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Constitutional Law--Federal Loyalty Program--Summary Suspension Act Limited to Sensitive Positions

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the res in a divorce proceeding is the marital status which either spouse may dissolve when properly domiciled in the state hearing the cause, even though the other spouse was given notice solely through constructive service.[11] The conclusion that Florida could not award alimony, since it lacked personal jurisdiction over the non-resident spouse, was a further adoption of the rationale in the *Estin* decision.[12]

It seems that the real significance of the present decision is that it resolves the question as to whether one may receive an alimony judgment *after* a divorce has been granted in another forum. In the sequence of events, (unlike the *Estin* case, in which the wife had a prior support order) Mrs. Armstrong procured her alimony decree subsequent to the divorce. All three opinions give tacit approval to the validity of a later alimony decree, despite the questionable language of the *Estin* decision, in which the court emphasized the priority of Mrs. Estin's support order.

In view of the interests involved it appears that the results of this decision are desirable. Ohio has a legitimate interest in all of its domiciliaries which extends to their economic status and well-being. The individual has an interest in due process of law with regard to decrees *in personam.* In divorce proceedings injustice is more likely to result when the parties are not acting in concert. This ruling tends to discourage one marital partner from leaving the home with hopes of securing a divorce in another state which would also discharge any alimony obligations.[13] To hold otherwise because of the chronology of events would seem an arbitrary disregard of rights. A recent New York decision,[14] adopting the rationale of the *Armstrong* holding, cites the *Armstrong* case in upholding the constitutionality of a statute[15] which allows a New York court to grant a wife a support order subsequent to an ex parte divorce obtained in another forum.

NORMAN S. JEAVONS

CONSTITUTIONAL LAW — FEDERAL LOYALTY PROGRAM — SUMMARY SUSPENSION ACT LIMITED TO SENSITIVE POSITIONS

Petitioner Cole, a preference-eligible veteran, was employed in the classified civil service as a food and drug inspector of the Department of

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[11] Estin v. Estin, 334 U.S. 541 (1948). See Pennoyer v. Neff, 95 U.S. 714 (1878); 1 A.L.R.2d 1423 (1948)

[12] It has been suggested that this general subject should be included within the scope of federal jurisdiction due to the increasing mobility of the population. See MAYERS, THE AMERICAN LEGAL SYSTEM 52-53 (1955).

[13] Vanderbilt v. Vanderbilt, 1 N.Y.2d 342, 135 N.E.2d 553 (1956).

[14] N.Y. CIVIL PRACTICE ACT § 1170-b (1953). This statute was enacted after the *Estin* case to protect a wife's support rights after a foreign divorce.

Health, Education and Welfare. After an investigation pursuant to Executive Order 10450, which authorized the summary suspension of unreliable government employees, petitioner was suspended without pay from his position with the government. He was charged with maintaining a close association with individuals reported to be Communists and maintaining a sympathetic association with the Nature Friends of America, an organization listed by the Attorney General as subversive. Petitioner refused to exercise his right to answer the charges or request a hearing. Then, the Secretary of the Department of Health, Education and Welfare, upon a determination that petitioner's employment was not clearly consistent with the interest of national security, terminated that employment.

The Civil Service Commission declined to accept petitioner's appeal under section 14 of the Veterans' Preference Act[1] holding that the act was not applicable to dismissals under the Summary Suspension Act of 1950.[2] Petitioner then filed a civil action in the District Court for the District of Columbia, seeking a declaratory judgment that his discharge was invalid and an order restoring him to his position. The district court dismissed the complaint.[3] The court of appeals affirmed[4] and certiorari was granted.[5] The Supreme Court of the United States, holding that petitioner's dismissal was not authorized by the Summary Suspension Act of 1950 and thus in violation of the Veterans' Preference Act, reversed the decision of the court of appeals and remanded the case to the district court.[6]

The Summary Suspension Act of 1950 authorizes dismissals upon a determination by the heads of certain enumerated agencies that such dismissals are "necessary or advisable in the interest of the national security."[7] The term "national security," said the Supreme Court, is used in a limited sense and relates only to those activities which are directly concerned with the nation's safety as distinguished from its general welfare. The court stressed that no determination was made that petitioner's position was affected with the "national security" as used in the Act of 1950. Consequently the dismissal was not authorized by the act. Therefore, petitioner's discharge was in violation of the Veterans' Preference Act which forbids the suspension of any preference-eligible veteran except

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[1] 58 STAT. 390 (1944), 5 U.S.C. § 863 (1952).
[2] 64 STAT. 476 (1950), 5 U.S.C. §§ 22-1, 22-3 (1952).
[3] Cole v. Young, 125 F. Supp. 284 (D.D.C. 1954).
[4] Cole v. Young, 226 F.2d 337 (D.C. Cir. 1955).
[5] Cole v. Young, 350 U.S. 900 (1955).
[6] Cole v. Young, 351 U.S. 536 (1956).
[7] 64 STAT. 476 (1950), 5 U.S.C. § 22-1 (1952).

for such cause as "will promote the efficiency of the service," and provides a right of appeal to the Civil Service Commission.

In a strong dissenting opinion three justices disagreed with the interpretation placed by the majority on the language and legislative history of the Act of 1950. These justices vigorously asserted that the plain meaning of the words in the act and the legislative history make the act applicable to any civilian employee or officer, not merely those in a sensitive position. In addition, the majority was rebuked for "intruding itself into presidential policy making" by "striking down the most effective weapon against subversive activity available to the Government."[8]

In the absence of statutes, all employees of the executive departments or agencies may be discharged at the discretion of the Chief Executive.[9] The Congress, however, has the power to limit the boundaries of that discretion. By virtue of Congress' power to pass all laws "necessary and proper" for carrying into execution the powers which the Constitution confers on the government, it may create an office.[10] As an incident to the power to establish an office Congress may also determine the qualifications of the officer, and in that manner limit the range of the Executive power. Prior to 1939 the problem of the loyalty of government employees was entirely under the scrutiny of the Executive. In 1939, Congress passed the Hatch Act making it unlawful for any person employed by the federal government "to have membership in any political party or organization which advocates the overthrow of our Constitutional form of Government in the United States."[11] Since then, the congressional and executive powers have worked together to establish a personnel security system to remove those persons who through disloyalty or for other reasons prove dangerous to the government. There are three classes of civil service employees: (1) classified — those required to take a competitive examination, (2) policy-determining employees, and (3) excepted employees — those for whom it is not practical to examine or for whom a non-competitive examination may be prescribed.[12] Two personnel security programs are applied to these three classes. Disloyal employees may be dismissed under the Civil Service Rules and Regulations (applied only to classified employees) or in the discretion of the Executive (applied to excepted and policy-determining positions). If deemed advisable in the interest of national security any employee may be sum-

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[8] Cole v. Young, 351 U.S. 536, 569 (1956).

[9] Myers v. United States, 272 U.S. 52 (1926).

[10] U.S. CONST. art. I, § 8, cl. 18; see Myers v. United States, 272 U.S.52 (1926).

[11] 53 STAT. 1148 (1939), 5 U.S.C. § 118 (Supp. III, 1955).

[12] 5 C.F.R. § 06.2 (Supp. 1956)

marily dismissed under the program formulated by the Summary Suspension Act[13] and Executive Order 10450.[14]

The Summary Suspension Act was enacted to:

> . increase the authority of the heads of Government departments engaged in sensitive activities to summarily suspend employees considered to be bad security risks, and to terminate their services if subsequent investigation develops facts which support such action.[15]

Before 1950 there was no effective way to remove an employee who, although loyal, was dangerously indiscreet. A great need was felt for legislation authorizing agency heads to remove such a security risk. Legislative history indicates that the Summary Suspension Act was designed to fill that gap. The House Committee on Post Office and Civil Service in a report on the Act of 1950 said:

> The bill does not deal with the suspension or removal of disloyal Federal employees. Executive Order 9835 of March 21, 1947, establishes procedures under which employees who are found to be disloyal are removed from the Federal Government. This bill is concerned with the all-important problem of dealing with those Federal employees who, although loyal to the United States, act in a manner which jeopardizes national security, either through wanton carelessness or general disregard for the public good.[16]

That the various executive departments were of the same opinion is evidenced in this statement by Dan Kimball, Under-Secretary of Navy:

> The Department of Defense, so long as Executive Order No. 9835 is in effect, would prosecute disloyal cases pursuant to that Executive order. It is the intention of the Department of Defense, in order to protect the best interests of national security, to use the authority in the proposed legislation for the summary suspension and termination of the employment of personnel who are security risks.[17]

The actual wording of the act also indicates that its application is to be limited to security risks. Had Congress intended to include all government agencies and employees it would not have limited the act to eleven specific agencies. It must be noted that of the eleven departments eight are concerned with military operations or weapons development,[18]

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[13] 64 STAT. 476 (1950), 5 U.S.C. §§ 22-1, 22-3 (1952).

[14] 18 FED. REG. 2489 (1953).

[15] S. REP. No. 2158, 81st CONG., 2d SESS. 2 (1950).

[16] H. R. REP. No. 2330, 81st CONG., 2d SESS. 4 (1950).

[17] H. R. REP. No. 2330, 81st CONG., 2d SESS. 6 (1950).

[18] Department of Commerce, Department of Defense, Department of Army, Department of Navy, Department of Air Force, Coast Guard, National Security Resources Board, National Advisory Committee for Aeronautics.

and the other three with international relations,[19] internal security[20] and the stock-piling of strategic materials.[21]

Also indicative of the narrow scope which Congress intended for the act is the provision which allows a dismissed security risk to obtain work in another executive department if he is determined suitable by the Civil Service Commission. Such a provision would have no meaning if the legislative intent was that the act should apply to *all* departments.

It must be recognized that the procedure of summary dismissal is a harsh one and bites deeply into individual rights. Where an employee is in a position in which he might harm the United States during the delay of an investigation and hearing, summary procedures are justified. But, until the legislative intent clearly dictates so, the extension of such procedures to individuals who are not in such vital positions is unwarranted. If such an extension was intended in this act it was not clearly demonstrated. The Supreme Court wisely refused to *imply* a curtailment of individual rights.

Such analysis can lead logically to but one conclusion — the Summary Suspension Act of 1950 applies only to *sensitive* agencies and positions. Perhaps the best statement of the scope of the Act of 1950 was voiced by Congressman McCarthy in the House of Representatives.

> When we passed Public Law 733, it was not contemplated that the authority given under that act would ever be extended to include all Government employees. We looked upon it as rather specialized legislation, applying to sensitive agencies.[22]

To implement the Summary Suspension Act, Executive Order 10450 was issued by President Eisenhower.[23] This order, however, deviated from its statutory basis. Instead of providing that an employee may be dismissed when it is deemed "necessary and advisable" Executive Order 10450 provides for his summary dismissal whenever his employment is "not clearly consistent with the interests of the national security." The latter standard affords less protection for individual rights than that promulgated by Congress. A person may be dismissed under Executive Order 10450 upon information that is sufficient to "cause a reasonable doubt" as to loyalty but not sufficient to render the dismissal "necessary or advisable." In addition, the blanket extension of Executive Order 10450 to all agencies and departments of the government was unauthorized and invalid. The President was authorized to extend the Act of 1950 to such other departments of the government as he might "deem

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[19] Department of State.
[20] Department of Justice.
[21] Atomic Energy Commission.
[22] 99 CONG. REC. 4525 (1953)
[23] 18 FED. REG. 2489 (1953).

necessary in the best interests of national security."[24] A limitation on the President's discretion was clearly indicated in the majority opinion:

> the character of the named agencies indicates the character of the determination required to be made to effect such an extension.[25]

This provision simply gives the President the authority to add to the list of "sensitive" agencies compiled by Congress. Only an unreasonable interpretation of the term "sensitive" could embrace all the agencies and departments of the executive branch.

Because it authorized an invalid extension and applied a different standard of loyalty, Executive Order 10450 was properly struck down by the Supreme Court of the United States.[26]

Contrary to the fears expressed by the dissenting justices and others, the decision in *Cole v. Young* has not brought about great changes in the federal loyalty program.[27] All potentially dangerous employees — security risk or disloyal — may be dismissed under existing procedures.[28] If merely disloyal, classified employees may be dismissed by virtue of the Civil Service Rules and Regulations. Disloyal policy-determining and excepted employees may be dismissed in the discretion of the Executive[29] or possibly under the provisions of a revitalized Executive Order 9835.[30] On the other hand, if a classified, excepted or policy-determining employee is dangerous enough to be termed a "security risk" he may be summarily suspended under the Act of 1950.

Recently, the federal government decided to reinvestigate all dismissals under Executive Order 10450 and determine if such dismissals were in accordance with the decision in *Cole v. Young*. The rehiring and even the re-investigation of such cases presents a massive practical problem. Although the deterrent effects of this decision will be great, it is submitted that they did not and will not outweigh the beneficial effects. In the opinion of this writer the Supreme Court has balanced the conflicting interests of individual rights and governmental self-preservation.

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[24] 64 STAT. 477 (1950), 5 U.S.C. § 22-3 (1952).

[25] Cole v. Young, 351 U.S. 536, 545 (1956).

[26] The dissenting justices, contending that the summary dismissal of any employee might be sustained under the grant of executive power in Article II of the United States Constitution, reprimanded the majority for not facing this constitutional question. It is submitted that there is no basis for such an argument. It is clear from the face of the Executive Order that it was intended as an implementation of the Act of 1950.

[27] 24 U.S.L. WEEK 3349 (June 26, 1956).

[28] Unless the individual is a veteran, and then compliance must be had with the Veterans' Preference Act.

[29] Myers v. United States, 272 U.S. 52 (1926).

[30] It is not clear whether the striking down of Executive Order 10450 will revive Executive Order 9835. By drawing an analogy to statutes, however, it seems reasonable to presume that Executive Order 9835 will be revived.