SENATE . . . . No. 497

The Commonwealth of Massachusetts

EXECUTIVE DEPARTMENT, BOSTON, April 29, 1935.

To the Honorable Senate and House of Representatives:

I return herewith, without my approval, Senate Bill No. 468 entitled, "An Act authorizing Preliminary Proceedings to simplify and render More Effective the Administration of Constitutional Provisions for the Retirement and Removal of Certain Judicial Officers."

This act, under the guise of providing means to assist the executive and legislative branches of the government in performing their constitutional functions with regard to the retirement and removal of judicial officers, sets up a system which is also capable of use for other and very different purposes and places in the hands of a single judicial officer such power in respect to all the judges of the Commonwealth, other than those of the Supreme Judicial Court, as virtually to permit the exercise of dictatorial authority on his part and to give to him such powers as might easily destroy the independence of the judiciary.

The act clothes the Chief Justice of the Supreme Judicial Court with the power to establish a standing commission or one or more temporary or special commissions to be known as Commissions on Judicial Tenure. The said Commissions must be composed of two judges and three other persons not judges.

The length of the Commissioners' terms of service is to be determined by the Chief Justice, but is not to exceed five consecutive years, and their terms are to be "subject to complete power of removal and substitution by" the Chief Justice. Such power of appointment and of removal and substitution of members of commissions may

be subject to the greatest abuse. It may be so used as to create bodies which will perform their duties in accordance with the views of the appointing officer. Such power is too great to place unchecked in the hands of any one public officer. The stability of our judicial system should not be jeopardized by placing such untrammeled control in a single individual, no matter how intelligent, able or honest he may be.

The functions of the commissions, which may or may not be availed of by the executive or legislative branches of the government, are of little consequence in comparison with the functions which such commissioners so appointed may exercise with regard to any "petition or information for inquiry as to the condition or conduct of a judicial officer, other than a justice of the supreme judicial court."

Any person may file such a petition under this act, and thereupon the Chief Justice is required to refer it to a commission of his own nominees, whom he may remove and supplant at his pleasure. Such a commission is then to pass upon the merits of such petition or information and make its determination and report as to what it considers should be done towards the retirement of the judge complained against, and this report is to "become a public record when so transmitted" to the Governor or to the General Court. It is obvious that such a report so made, whether correct in its findings or not, might well by the very fact of its existence be fatal to the character and career of the judge named therein.

Such a mode of bringing judges to account and for initiating inquiry into their conduct is a complete innovation in our system of laws, was never contemplated by the makers of our Constitution as a part of the provisions for the removal of judicial officers, and, as I have said, by reason of the extraordinary powers vested in the Chief Justice of the Supreme Judicial Court, is capable of great abuse, and calculated to make the judges of the Superior and lower courts so dependent for the tenure of their offices upon a single judicial officer as to destroy that

proper self-respect which they should possess as efficient and impartial justices of the courts of this Commonwealth.

There should be no place in our judicial system for the holding of petty inquests from time to time, with inquisitorial powers, the result of which will be to extend a permanent invitation to every malcontent, disappointed suitor or misguided student of false theories of government to attack our courts, to discredit the judiciary by making them the subject of continuous investigation and thus bringing them into public disrepute and destroying the morale of its members. No judge, under existing industrial conditions, would be immune from vicious, unfounded and unwarranted complaints. I believe the setting up and the maintenance of any commissions on judicial tenure, as suggested in this bill, would be the greatest detriment to the development of our judicial system, to the peace and tranquillity of its members and to the respect that every tribunal worthy of the name is entitled to from the citizens. Public confidence would be destroyed and the liberties of the people would be impaired.

What is there that calls for this pernicious innovation? Since 1780 the brilliant and remarkable record of the probity and honesty of judges who have administered justice in all our courts in this Commonwealth stands without a parallel. It is an achievement that every citizen of this State can look to with pardonable pride. In over one hundred and fifty years, no judge of the Supreme Judicial Court, the oldest existing court in this country today, has ever been removed on account of moral delinquency. Only one judge, Mr. Justice Bradbury, was removed in 1803, solely because a prolonged illness rendered him unable to perform his duties and who, on account of his economic condition, did not desire to resign unless some provision could be made for small payments from the Commonwealth. His plea to be furnished sustenance was answered by an address of a niggardly legislature and his removal was effected by Gover-

nor Strong. That incident was a plain disgrace and the responsibility therefor rests entirely with the legislature and the Governor. The record, however, of our Supreme Judicial Court remains unblemished.

The first removal of a judicial officer occurred in 1787 as an aftermath of Shays' Rebellion, so-called, when five judges became the subject of an legislative address and were removed by order of Governor Bowdoin. In 1794 the first impeachment proceedings were held, resulting in the ouster of William Hunt, a Justice of the Peace. John Vinal, a Justice of the Peace, was impeached in 1800 and three years later his brother, William Vinal, and Paul Dudley Sargent, both Justices of the Court of Common Pleas, were removed by an address of both Houses of the Legislature. It is the consensus of opinion that the removals in these last two mentioned cases were warranted, but there is some question as to the merits in the cases of the five judges above mentioned.

James Prescott, Judge of Probate for Middlesex County, was impeached on April 27, 1821 for misconduct and maladministration. Edward G. Loring, Judge of Probate of Suffolk County, was removed by address in 1858 because four years previously, while acting as United States Commissioner, he had considered his oath of office of sufficient sanctity to require him to follow the law of the land, notwithstanding his personal views and to order the return of one Burns, a fugitive slave, to his master in Virginia. Judge Loring was a victim of public sentiment and of the hysteria of the times. Joseph M. Day, Judge of Probate of Barnstable County, was removed by address by Governor Long on May 26, 1882. He was apparently temporarily unfit for the judicial position.

It is, therefore, clear that only two judges, Messrs. Prescott and Day, were removed in the last one hundred years because they were personally unfit to continue further in their judicial positions.

Have we become suspicious of our present day judges? Do they need the threat of star chamber proceedings to keep them on the path of rectitude? I refuse to believe it.

When there have been only two removals in a century, can it be said that there is any necessity whatever for the inauguration of any such system as is now proposed by means of commissions on judicial tenure? The General Court cannot possibly be in any actual need of assistance by any such preliminary proceedings as outlined in the proposed bill when the fact is that there have been no active duties to be performed by the General Court in matters of removal of judicial officers. The excellence of the standing and ability of the members of the judiciary since the adoption of our Constitution is a conclusive answer that there is no necessity whatever for the proposed legislation.

I do not believe that the creation of any commission on judicial tenure would have prevented the unjust ouster of Judge Loring. The proposed commission is a poor buffer against adverse public clamor and no commission at that time could have in any way interfered with the performance by both branches of Legislature to proceed, as they did, to remove this excellent judge from office because his ultimate decision was in favor of a slave owner. No one has ever denied the validity and correctness of that decision. It was simply an unpopular finding by the court. In the cases of the other two last mentioned Judges of Probate there was no need of a commission. The facts were clear and the matter was handled admirably by the legislature.

With the single exception of the case of Mr. Justice Bradbury and Judge Loring, the legislative branch of our government has, I believe, in the main performed well its duties in respect to the matter now under consideration. I am not aware that there is, at the present time, any complaint whatever as to the manner in which the legislature has been dealing with judicial removals. In fact, I recall only two such cases in the present century. The work of the legislature in the 1922 proceedings has been universally and highly commended. The judicial officer was acquitted and has since rendered highly efficient and meritorious service to the Commonwealth. In the last

case in which removal proceedings were started there is, however, no such unanimity of opinion as to the justness of the conclusion that was reached. There are those who believe that this judge ought to have been removed. There are present indications that the matter is not yet closed. What assurance could there be that if a commission on judicial tenure had been employed it would facilitate the ouster of this last mentioned judge, when the records of the Probate Court, supported by a finding of the material facts by a Judge of Probate, were not sufficient. Could it be said that the recommendations of such a commission would be more potent than the judicial findings of a Judge of Probate? Could it be argued that whatever strength a report by a commission on tenure could possibly have, such a report would be stronger than that rendered by the Judge of Probate in his findings of material fact that the most gross breach that can be committed by fiduciary, the crime of larceny, had taken place and that the guilty party was a judicial officer in active service? My own personal opinion is corroborated somewhat by a study of the legislative proceedings in this last mentioned case that the report of such a commission would have been a mere idle gesture.

In the Constitutional Convention of 1820, a resolution was offered to require a two-thirds vote in each House to secure an address. This motion was supported by no other personages than Joseph Story, who afterwards became Justice of the United States Supreme Court, by Daniel Webster and by Lemuel Shaw, who later became Chief Justice of our Supreme Judicial Court. Their efforts, however, in this respect, were unavailing and the amendment failed in the convention. Thereafter, the convention passed a resolution requiring the formulation of charges and the entry of such charges upon the journal of the House in all cases of removal by address. The resolution, however, was defeated by popular vote when it was submitted to the people. I do not believe that if it were possible to submit the proposed bill to popular vote, it would be sustained.

The proposed measure, if enacted into law, would challenge the independence of our courts; it would intimidate our judges and it would remove from them the protection they now have from unfounded resentment and unwarranted criticism. Life tenure during good behaviour is the term of their commission. Unless they can have reasonable assurance that they are to enjoy their tenure, then we cannot expect to be able to secure the services of those who can fully render efficient service to the Commonwealth and such public servants of such calibre would resign rather than cater to an influence foreign to any concept of impartiality. Of course, it is desirable that the judges should be free and impartial, but it is equally necessary that the people shall have a fair degree of supervision and control over their judges. The provision for such supervision and control appears in our Constitution, where ample provision is made for the removal of judicial officers, either by impeachment or by way of address, and our experience has been that, in the main, this present system of checks and balances between the rights of the individual judges and of the people at large has worked well in maintaining an equilibrium which has resulted in the administration of justice on a plane not surpassed by any court in this country. There is no necessity to impair the operation of the legislative machinery for ouster of unfaithful judicial officers by engrafting thereon any such commissions on judicial tenure as set forth in the proposed bill. The machinery furnished by the constitution is sufficient. It cannot be improved by the adjunct of any commission on judicial tenure. Experience shows that on the whole, the constitutional provisions have worked well, not only in normal times, but in periods of distress and public clamor.

I am, accordingly, returning the proposed bill without my approval for the reasons hereinabove enumerated.

Respectfully submitted,

JAMES M. CURLEY,

Governor of Massachusetts.