Michigan Law Review

Volume 50 | Issue 5

1952

CONSTITUTIONAL LAW-EXECUTIVE POWERS-RIGHT TO REMOVE EXECUTIVE EMPLOYEES WITHOUT JUDICIAL TRIAL

William E. Beringer
University of Michigan Law School

CONSTITUTIONAL LAW—EXECUTIVE POWERS—RIGHT TO REMOVE EXECUTIVE EMPLOYEES WITHOUT JUDICIAL TRIAL—Plaintiff was reinstated in the classified civil service of the federal government on the condition that removal might be ordered if, "on all the evidence, reasonable grounds exist for belief that the [plaintiff] is disloyal to the Government of the United States."[1] Such evidence having allegedly been uncovered, dismissal followed, with a ban against federal employment for three years. The specific grounds for suspicion were never revealed to plaintiff, and no opportunity was ever afforded to confront, cross-examine, or learn the identity of those who had informed against her. Plaintiff sought an order of reinstatement in the federal district court, contending that the method of dismissal failed to follow prescribed procedure[2] and unconstitutionally punished her without judicial trial. Summary judgment was entered for the government. The court of appeals reversed in part and affirmed in part, holding that, although the three year ban was invalid because it inflicted punishment without judicial trial, the dismissal procedure was proper.[3] On certiorari to the Supreme Court, *held,* affirmed, without opinion, by an evenly divided court. *Bailey v. Richardson,* 341 U.S. 918, 71 S.Ct. 669 (1951).[4]

Unless validly limited by Congress,[5] the executive department has full power over the removal of its inferior officials,[6] which includes the power to prescribe removal procedure. Thus, assuming that it is in accord with the governing statute and executive order, the dismissal procedure used in the principal case is clearly proper, unless there is a constitutional limitation restricting the kind of procedure which may be prescribed. It might be argued that such a limitation could be grounded upon the First Amendment, since there will be an unavoidable restraint on speech if the standard of dismissal is mere suspicion of disloyalty. However, once the general power to remove is conceded, providing that it is not used as a subterfuge to violate the amendment, free speech could be held immaterial. "Petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[7] A more likely

[1] 5 C.F.R. § 2.104 (1949 ed.) (civil service regulation).

[2] 5 U.S.C. (1946) § 652; and 3 C.F.R. 132 (Supp. 1947), which is the President's loyalty order. See 46 MICH. L. REV. 942 (1948).

[3] Bailey v. Richardson, (D.C. Cir. 1950) 182 F. (2d) 46. See 26 NOTRE DAME LAWYER 142 (1950); 99 UNIV. PA. L. REV. 98 (1950); 36 VA. L. REV. 675 (1950).

[4] See 27 N.D. L. REV. 341 (1951).

[5] United States v. Perkins, 116 U.S. 483, 6 S.Ct. 449 (1886), upheld the power of Congress to regulate removals ordered by department heads in whom Congress, under Art. II, §2, had vested the power to appoint. How far Congress may regulate has not been finally decided.

[6] Shurtleff v. United States, 189 U.S. 311, 23 S.Ct. 535 (1903). Power to appoint includes power to remove: Ex parte Hennen, 13 Pet. (38 U.S.) 230 (1839); Humphrey's Executor v. United States, 295 U.S. 602, 55 S.Ct. 869 (1935). Federal employees have no property rights in their jobs: Taylor and Marshall v. Beckham, 178 U.S. 548, 20 S.Ct. 890 and 1009 (1900); Crenshaw v. United States, 134 U.S. 99, 10 S.Ct. 431 (1890).

[7] Justice Holmes in McAuliffe v. New Bedford, 155 Mass. 216 at 220, 29 N.E. 517 (1892). Also, Washington v. Clark, (D.C. D.C. 1949) 84 F. Supp. 964 at 966.

approach[8] is a balancing of the conflicting individual and public interests,[9] which, in view of the seriousness of the present world conflict and judicial respect for executive discretion in handling its own affairs, should lead the Court to give the greater weight to the public interest in loyal employees.[10] In any event, the test of clear and present danger is not available, being confined to cases where the government's objective is to curtail speech for its own sake.[11] If removal or its consequences inflict punishment, the removal procedure is in effect a criminal trial, and the procedural guarantees of the Sixth Amendment will apply. Removal alone is not punishment, although removal plus proscription on further government employment has been so held.[12] Something more is needed to invoke the amendment, and it is doubtful whether the loss of reputation and narrowed opportunity for re-employment, which attend dismissal, can supply it. Although a court might conceivably consider this an extreme case justifying its stretching the amendment,[13] it would have to overcome the real difficulty of saying that mere incidental and unintentional infliction of hurt is genuinely analogous to infliction of punishment.[14] Thus, neither the First nor the Sixth Amendment provides any sound basis for limitation on the executive power of removal. As the recent dismissal cases agree, the federal employee has no right to the "pomp and circumstance" of a formal judicial trial.[15] It is enough if his removal satisfies the congressional standard of promoting the "efficiency and integrity" of the federal service.[16]

William E. Beringer

[8] The likely answer to Justice Holmes is the doctrine of unconstitutional conditions, accepted by the Court, over his dissent, in Western Union v. Kansas, 216 U.S. 1, 30 S.Ct. 190 (1910). Petitioner may not have a constitutional right to be a policeman, but he may have the right not to be discharged because he talks politics.

[9] For this test under the commerce power, compare American Communications Association v. Douds, 339 U.S. 382 at 399, 70 S.Ct. 674 (1950).

[10] See United Public Workers v. Mitchell, 330 U.S. 75 at 96, 67 S.Ct. 556 (1947).

[11] American Communications Association v. Douds, supra note 9, at 396.

[12] United States v. Lovett, 328 U.S. 303 at 316, 66 S.Ct. 1073 (1946), which stresses the factor of proscription. Although the case involved a bill of attainder and not the Sixth Amendment, it is a good precedent because both limitations apply only if there is punishment.

[13] Dissent, Bailey v. Richardson, supra note 3, at 66 and 69.

[14] Justice Frankfurter, concurring, United States v. Lovett, supra note 12, at 324; Ex parte Garland, 4 Wall. (71 U.S.) 333 at 379-380 (1866).

[15] Washington v. Clark, supra note 7, at 967. Also, Friedman v. Schwellenbach, (D.C. Cir. 1946) 159 F. (2d) 22; Garner v. Los Angeles Board, 341 U.S. 716, 71 S.Ct. 909 (1951); United Public Workers v. Mitchell, supra note 10.

[16] United Public Workers v. Mitchell, supra note 10, at 97 and 100. See 5 U.S.C. (1946) §652.