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CONCLUSION

Radkey sets out a policy of less restrictive admission, approves the law-fact distinction, and affirms the test applied thereto to be a differentiation between legal definitions or conclusions and general mental condition.

Ambiguity enters this criterion at the test level. Certainly the issue of testamentary capacity may be developed either directly or indirectly. It appears from *Radkey* that testimony may not include the phrase "legal capacity" because this approaches the issue too directly. The testimony may, however, involve the terms "mental capacity" and "sound mind," when not appended to the phrase "to execute a will," because this is an indirect approach. But the phrase "to execute a will" may also be asked indirectly, thus creating another problem area. No cases to date have tested the court's new criterion for admission.

The court at best has established a vague guideline. A possible alternative, which the court mentioned in a footnote[30] but dismissed because it did not follow prior Texas decisions, would have been better. This alternative would permit admission of all testimony, and "any difference of definition . . . [could] be brought out by proper cross examination."[31] Use of this approach avoids dealing with both "theories" and "tests." The only possible objection would be at the "policy" level, and, under the less restrictive *Radkey* approach, "any question and answer should be allowed if it would be helpful to the jury."

Jon Roger Bauman

Potential Limitations Upon the Tenure of Federal Trial Judges — Some Implications of the Chandler Case

While the United States district judge is basically independent with extensive discretionary power and potential life tenure, the development of an administrative process in recent years has posed a latent threat to his independence. Conflict finally erupted when the Tenth Circuit Judicial Council ordered that the Honorable Stephen S. Chandler, Chief Judge for the Western District of Oklahoma, be deprived of the power to adjudicate any presently pending or sub-

[30] *Id.* at 813 n.1.
[31] *Id.* at 813.

sequent cases.[1] The judge attacked the order in the United States Supreme Court, where it was declared interlocutory.[2] Pursuant to the Court's mandate, the Council granted the judge a hearing but subsequently cancelled it and ordered that the judge's pending caseload be restored.[3] The Council persistently refused to restore his power to hear future cases. Judge Chandler has renewed his attack in the United States Supreme Court, declaring as his purpose the defense of the concept of judicial independence.[4]

Independence of the federal judiciary is one of the primary tenets of the American constitutional system, developed in response to abuses of power by the kings of England,[5] and incorporated in Article III of the Constitution through the adoption of the Randolph Plan.[6] The Constitution states that judges "both of the supreme and inferior courts, shall hold their office during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."[7]

While the concept of an independent judiciary is fundamental in the federal trial system, some degree of administrative supervision is

[1] Since 1961 the Honorable Stephen S. Chandler has been embroiled in four major controversies. He has been disqualified in two separate actions: Occidental Petroleum v. Chandler, 303 F.2d 55 (10th Cir. 1962), *cert. denied*, 372 U.S. 915 (1963); and Texaco, Inc. v. Chandler, 354 F.2d 655 (10th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966). Later he was sued for alleged malicious prosecution, libel, and slander, but the case was dismissed, O'Bryan v. Chandler, 352 F.2d 987 (10th Cir. 1965), *cert. denied*, 384 U.S. 926 (1966). In an unrelated criminal case Judge Chandler was charged with conspiring to defraud the State of Oklahoma, but the indictment was quashed by the state court in Oklahoma v. Chandler & Kessler, No. 31299, D. Okla., Nov. 1965.

Citing these situations, and declaring that the judge was "presently unable, or unwilling, to discharge efficiently the duties of his office," the Council

> accordingly . . . ordered . . . that until the further order of the Judicial Council, the Honorable Stephen S. Chandler shall take no action whatever in any case or proceeding now or hereafter pending . . . ; that all cases and proceedings now assigned to or pending before him shall be reassigned to and among the other judges of said court; and that until the further order of the Judicial Council no cases or proceedings . . . shall be assigned to him for any action whatsoever.

[2] Chandler v. Judicial Council, 382 U.S. 1003 (1966). In his dissent Mr. Justice Black, joined by Mr. Justice Douglas, declared that the order was not interlocutory because the Council lacked the power to make even interlocutory orders which affected the continuance in office of a district judge.

[3] Order of the Judicial Council, *In the Matter of the Division of Business in the Western District of Oklahoma*, unpublished (February 4, 1966), on file in the United States District Court for the Western District of Oklahoma and in the files of the Tenth Circuit.

[4] *Application for a Writ of Prohibition and/or Mandamus*, renewed, February, 1966.

[5] "He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." THE DECLARATION OF INDEPENDENCE; Judges were "dependent on the Crown alone for their salaries." THE COLONIAL DECLARATION OF RIGHTS (Oct. 14, 1774).

[6] WARREN, THE MAKING OF THE CONSTITUTION 659 (1928).

[7] U.S. CONST. art. III, § 1. The origin of this provision, according to Justice Field in McAllister v. United States, 141 U.S. 174, 194 (1891), lies in the statute of 13 Will. III, ch. 2. See also THE FEDERALIST No. 78 (Hamilton).

essential to its efficient operation. For example, the district judge is greatly assisted by equitable caseload distribution and administrative coordination. In addition to these basic areas, however, supervision has been suggested as a potential tool to establish minimum standards of judicial conduct.[8] To be effective, enforcement of these standards must be predicated upon the power to require conformity from the recalcitrant judge, either by the threat of suspension or removal, or by some less radical alternative.

I. CONTROL OF THE JUDICIARY

Threat of impeachment has heretofore been the only significant restraint upon the independence of the judicial office, and it has often been declared inadequate for supervisory use. Impeachment can be cumbersome, overcast with political or partisian bias, costly, burdened with a lack of investigative procedure and an overly large body of judges, and only applicable to cases of misconduct.[9] Because of these inadequacies, other methods of removal and control of judges have been proposed. These include devices such as enforced retirement at a certain age[10] (a proposal specifically rejected by the Constitutional Convention),[11] "substitution" of an additional judge by the President (using the heretofore dormant section 372(b) of the Judicial Code),[12] and various methods of removal controlled by the judiciary

[8] Lumbard, *The Place of the Federal Judicial Councils in the Administration of the Courts*, 47 A.B.A.J. 169, 171 (1961). See also Frankel, *Judicial Control and Removal*, 44 TEXAS L. REV. 1117 (1966) (state removal plans).

[9] Frankel, *Removal of Judges—Federal and State*, 48 J. AM. JUD. SOC'Y 177, 180-81 (1965); Moore, *Judicial Trial and Removal of Federal Judges*, 20 TEXAS L. REV. 352 (1942); Potts, *Impeachment as a Remedy*, 12 ST. LOUIS L. REV. 15, 31 (1927); Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 870, 871 (1930); Simpson, *Federal Impeachments*, 64 U. PA. L. REV. 651, 825 (1916).

[10] This proposal has been introduced in Congress: S.B. 2299, 89th Cong., 1st Sess. (1965). The basic arguments behind this type of plan are discussed in Fairman, *The Retirement of Federal Judges*, 51 HARV. L. REV. 397, 433; and Major, *Why Not Mandatory Retirement for Federal Judges?*, 52 A.B.A.J. 29 (1966). Such a provision is included in the Model State Judicial Article, § 6, para. 2, 47 AM. JUD. SOC'Y 10-11 (1963).

[11] THE FEDERALIST No. 79 (Hamilton).

[12] 28 U.S.C. § 372(b) provides:

> Whenever any judge of the United States appointed to hold office during good behavior who is eligible to retire under this section does not do so and a certificate of his disability signed by a majority of the members of the Judicial Council of his circuit . . . is presented to the President, and the President finds that such judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability and that the appointment of an additional judge is necessary for the efficient dispatch of business, the President may make such appointment by and with the advice and consent of the Senate. . . ."

H.R. 10117, 89th Cong., 1st Sess. (1965), contains a similar, but more extensive, provision. These provisions are, of course, surprisingly similar to those advanced by President Roosevelt in regard to Justices of the Supreme Court.

itself.[13] The latter approach, removal by judicial action, has been defended as impartial, expedient, inherently judicial in nature, and justified by the doctrine of separation of powers.[14] Several plans involving judicial action propose an independent tribunal of judges summoned either by Congress or the Supreme Court, or meeting *sua sponte*, to determine the fitness of a judge.[15] Coordination of such an autonomous group with the judicial system presents a difficult task, and perhaps for the sake of efficiency other proposals suggest adding this function to the powers of some group now existing within the system.[16]

II. THE JUDICIAL COUNCILS

Federal Judicial Councils have been suggested to exercise supervisory power over federal judges.[17] Composed of the circuit judges of individual circuits, they presently consider the quarterly reports of the Director of the Administrative Office of the United States Courts and are empowered to make "all necessary orders for the effective and expeditious administration of the business of the courts within its circuit."[18] Normally the councils have functioned in the field of judicial administration, *i.e.*, in dispatching, organizing, distributing, and generally providing the mechanical supervision of the workload of the district courts.[19] However, the Judicial Conference of the United States recently noted a broader function which it considered included within the powers and responsibilities of the councils. The Conference termed this "the business of the judiciary in its institutional sense (administration of justice), such as the avoiding of any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system, from the actions of a judge or other person attached to the courts."[20]

It seems that the Tenth Circuit Judicial Council determined this broader function to be appropriate in the *Chandler* situation. As sta-

[13] Allard, *Judicial Discipline and Removal Plans, a Survey and Comparative Study*, 48 J. AM. JUD. SOC'Y 173 (1965); Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 870-71 (1930).

[14] Shartel, *supra* note 13, at 876.

[15] Allard, *supra* note 13, at 173; Shartel, *supra* note 13, at 878; *Retirement or Supersession of Federal Judges*, 5 CONST. REV. 242-43 (1921); and see the discussion of the McAdoo Bill in Note, *The Exclusiveness of the Impeachment Power Under the Constitution*, 51 HARV. L. REV. 330, 333-34 (1937).

[16] Judicial Conference of the United States, *Report on the Powers and Responsibilities of the Judicial Councils*, H.R. Doc. No. 201, 87th Cong., 1st Sess. 9 (1961).

[17] Lumbard, *supra* note 8, at 171.

[18] 28 U.S.C. § 332.

[19] House Comm. on the Judiciary, *Membership of District Judges on Judicial Councils*, S. REP. No. 263, 88th Cong., 1st Sess. 3 (1963).

[20] Judicial Conference of the United States, *supra* note 16, at 9.

tutory authorization for its first order, the Council referred to section 332 of the Judicial Code;[21] subsequently it also referred to section 137.[22] By referring to these provisions, the Council impliedly advanced the argument that its action was purely administrative in nature. The Council's administrative powers, as provided by these statutes, are broad indeed. The question is whether Congress intended for the councils to have the power to deprive a judge of his caseload, and, if so, whether Congress may authorize this exercise of power in view of the constitutional independence of the trial judge.

The legislative history of section 332 of the Judicial Code indicates that the purpose of Congress was to create an administrative body with extensive responsibilities.[23] Congress included the provision for the judicial councils in the Administrative Office Act of 1939, which set up the Office of Judicial Administration.[24] The primary purpose of the act was to take the judicial budget out of the hands of the Attorney-General's office and place it in the hands of the judiciary.[25] After minor amendments in 1948 and 1963, the provision relating to the judicial councils reads as follows:

> The chief judge of each circuit shall call . . . a council of the circuit judges for the circuit. . . .
>
> The chief judge shall submit to the council the quarterly reports of the Director of the Administrative Office of the United States Courts. The council shall take such action thereon as may be necessary.
>
> Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.[26]

[21] Order of the Judicial Council, *In the Matter of the Honorable Stephen S. Chandler, United States District Judge for the Western District of Oklahoma,* unpublished (December 13, 1965), on file in the United States District Court for the Western District of Oklahoma and in the files of the Tenth Circuit.

[22] Order of the Judicial Council, *In the Matter of the Division of Business in the Western District of Oklahoma,* unpublished (Feb. 4, 1966), on file in the United States District Court for the Western District of Oklahoma and in the files of the Tenth Circuit.

[23] The bill was entitled, "A bill to provide for the administration of the United States courts, and for other purposes." 84 CONG. REC. 9308 (1939). Parker, *The Federal Judicial System,* 14 F.R.D. 361, 369, points out that there were four purposes of the act: (1) to make the judiciary financially independent of the executive; (2) to create an agency to prepare the judicial budget and submit written reports to the Judicial Conference of the United States; (3) to set up the Judicial Councils in each circuit; (4) to require a conference of all district and circuit judges within each circuit each year.

[24] 84 CONG. REC. 10316, 10387 (1939).

[25] 84 CONG. REC. 9308 (1939). While the former system had worked well in practice, its potential defects were obvious. See 22 F.R.D. 71, 75 n.5.

[26] 28 U.S.C. § 332. In the original act the section was numbered § 306, and read "To the end that the work of the district courts shall be effectively and expeditiously transacted, it shall be the duty of the senior circuit judge of each circuit to call . . . a council composed of the circuit judges for such circuit, who are hereby designated a council for that purpose. . . . It shall be the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts." 84 CONG. REC. 9308 (1939).

In the hearings on the original act, Senate Bill 188, before a subcommittee of the Judiciary Committee, Chief Judge Harold Stephens stated that "the judicial councils of the several circuits [have the] . . . power to direct the activities of district judges, so far as efficiency is concerned."[27] In a recent article Judge Prettyman, Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, stated that "the statute is flat and unequivocal in conferring power."[28] Mr. Justice Brennan has noted that the councils have a "broad authority and a significant responsibility."[29]

Power is conferred upon the councils for the purpose of "effective and expeditious administration." Although this language is broad and somewhat indefinite, caseload distribution has been one of the councils' primary functions. Section 137 of the Judicial Code specifically confers this power on the councils in certain instances: "If the district judges in any district are unable to agree upon the [division of business] . . . the judicial council of the circuit shall make the necessary orders."[30]

Because the councils were created as administrative bodies, statutory authorization for actions like that of the Tenth Circuit in *Chandler* must turn on whether they are purely administrative in nature.[31] The only formal action involved in *Chandler* was caseload distribution, normally purely administrative. Were a judge completely incapacitated, the councils would have the power to delegate his cases to other judges of the district. It is an easy analogy from this situation to that of *Chandler*—to maintain that the Council acted where a district judge was prevented from properly fulfilling his judicial function because of some disability. On the other hand, there is no clear answer as to whether a council would be authorized to re-distribute the caseload of an incapacitated judge against his wishes; moreover, in *Chandler* it appears that the Council's "administrative" action was preceded by a judicial determination of the judge's suitability for office.[32] The fact that the Council restored the judge's pending cases indicates that

[27] *Hearings on S. 188 Before the Senate Judiciary Committee*, 76 Cong., 1st Sess. 18 (1939).

[28] Prettyman, *The Duties of a Circuit Chief Judge*, 46 A.B.A.J. 633, 634 (1960).

[29] Brennan, *The Continuing Education of the Judiciary in Improved Procedures*, 28 F.R.D. 42, 43 (1962).

[30] 28 U.S.C. § 137.

[31] Since administrative and judicial proceedings often involve substantially the same issues, the distinction between administrative and judicial actions is normally predicated upon the power of enforcement. A judicial body has the power to enforce its decisions; while an administrative body must submit its action to judicial scrutiny before sanctions can be applied. See Jaffe, *The Judicial Enforcement of Administrative Orders*, 76 HARV. L. REV. 865, 865-70 (1963). The distinction is not completely valid in *Chandler* because the members of the Judicial Council were also the judges of the Tenth Circuit Court of Appeals.

[32] See text accompanying note 20 *supra*.

judicial ability was not the entire criterion for its decision. Clearly the purpose of this action was to remove a United States district judge, and its propriety hinges on whether form or substance is to be controlling. While the councils are composed of judges, they are not authorized by statute to decide cases or controversies within the meaning of article III. If the Judicial Council in *Chandler* was deciding a "controversy" within the meaning of the constitutional provision, its action was judicial, and it had exceeded its statutory powers.

III. Constitutional Issues

A. *Impeachment*

Assuming that the Council's action in regard to Judge Chandler can be classified as administrative and is authorized by statute, it is necessary to determine if Congress has the constitutional power to authorize such action. The only removal device expressly mentioned by the Constitution is impeachment, and no other method has ever been used to remove or suspend federal judges.[33] However, the Constitution does not specify that impeachment is to be the exclusive remedy, and, therefore, while some authorities merely assume this to be settled in the affirmative,[34] others would suggest that removal by other means might be accomplished within the existing constitutional framework.[35] Those who suggest that the remedy is not exclusive point out that at the time of the adoption of the Constitution one form of the writ of *scire facias* emanated from the Court of King's Bench to remove officers holding letters patent from the king.[36] As the framers were learned in the law, there is no reason to suspect that they were unfamiliar with these proceedings nor that they sought to abolish them. This reasoning is buttressed by the fact that while impeachment is the sole removal device mentioned in the Constitution, nonjudicial officers have been removed by other means.[37] Furthermore,

[33] United States territorial judges, however, have been held subject to executive removal, as their office is not constitutional in origin. McAlister v. United States, 141 U.S. 174 (1891). Also, judges of United States constitutional courts have been effectively barred from taking office. See, *e.g.*, Marbury v. Madison, 1 U.S. (1 Cranch) 137 (1803). Nine federal judges have been impeached: John Pickering (1804); Samuel Chase (1805); James H. Peck (1831); West H. Humphreys (1862); Charles Swayne (1905); Robert Archbald (1913); George W. English (1926); Harold Louderback (1933); H. L. Ritter (1936). There have been no impeachment proceedings in the last thirty years. The relevant constitutional provisions are in U.S. Const. art. I, § 2, cl. 5; art. I, § 3, cls. 6, 7; art. II, § 4.

[34] Fairman, *supra* note 10, at 334-36; 51 Harv. L. Rev. 330, 334-36 (1937).

[35] See articles cited *supra* note 9.

[36] Note, *The Exclusiveness of the Impeachment Power Under the Constitution*, 51 Harv. L. Rev. 330, 335, n. 36. *But cf.* McAllister v. United States, 141 U.S. 174, 196 (1891) (Field, J., dissenting).

[37] Myers v. United States, 272 U.S. 52 (1925). *But cf.* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935). The removal of executive officials has presented many problems, all of which are not yet solved.

since judges hold office "during good behavior," when they cease to act in this manner the office is forfeited, and removal by any means may be an implementation of an implied constitutional directive.[38]

On the other hand, many authorities assume that a constitutional amendment would be required to implement removal by means other than impeachment.[39] They argue that the tenure of judges is fixed by the Constitution, unlike that of other, admittedly removable, civil officers.[40] Clearly the framers of the Constitution, themselves fearing the evils of a controlled judiciary, intended that the federal trial judge be independent.[41] In contrast, the removal of other civil officeholders has been based in large measure on implied grants to the executive from other provisions of the Constitution.[42] As Mr. Justice Brandeis once noted, "the power to remove [a non-judicial official] is . . . an incident to the power to appoint."[43] The fact that impeachment has traditionally been considered exclusive for the removal of judges lends additional support to this argument. Moreover, after the Act of Settlement,[44] *scire facias* was never used in England to remove officials whose tenure was for "good behavior."[45]

B. *Standards And Safeguards*

If Congress has the authority to grant the power to remove or suspend district judges, standards for the exercise of this power must be predicated upon the good behavior provision of article III. Determination of the meaning of this standard, however, has created many issues for resolution in previous impeachment trials: whether this includes only indictable offenses;[46] what relationship such actions must have to the judicial office;[47] and whether judicial ability is a measurable criterion.[48] If removal or suspension power is read into section 332 of the Judicial Code,[49] this difficulty in the implementation of appropriate standards is augmented by the lack of express statutory guide

[38] Frankel, *supra* note 9. Judge Frankel suggests that the good behavior clause, coupled with the necessary and proper clause, would justify removal. This argument provides a justification for mandatory removal of a judge whose conduct clearly places him beyond the constitutional protection. It is submitted, however, that it does not provide any guide for the real question, *viz.*, whether he may be subjected to judgment in the first place.

[39] See note 34 *supra*.

[40] 51 HARV. L. REV. 330, 335 (1937).

[41] See notes 5, 6, *supra* and accompanying text.

[42] Executive removal is often justified by the use of article II.

[43] Burnap v. United States, 252 U.S. 512, 515 (1920).

[44] 13 Will. 3 (1701).

[45] See *supra* note 36.

[46] Simpson, *Federal Impeachments*, 64 U. PA. L. REV. 651, 682-83 (1916); Potts, *Impeachment as a Remedy*, 12 ST. LOUIS L. REV. 15, 31 (1927).

[47] Simpson, *supra* note 46.

[48] *Ibid.*

[49] See note 26 *supra* and accompanying text.

and confused by the dual standard of "effective and expeditious administration" and "good behavior."

The application of any standard necessarily involves significant problems of due process. If the proceeding is judicial, of course the normal trial safeguards must be accorded. Moreover, although in authorizing administrative proceedings Congress may abridge the less fundamental trial procedures, *e.g.*, confrontation and cross-examination,[50] it is the announced policy of the Supreme Court to read all trial procedures into a statute unless the less fundamental are specifically abridged by Congress.[51] At a minimum, if the Judicial Council's action is deemed administrative, it must accord with the prior administrative removal cases which in some measure define the requirements of due process in this type of proceeding.[52] In *Chandler*, however, the action of the Council occurred in secret session, where the judge under consideration was neither present nor represented.[53]

IV. Conclusion

The disadvantages of the present system of judicial tenure are obvious—as where a once-excellent judge become senile or physically disabled, yet remains to burden the adjudicative process. Because the Supreme Court has as yet provided no definitive answer to the questions raised by this problem, ultimate resolution must remain in abeyance. However, the following conclusions seem justified with regard to the issue as it now exists.

First: Exclusion from participation in the adjudicative process is an effective removal of a district judge from office. The fact that judges would be allowed to retain the emoluments and accoutrements of office is immaterial. *Second:* Congress did not authorize the removal or suspension of district judges by sections 332 or 137. The purpose of the act as revealed by the legislative history, its lack of a sufficient standard, and its use for twenty-five years, leads to this conclusion. *Third:* Congress does not have the constitutional authority to grant its removal power to another body. *Fourth:* No removal of federal judges can be justified which does not provide the fundamental trial safeguards of either administrative or judicial proceedings, as the Judicial Council in *Chandler* failed to do.

W. Richard Jones

[50] See text accompanying note 31 *supra*.

[51] Greene v. McElroy, 360 U.S. 474 (1959). *But cf.* Bailey v. Richardson, 341 U.S. 918 (1951), *affirming* 182 F.2d 46 (1950).

[52] *Ibid.*

[53] The only persons present at this meeting were Judges Pickett, Breitenstein, Hill, and Seth.