

October 1974

Arnett v. Kennedy - A Dubious Approbation of Adverse Action Procedures

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Labor and Employment Law Commons](#)

Repository Citation

Arnett v. Kennedy - A Dubious Approbation of Adverse Action Procedures, 16 Wm. & Mary L. Rev. 153 (1974), <https://scholarship.law.wm.edu/wmlr/vol16/iss1/7>

Copyright c 1974 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmlr>

COMMENTS

ARNETT v. KENNEDY—A DUBIOUS APPROBATION OF ADVERSE ACTION PROCEDURES

Embodied within the Lloyd-LaFollette Act of 1912¹ and subsequent Civil Service Commission regulations² is an explicit procedure, designated "adverse action,"³ by which a nonprobationary federal employee in the competitive civil service may be removed from his position, reduced in rank or pay, or suspended without pay for "such cause as will promote the efficiency of the service."⁴ Heretofore considered the product of legislative grace during an era in which federal employees were deemed both privileged to receive career positions and without a concomitant right to retain them,⁵ this statutory removal procedure has become subject to much criticism⁶ due to its alleged failure to provide employees with sufficient

1. 5 U.S.C. § 7501 (1970).

2. 5 C.F.R. §§ 752.202(a)(1), 752.202(b), 752.203, 771.208 (1973).

3. 5 U.S.C. § 7511(2) (1970).

4. *Id.* § 7501(a). The Act provides:

(a) An individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service.

(b) An individual in the competitive service whose removal or suspension without pay is sought is entitled to reasons in writing and to—

(1) notice of the action sought and of any charges preferred against him;

(2) a copy of the charges;

(3) a reasonable time for filing a written answer to the charges, with affidavits; and

(4) a written decision on the answer at the earliest practicable date.

Examination of witnesses, trial, or hearing is not required but may be provided in the discretion of the individual directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for and the order of removal or suspension without pay, and also the reasons for reduction in grade or pay, shall be made a part of the records of the employing agency, and, on request, shall be furnished to the individual affected and to the Civil Service Commission.

These requirements have been modified in the employee's favor by a series of Civil Service Commission regulations which require 30 days advance notice of a proposed removal, 5 C.F.R. § 752.202(a)(1) (1973), allow the employee to appear personally, *id.* § 752.202(b), and permit appeal of any adverse decision to either the Civil Service Commission or the employing agency, *id.* §§ 752.203, 771.205, 771.208.

5. For a discussion of the history of civil service legislation, see *Arnett v. Kennedy*, 94 S. Ct. 1633, 1641-42 (1974).

6. See, e.g., Berzak, *Rights Accorded Federal Employees Against Whom Adverse Personnel Actions Are Taken*, 47 NOTRE DAME LAW. 853 (1972); Chaturvedi, *Legal Protection Available to Federal Employees Against Wrongful Dismissal*, 63 NW. U.L. REV. 287 (1968); Merrill, *Procedures For Adverse Actions Against Federal Employees*, 59 VA. L. REV. 196 (1973).

protection against unwarranted disciplinary action by their supervisors. The United States Supreme Court recently addressed the purported procedural shortcoming in *Arnett v. Kennedy*,⁷ in which the constitutionality of disciplinary action was challenged on the ground that the failure of the procedure to provide federal employees with a full evidentiary hearing before an impartial hearing examiner prior to removal⁸ deprived the employee of the due process guaranteed by the fifth amendment. Two specific issues required the Court's attention: whether the Lloyd-LaFollette Act grants federal career employees a "liberty" or "property" interest in their continued employment which falls within the purview of the fifth amendment's procedural due process protection,⁹ and, if so, whether the precise removal procedures set forth in the Act and attendant regulations protect the liberty or property interest sufficiently to satisfy the due process guarantees of the fifth amendment.¹⁰

With the Court unable to assume a unanimous position on any single aspect of the problem, a mere plurality of the Justices joined to uphold the current adverse action procedure¹¹ in an unusually complex decision expressed in five separate opinions. Since complex decisions are susceptible to misinterpretation and improper application, the relationship among the plurality, concurring, and dissenting opinions in *Kennedy* must be examined carefully; proper analysis of the opinions will indicate that the case may have only limited value as authority to uphold adverse action procedures that

7. 94 S. Ct. 1633 (1974).

8. Accused employees currently have access to an evidentiary hearing only at the appeal stage after removal under either the Civil Service Commission's regulations, 5 C.F.R. §§ 771.208, 771.210-.212, 772.305 (1973), or particular agency procedures, e.g., Office of Economic Opportunity Staff Instruction No. 771-2 (1971); 5 U.S.C. § 5596 (1970).

9. The right to due process of law under the fifth or fourteenth amendment is not all-inclusive, it "attaches" only upon a deprivation of an employee's rights to "liberty" and "property" as they relate to his job. See *Board of Regents v. Roth*, 408 U.S. 564, 570 (1972) (due process attachment under fourteenth amendment). Thus it is the nature of the interest involved which invokes due process protections rather than a balancing of the interest of the individual against those of the government employer. *Id.* at 571. See notes 18-25 *infra* & accompanying text. See also *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

10. This second issue was also one discussed in *Roth v. Board of Regents*, 408 U.S. 564, 569 (1972). See notes 18-25 *infra* & accompanying text. See also *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971).

In *Kennedy* the standard for removal, "such cause as will promote the efficiency of the service," see note 4 *supra* & accompanying text, also was challenged in the district court as vague, overbroad, and thus unconstitutional on its face, *Kennedy v. Sanchez*, 349 F. Supp. 863, 865 (N.D. Ill. 1972), but the district court's determination that the clause was insufficiently precise was rejected by the Supreme Court. *Arnett v. Kennedy*, 94 S. Ct. 1633, 1649 (1974).

11. 94 S. Ct. at 1636-39.

fail to track precisely those available under the Lloyd-LaFollette Act.

The Interest Created by the Act

In *Kennedy* a nonprobationary employee of the Office of Economic Opportunity (OEO) was removed from his position pursuant to the statutory adverse action procedure after being accused of making recklessly false statements about a superior.¹² In accordance with established Civil Service Commission and OEO regulations, the employee, Kennedy, was given notice of the proposed adverse action and was informed of his right to reply. Kennedy elected to forgo a reply, since the supervisor he had criticized was to preside over the subsequent proceedings, and chose instead to challenge the validity of the removal procedure in court. The maligned supervisor, acting on behalf of the OEO, then terminated Kennedy and informed him of his right to appeal.¹³ Kennedy instituted suit in federal district court seeking relief from the alleged governmental infringement without due process of law upon his "liberty" and "property" interest in continued employment, asserting a right under the fifth amendment to both a full evidentiary hearing and an impartial hearing examiner in the evidentiary proceeding prior to removal.¹⁴ A three-judge district court issued summary judgment for Kennedy and ordered him reinstated with full backpay.¹⁵ The OEO appealed this decision to the Supreme Court which reversed,¹⁶ a three-Justice plurality holding that the Act created no interest to which due process attached while two other Justices concurred in result on the basis that the removal procedures under the Act comported with fifth amendment due process.¹⁷

12. A field representative in the Chicago Regional Office of the Office of Economic Opportunity, Kennedy allegedly accused Wendell Verduin, the Regional Director, of having attempted to bribe a representative of a community organization by offering him \$100,000 in return for signing a statement adverse to Kennedy's interests. 94 S. Ct. at 1636.

13. 94 S. Ct. at 1636-37.

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

15. 349 F. Supp. at 866. The three-judge court was used in conformity with the statutory requirement of convoking a three-judge panel whenever an injunction is sought against the enforcement of an act of Congress on constitutional grounds. 28 U.S.C. § 2282 (1970). In *Kennedy* an injunction was sought against the OEO to restrain it from enforcing the Lloyd-LaFollette Act which was argued to be unconstitutional.

16. *Arnett v. Kennedy*, 94 S. Ct. 1633 (1974).

17. The five Justices united to approve the removal procedure although proffering different reasons in support of that position. Justice Rehnquist, writing for the plurality which included Chief Justice Burger and Justice Stewart, held that a federal employee's statutory right under the Lloyd-LaFollette Act to be removed only for cause does not create in him a

In the landmark companion cases, *Board of Regents v. Roth*¹⁸ and *Perry v. Sindermann*,¹⁹ the Supreme Court previously had abandoned expressly the concept that government employment was a privilege to which the fifth amendment protections could attach only when the interests of the employee outweighed those of the government.²⁰ Rather than a balancing process, the initial decision

property interest within the meaning of the fifth amendment. *Id.* at 1649. Therefore, since the fifth amendment's procedural due process requirement had nothing to which to attach, the plurality needed only to determine that Kennedy was removed in accordance with established procedures to rule in favor of the OEO. Concurring in the result only, Justices Powell and Blackmun filed a separate opinion in which they contended that the Lloyd-LaFollette Act does grant federal employees an expectancy of job retention to which the fifth amendment procedural safeguards attach. After examining the adverse action procedure, however, these Justices decided that the Act and attendant regulations complied with the due process requirement despite the inability of federal employees to demand a pretermination evidentiary hearing before an impartial examiner. *Id.* at 1649-52.

The remaining four Justices accepted the proposition that nonprobationary federal employees hold a property interest in their continued employment and agreed among themselves that the safeguards against arbitrary removal afforded such employees do not give them the full protection guaranteed by the fifth amendment. *Id.* at 1659, 1671. They were unable to concur, however, on what additional provisions are required to conform the Act and attendant regulations to the requirements of procedural due process. Agreeing that the Act was not unconstitutional on its face, Justice White would have been satisfied if an accused employee could appear before an impartial hearing examiner prior to removal, while Justices Marshall, Douglas, and Brennan would demand a full evidentiary hearing as well as an impartial decisionmaker prior to removal or suspension. *Id.* at 1680.

18. 408 U.S. 564 (1972).

19. 408 U.S. 593 (1972).

20. In *Roth* the Court stated: "[We have] fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the application of procedural due process rights." 408 U.S. at 571 (footnote omitted). Prior to the *Roth* decision an employee was held entitled to a specific due process protection only when his employment interest was deemed more important than the government's countervailing interest in remaining free from such an additional burden. See *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970). For an illustration of the balancing-of-interests test in operation, see 29 WASH. & LEE L. REV. 100, 105-10 (1972).

The classification of government employment as a privilege was reflected by Judge Holmes' often quoted statement near the turn of the century: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892). The last significant application of the right-privilege distinction occurred in *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951), in which a government employee was summarily dismissed from her job without being afforded the opportunity to know or refute the evidence upon which the removal was predicated. The Court of Appeals for the District of Columbia Circuit upheld the dismissal while noting: "Due process of law is not applicable unless one is being deprived of something to which he has a right." *Id.* at 58.

The first notable exception to the distinction was the "doctrine of unconstitutional conditions." See, e.g., *Weiman v. Updegraff*, 344 U.S. 183 (1952); *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956). See also Comment, *Constitutional Rights of Public Employees: Progress Toward Protection*, 49 N.C.L. REV. 302, 304 (1971). Although since applied to gov-

as to whether due process attached therefore was to be made by determining whether the employee had a "liberty" or "property" interest that would be infringed by termination. If so, then the fifth amendment due process protections were to be invoked, a balancing of the interests being performed, after the initial issue of attachment was resolved, to determine the specific content of the due process required in a particular instance.²¹

ernment benefits other than employment (*Lefkowitz v. Turley*, 94 S. Ct. 316 (1973)(government contract); *California v. LaRue*, 409 U.S. 109 (1972)(liquor license); *Sherbert v. Verner*, 374 U.S. 398 (1963)(unemployment benefits); *Speiser v. Randall*, 357 U.S. 513 (1958); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957) (taking of bar examination)), the doctrine was created to protect civil service employees from being disciplined for participation in activities specifically sanctioned by the Constitution, particularly the first amendment. See, e.g., *Birnbaum v. Trussell*, 371 F.2d 672 (2d Cir. 1966). In *Weiman v. Updegraff*, 344 U.S. 183 (1952), the first case to utilize this doctrine, an Oklahoma statute requiring a loyalty oath of all state employees was held unconstitutional when a state college professor was discharged pursuant to the statute because he exercised his fifth amendment right against self-incrimination during the course of Senate subcommittee hearings. The doctrine has retained its vitality, as evidenced by the Supreme Court holding in *Cole v. Richardson*, 405 U.S. 676 (1972), that government employment may not be conditioned upon an oath to refrain from engaging in constitutionally protected speech, and has been used to prohibit the removal of schoolteachers for constitutionally protected speech. See, e.g., *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Shelton v. Tucker*, 364 U.S. 479 (1960).

A second exception to the right-privilege distinction was recognized subsequently by the Supreme Court in 1959 in *Greene v. McElroy*, 360 U.S. 474 (1959). The petitioner in *Greene* was an aeronautical engineer whose security clearance was revoked without his being given an opportunity to contest the action by confronting and cross-examining adverse witnesses. Indicating that a federal employee, under some circumstances, may have a liberty or property interest in his continued employment to which fifth amendment protections attach, the Court stated: "The alleged property is petitioner's employment; the alleged liberty is petitioner's freedom to practice his chosen profession." *Id.* at 492. The Court failed to reach the merits of the constitutional argument, however, and chose to rule in favor of the employee by finding the revocation to be an ultra vires act: "[I]n the absence of explicit authorization from either the President or Congress, the respondents [Secretary of Defense and others] were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." *Id.* at 508.

Despite its suggestion in *Greene* that a right to government employment may exist, the Court nevertheless upheld a similar dismissal two years later in *Cafeteria Workers Union Local 473 v. McElroy*, 367 U.S. 886 (1961), in which the security clearance of a shortorder cook at a naval gun factory was revoked summarily, no opportunity having been given the cook to dispute the revocation. This apparently contradictory decision occasionally has been cited as support for the proposition that the Government may always summarily terminate employment absent explicit statutory protection of the employee. See, e.g., *Arnett v. Kennedy*, 94 S. Ct. 1633, 1643 (1974). It should be noted that, in *Cafeteria Workers*, by determining whether procedural due process protections attached to the employment interest through a process of balancing the interests of the Government against those of the individual on a case-by-case basis, the Court necessarily implied that such an interest protected by due process could yet exist in government employment in cases where the employee's interests are held to be of greater weight.

21. *Board of Regents v. Roth*, 408 U.S. 564, 570 & n.8 (1970).

The *Kennedy* opinions affect most directly the creation of a limited property interest by a statute. It was asserted in *Roth* that for a government employee to have a property interest in continued employment, he must have an "entitlement" to his job and not merely a unilateral expectation of retention.²² This entitlement can be created in several ways, including: (1) the employee may have a vested right to continue employment, absent cause for dismissal, arising from either a contract²³ or state or federal statutes;²⁴ or (2) an entitlement may arise whenever a right to receive benefits is contingent upon the satisfaction of certain objective criteria and the claimant meets those standards.²⁵ Neither *Roth* nor *Sindermann*, however, addressed the related issue of whether a statute granting an entitlement can simultaneously provide an employee fewer procedural protections for his property interest²⁶ than the fifth amendment dictates.

Both *Roth* and *Sindermann* discussed principally the attachment issue. *Roth* concerned purportedly untenured college professors teaching at state-supported institutions, who, upon not being rehired for another academic year, sought judicial relief by alleging deprivation of a constitutionally protected right to renewal without the benefit of procedural due process. Applying the theory that government employees may have or accrue a property or liberty interest in their continued employment, to which it had alluded in *Greene*, see note 20 *supra*, the Court held in *Roth* that an untenured professor holding absolutely no expectation of renewal did not have a property interest in reemployment embraced within the meaning of the fifth amendment. 408 U.S. at 567. Roth was hired under a one-year contract renewable at the option of both parties, but under the applicable state tenure statute he would be serving "during efficiency and good behavior" only after having completed four years of employment. Roth was dismissed after his first year on the job and thus had no tenure. Conversely, in *Sindermann*, the Court found that fifth amendment procedural due process protections would attach if the professor was able to demonstrate that he was operating under a de facto tenure system which gave him an expectancy of renewal. Sindermann had been working as a state college teacher for 10 years when he was dismissed. Although the state had no formal tenure system, the Court remanded the case to the lower court to allow Sindermann to prove his allegations that a de facto tenure system existed by virtue of published rules and understandings. 408 U.S. at 599-603.

22. 408 U.S. at 576-77.

23. *Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972). See also *Connell v. Higginbotham*, 408 U.S. 207, 208 (1971).

24. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), citing *Goldberg v. Kelly*, 397 U.S. 254 (1970). The majority in *Roth* said an entitlement is "defined by existing rules or understandings that stem from an independent source such as state law."

25. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

26. Beyond an assertion in dictum by Justice Rehnquist that Kennedy's liberty interest was not infringed so long as he was afforded an opportunity to clear his name, 94 S. Ct. at 1646, the various *Kennedy* opinions did not attempt to explicate further the liberty interest concept. For a termination of employment to be deemed a deprivation of an employee's liberty interest under the analysis set forth in *Roth* and *Sindermann*, it must either seriously damage the employee's reputation or substantially foreclose his future employment opportunities. 408 U.S. at 573-74. See also *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

The plurality in *Kennedy* held that the employee was not entitled to a pretermination evidentiary hearing before an impartial hearing examiner, regardless of whether fifth amendment procedural due process ordinarily requires such a procedure, since it found that Congress, through the Lloyd-LaFollette Act, did not create in federal employees a property right to which all of the fifth amendment protections attach. Justice Rehnquist, rejecting the district court's view, saw nothing in the fifth amendment prohibiting Congress from "granting protection against removal without cause and at the same time . . . specifying that the determination of cause should be without the full panoply of rights which attend a trial-type adversary hearing."²⁷ This conclusion that Congress intended to grant federal employees less than a whole right was supported by a finding that Congress, when adopting the Lloyd-LaFollette Act, was as concerned with avoiding unduly burdensome procedural requirements on federal agencies as it was with providing job security for employees.²⁸

Although subsection (a) of the Act, standing alone, contains the necessary language to bring the full range of fifth amendment pro-

Cognizant that most terminations influence prospective employers to some degree, the Court in *Roth* limited attachment of due process to those situations casting a serious stigma on an employee's record and noted that a termination which merely renders an employee "somewhat less attractive" to prospective employers is not so potentially harmful that procedural due process attaches. 408 U.S. at 574.

In *Arnett v. Kennedy* the employee alleged that the manner in which his dismissal was effected violated his liberty interest because it was predicated upon allegations of dishonesty that would seriously damage his reputation. 94 S. Ct. at 1645. Although the plurality did not find *Kennedy* endowed with a right to which procedural due process protections could attach, Justice Rehnquist asserted in dictum that prerequisite to any finding of deprivation of liberty without due process of law was dismissal unaccompanied by an opportunity for the accused to clear his name. He then stated that *Kennedy* suffered no deprivation, for the administrative appeal procedure is in "sufficient compliance with the requirements of the Due Process Clause." *Id.* at 1646. The concurring opinion simply noted that the Lloyd-LaFollette Act comported with due process with respect to *Kennedy's* liberty interest for the same reasons that it complied with due process with respect to his property interest. *Id.* at 1652. No discussion of the liberty issue was necessary in the dissenting opinions of Justices Marshall and White inasmuch as both found the Act's procedures to be unconstitutional with respect to *Kennedy's* property interest. *Id.* at 1660, 1672. One argument that *Kennedy* might have advanced was that he had a liberty right to be free from patently arbitrary or unfair governmental action to his detriment absent an extraordinary need for such governmental action. See also note 47 *infra* & accompanying text. This liberty interest seems no more attenuated than the freedom to pursue one's chosen profession implicitly recognized in *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972). While such a liberty right might not require a pretermination evidentiary hearing, it very well might require a pretermination right to reply before an impartial hearing examiner.

27. 94 S. Ct. at 1643.

28. *Id.*

tections into play,²⁹ the plurality read this section in conjunction with the specific procedures enunciated in subsection (b) and determined that Congress intended to limit the application of fifth amendment procedural due process to the procedures specified therein:

[T]he very section of the statute which granted [the employee] that right . . . expressly provided also for the procedure by which "cause" was to be determined, and expressly omitted the procedural guarantees which appellee insists are mandated by the Constitution. Only by bifurcating the very sentence of the Act of Congress which conferred upon appellee the right not to be removed save for cause could it be said that he had an expectancy of that substantive right without the procedural limitation which Congress attached to it. In the area of federal regulation of government employees, where in the absence of statutory limitation the governmental employer has had virtually uncontrolled latitude in decisions as to hiring and firing, *Cafeteria Workers v. McElroy*, . . . we do not believe that a statutory enactment such as the Lloyd-LaFollette Act may be parsed as discretely as appellee urges.³⁰

This analysis appears vulnerable on several fronts. At the outset, its reference to *Cafeteria Workers* appears unwarranted since that decision relied upon the balancing-of-interests test subsequently discarded by the Supreme Court in *Roth*.³¹ Moreover, although the plurality's reading of the two subsections as a unit conferring a limited right is reasonable, another interpretation is possible. Subsection (a) may be read as conferring a substantive right to which the full array of procedural due process protections attach, and subsection (b) may be regarded as a congressional attempt to specify how the guaranteed elements of procedural due process are to interrelate and be exercised. According to this interpretation subsection (b) does not impose limitations on subsection (a), it is merely explanatory and must meet fifth amendment standards of procedural due process.³² The reasons behind the enactment of the provision further undermine the plurality's bald assertion³³ that

29. See note 4 *supra*.

30. 94 S. Ct. at 1643, citing *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961).

31. See note 20 *supra*.

32. 94 S. Ct. at 1672.

33. Although placing its assertion regarding the intent of Congress in the context of a discussion of preceding Civil Service provisions, 94 S. Ct. at 1641-42, the Court apparently relied on speculation alone to fathom legislative intent in the Lloyd-LaFollette Act since it referenced no contemporary statement of that intent. See 94 S. Ct. at 1642.

subsection (b) was intended to limit subsection (a). At the time of its enactment in 1912, constitutional due process was not deemed protective of governmental employment since employees were considered privileged to hold their positions without a right to expect continued employment.³⁴ Rather than limiting the constitutional protections applicable to disciplined federal employees, Congress just as readily may be presumed to have been providing civil servants with procedural safeguards which they had not enjoyed previously. Congress may well have been concerned that federal employees were not receiving sufficient protection, rather than receiving so much that the system would be unduly burdened absent some restriction.

Notwithstanding the plurality's argument,³⁵ six Justices found that subsection (a) of the Act creates a right to continued employment for nonprobationary federal civil service employees, absent cause for dismissal, a right to which fifth amendment procedural due process protections attach.³⁶ Despite being divided over whether the Act and attendant regulations meet the standards of procedural due process, each of these Justices found support in *Roth* for the proposition that statutes granting government employees job security absent cause for removal create a property interest to which due process attaches.³⁷

34. See note 20 *supra*.

35. Besides its speculation regarding legislative intent, the plurality also denigrated Kennedy's attempt to challenge the Act, noting the "elementary rule of constitutional law that one may not 'retain the benefits of an Act while attacking the constitutionality of one of its important provisions.'" 94 S. Ct. at 1644, citing *Fahey v. Mallonee*, 332 U.S. 245, 255 (1947), citing *United States v. San Francisco*, 310 U.S. 16, 29 (1940). Pursuant to this line of reasoning, employees are not permitted to claim a right to employment, absent a showing of cause for removal, under subsection (a) of the Act while questioning the constitutionality of the procedures set forth in subsection (b) which were felt to limit the right created by subsection (a). Concluding that the substantive right was "inextricably intertwined" with the Act's procedural provisions, the plurality decided that "a litigant in the position of appellee must take the bitter with the sweet." 94 S. Ct. at 1644. Although this argument lends support to the plurality's limited-interest argument, even Justice Rehnquist acknowledged that the maxim of constitutional litigation has been ignored as often as followed in other cases. *Id.*

36. For the conclusion of dissenting Justices Marshall, Douglas, and Brennan regarding attachment, see 94 S. Ct. at 1672; for the decision of Justices Powell and Blackmun, concurring in result, see *id.* at 1650; for the dissenting opinion of Justice White, see *id.* at 1655-56. See also note 71 *infra*.

37. The Court reiterated in *Roth* that a statute granting government employees security absent cause for removal creates a "property" interest to which due process attaches. 408 U.S. at 577-78. This statement in *Roth* was probably never intended to represent an absolute rule, however, because the Court was not faced in *Roth* with an apparent statutory limitation to a section creating a property right. Justice Stewart, who wrote the opinion in *Roth* which relied upon this principle, was a member of the plurality in *Kennedy* which found an exception to it. 94 S. Ct. at 1645.

This solidarity was marred, however, by reliance upon unpersuasive arguments. Justice Marshall, addressing the plurality's contention that a right created by statute may be limited by that statute, cited several cases in which the Court previously had found a property interest protected by the due process clause³⁸ and asserted that "[i]n none of these cases did the Court consider a statutory procedure to be an inherent limitation on the statutorily created . . . property interest."³⁹ Justice Marshall failed to note, however, that in none of these cases did the statute which created the property right also provide the procedure for its termination.

Another of the arguments raised against the plurality also was flawed. Justice Powell, referring to the plurality's rationale in his concurring opinion, stated: "[Justice Rehnquist's view] misconceives the origin of the right to procedural due process. That right is conferred not by legislative grace but by constitutional guarantee."⁴⁰ This statement may reflect a misunderstanding of Justice Rehnquist's position. Justice Rehnquist did not claim that the right to due process springs directly from the statute involved; he merely adduced that the right to due process attaches, in the absence of a contract, only if Congress creates a property interest.⁴¹

Although neither the plurality's argument that no attachment occurs nor the affirmative position of the concurring and dissenting Justices is overwhelmingly convincing, it appears that at the present time six Justices have determined that subsection (a) of the Act invokes the procedural due process protections of the fifth amendment. In light of the inability of these Justices to adopt a uniform position concerning whether the Act and its accompanying administrative regulations comply with the requirements of procedural due process, careful attention must be given to each faction.

Determining the Constituent Elements of Due Process

Although the specific elements of procedural due process may

38. *Perry v. Sindermann*, 408 U.S. 593 (1972); *Bell v. Burson*, 402 U.S. 535 (1971) (driver held entitled to driver's license under statute providing for its issuance); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (public assistance recipients found entitled to welfare benefits where statute deferred eligibility).

39. 94 S. Ct. at 1672. Justice Rehnquist would distinguish these cases as dealing with areas of the law dissimilar to government employment and therefore inapplicable because "[t]he types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under that clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests." *Id.* at 1645.

40. 94 S. Ct. at 1650.

41. *Id.* at 1643.

vary in particular cases,⁴² the Supreme Court consistently has required the presence of two minimal safeguards for a disciplinary action to satisfy the demands of due process. It has become axiomatic that no deprivation of a protected interest may occur unless the party affected is furnished adequate prior notice of the proposed government action.⁴³ (Clearly satisfied by the procedures under the Lloyd-LaFollette Act,⁴⁴ this requirement was not at issue in *Kennedy*.) In addition the deprivation of a protected interest may not be effected without the divested party being afforded an opportunity to be heard⁴⁵ "at a meaningful time and in a meaningful manner."⁴⁶ This "meaningful time" has been interpreted by the Court, in the absence of an extraordinary governmental need for summary action,⁴⁷ to mean a time "before petitioner is condemned to suffer grievous loss."⁴⁸

The specific requirements of a meaningful hearing in any particular situation are determined by balancing the interests of the adverse parties.⁴⁹ Through this process both the opportunity to produce and cross-examine witnesses⁵⁰ and to present arguments before an impartial hearing examiner⁵¹ previously have been held to be important components of a meaningful hearing. In *Kennedy* the

42. In *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971), the Court said that "[t]he formality and procedural requisites . . . can vary, depending upon the importance of the interests involved . . .", and in *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961), it stated further that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."

43. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970); *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965).

44. See 5 U.S.C. § 7501(b)(1) (1970).

45. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963).

46. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

47. An extraordinary need for summary action has been found to exist where the Government claimed an interest in seizing and destroying allegedly rotten food without prior notice, *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908), and where the Government claimed an interest in seizing a yacht allegedly carrying contraband drugs, *Astol Calero-Toledo v. Pearson Yacht Leasing Co.*, 42 U.S.L.W. 4693 (U.S. May 15, 1974).

48. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

49. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971).

50. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Jenkins v. McKeithen*, 395 U.S. 411, 428 (1969); *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 103 (1963).

51. See, e.g., *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Winnick v. Manning*, 460 F.2d 545 (2d Cir. 1972); *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970).

appellee's claims⁵² that the absence of an opportunity to present and cross-examine witnesses rendered the pretermination hearing offered by the Lloyd-LaFollette Act less than meaningful met differing responses. Five Justices found no merit in his plea: and plurality simply held that procedural due process did not attach and never reached this issue,⁵³ while the two Justices concurring in result balanced the interests of the respective parties and determined in the Government's favor that the Act's procedures were sufficient.⁵⁴ The remaining four Justices perceived the balance of interests to lie in Kennedy's favor. All four determined that the absence of an impartial hearing examiner rendered the removal process unconstitutional; three of the four deemed a pretermination evidentiary hearing essential to procedural due process.⁵⁵

This diversity of opinion, presented in five separate statements, results from the differing weights given the employee interests and the ill effects presumed to flow from the removal procedure. Emphasizing the disastrous effects that wrongful removal could have on an employee,⁵⁶ even though subsequently reinstated on appeal, Justice Marshall gave the employee's interest great weight and found a pretermination evidentiary hearing to be an essential element of procedural due process. Although noting that a wrongfully removed employee receives, upon reinstatement, the full backpay he lost during the disciplinary period,⁵⁷ Justice Marshall argued that this

52. 94 S. Ct. at 1637.

53. 94 S. Ct. at 1644, 1646. A case very helpful in speculating how the Justices of the plurality would have balanced the interests in *Kennedy* had they found due process to attach, is *Sampson v. Murray*, 94 S. Ct. 937 (1974), in which a determinative question was whether the federal district court should have granted a stay of administrative action pending a federal employee's administrative appeal. The Court decided the issue by balancing the interests of the Government against those of the individual employee. As in *Kennedy*, Justice Rehnquist, joined by Chief Justice Burger and Justice Stewart, wrote the opinion for the Court, predictably finding the Government's need for removal of the employee to be superior to the employee's interest in remaining on the job.

54. 94 S. Ct. at 1652. Justice White agreed with Justices Powell and Blackmun, concurring in result, that a pretermination evidentiary hearing was not required, *id.* at 1667, but agreed with the dissent that an impartial hearing examiner was required at the pretermination stage, *id.* at 1668.

55. See notes 70-71 *infra* & accompanying text.

56. 94 S. Ct. at 1677.

57. 5 U.S.C. § 5596(b)(1) (1970) provides that an agency employee, if reinstated on appeal, "is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay . . . that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period"

payment may come too late to prevent the employee from suffering an unwarranted hardship during the perhaps lengthy period between removal and reinstatement.⁵⁸ He further noted that extended unemployment becomes more acute in light of the fact that a discharged federal employee often cannot obtain employment in the private sector,⁵⁹ is usually ineligible for unemployment benefits since the removal was premised on cause,⁶⁰ and consequently may be forced to resort to welfare benefits during the pendency of his appeal.⁶¹ Balanced against this hazard to wrongfully dismissed employees was the increased strain on governmental efficiency of a pretermination evidentiary hearing.⁶² Unpersuaded, however, that this greater burden outweighed the potential benefit inuring to employees from pretermination evidentiary hearings,⁶³ Justice Mar-

58. More than one-half of all appeals take longer than three months to complete. Merrill, *Report in Support of Recommendation 72-8, Procedures for Adverse Actions Against Federal Employees*, 2 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1006, 1014 (1972).

59. Obtaining private employment is difficult for two reasons: first, an employer in the private sector will be reluctant to hire a discharged government employee knowing that if the employee is successful upon his pending appeal, he will return to his government job, and, second, there is a widely held notion that government employees are extremely hard to fire, hence an assumption that anyone who is fired is likely to be an undesirable prospect for employment in the private sector. *Id.* at 1015.

60. See *Christian v. Department of Labor*, 94 S. Ct. 747 (1974).

61. Justice Marshall cited three reasons why reliance upon welfare is not satisfactory. First, the employee may, in order to become eligible for benefits, have to liquidate and exhaust all of his assets. Second, many people would decline welfare, finding it degrading and humiliating. Finally, the level of subsistence provided by welfare is so minimal that "painful and irremediable personal as well as financial dislocations" may result. 94 S. Ct. at 1677. He concluded by asserting that reliance upon the welfare system to prevent serious suffering by the discharged employee is a "gross insensitivity" for "[t]he costs of being forced, even temporarily, onto the welfare [rolls] because of a wrongful discharge from tenured government employment cannot be so easily discounted." *Id.*

62. 94 S. Ct. at 1678-80. It should be noted that one evidentiary hearing presently is available under Civil Service Commission regulations at the appeal stage. 5 C.F.R. § 752.203 (1973). In *Goldberg v. Kelly*, 397 U.S. 254, 267 n.14 (1970), the Court indicated that due process does not require two hearings.

63. 94 S. Ct. at 1677-79. Justice Marshall supported this contention by noting that during recent years the Court had held pretermination hearings to be required by due process in the governmental taking of interests other than employment. In 1969 the Court held unconstitutional a Wisconsin garnishment procedure which allowed a creditor's lawyer to have half of a debtor's wages frozen by simply serving him with a summons issued by the clerk of the court, even though the debtor could have his wages unfrozen at a later hearing, *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), and in the following year the Court found a nonevidentiary hearing prior to the termination of welfare benefits to be insufficient to satisfy due process in *Goldberg v. Kelly*, 397 U.S. 254 (1970), despite the recipient's ability to obtain a full evidentiary hearing after the termination of benefits. *But see Mitchell v. W.T. Grant Co.*, 94 S. Ct. 1895 (1974).

A Georgia statute was held not to satisfy due process in *Bell v. Burson*, 402 U.S. 535 (1971), because it failed to allow an evidentiary hearing before the revocation of a driver's license,

shall concluded that Kennedy's right to procedural due process was infringed by his removal under the existing procedures.⁶⁴

Justices Powell and Blackmun, concurring in result, did not deem discharged federal employees to be so helpless during the interim between removal and appeal. In contrast to the dissenting Justices, they appraised the removed employee's distress as consisting of nothing more than a temporary interruption of income⁶⁵ and found mitigating circumstances to exist since "a public employee may well have independent resources to overcome any temporary hardship."⁶⁶ Moreover, the concurring Justices found the Government's interest in possessing the prerogative to remove quickly disruptive employees to be substantial,⁶⁷ because, as the Government contended, this summary removal power is necessary to maintain efficiency and discipline⁶⁸ and a mandatory pretermination hearing would increase administrative costs.⁶⁹ Thus weighing the adverse interests, Justices

even though it subsequently could be restored at a trial-type hearing. Likewise, in *Fuentes v. Shevin*, 402 U.S. 67 (1972), the Court struck down a Florida procedure for summary replevin because it failed to provide a prior evidentiary hearing. Justice Marshall argued that the interests taken in these other cases were no more significant than the interest infringed in *Kennedy*.

64. He drew support from *Fuentes* to buttress this conclusion:

A prior hearing always imposes some costs in time, effort, and expense and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. . . . Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the persons whose possessions [or property] are about to be taken.

94 S. Ct. at 1678, quoting *Fuentes v. Shevin*, 407 U.S. 67, 90-91 n.22 (1972).

65. 94 S. Ct. at 1652. They did not find the deprivation to be as severe, however, as that suffered by the petitioner in *Goldberg v. Kelly*, 397 U.S. 254 (1970), in which the Court determined that a termination of welfare benefits without a prior evidentiary hearing was unconstitutional due to the recipient's "brutal need" for the funds, *id.* at 261.

66. 94 S. Ct. at 1652. Justice Powell's distinction is undoubtedly valid in many cases where a discharged public employee has independent resources upon which to rely while he is deprived of income temporarily. In many other cases, however, the employee may not have sufficient independent resources to carry him through the temporary deprivation of income. Justice Powell's distinction is therefore of limited validity. He seemed not to consider the possibility that the removal from public employment, like the termination of welfare benefits, may come in the face of "brutal need." Justice White, on the other hand, appeared more cognizant of how severe the consequences of a temporary deprivation of income can be, but he disagreed with Justice Marshall on the utility of the welfare system as a means of providing the employee with a minimum base of support while his appeal was pending. 94 S. Ct. at 1667-68.

67. 94 S. Ct. at 1651.

68. *Id.* at 1651, 1679.

69. 94 S. Ct. at 1651. Regulations currently in effect, however, prohibit the Government from removing the employee for 30 days after the start of the removal process. See note 4 *supra*. A report by Professor Robert Merrill for the United States Administrative Conference

Powell and Blackmun decided in favor of the Government that the existing procedures met the requirements of procedural due process.⁷⁰

Not only must a complaining party demonstrate that his interests outweigh those of government in order to prevail on a due process challenge, it appears that he also must persuade a court that the procedural protections demanded would enhance significantly the fairness of the controverted proceedings. It was on this point that Justice White differed from Justices Marshall, Douglas, and Brennan. Whereas Justice White concluded that Kennedy's removal was improper because he was not provided an impartial hearing examiner,⁷¹ the other three dissenting Justices found the balance of interests to lie so heavily in the employee's favor that the impartial examiner should be required to conduct a full evidentiary hearing before termination since the availability of such a full hearing would increase substantially the fairness of the removal procedure.

Only a Battle, Not the War

Reduced to their lowest common denominator, the five separate opinions filed in *Kennedy* uphold the constitutionality of the exist-

indicated that delays in the appeal procedure are caused by inefficient scheduling, not by lengthy hearings. Merrill, *supra* note 58, at 1017, 1056-57, 1060. Justice Marshall concluded that "there seems little reason why a hearing could not be held during that thirty-day period [after notice and before removal]." 94 S. Ct. at 1679. The notice requirement would not necessarily be an impediment to holding the hearing within 30 days. Justice Marshall seemed to have overlooked, however, the potential difficulties in having all necessary witnesses appear within the 30-day period. This problem could be very troublesome for the employing agency if the employee to be discharged knows that removal is not possible until he has received an evidentiary hearing, since in that situation he may attempt to delay the hearing as long as possible.

70. 94 S. Ct. at 1652. Justice White also found a pretermination hearing to be unnecessary, basing this decision partially upon his contention that the wrongfully removed employee "is not totally without prospect for some support during the period between the pretermination and final hearing on appeal. . . . [H]e may get some form of employment in the private sector, and, if necessary, may draw on the welfare system in the interim." *Id.* at 1667-68.

71. 94 S. Ct. at 1665-66. Justice White had little difficulty in reaching the conclusion that an impartial hearing examiner was required at the preremoval stage. 94 S. Ct. at 1665-66. He did not find the adverse action procedure under the Lloyd-LaFollette Act to be unconstitutional, however, since, even though the Act did not mention an impartial decisionmaker as a requirement, he assumed that Congress would have intended such a requirement had it considered the possibility that, as in *Kennedy*, the hearing examiner would have a personal adverse interest in the employee's fate. *Id.* at 1666. By use of such a fictional reading of legislative intent, Justice White implied that a failure of the Act to provide for an impartial decisionmaker would raise constitutional problems. *Id.* Thus Justice White joined the concurring and other dissenting Justices in the belief that the ultimate test of the Act's procedures was the Constitution rather than merely subsection (b) of the Act itself.

ing adverse action procedure by a slender five-to-four margin, the lack of a uniform rationale among the opinions emphasizing the likelihood that *Kennedy* perhaps would not be followed were even a slightly different state government employee removal statute to be challenged. The plurality of three, ruling that the Lloyd-LaFollette Act grants federal employees only a limited expectation of job retention to which procedural due process protections do not attach, was joined by two Justices who held that the full array of protections does attach, but deemed the adverse action procedure to be in compliance with the fifth amendment despite its failure to provide the two protections demanded by *Kennedy*.

The *Kennedy* opinions may be less significant for their approbation of adverse action under the Lloyd-LaFollette Act than for their rejection of the plurality's argument that a statute can limit the entitlement it creates. Six Justices very clearly found that a statute creating an expectation of job retention absent cause for removal conferred upon the employee a property interest to which due process attached such that government cannot effect a deprivation of that property interest without affording the employee due process.⁷² Although the six disagreed concerning the content of the due process to be afforded, they uniformly found that the procedures were to be measured against a constitutional standard, rather than against an ad hoc standard imposed by the Act.⁷³ Inasmuch as the determination of the constituent elements of constitutional due process, once it has attached, necessitates a balancing of the interests, it is unsurprising that the six Justices found diverse consequences to flow from the creation of a protected property interest.

Contrasting the relative solidarity of the six Justices on the attachment issue with their lack of agreement on the results of the balancing process indicates that *Kennedy* will provide only weak authority for upholding other termination procedures that may work even a slight shift in the balance of conflicting interests. In this regard the positions taken in concurrence by Justices Powell and Blackmun may be determinative. Crucial to their approbation of the Lloyd-LaFollette Act was their minimization of the harm to the employee's interest worked by temporary deprivation pending reinstatement.⁷⁴ Where the employee had an interest not so easily minimized, Justices Powell and Blackmun could reach a different result

72. See notes 17, 71 *supra*.

73. See notes 17, 71 *supra*.

74. See notes 65-70 *supra* & accompanying text.

in the balancing process; such a case might be presented by a removal procedure affecting exclusively lower echelon workers less likely to have "independent resources"⁷⁵ to tide them over a temporary deprivation of income, particularly if the removal procedure failed to provide for an expeditious opportunity for reinstatement by a showing that the removal was improper because without proper cause.

The availability of a post-termination evidentiary hearing also was crucial to the concurring Justices.⁷⁶ Had such a hearing not been available, it seems likely that they at least would have joined Justice White's call for the decision regarding the need for a pretermination evidentiary hearing to be made by an impartial examiner,⁷⁷ rather than by a supervisor with a potentially hostile interest in the employee's fate.⁷⁸ Whether use of an impartial decisionmaker is necessitated would be determined as a part of the balancing of interests to specify the content of the process due under the constitutional mandate. Because less would be required administratively to provide such an impartial decisionmaker than to conduct a full-scale pretermination evidentiary hearing merely upon the em-

75. 94 S. Ct. at 1652.

76. See *id.* at n.5 (stating Justice Powell's reasons for not adopting Justice White's resolution of the case).

77. The Lloyd-LaFollette Act does not prescribe an evidentiary hearing at the pretermination stage, but instead allows one under subsection (b) at the discretion of the hearing examiner: "Examination of witnesses . . . is not required but may be provided in the discretion of the individual directing the removal or suspension without pay." 5 U.S.C. § 7501(b). It is patently clear that the choice of hearing examiner is the key to effective procedural due process under the Act.

A statement by Justice Marshall in support of his contention that a pretermination evidentiary hearing was necessary to produce a fair proceeding is persuasive: "[T]he discharged employee should be afforded an opportunity to test the strength of the evidence of his misconduct by confronting and cross-examining adverse witnesses and by presenting witnesses in his own behalf, whenever there are substantial disputes in testimonial evidence." 94 S. Ct. at 1674. Nevertheless, any requirement that employees have an opportunity to test the evidence against them should be limited to those situations in which there are substantial issues of fact which can be decided better when witnesses are produced. Justice White at least would have an impartial decisionmaker determine when a pretermination evidentiary hearing is required. *Id.* at 1666. See note 71 *supra*.

78. Kennedy had been charged by a superior with making reckless accusations concerning the superior. See note 12 *supra*. This same official served as hearing examiner during the adverse action proceedings and in this capacity made the decision that a pretermination hearing was unnecessary. 94 S. Ct. at 1665. Whenever a presiding hearing examiner is simultaneously defending his own reputation during the proceedings, it is difficult to ignore the appearance of bias even if the hearing is in fact conducted in an impartial manner. Due to the holding derived from the plurality and concurrence in *Kennedy*, however, the inability of federal employees to appear before an impartial decisionmaker prior to termination has been perpetuated as a weakness in the adverse action procedure.

ployee's demand, Justice White's proposal would seem to accord better with the balancing performed by the concurring Justices than would the extensive procedures favored by Justices Marshall, Douglas, and Brennan.⁷⁹

Once the five separate opinions are studied carefully, *Arnett v. Kennedy* is not the defeat for all government employees that the plurality opinion might portend. However inequitable the particular result may seem which allows a hostile supervisor to determine whether the employee should receive a pretermination evidentiary hearing, the *Kennedy* opinions will not provide blanket authority for upholding even approximately similar state or local adverse action procedures. A clear majority reaffirmed the existence of a protected property right in certain employment as indicated by *Roth* and *Sindermann*. Moreover, the same majority of six rejected the plurality's argument that a statute could impose its own standard of due process. The constituent elements of due process will continue to be judged by the fifth or fourteenth amendment and determined by a balancing of the interests, a process that allows employees to challenge government action by a showing of particular harm that could be remedied by a not overburdening adjustment in government procedures.

79. See note 17 *supra*.