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## Incidents of the Government-Servant Relationship

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INCIDENTS OF THE GOVERNMENT-SERVANT  
RELATIONSHIP\**Ivor L. M. Richardson*†

THE procedures developed in the past five years to meet the threat of communist infiltration into public employment have focused attention on the position of persons working for the federal government. However, the loyalty program and the general problem of dismissal are not the only aspects of federal employment which raise important issues. Other aspects of the government-servant relationship may be of even greater importance to the civil servant in practice. For instance, what are his legal rights to his salary or to his pension if the government refuses to pay? Can he secure redress if he is suspended from the service? Is the government obliged to grant him annual leave, and what are his rights as to promotion? It is the purpose of this article to consider the rights of the servant of the federal government with regard to these matters.

Before beginning the analysis, the distinction between offices and employments should be noted, for, as we shall see, whether a position is an office or an employment will often be determinative of the rights of the servant in regard to some of the incidents of the government-servant relationship. The Constitution of the United States provides for the creation of all offices and the appointment of all officers of the United States,<sup>1</sup> and the weight of authority<sup>2</sup> supports the view that, in order to be an officer in the constitutional sense, a person must have been appointed in one of the constitutionally authorized modes, i.e., by the President by and with the advice and consent of the Senate, by the President alone,

\* This article is a chapter taken from a dissertation submitted to the faculty of the University of Michigan Law School in partial fulfillment of the requirements for the S.J.D. degree. [Another chapter, "Problems in the Removal of Federal Civil Servants," was published in the December 1955 issue. 54 MICH. L. REV. 219.—Ed.]

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<sup>1</sup> Article 2, section 2 of the United States Constitution provides: ". . . and he [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

<sup>2</sup> E.g., *United States v. Germaine*, 99 U.S. 508 (1878); *Hoepell v. United States*, (D.C. Cir. 1936) 85 F. (2d) 237; *United States v. Smith*, 124 U.S. 525, 8 S.Ct. 595 (1888); *Surowitz v. United States*, (D.C. N.Y. 1948) 80 F. Supp. 716.

by the head of a department, or by a court of law.<sup>3</sup> Although the Constitution does not refer to the appointment of employees or other agents by the federal government, it was agreed from earliest times that the constitutional provisions do not preclude the employment by the federal government of persons other than officers.

There is, however, no constitutional significance in the distinction between officers and employees. It is a matter of statutory interpretation, and so of determining the meaning of the terms as used by Congress in particular statutes. While at times some courts have indicated that there are some elements which are indispensable attributes of an office, such as tenure, duration of appointment, and the idea that an officer is clothed with part of the sovereignty of the state,<sup>4</sup> it is clear that there is nothing inherent in the nature of an office which distinguishes it from an employment.<sup>5</sup> An officer must have been appointed in one of the constitutionally authorized modes whereas an employee may be, but need not be, and it is fair to say that the courts will treat the functions and duties involved, the term and tenure, the purpose of Congress in creating the position, and such incidental matters as the source of the compensation right, the duty to take an oath and to give a bond, as indicia in determining whether a person is an officer or employee of the United States. In the final analysis,

<sup>3</sup> See note 1 *supra*.

<sup>4</sup> E.g., *Pope v. Commissioner of Internal Revenue*, (6th Cir. 1943) 138 F. (2d) 1006, per *Hamilton, C.J.*, at 1009: "Giving the word 'office' its technical qualities, five elements would seem indispensable in order to make a public office of a civil nature. (1) It must be created by the Constitution or the Legislature. . . . (2) There must be a delegation of a portion of the sovereign powers of government to be exercised for the benefit of the public. (3) The powers conferred and the duties to be discharged must be defined either directly or indirectly by the Legislature or through legislative authority. (4) The duties must be performed independently and without control of a superior power other than the law. (5) The office must have some permanency and continuity and the officer must take an official oath."

<sup>5</sup> The courts have refused to entertain the notion that any one of these alleged requirements is essential to constitute a post an office and to distinguish it from an employment. Furthermore, that there is no significance in the distinction between offices and employments is borne out by the fact that the courts have frequently considered a person an officer for some purposes and not for others. In *United States v. Mouat*, 124 U.S. 303, 8 S.Ct. 505 (1888), the Supreme Court of the United States held that a paymaster's clerk in the Navy was not an officer within the meaning of an 1876 statute so as to be entitled to the benefit of mileage allowance granted under that act, but, in *United States v. Hendee*, 124 U.S. 309, 8 S.Ct. 507 (1888), which was decided by the Court on the same day, it was held that such a clerk was an officer within the provisions of an 1883 statute regarding the longevity pay of officers and enlisted men in the Navy. Cf. *United States v. Tyler*, 105 U.S. 244 (1881) with *McMullen v. United States*, 100 Ct. Cl. 323 (1943); *United States v. Tinklepaugh*, (C.C. N.Y. 1856) 28 Fed. Cas. 193, No. 16,526, with *Douglas v. Wallace*, 161 U.S. 346, 16 S.Ct. 485 (1896); and *Steele v. United States* (No. 2), 267 U.S. 505, 45 S.Ct. 417 (1925) with *Keehn v. United States*, (1st Cir. 1924) 300 F. 493.

the courts will consider each case on its merits<sup>6</sup> as a question of statutory interpretation.

### A. *Compensation of Government Servants*

One of the basic conditions of service in any employment relationship is the compensation attaching to the job and, for this reason, it is most important to know what rights a government servant has to his salary. It is necessary to consider offices, employments, and military posts separately for it is this incident of the employment relationship that affords the greatest practical application of the distinction in the use of terms, even though that distinction is not itself of constitutional significance.

In the case of a public office, the salary attached thereto is incident to the title to the office and not to the exercise of its functions<sup>7</sup> with the result that, so long as he is the de jure incumbent and absent any contrary statutory provision, the officer cannot be deprived of the compensation although he may be prevented by illness or other absence from performing his duties.<sup>8</sup> The reason for the rule is that the claim to salary rests upon acts of Congress and not upon an agreement to pay for services rendered.<sup>9</sup> But, on the other hand, the officer is entitled only to the compensation attached by law to the office.<sup>10</sup> Consequently, if Congress has made no provision for the payment of the officer, he is deemed to be serving gratuitously or as a volunteer.<sup>11</sup>

In the case of an employment, the right to compensation is dependent upon the rendering of service<sup>12</sup> and so, if the employee does not fulfill his part of the bargain by exercising the functions of his employment, he cannot claim the payment of compensa-

<sup>6</sup> This is borne out by such statements as that of Groner, J., in *Morgenthau v. Barrett*, (D.C. Cir. 1939) 108 F. (2d) 481 at 483: "In reaching a conclusion it is well to remember that the word 'officer' is a term of variable import, whose connotation changes with the setting in which it is used."

<sup>7</sup> E.g., *Whiting v. United States*, 35 Ct. Cl. 291 at 301 (1900); *Pack v. United States*, 41 Ct. Cl. 414 (1906); *Beuhring v. United States*, 45 Ct. Cl. 404 (1910).

<sup>8</sup> See *Sleigh v. United States*, 9 Ct. Cl. 369 (1878), and the cases cited in the previous note. Of course, if the officer's conduct amounts to an abandonment of the office he will have no claim to the compensation attaching thereto. As to what amounts to abandonment, see *Barbour v. United States*, 17 Ct. Cl. 149 (1881).

<sup>9</sup> *United States v. McLean*, 95 U.S. 750 at 751 (1877).

<sup>10</sup> *Beuhring v. United States*, 45 Ct. Cl. 404 (1910), and the authorities there cited. In *Adams v. United States*, 20 Ct. Cl. 115 (1885), it was said at 117: "The appointing power has no control, beyond the limits of the statute, over the compensation, either to increase or diminish it."

<sup>11</sup> 20 Comp. Gen. 267 (1940). Although the decision related to employees, it applies equally in this connection to officers of the United States.

<sup>12</sup> 1 Comp. Gen. 87 (1921); 5 Comp. Gen. 666 (1926).

tion.<sup>13</sup> Unfortunately the courts have not always recognized this distinction,<sup>14</sup> partly because they have not been able to decide conclusively whether or not there is a contractual element in the right to compensation of both officers and employees.

The position of members of the armed forces is different again. The rule to be deduced from the applicable statutes and regulations is that both officers and men become entitled to their pay so long as they remain in their respective services whether or not they actually perform service, unless their right is forfeited in one of the modes prescribed in the statutory provisions or regulations.<sup>15</sup>

It has never been seriously doubted that, in the absence of a constitutional restriction,<sup>16</sup> Congress may increase or diminish the compensation of officers and employees of the United States.<sup>17</sup> This results from the long-established rule that neither an office nor an employment is a contract.<sup>18</sup> Nevertheless, it does not necessarily follow that none of the incidents of the government-servant relationship may be contractual in nature. Indeed, the courts have always been careful to say that statutes altering salaries of officers and employees can never have retrospective effect.<sup>19</sup> In some cases<sup>20</sup> the courts have so held on the basis that there is a

<sup>13</sup> *Ibid.*

<sup>14</sup> Thus, in *Sleigh v. United States*, 9 Ct. Cl. 369 (1878), *Reinhard v. United States*, 10 Ct. Cl. 282 (1874), and *Chisholm v. United States*, 27 Ct. Cl. 94 (1892), the claimants were clerks and not officers in the constitutional sense of the term; yet the court applied the principle properly applicable to officers. And see *Saunders v. United States*, 21 Ct. Cl. 408 (1886).

<sup>15</sup> 1 Comp. Gen. 87 (1921); 23 Comp. Gen. 978 (1944); 37 Op. Atty. Gen. 457 (1934).

<sup>16</sup> The constitutional limitations are that the compensation of the president shall neither be increased nor diminished during the period for which he shall have been elected (art. II, §1), and that the judges, both of the Supreme Court and inferior courts, shall receive for their services a compensation which shall not be diminished during their continuance in office (art. III, §1). For a discussion of the protection afforded to judges' salaries see *O'Donoghue v. United States*, 289 U.S. 516, 53 S.Ct. 740 (1933); and *Williams v. United States*, 289 U.S. 553, 53 S.Ct. 751 (1933).

<sup>17</sup> *Embry v. United States*, 100 U.S. 680 at 685 (1879); 15 Op. Atty. Gen. 316 at 321 (1877); *Fitzsimmons v. Leon*, (1st Cir. 1944) 141 F. (2d) 886.

<sup>18</sup> *Crenshaw v. United States*, 134 U.S. 99, 10 S.Ct. 431 (1890); *Butler v. Pennsylvania*, 10 How. (51 U.S.) 402 (1850); *Taylor v. Beckham*, 178 U.S. 548, 20 S.Ct. 1009 (1900); *Bailey v. Richardson*, (D.C. Cir. 1950) 182 F. (2d) 46, *affd.* on appeal by equally divided Court, 341 U.S. 918, 71 S.Ct. 669 (1951).

<sup>19</sup> *Fisk v. Jefferson Police Jury*, 116 U.S. 131, 6 S.Ct. 329 (1885); *Mississippi ex rel. Robertson v. Miller*, 276 U.S. 174, 48 S.Ct. 266 (1928); *Fisher v. United States*, 15 Ct. Cl. 323 (1879).

<sup>20</sup> See the cases cited in the previous note. In *Fisher's* case, *Richardson, J.*, said at 329: "The only contract which arises upon a statute establishing a salary is to pay the incumbent of the office that salary while the law remains in force and unchanged. When the statute is repealed, superseded, or amended so as to alter the amount of the salary for the time being, the contract from that time forward is correspondingly changed."

contract right to receive such compensation as may from time to time be provided by law. In other cases<sup>21</sup> the courts, while recognizing the existence of a right to the compensation, have disclaimed its contractual origin without giving any explanation of its source.

One reason for this is that throughout the government-servant relationship the incidents thereof are dominated by the public law, with the result that it is extremely difficult to point to the true source of any rights which the officer or employee may have. For instance, although their compensation may be altered, this may be done only by the legislature or under its direction.<sup>22</sup> Again, no portion of the salary of an officer may be withheld without specific statutory authority<sup>23</sup> and so an officer who agrees to accept less than the full compensation attached to his office is entitled to claim the statutory allowance, even though he agreed to accept a reduction as a condition of his continued employment in the government service.<sup>24</sup> This is because public policy prohibits any attempt by unauthorized agreement with an officer of the United States, under guise of a condition or otherwise, to deprive him of the right to pay given by statute,<sup>25</sup> and the same reasoning should apply to a federal employee whose compensation has been fixed by statute. Furthermore, the dominance of the public law over the will of the parties can be seen in the established rule that compensation may not be paid an employee for any period prior to the effective date of his appointment and that the appointment may not be made retroactively effective to cover services rendered.<sup>26</sup> In one case an employee had served without an appointment in connection with the establishment of the Selective Service

<sup>21</sup> *Maryland Cas. Co. v. Kansas City, Mo.*, (8th Cir. 1942) 128 F. (2d) 998; *Fitzsimmons v. Brooklyn*, 102 N.Y. 536 (1886).

<sup>22</sup> *Dyer v. United States*, 20 Ct. Cl. 166 (1885); *Amchanitzky v. Carrougher*, (D.C. N.Y. 1933) 3 F. Supp. 993. In *Corcoran v. United States*, 38 Ct. Cl. 341 (1903), Nott, C.J., said at 345: "Two things are essential to deprive an officer of his statutory compensation: The first is that the power so to do must be lodged, directly or by necessary implication, in some official hands; the second is that it must be exercised actually and expressly, and not indirectly or by implication."

<sup>23</sup> *Corcoran v. United States*, 38 Ct. Cl. 341 (1903); *Smith v. Jackson*, 246 U.S. 388, 38 S.Ct. 353 (1918); *McCarl v. Cox*, (D.C. Cir. 1925) 8 F. (2d) 669; 40 Op. Atty. Gen. 38 (1941).

<sup>24</sup> *Glavey v. United States*, 182 U.S. 595, 21 S.Ct. 891 (1901); *United States v. Andrews*, 240 U.S. 90, 36 S.Ct. 349 (1916); *Rush v. United States*, 35 Ct. Cl. 223 (1900). Cf. *Jackson v. United States*, 8 Ct. Cl. 354 (1872), where the Secretary of the Treasury had made an appointment on terms of compensation differing from the salary expressly established by law.

<sup>25</sup> *United States v. Andrews*, 240 U.S. 90, 36 S.Ct. 349 (1916).

<sup>26</sup> 20 Comp. Gen. 267 (1940).

System before the congressional act authorizing the employment of necessary staff had come into effect. Despite a promise to pay on the part of the responsible government official, the comptroller general held that the employee must be regarded either as a volunteer or as furnishing gratuitous service and not entitled to compensation in any event.<sup>27</sup>

The final and fundamental problem is, what is the nature of the claim to compensation? Is it based on contract, is it founded on quantum meruit or restitution as a fair reward for services rendered, or is it dependent upon the laws of Congress as an incident of a statutory status relationship? Before considering this it is important to determine what the term "status" means since it has been subject to so many indefinite interpretations by the courts and has, in many cases, degenerated to mean any type of legal relationship.<sup>28</sup>

The hallmark of status is the attaching to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties. But it means more than that. It has been suggested by an English writer<sup>29</sup> that, where there is "status," the legal relationship can be determined only by operation of law. This would be a valuable criterion if it were one hundred percent accurate, for it would serve to distinguish such typical status relationships as infancy and marriage from the master-servant relationship which, though subjected in many countries to so many incidents imposed by the public law—such as working conditions, wage scales, compulsory unionism, provisions for annual and sick leave, restrictions on arbitrary dismissal, hours of work, and other conditions of employment—is distinctive in that the relationship may be terminated without recourse to the public law.

Unfortunately there is not a rigid line of demarcation between status and contract in this connection. For instance, even in the case of the marriage relationship, an English court has recognized a foreign marriage which was capable of being dissolved simply by agreement of the spouses<sup>30</sup> and, although it may be argued that this is not so much a case of the termination of a status relationship without the intervention of the public law as it is of the recognition and application of a foreign law, still it indicates

<sup>27</sup> *Ibid.*

<sup>28</sup> It is necessary to read only a few decisions of the comptroller general to realize this.

<sup>29</sup> GRAVESON, STATUS IN THE COMMON LAW 48 (1953).

<sup>30</sup> *Nachimson v. Nachimson*, 99 L.J. (n.s.) (Prob.) 104 (1930).

that the basic status relationship is not so squarely bounded by and dependent upon the public law as has been thought.

Again, from the point of view of a worker with specialist skills, unless he is willing to learn another trade, the terms of his employment may be so rigidly determined by the public law that the only element of "contract" in the employer-employee relationship (apart from his implied agreement to work under those conditions or else seek another occupation) is the agreement to work or cease working for a particular employer.<sup>31</sup> Then, where there is compulsory unionism, the potential worker cannot even secure an employment unless he joins the appropriate union. To carry the notion further, take the case of the civilian who, in time of war is assigned to a particular job—there is no question of agreement, unless it is an implied duty arising from the correlative rights and duties of allegiance and protection stemming from the government-citizen relationship.

Just as the release from a particular status relationship may be based purely on agreement or secured with the aid of the public law, so may the entrance to a status relationship be voluntary or involuntary, although it is important to remember that it is not the agreement but the public law which imposes the status. In the case of marriage, citizenship acquired by naturalization, peacetime service in the regular armed forces, it is voluntary and the agreement is the gateway to the status relationship into which the rights and duties under the contract may be said to merge, while in the case of citizenship by birth, infancy and insanity in their legal aspects, and service in the armed forces under a compulsory military training program or under draft laws, it is involuntary.

It seems then that there is no particular factor the presence or absence of which will inevitably determine whether or not the legal relationship is one of status. Rather it is a matter of degree and the most that can be said is that, for a true status relationship to exist, the great majority of the incidents thereof must be fixed by the public law<sup>32</sup> so that the element of contract plays a minor

<sup>31</sup> As Graveson points out, note 29 *supra*, at 47 ff., in some ways there is not much difference between the employment position of the modern worker and the member of one of the Guilds of the Middle Ages as far as rigidity of conditions is concerned.

<sup>32</sup> In this connection, two of Graveson's points are worth noting. Assuming that status denotes a legal personality different from the norm, he argues (1) that a disability or exemption imposed by the public law must be such as to affect substantially and generally a man's legal standing in order for a special status to result (p. 126), and (2) that the public and social interest both in its existence and extent will be the funda-



part and serves as little more than a gateway to and from the relationship.

It may well be asked, what is the exact significance of the distinction between status and contract. It is not so much the type of relationship as the nature of the particular incident of the relationship which is under consideration that is important. As a Minnesota court recently pointed out, "Confusion results from a failure to observe the fundamental distinction between status and the rights which arise thereunder."<sup>33</sup> A status incident is, of course, imposed by the public law. More important, by its very nature it is variable at the will of the government for it does not give rise to vested property rights in the other party to the relationship. On the other hand, where the particular incident, i.e., salary, is contractual in nature, the government servant may have some vested rights. Thus, if in the particular relationship the right to past salary is a status incident, it may be abrogated at will by the government. But, if it happens to be a contractual incident of the government-servant relationship, then the official will have a vested property right to his salary in respect of past services.

It is impossible to reconcile the dicta of the different judges on the right to compensation. Clearly there is no claim to compensation in respect of future services but, as we saw, the courts have always recognized that government servants are entitled to recover compensation for past services. The theory which has the greater weight of authority behind it is that such a right is contractual in origin and, in the words of Justice Miller in *Fisk v. Jefferson Police Jury*,<sup>34</sup> ". . . after the services have been rendered, under a law, resolution, or ordinance which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate. This contract is a completed contract. Its obligation is perfect, and rests on the remedies which the law then gives for its enforcement." On the other hand, in a recent case it was said:

mental factor determining the creation or attribution of status. It appears to the writer that these are simply explanations of the basic proposition suggested in the text that, whether or not the dominance of the public law is sufficient to confer a status is a matter of degree.

<sup>33</sup> *Boyle v. Kirby*, 223 Minn. 268 at 272, 26 N.W. (2d) 223 (1947).

<sup>34</sup> 116 U.S. 131 at 134, 6 S.Ct. 329 (1885). Likewise in *Patton v. United States*, 7 Ct. Cl. 362 (1870), Drake, C.J., said at 371: "All questions of salary are questions of contract. Whether the salary be fixed by law, or by the order of a Department under authority of law, the Government contracts to pay the officer his salary, and, failing to do so is liable to be sued therefor." This dictum of course does not apply to claims for unearned salary.

“ . . . the right of a public official to compensation must be founded on a statute; and a statute granting a public official compensation should be strictly construed against the officer. Furthermore, the right of a public officer to be compensated by salary for the performance of duties imposed upon him by law, does not rest on any theory of contract, express or implied, but is purely a creature of statute. . . . ”<sup>35</sup>

There is a great deal of merit in this contention. In the first place, as compensation of an officer is an incident to the title to the office and not to the exercise of its functions, how can the “right” of the officer to the compensation be postulated on the rendering of services, which is the rationale of *Fisk’s* case? In any case this disposes of the argument that the right to compensation is based on quantum meruit or restitution.<sup>36</sup> Even if we say that the contractual right is to the compensation provided for having held the office, there is not much room for the operation of a contract. In the second place, employees have no claim to compensation for services rendered unless there is statutory authority for their employment,<sup>37</sup> and it may reasonably be argued that the only power to create employments and employ servants other than officers which the Executive has is that granted by Congress and thus under the public law.<sup>38</sup> In the third place, where the compensation of an officer or employee has been fixed by law, the parties (i.e., the executive department and the officer or employee) cannot validly agree to vary it and the appointing power has no control over the compensation beyond the limits of the statute, either to increase or to diminish it. The Supreme Court of the United States in one case<sup>39</sup> considered the reason for this rule to be that such claims “rest not upon any contract with the Government, either express or implied, but upon acts of Congress.”

<sup>35</sup> Maryland Cas. Co. v. Kansas City, Mo., (8th Cir. 1942) 128 F. (2d) 998 at 1001, per Von Valkenburgh, C.J.

<sup>36</sup> Since the foundation of that remedy is a return for services rendered.

<sup>37</sup> Thus, in *Jordan v. United States*, 123 Ct. Cl. 577 (1952), where the plaintiff’s contention that the Agreement of Enrollment constituted a contract on the part of the Government to pay him for the entire period of his enrollment in the War Department Transportation Corps was not sustained, Howell, J., said at 591: “Congress is the only body under our Constitution with the authority to consent to the assumption of liability by the United States or authorize others to do so.”

<sup>38</sup> The reason for this was well stated in *Love v. United States*, (8th Cir. 1939) 108 F. (2d) 43 at 46: “Unless a legal right has been defined and conferred by legislative authority, no justiciable controversy is present. . . . The right to work at a particular employment must be shown to have become vested by law in the person asserting it.”

<sup>39</sup> *United States v. McLean*, 95 U.S. 750 at 751 (1877). Although the dictum was pronounced with regard to an officer’s compensation, it is difficult to see why it should not also apply to the claim of an employee whose compensation is fixed by statute.

Despite these weighty arguments it seems that the right to past compensation is properly based on contract. As we shall see, "rights" to pension and leave are based on the statutory status relationship (or, perhaps more correctly, they should be termed status incidents of the relationship), yet even such leave and pension rights as have accrued to the officer or employee may be denied him at any time. Such action does not deprive the officer or employee of property without due process of law, but it is submitted that if Congress attempted to deprive an officer or employee of "past" compensation its action would be unconstitutional as violative of the Fifth Amendment.<sup>40</sup>

However, as often happens in this area, the legal right is not very valuable without an effective remedy. The Court of Claims may render judgment against the United States in respect to pension and salary claims of both officers and employees.<sup>41</sup> Under section 2517 of Title 28 of the United States Code, certified judgments of the court are to be paid by the General Accounting office out of any general appropriation therefor. Although there is no execution against the Government, a government servant may obtain a writ of mandamus against the comptroller general if the administration refuses to pay such a claim.<sup>42</sup>

Non-appropriation of funds does not relieve the United States of its contractual liability to pay the compensation of its servants. Article I, section 9, clause 7 of the Constitution providing that ". . . no money shall be drawn from the Treasury but in consequence of appropriations made by law" is exclusively a direction to the officers of the Treasury and it neither controls courts nor prohibits the creation of legal liabilities.<sup>43</sup> An officer or employee of the United States is entitled to the compensation allowed by law

<sup>40</sup> Because valid contracts are property within the protection of the Fifth Amendment. *Lynch v. United States*, 292 U.S. 571 at 579, 54 S.Ct. 840 (1934), and the cases there cited.

<sup>41</sup> 28 U.S.C. (1952) §§1346(d) and 1491.

<sup>42</sup> See *Houston v. Ormes*, 252 U.S. 469, 40 S.Ct. 369 (1920); *Louisiana v. McAdoo*, 234 U.S. 627, 34 S.Ct. 938 (1914). And see 3 *Geo. Wash. L. Rev.* 97 (1934). However, the American courts originally followed the English view expressed in *R. v. Lords Commissioners of the Treasury*, L.R. 7 Q.B. 387 (1872), that mandamus would not lie in such circumstances. *Louisiana v. Jumel*, 107 U.S. 711, 2 S.Ct. 128 (1883).

<sup>43</sup> Richardson, J., pointed out in *Mitchell v. United States*, 18 Ct. Cl. 281 at 286 (1883): "The United States can no more discharge its contracts by part performance than can an individual person do so. Congress may fail to appropriate, in whole or in part, the money required for payment of a public creditor, and thus leave the public officers without authority to draw the money from the Treasury for that purpose, but the indebtedness and the liability to pay remain in force." Likewise, see *Schuler and McDonald v. United States*, 85 Ct. Cl. 631 (1937).

and is not limited by the amount supplied, even if a lesser sum is provided for his services by Congress<sup>44</sup> unless, of course, the appropriation act contains words which expressly or by clear implication modify or repeal the previous law.<sup>45</sup>

Certified judgments of the Court of Claims are to be paid out of any general appropriation for that purpose. It need hardly be added that, even though there is a theoretical legal right, the claimant will in practice fail to get redress if Congress refuses to vote the necessary funds.<sup>46</sup> Though appropriation of funds is not a condition precedent to the creation of liability on the part of the United States, it is for all practical purposes the governing factor in determining whether or not the United States will in fact meet its obligations to the federal servant.

A pragmatist confronted with this situation would doubtless argue that there is in effect no legal right to the salary. But the view adopted in this paper is that the lack of an effective and guaranteed remedy does not necessarily connote the non-existence of a legal right—the lack of substantive rights is not to be inferred from the failure of the legal order to provide procedural remedies. As Chief Justice Hughes said in *Perry v. United States*, “. . . the right to make binding obligations is a competence attaching to sovereignty. . . . The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and binding character of its contracts.”<sup>47</sup> As there is no right of execution against the government in Anglo-American law, then adoption of the pragmatic approach will lead to the conclusion that there are no legal rights against the government under any circumstances. This seems to be far too extreme a position.

### B. *Suspension*

It is not uncommon for the Executive to suspend a civil servant after charges have been made against him while it is being con-

<sup>44</sup> *United States v. Langston*, 118 U.S. 389, 6 S.Ct. 1185 (1886); *Collins v. United States*, 15 Ct. Cl. 23 (1879).

<sup>45</sup> E.g., *United States v. Mitchell*, 109 U.S. 146, 3 S.Ct. 151 (1883) (expressly); *United States v. Fisher*, 109 U.S. 143, 3 S.Ct. 154 (1883) (impliedly).

<sup>46</sup> *Hetfield v. United States*, 78 Ct. Cl. 419 (1933). It may with some force be argued that, if Congress has conferred a right of action in contract or tort on the citizen as against the United States, once judgment has been given in the citizen's favor, there should be no legal obstacles to recovery. Cf. *Gordon v. United States*, 117 U.S. 697 at 702 (1864): “. . . the award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power.”

<sup>47</sup> 294 U.S. 330 at 353-354, 55 S.Ct. 432 (1935).

sidered what final action should be taken. The period of suspension may often enable a more thorough investigation to be made of the civil servant's fitness for continued service than if action were to be taken immediately, particularly if the charges against him arise under the loyalty and security program. In any case, it is important that the government servant should know his legal rights during a period of suspension.

The word suspension never signifies a final removal of an officer or employee because in its nature a suspension is temporary and the necessary effect of a termination of the suspension is a reinstatement of the suspended government servant where the law has not otherwise provided.<sup>48</sup> It was at one time a matter of some doubt, but it now seems to have been conclusively settled that, in the absence of a statutory provision, the power of suspension is an incident of the power of appointment and removal.<sup>49</sup> In this respect the American law differs from the English which recognizes the power of suspension as a separate power inherent in the Crown.<sup>50</sup>

The power of suspension must, of course, be exercised by the officer in whom is vested the power of appointment; otherwise the purported suspension is invalid and the officer or employee is entitled to his compensation,<sup>51</sup> although the legal requirement is satisfied if the act of suspension performed by a subordinate official is ratified by the competent authority.<sup>52</sup> One question is whether, in the absence of a statutory provision governing suspensions, the power to suspend must be exercised in accordance with the procedures prescribed for the exercise of the power of removal. This has been held to be so, the reasoning apparently being that the power of suspension is incident to the power of removal and consequently a suspension is subject to the same procedures as a removal.<sup>53</sup> But the better view is that the power of suspension is incident to the combined power of appointment and removal.<sup>54</sup> Consequently, in the absence of a governing statutory provision, it may be exercised freely without having to conform to any specific procedures.

<sup>48</sup> See 13 Op. Atty. Gen. 221 at 223 (1870); *id.*, 301 at 304-305; *id.*, 308 at 309.

<sup>49</sup> *Howard v. United States*, 22 Ct. Cl. 305 at 316 (1887); 4 Comp. Gen. 849 at 851 (1925); 6 Comp. Gen. 534 at 536 (1927); 25 Dec. C.T. 996 (1919).

<sup>50</sup> *Slingsby's Case*, 3 Swans. 178, 36 Eng. Rep. 821 (1680); *Hunkin v. Siebert*, 51 C.L.R. 538 (1934).

<sup>51</sup> *United States v. Wickersham*, 201 U.S. 390, 26 S.Ct. 469 (1906).

<sup>52</sup> 1 Comp. Gen. 42 (1921).

<sup>53</sup> *Miller v. United States*, 45 Ct. Cl. 509 (1910).

<sup>54</sup> See the authorities cited in note 48 *supra*.

The right of recovery of salary after a wrongful suspension was for many years a perplexing question, although it has now been resolved. Before the 1948 amendment to the civil service act was passed,<sup>55</sup> the answer depended on several factors. First, (and the law is unchanged on this point) if an officer was suspended, he was entitled to his compensation during the period of his suspension, even though he performed no duties, under the well-settled rule that the right to compensation attached to a public office is an incident to the title to the office,<sup>56</sup> and not to the exercise of the functions of the office. Secondly, in the absence of statutory authority, an employee (as distinguished from "officer") clearly had no right to compensation unless his suspension was followed by restoration to duty,<sup>57</sup> except to the extent of pay for annual leave which might be substituted for a period of unjustified suspension.<sup>58</sup> This was because salary payments to employees may validly be made only for periods when the employees are in actual duty status or are on authorized leave with pay.<sup>59</sup> Thirdly, and although there is some authority for the opposing view,<sup>60</sup> it seems that these principles applied regardless of the fact that the appointing officer had suspended the employee on the understanding that if, as it turned out, he was found not guilty of the charges preferred against him, he should receive his regular compensation.<sup>61</sup> Fourthly, in *Ginn v. United States*<sup>62</sup> it was held that, where a federal employee was suspended upon reasonable

<sup>55</sup> 62 Stat. L. 354, c. 447 (1948), 5 U.S.C. (1952) §652.

<sup>56</sup> 11 Comp. Gen. 382 (1932); *Steele v. United States*, 40 Ct. Cl. 403 (1905). Such cases as *Barbour v. United States*, supra note 8 and *Howard v. United States*, supra note 49 where the suspended officer was denied his compensation during the period of suspension, were governed by a congressional statute specifically prohibiting the payment of salary to suspended officers.

It is a matter of some doubt whether a suspended officer can recover compensation from the government if a de facto officer has performed the services and received the compensation attaching to the office. On the one hand, it may be argued that the government must pay the salary to the holder of the legal title, because the salary is attached to the office and is not based upon the rendering of particular services. On the other hand, it may be contended that the burden of establishing title is not upon the government and once it has paid compensation to a person ostensibly holding the office as of right its obligation ceases as it is unfair to compel it to pay twice (and in view of congressional control over finances, it is not entitled to do so). There is little authority on this point insofar as it affects federal officers but *Arant v. United States*, 55 Ct. Cl. 327 (1920), indicates that the suspended de jure officer has no claim against the government but must attempt to recover the compensation from the de facto officer.

<sup>57</sup> 21 Comp. Gen. 717 (1942); 7 Comp. Gen. 584 (1928).

<sup>58</sup> 25 Comp. Gen. 620 (1946), and the authorities there cited.

<sup>59</sup> 6 Comp. Gen. 534 at 536 (1927); 11 Comp. Gen. 382 (1932).

<sup>60</sup> 6 Comp. Gen. 534 at 536 (1927); 4 Comp. Gen. 849 (1925).

<sup>61</sup> 9 Comp. Gen. 284 (1930); 25 Comp. Gen. 620 at 624 (1946).

<sup>62</sup> 110 Ct. Cl. 637 (1948).

cause, as distinguished from an arbitrary suspension, and where he was afforded proper and regular procedure, he was not entitled to compensation for the period of suspension. This was so even though it was subsequently determined after investigation of the charges that the cause for which he was suspended was insufficient, the result following from the rule that the decision of a department head is not subject to judicial review provided that the prescribed procedures have been followed and provided that there is no evidence of arbitrary or capricious action on his part.<sup>63</sup>

The 1948 amendment gave new substantive rights to classified civil servants to receive compensation in certain circumstances for periods when no services had been performed, and it has since been held<sup>64</sup> that, by virtue of this amendment, the rule expressed in *Ginn's* case is no longer applicable to classified civil service employees suspended or removed for a cause subsequently found to be insufficient. But the amendment applies only to persons in the classified civil service of the United States<sup>65</sup> and, consequently, the principle enunciated in *Ginn's* case is still applicable to non-classified and excepted schedule civil service employees.<sup>66</sup> Of course, this section does not deprive an officer of the United States who is not in the classified civil service of the right to compensation for a period of suspension.

### C. Pension Rights

Applicants for employment in the government service are attracted by the general conditions of service, including retirement provisions, as well as by the actual salaries paid, and retirement benefits will often make up for higher pay scales in positions where no such benefits are offered. Over the years the retirement schemes have been gradually extended until at the present time virtually all officers and employees of the United States come within some one of these schemes. It is not proposed to consider the different schemes, since they are all based on statutory provisions. The reason for this dependence on statutory provisions is that, as we have seen, Congress is the only body which has

<sup>63</sup> E.g., *Gadsden v. United States*, (Ct. Cl. 1948) 78 F. Supp. 126; *Vallesteros v. United States*, 125 Ct. Cl. 218 (1953).

<sup>64</sup> *Lezin v. United States*, (Ct. Cl. 1951) 98 F. Supp. 574, approved in *Egan v. United States*, (Ct. Cl. 1952) 107 F. Supp. 564; and *Getzoff v. United States*, (Ct. Cl. 1953) 109 F. Supp. 712.

<sup>65</sup> 62 Stat. L. 354 (1948), 5 U.S.C. (1952) §652 (b).

<sup>66</sup> *Brown v. United States*, 122 Ct. Cl. 361 (1952); *Jordan v. United States*, 123 Ct. Cl. 577 (1952).

authority to consent to the assumption of liability by the United States, or to authorize others to do so and, therefore, in the absence of that authority, the Executive has no power to provide pensions for its retired servants.

As distinguished from salaries and wages, pensions have always been considered a matter of bounty. Justice Brandeis once explained this in a well-known judgment when he said: "Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress."<sup>67</sup> Again, Chief Justice Taft pointed out in *United States v. Cook*: ". . . Congress in shaping the form of its bounty may impose conditions and limitations on its acquisition and enjoyment by the beneficiaries which it could not impose on the use and enjoyment by them of a vested right."<sup>68</sup>

In these cases the Court was considering non-contributory pensions and we meet with greater difficulty in determining the rights (if any) of a government servant to a pension where he has made periodic contributions to the pension fund during his term of service.<sup>69</sup> There is little authority either way on this point, but in one case, *Pennie v. Reis*,<sup>70</sup> the Supreme Court regarded as the controlling factor the manner in which the contribution was paid to the fund and, basically, whether the contribution was voluntary or involuntary. In that case the Court had to consider the effect of a direct appropriation to a pension fund of a monthly sum out of a police officer's pay, and Justice Field said: "Though called part of the officer's compensation, he never received it or controlled it, nor could he prevent its appropriation

<sup>67</sup> *Lynch v. United States*, 292 U.S. 571 at 577, 54 S.Ct. 840 (1954). And see *Frisbie v. United States*, 157 U.S. 160 at 166, 15 S.Ct. 586 (1895); and *United States v. Teller*, 107 U.S. 64 at 68 (1882).

<sup>68</sup> 257 U.S. 523 at 527, 42 S.Ct. 200 (1922). Of course, if a statute imposes a peremptory obligation on the executive to grant a pension under certain conditions, a person who satisfies those conditions has a right to the pension so long as the statute remains in force and the right is enforceable against the appropriate official. *Dismuke v. United States*, 297 U.S. 167, 56 S.Ct. 400 (1936); 28 Op. Atty. Gen. 417 at 421 (1910). But, in such a case the right, though founded on statute, is neither a property nor a contractual right; otherwise it could not be constitutionally abrogated by Congress. But see pp. 655-658 *infra*.

<sup>69</sup> This is an important issue in view of the proposal to make available to civilian officers and employees of the United States group life insurance which would be financed partly by voluntary salary deductions and partly by government subsidy. See 1 U.S.C. Cong. and Admin. News 857 (1954).

<sup>70</sup> 132 U.S. 464, 10 S.Ct. 149 (1889), followed in *Rafferty v. United States*, (3d Cir. 1954) 210 F. (2d) 934, and see the cases there cited.



to the fund in question. He had no such power of disposition over it as always accompanies ownership of property."<sup>71</sup>

It is clear, in view of the weight of authority, that a pension cannot be regarded as postponed compensation, and it seems that, unless the officer or employee may refuse to contribute to the pension fund, he has no vested rights in it whatsoever and cannot even recover the forced deductions from his salary. Furthermore, it is suggested that, even if he voluntarily contributed to the pension fund, he would not be entitled to an annuity or other benefit at the rate fixed by statute, either at the time he began making contributions or at the time he became eligible to receive the pension. The Court would, it seems, conclude that the government could not contract to pay him a pension at a fixed rate<sup>72</sup> and so would probably consider him entitled only to a refund of his contributions and to interest thereon.

#### D. *Leave*

Some of the most important incidents of service from the employees' point of view are those relating to leave. It is important for the employee to know if, and how long, he will be entitled to draw his salary should he be taken ill. Again, an applicant for government employment will be interested in knowing how much vacation he will be allowed.

There are full statutory provisions regulating the granting of leave of absence and sick leave to officers and employees of the United States.<sup>73</sup> In the absence of any statutory provision, the grant of leave of absence with or without pay to government servants whose compensation is fixed by an appropriation has been considered within the discretion of the head of the department.<sup>74</sup>

<sup>71</sup> 132 U.S. 464 at 470, 10 S.Ct. 149 (1889).

<sup>72</sup> This is simply because "the United States as the sovereign is immune from liability in the absence of congressional action, and neither the President nor any of his executive officers, nor the courts, possess power to impose such liability." *Brown v. United States*, 122 Ct. Cl. 361 (1952), per Howell, J., at 377, and see the authorities there cited. This is particularly so where the Executive, without authority, attempts to impose on Congress liability for future pension payments.

<sup>73</sup> See 65 Stat. L. 679 (1948), as amended, 5 U.S.C. (1952) §§2061-2066.

<sup>74</sup> 19 Dec. C.T. 661 (1913). The correctness of this decision is perhaps doubtful in view of the rule that compensation may be paid to employees only for services rendered, but it is suggested that the rule in fact permits the payment of compensation so long as the employee is in an actual duty status or is on authorized leave with pay (see note 59 supra). This is supported by the fact that employees are paid a week's salary in respect of five or five and a half days' work. Thus, in 23 Comp. Gen. 541 (1944), it was held within administrative discretion to suspend a per annum employee on Sundays

All provisions for leave of absence are conditioned on the discretion of the Executive as to whether it shall be allowed to the government servant.<sup>75</sup> But, this is not all. First, a person is entitled or, to be more accurate, is eligible for leave only while he is in the government service.<sup>76</sup> So, unless a special statute provides otherwise, if an officer or employee resigns or is discharged before taking accrued leave, he loses his right to it, while if he dies before receiving it, his estate is not entitled to collect the money value.<sup>77</sup> Secondly, neither an officer nor an employee has a legally enforceable right to accrued leave.<sup>78</sup> Understandably he can have no rights in respect of leave which will accrue as the result of future service, but it is not easy to see why he can be deprived of leave which has accrued from past government service. The courts have, as an initial assumption, treated annual leave as being intended simply "to secure to the individual employee a vacation for refreshment and recuperation,"<sup>79</sup> and not as a bonus or as a congressional device to increase an employee's pay.<sup>80</sup> Consequently, it is wholly under the control of Congress, which may withhold or reduce it at any time.

Thus, in *Field v. Giegenack*<sup>81</sup> a statute reducing the annual leave of absence of government employees with pay from thirty

and withhold, as a disciplinary measure, the compensation he otherwise would have received for Sundays had he not been suspended from working or the opportunity of working if he had been obliged to work on Sundays.

In an opinion of the attorney general there is an interesting analysis of the nature of leave. In holding that a certain statute did not cover per diem or piece workers, the attorney general said [27 Op. Atty. Gen. 613 at 619 (1909)]: "'Leave of absence' seems to imply a surrender by the Government of time or service which is a part of a larger total time or service contracted for by the Government. The statement that pay shall not be 'forfeited' during the leave of absence similarly suggests that the employee works under an arrangement which entitles the Government to his time and service. Likewise, the provision giving heads of Department discretion as to the time when the leave of absence shall be allowed presupposes that the arrangement or contract between the Government and the employee gives the Government control over the question when the employee shall work; and only a continuous time contract accords with that supposition."

<sup>75</sup> This is so in the absence of a controlling statutory provision as leave of absence is not a legally enforceable right. 19 Dec. C.T. 661 (1913).

<sup>76</sup> *Butler v. United States*, 101 Ct. Cl. 641 at 644 (1944); 7 Comp. Gen. 83 (1927), and the authorities there cited.

<sup>77</sup> *Ibid.* The reason for this is that "to authorize payment of salary for accrued unused leave of absence subsequent to the separation of the officers from the service would be equivalent to increasing the salary rate for the three offices in excess of that specifically authorized by statute, which, of course, was not intended and is not authorized." 7 Comp. Gen. 83 at 85 (1927).

<sup>78</sup> *Field v. Giegenack*, (D.C. Cir. 1934) 73 F. (2d) 945; *Butler v. United States*, 101 Ct. Cl. 641 (1944); 12 Comp. Gen. 301 (1932).

<sup>79</sup> *Harrison v. United States*, 26 Ct. Cl. 259 at 269 (1891).

<sup>80</sup> *Butler v. United States*, 101 Ct. Cl. 641 at 644 (1944).

<sup>81</sup> (D.C. Cir. 1934) 73 F. (2d) 945.

days to fifteen days was held not to be in violation of the constitutional provision prohibiting the taking of private property for public use without compensation, even so far as it affected leave then accrued. Associate Justice Hitz considered<sup>82</sup> that, as the office itself was not a contractual or property right but a revocable privilege, leave of absence could be no more. As we have seen, no pensioner has a vested legal right to his pension which is a bounty of the government which Congress may give, withhold, reduce or recall at its discretion, and Associate Justice Hitz argued that a leave of absence with pay bears more analogy to a pension than to a wage. He then said: "Under these statutes, leave of absence tentatively accrues to a beneficiary by virtue of his service, yet is not earned in the sense that his wage is earned, which becomes absolutely due and inevitably payable upon his performance of his work. But the leave must be specially sought, granted, and used, under certain conditions and within certain times, determined within the statutory maximum and regulations, by the public printer, with due regard to the needs of the service and justice to the individual."<sup>83</sup>

Then, in *Butler v. United States*,<sup>84</sup> the Court of Claims affirmed the view that Congress may take away from a government employee the leave formerly granted him, which had accrued at the time of his discharge. The court considered that an employee has no vested right to his position and may be discharged at any time at the will of the sovereign, whether he is working at the time or is on leave,<sup>85</sup> from which it inferred that an employee has no vested right to the leave to which he was entitled under the law in force at the time of his discharge.

This view of the legal position leaves much to be desired, both from a theoretical and from a practical standpoint. In the first place, and contrary to what was assumed in both the *Field* and *Butler* cases, it does not necessarily follow from the fact that neither

<sup>82</sup> Id. at 946-947.

<sup>83</sup> Id. at 947.

<sup>84</sup> 101 Ct. Cl. 641 (1944). This decision goes much further than that in *Field v. Giegenack*. In the latter case the statutory provision clearly left the amount of leave granted and the time when it might be taken by the employee to the discretion of the Public Printer, whereas in *Butler's* case the statute purported to grant leave without attaching any strings to the grant. In view of this, *Field v. Giegenack* is not an authority against the view suggested herein that leave with pay when properly made part of the compensation of the employee (as where an unconditional "right" is given to the employee) should be treated as a vested right, and it may reasonably be argued that the lone contrary authority, *Butler v. United States*, was incorrectly decided on this point.

<sup>85</sup> Citing *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21 (1926).

an office nor an employment is a contract that none of the incidents thereof may be contractual. It is quite possible to have a relationship dependent basically upon the public law, i.e., a status relationship, where some of the incidents are regulated by contract. The marriage relationship is a good example of this. It is necessary to distinguish between the nature of a relationship and the nature of the incidents of that relationship, and, even where a relationship is a creation of the public law, certain of its incidents may be regulated by contract. Indeed, it is probably not going too far to say that in a given status relationship all those incidents which are not in fact regulated by the public law (those regulated by the public law may be termed status incidents) are subject to the will of the parties and may be regulated by their agreement.

In the second place, it is suggested that a leave of absence with pay, and this applies particularly to annual leave, bears more analogy to a wage than it does to a pension, and that the supposition of Associate Justice Hitz that leave of absence accrues only tentatively is artificial and illogical. It is clear that no one would think of reading an act fixing the salaries of employees to mean that one who ceases to be an employee, by resignation or discharge, disables himself from drawing pay earned while he was an employee,<sup>86</sup> and the same reasoning should apply to annual leave.<sup>87</sup> To put it simply, annual leave should be considered part of the compensation attached to an office or employment which accrues day by day in the same way as salary, although the enjoyment of it is deferred until a certain amount has accumulated and it is convenient for the due functioning of the department for the officer or employee to take it. It is not realistic to assert that the sole purpose of leave with pay is to provide a period of rest and refreshment so that the employee may return and better serve the government after his leave. Judge Madden, dissenting in *Butler's* case, pointed out: "But to make this better service the *quid pro quo* for the employer's agreement to give leave with pay, so that the employee would not be really entitled to the pay for his leave period until he had returned and given the employer the benefit of his re-created energy for a sufficient period, would

<sup>86</sup> Per Madden, J., dissenting in *Butler's* case, 101 Ct. Cl. 641 at 648 (1944).

<sup>87</sup> If this is not a valid argument, it is possible that the established practice of fixing the date of separation of an employee far enough ahead to permit him to take the leave to which he is "entitled" before he is dropped from the pay roll is not authorized by law. Admittedly, however, the employee is not entitled to have this done as of right (see the references in note 78 supra).

be a difficult bargain to spell out in a labor agreement or a statute and, so far as I know, it has never been read into such an arrangement by implication."<sup>88</sup>

However, notwithstanding the theoretical and practical desirability of this approach, the legal position is clear<sup>89</sup> and, no matter how the statute purporting to grant the leave is worded,<sup>90</sup> the government acting through Congress may reduce, withhold or deny completely an officer's or employee's "rights" to leave with or without pay.<sup>91</sup>

### E. *Promotion*

One of the distinctive features of government employment is the provision made in the regulations and rules governing the conditions of service for promotions in rank and increases in salary. Opportunities for advancement and pay schedules based on years of service and grade of position are important factors to be considered by any person seeking a career in the government service, and it is worthwhile to consider briefly the two aspects of this matter—the power of promotion and the right to promotion.

The powers to promote and to reduce have generally been considered not so much as incidents of the power of appointment as species of that power.<sup>92</sup> This is illustrated by the long-established practice of submitting nominations for promotion in the armed forces (officers being appointed by the President by and with the advice and consent of the Senate) to the Senate for confirmation and of thereafter issuing a commission for the higher office. Now, appointment of officers is an executive function,<sup>93</sup>

<sup>88</sup> 101 Ct. Cl. 641 at 648 (1944).

<sup>89</sup> But see note 84 *supra*.

<sup>90</sup> E.g., in *Butler's* case the relevant statute provided, ". . . all civilian officers and employees of the United States . . . shall be entitled to twenty-six days' annual leave with pay each calendar year, exclusive of Sundays and holidays. . . ." [49 Stat. L. 1161 (1936)]. The only condition apparently attached to the grant was that the leave "shall be granted at such time as the heads of the various departments and independent establishments may prescribe."

<sup>91</sup> Of course, so long as a statute unconditionally granting an employee leave is in force, the employee has a right to the leave provided that he complies with the conditions imposed by statute, and he may enforce the right. *Barringer v. United States*, 188 U.S. 577, 23 S.Ct. 405 (1903), and the cases there cited. However, this is not because he has a property right to the leave but because the Executive cannot avoid the peremptory obligation to grant the leave imposed on it by Congress.

<sup>92</sup> 21 Op. Atty. Gen. 355 at 356 (1896).

<sup>93</sup> *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21 (1926); *Humphrey's Executor (Rathbun) v. United States*, 295 U.S. 602, 55 S.Ct. 869 (1935).

yet the courts have in at least two cases<sup>94</sup> issued a mandamus compelling a government official to promote a government servant to a grade to which he was entitled to progress automatically under statute. Again, in an opinion of the attorney general it is said:

“Now appointment in the Army as in any other department of the Government is an executive, not legislative, act. . . . Congress may point out the general class of individuals from which an appointment must be made, if made at all, but it cannot control the President’s discretion to the extent of compelling him to commission a designated individual. . . . It follows, therefore, that, while promotion is a “right” inhering in the officer next in the line of promotion and practically almost certain to vest in him, it is yet inchoate in its nature and its legal vesting is subject to the fundamental condition of an appointment by the President. . . .”<sup>95</sup>

But, whatever this may mean, it does not answer our problem, and it seems to the writer that it is incorrect to treat promotion as always being a species of appointment. From the point of view of our analysis there are two types of promotion: (1) where a government servant is appointed to a new office or employment as is the case in army promotions which are confirmed by the Senate, and (2) where a government servant, while still in effect holding the same position, is advanced in grade or pay. In the latter case there is not an appointment in the constitutional sense and, therefore, Congress under its power to prescribe conditions of employment may provide for automatic promotions. But, where the promotion amounts to a new appointment, Congress cannot usurp the executive power.

It is difficult to speak of a government servant having the right to promotion.<sup>96</sup> But, just as we saw in the cases where an employee sues his superior administrative officer for accrued pension or leave as provided for in a particular statute regarding that branch of the government service, so an employee may enforce as against his superior officer a statutory right to promotion of

<sup>94</sup> *Macfarland v. Russell*, 31 App. D.C. 321 (1908); *Farley v. Welch*, (D.C. Cir. 1937) 92 F. (2d) 533.

<sup>95</sup> 29 Op. Atty. Gen. 254 at 256-257 (1911).

<sup>96</sup> No matter what the statute says, the right of an individual to an office does not vest even in a limited sense of the word, until the appointment has been made by the proper authority. An attorney general said in an early opinion with respect to a promotion in the army [13 Op. Atty. Gen. 13 at 14 (1869)]: “But these laws and regulations . . . do not confer any right to the vacant place. This he can acquire only by virtue of a new commission.” And see 30 Op. Atty. Gen. 10 (1913).

the second type referred to above.<sup>97</sup> In such cases the government servant is asserting a right given to him by express legislation and not a contractual and property right and, consequently, he has no remedy if his "right" to the promotion is varied or annulled by statute.

### F. *Resignation*

There is still some doubt as to the right of an officer or employee of the United States to resign from the government service. In a recent decision the comptroller general said: "The general rule in the United States is that a public officer has the right to resign. That right may be absolute, i.e., he may resign at his mere will or pleasure without any regard to the will or convenience of the appointing power, or his right to resign may be limited, i.e., may become effective only with the consent of the appointing power."<sup>98</sup>

Notwithstanding certain dicta holding to the contrary, it is submitted that the decision in *United States v. Wright*,<sup>99</sup> decided back in 1839, is still an accurate interpretation of the law. In that case Circuit Justice McLean said: "There can be no doubt that a civil officer has a right to resign his office at pleasure and it is not in the power of the executive to compel him to remain in office. It is only necessary that the resignation should be received, to take effect, and this does not depend upon the acceptance or rejection of the resignation by the president."<sup>100</sup> This principle was followed in the only other decision of the courts involving the resignation of a federal official that I have found,<sup>101</sup> but in other decisions<sup>102</sup> of the courts it has been trenchantly criticized. The view of these other cases is that, in order to be effective, a resignation must be accepted by the appointing power, and reliance is placed upon the common law rule that resignation of a public officer is not complete until the proper authority accepts it, or does something tantamount thereto such as to appoint a successor. Then, there is the assumption in a recent decision of the comp-

<sup>97</sup> On this view the decisions referred to in note 94 supra are undoubtedly correct.

<sup>98</sup> 25 Comp. Gen. 241 at 243 (1945).

<sup>99</sup> (C.C. Ohio 1839) 28 Fed. Cas. 792, No. 16,775.

<sup>100</sup> Id. at 793.

<sup>101</sup> *Barbour v. United States*, 17 Ct. Cl. 149 (1881). See this case, too, for an excellent analysis as to what constitutes a resignation.

<sup>102</sup> *Edwards v. United States*, 103 U.S. 471 (1880), and the cases there cited. See also 19 A.L.R. 39 (1922).

troller general<sup>103</sup> that this rule may apply to employees of the United States, even though the only possible justification for the principle lies in the historical origins of an office. Furthermore, none of the English cases relied on in the leading American decision of *Edwards v. United States*<sup>104</sup> related to officers of the central government and, indeed, in that decision the Court refers only to a person "elected to a municipal office" in England.<sup>105</sup>

It is suggested then that all civil officers and employees of the United States have a right to resign which is not contingent upon acceptance by the appointing power.<sup>106</sup> But it is settled law that, as in the United Kingdom,<sup>107</sup> members of the armed forces have a limited right to resign, in that their resignation does not become effective unless and until it is accepted by the proper authority.<sup>108</sup>

### Conclusions

It is hardly necessary to repeat that all offices must be created by law and appointment thereto made in one of the constitutionally authorized modes. Nor is it necessary to consider in detail the numerous authorities holding that offices are neither property nor contractual rights but are public trusts or privileges revocable at the will of the sovereign power. Initially, the courts assumed that, although there were contracts between officers and governments, they did not give rise to the type of obligations protected by the Constitution from impairment by state governments.<sup>109</sup> But, the courts soon began to consider the issue more from the point of view of public policy,<sup>110</sup> and now the theory that offices and employments are neither property nor contractual rights is based on two equally valid propositions: (1) neither

<sup>103</sup> 20 Comp. Gen. 321 (1940).

<sup>104</sup> 103 U.S. 471 (1880).

<sup>105</sup> *Id.* at 473.

<sup>106</sup> This view is supported by an obiter dictum of Moss, J., in *Brown v. United States*, 67 Ct. Cl. 172 at 176 (1929): "The employee may likewise resign at any time, although appointed for a definite term, without the consent of the Government, and without incurring any liability to the Government, by so doing."

<sup>107</sup> *Hearson v. Churchill and others*, [1892] 2 Q.B. 144; *Parker v. Clive*, 4 Burr. 2419, 98 Eng. Rep. 267 (1769).

<sup>108</sup> *Mimmack v. United States*, 97 U.S. 426 (1878); 22 Op. Atty. Gen. 237 (1898); 18 Comp. Gen. 528 (1938).

<sup>109</sup> An indication of this approach is seen as recently as 1950 in *Bailey v. Richardson*, (D.C. Cir. 1950) 182 F. (2d) 46, where it was said, at 57, that (with reference to the applicability of the Fifth Amendment), "It has been held repeatedly and consistently that Government employ . . . in this particular . . . is not a contract."

<sup>110</sup> There are indications of this approach in *Butler v. Pennsylvania*, 10 How. (51 U.S.) 402 at 417 (1850), and it dominates the later cases.



Congress nor the Executive should fetter in any way its freedom by entering into obligations to be performed at a future time,<sup>111</sup> and (2) the Executive cannot in the absence of statutory authority impose any pecuniary liability on Congress or the United States.<sup>112</sup>

Employments in the federal service must be established by law,<sup>113</sup> but it is possible for the government, under statutory authority, to contract away some of its freedom of action. Back in 1880 the Supreme Court held<sup>114</sup> that a contract between a state and the plaintiff, made pursuant to a state statute whereby the plaintiff was to perform certain duties for a specified period at a stipulated compensation, was within the protection of the constitutional provision prohibiting the impairment of the obligations of contracts, and, on his executing it, he was entitled to that compensation although, before the expiration of the period during which the services were rendered, the state repealed the statute. Nearly sixty years later the Court applied the same principle in holding that state governments may by contract surrender their power to regulate the tenure of public school teachers.<sup>115</sup>

These cases related to state offices, and the constitutional provision prohibiting the impairment of the obligations of contracts applies to states and not to the federal government. However, it is clear that valid contracts are property within the protection

<sup>111</sup> E.g., *Butler v. Pennsylvania*, *id.* at 417: "They are functions appropriate to that class of powers and obligations by which governments are enabled, and are called upon, to foster and promote the general good; functions, therefore, which governments cannot be presumed to have surrendered, if indeed they can under any circumstances be justified in surrendering them."

<sup>112</sup> E.g., *Jordan v. United States*, 123 Ct. Cl. 577 at 591: "Congress is the only body under our Constitution with the authority to consent to the assumption of liability by the United States or authorize others to do so."

<sup>113</sup> See note 38 *supra*.

<sup>114</sup> *Hall v. Wisconsin*, 103 U.S. 5 (1880). At pp. 10-11 the Court quoted from the opinion of Story, J., in *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (21 U.S.) 518 at \*694 (1819): "It is admitted that the state legislatures have power to enlarge, repeal and limit the authorities of public officers, in their official capacities, in all cases, where the constitutions of the States respectively do not prohibit them; and this, among others, for the very reason, that there is no express or implied contract, that they shall always, during their continuance in office, exercise such authorities. . . . But when the legislature makes a contract with a public officer, as in the case of a stipulated salary for his services, during a limited period, this, during the limited period, is just as much a contract, within the purview of the constitutional prohibition, as a like contract would be between two private citizens."

<sup>115</sup> *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 58 S.Ct. 443 (1938); *Dodge v. Board of Education*, 302 U.S. 74, 58 S.Ct. 98 (1937); *Phelps v. Board of Education*, 300 U.S. 319, 57 S.Ct. 483 (1937). And see *Brown v. United States*, 39 Ct. Cl. 255 (1904), where the Court apparently considered that, in certain circumstances, the government might bind itself to employ a person for a definite period.

of the Fifth Amendment,<sup>116</sup> and in view of this a strong argument may be made for the application of the cases involving state offices to federal employment. Indeed, in the 1880 case the Supreme Court said: "The same reasoning is applicable to the countless employees in the same way, under the national government."<sup>117</sup>

But, it is not every acceptance of employment which creates a contract protected by the Constitution. Justice Roberts, who wrote the opinions in all three cases on this issue decided by the Court in 1937 and 1938, said in *Dodge v. Board of Education*:<sup>118</sup>

"In determining whether a law tenders a contract to a citizen it is of first importance to examine the language of the statute. If it provides for the execution of a written contract on behalf of the state the case for an obligation binding upon the state is clear.<sup>119</sup> . . . On the other hand, an act merely fixing salaries of public officers creates no contract in their favor, and the compensation . . . may be altered at the will of the legislature. This is true also of an act fixing the term or tenure of a public officer or an employee of a state agency. The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise. He who asserts the creation of a contract with the state in such a case has the burden of overcoming the presumption. If, upon a construction of the statute, it is found that the payments are gratuities, involving no agreement of the parties, the grant of them creates no vested right."

Justice Black, who dissented in *Indiana ex rel. Anderson v. Brand*,<sup>120</sup> seemed to think that, as the rights claimed were created by the public law through the medium of the statute authorizing the contract, those rights could not be considered contractual. But, as the majority opinion in the same case pointed out, "The source of authority for the so-called permanent teacher's contract is the statute. The legislature need not have provided for such contracts, but, since it did so provide, the entire statute, with all of its provisions, must be read into and considered as a part of the contract."<sup>121</sup>

<sup>116</sup> *Lynch v. United States*, 292 U.S. 571 at 579, 54 S.Ct. 840 (1934), and the cases there cited.

<sup>117</sup> *Hall v. Wisconsin*, 103 U.S. 5 at 10 (1880).

<sup>118</sup> 302 U.S. 74 at 78-79, 58 S.Ct. 98 (1937).

<sup>119</sup> This was the case in *Hall v. Wisconsin*, 103 U.S. 5 (1880).

<sup>120</sup> 303 U.S. 95 at 109 ff.

<sup>121</sup> *Id.* at 107, quoting from *Arburn v. Hunt*, 207 Ind. 61 at 64, 191 N.E. 148 (1934).

In the United States the public law dominates and controls practically all the incidents of the government-servant relationship so that, in the usual case, the only contractual incident is the right to compensation for past services. It would seem then that with the authority of the public law, the federal government and its officer or employee, as the case may be, may annex contractual incidents to their legal relationship, which create constitutionally protected rights. Whether or not there is a limit to the rights which may be so created is a difficult question and admits of no certain answer. The decided cases have thus far related only to pensions and compensation where the term of the employment was cut short by a statute repealing the act under which the contract with the government had been made.

In special cases, then, where there is a statute specifically providing for the creation of contractual rights against the government, the government servant will have rights which are enforceable against the government. But in the typical employment relationship, the government servant has no rights in respect to the enforcement against the United States of the terms of employment, except as to compensation. This is because almost all elements of the typical government-servant relationship are status incidents which do not give rise to vested rights in the government servant. But, the right to past compensation is in all cases a contractual incident of that relationship. Consequently, the government servant has a vested right to compensation for past services of which he cannot be deprived by statute and thus he can recover arrears of salary from the government.