

THE GOVERNOR'S COMMITTEE ON PREPARATORY RESEARCH  
for the  
NEW JERSEY CONSTITUTIONAL CONVENTION

THE GOVERNOR--CONSTITUTIONAL POWER OF  
INVESTIGATION AND REMOVAL OF OFFICERS

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REMOVAL OF OFFICERS

The subject-matter herein, as indicated in the title, is limited to the constitutional power vested in the governor to investigate and to remove state officers. Reference is made to comparable statutory authority but no attempt is made to cover that field.

In addition, there has been included the subject of the governor's constitutional power to obtain reports from state departments and officers since such power may be regarded as incidental to the more inclusive power of investigation.

For convenience in presentation, the subject-matter is subdivided as follows:

1. In General
2. Reports
3. Investigation
4. Removal

Necessarily, there must be considerable overlapping in treatment in view of the common purpose frequently existing in the exercise of such powers; but, in the main, the bulk of the available material is presented under the appropriate heading.

1. In General

Initially, it should be observed that a strong executive in state government is comparatively a recent development. Our colonial history readily furnishes the cause. As noted by a member of the New Jersey Joint Committee:

"It has been pointed out by students of political science that in America there have been four periods in the development of State Constitutions. \* \* \*

"During the first period--between the Revolution and the War of 1812--the people of the Union still had uppermost in their minds the harassing experiences they, as colonists, had suffered at the hands of Royal Governors. Naturally, then, they had come to regard the office of Governor with suspicion. Thus, when drafting their own State Constitutions, they clothed the Executive with the least possible constitutional authority; and they made supreme the Legislature, which they came to regard as the protector of popular rights and as the safest and best agency of government in which to repose the people's power." (1)

During the first half of the 19th Century, the position of the governor was gradually strengthened at the expense of the legislature. In most of the states, the veto power was adopted and executive councils disappeared. But at the same time, the governor's control over the executive department was weakened by making elective both state and local officers while requiring senate approval of his appointments over which he had no power of removal. Thus, his influence in legislation was increased but his administrative authority diminished. (2)

However, this trend in the 19th Century led away from the principle of legislative supremacy. (3) After 1850, the position of the state governor was largely strengthened in part by constitutional change but mainly by statute. While the importance of the governor's position has been still further increased in the 20th Century, his power is still limited by constitutional provisions. (4)

This general development is easily exemplified in New Jersey. The first Constitution of 1776 represents the epoch of popular faith in a representative legislature as a reaction against royal power represented by the executive. By 1844, popular trust in the Legislature had lessened considerably, but the people were not inclined to trust the Governor much more.

"The constitution of 1844 departs therefore from the principle of legislative responsibility for the general conduct of the government, which was implicit in the constitution of 1776, without making provision for any other system of responsibility." (5)

With the growth of state government attaining in modern times the proportions of a gigantic business enterprise, recognized authorities in the field of government exhibit unanimity in their opinion that the growth of the governor's power has not kept pace with the increase in executive responsibility. (6) A former New Jersey Governor expressed a similar view, presumably on the basis of actual experience, rather emphatically:

"The fact is that under the 1844 Constitution a Governor's powers are sadly diluted. If the people of New Jersey were offering for sale a beverage with as much dilution as the article they offer to a Governor under the name of executive powers, I am sure the Federal Trade Commission would get after them." (7)

Undoubtedly, it was this generally predominant viewpoint that led the Commission on Revision of the New Jersey Constitution to formulate a new Constitution that, among the three purposes to be accomplished, would:

"2. Confer power commensurate with the responsibility placed upon public officials;" (8)

and, concerning the Governor specifically, the Commission reported:

"The functions of modern executives in all forms of business organization contrast sharply with the office of Governor of New Jersey, who can be an executive in name only. Hampered by whimsical laws and inadequate constitutional authority, the Governor of New Jersey suffers as an executive from the multiplicity of offices, \* \* \* and from lack of authority to control his most important departments. Our greatest need, to which the revision is directed, is to strengthen the executive authority." (9)

The constitutional powers of a Governor to obtain reports from state departments, to investigate state offices and to remove executive officers are intended to effectuate that object.

## 2. Reports

By constitutional provision, 34 states now provide that the governor may require information in writing from heads of executive departments upon any subject relating to the duties of their respective offices. (10)

Alabama	Iowa	Nevada
Arizona	Kansas	North Carolina
Arkansas	Kentucky	Ohio
California	Louisiana	Oregon
Colorado	Maine	Pennsylvania
Connecticut	Michigan	South Carolina
Delaware	Minnesota	Tennessee
Florida	Mississippi	Utah
Georgia	Missouri	Virginia
Idaho	Montana	Washington
Illinois	Nebraska	West Virginia
Indiana		

Eight of these states specify that such information shall be given under oath if the governor so requires. (11)

Alabama	Idaho	Nebraska
Colorado	Missouri	West Virginia
Delaware	Montana	

The Model State Constitution of the National Municipal League merely provides:

"(The Governor) may at any time require information, in writing or otherwise, from the officers of any administrative department, office or agency upon any subject relating to their respective offices." (12)

Neither the present Constitution of New Jersey nor its predecessor provided for reports to the Governor. However, such a provision was included in the proposed Constitution of 1942:

" . . . The Governor may, whenever in his opinion it would be in the public interest, require from the Comptroller or the Treasurer written statements under oath of information on any matter relating to the conduct of their respective offices." (13)

A similar requirement was included in the draft Constitution of 1944, with the addition of a State Auditor. (14)

It should be noted that these officers were to be elected by the Legislature and, hence, not otherwise subject to executive control. All other officers were removable by the Governor at his pleasure under the proposed Constitution of 1942, or as provided by law under the draft Constitution of 1944. Hence, a constitutional provision requiring them to furnish reports at the request of the Governor would have been superfluous.

### 3. Investigation (15)

No matter what its character or the problems it faces, a government cannot function successfully unless it has adequate and accurate information. Empowering the governor to obtain reports from officers furnishes one method of obtaining information. But such reports from elective officials are often perfunctory and inadequate. (16) More important, however, is the lack of access to person other than those required to make reports but who have some kind of association with the administrative activities of the state which the governor may wish to investigate. An independent power of investigation vested in the governor remedies these shortcomings.

Only Idaho, Montana and Utah vest constitutional authority in the governor to:

" . . . at any time he deems it necessary, appoint a committee to investigate and report to him upon the condition of any executive office or State institution." (17)

Michigan also provides for a similar power of investigation but forbids its exercise during legislative sessions. (18)

Fourteen states make no provision, by constitution or statute, for any executive inquiry. Approximately 15 states, including New Jersey, provide for an executive inquiry similar to that of the Moreland Act of New York. In New Jersey, the original act of 1931 providing for an executive inquiry was subsequently repealed and, in place thereof, an amended version was enacted in 1941. (19)

Leading authorities have emphasized the desirability of vesting in the governor the power of investigation. If administration is to be effective and responsible, the chief executive must not only have the power to appoint, but the power to investigate and remove for proper cause. (20) Although such constitutional power never existed in New Jersey, both the proposed Constitution of 1942 and the draft Constitution of 1944 included it, although not in identical terms.

The proposed Constitution of 1942 provided:

"The Governor may, upon complaint submitted to him by at least twenty reputable citizens, cause an investigation to be made of the conduct in office of any State officer, except a member of the Legislature, an officer appointed or elected by the Legislature or a judicial officer. The Governor may remove any such officer after notice and an opportunity to be heard, whenever, in his opinion, such investigation discloses misfeasance or malfeasance in office." (21)

This provision did not escape some criticism at the Joint Committee hearings.

With stark realism and unassailable logic, a member of the bar protested:

". . . it is ridiculous . . . to stick in any provision about twenty names, twenty reputable citizens . . . there can be no doubt that a Governor could get at least twenty supposedly reputable citizens to sign a complaint . . . we will say ten did know . . . is it presumed that he

wouldn't be allowed to make an investigation because there weren't twenty people who could really be truthful bona fide signers of the petition and knowers of the facts which would be necessary to put in a complaint?" (22)

Apparently, the criticism was sufficiently persuasive to result in a deletion of the objectionable limitation from the draft Constitution of 1944 which provided:

"The Governor may cause an investigation to be made of the conduct in office of any State officer except a member of the Legislature or an officer elected by the Senate and General Assembly in joint meeting or a judicial officer. After notice, service of charges and an opportunity to be heard at a public hearing, the Governor may remove any such officer whenever in his opinion the hearing discloses misfeasance or malfeasance in office. Upon application on behalf of the Governor or officer under investigation or subject to charges, a Justice of the Superior Court may issue subpoenas and, under penalty of contempt of the Superior Court, may compel the attendance of witnesses, the giving of testimony, and the production of books and papers, in the investigation or at the hearing." (23)

Commenting on the latter provision, former Governor Edison stated:

"This would be fair enough as to method. The governor, who is head of the executive department, could remove an official after a public hearing. He could also use judicial processes to produce witnesses and papers, so that a hearing could be complete. The governor could not--as has happened in the past--be defied by recalcitrant witnesses or by officials who might wish to cover up their misdeeds by a refusal to testify.

"It is interesting to notice that the legislature, which drafted this proposed constitution, limited the scope of the governor's investigations to officials in the executive division of the state government; and indeed he will not be able to examine all of them, for those elected by the legislature are specifically excepted.



"Yet when the legislature drafted a clause (Article VI, section III) to provide for legislative investigations it authorized legislatures to investigate any public official or employee, state or local, and the performance of any public trust.

"The governor of New York, as you probably know, can investigate local officers; and many governors have used this power with salutary effects upon city and county officers. The governor of New Jersey should have the same power, and perhaps by amendment we can some day have it so." (24)

#### 4. Removal

State constitutions vest in the governor supreme executive power with the mandate that he faithfully enforce the laws. Such obligation, however, does not carry with it by implication a corresponding grant of power.

"The courts have repeatedly ruled that the governor has only those powers vested in him by the constitution. \* \* \* In a number of cases the courts have ruled that a governor has no inherent powers." (25)

In the absence of a commensurate, constitutional grant of power, therefore, the governor is charged fully with the responsibility for the administration of the state government but is left without an adequate means of discharging it.

Authorities agree that vesting in the governor the power of removal of state officers is essential to enable the governor to fulfill his duties effectively as chief executive.(26)

"In recognition of this fact, the majority of the states have adopted a policy with regard to removal by the governor in harmony with the principle set forth in *Myers v. United States*, 272 U. S. 52 (1926) as applying to the President. This rule permits the executive to remove for proper cause, without consent of the Senate,

officers for whose appointment the consent of the Senate is required, as well as to remove officers over whose appointment he has the sole power. If the principle of administrative responsibility is to be maintained, this is the only rule which could be reasonably followed."(27)

It should be noted that where the removal power is constitutionally vested, problems of judicial construction will arise only rarely, making it unnecessary to adopt a policy and, at the same time, avoiding the usual attacks on a statute on constitutional grounds. Moreover, a constitutional grant of the power of removal renders the governor immune from a hostile legislature which might be disposed to abrogate the power.

Nine states provide by constitution for the removal of a state officer by the governor:(28)

Colorado	Michigan	Pennsylvania
Illinois	Nebraska	West Virginia
Maryland	New Mexico	Delaware

Of these, only Pennsylvania authorizes removal at the pleasure of the appointing power but excludes judges from being thus removed. Nebraska limits removal, in the absence of cause, to heads of executive departments. In the remaining states, cause is required ranging from incompetency to conviction of crime.

While Michigan permits removal of elective officers, legislative and judicial officers are expressly excluded. New York permits removal by the governor of certain elective local officers--a rare power.

The Model State Constitution directs the establishment by law of administrative departments and provides:

"The heads of all administrative departments shall be appointed by and may be removed by the governor."(29)

In New Jersey, constitutional officers are removable only by impeachment. When the Governor possesses the power to remove other state officers, it must be authorized by statute which usually specifies the cause. Hence, the criticism of lack of power in state executives generally is particularly apt in New Jersey.

With the announced intention to give the Governor complete control over his subordinates(30), the Commission on Revision provided in the proposed Constitution:

"The heads of all administrative departments shall serve during the term of the Governor appointing them, at his pleasure, and until their successors have been appointed and qualified,"(31)

and, under Art. IV, Sec. II, Par. 6 (quoted ante), authorized the Governor, after investigation, to remove for cause any state officer, other than a legislative, judicial, or officer appointed or elected by the Legislature.

In the draft Constitution of 1944, the foregoing quoted section was drastically revised to provide:

"The Principal Departments shall be under the supervision and control of the Governor. The head of each Principal Department shall be a single executive unless otherwise provided by law; and all such single executives shall be nominated and appointed by the Governor with the advice and consent of the Senate and shall hold their offices until their successors shall be appointed and qualified, but they may be removed by the Governor as shall be provided by law."(32)

However, the removal power incidental to investigation was retained but with the additional provision regarding subpoenas (quoted ante).

Footnotes

1. Record of Proceedings of the Joint Committee of the New Jersey Legislature . . . to ascertain the sentiment of the people . . . as to change, 1942, Minority Report of D. A. Cavicchia, pp. 878-879.
2. J. A. Fairlie, The Executive Power in the State Constitution, Annals of American Academy of Political and Social Science, Vol. 181, p. 59, 1935.
3. A. W. Bromage, State Government and Administration in the U. S., 1936, p. 165.
4. J. A. Fairlie, supra, p. 61.
5. Proceedings of New Jersey Constitutional Convention of 1844, Introduction, p. ciii.
6. A. W. Bromage, supra, p. 165.
7. Speech by Governor Edison, "Constitutional Limitations on the Executive in New Jersey", May 14, 1941, p. 5.
8. Report of the Commission on Revision of the New Jersey Constitution, 1942, p. 8.
9. Ibid., p. 17.
10. "The Executive--Comparison of the Executive Functions of the State: The New York Study", La. State Univ., Constitution Revision Project, Monograph No. 28, 1947.
11. Ibid.
12. Model State Constitution, Sec. 503, p. 11, 1946.
13. Art. IV, Sec. III, Par. 6; Report of the Commission on Revision of the New Jersey Constitution, 1942, p. 1006.
14. Draft Constitution of 1944, Art. VI, Sec. II, Par. 1.
15. Unless otherwise indicated, the chief source of material under this heading is: J. E. Missall, The Moreland Act, Executive Inquiry in the State of New York, 1946.
16. J. A. Fairlie, supra, p. 64
17. Idaho Constitution, Art. IV, Sec. 8; Montana Constitution, Art. VII, Sec. 10; Utah Constitution, Art. VII, Sec. 5. Although coupled with the power to obtain reports, the powers are severable.
18. Michigan Constitution, Art. IX, Sec. 7.

Footnotes

19. R. S. 52:22-21; R. S. 52:15-7.
20. W. B. Graves, American State Government, 1941, p. 370.
21. Proposed Constitution of 1942, Art. IV, Sec. II, Par. 6.
22. Record of Proceedings, supra, Testimony of R. R. Chance, p. 243.
23. Draft Constitution of 1944, Art. IV, Sec. I, Par. 14.
24. Addresses of Charles Edison, 1941-1944, "A New Constitution for New Jersey," p. 35.
25. A. W. Bromage, supra, p. 181.
26. Earl L. Shoup, The Government of the American People, 1946, p. 651; A. N. Holcombe, State Government in the United States, p. 297.
27. W. B. Graves, supra, p. 371.
28. New York State Constitutional Convention Committee Report, "Constitutions of the States and United States," Vol. III, 1938.
29. Art. V, Sec. 507.
30. Report of the Commission, supra, p. 17.
31. Art. IV, Sec. III, Par. 5.
32. Art. IV, Sec. III, Par. 6

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