

2-3-1977

## 02-03-1977 Memorandum to the Conference

William H. Rehnquist  
*US Supreme Court Justice*

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### Recommended Citation

Rehnquist, W.H. Memorandum to the Conference, Codd V. Velger, 429 U.S. 624 (1977). Box 367, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

February 3, 1977

MEMORANDUM TO THE CONFERENCE

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

Part III of John's dissent in this case takes the position that since the Court of Appeals did not pass on the issue of whether respondent had a "property interest" in his employment, the judgment of the District Court should not be ordered reinstated but instead the case simply reversed and the Court of Appeals left free to consider that matter if it chooses to do so upon the remand. Bill Brennan has sent around a note indicating his sympathy with John's point of view. It seems to me there are three alternative ways to deal with the question, two of which would be acceptable to me and one of which would not.

(1) The newly added footnote 2 in the fourth draft of the per curiam, circulated February 3rd, sets forth my

reasons for thinking that we are perfectly justified in letting the finding of the District Court on this point remain undisturbed. Judge Gurfein's opinion certainly stated the governing principles of Roth and Perry accurately, and I cannot see why at this late stage of the litigation we would encourage further dispute over what, under Roth and Perry, are interpretations of state law. I am fortified in this conclusion, I think, by the way in which respondent deals in his brief with the cases upon which Judge Gurfein relied; as I read it, he in effect says "that is all well and good, but here we are talking about stigma". But the main body of the per curiam deals with the stigma point, and once that is out of the case on the merits I do not think even respondent seriously quarrels with Judge Gurfein's analysis of the New York law.

(2) Instead of the present content of the newly added footnote 2, it could be replaced by a statement to the

effect that the Court of Appeals did not decide the issue of "property interest", and therefore we have no occasion to express any view on it here. This would presumably leave the matter open to the Court of Appeals on remand.

(3) Adopt John's treatment of the "property interest" issue embodied in Part III of his present dissent.

My preference is the first alternative, but if a majority prefers, I will adopt the second alternative. I disagree with John's analysis in Part III of his dissent, for reasons which I will briefly state, and if a majority adhered to that view I would feel that the opinion should be reassigned.

As I understand John's dissent, it takes the position that if under state law there is any limit whatever on the absolute discretion of the supervising employer to discharge a probationary employee, there is ipso facto a "property interest" in the probationary employee's job, which gives rise to all of the rights which such a property interest would confer under Roth and Perry. I think such a holding would represent a significant extension of those cases, and, if I do not sound too much like Cassandra, a disastrous extension.



Each of us can read for ourselves Part III of Potter's Roth opinion, 408 U.S. 576-578, analyzing the concept of a property interest in employment. I quote the following:

"But the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent 'sufficient cause.' Indeed, they made no provision for renewal whatsoever.

"Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment." 408 U.S., at 578 (footnote omitted).

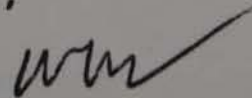
I submit that procedural protections of job tenure incorporated in some statute or regulation pertaining to the job classification itself are quite different than general principles of administrative law, which frequently provide

that the action of any public official which is "arbitrary and capricious" may be set aside by a reviewing court. It seems to me that this is what the holding of the New York Court of Appeals in Talamo v. Murphy, 38 N.Y. 2d 637 (1976), represents. The action was brought under Article 78 of the N.Y. C.P.L.R., which as I understand it is the codified equivalent of certiorari, mandamus and prohibition. The action of the supervising employer is subject to limited review on an "arbitrary and capricious" standard, not because New York confers any statutory or contractual interest in continued employment on probationary employees, but because it does not wish its public officials of whatever nature acting in an arbitrary and capricious manner. The result of such a rule may well give a non-tenured employee protection against arbitrary and capricious action in refusing to rehire him, but I think if we were to say that that in itself is a "property interest" which qualifies for protection under the Fourteenth Amendment, we would misinterpret the meaning of Roth. We would also make

virtually certain that every termination of employees heretofore thought to be nontenured could give rise to a § 1983 claim in a federal court.

It would also create a burgeoning class of other property interests entirely apart from employee tenure. In effect we would be saying that if a state authorizes judicial review of official acts if they are claimed to be arbitrary and capricious, such review by itself confers on the claimant a "property interest" which under the Fourteenth Amendment entitles him to an administrative hearing unknown to state law, or to exactly the same state judicial hearing which this respondent has always had available to him under Article 78 but chose not to pursue. Into such an abyss I would much prefer not to journey.

Sincerely,

A handwritten signature in black ink, appearing to be the initials 'WM' followed by a long, sweeping flourish that extends to the right.