

SUPREME COURT CASE

Arnett vs. Kennedy

**Factual Summary:** A non-probationary federal employee in a regional office of the Office of Economic Opportunity(OEO) was discharged by his supervisor after the supervisor had given the employee notice of written charges against him. The employee, without any proof and in reckless disregard of the actual facts known to or reasonably discoverable by him, had publicly stated that the supervisor and his assistant had attempted to bribe a third party. The employee chose not to exercise his right under administrative regulations to reply orally or in writing to the written charges, but instead asserted that he had a right to a trial-type hearing before an impartial hearing officer before he could be removed, and that his statements were protected by the First Amendment. Discharge was effected pursuant to the provisions of (1) the Lloyd-La Follette Act (5 USCS 7501: "ACT"), authorizing removal or suspension without pay of a non-probationary government employee "only for such cause as will promote the efficiency of the service," and requiring that the employee be given written notice of the charges against him and an opportunity to file a written answer, but not requiring a pretermination trial-type hearing, and (2) implementing administrative regulations affording a post-removal full evidentiary hearing on appeal by the employee, with full back pay and benefits if the employee prevails.

After filing an administrative appeal with the Civil Service Commission(CSC), the employee, on behalf of himself and other employees similarly situated, instituted the instant action for injunctive and declaratory relief in the United States District Court for the Northern District of Illinois, contending that the removal standards and procedures established by and under the Lloyd-LaFollette Act unconstitutionally interfered with government employees' freedom of expression and denied them procedural due process under the Fifth Amendment. The employee claimed that the Act and attendant administrative regulations violated due process in failing to provide for a pre-removal trial-type hearing before an impartial agency official prior to removal, and that the statute and regulations were unconstitutionally vague in failing to furnish sufficiently precise

guidelines as to what kind of speech could be made the basis of a removal action. A three-judge District Court ordered the plaintiff reinstated with back pay, and that he be accorded a pretermination hearing in any future removal proceedings

**Legal Argument:** Rehnquist, J., announced the judgment of the Court, and in an opinion joined by Burger, Ch. J., and Stewart, J., expressed the views that (1) the Lloyd-LaFollette Act, in failing to require a pretermination evidentiary hearing, did not violate the due process clause of the Fifth Amendment, since in conferring upon non-probationary federal employees the right not to be discharged except for "cause" while at the same time prescribing the procedural means by which such right was to be protected, the Act did not create an expectancy of job retention requiring procedural protection under the due process clause beyond that afforded by the statute and related regulations. Powell, J., joined by Blackmun, J., concurring in part and concurring in the result in part, expressed the view that the Lloyd- LaFollette Act was neither unconstitutionally vague nor overbroad.

1) The Fifth Amendment's guarantee of procedural due process does not require that a non-probationary federal employee be accorded an evidentiary hearing before an impartial decision maker prior to, rather than after, the employee's removal from employment under the Lloyd-LaFollette Act. The implementing regulations--which provide that a non-probationary employee may be discharged only for "cause," and which require that written notice of charges be given to the employee, with an opportunity to file a written or oral answer to the charges, and with an evidentiary hearing on administrative appeal after removal from employment--fairly balance the government's substantial interests in the maintenance of employee efficiency and discipline against the employee's interest in the continuation of his employment pending an evidentiary hearing. The Act and regulations comport with due process by providing a reasonable accommodation of these competing interests, minimizing the risk of error in the initial removal decision and providing, if such decision should eventually prove wrong on administrative appeal, for reinstatement and back pay to the employee, who may secure non-government employment pending the appeal or alternatively obtain welfare benefits if he has no independent resources.

2) The Lloyd-LaFollette Act authorizes removal or suspension without pay "for such cause as will promote the efficiency of the service." A public employee's First Amendment right of free speech is not infringed in finding "cause" for his discharge, if there is satisfactory proof that the employee, in reckless disregard of the actual facts known to or reasonably discoverable by him, had publicly accused his supervisor and the supervisor's assistant of attempted bribery. The Act does not extend to constitutionally protected conduct, and the employee's conduct was not immune under the First Amendment.

3) The standard of employment protection under the Act, authorizing removal or suspension "for such cause as will promote the efficiency of the service," is not unconstitutionally vague or overbroad in its regulation of the speech of federal employees. Because of the infinite variety of factual situations in which public statements might reasonably justify dismissal for "cause," the Act describes as explicitly as is required the conduct which is ground for removal, the quoted provision excludes constitutionally protected speech, and is thus not being overbroad.

**Closing Points:** The Lloyd-LaFollette Act confers on non-probationary federal employees the right not to be discharged only for "cause" and describes the procedural means by which that right is protected. There is no expectancy of job retention beyond that of the Due Process Clause afforded by the Act and its related agency regulations. The post-termination procedures provided by the CSC and the OEO protect the employees' liberty interest in not being wrongfully stigmatized by untrue and unsupported administrative charges. The employment standard imposed by Congress in the Lloyd-LaFollette Act is not vague or overboard in its regulation of the speech of federal employees and is therefore not unconstitutional.