The Judicial Review

An Analysis of Recent Decisions Affecting Public Servants

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As an English jurist, Nathaniel Lindley, once commented, no duty of a court is more important to observe and no power of a court is more important to enforce than that of keeping public bodies within their rights. "The moment public bodies exceed their rights," Lindley remarked, "they do so to the injury and oppression of private individuals."[1]

This section of the Journal is primarily a report of cases in which the judiciary has attempted to do just that: delineate the rights and responsibilities of government entities and the public servants within those entities, including elected officials and career administrators. Cases reported here (alphabetically arranged by topic) were selected from among cases that the U.S. Supreme Court and the federal courts of appeals published during approximately the past year. A government entity, officer or employee is a party in every case reported here. Cases were selected primarily for their impact on public servants and, hence, on the many members of the public whom those public workers are serving. Supreme Court opinions received priority; lack of space precludes reporting more than a few decisions of the courts of appeals.

Administrative Procedure/ Exhaustion of Remedies

Darby v. Cisneros[2] illustrates that in some instances a federal agency can delay or avoid being sued simply by requiring persons disputing an agency decision to follow certain agency-level dispute-resolution procedures. In *Darby*, an administrative law judge at the Department of Housing and Urban Development (HUD) suspended plaintiff (a real estate developer) from participating in any HUD procurement contracts and certain other transactions due to plaintiff's alleged misconduct in connection with certain HUD programs. Plaintiff asked the U.S. district court to review the administrative decision. Defendants, HUD and the Secretary of HUD, argued that plaintiff could not properly seek review in district court because plaintiff failed to utilize all means of obtaining review within the agency in a timely manner (*i.e.*, "exhaust administrative remedies"). Specifically, defendants argued that plaintiff failed to ask the HUD Secretary to review the decision. The district court rejected HUD's argument but the court of appeals agreed with HUD and dismissed plaintiff's case.[3] The Supreme Court then agreed to consider the matter.

The Supreme Court relied on the Administrative Procedure Act ("APA"),[4] which generally provides for district court review of administrative rulings only after those rulings are final. Thus, to determine whether the plaintiff properly sought district court review, the Supreme Court had to determine whether the administrative decision was final. In making this determination, the Court applied an APA provision[5] that states in pertinent part:

> Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented . . . an application for . . . reconsideration, or, unless the agency otherwise *requires* by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Emphasis added.)

The Court found that by this language Congress intended to delineate fully the requirement of administrative exhaustion of remedies and to preclude any additional judicially imposed requirement of administrative exhaustion.[6] The administrative rule[7] HUD relied on in its argument *authorized* plaintiff to seek further administrative review but did not *require* him to do so; thus, since plaintiff had

the option to go to court without going further in the agency, the administrative law judge's decision (which had been entitled "Initial Decision and Order") was a final appealable administrative ruling.

Darby thus suggests that the wording of administrative regulations regarding administrative appeals often will determine whether and when an agency is hailed into court. Had HUD required, rather than just permitted, plaintiff to seek further administrative review, HUD would have delayed, if not avoided, being sued.

Americans with Disabilities Act

Several recent cases illustrate the pervasive impact that the Americans with Disabilities Act ("ADA")[8] will continue to have on governmental budgetary and employee-relations decisions. *Cook v. Rhode Island Department of Mental Health*[9] highlights the broad class of persons deemed "disabled" under the ADA and *Kinney v. Yerusalim*[10] demonstrates the extent to which states and localities must go to accommodate such individuals.

In *Cook*, plaintiff claimed that a state agency denied her employment because of her obesity. The Court of Appeals for the First Circuit applied a definition of "disability" appearing in the Rehabilitation Act of 1973[11] substantially similar to the ADA's definition. The court emphasized that even assuming that a "disability" must be unchangeable, obesity may still be a disability. The court also found that a "disability" can encompass a condition that a prospective employer merely *perceives* to be a disability.

In *Kinney*, disabled individuals claimed that regulations implementing the ADA require the City of Philadelphia to install curb ramps on any street in Philadelphia being resurfaced. The Court of Appeals for the Third Circuit agreed and affirmed the district court's ruling to that effect. The court of appeals' ruling illustrates the broad applicability of the ADA to municipal activities that may appear to be simple maintenance but that may affect a facility's "usability."

The court focused on Section 227 of the ADA,[12] which provides that when "altering" an existing facility used in providing public transportation, a public entity shall make the alteration in such a manner that the altered portions are readily usable by disabled individuals. The court determined that an "alteration" is simply "a change . . . that affects or could affect the usability of the building or facility or part thereof."[13] Citing a House Report on the ADA,[14] the court asserted that "[u]sability should be broadly defined to include renovations which affect the use of a facility, and not simply changes which relate directly to access."[15]

Since resurfacing a street affects the usability for everyone, resurfacing triggers the requirement that the street be made accessible to disabled persons. Further strengthening the dictates of the ADA, the court ruled that no "undue burden" defense[16] is available with respect to alterations.

Apportionment/Voting Rights

In *Shaw v. Reno*,[17] five white North Carolina residents challenged the Constitutionality of a Congressional districting (or "reapportionment") statute that the U.S. Supreme Court acknowledged was "designed to benefit members of historically disadvantaged racial minority groups."[18] The white residents alleged that the plan created grossly distorted districts in order to separate voters by race and that this violated the Equal Protection Clause. The districts in question were created when the North Carolina legislature enacted the redistricting plan following the 1990 census which had revealed demographic changes. The legislature intended the plan to assure black minority voting power and to comply with the Voting Rights Act of 1965 as amended,[19] which provides in pertinent part that "[n]o standard, practice, or procedure shall be imposed or applied by any State . . . to deny or abridge the right of any citizen . . . to vote on account of race. . . ."[20]

Noting the extremely irregular shape of the two majority-black districts,[21] the Court (in a narrow, 5-4 opinion) held that:

> [A] plaintiff challenging a reapportionment statute under the Equal Protection Clause[22] may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.[23]

The Court did not explain what justification would be "sufficient," stating only that, when the case was sent back to the district court, if the inference of racial gerrymandering was uncontradicted, then the district court had to closely examine the statute to determine whether the statute was narrowly tailored to further a compelling governmental interest. If the statute was written to further such an interest, the law would be allowed to stand.

Because the Supreme Court generally addresses only those issues necessary to resolve a case, the Court declined to determine "whether or how a reapportionment plan that, on its face, can be explained in nonracial terms successfully could be challenged," and thus expressed "no view" as to whether "'the intentional creation of majority-minority districts, without more' always gives rise to an equal protection claim."[24]

The Court's holding, in conjunction with the language about issues not reached, raises questions about the Constitutionality of reapportionment plans in other states that create districts along racial lines. In particular, the question arises as to which Constitutional test will be applied to an apportionment plan: (1) "strict scrutiny," requiring that a plan satisfy a compelling state interest in order to be valid; or (2) the "rationally related" test, where a plan is valid as long as it furthers a "legitimate" state interest. The question also arises as to when plaintiffs asserting an equal protection challenge to reapportionment legislation must establish that the challenged legislation has the "intent and effect of unduly diminishing their influence on the political process."[25]

Since the *Shaw* decision was announced last June, a Louisiana district judge, relying on *Shaw*, has found Louisiana's districting plan unconstitutional. The Louisiana case, *Hays v. Louisiana*,[26] involved a districting plan admittedly designed in part to increase the number of black representatives in Louisiana's Congressional delegation.

The reapportionment plan addressed in *Shaw* was created, ostensibly at least, in an effort to comply with the Voting Rights Act. *Shaw* thus also raises questions about the extent to which attempted compliance with the Voting Rights Act — through racially based districting — may run afoul of the Equal Protection Clause. In the months before announcing *Shaw*, however, the Supreme Court minimized the possibility that the Court will find any *actual* conflict between the Voting Rights Act and the Equal Protection Clause through two decisions, *Growe v. Emison*[27] and *Voinovich v. Quilter*.[28] Those decisions minimize the likelihood of such conflict by making clear that: (1) only under highly unusual conditions is racially based districting necessary in order to comply with the Voting Rights Act, and (2) the evidentiary burden of convincing the Court that such highly unusual conditions exist is immense. Accordingly, it is likely that in any case in which the Court finds that racially conscious districting runs afoul of the Equal Protection Clause, the Court will also conclude that such racially conscious districting is unnecessary to comply with the Voting Rights Act.

In *Growe*, the Court considered a "single-member" legislative districting plan's alleged inconsistency with the Voting Rights Act. In a "single-member" districting plan, one legislator from a particular district serves in a particular state or local legislative entity (such as a state senate) at any given time. By contrast, in a multi-member districting plan, two or more legislators serve concurrently in the same state or local legislative entity. In *Growe*, the Court for the first time addressed a so-called "vote-fragmentation" claim—a claim that a racial minority group's ability to elect the legislator of the group's choice is thwarted by the manner in which the districts are configured.[29] The Court took the opportunity to reaffirm the requirements for a successful Voting Rights Act challenge to a multi-member districting plan, and then applied those same requirements to challenges to a single-member districting plan.

The requirements for a successful Voting Rights Act challenge to a Congressional or legislative districting plan, as set forth in *Growe*, are: (1) that the minority group is sufficiently large *and geographically compact* to constitute a majority in a single-member district, (2) that the minority group is politically cohesive, and (3) that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.[30] The Court emphasized that "[u]nless these points are established, there neither has been a wrong nor can be a remedy," and went on to suggest that, among other items of proof, statistical evidence of minority bloc voting *in the particular region at issue* is required.[31] The Court sharply criticized the district court for relying on law journal articles regarding the pervasiveness of bloc voting as a national phenomenon.

Citing "elementary principles of federalism,"[32] the Court in *Growe* also took issue with the district court's decision even to take the case, in light of the fact that the state court had already found that the apportionment plan violated the state constitution and that the state legislature was holding public hearings in an attempt to design new legislative districts. The Supreme Court asserted, "In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself."[33]

In *Voinovich v. Quilter*,[34] plaintiffs alleged that a reapportionment plan violated black minority rights under the Voting Rights Act[35] not by fragmenting black voters among various districts but by concentrating them in too few districts. Plaintiffs[36] claimed that the challenged plan minimized the total number of districts in which black voters could select their candidate of choice. In plaintiffs' view, the plan should have created a larger number of "influence" districts—districts in which black voters would not constitute a majority but in which they could, with the help of a predictable number of cross-over votes from white voters, elect their candidates of choice.

The Court in *Voinovich* explicitly avoided deciding whether such an "influence-dilution" claim is actionable under the Voting Rights Act. Instead, the Court assumed for the sake of argument that such a claim could be validly established, acknowledging that the creation of "majority-minority" districts can, depending upon the circumstances, minimize minority voting strength. The Court then went on to establish that plaintiffs had failed to satisfy what would be one of several requirements of such a claim, namely, "sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice."[37]

Freedom of Expression/Honoraria

The U.S. Court of Appeals for the District of Columbia Circuit held, in *National Treasury Employees Union v. U.S.*,[38] that Section 501(b) of the Ethics in Government Act[39] is overly broad as applied to executive branch employees and therefore violates the First Amendment.[40] Section 501(b) prohibits the acceptance of "any honorarium" by a government officer, employee or member of Congress.

The court in *National Treasury* acknowledged that "the government has a strong interest in protecting the integrity and efficiency of public service and in avoiding even the appearance of impropriety created by abuse of the practice of receiving honoraria."[41] The court recognized, however, that such interest must be balanced against the federal workers' First Amendment interests. The court concluded that the government's interest must be protected, if at all, through legislation that is narrow enough that a clear connection generally exists "between the employee's job and either the subject matter of the [banned] expression or the character of the payor."[42] Section 501(b), in the court's view, was not sufficiently narrow.[43]

Rather than declare the entire legislation void, however, the court ruled that the statute would be interpreted in a manner that excluded executive branch employees. The court suggested that a Constitutional challenge to the statute as applied to legislative and judicial branch officers and employees "would raise quite different considerations."[44]

The issue is not resolved, however. The Clinton administration successfully petitioned the Supreme Court for review of the court of appeals' decision[45] and will likely ask the Court to reinstate the honoraria ban.[46]

Immunity

In *Buckley v. Fitzsimmons*,[47] the U.S. Supreme Court addressed the limited immunity of a criminal prosecutor from civil damages suits by persons claiming an infringement of civil rights. In addressing that issue, the Court delineated the general rules for determining whether and when public officials are immune from civil suit.

In *Buckley*, a former criminal defendant sued the prosecutor pursuant to 42 U.S.C. Sec. 1983, which subjects to liability every person who, acting under color of state law, commits certain proscribed acts. The former criminal defendant claimed that the prosecutor retained an expert during a preliminary investigation to give knowingly false testimony and made false statements at a press conference announcing the indictment.

The Court in *Buckley* noted that Sec. 1983 does not contain an immunities provision and that the immunities of public officials from Sec. 1983 liability are only those that "were so well established in 1871, when Sec. 1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish' them."[48] Applying this standard, the Court explained that "[m]ost public officials are entitled only to qualified immunity."[49] Under this form of immunity, said the Court, "government officials are not subject to damages liability for the performance of their discretionary functions when 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[50] In other words, if a public official performs his or her duties that involve discretion with careful regard for the rights of those affected by the exercise of those duties, then the public official will generally be safe from liability in lawsuits alleging that in performing those duties the official violated an individual's civil rights. The Court stated that "in most cases" qualified immunity is sufficient "to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."[51]

The Court recognized, however, that some officials perform "special functions" which, because of their similarity to functions that were absolutely immune when Sec. 1983 was enacted, deserve absolute protection from damages liability. The Court found that under some circumstances a criminal prosecutor does perform such special functions. The Court concluded that a prosecutor's activities in initiating a prosecution and presenting a state's case are absolutely immune, but that a prosecutor's "administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings" are entitled only to qualified immunity.[52] The Court found that the criminal prosecutor had only qualified immunity from liability for the two alleged acts of impropriety.

The Court did not provide illustrations of functions entitled to absolute immunity. The Court's discussion suggests, however, that such functions are extremely rare.

Intergovernmental Relations

In *U.S. v. California*,[53] the Supreme Court addressed the scope of intergovernmental tax immunity, a long-standing doctrine created by the Supreme Court to protect the Constitutional system of dual sovereign governments. The doctrine refers to the federal government's freedom from state taxes and state governments' freedom from taxes of other states or the federal government.[54] In *U.S. v. California*, the Court illustrated the very limited scope of the doctrine.

In *U.S. v. California*, the federal government sought reimbursement of certain sales and use taxes paid to the State of California. The federal government, however, paid those taxes only indirectly. Specifically, the federal government entered into a contract with a private corporation whereby the corporation managed some oil drilling operations on federal land, and the private corporation then purchased (and paid sales and use taxes on) various items with money the federal government provided to the corporation in accordance with the contract.

The Supreme Court found that no valid claim for reimbursement existed. Specifically, the Court concluded that tax immunity did not apply. The Court in *U.S. v. California* found that tax immunity applies to the federal government only where the tax is levied directly on the federal government. The mere fact that the federal government may indirectly bear the financial burden of the tax does not implement the tax immunity doctrine.

The Court also considered an argument based on the judicially created or "common law" doctrine of unjust enrichment. This argument, as applied in *U.S. v. California*, was that the State of California would be unjustly enriched if the State retained the tax revenue at issue because the State was never entitled to acquire that revenue. The argument was based on the federal government's interpretation of the tax laws being applied by the State of California; the federal government contended that the tax provisions did not apply to the property and transactions at issue.

The Court found that no state or federal common law claim based on unjust enrichment applied. The Court determined that even if a federal common law cause of action might apply when federal funds are fraudulently procured, no such cause of action exists where, as here, the taxes were knowingly paid. The Court concluded that the federal government's rights, if any, were derived from the rights of the corporation that paid the taxes and were thus subject to any defenses that could be asserted against that corporation. Since any tax claim the corporation might have had for return of the taxes paid was now barred by a statutory time limitation, so, too, was any claim by the federal government. The ruling in this respect was consistent with the court of appeals' decision but was contrary to what the court of appeals in a different circuit had ruled.[55]

U.S. v. California highlights the importance of requiring government contractors to avidly pursue tax reimbursement claims where the federal government has advanced the tax payments. The Court suggests as much, saying, "Nothing in our decision prevents the Government from including in its contracts a requirement that its contractors be responsible for all taxes the Government believes are wrongfully assessed, a contract term that likely would remove any disinterest a contractor may have toward litigating in state court."[56] The decision also reaffirms that the surest means for the federal government to protect its tax immunity is through direct purchase of otherwise taxable goods used on government projects.

Labor Relations/Preemption

In *Building & Trades Council v. Associated Builders*,[57] the Supreme Court held that the National Labor Relations Act ("NLRA")[58] generally preempts states from *regulating* in the labor relations area but has no preemptive effect when states act as *proprietors*. In *Building and Trades Council*, a state agency charged with cleaning up Boston Harbor agreed with a trades council that all successful bidders and subcontractors would, as a condition of being awarded a contract, agree to use only union labor. An organization representing nonunion employers sued, claiming that the NLRA precluded the state from such an "intrusion into the bargaining process."[59]

The Court reaffirmed that in many respects the NLRA preempts state regulatory activity but found that the state here was acting as a business operator rather than a regulator. Accordingly, the state was merely participating as a "proprietor" in the "free play of market forces" in an area that Congress, by its silence, intentionally left to market forces: a determination of whether or not to require union labor. The Court distinguished *Wisconsin Dept. of Industry v. Gould*, Inc.,[60] where a state *was* precluded from acting. In *Gould*, the state established a policy of refusing to do business with persons who had violated the NLRA three times within five years. That policy was "tantamount" to regulation because the policy

addressed conduct unrelated to an employer's performance of contractual obligations to the state and because the state's motivation for the policy was clearly to deter NLRA violations and thus intruded impermissibly into an area regulated by the NLRA.[61]

Building and Trades Council thus suggests that state and local governments have broad latitude to prescribe labor restrictions on state projects *on a project-by-project basis.* The case also suggests, however, that state and local governments run a substantial risk that a court will find such restrictions pre-empted if the restrictions are adopted as an invariable policy.

Separation of Powers

In *Weiss v. U.S.*,[62] the U.S. Supreme Court demonstrated that the Court will give Congress broad latitude to determine whether executive or administrative tasks prescribed in legislation require the creation of a new public office, the holder of which must be confirmed by the Senate, or instead can be assigned (by either the President or Congress) to a previously confirmed public officer. In *Weiss*, individuals sentenced at courts-martial challenged the authority of the military trial and intermediate appellate judges to convict them, arguing that the method of appointing those judges violated the Appointments Clause.[63] The judges were selected by the Judge Advocate General of the Navy-Marine Corps[64] from a group of commissioned officers. The Supreme Court held that the selection method was consistent with Congressional intent and that, since the judges were selected from among individuals whom the President had already nominated and the Senate had already confirmed as commissioned officers, the selection method did not violate the Appointments Clause.

The selection method for the military judges involved in *Weiss* had been administratively established rather than Congressionally specified. The Court, however, concluded that the method was consistent with Congressional intent in the absence of contrary statutory language, since "Congress has not hesitated to expressly require the separate appointment of military officers to certain posts," and since "[t]his difference negates any permissible inference that Congress intended that military judges should receive a second appointment, but in a fit of absentmindedness forgot to say so."[65]

The Court in *Weiss* assumed and strongly suggested that military judges are "officers" subject to the Appointments Clause, rather than simply "employees," but stopped short of so stating, since the parties agreed on that point.[66] The Court then utilized a "germaneness" test. This test was established in *Shoemaker v. U.S*,[67] where the Court permitted Congress to confer statutorily certain duties on an officer since the additional duties were "germane" (closely related) to the position that the officer already held.

The Court concluded that "the role of military judge is 'germane' to that of military officer,"[68] and that therefore a military officer could be appointed military judge without further Senate confirmation. The Court did not, however, acknowledge any *necessity* of satisfying the "germaneness" test. The Court merely assumed for the sake of argument that the test applied. The Court noted that the purpose for judicially establishing the "germaneness" test was to assure that Congress does not circumvent the Appointments Clause by unilaterally appointing an incumbent to a new and distinct office. The Court found that since military judges are designated "from among hundreds or perhaps thousands of qualified commissioned officers," there is "no ground for suspicion here that Congress was trying to both create an office and also select a particular individual to fill the office."[69]

The breadth of the judicial interpretation of "germaneness" suggests the extremely broad latitude that the Court may give both Congress and the executive branch to designate additional tasks for "officers" both within and outside the military. (The "germaneness" test is not limited to military cases.) The latitude may be larger still if the Court did mean to suggest that "germaneness" need not be satisfied when Congress authorizes the executive branch to designate, from among current "officers," individuals to perform certain Congressionally prescribed tasks.

Justice Souter, concurring in the decision, took issue with the majority's failure to specify whether commissioned officers and military judges are principal or inferior officers. In Justice Souter's view, commissioned officers are inferior officers and, if military judges were principal officers, such judgeships would have to be separately confirmed.[70]

Notably, Justice Souter relied on an apparent *Congressional* determination that military judges are inferior officers, rather than deciding that Constitutional question independently. Justice Souter approvingly quoted an opinion by then-Judge (now Justice) Ginsburg, in which she said, "Where . . . the label that better fits an officer is fairly debatable, the fully rational congressional determination surely merits tolerance."[71] This approach would give Congress further latitude in complying with the Appointments Clause, latitude beyond that afforded Congress to determine what duties are "germane" to existing offices.

In another recent separation-of-powers case, *Walter Nixon v. U.S.*,[72] the Supreme Court addressed the extent to which the judiciary will inquire into the exact procedures that the Senate uses when impeaching an individual. The Court concluded that the procedures are to be determined by the Senate except where the Constitution specifically provides otherwise.

In *Walter Nixon*, the Senate had convicted Walter Nixon (a former U.S. District Judge) on two articles of impeachment, thereby removing him from office. Pursuant to a Senate rule, a Senate committee (rather than the full Senate) had conducted Nixon's evidentiary hearing. Nixon claimed that this procedure violated the Constitutional grant of authority to the Senate to "try" all impeachments because the procedure prohibits the whole Senate from taking part in the evidentiary hearings.[73] At issue was the construction of the term "try" as used in the Constitutional grant of authority to the Senate. In deciding the case, the Supreme Court applied the concept of "nonjusticiability." The Court explained that a controversy is nonjusticiable where there is either a "textually demonstrable constitutional commitment of the issue to a coordinate political department" or a "lack of judicially discoverable and manageable standards for resolving [the issue]."[74] The Court found the issue raised by Walter Nixon nonjusticiable for two reasons and therefore affirmed the lower court's dismissal of the complaint.

The first basis for the finding of nonjusticiability was that "the use of the word 'try' in the first sentence of the Impeachment Trial Clause lacks sufficient precision to afford any judicially manageable standard for review."[75] In other words, the Court acknowledged at the outset that no guidelines were available to help the Justices determine the meaning of "try" and without such guidelines the Court was unable to answer the question presented by Walter Nixon. The second basis was the "textual commitment" of the determination to the Senate. In this regard, the Court noted three "very specific requirements" that the Constitution imposes on the Senate when trying impeachments: the members must be under oath, a two-thirds vote is required to convict, and the Chief Justice presides when the President is tried. The Court opined that these limitations suggest that the Framers did not intend to impose additional limitations on the form of the Senate proceedings by the use of the word "try."

As support for this conclusion, the Court in *Nixon* noted that judicial review of the impeachment trial process would be "counterintuitive" because it "would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate," and would be inconsistent with the system of checks and balances. "Judicial review [of impeachment trials] would remove the only check placed on the Judicial Branch by the Framers."[76]

Nixon thus precludes judicial review of the means of conducting Senate impeachment trials themselves. *Nixon* does not, however, preclude judicial review of Senate compliance with the three "very specific requirements" (set forth above) that the Constitution imposes on the Senate in *connection with* impeachment. Those specific requirements obviously do not have "a lack of judicially discoverable and manageable standards" about which the *Nixon* decision expresses concern. ✯

Notes

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1 Nathaniel Lindley, English jurist, *Robert v. Guyrfai District Council*, L.R. 2 C.D. 614.

2 113 S.Ct. 2539 (1993).

3 *Darby v. Kemp*, 957 F.2d 145 (4th Cir. 1992).

4 5 U.S.C. Sec. 701-706 (1988).

5 5 U.S.C. Sec. 704 (1988).

6 The Court noted that "[i]t is perhaps surprising that it has taken over 45 years since the passage of the APA for this Court definitively to address this question." 113 S.Ct. at 2544.

7 24 C.F.R. Sec. 73.609 (1993).

8 42 U.S.C. Sec. 12101-12213 (Supp. 1992).

9 10 F.3d 17 (1st Cir. 1993).

10 9 F.3d 1067 (3d Cir. 1993).

11 Pub. L. No. 93-112, Sec. 7, 87 Stat. 361 (1973).

12 42 U.S.C. Sec. 12147 (Supp. 1992).

13 9 F.3d at 1072, citing 28 C.F.R. Sec. 36 (1993).

14 H.R. REP. NO. 485, 101st Cong., 2d Sess. 3 (1990) at 64.

15 9 F.3d at 1073.

16 An "undue burden" defense is available with respect to an inability to meet the Act's timetable for making existing facilities which are not otherwise being altered accessible to the disabled. To successfully assert the defense, a public entity must demonstrate that compliance would involve an undue administrative or financial burden, considering all available resources. *See* 28 C.F.R. Sec. 35.150(a)(3) (1993).

17 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). Among the initial defendants were certain individuals in both state and federal government, but the district court dismissed the federal officials and the Supreme Court upheld that dismissal, addressing in detail only the claims against the state government officials.

18 113 S.Ct. at 2819.

19 42 U.S.C. Sec. 1973-1973p (1988).

20 42 U.S.C. Sec. 1973 (1988).

21 The Court noted that one district was "hook shaped with finger-like extensions" and that the other "winds in snake-like fashion through tobacco country, financial centers, and manufacturing areas 'until it gobbles in enough enclaves of black neighborhoods.'" 113 S.Ct. at 2820-21, quoting the district court's dissenting opinion.

22 U.S. CONST. amend XIV, Sec. 1.

23 113 S.Ct. at 2828.

24 113 S.Ct. at 2828.

25 Quoted language is from Justice White's dissenting opinion, 113 S.Ct. at 2834.

26 *Hayes v. Louisiana*, 839 F.Supp. 1188 (W.D.La. 1994)

27 113 S.Ct. 1075 (1993).

28 113 S.Ct. 1149 (1993).

29 The Court emphasized that the district court had addressed a minority group's ability to actually determine election results in a district (by configuring the district to have a majority of an ethnic group that is a minority in the state or locality as a whole), rather than merely *influence* election results. Accordingly, the Supreme Court expressly declined "to resolve whether, when a plaintiff alleges that a voting practice or procedure impairs a minority's ability to *influence* . . . election results, a showing of geographical compactness of a minority group not sufficiently large to constitute a majority will suffice." 113 S.Ct. at 1084, citing *Thornburg v. Gingles*, 478 U.S. 30 (1986). (Emphasis added.)

30 113 S.Ct. at 1084. (Emphasis added.)

31 113 S.Ct. at 1084-85.

32 113 S.Ct at 1082.

33 113 S.Ct. at 1080. (Emphasis in original.)

34 113 S.Ct. 1149.

35 The plaintiffs also alleged that the reapportionment plan violated the Fourteenth and Fifteenth Amendments, U.S. CONST. amend. XIV and XV. The Court declined to determine whether the Fifteenth Amendment's prohibition of an abridgement of a right to vote applies to "vote-dilution" claims, stating, "[W]e have never held any legislative apportionment inconsistent with the Fifteenth Amendment." 113 S.Ct. at 1158. The Court found that even if the Fifteenth Amendment applied, its violation would only exist if discrimination were intentional; the Court found the district court's finding of intentional discrimination "clearly erroneous." *Id.* The Supreme Court's Fourteenth Amendment analysis dealt with alleged inequality of district size, not with racial claims. The Court explicitly declined to reach any racially based Fourteenth Amendment challenge. *Id.* at 1157.

36 The Court described the plaintiffs as "two Democratic members of the Board [established by the Ohio constitution to periodically reapportion electoral districts], and various Democratic electors and legislators." 113 S.Ct. at 1153.

37 113 S.Ct. at 1158.

[38] 990 F.2d 1271 (D.C. Cir. 1993).

[39] 5 U.S.C. App. Sec. 501(b) (Supp. 1992).

[40] U.S. CONST. amend. I.

[41] 990 F.2d at 1274.

[42] 990 F.2d at 1275.

[43] A dissenting judge argued that the statute was sufficiently tailored to survive an "overbreadth" First Amendment challenge. The dissenter contended that the case was indistinguishable from *Sanjour v. E.P.A.*, 984 F.2d 434 (D.C. Cir. 1993), in which the same court rejected an overbreadth challenge to an administrative ethics regulation banning travel expense reimbursement for unofficial engagements. The ban at issue in *Sanjour*, however, applied only to non-governmentally authorized speaking or writing engagements on subject matter focusing specifically on the government employee's official duties. By contrast, the ban in *National Treasury Employees* involved a ban on payments without regard to the subject matter of the engagement, and is therefore arguably distinguishable.

[44] 990 F.2d at 1278.

[45] A petition for *certiorari* (request for review) was filed in the Supreme Court on January 19, 1994, and was granted on April 18, 1994.

[46] The Clinton administration's decision to appeal *National Treasury Employees* to the Supreme Court may suggest an emphasis on the government interest (recognized by the court of appeals) in avoiding any appearance that a government employee is financially benefitting from outside engagements due to his government status. In the context of political activities, however, the Clinton administration is arguably emphasizing individual employees' rights. President Clinton signed the Hatch Act Reform Amendments of 1993 (Pub. L. No. 103-94, 107 Stat. 1001 (1993)), enabling federal employees to participate in partisan political activities as private citizens outside of work.

[47] 113 S.Ct. 2606 (1993).

[48] 113 S.Ct. at 2613, quoting *Pierson v. Ray*, 386 U.S. 547, 554-555 (1967).

[49] 113 S.Ct. at 2613.

[50] 113 S.Ct. at 2613, quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

[51] 113 S.Ct. at 2613, quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978).

[52] 113 S.Ct. at 2615.

[53] 113 S.Ct. 1784 (1993).

[54] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Metcalf & Eddy v. Mitchell*, 269 U.S. 514 (1926).

[55] See *United States v. Broward County*, 901 F.2d 1005 (11th Cir. 1990).

[56] 113 S.Ct. at 1792.

[57] 113 S.Ct. 1190 (1993).

[58] 29 U.S.C. Sec. 151-167 (1988).

[59] 113 S.Ct. at 1194.

[60] 475 U.S. 282 (1986).

[61] 113 S.Ct. at 1197.

[62] 114 S.Ct. 752 (1994).

[63] The Appointments Clause of Article II of the Constitution reads as follows:

> "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Minsters and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST., Art. II, Sec. 2, Cl. 2.

The individuals sentenced at courts-martial also claimed that their convictions violated the Fifth Amendment's Due Process Clause (U.S. CONST., Amend.V), since the convictions were imposed by judges who were untenured and therefore lacked sufficient independence. The Court noted that special deference to Congressionally prescribed procedures is appropriate in military matters, since "[t]he Constitution contemplates that Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.'" 114 S.Ct. at 760, quoting *Chappell v. Wallace*, 462 U.S. 296, 301 (1983). The Court found no Due Process violation.

[64] The Court used the hyphenated term "Navy-Marine Corps." The Navy is actually *part of* the Marine Corps. 10 U.S.C. 5061. The Judge Advocate General for each service is the principal legal officer for that service. *See* 10 U.S.C. Sec. 3037 (Army), Sec. 5148 (Navy-Marine Corps), Sec. 8037 (Air Force), Sec. 801(1) (Coast Guard).

[65] 114 S.Ct. at 758.

66 The Court stated:

> The parties do not dispute that military judges, because of the authority and responsibilities they possess, act as "officers" of the United States. See *Freytag v. Commissioner*, 501 U.S.___, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991) (concluding special trial judges of Tax Court are officers); *Buckley v. Valeo*, 424 U.S. 1, 126, 96 S.Ct. 612, 685, 46 L.Ed.2d 659 (1976) ("[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by [the Appointments Clause]").

114 S.Ct. at 757. For cases distinguishing between "employees" and Appointments Clause "officers," *see, e.g., Morrison v. Olson*, 487 U.S. 654 (1988), *Auffmordt v. Hedden*, 137 U.S. 310 (1890); and *U.S. v. Germaine*, 99 U.S. 508 (1879).

67 147 U.S. 282 (1893).

68 114 S.Ct. at 760.

69 114 S.Ct. at 759.

70 Justice Souter stated:

> It cannot seriously be contended that in confirming the literally tens of thousands of military officers each year the Senate would, or even could, adequately focus on the remote possibility that a small number of them would eventually serve as military judges. . . . [W]hile . . . Congress has certainly attempted to create a single military office that includes the potential of service as a military judge, I believe the Appointments Clause forbids the creation of such a single office that combines inferior- and principal-officer roles, thereby disregarding the special treatment the Constitution requires for the appointment of principal officers. For these reasons, if military judges were principal officers, the current scheme for appointing them would raise a serious Appointments Clause problem indeed. . . .

114 S.Ct. at 767-768. (Citations omitted.)

71 114 S.Ct. at 769, quoting Judge Ginsburg's dissenting opinion in In *re Sealed Case*, 838 F.2d 476, 532 (D.C. Cir. 1988), *rev'd sub nom. Morrison v. Olson*, 487 U.S. 654 (1988).

72 113 S.Ct. 732 (1993).

73 U.S. CONST., Art. I, Sec. 3, cl. 6.

74 113 S.Ct. at 735, citing *Baker v. Carr*, 369 U.S. 186 (1962).

75 113 S.Ct. at 736.

76 113 S.Ct. at 738-39 and note 2 therein. Although the Court cited this concern in support of its holding, the Court did not limit its ruling about the nonjusticiability of the word "try" to impeachment trials involving *judges*. ★