# Public Employment and the Supreme Court's 1975-76 Term

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The just-concluded term of the Supreme Court has decided more public employment cases than in any other term within memory. The Justices defined the procedural rights of federal employees who claim they were the subject of racial, sex, religious or national origin discrimination, dealt a "body blow" to the patronage system, examined the procedural and substantive rights of government employees subjected to discharge, considered the long-standing dispute over residence requirements for public employment and, in holding the Fair Labor Standards Act inapplicable to state and local governments, began a controversy over state sovereignty whose repercussions on local governmental employment could be enormous. This article will attempt to examine this court's actions as they relate to the public employment field by putting this term's decisions in the context of previous court action.

## PROCEDURAL PROTECTIONS

In *Perry* v. *Sinderman* and *Board of Regents* v. *Roth*, the Supreme Court established the principle that tenured public employees—those who could only be discharged for cause—had a constitutionally protected property interest in continued employment and hence could only be discharged after notice and hearing.[1] Non-tenured employees lacked such interest and were not entitled to any hearing on termination, unless termination and the circumstances surrounding it constituted a "stigma"; in such case the employees' liberty interests (as protected by the Fifth and Fourteenth Amendments and construed by the court to include a person's interests in his or her good name and reputation) were involved and hence a hearing was required.[2]

More recently, in *Arnett* v. *Kennedy*, the court reaffirmed the principles of *Roth* and *Perry* and held that while such a hearing

The views expressed herein are those of the author and not necessarily those of the U.S. Civil Service Commission.

was required it need not precede termination.[3] In *Arnett,* Justice Rhenquist, writing for three justices, was of the view that the public employees' right to a hearing grew out of and was defined by the statute which created tenure rights. The Constitution itself did not create property rights—rather it merely protected rights that were created through statutory enactment or as a result of negotiated agreement. In other words, when Congress provided in the Veterans Preference Act and Civil Service Act that certain employees could only be discharged for such cause as would benefit the efficiency of the service and that this determination would be subject to post-termination review, the statute fully defined the employees rights. A pre-termination hearing was not required because the statute did not call for it. The employee took the good (tenure) with the bad (no pre-termination hearing). In effect, the statute defined the employees rights and no constitutional principles were implicated.

The majority view in *Kennedy* was in favor of post-termination hearing. However, this majority was only achieved because two other justices, while disagreeing with the Rhenquist analysis, agreed with the conclusion that a pre-termination hearing was not required. These justices were of the view that once a statute gave government employees tenure rights the employees obtained a constitutional right to a hearing on discharge. This constitutional right could not be narrowed or defined by statute. These justices however, balanced the employees right to a hearing with the government's right to an efficient workforce and concluded that while a hearing was required, a post-termination hearing was sufficient.

While a majority of the *Arnett* court upheld the concept of post-termination hearings, because of the numerous opinions written, a second majority view emerged from the case. Namely, six justices held that once an employee is granted tenure rights a *constitutional* right to a hearing emerges. This second majority view appears to have suffered a severe setback in this term's decision in *Bishop* v. *Wood.*[4]

Before turning to *Bishop,* one further concept must be explored. Public employees and administrators are well aware of the substantial difference between the traditional rights of probationary and permanent employees. Probationary employees are serving a period of "trial employment," they have little or no rights and are subject to discharge without hearing. Unlike "permanent" employees, probationers have no tenure rights. In *Sampson* v. *Murray,* decided in the same year as *Arnett* v. *Kennedy,* the Supreme Court recognized the precarious position of the probationer—while Kennedy was entitled to a hearing on discharge, Mrs. Murray was not.[5] The distinction between probationers and permanent or tenured employees was of constitutional dimensions. This concept is also blurred by *Bishop* v. *Wood.*

In *Bishop,* the city manager of Marion, North Carolina, terminated a policeman's employment, without affording the employee either a pre- or post-termination hearing. The employee had been a member of the force for some 33 months. Under a city ordinance policemen serve a probationary period of six months after which they become "permanent" employees. A permanent employee in turn may be dismissed by the city manager "if [he] fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties."[6] A majority of the justices recognized that on its face the Marion ordinance could fairly be read as providing employees with tenure right:

> [H]owever, such a reading is not the only possible interpretation; the ordinance may also be construed as granting no right to continued employment but merely conditioning an employee's removal on compliance with certain specified procedures.

Relying on the opinion of the district judge (rendered prior to *Arnett*), that the ordinance did not provide tenure rights and that the employee "held his position at the will and pleasure of the city" (which position was supported by an equally divided court of appeals) the court concluded

that "the city manager's determination of the adequacy of the grounds for discharge is not subject to judicial review" and no hearing was required. By construing the ordinance as not providing tenure, the court was able to find that no hearing was required without expressly disturbing its previous holdings in *Arnett, Roth,* and *Perry.* Thus the rationale of the court is consistent with these decisions, but, is the court's interpretation of the ordinance anything less than strained? As Justice Brennan points out in dissent:

> . . . petitioner was hired for a "probationary" period of six months, after which he became a "permanent" employee. No reason appears on the record for this distinction, other than the logical assumption, confirmed by a reasonable reading of the local ordinance, that after completion of the former period, an employee may only be discharged for cause.

*Bishop,* however, raises more fundamental questions. While, as noted above, the majority opinion can be reconciled with *Perry, Roth,* and *Arnett,* the district judge's finding (which the court relies on) that petitioner served at the "will and pleasure" of the city was based on the fact that the ordinance set out its own procedure for determining cause and this procedure did not provide for a hearing. Yet, as noted earlier, six justices had held in *Arnett* that once an employee is granted tenure rights the statute or ordinance cannot take away hearing rights. It appears that the district court's analysis was similar to the analysis pursued by Justice Rhenquist in *Arnett.* However, that analysis was only supported by three justices and rejected by six. As the dissent in *Bishop* notes:

> The majority's holding that petitioner had no property interest in his job in spite of the unequivocal language in the city ordinance that he may be dismissed only for certain kinds of cases rests, then, on the fact that state law provides no *procedures* for assuring that the city manager dismiss him only for cause. The right to his job apparently given by the first two sentences of the ordinance is thus redefined, according to the majority, by the procedures provided for in the third sentence and as redefined is infringed only if the procedures are not followed. This position, which was embraced by only three and expressly rejected by six members of this court in *Arnett* v. *Kennedy.* . . .

While the logic of the dissent is compelling, the projected demise of *Roth, Perry,* and *Arnett* appears premature. The majority in *Bishop* was careful to base its rationale on consistency with the six justices' philosophy of *Arnett* and not the Rhenquist approach. What *Bishop* does indicate is that merely classifying positions as "probationary" or "permanent" does not resolve the hearing question. State laws and local ordinances must be carefully analyzed to determine whether they, in fact, create mutual expectations of continued employment which can only be terminated for cause. The message for both employer and employee is clear—once tenure is granted the Constitution may require a hearing, but the question of whether to grant tenure is not of Constitutional dimension, it is discretionary with the state legislature or city council (and we shall see when we consider *National League of Cities* v. *Usery*[7] it is a matter of state sovereignty over which the federal Congress has no jurisdiction or authority).

The *Bishop* case is also significant in what it has to say about the issue of stigma and the concept of protectible liberty interests. The policeman in that case was discharged for failure to follow orders, causing low morale and "conduct unsuited to an officer." He contended that these reasons were so serious that they damaged his reputation in the community and hense constituted a stigma of sufficient proportion to require a hearing at which the police officer would have an opportunity to "clear" his name. All parties agreed that a public employee is entitled to a hearing if stigmatized by his employer. The Supreme Court, however, found no stigma since the police officer was advised of the reasons orally and there was no "public disclosure" but while the majority opinion notes that the reasons were stated to petitioner orally, the dissent points out "there is no reason to believe

that respondents will not convey these actual reasons to petitioner's prospective employers." What the court leaves unresolved is whether formal written communication of charges, such as those here involved, which finds its way in an official personnel folder, constitutes stigma. The tenor of the court would indicate that such communication would not constitute stigma; still, public employers could appear to avoid this issue by simply noting innocuous grounds as cause for discharge.

## SUBSTANTIVE PROTECTIONS

In two decisions this past year, the court substantially narrowed the substantive rights of government employees while broadening the authority of the government employer over personnel matters. In *Kelley* v. *Johnson,* the court upheld the right of the Suffolk County Police Department to promulgate hair grooming standards for members of the force.[8] While the decision can be viewed narrowly as one applying only to a "pari-military" force which needs "discipline, esprit de corps, and uniformity," the language of the court points to a broader interpretation:

> Respondent has sought the protection of the Fourteenth Amendment not as a member of the citizenry at large, but on the contrary as an employee of the police force of Suffolk County, a subdivision of the State of New York. While the court of appeals made passing reference to this distinction, it was thereafter apparently ignored. We think, however, it is highly significant.

The court, citing *Pickering* v. *Board of Education* and *C.S.C* v. *Letter Carriers* as illustrations of constitutionally permitted restrictions on First Amendment rights of public employees, notes:

> If such state legislation may survive challenges based on the explicit language of the First Amendment, there is surely even more room for restrictive regulations of state employees where the claim implicates only the mere general contours of the substantive liberty interests protected by the Fourteenth Amendment.[9]

This is hardly language restricted to a pari-military police force.

Nonetheless, the court did not overthrow completely the requirement that the regulation involved have a nexus to the employment relationship.[10] The court did, however, redefine the burden as well as the relationship required:

> Having recognized in other contexts the wide latitude accorded the Government in the "dispatch of its own internal affairs," *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 896 (1961), we think Suffolk County's police regulations involved here are entitled to similar weight. Thus, the question is not, as the court of appeals conceived it to be, whether the state can "establish" a "genuine public need" for the specific regulation. It is whether respondent can demonstrate that there is no rational connection between the regulation, based as it is on respondent's method of organizing its police force, and the promotion of safety of persons and property.

Thus, the state need not demonstrate a nexus but the employee must demonstrate the lack of nexus. Further in showing the lack of a "rational connection" the employee's burden is increased to proving that the decision to promulgate such regulations "is so irrational that it may be branded as 'arbitrary.'" Just how difficult this burden is is demonstrated by *Quinn* v. *Muscare,* where the court upheld the suspension for 29 days of a lieutenant in the Chicago Fire Department for wearing a goatee in violation of regulations.[11] The Fire Department had sought to justify the regulation on the basis that it was a safety measure designed to insure proper functioning of gas masks. Relying on *Kelley* v. *Johnson* the court concluded that the facts surrounding the safety justification were "immaterial." Yet even under *Kelley,* the safety factor would presumably be material to a determination as to whether the regulation was rationally connected to the employment. After all, the city had sought to justify its regulation on safety grounds—was not the employee entitled to attempt to show that this rationale was so irrational as to be branded arbitrary?

*Kelley* and *Quinn* appear to stand for the proposition that public employers may set

such terms of employment are acceptable, provided only that such terms do not improperly violate specific constitutional guarantees[12] or are not so irrational as to be considered arbitrary. When read together with *Bishop*, it seems clear that the court has substantially broadened the right of the public employer in connection with its workforce and correspondingly narrowed both the procedural and substantive rights of public employees.

The greater discretion in the area of employee relations which the court is giving to public employers is demonstrated further by *Hortonville Joint School District* v. *Hortonville Education Association*.[13] In *Hortonville*, public school teacher negotiations with the school board broke down and the teachers went on strike. As a consequence, the school board, after notice to the striking teachers and a hearing before the board, discharged the strikers. Under state law, the strike was illegal; but the strikers, while on strike, remained employees of the state who had tenure rights. Hence, under *Perry* and *Roth*, they were entitled to a hearing. The only issue before the court was whether the school board could provide an unbiased hearing and decision as required by the due process clause of the Fourteenth Amendment.

The striking teachers had argued that the board could not provide an unbiased hearing since it was one of the two parties to the labor negotiations out of which the strike arose. The board in turn argued that its prior involvement in the negotiations did not disable it from exercising its power to discharge employees or prevent it from holding an unbiased hearing.

The court recognized the board's power under state law to discharge employees and also recognized that this power could be taken from the board under Fourteenth Amendment considerations, but *only* if the board "cannot act consistent with due process." In defining the parameters of due process in a case such as this, the court balanced the teachers' interests against the state's interest—a process similar to that involved in *Pickering* v. *Board of Education* (in which the swing justices found that upon a weighing of the public employees' interest in a predetermination hearing and the employer's interest in maintaining employee efficiency and discipline, the employer's interest prevailed and a post-termination hearing sufficed.) In doing so, the court concluded that the public employer's interest—in this case the obligation to make the policy decision (in regard to discharge) which would best serve the interests of the school system, children in school and the taxpayers—prevailed. The court concluded:

> Permitting the Board to make the decision at issue here preserves its control over school district affairs, leaves the balance of power in labor relations where the state legislature struck it, and assures that the decision whether to dismiss the teachers will be made by the body responsible for that decision under state law.

Thus, the fact that a public employer is intimately involved in the events leading up to a decision to discharge does not take from that employer the authority and responsibility granted to it by the state legislature (or city council) to discharge employees. The presumption of honesty and integrity of the decisionmaker employer will overcome the presumed bias resulting from involvement and hence basic due process will be preserved.

## RESIDENCE REQUIREMENTS

There are three residence questions which confront public employers: (1) is it constitutional to require that public employees live within the jurisdiction where they are employed; (2) is it constitutional to require residence within the jurisdiction for a period of time prior to employment; and (3) may a jurisdiction require by new legislation that present nonresident employees move into the jurisdiction or lose their jobs? *McCarthy* v. *Philadelphia Civil Service Commission* answers question (1) yes, while questions (2) and (3) are left unresolved.[14]

In *McCarthy*, the petitioner had been a Philadelphia Firefighter for 16 years, during

which period he resided in Philadelphia. A municipal ordinance requires that employees of the City of Philadelphia live within the city. Petitioner moved to a suburban area (in New Jersey) outside the city and was discharged.

The basic principle involved in municipal or state residence requirements is the constitutionally protected right of interstate travel.[15] While the court reaffirms that right, it notes that there is a difference between a condition that a person be a resident "at the time of his application" and one that a person have been a resident for a given duration prior to application. The Philadelphia ordinance was not durational in character and hence did not implicate the right of interstate travel. Philadelphia's ordinance required residence at the time of application and thereafter during employment. The court found such a residency requirement to be both bona fide and valid.

While the court clearly distinguishes the Philadelphia ordinance from durational residence requirements and notes the general constitutional infirmities of durational residence, it does not decide the issue of its validity. Indeed, while the general trend of the cases would point to invalidity of a durational requirement, the court distinguishes the general line of cases by noting:

> Nor did any of those cases involve a public agency's relationship with its own employees which, of course, may justify greater control than over the citizenry at large.

Thus, the court has provided public employers with grounds to justify durational residence. Significantly, *McCarthy* illustrates the same point made by the court in *Bishop, Kelley, Quinn,* and previously by *Pickering* and *Letter Carriers*—government may deal differently with public employees than it can with the public at large and that while as individuals public employees have constitutional rights, as public employees those rights are subject to limitations which would not be available to the state when legislating generally.

In light of *McCarthy,* some jurisdictions have considered instituting residence requirements. It is important that these jurisdictions recognize that *McCarthy* leaves unresolved the issue of whether newly established residence requirements may be imposed on nonresident employees. On the one hand the employee can argue that his or her right to travel or not to travel is impaired because the ordinance will require travel or giving up employment.[16] On the other hand, the jurisdiction may point out that it is dealing with its employees, not with the public at large, and rely on the language of *McCarthy:*

> In this case appellant claims a constitutional right to be employed by the City of Philadelphia *while* he is living elsewhere. There is no support in our cases for such a claim.

## EQUAL EMPLOYMENT OPPORTUNITY

### Citizenship

In *Sugarman* v. *Dougall,* the Supreme Court found New York State's across-the-board citizenship requirement for public employment an unconstitutional violation of the Fourteenth Amendment.[17] The court held that a citizenship test for public employment violated the rights of resident aliens to the equal protection of the laws guaranteed by the Fourteenth Amendment. The court's decision was in line with several earlier cases where the court had stricken state statutes that distinguished between citizens and aliens.[18] However, *Sugarman* did not reach federal public employment; and the Supreme Court, in both *Sugarman* and *Espinoza* v. *Farah Manufacturing Co.* (holding distinctions based on citizenship to be outside the scope of the prohibition on "national origin" discrimination found in Title VII of the Civil Rights Act of 1964), specifically left open the question as to whether the federal government could utilize an across-the-board citizenship test.[19] (The *Sugarman* court had held that a state could limit policy-making positions to citizens.)

The federal government has had a citizenship requirement, in one form or another, since the late 18th century. The fed-

eral merit system was established in 1883 with the passage of the Pendleton Act, which also created the U.S. Civil Service Commission. The USCSC, in turn, immediately adopted a citizenship test for competitive appointment and that requirement has remained basically the same since then.[20]

Unlike the states, the federal government is not subject to the provisions of the Fourteenth Amendment. While the federal government is subject to the due process clause of the Fifth Amendment and while that clause encompasses the concept of equality, the restrictions on governmental action are not identical. Moreover, while the states have no authority under which they may deal with aliens qua aliens, the federal government has plenary power over immigration and naturalization. Thus, neither *Sugarman* nor the principles enunciated therein are automatically applicable to federal employment.

In *Hampton* v. *Mow Sun Wong*, the court invalidated the federal across-the-board citizenship requirement for the competitive civil service.[21] In doing so, however, the court left open the possibility that a citizenship test required by statute or executive order could be found to be constitutional.

*Mow Sun Wong* represents Justice Steven's first opinion for the court. In striking down the Civil Service Commission's citizenship regulation he combines equal protection and substantive due process analysis to conclude that:

> When the federal government asserts an overriding national interest as justification for a discriminatory rule which would violate the equal protection clause if adopted by a state, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest.

The interests stated by the government were recognized by the majority as potentially justifying the citizenship restriction. However, a definitive answer to this question was not required because the court was of the view that the arguments presented "do not identify any interest which can reasonably be assumed to have influenced the Civil Service Commission." In other words, while the federal government as such might have a valid interest in restricting federal employment to citizens, such restriction did not serve the Civil Service Commission's basic function of providing a merit based workforce and hence the commission's regulation could not be upheld.

The court's analysis of the issue is subject to question. In matters of pure logic, the four-justice dissent appears to have the upper hand. The majority's bifurcation of the executive function is a strange inroad into the management of the executive branch, it narrowly reads the Civil Service Commission's role and disregards both the commission's function as agent of the president in personnel management and the congressional and presidential delegations of authority to the commission. Moreover, in *Examining Board of Engineers* v. *Otero*, the court noted that "[w]e do not suggest, however, that a state, territory or local government, or certainly the federal government, may not be permitted some discretion in determining the circumstances under which it will employ aliens . . ." suggesting again that the federal government's authority in this area is greater than that of state or local government.[22]

It is this writer's opinion that the court's decision is an ingenious but disingenious way of avoiding the tough constitutional question; namely, may the federal government restrict its public employment to citizens. There are indications in the decision that a statutory or executive order restriction, both of which avoid the question of commission jurisdiction and justification, would pass constitutional muster. It hardly seems appropriate for the judicial branch to require the president himself or the Congress to relegislate a policy which is more than a century old and which neither branch has seen fit to change in that time. It is this writer's opinion based on *Sugarman* and *Mow Sun Wong* that state citizenship tests for public employment are uncon-

stitutional whereas similar requirements congressionally enacted or presidentially proclaimed are constitutional and valid.

## Employment Testing

The Civil Rights Act of 1964 specifically allows for the use of professionally developed employment tests. In the seminal case of *Griggs* v. *Duke Power Co.*, the Supreme Court was confronted with an employer who had publicly announced a change to an open employment policy in accordance with the act but who had at the same time also adopted two professionally developed tests as employment entry devices.[23] Results of test use showed that a substantially higher percentage of blacks failed the test than did whites. Arguing that this statistical disparity established prohibited discrimination, black applicants for employment with Duke Power sued under Title VII. The court, in a broad-reaching opinion rejected the polar positions staked out by the parties —to prohibit entirely the use of employment tests as it had previously done for voter literacy tests[24] or to permit the use of any test as long as it was developed by an industrial psychologist—and instead held that an employment test with a substantial adverse racial impact was presumptively discriminatory. Use of such a test could only be permitted if justified by business necessity which in turn could be established through a demonstration of the job relatedness of the test. Once adverse impact was established, the employer bore the heavy burden of showing job relatedness. Under the *Griggs* standard intent to discriminate became unimportant—the key factor in discrimination was an employment practice's effect.

Title VII of the Civil Rights Act became effective in 1964 but, government employment—state, local, and federal—was not covered by the act until 1972. Even prior to 1972, however, suits were instituted against government employers on the basis of the Fourteenth Amendment. In a series of opinions, the various courts of appeals uniformly held the *Griggs* standard applicable to pre-1972 testing by state and local governments. *Washington v. Davis* holds this approach to be improper and represents the first case where the Supreme Court has upheld an employment test having an adverse impact.[25]

*Davis* concerns the District of Columbia Police Department's entrance examination. The test, which has an adverse racial impact, was alleged to be discriminatory. The court of appeals utilizing the *Griggs* standard (even though the suit was instituted prior to congressional action making Title VII applicable to federal employment) found that the department had failed to establish the job relatedness of the test and rejected the city's attempt to establish validity through a correlation between success on the test and success in the city's police academy. According to the court of appeals, the city had to correlate success on the test with success as a police officer—success in the academy simply was insufficient. This holding was clearly reversed by the Supreme Court.

*Davis* is significant in several respects. First, the court clearly distinguishes constitutional cases (*i.e.*, those founded upon the Fifth and Fourteenth Amendments) from Title VII litigation. While *Griggs* establishes the Title VII rule, "[W]e have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today." Under the constitutional standard, there must be discriminatory purpose or intent—adverse impact alone is insufficient to shift the burden of justification to the employer. Unlike the *Griggs* standard intent rather than effect is the key to constitutional litigation. In reaching this conclusion the court uses language which may have a decided impact on the testing program of statutory merit systems.

Before considering the specific statements of the court it is important to recognize that the 1964 act provides an exception for bona fide seniority and merit systems. More specifically, the 1964 act provides that "[N]otwithstanding any other provision of . . . Title [VII], it shall not be

an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority *or merit system . . .*" (emphasis added). A series of court of appeals decisions has held that company-wide, last-in-last-out seniority systems are bona fide and hence permissible under the Act even though a greater proportion of those laid off by such systems are minority group members.[26] The adverse impact of the seniority system is "neutralized" by its bona fide character. What constitutes a "bona fide . . . merit system" is yet to be determined.

Prior to *Davis* there was virtually no attention paid to this "merit system" exception. For it was generally assumed that the *Griggs* standard was applicable across-the-board and no employment system—including a merit system—was bona fide if it did not meet that standard. While *Davis* does not directly discuss the "merit system" exception, it does suggest the argument that a governmental merit system, required by local law, which meets the constitutional test of *Davis* is bona fide and, hence, outside the strictures of Title VII. The point would be that *Griggs* is a statutory standard and one need never reach the issue of conformity with the statute if one shows the system to be bona fide under the *Davis* standard since once the merit system is shown to be bona fide it is outside the coverage of Title VII. In arguing this position a state could argue that clearly one need not comply with the statutory standard in order to not be subject to the statute.

*Davis,* of course, does not go this far—but it does require an analysis of this position and, indeed, contains language to support such a rule. It must be recalled that *Griggs* is premised on the primacy of adverse impact—*Davis* notes:

> . . . we have not held that a law, neutral on its face and serving ends otherwise within the power of Government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another

and:

> As an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies "any person equal protection of the laws" simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups.

and finally:

> . . . it is untenable that the Constitution prevents the Government from seeking modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing.

Counter arguments are found in the fact that the language dealing with bona fide merit systems was part of the 1964 act and thus applied to private employees, but was given no weight in *Griggs,* as well as the legislative history of the 1972 amendments which reflect a congressional intent to apply similar standards to both public and private employment.[27] Nonetheless, it may be argued that the social policy underlying statutory public merit systems distinguishes them from private employment,[28] and one may question whether congressional intent is sufficient to mandate the *Griggs* standards in light of the court's decision in *National League of Cities.*

In *National League of Cities,* the court held that Congress lacked the authority to make the Fair Labor Standards Act applicable to the states. Congress had sought to justify its actions under the commerce clause, Constitution Article 1, Section 8, Clause 3. The 1972 amendments to the Civil Rights Act are premised on the Fourteenth Amendment, Section 5 of which contains a delegation of legislative authority to carry out the amendment. Clearly Congress can legislate as to the states under the amendment,[29] but can Congress in carrying out the Fourteenth Amendment establish standards which are not called for by the equal protection clause? Again, the court did make it clear in *Davis* that Title VII goes significantly beyond what is re-

ployment opportunity area. Do the concepts of sovereignty found in *National League of Cities* have any viability when legislation under the Fourteenth Amendment is involved? These are questions raised by but undecided by this term's decisions.

*Davis* has other ramifications for local government employment practices. For the first time the court has upheld the validity of a test. In doing so, the court appears to have given substantial weight to the affirmative action progress made by the District of Columbia:

> Even agreeing with the District Court that the differential racial effect of Test 21 called for further inquiry, we think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race or that "a police officer qualifies on the color of his skin rather than ability."

This language, when taken together with the court's concern for an employee's past history,[30] may indicate that the issue of job relatedness is not the purely scientific question which some psychologists and the Guidelines of the Equal Employment Opportunity Commission would tend to make it. In fact, this language leaves open the door for a "bottom line" definition of adverse impact under which tests are not viewed in isolation but rather as a part of an entire employment system. If the system as a whole does not discriminate, its parts are not subject to challenge because of adverse impact.

Moreover, the court's opinion, even when dealing with the psychometrics of validity, indicates that "[I]t appears beyond doubt by now that there is no single method for appropriately validating employment tests for their relationship to job performance."[31] This recognition of various approaches to validity (the court refers to criterion related validity, content validity and construct validity) appears to negate the preference for criterion-related validity found in the Equal Employment Opportunity Commission Guidelines.[32] Indeed, the court's language, while for the first time requiring "validity" to establish job relatedness, specifically notes that tests may be validated "in any one of several ways, perhaps by ascertaining the minimum skill, ability or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question." Significantly, the *Davis* court, even when operating under the *Griggs* standards, permits an employer to test for "potential."

In addition, the court rejected the notion that an employer must demonstrate a correlation between success on the test and performance on the ultimate job. Police recruits go to a police academy. In upholding the concept of training program validation, the court relied on regulations of the Civil Service Commission, opinion evidence and "the current views of the Civil Service Commissioners." This is the first substantive recognition which the Supreme Court has given to the testing instructions of the United States Civil Service Commission.

Finally, the significance of *Davis* on the issue of quota hiring should not be lost. While the District of Columbia received favorable treatment as a consequence of its highly successful affirmative action program the court made it clear that the Fourteenth Amendment does not call for proportional representation nor any other concept of racial representativeness in employment. To this must be added the court's holding in *McDonald* v. *Santa Fe Trail Transp. Co.* that "Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes. . . ."[33] This holding specifically reaffirms the court's language in *Griggs* that the act prohibits "discriminatory preference for any group minority or majority."

It is this writer's view that *Davis* cannot be dismissed simply as a case involving a

constitutional doctrine, while state and local governments are now subject to Title VII. As the foregoing shows, *Davis* raises more questions than it answers. It remains to be seen how the lower courts and ultimately the Supreme Court interprets *Davis*. Two things are clear however—public employers may validate their tests under any of the three generally recognized methodologies and may rely on successful correlations between success on the test and success in job related training programs—success in affirmative action has legal (as well as moral) significance.

### Procedural Protections for Federal Employees

It has long been held in the private sector that alleged victims of racial discrimination may rely on either (or both) Title VII of the 1964 act or 42 U.S.C. §1981 the old Civil War Civil Rights Act. Unlike Title VII, §1981 contains no requirement for filing claims with the Equal Employment Opportunity Commission or other preliminary procedural steps. In addition, the courts have made it clear that regardless of the procedures before the Equal Employment Opportunity Commission an alleged victim of discrimination may institute an action in district court and is entitled to a full and complete trial of his or her allegations.[34] In fact, a full trial is required even though the issue has been presented to and decided by an arbitrator.[35]

Unlike employees in the private sector, federal government employees are under the jurisdiction of the U.S. Civil Service Commission. The USCSC, in turn, unlike the EEOC, provides a full range of administrative procedures to alleged victims of discrimination. These procedures call for pre-complaint counseling, investigation, administrative hearing, administrative appeal and ultimately review in court. In *Brown* v. *General Services Administration* and *Chandler* v. *Roudebush* the court was called upon to consider whether these procedural changes had substantive effect once a party instituted a court action.[36]

In *Brown*, the court treated federal employees differently from private sector employees and concluded that such employees could not rely on 42 U.S.C. §1981. Rather, the exclusive remedy for federal employees who allege employment discrimination is Title VII and the administrative procedures of §717 of the 1972 Amendments must be pursued.

While *Brown* held that the procedures of Title VII must be followed, *Chandler* held that once those procedures are followed and a judicial proceeding is instituted, federal employees are entitled to the same full trial de novo available to private sector employees. The prior administrative findings are admissible in evidence at the trial de novo but the employee is entitled to a full trial just as is available in the private sector.

### Age—Mandatory Retirement

In *Massachusetts Board of Retirement* v. *Murgia*, the Supreme Court rejected an equal protection challenge to Massachusetts' mandatory retirement at age 50 for state police officers.[37] At the time of his forced retirement, Murgia was in excellent physical and mental health and was capable of performing the duties of a police officer. Utilizing the rational basis analysis applicable to equal protection claims not involving exercise of a fundamental right (a right to government employment per se is not fundamental) or suspect classifications ("old age does not define a 'discrete and insular' group . . . in need of 'extraordinary protection from the majoritarian political process' "), the court concluded:

> The Massachusetts statute clearly meets the requirements of the equal protection clause, for the state's classification rationally furthers the purpose identified by the state: Through mandatory retirement at age 50, the legislature seeks to protect the public by assuring physical preparedness of its uniform police.

It matters not that the state could have chosen better means to accomplish its purpose—the means chosen were rationally related to the state's objective and hence constitutional. The court is quick to note that it is not deciding that the Massachusetts sys-

tem is rational—not that it is the most desirable objective or even that the system is just or humane—all the court decides is that the system is rational and, hence, constitutional.

Murgia had based his challenge on the Fourteenth Amendment and had placed no reliance on the Age Discrimination in Employment Act of 1967.[38] As *Washington* v. *Davis* makes clear, the constitutional standard under the Fourteenth Amendment may not replicate the standard arising from legislation. Thus, it is possible that while constitutional a state mandatory retirement system for police officers may run afoul of the Age Discrimination Act. *Murgia* does not implicate this question. The applicability of federal age discrimination legislation to state or local government employment is drawn into question by *National League of Cities*. After all, if Congress lacks the authority to legislate minimum wages for state or local government employees can it have the authority to mandate minimum or maximum ages? Unlike the Equal Employment Opportunity Act of 1972 which amended Title VII of the Civil Rights Act of 1964 to make it applicable to state employment, the Age Discrimination in Employment Act does not appear to be based on the Fourteenth Amendment.

## THE PATRONAGE SYSTEM

In *Elrod* v. *Burns*, a five-justice majority dealt a severe setback to the patronage system. The specific holding of the court is clearly stated in the concurring opinion of Justices Stewart and Blackman:

> The single substantive question involved in this case is whether a nonpolicymaking, nonconfidential government employee can be discharged from a job that he is satisfactorily performing upon the sole ground of his political beliefs. I agree with the court that he cannot.

It is thus clear that a new administration, be it national, state, county or municipal cannot demand that its nonpolicymaking nonconfidential employees either support the party in power or face discharge. Nor can such administration make wholesale discharges of nonconfidential personnel because present employees do not share the political philosophy of the party in power or choose not to join that party. Until *Elrod* it had always been assumed that such insulation from politics was reserved to civil servants serving under a merit system.

The *Elrod* decision is based on the concept enunciated by the court in *Perry* v. *Sinderman* to the effect that a public employee cannot be discharged for lawful exercise of his First Amendment rights. This same concept appears in *Pickering* v. *Board of Education*.[39] The right to associate with the political party of one's choice is an attribute of the First Amendment.[40] While the majority apparently recognizes that the state may impose certain restrictions on its employees which it could not justify as to the public at large, political belief and affiliation do not fall into this character.

The plurality opinion by Justice Brennan is far reaching in its approach. Starting with the premise that patronage dismissals restrict freedom of association protected by the First Amendment, Justice Brennan considers and rejects arguments made by the Cook County sheriff to justify patronage practices. To the argument that patronage motivates more effective and efficient employees, he responds, "[T]he inefficiency resulting from the wholesale replacement of large numbers of public employees every time political office changes hands belies this justification"; to the claim that the patronage system contributes to the democratic process by assisting political parties, he notes that as an historical matter, "[P]olitical parties existed in the absence of active patronage practice prior to the administration of Andrew Jackson, and they have survived substantial reduction in their patronage power through the establishment of merit systems"—an historical view challenged by the dissent—and concludes:

> The [democratic] process functions as well without the practice, perhaps even better, for patronage dismissals clearly also retard that process. Patronage can result in the entrenchment of one or a few parties to the

exclusion of others. . . . [I]most indisputably, as we recognized at the outset, patronage is a very effective impediment to the associational and speech freedom which are essential to a meaningful system of democratic government. Thus, if patronage contributes at all to the elective process, that contribution is diminished by the practices impairment of the same. Indeed, unlike the gain to representative government provided by the Hatch Act in *CSC* v. *Letter Carriers, supra.*, and *United Public Workers* v. *Mitchell, supra.*, the gain to representative government provided by the practice of patronage, if any, would be insufficient to justify its sacrifice of First Amendment rights.

Thus government may place restrictions on active political management by its employees since this impediment to First Amendment rights constitutes a positive gain to representative government; but it may not discharge a nonpolicymaking or nonconfidential employee for his political beliefs, associations or activities.

The concurring opinion bases its view on narrower grounds, namely discharge "upon the sole ground of his political *beliefs*" is forbidden when nonpolicymaking, nonconfidential government employees are involved. But, the concurring justices (whose votes are necessary to establish a bare majority) leave unexpressed their view as to whether state and local employees who, in light of the recent amendments to the Hatch Act,[41] actively campaign for the loser may be discharged. Is there a difference between campaigning and "the sole ground of his political *beliefs*?" It is this writer's view that there should not be, but the concurring justices are quick to note that they "cannot join the court's wide-ranging opinion." Moreover, *Elrod* involves solely the question of patronage discharge —not issues of patronage hiring. The concurring justices are explicit in noting that on this issue they "would intimate no views whatever." Finally, all the justices agree that at least as to policymaking employees who have no tenure or career rights, patronage discharges are permitted. The difficulty here is in defining policymaking:

> No clear line can be drawn between policymaking and nonpolicymaking positions. While nonpolicymaking individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policymaking position. The nature of the responsibilities is critical . . . In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an advisor or formulates plans for the implementation of broad goals.

At all events, *Elrod* is a decision of single importance. Noncareer, nonmerit system employees, as well as merit system civil servants, in nonpolicymaking, nonconfidential positions may not be swept out of office when a local, state or federal election results in a change in the party in power. While not dead, the spoils system has suffered a severe setback and merit systems, as well as public administration in general, should be the victor.

## STATE SOVEREIGNTY AND THE PUBLIC EMPLOYEE

Article 1 of the Constitution defines the legislative branch of government. Section 8 thereof enumerates the powers of Congress. One of the broader powers is contained in Clause 3 thereof—commonly called the commerce clause. Congress is given the power: "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

In *Gibbons* v. *Ogden*, Chief Justice Marshall gave the term "commerce" the broadest possible interpretation—it includes "every species of commercial intercourse between the United States and foreign nations," "commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior." And, once interstate commerce is involved: "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution."[42]

Since *Gibbons* in 1824 the court has continued to expand the concept of interstate commerce—with brief retreats, such as *Hammer* v. *Dagenhart*, striking child la-

bor laws as outside congressional power.[43] In *United States* v. *Darby,* the court upheld the power of Congress to enact the Fair Labor Standards Act.[44] In 1968, the Supreme Court, in *Maryland* v. *Wirtz,* upheld the power of Congress to amend the FLSA so as to make it applicable to employees of state hospitals, institutions, and schools—all of whom are public employees.[45] Shortly thereafter, in *Fry* v. *United States,* the court upheld those provisions of the Economic Stabilization Act of 1970 which applied so as temporarily to freeze the wages of state and local employees.[46] In 1974 the minimum wage and maximum hours provisions of the FLSA was made applicable to state and local employees. In 1976, the Supreme Court, reversing *Maryland* v. *Wirtz* and distinguishing *Fry* v. *United States,* held that such provisions "operate to directly displace the states' freedom to structure integral operations in areas of traditional governmental functions" and hence "they are not within the authority granted Congress by Article 1 §8 Clause 3."

In reaching this conclusion the court relied on concepts of state sovereignty which cannot be impaired by Congress, even though Congress has plenary powers under the commerce clause. One aspect of this state sovereignty "is the states' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime." By infringing on these sovereign powers, Congress has exceeded its proper authority in a federal system. Limited measures designed to "combat a national emergency," such as the temporary freeze on wages under the Economic Stabilization Act approved in *Fry,* may be upheld.

Clearly the decision in *National League of Cities* has broader application than simply to the Fair Labor Standards Act. Just as minimum wages cannot be congressionally mandated, so too, it would follow, compulsory collective bargaining may not be congressionally imposed on the states. The same reasoning would limit congressional power to authorize strikes by state employees and as noted *supra* might affect such legislation as the Age Discrimination in Employment Act.

*National League of Cities* appears to stand for the proposition that Congress may not legislate under the commerce clause in any area dealing with state or local public employees as public employees. In order to reach such public employment relationship, Congress must rely on some constitutional authority expressly directed at the states, such as the Fourteenth Amendment.[47] Absent such authority, it is for the states themselves to determine how they will deal with public employment. (Of course, the states may not deal with public employment in such a way as to violate enumerated constitutional rights.)[48]

## MISCELLANEOUS

The "Back Pay Act" provides in substance that when a federal employee is found "to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction" of his pay, he is entitled to correction of the personnel action as well as such back pay as would have been earned were it not for the unjustified personnel action.[49] In recent years, the comptroller general has been broadening his interpretation of the act so as to allow employees to receive back pay lost as a consequence of an unjustified personnel action or the failure of an agency to perform a nondiscretionary personnel action.[50] Such an interpretation takes the position that failure to perform a nondiscretionary action constitutes the taking of an unjustified personnel action. The comptroller general has never applied this reasoning to an improper classification. In *United States* v. *Testan,* the Supreme Court had to consider whether the Back Pay Act covered an improper classification.[51] Testan, a grade GS-13 attorney, sued the government in the Court of Claims, arguing that his position should have been classified at grade GS-14. Testan sought both a

reclassification of his position as well as back pay for the period when the position was allegedly misclassified. The Court of Claims is a court of limited jurisdiction which can handle only cases calling for a money judgment. Thus, the issue before the Supreme Court was whether the Back Pay Act applied to misclassifications. The court, in an opinion that literally interpreted the Back Pay Act, held that the act did not apply. In broad language the court stated:

> . . . that the Back Pay Act, as its words so clearly indicate, was intended to grant a monetary cause of action only to those who were subjected to a reduction in their duly appointed involvements or position.

If the act applies "only" to those who were "subjected to a reduction" in pay or position, can it apply to those who were not subjected to any action but rather were the subjects of a failure to act? The language of the opinion appears to conflict with the recent trend of comptroller general decisions—however, the court was not aware of this trend and was only concerned with a classification question. It remains to be seen whether *Testan* will be applied more widely than to the classification issue.

Finally, in *Department of the Air Force* v. *Rose*,[52] the court gave a narrow reading to Exemption 2 of the Freedom of Information Act,[53] which exempts from disclosure by federal agencies matters "related solely to the internal personnel rules and practices of an agency." The court noted that the congressional policy was one of disclosure, not secrecy, and that the records of an agency's internal personnel management could be kept secret only if they dealt with "trivial matters" but must be disclosed where "more substantial matters in which the public might have a legitimate interest" were involved. In this connection, the court made it clear that the public does have a "legitimate interest" in most aspects of federal personnel management administration and, while the court noted that Exemption 6 of the Freedom of Information Act is available to protect whatever genuine privacy interests may be implicated by such a disclosure policy, it also indicated that Exemption 6 should not be had as a "blanket exemption for personnel files." In each instance where privacy values are involved, a compromise must be struck "between individual rights" and "the preservation of public rights to Government information."

In any event, the court has reaffirmed the congressional policy of disclosure of government information and has made it clear that this policy applies no less in the personnel management area than as to other substantive, mission-related matters.

## CONCLUSION

This past term represents a turning point in the law of public personnel. While many questions remain unanswered—such as what is the full impact of *Washington* v. *Davis* on public merit system examining? do the principles of *Elrod* v. *Burns* apply to patronage practices or is it limited merely to dismissals? and, just how far-reaching are the concepts of state sovereignty in internal affairs, such as employment, set out in *National League of Cities*?—this year's plethora of decisions does paint an emerging and changing pattern of public employment law. The court, while still concerned that public employers not improperly cross the line of specific constitutional prohibition (*e.g., Elrod* v. *Burns*), recognizes that the relationship between a public employer and its employees is different from that of the agency involved and the general public (*e.g., McCarthy* v. *Philadelphia Civil Service Commission*). This difference means that governmental action forbidden when the public is implicated may be permitted when the employer–employee relationship is involved (*e.g., Kelley* v. *Johnson*). Moreover, when a specific constitutional right is not involved, the court is less likely to find a property interest protected by the Fourteenth Amendment than has been the case in the past (*e.g., Bishop* v. *Wood*). This de-emphasis on the Fourteenth Amendment and constitutional protection is reflective of a general trend to grant greater discretion in

personnel by public employers and thus to rely more on legislative intention than constitutional principle. In this same vein, the court appears to be following a pattern which vests greater authority over personnel matters in locally elected public employers (*e.g., Hortonville Joint School District* v. *Hortonville Education Association* and *National League of Cities* v. *Usery*) and casts on the employee the heavy burden of establishing that the employer's policy is unrelated to the employment involved (*e.g., Kelley* v. *Johnson* and *Quinn* v. *Muscare*).

**Notes**

1. *Perry* v. *Sinderman*, 408 U.S. 593 (1972); *Board of Regents* v. *Roth*, 408 U.S. 564 (1972).
2. *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971); *Perry* v. *Sinderman, supra.*
3. *Arnett* v. *Kennedy*, 416 U.S. 134 (1974).
4. *Bishop* v. *Wood*, – U.S. – (1976).
5. *Sampson* v. *Murray*, 415 U.S. 61 (1974).
6. Article II, §6, Personnel Ordinance of the City of Marion, North Carolina.
7. *National League of Cities* v. *Usery*, – U.S. – (1976).
8. *Kelley* v. *Johnson*, – U.S. – (April 5, 1976).
9. *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *U.S. Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 518 (1973).
10. See, *e.g.*, Carl F. Goodman, "Judicial Trends in Public Personnel Management," *Public Personnel Management* (September-October 1975), 278–288; *Norton* v. *Macy*, 417 F. 2d 1161 (D.C. Cir. 1969).
11. *Quinn* v. *Muscare*, – U.S. – (May 3, 1976).
12. *E.g.*, free speech, in *Pickering* v. *Board of Education, supra;* freedom of association, in *Elrod* v. *Burns*, discussed *infra.*
13. *Hortonville Joint School District* v. *Hortonville Education Association*, 44 L.W. 4864 (June 17, 1976).
14. *McCarthy* v. *Philadelphia Civil Service Commission*, – U.S. – (March 22, 1976).
15. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).
16. Cf. *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974); *Cohen* v. *Chesterfield County*, 474 F.2d 395 (1973).
17. *Sugarman* v. *Dougall*, 413 U.S. 634 (1973).
18. See, *e.g.*, *Truax* v. *Raich*, 239 U.S. 33 (1915); *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410 (1948).
19. *Sugarman* v. *Dougall, supra; Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973).
20. 2nd Report, U.S. Civil Service Commission 83 (1885).
21. *Hampton* v. *Mow Sun Wong*, – U.S. – (June 1, 1976).
22. *Examining Board of Engineers* v. *Otero*, 44 U.S.L.W. 4890 (1976).
23. *Griggs* v. *Duke Power Co.* 401 U.S. 424 (1971).
24. *Gaston Co.* v. *U.S.*, 395 U.S. 285 (1969).
25. *Washington* v. *Davis*, – U.S. – (June 7, 1976).
26. *Jersey Central Power Co.* v. *Local Unions*, 508 F.2d 687 (3rd Cir. 1975), remanded for proceedings consistent with *Franks* v. *Bowman*, 44 U.S.L.W. 4356 (March 24, 1976); *Waters* v. *Wisconsin*, 502 F.2d 1309 (7th Cir. 1974); *Watkins* v. *United Steel Workers*, 516 F.2d 41 (5th Cir. 1975); *Chance* v. *Board of Examiners*, – F.2d 44 U.S.L.W. 2343 (2nd Cir. 1976).
27. See *Mancari* v. *Morton*, 417 U.S. 535 (1974); *Chandler* v. *Roudebush*, – U.S. – (June 1, 1976, discussed *infra.*).
28. Cf. *Kirkland* v. *New York State Dept. of Correctional Services*, 520 F.2d 420 (CA2, 1975); *Elrod* v. *Burns*, – U.S. – (June 28, 1976).
29. *Fitzpatrick* v. *Bitzer*, – U.S. – (June 28, 1976).
30. *E.g.*, in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), the court said: "The concept of job relatedness takes on meaning from the facts of the *Griggs* case . . . the question of job relatedness must be viewed in the context of the plant's operation and the history of the testing program."
31. *Washington* v. *Davis*, footnote 13.
32. Compare *Douglas* v. *Hampton*, 512 F.2d 976 (CADC 1975), decided the same day as *Davis* and relied upon by the *Davis* lower court, two of whose members also served on the *Douglas* panel.
33. *McDonald* v. *Santa Fe Train Transportation Co.*, – U.S. – (June 25, 1976).
34. *McDonnell Douglas Corp* v. *Green*, 411 U.S. 791 (1973).
35. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975).
36. *Brown* v. *General Services Administration*, – U.S. – (June 1, 1976); *Chandler* v. *Roudebush*, – U.S. – (June 1, 1976).
37. *Massachusetts Board of Retirement* v. *Murgia*, – U.S. – (June 25, 1976).
38. 29 U.S.C. §621, *et seq.*
39. *Pickering* v. *Board of Education*, 391 U.S. 563 (1968).
40. Cf. *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *NAACP* v. *Button*, 371 U.S. 415 (1963).
41. See 5 U.S.C. §1501, *et seq.*
42. *Gibbons* v. *Ogden*, 9 Wheat 1 (1824).
43. *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918).
44. *United States* v. *Darby*, 312 U.S. 100 (1941). See also *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946); *Borden Co.* v. *Borella*, 325 U.S. 679 (1945).
45. *Maryland* v. *Wirtz*, 392 U.S. 183 (1968).
46. *Fry* v. *United States*, 421 U.S. 542 (1975).
47. See *Fitzpatrick* v. *Bitzer, supra.*
48. *Elrod* v. *Burns, supra.*
49. 5 U.S.C. §5596.
50. See, *e.g.*, *Matter of Turner and Caldwell*, C. G. Decision B-183086 (1975).
51. *United States* v. *Testan*, 44 U.S.L.W. 4243 (1976).
52. *Department of the Air Force* v. *Rose*, 44 U.S.L.W. 4503 (1976).
53. 5 U.S.C. §552 (b)(2).

FILE

SELECTION - OUT

# JUDICIAL TRENDS IN PUBLIC PERSONNEL MANAGEMENT

CARL F. GOODMAN

Until a few short years ago, the judicial presence in personnel management had a very low profile. In *Keim* v. *United States*,[1] the Supreme Court made it clear that the appointment and discipline of federal employees were matters for their supervisors and not for the judiciary. Then came the Lloyd–LaFollette Act,[2] the Veterans Preference Act[3] and U.S. Civil Service Commission regulations,[4] all establishing procedures which had to be followed in effecting certain personnel actions, particularly disciplinary actions, and court decisions began to look for procedural compliance. Today the trend appears to be to cast personnel problems in a constitutional mold consistent with the general judicial and societal emphasis on personal rights. The "right-privilege" concept of government employment has died in favor of a due process approach.[5] While it is true that persons do not have a right to government employment as such, it is also true that a government employee may have a sufficient interest in the continuation of his position as to be entitled to constitutional protection,[6] and an applicant for government employment may not be rejected because of exercise of constitutional rights[7] nor may an applicant be rejected on the basis of racial considerations[8] or any other arbitrary grounds.[9]

In *Wieman* v. *Updegraff*, the Supreme Court noted that "we need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to statute is patently arbitrary or discriminatory."[10] And, more recently, it has been held that an applicant for public employment "is not without constitutional protection. The Constitution does not distinguish between applicants and employees; both are entitled like other people, to equal protection against arbitrary and discriminatory treatment by the government."[11]

In the vanguard of decisions dealing with the protection of federal employees' constitutional rights, were those that stood firmly for the proposition that due process requires an agency to comply with its own regulations in effecting disciplinary action.[12] However, until the late 1950s the "soundness of propriety" of a department head's

The views expressed herein are those of the author and not necessarily those of the U.S. Civil Service Commission. Appreciation is expressed to Sandra Shapiro, deputy assistant general counsel for her invaluable assistance.

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exercise of judgment remained inviolable.[13]

In the succeeding twenty years, however, the situation has changed dramatically keeping pace with similar developments in other areas of the law with which the courts are dealing more actively than formerly. For example, to the original review for procedural regularity, the courts have added a standard by which they will examine the executive action to determine whether it was "arbitrary or capricious"[14] and, in the 2nd,[15] 3rd,[16], 4th,[17] 9th,[18] 10th,[19] and D.C. Circuits,[20] the criterion for judging a final agency decision in the personnel area has become whether it is based upon "substantial evidence."

One of the most dynamic areas in judicial oversight of personnel management has been that of the public employee and his right to dissent. The time was not so distant when Justice Oliver Wendell Holmes, sitting on the Massachusetts Supreme Court could uphold the discharge of a policeman noting "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[21]

In keeping with the trend toward increased vigilance over the constitutional rights of the public employee is the landmark decision in the free speech area, *Pickering* v. *Board of Education*. A teacher was removed on the basis of a letter sent to a local newspaper criticizing the handling of finances by the Board of Education. The court noted that:

> It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statement might furnish permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined.[22]

Clearly the court's concern lay not as much with the truth or falsity of the statements made in the letter, as with the effect of those statements upon the employment situation. In that regard the court issued the now standard test against which utterances of public employee's continue to be measured.

> The problem in any case is to arrive at a balance between the interest of the teacher [public employee] as a citizen commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public service through its employees.[23]

The Court in *Pickering* found that the remarks had been made basically in his capacity as a citizen, not as a public employee and thus were protected.

In April 1974, the *Pickering* doctrine was further elaborated in *Arnett* v. *Kennedy*.[24] Plaintiff had attacked the standard for removal of a federal employee, authorizing such removal only for "cause as will promote the efficiency of the service," as being unconstitutionally vague when applied to the removal of a federal employee for statements made to the press and public critical of his immediate superior. A three-judge district court,[25] had held that this standard, as set forth in the Lloyd–LaFollette Act, did not provide sufficient guidelines for the employee to know what speech might be grounds for removal and was thus unconstitutional.

Mr. Justice Rehnquist, writing for the majority in an opinion signed by six justices, held that the standard was as specific as it was possible to get. Certainly an employee cannot be discharged for protected speech. Even if the speech were unprotected, he cannot be discharged unless it is for good cause shown. Thus, the employee has more rights than he had in the pre-Lloyd–LaFollette days under the doctrine of *Keim*. Mr. Justice Rehnquist noted:

> The Act proscribes only that public speech which improperly damages and impairs the reputation and efficiency of the employing agency, and it thus imposes no greater controls on the behaviour of federal employees

than are necessary for the protection of the Government as an employer.[26]

Concerning the "void for vagueness" claim, the court set out a common sense standard by quoting with approval language from Judge Leventhal's opinion in *Meehan* v. *Macy*,[27] to the effect that the employee could not reasonably expect to keep his job while inveighing in public against his employer.

The inability to precisely define what speech is protected played a major role in the decision in *United States Civil Service Commission* v. *National Association of Letter Carriers*.[28] In that decision upholding the Hatch Act against an attack as being unconstitutionally broad and vague, the court noted:

> There are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.[29]

In an era in which public dissent has become prevalent and there has developed increasing awareness of the rights of the previously unheard and unrepresented, the judicial trend has come more and more to represent that often elusive balance set up in *Pickering* between the constitutional rights of the public employee on the one hand and the necessity for the public employer to function and carry out the mission for which it exists. Thus, an agency cannot summarily dismiss an employee for wearing a black armband on Moritorium Day,[30] but a Veterans Administration doctor can be fired for wearing a dove pin when that pin disturbs the psychiatric patients with whom he works.[31]

There are several decisions which consider the free speech rights of the public employee and his relationship to his employer. In *Meehan* v. *Macy*, the plaintiff, who was a Canal Zone policeman and president of the local policeman's union, circulated to the press an anonymous letter containing a derogatory poem about the governor in response to a plan for admitting more Panamanian natives into the local police force. In language quoted approvingly in *Arnett*, the court upheld the removal for conduct unbecoming a police officer.[32]

> We think it is inherent in the employment relationship as a matter of common sense if not of common law that a government employee . . . cannot reasonably assert a right to keep his job while at the same time he inveighs against his superior in public with intemperate and defamatory cartoons. Dismissal in such circumstances neither comes as an unfair surprise nor is so unexpected as to chill freedom to engage in appropriate speech.[33]

The Court went on to say that—

> While a free society values robust, vigorous and essentially uninhibited public speech by citizens, when such uninhibited public speech by Government employees produces intolerable disharmony, inefficiency, dissension and even chaos, it may be subject to reasonable limitations, at least concerning matters relating to the duties, discretion and judgment entrusted to the employee involved.[34]

However, in *Tygrett* v. *Washington*,[35] a probationary policeman with the District of Columbia police department was fired after being reported in the paper as having made statements in favor of a "sick-in" by police officers if a Congressional pay raise was not passed. The district court found that the statements were not protected since they disrupted the operations of the police department. On appeal, however, the Court of Appeals reversed on the ground that there was no evidence in the record to show that the statements had an actual deleterious effect on the operations of the department. That court noted:

> "Policemen, like teachers, and lawyers, are not relegated to a watered-down version of constitutional rights." To be sure, as a police-

> man appellant was bound to a high standard of accountability for comments made to fellow officers or to the public. He could not, however, be banished from the force "on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech." Rather, his discharge could be justified only by a specific finding that the statements in question adversely affected his efficiency as a police officer or the efficiency of the Department as a police force.[36]

Thus, a Peace Corps volunteer in Chile could not be dismissed for writing a letter to a local newspaper criticizing U.S. involvement in Vietnam since he was not sufficiently high in the agency for his statements to have an adverse effect on their program[37] but a "Declaration of Conscience" by VISTA volunteers opposing U.S. involvement in the Vietnam War was found not to be protected since it "conflicted with a definite goal of VISTA, detracted time and effort from the primary work of the volunteers, promoted dissension between volunteers and their superiors, and generally interfered with the regular operation of VISTA.[38]

The protection or lack thereof of the speech in question clearly depends upon where it is spoken and who hears it. A teacher at a Navy Dependents School on Midway Island was removed for a written statement accusing the principal of the school of incompetence and lack of ethics.[39] In holding that it was far from clear that protected speech was not involved, the court noted a significant difference from *Pickering* in that the teacher only distributed the statements to four individuals all of whom had official responsibilities either in regard to the school or the teaching profession, whereas *Pickering's* letter was published in a newspaper. Similarly, an instructor assigned by the Department of Defense to teach English to foreign nationals could make any statements he wished concerning the Vietnam War in private to his friends but could be removed for making the same statements in the classroom.[40]

In an analogous era of evolving personnel law, the connection or "*nexus*" between an employee's conduct and the efficiency of the service has become all important. I say analogous because if one looks at the *Tygrett* decision closely you can see that the speech there lacked any *nexus* to efficiency of the service since there was no showing that "the speech in question adversely affected his efficiency as a police officer or the efficiency of the Department as a Police force." In *Norton* v. *Macy*, the Court of Appeals for the District of Columbia held that a federal employee could not be dismissed for homosexuality unless a *nexus* could be shown between the homosexual conduct and the efficiency of the service. That court noted:

> [A] finding that an employee has done something immoral or indecent could support a dismissal without further inquiry only if all immoral or indecent acts of an employee have some ascertainable deleterious effect on the efficiency of the service. The range of conduct which might be said to affront prevailing mores is so broad and varied that we can hardly arrive at any such conclusion without reference to specific conduct. Thus, we think the sufficiency of the charges against appellant must be evaluated in terms of the effect on the service of what in particular he had done or had been shown to be likely to do.[41]

From *Norton* has come a line of cases holding that what an agency or even the general public might think of as immoral cannot be grounds for removal or disqualification without a thorough analysis of what job is in question, the nature of the activity, and how it would effect that job and agency. A postal clerk cannot be removed merely for living discretely with a woman to whom he is not married.[42] However, it has been held that a homosexual activist can be declared unsuitable for engaging in publicity seeking activities in which he often identifies himself as a federal employee in the course of such activities or publicity.[43] A mere finding that the employment of a homosexual person in the government service might bring that ser-

vice into disrepute is too general and unspecific to demonstrate a tangible detriment to the federal service.[44] When presented with evidence that a homosexual had engaged in prior behavior that included solicitation on the job, however, the government had a right to inquire further to determine whether such activity was likely to recur and to disqualify an applicant who refused to cooperate.[45]

Some activities are clearly related to the efficiency of the service, and the *nexus* can be presumed. This is true of criminal activities, particularly homicide.[46] But, in most instances the trend is clear—discipline for off-the-job conduct can only be effected on a clear finding that such conduct has a direct and substantial effect on the performance of the activity's mission. This has been found to be true, for example, by the reluctance of courts to uphold a dismissal where an employee has been fired for the nonpayment of a single debt.[47]

As noted earlier *nexus* concepts extend into constitutional rights areas such as free speech. They are indeed the overlay to all areas of personnel law. Thus, in the equal employment opportunity area the Supreme Court used *nexus* concepts, in *McDonnell Douglass* v. *Green,* in noting that an employer could refuse to rehire a person who had engaged in unlawful conduct directed against the company.[48]

Likewise, in *Sugarman* v. *Dougall,* the Supreme Court struck down New York State's across-the-board prohibition on employment of aliens in clear *nexus* language:

> We hold that a flat ban on the employment of aliens in positions that have little, if any, relation to a state's legitimate interest, cannot withstand scrutiny under the Fourteenth Amendment.

As if to drive home the *nexus* point the court continued:

> Neither do we hold that a State may not, in an appropriately defined class of positions, require citizenship as a qualification for office. Just as "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections," . . . "each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen . . ."
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> And this power and responsibility of the State applies not only to the qualifications of voters, but also to persons holding state elective or important non-elective executive, legislative and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government. There as Judge Lumbard phrased it in his separate concurrence is "where citizenship bears some rational relationship to the special demands of the particular positions."[49]

In other words, in such cases a *nexus* exists between citizenship and the positions.[50]

The First Amendment and *nexus* cases also demonstrate another judicial trend, namely the increased emphasis on constitutional rights. In addition to the free speech issues in *Arnett* v. *Kennedy, supra,* the plaintiff had urged that Civil Service regulations and the Veterans Preference Act were unconstitutional in not providing for a hearing prior to termination. This argument was based on earlier decisions of the Supreme Court which had held that an individual's property could not be taken without a prior hearing.[51]

The Supreme Court held—in an *Arnett* opinion signed by three judges and concurred in for different reasons by three other judges—that the statutory and regulatory procedures for the removal of nonprobationary employees are constitutionally adequate. The three judges who wrote the plurality opinion on that question held that the same statute granting federal nonprobationary employees the right not to be removed except for the efficiency of the service also provided the procedures by which that "cause" would be determined and "we decline to conclude that the substantive right may be viewed wholly apart from the procedure provided for its enforcement."

The employee's statutorily defined right is

> not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause.[52]

Thus, the plurality opinion, written by Mr. Justice Rehnquist, reasoned that the nature of an employee's interest in continued federal employment is necessarily defined and limited by the procedures created by Congress and no additional procedural protections are required by the Constitution other than those expressly provided in the statute.

In a concurring opinion, Justices Powell and Blackmun agreed that the act is constitutional but based that conclusion on different reasoning. They concluded that when statutory provisions guarantee continued employment in the absence of "cause" for discharge, the employee has a property interest in his job which is subject to Fifth Amendment protections. Hence, the employee may not be removed without notice and a hearing. The question remaining was therefore the appropriate time for that hearing. The judges then balanced the interest of the government (maintenance of employee efficiency and discipline) against the interest of the employee (continuation of his income during the interim) and concluded that a post-termination hearing satisfied the requirements of due process.

Mr. Justice White, in a separate opinion, expressed his belief that due process requires a pre-termination hearing but found that the provisions in the statute for 30-days notice and the right to make a written presentation satisfied that requirement. However, Mr. Justice White found that Kennedy had been denied due process in that the same person who made the initial charges against him (and whom he had accused of taking a bribe) also made the final decision on termination. White concluded that due process requires an impartial hearing officer at the preliminary hearing stage. Both the majority and concurring opinions responded to this last statement. In each case they found there is no statutory requirement of an impartial decisionmaker at the preliminary stage and no such constitutional requirement. This is explainable because neither the opinion for the court nor the concurring opinion find a need for, nor place much emphasis on, pre-termination procedures. Therefore, the fact that an impartial decisionmaker would preside at the post-termination appeal stage would cure any possible error.

Three judges dissented on the basis of their opinion that the Constitution requires a full-blown hearing prior to the discharge of a nonprobationary federal employee.

Beyond considering the question of the property rights of federal employees, in *Arnett*, the court also reiterated its position, taken earlier in *Board of Regents* v. *Roth*, that the deprivation of a liberty interest of a public employee entitled him to a hearing. That liberty interest was defined as:

> . . . not offended by dismissal from employment itself, but instead by dismissal based upon an unsupported charge which could wrongfully injure the reputation of an employee.[53]

This concept has taken on considerable importance for the courts when dealing with the rights of federal employees having something less than career status. The provisions of Civil Service Commission regulations providing for summary removal of probationers have been subject to several attacks in the courts as being an unconstitutional deprivation of their liberty and property rights. All the courts that have considered this question have held that probationary employees do not have sufficient property rights to entitle them to a hearing upon termination.

In *Sampson* v. *Murray, supra*, the court notes:

> We are dealing in this case not with a permanent Government employee, a class for which Congress has specified certain substantive and procedural protections, but with a probationary employee, a class which Congress has specifically recognized as en-

titled to less comprehensive procedures. . . . It is also clear from other provisions in the Civil Service statutory framework that Congress expected probationary employees to have fewer procedural rights than permanent employees in the competitive service. For example, preference eligibles, commonly veterans, are entitled to hearing procedures extended to persons in the competitive service only *after they have completed* "a probationary or trial period." (Emphasis in original)[54]

As noted in *Sayah* v. *United States of America,* probationary employees do not have a property right in their employment sufficient to give them a due process right to a hearing since "a probationary employee is not promised a lasting job after one year or even that he is guaranteed a full year's stay."[55] The court noted that the regulation "unambiguously sets forth a 'watchful waiting' period in which the probationer can be terminated."[56]

However, if a probationer is stigmatized by his removal and if, in essence, the cause for the removal would effectively preclude him from obtaining other employment, he is entitled to a hearing. Such stigmatization constitutes the deprivation of a liberty interest.[57] Mere removal alone is not such a deprivation.[58] However, a "dismissal which becomes public and which suggests immorality or dishonesty necessitates due process."[59]

This same issue is being litigated regarding federal excepted-service employees. As yet, no recent court decisions have been issued on this point.[60]

In *Lindsay* v. *Kissinger,*[61] the court held that the State Department's regulations and procedures governing the selection-out for inadequate performance of officers in the Foreign Service of the United States Information Agency (USIA) without notice are constitutionally defective in that they deny him the right to be heard and the right to confront his accusers.[62] In light of the later decisions in *Arnett* v. *Kennedy, supra,* this decision is subject to question. The starting point in an analysis of the question presented is to determine "the nature of the interest at stake . . . we must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property."[63] The court found that plaintiff had a property interest because of an "expectation of continued employment absent an official finding of inadequate performance." But such expectation cannot withstand analysis.

Unlike civil service employees who have protections of the Veterans Preference Act or competitive civil service employees covered by the Lloyd–LaFollette Act, who can only be discharged for "such cause as will promote the efficiency of the service" as determined by certain procedures (5 U.S.C. § 7501) and, hence, have tenure, Foreign Service Officers were specifically denied tenure by the Foreign Service Act of 1946. It is obvious that even if all Foreign Service Officers met minimum qualifications and standards (or higher), ten percent of them would fall into the bottom tenth percentile and would be subject to selection-out. The mutual understanding between Lindsay and the State Department was not *an expectance of continuation of employment but, rather, an annual review of his employment by selection boards for selection-out purposes.* Rather than tenure, plaintiff was in the same position as a probationary employee—continuously subject to review, without tenure, for selection-out purposes. In effect, plaintiff had a year-to-year employment which could be terminated by the State Department at any time as a consequence of its selection-out techniques. While the court is correct, in that "Congress, by appropriate legislation, determined some time ago that officers, once appointed, should not have permanent tenure . . .," it is incorrect when it uses Lloyd–LaFollette language (failure to maintain minimum standards . . . to "promote the overall efficiency of the services . . .") to define the selection-out process. In one sweep, the court has recognized that plaintiff lacks tenure while defining his rights as tenure. That part of the Act in question, 22 U.S.C

1003, provides for selection-out on the basis of an officer not measuring up to the standards of his class and has been specifically differentiated from 22 U.S.C. 1007 referring to removal for cause and using the terminology "efficiency of the service."[64] The "mutually explicit understanding" that plaintiff lacks tenure and is subject to the selection-out process is further demonstrated by the wide publicity given to the selection-out system in the State Department. Thus, plaintiff's interest in continued employment is "created and [its] dimensions are defined" by the very selection-out process and system which is set aside by the court in favor of the type of hearing which is reserved for tenured employees.[65]

Aside from the "property interest" argument discussed above, the court apparently found a constitutionally protected "liberty" interest arising out of a supposed "stigma" associated with selection-out. But no such stigma attaches to selection-out.

Unlike the situation in *Wisconsin* v. *Constantineau, supra,* the State Department did not brand plaintiff with "a badge of infamy" and post it all over the state. Instead, plaintiff was simply involuntarily retired from his position because he ranked lower than others. The parameters of alleged stigma is also defined in *Board of Regents* v. *Roth*:

> The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' *Wisconsin* v. *Constantineau,* 400 U.S. 433, 437. *Wieman* v. *Updegraff,* 344 U.S. 183, 191; *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123; *United States* v. *Lovett,* 328 U.S. 303, 316-317; *Peters* v. *Hobby,* 349 U.S. 331, 352 (concurring opinion). See *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 898. In such a case, due process would accord an opportunity to refute the charge before University officials. In the present case, however, there is no suggestion whatever that the respondent's interest in his 'good name, reputation, honor or integrity' is at stake.
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> Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in State universities. Had it done so, this, again, would be a different case. For '[t] be deprived not only of present government employment but of future opportunity for it is no small injury . . .' *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra,* at 185 (Jackson, J., concurring). See *Truax* v. *Raich,* 239 U.S. 33, 41. The Court has held, for example, that a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities 'in a manner . . . that contravene[s] due process,' *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 238, and, specifically, in a manner that denies the right to a full prior hearing. *Willner* v. *Committee on Character,* 373 U.S. 96, 193. See *Cafeteria Workers* v. *McElroy, supra,* at 898. In the present case, however, this principle does not come into play.[66]

Here, too, the State Department did not base discharge on a charge of "dishonesty or immorality;" nor did State draw into issue plaintiff's "good name, reputation, honor, or integrity;" nor did State "invoke any regulations to bar the respondent from all other public employment;" nor foreclose plaintiff's eligibility for a professional license. "Mere proof, for example, that his record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of 'liberty' ".[67] While any reason for dismissal, other than a reduction in force, is likely to have some reflection on ability, temperament, or character, not every dismissal involves a stigma in a constitutional sense.[68] To so hold would be to make the exceptional case for hearing [stigma] into the general and would require hearings in all

discharge cases except perhaps for reduction in force.[69] Indeed, discharge by selection-out is clearly less of an indication of lack of ability than is discharge of a civil service probationer since selection-out does not result, necessarily, from lack of ability or even, as the court below erroneously believed, from lack of meeting certain minimum standards. Rather, it is a function of competitive ranking among one's peers. Unlike probationers, some Foreign Service Officers must be in the bottom tenth percentile and some must be subject to selection-out.

Another area in which the courts have been given scrupulous attention to the constitutional rights of federal employees has been that of the protection of Fifth Amendment rights against self incrimination. Clearly, a federal employee cannot be removed for failure to answer questions put to him during an investigation where his answers might put him in jeopardy of criminal prosecution and where he is not informed that his answers will not be used in such a criminal prosecution.[70] As the Supreme Court has noted in *Gardner* v. *Broderick*:

> The mandate of the great privilege against self-incrimination does not tolerate the attempt regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment.[71]

The privilege against self incrimination is so strong that the mere comment by the Civil Service Commission on the fact that an employee refused to answer a question put to him, although he was removed on other grounds, was sufficient to invalidate the removal.[72] However, testimony obtained under a threat of removal for failure to answer can be used as a basis for removal since the nature of that threat removes any possibility that the fruits of the testimony could be used in any subsequent criminal trial.[73]

On the other hand, employees have no abstract right to be represented by counsel when being interviewed by their employer. Just this past term the Supreme Court in *National Labor Relations Board* v. *Weingarten, Inc.*,[74] a private employment case, held that it was an unfair labor practice, violative of § 7 of the National Labor Relations Act ("to engage in . . . concerted activities for mutual aid and protection," a clause not found in E.O. 11491, the federal labor relations order) for an employer to discharge an employee for refusing to be interrogated in a situation which reasonably looked toward discipline without allowing the employee union representation. But, significantly, while the court held that the employer could not insist on the unrepresented interview, the employee had no right to such representation but instead could refuse to discuss the matter if requested union representation was denied by the employer. In an interesting sidelight the court noted:

> The employer has no obligation to justify his refusal to allow union representation and despite refusal, the employer is free to carry on his inquiry without interviewing the employee and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and foregoing any benefits that might be derived from one.[75]

The judicial trend in the personnel area is a clear trend in the direction of protecting the employee from any exclusion from public employment or loss of such employment already held on the basis of any activities on his part not related to the performance of his job. The public employee does not relinquish his constitutional rights when crossing the threshold of his office. Nor can his off the job conduct, if it is unrelated to the activities of his agency or the performance of his own duties, form the basis of disqualification or removal. On the other hand, when his constitutional rights are not at issue, he is protected in his employment relationship only to the extent that statute or regulation provides him with safeguards against what the courts speak of as arbitrary or capricious agency action. In every instance, what is

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sought is a *nexus*, a relationship, between whatever conduct is at issue and that most important concept "the efficiency of the public service."

### Notes

1. 177 U.S. 290, 293, (1899). As the Court noted:

> The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power. In the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment.

See also, *Eberlein* v. *United States*, 257 U.S. 82 (1921); In the *Matter of Hennan*, 13 Pet. 230, 246, 259. The U.S. Supreme Court has consistently maintained the position that the rights of federal employees are governed by statute; that specifically referring to the question of dismissal, they have only such protection as Congress has seen fit to extend. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886 (1961) ("It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer"); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Sampson* v. *Murray*, 415 U.S. 61 (1974).

2. The Lloyd-LaFollette Act, adopted in 1912, was cited as 5 U.S.C. § 652(a). Part of it is now codified as 5 U.S.C. § 7501. This section provides that an individual in the competitive service may be removed "only for such cause as will promote the efficiency of the service," and further requires that he be given notice of the charges, a reasonable time to answer and a written decision as soon as practicable.

3. The Veterans Preference Act was originally cited as 5 U.S.C. § 863. Parts of that act are now codified as 5 U.S.C. § 7512. That statute gives a preference eligible (veteran) employee the right to be removed only for such cause as will promote the efficiency of the service, 30 days written notice, a reasonable time to answer and notice of an adverse decision. The provisions of the act were extended to all employees in the competitive service in 1962 by Executive Order 11491.

4. 5 CFR Part 752.

5. See Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law," 81 *Harvard Law Review* 1439 (1968); Comment, "The Right of Federal Agencies to Control the Private Lives of their Employees—Some Recent Developments," 21 *Catholic University Law Review* 596 (1972); Weymann, *Civil Rights and the Public Employee* 31-33 (1971).

6. *Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Fitzgerald* v. *Hampton*, 467 F.2d 755 (D.C. Cir. 1972).

7. *Slochower* v. *Board of Education*, 350 U.S. 551 (1956); *Torcaso* v. *Watkins*, 367 U.S. 488 (1961).

8. *United Public Workers* v. *Mitchell*, 330 U.S. 100 (1947); *Garner* v. *Los Angeles Board of Public Works*, 341 U.S. 716 (1951), concurring opinion of Mr. Justice Frankfurter at 725.

9. *Wieman* v. *Updegraff*, 344 U.S. 183, 192 (1952); *Scott* v. *Macy*, 349 F.2d 182 (D.C. Cir. 1965); *Bruns* v. *Pomerleau*, 319 F. Supp. 58 (D. Md. 1970).

10. *Ibid.*

11. *Scott* v. *Macy*, 349 F.2d 182, 183-4 (D.C. Cir. 1965); *Norlander* v. *Schleck*, 345 F. Supp. 595 (D. Minn. 1972).

12. *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *Service* v. *Dulles*, 354 U.S. 363, 372 (1957) ("regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and this principle holds even when the administrative action under review is discretionary in nature."). This principle applies even where an agency could have summarily removed an employee who, as a member of the excepted service had no rights under the Veterans Preference Act, but since he was gratuitously given a reason for his removal and that reason involved national security, he was entitled to the procedural rights of employees removed on national security grounds. *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959). Under the *Vitarelli* doctrine, the employee must be given the greatest procedural protection to which he is entitled under any possible regulatory standards. See *Cole* v. *Young*, 351 U. S. 536 (1955). Accord: *Slowick* v. *Hampton*, 470 F.2d 467 (D.C. Cir. 1972); *O'Shea* v. *Blatchford*, 346 F. Supp. 742 (S.D.N.Y. 1972); *Massman* v. *Secretary of Housing and Urban Development*, 332 F. Supp. 894 (D.D.C. 1971).

13. *Hargett* v. *Summerfield*, 249 F.2d 29 (D.C. Cir. 1957).

14. *McTiernan* v. *Gronouski*, 337 F.2d 31, 34 (2nd Cir. 1964).

15. *Finfer* v. *Caplan*, 344 F.2d 38, 40-41 (2nd Cir.), *cert. denied, sub nom Finfer* v. *Cohen*, 382 U.S. 883 (1965).

16. *Charlton* v. *United States*, 412 F.2d 290 (3rd Cir. 1969).

17. *Halsey* v. *Nitze*, 390 F.2d 142 (4th Cir.), *cert. denied*, 392 U.S. 939 (1968).

18. *Toohey* v. *Nitze*, 429 F.2d 1332 (9th Cir. 1970).

19. *Vigil* v. *Post Office Department*, 406 F.2d 921 (10th Cir. 1969).

20. *Polcover* v. *Secretary of the Treasury*, 477 F.2d 1223 (D.C. Cir. 1973); *Dabney* v. *Freeman*, 358 F.2d 533 (D.C. Cir. 1965). In the equal employment opportunity area, the standard of review under 42 U.S.C. § 2000e-16 is currently evolving, but appears to require that there be more than substantial evidence in the record to justify the agency decision. Thus, some courts are requiring that the absence of discrimination be shown by the preponderance of the evidence. *Hackley* v. *Johnson*, 360 F. Supp. 1247 (D.D.C. 1973), appeal pending, cited with approval in *Salone* v. *United States*, 511 F.2d 902 (10th Cir. 1975), and *Chandler* v. *Johnson*, 9th Cir. No. 74-1596 (April 25, 1975). However, other courts have found a substantial evidence standard to be adequate, *Leinster* v. *Engman*, 8 E.P.D. Paragraph 9774 (D.D.C. 1974) while in yet other decisions the complainant has been required to prove discrimination by a preponderance of the evidence. *Abrams* v. *Johnson*, 383 F. Supp. 450 (N.D. Ohio 1974).

21. *McAuliffe* v. *Mayor, etc.*, of *City of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892).

22. 391 U.S. 563 (1968).

23. *Ibid.*

24. 416 U.S. 134 (1974).

25. *Kennedy* v. *Sanchez*, 349 F. Supp. 863 (N.D. Ill. 1972).

26. 40 L. Ed. at 38.
27. 392 F.2d 822 (D.C. Cir. 1968).
28. 413 U.S. 548 (1973).
29. 413 U.S. at 578 & 579.
30. *Peale* v. *United States,* 325 F. Supp. 193 (N.D. Ill. 1971).
31. *Smith* v. *United States,* 502 F.2d 512 (5th Cir. 1974).
32. 40 L. Ed. at 37.
33. 392 F.2d at 835.
34. 392 F.2d at 833.
35. 346 F. Supp. 1247 (D.D.C. 1972).
36. *Tygrett* v. *Washington,* D.C. Cir. No. 1392-72 (October 23, 1974).
37. *Murray* v. *Vaughn,* 300 F. Supp. 698 (D.R. I. 1969).
38. *Murphy* v. *Facendia,* 307 F. Supp. 353 (D. Colo. 1969). See also *Ianarelli* v. *Morton,* 327 F. Supp. 873 (E.D. Pa. 1971), *aff'd,* 463 F.2d 179 (3rd Cir. 1972) ("A proper balance between freedom of expression and discipline in government service should not unreasonably restrain expressions of opinion and should permit and encourage full inquiry into allegations of racial and religious discrimination. Yet, at the same time, this balance would protect these rights without an unwarranted restriction of the right of the government to discipline those employees whose conduct unjustifiably causes demonstrable adverse impact on the efficient operation of the government.").
39. *Ring* v. *Schlesinger,* 502 F.2d 479 (D.C. Cir. 1974).
40. *Goldwasser* v. *Brown,* 417 F.2d 1169 (D.C. Cir. 1969), *cert. denied, sub nom Goldwasser* v. *Seamans,* 397 U.S. 922 (1970). Another issue which arises in this context is the question of whether the statements were made with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 279 (1964). An employee is entitled to first amendment protection only where the statements are not made with actual malice. *Ruderer* v. *United States,* 188 Ct. Cl. 456, 412 F.2d 1285 (1969), *cert. denied,* 398 U.S. 914 (1970). cf. *Old Dominion Branch No. 496 N.A.L.C.* v. *Austin,* 412 U.S. 917 (1974). However, in some instances, such as sending anonymous letters to the wife of a fellow employee accusing him of wrongdoing, the malice can be presumed. *Krennrich* v. *United States,* 169 Ct. Cl. 6, 340 F.2d 653 (1965).
41. 417 F.2d 1161 (D.C. Cir. 1969).
42. *Mindel* v. *United States Civil Service Commission,* 312 F. Supp. 485 (N.D. California 1970).
43. *Singer* v. *United States Civil Service Commission,* (W.D. Wash. March 29, 1974), *appeal pending,* cf. *McConnell* v. *Anderson,* 451 F.2d 193 (8th Cir. 1971). While the courts have been virtually unanimous in holding that homosexuality per se cannot be grounds for exclusion from public employment, there has been a marked reluctance to place them in positions where they may cause a disturbance or effect the lives of young people. *Burton* v. *Cascade School District Union High School,* ——— F.2d ——— (9th. Cir. 1975); *Acanfora* v. *Board of Education of Montgomery County,* 359 F. Supp. 843 (D. Md. 1973), *rev'd on other grounds,* 491 F.2d 498 (4th Cir. 1974). But see *Anonymous* v. *Macy,* 398 F.2d 318 (5th Cir. 1968) which held that an administrative determination that an employee was validly dismissed for homosexuality was "not reviewable as to the wisdom or good judgment of the department head in exercising his discretion." The case is a throwback to decisions reviewing only for procedural compliance and of doubtful validity today.
44. *Society for Individual Rights* v. *Hampton,* N.D. California, October 31, 1973.
45. *Richardson* v. *Hampton,* 345 F. Supp. 600 (D.D.C. 1972). This issue frequently arises in the context of the granting or denial of security clearance. In *Wentworth* v. *Schlesinger,* 490 F.2d 740 (D.C. Cir. 1973) the court noted that "homosexual activity may be considered in determining the issue of security clearance in a situation where the acceptable degree of risk to the national security is less than the risk to the efficiency of the service with respect to civil service employment generally."
46. *Gueory* v. *Hampton,* D.C. Cir. October 1974.
47. *White* v. *Bloomberg,* 345 F. Supp. 133 (D. Md. 1972). An employee can be removed however, for being a "deadbeat" and running up multiple debts which interfere with his performance on the job. *Norton* v. *Macy, supra; Robinson* v. *Blount,* 472 F.2d 839 (9th Cir. 1973).
48. 411 U.S. 792 (1973).
49. 413 U.S. 634 (1973).
50. The issue of the employment of aliens by the federal government has not as yet been settled. *Mow Sun Wong* v. *Hampton,* 500 F.2d 1031 (9th Cir. 1974), review granted 43 U.S.L.W. 3044 (1974), set down for reargument.
51. A hearing prior to termination had been required before the termination of welfare benefits, *Goldberg* v. *Kelly,* 397 U.S. 254 (1970); prejudgment replevin, *Fuentes* v. *Shevin,* 407 U.S. (1972); prejudgment garnishment *Snaidach* v. *Family Finance Corp.,* 395 U.S. 337 (1969).
52. 40 L. Ed. at 32. See also *Snead* v. *Dept of Social Services* 355 F. Supp. 764 (S.D.N.Y. 1973) vacated 416 U.S. 977 (1974), for an application of *Arnett* to a state employment situation.
53. 408 U.S. 564 (1972).
54. 415 U.S. at 80.
55. 355 F. Supp. 1008 (C.D. Calif. 1973).
56. See also *Donovan* v. *United States,* 433 F.2d 522 (D.C. Cir. 1970); *Jaegar* v. *Freeman,* 410 F.2d 528 (5th Cir. 1969); *Medoff* v. *Freeman,* 362 F.2d 472 (1st Cir. 1966); *Krukar* v. *Alexander,* 386 F. Supp. 1112 (N.D. Ill. 1974).
57. *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1970).
58. *Jenkins* v. *United States Post Office,* 475 F.2d 1256 (9th Cir. 1973), *cert. denied,* 414 U.S. 866 (1974); *Shirck* v. *Thomas,* 486 F.2d 691 (7th Cir. 1973). But see *Wilderman* v. *Nelson,* 467 F.2d 1173 (8th Cir. 1972). The question of what constitutes a stigma has never been adequately resolved although it appears that an accusation of disloyalty might meet the criteria. See the Supreme Court's vacation of *Bennett* v. *United States,* 356 F.2d 525 (Ct. Cl. 1966) on the basis of the dissenting opinion of Judge Davis to the Court of Claim's decision.
59. *Hirsch* v. *Green,* 368 F. Supp. 1061 (D. Md. 1973).
60. *H. Tim'Hoffman, et al.* v. *Howard Phillips,* U.S.D.C. N.D. Calif. No. C-73-0751ACW (Filed May 7, 1973). In *McGinty* v. *Brownell,* 249 F.2d 124 (D.C. Cir. 1957), the court held that a Schedule A, Excepted Service employee had no appeal rights under statute or regulation. Considering the changes in the law in the last 18 years it would seem that a court considering the question today would be obligated to at least

cases involving probationary employees, it would probably reach the same result.

61. 367 F. Supp, 949 (D.D.C. 1973).

62. That decision has been held not to be retroactive. *Bergstrom* v. *Kissinger*, 387 F. Supp. 794 (D.D.C. 1974).

63. 416 U.S. 134 (1974).

64. See *Chwat* v. *United States*, 175 Ct. Cl. 392 (1966).

65. See *Arnett* v. *Kennedy*, 416 U.S. 134 (1974).

66. 408 U.S. at 573-74.

67. 408 U.S. at footnote 13.

68. See, *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886 (1961).

69. C.I., *Meaby* v. *Freeman*, 362 F.2d 472 (1st Cir. 1966).

70. *Kalkines* v. *United States*, 473 F.2d 1391 (Ct. Cl. 1973).

71. 392 U.S. 273 (1968) at 279. See also *Uniformed Sanitation Men Association, Inc.* v. *Commission of Sanitation of the City of New York*, 392 U.S. 280 (1968); *Garrity* v. *New Jersey*, 385 U.S. 493 (1967); *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973).

72. *Schwartz* v. *Secretary of the Treasury*, 364 F. Supp. 344 (D.D.C. 1973).

73. *Womer* v. *Hampton*, 496 F.2d 99 (5th Cir. 1974).

74. No. 73-1363 (February 19, 1975).

75. Slip opinion p. 7.

without regard to any suggested procedural steps when he deems it necessary or advisable in the interests of the United States.

**d. CRITERIA**

(1) WORK AND EFFICIENCY. An employee who fails to meet the work and efficiency requirements of his Career Service or fails to adequately perform the duties of the position to which he is assigned should be considered for separation from that Career Service and possibly the Agency. If the Deputy Director or Head of Career Service having jurisdiction concludes that the individual should be separated from the particular Career Service, he will forward the case with all pertinent documentation to the Director of Personnel for further processing as set forth in subparagraph f below.

(2) THE FIRST-YEAR TRIAL PERIOD. Deputy Directors and Heads of Career Services are responsible for identifying employees under their jurisdiction who do not successfully complete the first-year trial period. The Deputy Director or Head of Career Service, or his representative, will notify the Director of Personnel before the close of the first-year trial period when an employee has failed to meet the applicable employment standards.

(3) SECURITY AND MEDICAL STANDARDS. The Director of Security and the Director of Medical Services will make appropriate recommendations to the Director of Personnel when an employee does not meet Agency security or medical standards.

(4) STANDARDS OF CONDUCT. The Agency standards of employee conduct are prescribed in HR [redacted] Deputy Directors will ensure that appropriate officials take or initiate corrective or disciplinary action as necessary or, if warranted, forward a recommendation for separation to the Director of Personnel if an employee fails to meet Agency standards of conduct. Whenever the Director of Personnel is informed that an employee has failed to meet Agency standards of conduct, he will, if the matter is of a serious nature, review the case with the Deputy Director responsible for the employee's organization of assignment and the Head of the employee's Career Service, if different. He may, in coordination with the Deputy Director concerned, conduct an investigation if this is required. If the Director of Personnel concludes that the individual should be separated, he will forward his recommendation with appropriate documentation through the Deputy Director concerned with the employee's organization of assignment and the Head of the employee's Career Service, and, if appropriate, to the Director of Central Intelligence. 25X1

(5) SELECTION OUT. It is the policy of the Agency to improve the overall level of employee performance by separating those employees whose qualifications and potential are low in comparison with those of other employees of the same grade and occupational category. Heads of Career Services are responsible for recommending the separation of personnel under their jurisdiction.

(6) OTHER. In addition to (1) through (5) above, employees may be terminated upon a finding by the Director of Central Intelligence that such termination is necessary and advisable in the interest of the Agency or for such other reasons as the Director may find will advance the efficiency of the Agency.

**e. RESPONSIBILITIES**

(1) HEADS OF CAREER SERVICES. Heads of Career Services are responsible for identifying employees under their jurisdictions who should be con-

SEPARATION

# Court Orders New Selection Out Pro[illegible]dures



[illegible] and Pemple G. Cole, FSO's, filed a class action lawsuit last June attacking the Department's standard of performance selection out policies and procedures. Later, USIA's selection out policies and procedures were brought into issue by two FSIO's who joined in the law suit.

United States District Court Judge Gerhard A. Gesell ruled on December 12 that the selection out procedures of the Department and USIA lacked procedural due process and were therefore deficient.

The Court was swayed by a recent line of Supreme Court decisions which have sharply extended the procedural rights of public employees facing dismissal for cause where the dismissal carries with it a stigma.

In order to cure the found deficiences in the present State-USIA selection out procedures, the Court ordered (1) that an officer be provided with full notice as to the basis for his proposed selection out, including all materials concerning him that were considered by the appropriate selection boards, (2) that an officer be afforded a hearing at which to present evidence on his behalf and to confront adverse witnesses personally or by affidavit, (3) that an officer be permitted representation at such a hearing by retained counsel at his own expense, and (4) that an officer seeking a hearing be returned to Washington, D.C., at agency expense.

Judge Gesell opted not to prescribe detailed methods for the conduct of such hearings and concluded: "Experience will dictate methods for developing a fair hearing consistent with these rights without turning the process into an unduly formal adversary trial. The Board (Special Review Panel) may, of course, impose strict rules of relevance and materiality and, obviously, any fact that has been the subject of a formal grievance hearing need not be reheard."

Although the Court invalidated the selection out procedures, it rejected contentions that the standard of performance criteria of the Department and USIA were illegal. The Court stated:

". . . the Court finds no ground for plaintiffs' effort to require a greater specificity of standards for determining who will be selected out. These have already been adequately defined. The matter cannot be reduced further to a mathematical precision. Professional competence is not susceptible to such treatment. Moreover, there is nothing in the Foreign Service Act of 1946 or the Constitution which prevents budgetary considerations from affecting the particular selection out percentiles."

The Court also rejected a contention that the prescribed standards of performance were null and void for failure of publication in the Federal Register.

The Department and USIA have accepted the District Court's decision which affects *only* officers presently on the rolls and subject to selection out on standard of performance grounds. The Court's order d deal with selection out on class grounds, or with office had been selected out in the pa

The Department shall as ority matter correct the four ciencies in its procedures a consult with the American Service Association, the exclus ployee representative, towar end, officials said.

The Department is confide the necessary reforms will, in Gesell's words, ". . . in the lo result in better informed judgm particular cases. At the same ti laudable and necessary proced weeding out marginal officers interests of efficient and ef competitive foreign service ag will be preserved as Congress desired."

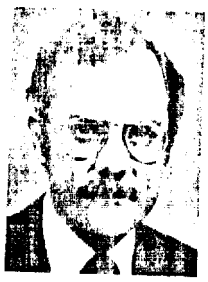
# *Officers Honored for Paperwork Managem*

Three Department officers were presented a group award for distinguished accomplishment at the Ninth Annual Federal Government Paperwork Management Awards luncheon sponsored by the Association of Records Executives and Administrators (AREA) at the Twin Bridges Marriott Motor Hotel on November 6.

Cited were Alex C. Adrian, Chief of the Vocabulary Maintenance Staff, Foreign Affairs Document and Reference Center, O/FADRC; William F. Farrell, Jr., Acting Chief of the Records and Reports Management Staff, O/FADRC; and Denis Lamb, Chief of the User Support Se Staff, Information Systems O/ISO.

Mr. Adrian

Mr. Farrell



Mr. Lamb

The three were honored for "distinguished work in the U States Government exemplifyi an outstanding manner the h characteristics of public s through paperwork improvemen simplification."

Mr. Adrian, Mr. Farrell and Lamb jointly designed and i mented certain key componen the centralized Automated I ment Storage and Retrieval Sy for the Department.

The new system has a far-reac impact on paperwork in the De ment, their citation pointed out.

"Hard-copy records will be e nated, storage space reduced, equipment reduced, indexing proved, retrieval expedited, and precise and improved reporting n possible.

"This system is estimated to $250,000 annually. While this re sents but a portion of the in investment, the expected accu lated savings combined with the efits of improved information dling and better service to the partment and other agencies i cated that a sound investment been made in developing a hi significant solution," the cita added.

John M. Thomas, Assistant Se tary for Administration, represen the Department at the ceremony. speaker at the awards luncheon Ambassador William Leonhart.

## *730 INVOLUNTARY RETIREMENT

### 731 Authority

Regulations relating to involuntary retirement of Foreign Service officers and to benefits such officers shall receive are prescribed under authority of sections 633 through 635 of the Foreign Service Act of 1946, as amended.

### 732 Kinds of Involuntary Retirement

### 732.1 Mandatory Retirement for Age

(See sections 672.2-3 and 672.2-6c.)

### 732.2 Retirement Through Maximum Time-in-Class

Any Foreign Service officer below the class of career minister who does not receive a promotion to a higher class within the period specified for the officer's class shall be involuntarily retired from the Service under the provisions of section 633 of the Foreign Service Act of 1946, as amended, and receive benefits in accordance with section 733, except as provided in section 734.

a. Foreign Service Officers of Classes 1 and 2

A Foreign Service officer of class 1 or 2 shall be involuntarily retired from the Service and receive benefits in accordance with section 733 of these regulations if the officer has remained in class 1 for 12 years or in class 2 for 10 years without promotion to a higher class.

b. Foreign Service Officers of Class 3, 4, and 5

Foreign Service officers of classes 3, 4, and 5 shall be involuntarily retired from the Service for maximum time-in-class under the criteria stated in subparagraph (1), (2), and (3) of this section and shall receive benefits in accordance with section 733.

(1) Except as provided in subparagraphs (2) and (3), the total cumulative maximum time that an officer now on active duty may remain in any combination of classes 5, 4, and 3 shall be 20 years, and, within this period, the maximum time that such an officer may remain in any one of these three classes shall be 15 years.

(2) An officer now in class 3 may remain in class until the expiration of the previous maximum time-in-class limit of 10 years for class 3, if that is more advantageous for the officer than the cumulative time specified in subparagraph (1).

(3) An officer in class 5 or 4 who has not attained eligibility to apply for voluntary retirement upon the expiration of the maximum time-in-class applicable to the officer's class under subparagraph (1) will not be separated because such time has expired until the officer attains eligibility to apply for voluntary retirement.

c. Foreign Service Officers of Classes 6 and 7

Foreign Service officers of classes 6 and 7 (nonprobationary) shall be involuntarily retired from the Service for maximum time-in-class under the criteria stated in subparagraphs (1), (2), (3), (4), and (5) of this section and shall receive benefits in accordance with section 733.

(1) A Foreign Service officer of class 6 who was appointed to that class by "lateral entry" must be nominated by the Department for promotion to class 5 within 5 years from the date of appointment to class 6. Otherwise, the officer shall be involuntarily retired within 6 months of the official notification of the officer's failure to achieve promotion.

(2) A Foreign Service officer of class 6 who was initially appointed to class 7 must be nominated by the Department for promotion to class 5 within 5 years from the date of appointment to class 7. Otherwise, the officer shall be involuntarily retired within 6 months of the official notification of the officer's failure to achieve promotion to class 5.

(3) A Foreign Service officer of class 6 who was initially appointed to class 8 must be nominated by the Department for promotion to class 5 within 7-1/2 years from the date of appointment to class 8. Otherwise, the officer shall be involuntarily retired within 6 months of the official notification of the officer's failure to achieve promotion to class 5. *

✻ (4) A Foreign Service officer of class 7 who was initially appointed to class 8 must be nominated by the Department for promotion to class 6 within 5 years from the date of appointment to class 8. Otherwise, the officer shall be involuntarily retired within 6 months of the official notification of the officer's failure to achieve promotion to class 6.

(5) A Foreign Service officer of class 7 who was appointed to that class by "lateral entry" must be nominated by the Department for promotion to class 6 within 4 years from the date of appointment to class 7. Otherwise, the officer shall be involuntarily retired within 6 months of the official notification of the officer's failure to achieve promotion to class 6.

(6) Officers who were in classes 6 and 7 before June 1971 will be subject to the previous maximum time in-class of 4 years. Such officers in classes 6 and 7 whose date of promotion by the Probationary Officer Selection Board was within 6 months of the convening of the annual Selection Boards will, if faced by maximum time-in-class, be extended to permit review by one additional Selection Board. Should such an officer not achieve promotion as a result of the recommendations of this additional Board, the officer will be involuntarily retired within 6 months of the official notification of failure to achieve promotion.

d. Probationary Foreign Service Officers of Classes 7 and 8

(See section 734.)

e. Computation of Time-in-Class

(1) Computation Date and Excepted Periods of Service

The period of service in class is computed from the effective date of appointment to the class and includes any minimum period of service in a class that may be required for promotion eligibility and all other periods of service, except:

(a) Periods of leave without pay in excess of 3 months;

(b) Periods of military furlough;

(c) Periods for which a Selection Board nonrated an officer on grounds of insufficient performance data; or

(d) Periods for which the Director General or Deputy Director General determines that an officer should be nonrated on the grounds of insufficient, incomplete, or inaccurate performance data.

(2) Notification to Nonrated Officers

In all such cases in which an officer is nonrated, the Director General or Deputy Director General notifies each officer in writing of the additional period in class to be granted.

(3) Restoration to Duty

An officer separated from the Service who is subsequently restored to duty retroactively to the date of separation does not have such period of separation included in the computation of time-in-class.

(4) Extension of Termination Date

If an officer reaches maximum time-in-class while serving in a position to which appointment was made by the President, the officer's retirement from the Service becomes effective upon completion of service in a position requiring Presidential appointment.

## 732.3 Retirement Through Failure to Meet Required Standard of Performance

Any Foreign Service officer below the class of career minister who fails to meet the standard of performance required for the officer's class is involuntarily retired from the Service under the provisions of section 633 of the Foreign Service Act of 1946, as amended, and receives benefits in accordance with section 733, except as provided in section 734.

a. Findings of Selection Boards

(1) Each Selection Board shall determine the standing of officers in relation to others in their class in accordance with the Precepts approved by the Deputy Under Secretary for Management, by and with the advice of the Board of the Foreign Service. ✻

* Any Foreign Service officer in classes 1 through 7 (nonprobationary) shall be presumed not to have maintained the performance standard required for the officer's class when the officer has been ranked by one or more Selection Boards while in the same class in such low percentiles or other substandard performance group as are annually determined to constitute the criteria for involuntary retirement for the officer's class. The cases of Foreign Service officers thus identified will be considered for involuntary retirement in accordance with the provisions of section 732.3b.

(2) The Board shall also designate, in accordance with the instructions in the Precepts, any officer who, in the opinion of the Board, should be denied the next step-increase in salary because the officer's services fail to meet the standard required for efficient conduct of the work of the Service.

b. Review of Findings of Selection Boards

(1) The record of each officer who is to be considered for involuntary retirement in accordance with the provisions of sections 732.3 and 732.3a(1) shall be reviewed by a Special Review Panel, which will determine those officers whose performance fails to meet the standard required of officers of their classes and whose records do not warrant their retention. The Special Review Panel will make positive recommendations to the Secretary of State that those officers so identified be involuntarily retired from the Service under the provisions of section 633 of the Foreign Service Act of 1946, as amended. The Secretary or the Secretary's designee will then make the final decision as to those officers who are to be separated.

(2) The records of those officers whom the Selection Boards have recommended should be denied the next step-increase in salary because their services fail to meet the standard required for efficient conduct of the work of the Service will be referred to the Director General of the Foreign Service, together with the findings and recommendations of the Selection Boards. The Director General will determine whether a step-increase shall be denied.

c. Documentation

Each Selection Board shall document its findings as required in the Precepts. The panel referred to in section 732.b(1), upon making a finding that an officer's performance fails to meet the standard required for the officer's class and that the officer's record warrants involuntary separation, shall in each instance prepare a specific statement in writing; setting forth the basis for the finding.

## 733 Retirement Benefits

In accordance with the provisions of section 634 of the Foreign Service Act of 1946, as amended, Foreign Service officers who are involuntarily retired from the Service under the provisions of sections 732.2 or 732.3 shall receive benefits as follows:

a. A Foreign Service officer of class 1, 2, or 3 who is involuntarily retired under the provisions of sections 732.1, 732.2, or 732.3 shall receive retirement benefits in accordance with section 673.

b. A Foreign Service officer of class 4, 5, 6, or 7 (nonprobationary) who is involuntarily retired under the provisions of section 732.2b, 732.2c, or 732.3 shall receive benefits as follows.

(1) One-twelfth of a year's salary at the officer's then current salary rate for each year of service and proportionately for a fraction of a year, but not exceeding a total of one year's salary at the officer's then current salary rate, payable without interest, from the Foreign Service Retirement and Disability Fund, in three equal installments on the first day of January following the officer's separation and on the two anniversaries of this date immediately following; provided, that in special cases, the Director General of the Foreign Service or the Deputy Director General may approve the acceleration or combining of the installments; and *

*(2) A refund of the contributions made to the Foreign Service Retirement and Disability Fund, with interest as provided in section 671.3-4, except that in lieu of such refund, if the officer has at least 5 years of service credit toward retirement under the Foreign Service Retirement and Disability System, excluding military or naval service that is credited in accordance with the provisions of section 851 or 852(a) of the Foreign Service Act of 1946, as amended, that officer may elect to receive retirement benefits on reaching the age of 60, in accordance with the provisions of section 673.

In the event that an officer who is involuntarily retired from class 4 or 5 and who has elected to receive retirement benefits dies before reaching the age of 60, the officer's death shall be considered a death in service within the meaning of section 673.3.

In the event that an officer who was involuntarily retired from class 6 or 7 and who has elected to receive retirement benefits dies before reaching the age of 60, the total amount of the officer's contributions made to the Foreign Service Retirement and Disability Fund, with interest as provided in section 671.3-4, shall be paid upon establishment of a valid claim therefor, in the order of precedence set forth in section 671.3-6.

(3) A Foreign Service officer of class 4, 5, 6, or 7 who is involuntarily retired shall have the right to assign to any person or corporation the whole or any part of the benefits receivable by the officer pursuant to subparagraph (1) of this section. Any such assignment shall be made on Form DS-977, Assignment of Retirement Benefits, which will be provided by the Department on request of an individual officer.

(4) A Foreign Service officer in class 4, 5, 6, or 7 who is scheduled for involuntary retirement and who is being retained on the Department's rolls may be offered employment in the Foreign Service Reserve, Foreign Service Staff, or Civil Service categories only if the officer resigns as a Foreign Service officer. The severance benefits described in subparagraph (1) of this section, do not apply in these circumstances. Such an officer, however, is entitled to the benefits provided under section 672.1-5, unless the officer remains as a participant in the Foreign Service Retirement and Disability System by virtue of appointment as a Foreign Service Staff officer.

(5) Notwithstanding the provisions of section 733, any officer of class 4, 5, 6, or 7 who is eligible for voluntary retirement may be granted such retirement in lieu of involuntary retirement.

## 734 Probationary Foreign Service Officers of Classes 7 and 8

Under the provisions of section 635 of the Foreign Service Act of 1946, as amended, any Foreign Service officer of class 7 who is appointed under the provisions of section 516(b) of the Foreign Service Act of 1946, as amended, and any Foreign Service officer of class 8 shall occupy probationary status. The services of such officers may be terminated at any time.

Any probationary Foreign Service officer of class 7 or 8 who has remained in class for 4 years without promotion to a higher class shall be separated from the Service within 4 months after completion of the fourth year of service in class, except as provided in section 736.2.

Foreign Service officers separated from classes 7 or 8 under the above provisions shall have their contributions to the Foreign Service Retirement and Disability Fund returned in accordance with section 671.3-4.*

✻735 (Unassigned)

## 736 Effective Date of Separation

### 736.1 Determining Effective Date

In cases of involuntary retirement from the Service in accordance with the provisions of section 732.2, the Director General of the Foreign Service or the Deputy Director General shall set the effective date of separation which, except as provided in sections 732.2b, and 736.2, shall be within the following time limits:

a. For officers retired under the provisions of section 732.2, within 6 months after the anniversary date of entry into the class, or within such other period as specified in section 732.2;

b. For officers retired under the provisions of section 732.3, within 6 months after the date of notification of involuntary retirement by the panel referred to in section 732.3b(1); and

c. For officers separated under the provisions of section 734, within the 4-month period specified.

### 736.2 Postponement of Effective Date

Notwithstanding the time limits contained in section 736.1, paragraphs a and b, the Director General of the Foreign Service or the Deputy Director General may postpone the effective date of separation, upon determination that such action is in the interest of the Service. The record of any officer whose effective date of separation is postponed shall not be reviewed by Selection Boards which convene during the intervening period, nor shall such an officer receive a within-class salary increase during this period.

### 736.3 Notice of Separation

The Director General of the Foreign Service or the Deputy Director General shall issue a written notice of the effective date of separation to each officer involuntarily retired. The notice shall be issued at least 30 days before the effective date of separation.

737 through 739 (Unassigned) ✻