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LOUISIANA CONSTITUTIONAL LAW

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EXPROPRIATION

The Louisiana Supreme Court recognized in *State v. Constant*[1] that article I, section 4 of the 1974 constitution requires compensation for *business losses* resulting from a taking, even if the amount of those losses is greater than the market value of the expropriated land. This principle is clearly correct; of course, since the compensation is not limited by the value of the property, there still remains the difficult task of determining the amount of the business losses, as is discussed in a Note appearing in this issue.[2]

GOVERNMENT EMPLOYEES AND CONTRACTORS

Civil Service

Constitutional "reformers" normally advocate short, flexible constitutions and support enhanced legislative power.[3] Louisiana's "reformers" in the 1973 constitutional convention, however, considering both the state's peculiar history of patronage and its experience with civil service legislation,[4] demanded the detailed provisions of article X which establish a self-executing merit system, one that is not subject to legislative change. The convention's decision was probably an unwise one that will inhibit needed change; however, the decision was clear: article X, section 2(A) includes in the classified merit system *all* state employees, excepting only the positions enumerated in section 2(B). Among the exceptions are "employees, deputies, and officers of the legislature and of the *offices of the governor* . . . ."[5]

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1. 369 So. 2d 699 (La. 1979), *rev'g*, 359 So. 2d 666 (La. App. 1st Cir. 1978).

2. *See* Note, *Expropriation: Compensating the Landowner to the Full Extent of His Loss*, 40 LA. L. REV. 817 (1980).

3. The Model State Constitution provides simply, "The legislature shall provide for the establishment and administration of a system of personnel administration in the civil service of the state and its civil divisions. Appointments and promotions shall be based on merit and fitness, demonstrated by examination or by other evidence of competence." NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION art. 10, § 10.01 (6th rev. ed. 1963).

4. *See* 3 LOUISIANA STATE LAW INSTITUTE, PROJET OF A CONSTITUTION FOR THE STATE OF LOUISIANA WITH NOTES AND STUDIES 499-510 (1954) [hereinafter cited as PROJET].

5. LA. CONST. art. X, § 2(B)(10).

Smith v. Division of Administration[6] holds that employees of the Division of Administration are not in the "office of the governor" and thus are classified employees. The Division, which employs more than 1,000 persons, is responsible for the mechanics of state administration—budget control, payrolls, purchasing, data processing, etc.—rather than formulating public policies.[7] While legislation has made the Division a part of the office of the governor,[8] this legislative assertion is not a binding definition of the constitutional phrase "office of the governor." If the legislature were to have the power to establish additional exceptions from the classified service, the constitution would have used the "as provided by law" formula it used in so many other contexts.[9]

The supreme court in *Smith* reviewed prior law and the constitutional convention debates to support the principle that the phrase "office of the governor" must be narrowly construed to include only his personal staff and policy advisors and that the phrase is not a device which enables the legislature to transfer state departments into the office and thus out of the classified service. To hold otherwise would be to subvert the constitution's language and purpose.

Especially strong support for the result in *Smith* comes from references by Delegate Stagg in the convention transcripts to the same Division:

> If I'm not too far wrong on my facts here, in recent months, the Centrex operators were changed from, I think, classified service, to be a part of the Division of Administration. I believe in addition to that, the guards out here on the parking lot may have similarly, or some other groups of employees were moved to the Division of Administration and, therefore, I presume, out from under the classified service.[10]

The author of the civil service provisions spoke disapprovingly of such action. Referring to *Murtagh v. Department of City Civil Service*,[11] Delegate Moise Dennery stated:

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6. 362 So. 2d 1101 (La. 1978), *overruling In re* Division of Administration, 343 So. 2d 277 (La. App. 1st Cir.), *cert. denied*, 345 So. 2d 504 (La. 1977).

7. *See* LA. R.S. 39:4 (1950).

8. LA. R.S. 39:1 (1950) provides: "A division of administration is hereby created as a division of the office of the governor . . . ." House Concurrent Resolution No. 264 of 1976 was also an attempt by the legislature to express the "intent" of the legislature that the Division be part of the office of the governor.

9. *See The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Louisiana Constitutional Law*, 38 LA. L. REV. 438, 442 (1978).

10. 9 RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: CONVENTION TRANSCRIPTS, Dec. 7, 1973, at 2639 [hereinafter cited as RECORDS].

11. 215 La. 1007, 42 So. 2d 65 (1949).

> Mr. Stagg, the only way I can answer that question is to refer you to a case in New Orleans many years ago when the mayor of the city at that time did exactly what you suggest could be done. The court slapped him down and said you could not enlarge "the office of the governor" by taking in extraneous divisions and say they are part of his office. It means the office of the governor in a normal sense of the word.[12]

A starting place for a more concrete definition of the phrase "office of the governor" is the wording of section 2(B) itself. The exception is for "employees, deputies, and officers," a change from an earlier draft's reference to "administrative officers and employees." The change, Delegate Dennery explained, was effected because the word formula "might restrict it to administrative employees alone."[13] The implication is that non-administrative employees are also excepted, non-administrative in the sense they do not administer rules and policies but rather participate in their making. This is consistent with the basic reason for having an unclassified service in which hiring is not based on competitive examination and dismissal is possible absent good cause. Some servants of the governor must reflect his political views and his policy choices and ought to be hired on those grounds—otherwise he will be less able to implement the political policies for which he was elected. Political loyalty and adherence to party views are matters not capable of being tested by competitive examination, so hiring should be based on other reasons. Policy advisors ought to be released, even if they perform well, if they do not agree with the policies of the newly elected governor.

An additional implication from the language and the Dennery explanation is that some administrative employees are also included within the exception. Even though such employees neither participate in making policy choices nor exercise discretion, their closeness to the governor brings them within the exception. The underlying notion here must be the need for confidentiality and loyalty to the governor. The reference in *Smith* to the "retinue" of the governor[14]

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12. RECORDS, *supra* note 10.

13. *Id.* at 2634. The provision can also be traced back to the 1954 Projet of a Constitution where the term "office of the governor" is used. It was explained there:

> Most states seem to have made an effort to limit the exemptions from coverage to positions of a political policy-making nature or to work immediately attached to such political positions, as, for example, work as a confidential secretary to a department head or as a deputy administrator. . . . Excepted positions are usually of a policy-determining, confidential, or professional nature and do not lend themselves to strict classification within the civil service.

PROJET, *supra* note 4, at 581.

14. 362 So. 2d at 1105.

implies that a personal staff would be included within the exception, consistent with the view that such traits as confidentiality and personal compatibility with the governor are not testable by competitive examination and that such persons ought to be subject to release by a new governor. In the same pattern are the suggestions from *Smith* that the phrase "office of the governor" involves the "*individual* who holds the elective office"[15] and the "employees in the office of the *person* elected governor,"[16] rather than the institutionalized administrative apparatus of the executive branch.

It would seem, therefore, that a logical starting point in analyzing whether a particular position is within the "office" of the governor or of any official is whether the position is either one involving the making of political and policy choices that ought to reflect the electorate, or one that involves largely personal services of a confidential nature to an elected policy maker. If either of these conditions are met, it would seem that they would be in the office of the governor "in a normal sense of the word."[17]

Due Process

Article X is quite specific in protecting classified employees against a hiring and firing process that would reward political service rather than merit. A negative implication from the same provision is that unclassified employees are not so protected. Nevertheless, there is developing a body of case law that grants unclassified employees some protection against deprivations of their positions without some due process. Federal statutes, as well as equal protection concerns and freedom of speech concerns, are being given more attention in this area.

Patronage Dismissals

In *Boyer v. St. Amant*,[18] the Louisiana Fourth Circuit Court of Appeal sustained an exception of no cause of action in a suit for wrongful dismissal by a deputy sheriff who alleged that his services were terminated by a newly elected sheriff as "part of a systematic purge conducted by the defendant of all persons employed by the Sheriff's Office who do not and did not support the defendant's political aspirations. The petitioners have been fired solely due to their political activities and affiliations . . . ."[19]

15. *Id.* (Emphasis added).
16. *Id.* at 1107 (Emphasis added).
17. RECORDS, *supra* note 10, at 2639.
18. 364 So. 2d 1338 (La. App. 4th Cir.), *cert. denied*, 365 So. 2d 1108 (La. 1978).
19. Transcript of Proceedings Before Twenty-Ninth Judicial District Court, Peti-

The court failed to discuss—and the parties failed to raise—the significant constitutional issue. Since the United States Supreme Court's decision in *Elrod v. Burns*,[20] it has been clear that first amendment freedom of association and expression prohibit the firing of governmental employees solely because of their support or non-support of a political candidate. In *Elrod*, a newly elected Democratic sheriff in Cook County, Illinois, fired Republican employees in the office and replaced them with loyal supporters. The facts alleged in *Boyer* are virtually indistinguishable from *Elrod* and would seem to have required at least a full factual development of the case.

The basic concerns of the court in *Elrod*—inhibiting freedom of belief and association by requiring political allegiance for one to maintain his job, plus the resulting limitations on the free functioning of the electoral process[21]—are present in *Boyer*. Even if two political parties are not involved, the situation is the same where one is dealing with two different factions in a basically one-party area.

Under *Elrod*, public employees in policy making positions can be dismissed because of their differing political views.[22] Indeed, in areas where discretion is to be exercised, the political process requires replacement of officers who do not represent the views of the majority of the electorate. But, in *Boyer*, there is no factual record supporting the application of this exception to the general rule. Even though it is arguable that the plaintiff was not "dismissed" but instead was simply not reappointed at the end of his term, the impact on political expression is the same in either situation. The difference between the two types of termination is a matter of form and not of substance. There is an additional reason for adopting the *Elrod* principle in Louisiana: Article I, section 3 of the constitution provides that no law shall arbitrarily, capriciously or unreasonably discriminate against a person because of "political ideas or affiliations."

Dismissal Procedures

Article X, section 8 protects a classified employee by prohibiting dismissal except for "cause expressed in writing" and by granting a

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tion at 3, Boyer v. St. Amant, 364 So. 2d 1338 (La. App. 4th Cir.), *cert. denied*, 365 So. 2d 1108 (La. 1978).

20. 427 U.S. 347 (1976).

21. *Id.* at 355-56.

22. *Id.* at 367. The Fifth Circuit Court of Appeals has held that a "confidential" assistant may be discharged for political reasons, even if the employer is not a policy maker. Stegmaier v. Trammell, 597 F.2d 1027 (5th Cir. 1979). In *Stegmaier* the court upheld the discharge of the only deputy to an elected circuit clerk.

hearing at which the burden of proof is borne by the governmental agency. Article X does not extend such protection to unclassified employees, and the due process clauses of the state and federal constitutions have not been construed to prohibit the firing of governmental employees without a hearing.

Jackson v. East Baton Rouge Parish Indigent Defender's Board[23] applied the orthodox view and upheld the dismissal of an unclassified secretary without a hearing or a showing of cause for the firing. The case is consistent with the United States Supreme Court's approach in *Board of Regents v. Roth*,[24] since the employment was terminable at will and there was no provision in state law or custom that established any greater entitlement to continued employment. The federal position, however, is that if there is established by state law or by institutional custom an expectancy in continued employment, terminating the employment requires some sort of hearing. In *Perry v. Sinderman*,[25] for example, there existed at the college a type of "de facto" tenure under which expectations of continued employment upon satisfactory service had been supported by a long-term course of conduct by the governmental agency.

It is then consistent with the line between *Roth* and *Sinderman* for the Louisiana Supreme Court to have held as it did in *Haughton Elevator Division v. Division of Administration*.[26] In a scheme where state law requires granting public contracts to the lowest "responsible" bidder, the court held that due process requires that the low bidder not be disqualified without having been given notice of and the reasons for the disqualification and an opportunity to respond to the allegations of irresponsibility. Here, it was a state law that established an expectancy or an entitlement—the right to a public contract under stated conditions. However, in contrast to public bid contracts, no such state law or custom established such an expectancy or an entitlement to continued public employment even if one's service was satisfactory.

The position is a convenient one for the courts; they are ostensibly making no subjective judgments about the "fundamentalness" or the importance of various rights. They are looking at the rights or expectancies established by state law and, if such an expectancy is established, requiring procedural regularity for its impairment.

23. 353 So. 2d 344 (La. App. 1st Cir. 1977), *cert. denied*, 354 So. 2d 1385 (La. 1978).

24. 408 U.S. 564 (1972).

25. 408 U.S. 593 (1972).

26. 367 So. 2d 1161 (La. 1979). *See* Note, *Shaping Specific Procedural Requirements for Disqualification Under Louisiana's Public Bid Law*, 40 LA. L. REV. 871 (1980).

However, this analysis is all too easy. If the evils are political pressure and favoritism, they exist not only with respect to state employment but also to state contracts. The legitimate expectations of private citizens, be they employees or contractors, are hinged on more fundamental concerns than whether the legislature has declared that the expectation exists. Private citizens' concerns in employment are worthy of as much protection as their interest in obtaining a state contract. As Laurence Tribe aptly noted:

> While the positivist theory, which would produce a significant contraction in protection of "liberty" and "property," contains no *internal* contradictions, it may be criticized as an unjustifiable abdication of judicial responsibility. An emphasis on limiting federal judicial intrusion in state affairs can take one only so far: the fourteenth amendment, after all, was clearly designed to place limits on state action adverse to individuals.[27]

ELECTIONS

The constitution requires most candidates for state office to meet the qualifications for their offices as of the date fixed by law for "qualification as a candidate."[28] Judges and district attorneys, however, must meet their qualifications for office at a different time—the time of their "election."[29] While the different treatment of judicial officers in this regard seems difficult to justify, it is the product of a deliberate choice by the constitutional convention.[30]

Determining the time of election was simple under the former election scheme, which included party primaries and run-offs followed by a general election; a candidate was elected at the general election and not before. However, the change to a simpler election process, without party primaries and with an open primary followed by general election if necessary, leads to some uncertainty as to time of election.[31] Arguably, if only two candidates were in a race, or if one candidate among several received a majority of the votes cast in the primary, a candidate would be "elected" after the first pri-

27. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 535 (1978).

28. LA. CONST. art. III, § 4; art. IV, § 2.

29. LA. CONST. art. V, §§ 24 & 26. While the attorney general must meet the age, citizenship, and elector requirement as of the date of qualification as a candidate, the five year law practice requirement is tested as of the date of "his election." LA. CONST. art. IV, § 2.

30. Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974*, 37 LA. L. REV. 765, 819 (1977).

31. Pursuant to the constitutional mandate of article XI, section 1, the legislature adopted an Election Code which became effective January 1, 1978. 1976 La. Acts, No. 697, *amending* LA. R.S. 18:1-1466 (1950).

mary, even though a second election was scheduled to be conducted some time later.[32] It would be possible for this candidate to obtain the most votes and then be retroactively disqualified because his "election" came at the first election and no second race was necessary. To avoid this kind of uncertainty, the courts of appeal have construed the constitutional requirement to mean that the candidate must meet the qualifications as of the date established by law for the general election. In *Cook v. Campbell*,[33] Judge Hall explained:

> The date of the general election is certain and ascertainable in both regular and special elections. The interpretation of "election" urged by plaintiff would leave the determinative date uncertain and dependent on how many candidates qualify and, where there are more than two candidates, on whether one candidate receives a majority of the votes cast in the first primary, matters which cannot be determined until after expiration of the qualifying period or after the primary election.[34]

McKenzie v. Edwards[35] legitimates a system under which judges can resign effective at a future date so that a successor can be elected to take office immediately upon the effective date of the incumbent's resignation. In *McKenzie*, two incumbent judges of the Baton Rouge City Court filed declarations on August 1, 1978, expressing their intention to resign Janaury 1, 1979, when they were to be sworn in as district judges. In order to fill the vacancies, the governor then called a special election to be held at the same time as a regularly scheduled election. Considerations of economy no doubt came into play in the decision, for this procedure can sometimes save cost by avoiding special elections. Additionally, as Chief Justice Summers argued, it is consistent with the convention policy of having elected judges, for the procedure obviates the necessity of appointing temporary judges to fill the vancancies pending an election. Nonetheless, there is some doubt as to whether the decision is consistent with article V, section 22 of the constitution, which provides: "A . . . vacancy in the office of a judge shall be filled by special election called by the governor and held within six months after the day on which the vacancy occurs . . . ." Article X, section 28 also indicates: "A vacancy, as used in this Constitution, shall oc-

32. LA. R.S. 18:511 (Supp. 1979) provides: "A candidate who receives a majority of the votes cast for an office in a primary election is elected."

33. 360 So. 2d 1193 (La. App. 2d Cir.), *cert. denied*, 362 So. 2d 573 (La. 1978).

34. 360 So. 2d at 1197. *See also* Seale v. Caldwell, 360 So. 2d 1197 (La. App. 2d Cir.), *cert. denied*, 362 So. 2d 573 (La. 1978); Jory v. Arnette, 360 So. 2d 921 (La. App. 3d Cir.), *cert. denied*, 361 So. 2d 1206 (La. 1978).

35. 361 So. 2d 880 (La. 1978).

cur in the event of death, resignation, removal by any means, or failure to take office for any reason."

On a word analysis alone, it would seem that the reference is to a vacancy as a fact, and not as the expression of an intention to resign in the future and produce a vacancy. It is a vacancy in the *office of a judge* that is referred to in section 22; the reference is also to a vacancy that *occurs*. If one were to refer to the expression of an intention to resign, the reference would be to filing, depositing, forwarding, etc. of a resignation, rather than to a vacancy *occurring*.[36] Additional support for this view comes from the fact that the contemplated special election cannot occur before the judge leaves the office—the reference is to the election being within six months "*after the day on which the vacancy occurs*." If elections prior to the vacancy had been contemplated, a different word choice would have been made.

In section 28, the reference to "resignation" is used in conjunction with three other expressions—death, removal, and failure to take office. Death obviously would not be an event for which one could declare an anticipatory vacancy. Removal would not occur until a stated procedure was completed. Failure to take office similarly refers to a fact of the office being vacant. In like manner, resignation would seem to be consistent with the view that it is an event that is contemplated rather than a statement of intent to resign at a future time.

Indeed, if the vacancy is considered to occur upon filing a letter of anticipatory resignation, when is the six-month time period for holding the election to run? From the time of filing the letter? From the time of the date of the resignation? What if the resignation letter states an intention to resign more than six months later?

The argument has more than word analysis to support it. The convention sought to protect the judicial electoral process from influence through gubernatorial appointments to vacant judgeships.[37] This policy was chosen over one of election cost savings. An attempt to amend the committee proposal, to say simply that "[e]lection of judges shall be as provided by law," was rejected by a vote of

36. The 1974 constitution establishes a procedure for state officials to declare their inability to perform their duties; the references are to an official who "*transmits* to the presiding officers of the Senate and House of Representatives a written declaration . . . ." LA. CONST. art. IV, § 17 (Emphasis added). Contrast the constitutional language with Revised Statutes 18:581, which states that a vacancy occurs "when the office is or *will* be unoccupied . . . ." (Emphasis added.) The "will be" reference is lacking in the constitution.

37. Hargrave, *supra* note 30, at 815.

15-99.[38] Also rejected was an attempt by Delegate Rayburn to abolish the special election procedure and instead have the election to fill a vacancy "at the next regularly scheduled congressional or statewide election."[39] Debate on the Rayburn amendment shows a rejection of his aim of "attempting here to save the taxpayers some money by not having to call special elections so often."[40] The convention rejected the amendment and knowingly kept the committee proposal language.[41] It can be argued that the choice was not a wise one and that the choice results in some instances in greater cost; yet it was a clearly posed choice and the delegates adopted the detailed proposal.

Also involved is the fact that no constitutional mechanism exists to make a future resignation binding. Though the *McKenzie* opinion states "[t]hese resignations were accepted when the Governor issued his proclamation . . . [and] became irrevocable, creating a vacancy in the office,"[42] no constitutional authority exists to support this contention.[43] At the least, some uncertainty as to this issue exists; and it is not desirable for such uncertainties to be the basis on which to conduct elections which may later be invalidated. Indeed, the majority opinion must hedge on this point: "When the event is so certain to occur there is no legal impediment to anticipating the vacancies . . . ."[44] The implication is that if the event is not so certain to occur, an anticipatory resignation statement would be treated otherwise.

One might argue that, despite the fact that the text and the legislative history are contrary to *McKenzie*, there is some flexibility in the references to an undefined term like "resignation" and that the decision is justifiable construction, albeit strained, to effec-

38. OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1973, Aug. 18, 1973, at 4; 1 RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: JOURNAL OF PROCEEDINGS, Aug. 18, 1973, at 341.

39. *Id.*

40. 6 RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: CONVENTION TRANSCRIPTS, Aug. 18, 1973, at 822.

41. *Id.* at 823.

42. 361 So. 2d at 882.

43. Compare Revised Statutes 18:654, which states a resignation is irrevocable three days after the day on which the secretary of state has transmitted the notice to the appropriate authority. That provision was not relied upon in *McKenzie*, and the case depends on independent constitutional authority of the governor to call the special election. Even so, there is some doubt as to whether the statute applies to judges; and, if there is a constitutional right to a full term in one's office, there may be no power in the legislature to make an anticipated resignation irrevocable.

44. 361 So. 2d at 883. In a concurring opinion, Justice Dennis indicates the effective date of the resignation could be delayed "for a reasonable period of time," apparently indicating some limits on the freedom to anticipate the resignation date. 361 So. 2d at 883 (Dennis, J., concurring).

tuate an important policy of saving election costs and avoiding temporary appointments in judgeships. This may be true, but there is also another important policy being advanced by disallowing anticipatory resignations. The problem here is that manipulations of resignation dates can be used to manipulate the holding of elections so as to favor or disfavor certain candidates. There is room for this kind of manipulation by the governor and by judges who are resigning. This is exactly the kind of gubernatorial influence the convention sought to eliminate from the judicial election process. In *McKenzie*, for example, if the case were decided otherwise the city court judgeships would have been filled by an election held at a different time from that of the district court judgeships in Baton Rouge, giving the election quite a different flavor. Whether that difference would be good or bad, it still would have been a difference. A random variable has been replaced by a manipulatable one, manipulatable by incumbents and a governor. Additionally, under the Election Code, regular elections are scheduled in such a manner that the vacancy would invariably be filled at a regularly scheduled election without the necessity for calling a special election at which no other elections will occur.[45]

45. LA. R.S. 18:402E (Supp. 1979).