and the members of her staff are county employees. Under those circumstances it is inevitable that administrative and budgetary issues will arise in which the County Commissioners and County Manager will become involved. In all such issues there is the potential for disagreement – although it is highly unfortunate that the level of disagreement is so significant between Judge Nadeau, the County, the County Manager, and the Register.

The short answer to Judge Nadeau's claims against the County and County Manager Zinser is that under the circumstances of this case, there is no legally enforceable right to be free of alleged "interference." Accordingly, count two of the cross claim and the third party complaint against Zinser fail to state a claim upon which relief may be granted.

Judge Nadeau's third party complaint against Resister Lovejoy also fails to state a cognizable claim. First, the statutory language providing that the Register is subject to the probate judge's supervision and authority, 18-A M.R.S. §1-305, is the second sentence of a provision that specifically refers to probate records. It is not clear that the statutory language is intended to give a probate judge general authority over the register of probate in all respects. However, even assuming that general authority exists, there is no allegation in the complaint that the Register has refused to implement any of Judge Nadeau's scheduling decisions. The pleadings in this case demonstrate that she has implemented Judge Nadeau's scheduling changes even though she disagrees with them.

18-A M.R.S. § 1-305 cannot be read to require that Register Lovejoy, an independently elected county official, has no option except to express unqualified agreement with Judge

Nadeau's scheduling decisions and not offer any dissenting views. To the extent that Judge Nadeau's claim that Lovejoy is interfering with his authority is intended to stifle dissent on Register Lovejoy's part, it does not state a cognizable claim. To the extent that he is instead seeking a general declaration as to the extent of his authority as judge of probate, the court cannot decide that issue in the abstract.[4]

Finally, to the extent that Judge Nadeau is complaining that Lovejoy is failing to adequately perform her duties as Register, 18-A M.R.S. §§ 1-507 and 1-508 provide a specific procedure by which a probate judge may address alleged deficiencies in the performance of the Register. The existence of that statutory remedy indicates that Judge Nadeau has a remedy at law, which precludes his claim for injunctive relief.

Judge Nadeau's third party complaint against Zinser and Lovejoy is subject to dismissal for an additional reason. M.R.Civ.P. 14(a) allows a defendant to assert claims as a third party plaintiff against a person "who is or may be liable to such third party plaintiff for all or part of the plaintiff's claim against the third party plaintiff." In this case the plaintiff (Renee LeGrand) is seeking declaratory relief against Judge Nadeau based on the allegation that he made retaliatory schedule changes that deprived LeGrand of due process and her constitutional right to access to the courts. The court is not aware of any authority that a third party defendant can be brought into litigation that only seeks declaratory or injunctive relief. Even overlooking that issue, Nadeau is not alleging that Zinser or Lovejoy required him to adopt the schedule that LeGrand is challenging. The court can see no way in which, if LeGrand prevails, Zinser or Lovejoy would be responsible to Nadeau for the declaratory relief sought by LeGrand.

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[4] Judge Nadeau's claims in Count Two of his cross claim and in his third party complaint against Zinser and Lovejoy are reminiscent of a claim raised in *York County Probate Court v. Atwood*, No. CV-03-41 (Superior Ct. York) as to who was the "head" of the York County Probate Court at official meetings, an issue which the court (Studstrup, J.) found to be nonjusticiable. Order dated January 13, 2005, reported at 2005 Me. Super. LEXIS 16.

Count Three – Unpaid Vacation Time

In Count Three of his cross claim Judge Nadeau contends that he is entitled to recover for 60.52 hours of "Paid Time Off" available to part-time county employees under the County's personnel manual. On this issue the County argues that Judge Nadeau has only been sued in his official capacity and therefore cannot assert a cross-claim in his personal capacity. The court does not have to reach this issue because the unpaid vacation claim is legally insufficient in any event. As discussed above, Judge Nadeau is not a county officer or employee but is a state officer whose salary happens to be paid by the County. His claim that he should be treated as a part-time county employee for purposes of "Paid Time Off" fails to state a claim.

In addition, the unpaid vacation claim does not arise out of the same "transaction or occurrence" that is the subject of LeGrand's claim against Judge Nadeau and is therefore not a proper subject for a cross-claim under M.R.Civ.P. 13(g).

Count Four – Open Meetings Violation

In Count Four of his Cross-Claim Judge Nadeau contends that on various unspecified occasions the County Commissioners have engaged in executive sessions regarding his employment without complying with the notice and participation requirements of the Freedom of Access Law, 1 M.R.S. §§ 405(4), 405(5), and 405(6)(A). The parties strenuously disagree as to the viability of this claim,[5] but the court finds that there are two reasons this claim cannot proceed, at least as part of this action.

[5] Part of that disagreement concerns the interpretation of the Law Court's decision in *Underwood v. City of Presque Isle*, 1998 ME 166, 715 A.2d 148. To the extent that Judge Nadeau is contending that there have been clandestine executive sessions, he would have the initial burden of demonstrating that those occurred. *Underwood*, 1998 ME 166 ¶ 18, citing *Marxsen v. MSAD 5*, 591 A.2d 867, 871 (Me. 1991). If the existence of a closed session has been established, however, the defendant has the burden of proving that its actions in executive session complied with the Freedom of Access law. *Underwood*, 1998 ME 166

The first is that, as noted above, a cross-claim has to arise out of the same "transaction or occurrence" that is the subject of the original action. M.R.Civ.P. 13(g). Judge Nadeau is complaining about allegedly improper executive sessions throughout his tenure, Cross Claim ¶ 42, but he does not allege that these arise out of the same transaction or occurrence as the schedule changes that are the subject of plaintiff's complaint.

Second, as the Law Court has noted, the Freedom of Access law provides "a very narrow choice of remedies in circumstances where violation of its limits on executive sessions are found." *Lewiston Daily Sun v. MSAD 43*, 1999 ME 143 ¶ 11, 738 A.2d 1239. Official actions taken in violation of the executive session rules may be declared null and void, and the Attorney General may seek civil penalties. *Id.* In his cross-claim there is no official action that Judge Nadeau is seeking to have declared null and void. His generalized complaint about improper executive sessions that have allegedly occurred in the past and that he believes will continue in the future fails to state a claim.

Count Five and Third Party Claim against Zinser and Lovejoy – Hostile Work Environment

The final count in Judge Nadeau's cross-claim against York County seeks damages from the County for creating a "hostile work environment." The same claim is incorporated in his third party complaint against Zinser and Lovejoy.

Once again, the issues he is raising do not arise from the same transaction or occurrence as the subject of plaintiff's complaint under Rule 13(g) and are therefore not the proper subject of a cross-claim. They are also not the proper subject of a third party complaint because Zinser

¶¶ 18-19. Finally, when a plaintiff is arguing that a decision should be vacated because of an improper closed session, the plaintiff has 30 days from the time he or she learns of the closed session in which to seek redress under Rule 80B. *E.g., Palmer v. Portland School Committee*, 652 A.2d 86, 89 (Me. 1995).

and Lovejoy cannot be found liable to Judge Nadeau for the declaratory relief sought by LeGrand based on Judge Nadeau's scheduling changes.

In any event, the short answer to count five of the cross-claim is that hostile work environment claims are employment discrimination claims based on membership in a protected class under the Maine Human Rights Act. *Watt v. UniFirst Corp.*, 2009 ME 47 ¶ 22, 969 A.2d 897. Judge Nadeau does not allege that he was subjected to a hostile work environment based upon gender, age, race, color, sexual orientation, physical or mental disability, religion, ancestry or national origin. 5 M.R.S. § 4571.

Count Five also refers to the Whistleblowers Protection Act. However, Judge Nadeau has not identified any report or activity that would constitute protected activity under the Whistleblowers Protection Act. *See* 26 M.R.S. § 833(1)(A)-(F). All of the actions protected under § 833(1)(A)-(F) are actions taken by an "employee." Judge Nadeau is not a county employee. His disputes with York County as to whether the County should give him more court time and more compensation and his disputes with the County over the management of the Register's office are policy disputes between elected officials.

For the foregoing reasons, Count Five of the Cross-Claim fails to state a cognizable claim.

The entry shall be:

The motion by York County to dismiss defendant's cross claim and the motion by third party defendants Zinser and Lovejoy to dismiss defendant's third party complaint are granted. The clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: February 12, 2016

Thomas D. Warren
Justice, Superior Court

KeyCite Yellow Flag - Negative Treatment
Distinguished by Peter-Palican v. Northern Mariana Islands, N. Mariana Islands, June 29, 2012

343 A.2d 196
Supreme Judicial Court of Maine.

OPINION OF THE JUSTICES OF THE SUPREME JUDICIAL COURT GIVEN UNDER THE PROVISIONS OF SECTION 3 OF ARTICLE VI OF THE CONSTITUTION.

Question Propounded by His Excellency, the Honorable James B. Longley, the Governor of Maine in an Order Dated July 29, 1975.

Answered Aug. 20, 1975.

Synopsis
A question was propounded by the Governor to the Justices of the Supreme Judicial Court relating to the validity of statute pertaining to the removal of a district attorney from office. The Justices answered the question in the affirmative and held that there was a solemn occasion involving the constitutional rights, powers and duties of the three departments of the government and thus the question would be answered; and that statute which provides for the removal of a district attorney from office by the Governor and Executive Council, upon complaint and due notice and hearing, does not violate the 'distribution of power' provisions of the Constitution; by conducting a 'quasi-judicial' hearing the executive department does not exercise a function of the judicial department nor does it undertake the function of the legislature of removing a constitutional civil officer from office.

Question answered.

West Headnotes (6)

[1] **Courts** ⇐ Questions submitted by Legislature or Governor or other officer

The Justices of the Supreme Judicial Court should decline to answer the question submitted by the Governor where prejudice might result when the question is presented before any occasion has arisen calling for its legal determination. M.R.S.A.Const. art. 6, § 3.

1 Cases that cite this headnote

[2] **Courts** ⇐ Questions submitted by Legislature or Governor or other officer

Where the Governor and the Executive Council had before them a complaint seeking removal of a district attorney which was filed by the Attorney General and the Governor and Council must either act or refuse to act immediately and the Governor and Council entertained doubts as to the constitutionality of the statute pursuant to which they were requested by the Attorney General to act, a "solemn occasion" existed which required the Supreme Judicial Court to answer the question submitted by the Governor concerning the validity of the statute pertaining to removal of district attorneys. M.R.S.A.Const. art. 3, § 2; art. 4, pt. 1, § 8, pt. 2, § 7; art. 6, § 3; art. 9, § 5; 30 M.R.S.A. § 451.

5 Cases that cite this headnote

[3] **Constitutional Law** ⇐ Encroachment on legislature

Constitutional Law ⇐ Executive Exercise of Statutory Authority as Encroaching on Judiciary

District and Prosecuting Attorneys ⇐ Tenure and removal

Statute which provides for the removal of a district attorney from office by the Governor and Executive Council, upon complaint and due notice and hearing, does not violate the "distribution of power" provisions of the Constitution; by conducting a "quasi-judicial" hearing the executive department does not exercise a function of the judicial department nor does it undertake the function of the legislature of removing a constitutional civil officer from office. M.R.S.A.Const. art. 9, § 5; 30 M.R.S.A. § 451.

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[4] **Public Employment** ⇐ Definite or Fixed Term

When the Constitution fixes the tenure of a civil office, it is beyond the power of the legislature to affect the tenure and persons holding such constitutional offices may be removed only by methods authorized by the Constitution itself. M.R.S.A.Const. art. 9, § 5.

3 Cases that cite this headnote

[5] **Public Employment** ⇐ Impeachment or address

A civil officer whose tenure is constitutionally established may be removed only by impeachment or address of the legislature. M.R.S.A.Const. art. 9, § 5.

[6] **Public Employment** ⇐ Impeachment or address

A civil officer whose tenure is fixed by statute may be removed from an office in a manner other than by impeachment or address of the legislature. M.R.S.A.Const. art. 9, § 5.

4 Cases that cite this headnote

*197 Augusta

July 29, 1975

To the Honorable Justices of the Supreme Judicial Court

Under and by virtue of the authority conferred upon me as Governor by the Constitution of Maine, Article VI, Section 3, and believing that this is a solemn occasion involving the constitutional rights, powers and duties of the Executive, Legislative and Judicial departments of the government,

I James B. Longley, Governor of Maine, submit the following statement of facts and questions of law and respectfully ask the opinion of the Justices of the Supreme Judicial Court thereon:

*198 STATEMENT OF FACTS

Title 30, M.R.S.A., Section 451, in part, reads as follows:
'Whenever the Governor and Council, upon complaint and due notice and hearing, shall find that a district attorney has violated any statute or is not performing his duties faithfully and efficiently, they may remove him from office and appoint another attorney in his place . . ..'

The Constitution of Maine, Article III, Section 2, provides:
'No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted.'

The Constitution of Maine, Article IV, Part Second, Section 7, provides:
'The House of Representatives shall have the sole power of impeachment.'

The Constitution of Maine, Article IV, Part Second, Section 6, provides:
'The Senate shall have the sole power to try all impeachments, and when sitting for that purpose shall be on oath or affirmation, and no person shall be convicted without the concurrence of tow-thirds of the members present. Their judgment, however, shall not extend farther than to removal from office, and disqualification to hold or enjoy any office of honor, trust or profit under this State. But the party, whether convicted or acquitted, shall nevertheless be liable to indictment, trial judgment and punishment according to law.'

The Constitution of Maine, Article IX, Section 5, provides:
'Every person holding any civil office under this State, may be removed by impeachment, for misdemeanor in office; and every person holding any office, may be removed by the Governor with the advice of the Council, on the address of both branches of the Legislature. But before such address shall pass either House, the causes of removal shall be stated and entered on the journal of the House in which it originated, and a copy thereof served on the person in office, that he may be admitted to a hearing in his defense.'

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On June 27, 1975, Joseph E. Brennan, Attorney General of the State of Maine, caused a complaint to be delivered to the Governor and to the Executive Council of the State of Maine seeking the removal of Mr. William P. Donahue, District Attorney for Prosecutorial District #1 on the grounds of alleged violation of statute and improper performance of duty. This complaint requests the Governor and the Council to conduct the hearing to determine said charges and effect the removal of said William P. Donahue from office under Title 30 M.R.S.A. Section 451.

In view of the explicit constitutional prohibition of members of the Executive department from exercising powers properly belonging to the Legislative or Judicial departments in the absence of express constitutional direction, and in view of the explicit constitutional provision placing the sole power of initiating removal by address in the Legislative department; both the Governor and Council have serious doubt of their constitutional power to comply with the request of the Attorney General under Title 30, M.R.S.A., Section 451, and they have no means of resolving this legal question other than through resort to the opinion of the Justices.

Therefore, I James B. Longley, Governor of Maine respectfully request an answer to the following question:

QUESTION OF LAW

Must the Governor, in response to the Attorney General's request, convene the Executive Council and, together with that body, conduct a quasi-judicial hearing to ***199** determine the issue of the accused's removal from office?
Respectfully submitted,

s/ James B. Longley

James B. Longley, Governor

ANSWER OF THE JUSTICES

To His Excellency James B. Longley, Governor of Maine:

In compliance with the provisions of Section 3 of Article VI of the Constitution of Maine, we, the undersigned Justices of the Supreme Judicial Court, have the honor to submit the following answer to the question propounded on July 29, 1975.

QUESTION: Must the Governor, in response to the Attorney General's request, convene the Executive Council and, together with the body, conduct a quasi-judicial hearing to determine the issue of the accused's removal from office?

ANSWER: We answer in the affirmative.

The Statement of Facts describes action having been commenced by the Attorney General against a District Attorney seeking removal of such District Attorney from office pursuant to 30 M.R.S.A. s 451.

There is in existence a live controversy between the State through its Attorney General and a citizen who has been elected by the people of his prosecutorial district to the office of District Attorney.

If the action of the Attorney General is successful, the consequences of such action to the person whom the Complainant seeks to remove from office are obvious. Not only will a forfeiture of the title and emoluments of office result, but it is reasonable to conclude such person will suffer greatly in his reputation.

We must ask ourselves, ought the question submitted to us for our opinions, which so vitally affects rights of a person who is not before us and cannot in this proceeding be brought before us by any known legal process, be answered in an Advisory Opinion of the Justices?

This question is formulated in the language employed by the Constitution as 'Is this a solemn occasion?'[1]

That the question we now pose has caused concern not only in this State but in other states, where similar constitutional provisions exist, is well known. Opinion of the Justices, 85 Me. 545, 27 A. 454 (1891); Opinion of the Justices, 72 Me. 542, 559 (1881) (Justices Libby and Walton); Opinion of the Justices, 125 Me. 529, 539, 133 A. 265 (1926) (Justice Dunn); Opinion of the Justices, 5 Met. (Mass.) 596 (1844); Opinion of the Justices, 9 Cush. (Mass.) 604 (1852).

An historical review of this particular provision of our Constitution becomes helpful.[2]

It must be remembered that the Constitutional Convention from which this provision emanated in Massachusetts was held in 1780 and was widely discussed in the Massachusetts Constitutional Convention of 1820.

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It first appeared in the Constitution of New Hampshire as a result of the Constitutional Convention in New Hampshire held in 1792.

It may be assumed that the participants, or some of them, who were at the Maine Constitutional Convention in 1819-1820, had some familiarity with the doings of ***200** the Massachusetts Constitutional Convention of 1780, and the New Hampshire Constitutional Convention of 1792.

Perley's Debates reveal that no part of Article VI of the Constitution of Maine was debated at the Constitutional Convention of 1819-1820. Rather it was adopted in toto without debate. Perley's Debates and Journal, Constitutional Convention of Maine 1819-1820 (p. 236).

In contrast, the Massachusetts Constitutional Convention of 1820-1821 not only debated the subject extensively but recommended:
'In the second article of the third chapter it is provided, that each branch of the Legislature, as well as the governnor and council, shall have authority to require the opinion of the judges, on important questions of law, and upon solemn occasions. We think this provision ought not to be a part of the constitution; because, First, each department ought to act on its own responsibility. Second. Judges may be called on to give opinions on subjects, which may afterwards be drawn into judicial examination before them, by contending parties. Third. No opinion ought to be formed and expressed, by any judicial officer, affecting the interest of any citizen, but upon full hearing, according to law. Fourth. If the question proposed should be of a public nature, it will be likely to partake of a political character; and it highly concerns the people that judicial officers should not be involved in political or party discussions.

'We therefore, recommend that this second article should be annulled.'

Journal of Debates and Proceedings in the Massachusetts Constitutional Convention, 1820-1821 (1853) (p. 629).

Despite such strong recommendation[3] by the Convention, the provision remains in ***201** the Constitution of Massachusetts to this day.[4]

Opinion of the Justices, 126 Mass. 557 (1878), contains a most interesting and enlightening history of the provisions of the Constitution of Massachusetts, Chap. 3, Article 2.

In that Opinion the Justices referred to the Journal of the Constitutional Convention of 1779 and 1780, at pages 211 and 242, and opinion that the participants in the Convention 'evidently and in view the usage of the English Constitution, by which the King, as well as the House of Lords, whether acting in their judicial or in their legislative capacity, had the right to demand the opinions of the twelve judges of England.' 126 Mass. at 561.

In Opinion of the Justices, 85 Me. 545, 27 A. 454 (1891), there was presented a question similar[5] in its factual framework to that now before us. The Justices were asked.
'Would a removal, by the Governor, of a County Attorney, upon proper charges, due notice and hearing, under . . . section 61 (of chapter 27, of the Revised Statutes), and the appointment of a proper person to fill his place, be valid?' (p. 545, 27 A. 454) (Emphasis supplied)

The Justices declined to answer, saying,
'Although the attorney is to be heard upon the charges against him presented to the Governor, he cannot be heard upon the question submitted to us, and we think it inexpedient to prejudice that question before any occasion has arisen calling for its legal determination.' (p. 546, 27 A. 454).

The Justices then pointed to,
'. . . the late statute of the State upon the subject of the tenure of office, under which, if the removal of such official be made and another appointed, the legality of the removal can be immediately contested, by proceedings to be instituted before any judge in any county in the State where either party resides, in term time or vacation, ...' (p. 546, 27 A. 454)

This, they said, confirmed them in their opinion that the question ought not be answered.

See also Opinion of the Justices, 95 Me. 564, 51 A. 224 (1901).

Later in 1926, the Justices were asked to give their opinion in a matter arising out of the proposed removal of a sheriff by the Governor pursuant to Amendment 38 of the Constitution of Maine. There, as here, the rights of an elected official were substantially involved.

Of the nine Justices then on the Court, eight considered there was a 'solemn occasion' and did not hesitate to answer

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the question. Only Justice Dunn (later Chief Justice Dunn) considered the question was one in which 'the quality of solemnity is lacking.'

***202** [1] The careful reading of the Opinion of the Justices, 85 Me. 545, 27 A. 454 (1891), reveals that the Justices did not say that a legal remedy available to a possibly adversely affected party precludes the finding of a 'solemn occasion' and it does not say that possible prejudice to a party not then before the Court limits the constitutional remedy. What the Justices' opinion stands for is that the Justices should decline of answer a question where prejudice might result, when the question is presented before any occasion has arisen calling for its legal determination.

In other words, the Justices declined to answer the question as to an appointment at a time when there was no vacancy in office and the Governor was not then (at the time of asking for the opinion) required to act upon any appointment.

The question asked of the Justices in 1891 involved both the removal of the incumbent County Attorney and the appointment of some other person to fill the vacancy thus created. Thus there was in issue the prospective title to an office when at the time the question was asked there existed no vacancy in such office.

[2] In the instant case, the Governor and Council have before them a complaint seeking removal of a District Attorney which complaint was filed by the Attorney General. The Governor and Council must either act or refuse to act now.

The Governor and Council profess substantial doubt as to the constitutionality of the statute pursuant to which they are requested by the Attorney General to act.

As we view it, the situation now before us is unique.

Action has been instituted to remove the District Attorney from his office.

The Governor and Council entertain doubts based on advice given them by competent legal advisors whom the Governor has consulted.

The Governor and Council hear two voices giving them direction.

The first, that of the Constitution Article IX, Sec. 5, Constitution of Maine, which the Governor could reasonably interpret as saying: You shall with the advice of the Council, remove officers on the address of both branches of the Legislature.

The other, the statute, 30 M.R.S.A. s 451, which says: You shall remove the District Attorney, if after due notice and hearing, you find that he has violated any statute or is not performing his duties faithfully and efficiently.

The Governor is asking us 'to which voice shall I listen?'

Ordinarily he would turn to the Attorney General for guidance, but in the instant case the Attorney General is not only a party but the moving force in the matter.

As the Justices of the Supreme Judicial Court of Massachusetts said in Opinion of the Justices, 354 Mass. 804, 241 N.E.2d 91 (1968),

'We are strengthened in our belief that we should answer the Governor's question because the Attorney General deems himself disqualified from giving the opinion which usually might be expected from him.' (p. 808, 241 N.E.2d p. 93)

The Governor and Council are faced with an important dilemma. They are requested to proceed under the authority of 30 M.R.S.A. s 451.

If that statute is constitutional they have the duty to proceed, and if they do not, they fail to discharge a mandated responsibility.

If they lack power to proceed but do, they violate the Constitution of Maine and their oath of office.

Under these unique circumstances, we feel there is a 'solemn occasion' and there is an 'important question' and we must ***203** answer. See Opinion of the Justices, 96 N.H. 517, 83 A.2d 738 (1950).

[3] We interpret the question to be directed to whether 30 M.R.S.A. s 451 contravenes the 'Distribution of Powers' provisions of Article III of the Maine Constitution because the statute requires that: (1) the Executive Department exercise a function of the Judicial Department by conducting a 'quasi-judicial' hearing, and (2) the Executive Department undertake the function, established by Article IX, Section 5, of the Constitution as exclusively legislative, of removing a civil officer from office.

We find no such violations of Article III.

The requirement in 30 M.R.S.A. s 451 that the removal proceeding be 'upon complaint and due notice and hearing' is calculated to conform to constitutional mandates of procedural due process of law. In this sense the hearing may be labelled 'quasijudicial.' However, that the Executive Department is charged with conducting a hearing characterized as 'quasi-judicial' because it complies with procedural due process requirements does not transform the Executive Department into

'. . . a court or vest . . . (it) with judicial functions contrary to the requirements of our Constitution as to the separation of powers of government.' Johnson v. Laffoon, 257 Ky. 156, 77 S.W.2d 345, 350 (1934).

We are further satisfied that the Executive Department in carrying out the duties imposed upon it under 30 M.R.S.A. s 451 is not performing a function rendered exclusively legislative by Section 5 of Article IX of the Constitution.

[4] [5] When the Constitution fixes the tenure of a civil office, it is beyond the power of the Legislature to affect the tenure. Persons holding such constitutional offices, therefore, may be removed only by methods authorized by the Constitution itself. Laverty v. Cochran, 132 Neb. 118, 271 N.W. 354 (1937); Fugate v. Weston, 156 Va. 107, 157 S.E. 736 (1931). Insofar, then, as Section 5 of Article IX authorizes impeachment or address of the Legislature as methods for the removal of civil officers, these are the exclusive methods for the removal of civil officers whose tenure is constitutionally established.

[6] It does not follow, however, that the same principle governs as to civil offices the tenure of which is fixed by statute. As to such offices it has been held that, in the absence of a constitutional prohibition to the contrary, it is 'undisputed' that

'(o)nly the legislature can establish a public office (other than a constitutional office) as an instrumentality of government. Whether the creation of the office is necessary or expedient, its duties, its powers, its beginning, its duration, its tenure, are all questions for the legislature to determine and be responsible to the people for their correct determination.' State v. Butler, 105 Me. 91, 96, 97, 73 A. 560 (1909).

See also: Graham v. Roberts, 200 Mass. 152, 157, 85 N.E. 1009, 1011 (1908), in which Chief Justice Knowlton, quoting Chief Justice Shaw in Taft v. Adams, 3 Gray, 127, 130, said

'Where an office is created by law, and one not contemplated, nor its tenure declared by the Constitution, but created by law solely for the public benefit, it may be regulated, limited, enlarged or terminated by law, as public exigency or policy may require.'

Also see: McFeeters v. Parker, 113 Vt. 139, 30 A.2d 300 (1943).

Section 5 of Article IX does not clearly and expressly mandate impeachment or address of the Legislature as the exclusive methods for the removal of all civil officers. The textual language is not language of restriction or limitation but language of authorization.

Our opinion is that to resort to a process of negative implication to transform such ***204** plain language of enablement into language of limitation would be unjustifiably to extend the true import of Section 5 of Article IX and unnecessarily and undesirably to impose restriction upon the otherwise plenary power of the Legislature to prescribe, as it sees fit, the method for the removal from office of one holding an office for which the Legislature has fixed the tenure.

In 30 M.R.S.A. s 451 the Legislature has seen fit to prescribe the method for removal from an office for which it, and not the Constitution, has prescribed the tenure. The statute, therefore, contravenes neither Section 5 of Article IX nor Article III of the Constitution.

Dated at Portland, Maine, this twentieth day of August, 1975.

Respectfully submitted:
ARMAND A. DUFRESNE, Jr.

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All Citations

343 A.2d 196

Footnotes

1 The Justices of the Supreme Judicial Court shall be obligated to give their opinion upon important questions of law, and upon solemn occasions, when required by the Governor, Senate or House of Representatives. Constitution of Maine, Article VI, Sec. 3.

2 A provision similar in substances is found in the Constitution of Massachusetts, Chap. 3, Art. 2, and in the Constitution of New Hampshire, Part 2, Art. 74, and in Amendment 12 of the Constitution of Rhode Island.

3 'The second resolution, that it is inexpedient to retain that article of the constitution which requires the judges of the supreme court to answer questions proposed to them by the governor and council, or either branch of the Legislature, was then read.

'MR. STORY of Salem said that it was exceedingly important that the judiciary department should, in the language of the constitution, be independent of the other departments; and for this purpose, that it should not be in the power of the latter to call in the judges to aid them for any purpose. If they were liable to be called on, there was extreme danger that they would be required to give opinions in cases which should be exclusively of a political character. There were two classes of cases in which the Legislature may demand the opinion of the judges-those of a public and those of a private nature. A question may be proposed in which the whole political rights of the State are involved. It is impossible that there should be an argument, and the individual most interested, will be deprived of a right which is secured to every person by the constitution, that of being heard. Questions of fact and of law may be decided without argument and without a jury. There was no necessity for such a provision. In cases where it is necessary to obtain a judicial decision, the Legislature may, by resolve, order a suit to be brought to try any question of law or fact, and have it regularly argued. Why then should the great principle be violated by taking away the right of trial by jury? The power of calling on the judges for their opinion, may be resorted to in times of political excitement, with the very view to make them odious, and to effect their removal from office. A better opportunity could not be afforded to an artful demagogue, for effecting the purpose of their removal, than by drawing from them opinions opposed to the strong popular sentiment, and subjecting them to popular odium. It ought not to be in the power of the other departments to involve the judiciary in this manner. As the constitution now stands, the judges are bound to give their opinions if insisted upon, even in a case where private rights are involved, and without the advantage of an argument. However great the talents of the judges, however extensive their learning, they are never safe in deciding without an argument. Some judges of the greatest learning make it a rule. that no opinion which they have given without argument, shall be binding upon themselves, or on others. The greatest judges have sometimes changed their opinion on argument. They ought always to have the aid of the talents of the bar, before pronouncing their opinion. The right of being heard, and the practice of arguing all questions has, more than anything else, preserved the uniformity of the common law. He did not know that there was the slightest objection to the proposed amendment. It had the assent of nearly all, in (sic) not all the select committee.

'The resolution was agreed to, by a large majority.' Journal of Debates and Proceedings in the Massachusetts Constitutional Convention 1820-1821 (1853) (p. 489-490).

4 Another attempt to remove the advisory opinion provision of the Massachusetts Constitution was made at the Constitutional Convention of 1853. This too failed. Massachusetts Commission to Compile Information and Data for the use of the Constitutional Convention. Manual for the Constitutional Convention, 1917 (p. 54).

5 An important dissimilarity in the factual framework was that the inquiry was directed partly to the question of appointing a person to an office. At the time the question was asked there was no vacancy in the office and there would not be a vacancy unless and until the incumbent was removed. Thus as to the appointment, there was no imminent occasion for the Governor to act. The matter was not of live gravity. Rather, it concerned action he might or might not be caled upon to take in the future.

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