

1-6-1977

## 01-06-1977 Clerk Memo

Unknown

*Law clerk, US Supreme Court*

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Re: Codd v. Velger, No. 75-812

This case originally seemed to present very substantial conceptual problems and it was inadequately briefed and argued. Justice Rehnquist has circulated a draft designed to postpone the problems by resting decision on the inadequacy of resp's pleadings.

I have one major conceptual problem with the draft. As my bench memo indicated, I view the case as somewhat distant from the Roth line of due process employment cases: the case does not really concern the loss of the NYPD job so much as the problems attendant to the disclosure of a personnel file to future employers. I thus believe that the case presented a new and difficult issue for the Court. The draft assumes, however, that an employee can only challenge the <sup>disclosure of</sup> information in his personnel file on the basis that it is inaccurate. See draft at 3-4. It thus tacitly bars a suit to bring about the expungement from a personnel file of prejudicial, but irrelevant, accurate information.\* (Suppose, for example, that the file accurately disclosed that the former employee was a homosexual, a Moonie, or a socialist. I would think that the disclosure of such accurate information might stigmatize the employee in the sense that it would cause him to be viewed with disfavor.) Foreclosure of such suits may be correct, but the issue is not before the Court and there is no need to decide it prematurely.

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\* Whalen v. Roe obviously bears on this aspect of the case.

I therefore suggest that the following footnote be dropped from the end of the last complete paragraph on p.3 of the draft:

✓ *stigmatizing* } "Nowhere is it suggested that the *stigmatizing* information, if true, was not information of a kind that might appropriately be disclosed to prospective employers. We are thus not presented with any question as to the limits, if any, on the disclosure of prejudicial, but irrelevant, accurate information."

*RM* ✓ Aside from the difficulty discussed above, I have no substantial problem with the draft, given that it is intended to slough off the case. I do find that it is rather inelegantly written.

RM 1/6/77