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Miscellaneous

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MISCELLANEOUS

I. MILITARY DISCHARGE PROCEEDINGS

In *Peppers v. United States Army*[1] the Reverend James Peppers sought to have the designation of his 1943 Army discharge changed to "honorable." Peppers had been discharged pursuant to the then current Army Regulation 615-360—the infamous "Section VIII" or "blue" discharge.[2] At his hearing, the Board of Officers had relied on the testimony of Captain Frankfurth, a Neuropsychiatric consultant.

In 1946, Peppers, acting *pro se*, applied to the War Department Discharge Review Board to have the terms of his discharge changed. The gravamen of his complaint was that he had been told the blue discharge would not interfere with his obtaining a defense job, a statement which was untrue.[3] Peppers waited twenty years after the denial of this appeal before making the same request of the Army Board for Correction of Military Records.[4] That body referred the petitioner to the Army Discharge Review Board[5] for a "rehearing" of its 1947 decision. At the subsequent hearing, Peppers reiterated his charges that he had been misinformed about the impact of his "blue" discharge and described the discharge hearing as a "mockery" because "there was no counseling, no person to guide [him] at all . . ."[6] The Board, however, found that Peppers' discharge had been proper. In 1968, Peppers made his last administrative appeal—again to the Army Board for Correction of Military Records, which refused to grant another hearing.

Undaunted, Peppers turned to the District Court of South Carolina, which accepted jurisdiction under 28 U.S.C. section 1361.[7] There, Judge Hemphill vacated the 1943 discharge and

1. 479 F.2d 79 (4th Cir. 1973).

2. Peppers' service record at the time of his discharge included several entries for absence without leave and disorderly conduct.

3. 479 F.2d at 81.

4. This board is established pursuant to 10 U.S.C. § 1552 (1970) which enables the Secretary of a military department to "correct any military record . . . when he considers it necessary to correct an error or remove an injustice."

5. 10 U.S.C. § 1553 (1970) authorizes the establishment of a board of review "to review the discharge or dismissal by a sentence of a general court martial of any former member of an armed force . . . ."

6. 479 F.2d at 81.

7. "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361 (1970).

remanded the case to the Army for further proceedings.[8] The court concluded that there was a "blatant violation of due process" in the procedure used by the Army in that: (1) Peppers was ignorant, unable to communicate, and poorly educated; (2) Peppers had no counsel at the hearing; (3) Peppers did not understand the consequences of a "blue" discharge, and it was probable that he was misled in this respect; (4) there was no evidence the Army gave Peppers a physical or mental examination before discharge; and (5) some doubt existed whether Captain Frankfurth, the psychiatric consultant, was even present at the discharge hearing.[9]

The court of appeals reversed, relying primarily on a 1961 Fourth Circuit case, *Reed v. Franke.*[10] Reed, a Navy enlisted man, had attempted to prevent the Navy from issuing him a "general discharge" pursuant to regulations that provided for no hearing prior to a general discharge. It was noted, however, that 10 U.S.C. section 1553[11] does provide for a mandatory hearing upon request *after* the discharge. At such a hearing, all the traditional due process safeguards, such as the right to counsel and the right to call witnesses and present rebuttal testimony, are accorded the defendant. The *Reed* court also took cognizance of 10 U.S.C. section 1552,[12] which authorizes the Secretary of a military department to correct military records when he deems it necessary to "correct an error or remove an injustice."[13] In holding that this somewhat inverted procedure meets constitutional requirements, the court said:

> A fact-finding hearing prior to discharge is one way to protect plaintiff's alleged rights, but it is not the only means of protection and Congress has provided other ways of preventing injustices and correcting errors in connection with military discharges. By statute, Reed is provided an opportunity to avoid the injury he claims he will suffer when the discharge becomes effective.

8. Peppers v. United States Army, Civil No. 71-317 (D.S.C. Jan. 27, 1972).

9. *Id.* at 4.

10. 297 F.2d 17 (4th Cir. 1961). The court of appeals also noted that the district judge erred by relying in part on factual claims not made in the previous administrative appeals. This argument had been the main one presented by the Army in its brief; however, the court relegated its treatment of this issue to a footnote, indicating that the rationale of *Reed* weighed more heavily in its decision.

11. 10 U.S.C. § 1553 (1970).

12. 10 U.S.C. § 1552 (1970).

13. *Id.*

> The fact that the hearing provided by statute does not precede, but follows, Reed's separation from the service does not make the hearing inadequate.[14]

With *Reed* as precedent, the *Peppers* court logically reasoned that if due process requirements are met by post-discharge procedures when there is *no* hearing prior to discharge, then surely due process was accorded in Peppers' case. He received both a hearing prior to his discharge and the statutory post-discharge procedure, however inadequate the former might have been. In the view of the court, the 1947 review, the 1967 hearing, and the 1968 review cured any possible due process violations of the 1943 discharge.

The analysis used by the court is rational and persuasive if one accepts the somewhat questionable premise upon which it rests, *viz.*, the continued validity of the *Reed* rationale in light of subsequent Supreme Court decisions. In the thirteen years since *Reed* was decided, the Court has extended the elements of due process in a totally unprecedented fashion. Although no Supreme Court case had dealt squarely with the *Reed* issue, numerous cases have treated the problem in analogous situations. For example in *Goldberg v. Kelly,*[15] the Court held that the state of New York could not terminate welfare payments to a recipient without affording him an evidentiary hearing prior to termination. The Court specifically rejected the argument of state officials that an informal pre-termination review coupled with a post-termination "fair hearing" satisfied due process requirements.[16] *Bell v. Burson*[17] extended this principle even further by holding that before a state can suspend the driver's license of an uninsured motorist involved in an accident, it must afford the driver procedural due process. The Court said:

> [I]t is fundamental that except in emergency situations . . . due process requires that when a State seeks to terminate an interest such as that here involved, it must afford "notice and opportunity for hearing appropriate to the nature of the case" *before* the termination becomes effective.[18]

Of course, there are many other instances in which the court has not been hesitant to extend the umbrella of procedural due pro-

14. 297 F.2d at 27.
15. 397 U.S. 254 (1970).
16. *Id.* at 266.
17. 402 U.S. 535 (1971).
18. *Id.* at 542 (emphasis supplied by the court).

cess.[19] *Goldberg* and *Bell* must be recognized as representing but a small portion of the virtual "procedural revolution" that has occurred since 1961, when *Reed* was decided.

It is well documented that the deprivations ensuing from a discharge, such as the one Peppers received, are of no little consequence. In addition to losing his rights to veteran's benefits, Peppers was, in effect, sentenced to what courts have recognized as "a life long disability . . . very akin to the concept of infamy."[20] Other courts have stated that a discharge on other than honorable grounds "is in life, if not in law, prima facie evidence against the serviceman's character, patriotism, or loyality."[21] Perhaps most importantly, it results in a "social stigma which greatly limits the opportunities for both public and private civilian employment."[22]

In several recent cases,[23] the Court has had occasion to discuss exactly what interests are within the scope of the due process clause of the fourteenth amendment.[24] The language used in some of these cases is remarkably similar to language used by courts to describe the consequences of a dishonorable discharge. For example, in *Wisconsin v. Constantineau,*[25] the Court said:

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19. *See* Fuentes v. Shevin, 407 U.S. 67 (1972), indicating due process requirements also attach to replevin actions; Wisconsin v. Constantineau, 400 U.S. 433 (1971), holding violative of due process the posting of names of persons unable to buy liquor without affording such persons notice and an opportunity to be heard; Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), declaring that the Wisconsin prejudgment garnishment procedure did not afford procedural due process; *cf.* Board of Regents v. Roth, 408 U.S. 564 (1972).

20. Evertt, *Military Administrative Discharges—The Pendulum Swings,* 1966 DUKE L.J. 41, 50 (1966); *cited in* Kaufman v. Secretary of the Air Force, 415 F.2d 991, 995 (D.C. Cir. 1969).

21. Stapp v. Resor, 314 F. Supp. 475, 478 (S.D.N.Y. 1970). *See, e.g.*, Bland v. Connally, 293 F.2d 852 (D.C. Cir. 1961).

22. Bland v. Connally, 293 F.2d 852, 858 (D.C. Cir. 1961) (footnote omitted). *See also* 119 CONG. REC. 20161 (daily ed. Nov. 9, 1973) (remarks of Senator Ervin):

> [L]etters from discharged servicemen unable to find jobs, from those who cannot get the job they desire, and from those who wanted a military career but were returned to the civilian world with little marketable experience continue to reach the [Constitutional Rights] subcommittee. Their common complaint is that the administrative discharge system has unfairly condemned them to an inferior condition—whether it be in terms of a job or simply the respect of their family and friends . . . .

23. Wisconsin v. Constantineau, 400 U.S. 433 (1971); Board of Regents v. Roth, 408 U.S. 564 (1972).

24. The fourteenth amendment is, by its terms, applicable only to the states. However, the fifth amendment due process clause, applicable to the federal government would, presumably, include essentially the same protected interests.

25. 400 U.S. 433 (1971).

> [C]ertainly where the State attaches a "badge of infamy" to the citizen, due process comes into play . . . .
>
> Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.[26]

Again, in *Board of Regents v. Roth*,[27] the Court undertook to define some of the "liberties" guaranteed by the fourteenth amendment. Stating that the term embraces more than the freedom from bodily restraint, the Court included in its definition "the right of the individual to contract, to engage in any of the common occupations of life . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."[28]

Thus, it appears that in *Peppers* the court of appeals was presented with an opportunity to repudiate the *Reed* rationale and extend the due process requirement of an adequate pretermination hearing to an area arguably as important as some of the areas dealt with by the Supreme Court in recent years. Perhaps one reason the court failed to take this step is pragmatic. Allowing Peppers' appeal would open the court to an influx of similar petitions,[29] many of which would (like Peppers') have to be decided on the basis of inadequate or lost military records.

In partial response to the *Peppers* problem, several bills dealing with military discharges have been introduced in Congress. One would eliminate all designations from military discharge certificates.[30] This bill also provides for a retroactive effect; serv-

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26. *Id.* at 437.

27. 408 U.S. 564 (1972).

28. *Id.* at 572, *quoting* Meyer v. Nebraska, 262 U.S. 390, 399 (1922).

29. The court's possible fear of being overburdened by petitions similar to Peppers' may be unjustified in that the jurisdiction of the Court of Claims was expanded in August, 1972 by 28 U.S.C.A. § 1491 (1973):

> To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States.

See also Parrish v. Seamans, 485 F.2d 572 (4th Cir. 1973), where the Court of Appeals for the Fourth Circuit, noting this expansion of jurisdiction, affirmed the district court's holding that Parrish should have sought relief in the Court of Claims. Parrish, a former Air Force officer, had sought to have his court martial set aside on the grounds that depositions had been used in lieu of witnesses. He had also asked for a writ of mandamus pursuant to 10 U.S.C. § 1361 (1970), to compel the Secretary of the Air Force to restore the rank, pay and allowances he had forfeited.

30. S. 1716, 93d Cong., 1st Sess. (1973).

icemen discharged prior to its enactment may, upon proper application, receive a new discharge certificate bearing no designation. A second bill,[31] introduced by Senator Ervin, would completely overhaul the current structure for awarding military discharges, incorporating essentially all of the traditional due process requirements into military administrative discharges.[32]

II. DISCIPLINARY PROCEEDINGS

The dangers inherent in attorneys' advancing money to their clients and the complications that can follow from such a practice were forcefully illustrated by *In re Sandifer*.[33] The respondent had agreed to represent his client, Roland, in a personal injury action arising from a Washington, D.C., train accident. When the contingent fee contract was agreed upon, Roland was hospitalized and unable to work. In addition, his wife was disabled, and there were small children in the family. According to Roland's own testimony, he was "desperately in need of both money and a lawyer to represent him."[34]

Beginning with a $150 loan on the date of employment,[35] there followed "extensive and involved" loan transactions between Sandifer and Roland, ultimately totaling $4,544.47. A Washington, D.C., attorney was associated to assist in the case, and a settlement of $16,000 was finally agreed upon. After attorneys' fees and an amount owed to the Lexington State Bank were deducted, there remained only $3,029.50 of the original $16,000. This amount was applied to "notes from Roland to Sandifer, for food and clothes, living essentials . . . ."[36] This, of course, left Roland still owing respondent Sandifer the sum of $1,514.97, a

31. S. 2684, 93d Cong., 1st Sess. (1973).

32. Current Army regulations provide for courts martial for discharges designated as "dishonorable" or "bad conduct" discharges. The remaining three types of discharges, generally designated as "administrative discharges" ("undesirable," "general," and "honorable") "may or may not have been directed by an administrative board." Ervin, *Military Administrative Discharges: Due Process in the Doldrums*, 10 SAN DIEGO L. REV. 9, 11 (1972). The Ervin bill is aimed primarily at the so called "administrative" discharges.

33. 260 S.C. 633, 198 S.E.2d 120 (1973).

34. *Id.* at 635, 198 S.E.2d at 121.

35. The court noted that this fact, standing alone, might be an indication of solicitation; however, it accepted the finding of the Board of Commissioners on Grievances and Discipline that the evidence was "clearly to the effect . . . that there was in fact no solicitation." *Id.* at 638, 198 S.E.2d at 123.

36. *Id.* at 637, 198 S.E.2d at 122.

37. There was a conflict in the evidence concerning what transpired when the settle-

most undesirable situation from the point of view of both the attorney and his client.[37]

In ordering a public reprimand as the appropriate punishment, the court was cognizant of the fact that Sandifer was not acting out of selfish or otherwise reprehensible motives:

> While initially humane consideration for the desperate needs of Roland and his wife, rather than any selfish end of the respondent, appears to have led to the loans, the end result was a situation where obviously the attorney had, even by his testimony, lost control of the litigation.[38]

Beclouding what appears to be the main issue in the case is the additional factor that the memorandum given by the respondent to Roland at the time of the settlement was found to be an inadequate accounting of the settlement distribution. From the facts given in the opinion, it is difficult to ascertain all the elements that made the accounting unsatisfactory. The opinion reveals that the memorandum was handwritten but accompanied by photocopies of the various checks and notes representing the sums advanced. The court did point out an error in the memorandum; one $500 note listed as due the respondent had actually been incorporated into an indebtedness due the bank. Stating that this error emphasized "the inadequacy of his accounting,"[39] the court concluded that the respondent failed "to give a complete and intelligible statement of account to his client . . . ."[40]

The court was careful to point out that it considered *both* offenses in finding Sandifer guilty of professional misconduct:

> [The] loan transactions of the respondent with his client *coupled with* his failure to give a complete and intelligible statement of account . . . tended to pollute the administration of justice and bring the legal profession into disrepute . . . .
> . . . When faced with this situation, it was more incumbent than ever upon the respondent to furnish the client a detailed and intelligible statement . . . .[41]

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ment was agreed upon. Roland testified that he was told he would receive at least some money from the settlement; Sandifer maintained he told his client he would, in fact, still be in debt. *Id.* at 638, 198 S.E.2d at 122.

38. *Id.* at 638, 198 S.E.2d at 123.

39. *Id.* at 637, 198 S.E.2d at 122.

40. *Id.* at 638, 198 S.E.2d at 122.

41. *Id.* at 638, 198 S.E.2d at 122-23 (emphasis added). The court also noted that in nearly all disciplinary proceedings of this nature, the loan has been "only one factor accompanied by other misconduct, such as improper solicitation of legal business." *Id.* at 639, 198 S.E.2d at 123.

This language leaves unanswered the perplexing question of whether the result would have been the same had the advancement of funds been the sole instance of questionable conduct. Despite several provisions in the *Canons of Professional Ethics*[42] (which are somewhat obscure on this issue), and an American Bar Association Opinion[43] (which is more specific in prohibiting loans to clients), courts in some jurisdictions have indicated that the advancement of living expenses is not improper, at least when no solicitation is involved.[44] The South Carolina Supreme Court has not made a definitive statement on this matter, but arguably its position is clear. On January 29, 1973, the supreme court took the desirable step of adopting the *Code of Professional Responsibility* promulgated by the American Bar Association.[45] The *Code* supersedes the somewhat vague and outmoded *Canons of Professional Ethics* which have previously been the controlling standards of professional responsibility in South Carolina. Consisting of Canons, Ethical Considerations and Disciplinary Rules, the *Code* is much more explicit and detailed than were the *Canons* in delineating the exact ethical standards expected of attorneys.

With respect to the *Sandifer* situation, the *Code* provides:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation . . . medical examination, and . . . obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.[46]

When this precise wording is compared with the more general language of the *Canons*,[47] which governed when the infractions

42. ABA CANONS OF PROFESSIONAL ETHICS No. 10, "The lawyer should not purchase any interest in the subject matter of the litigation he is conducting"; No. 42, "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement." *See also* Canon 6 (conflicting interests) and Canon 27 (advertising).

43. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 288 (1954).

44. *See* Hildebrand v. State Bar, 18 Cal. 2d 816, 117 P.2d 860 (1941); State *ex rel.* Florida Bar v. Dawson, 111 S.2d 427 (Fla. 1959); People *ex rel.* Chicago Bar Ass'n v. McCallum, 341 Ill. 578, 173 N.E. 827 (1930); Johnson v. Great N. Ry., 128 Minn. 365, 151 N.W. 125 (1915); *In re* Sizer, 306 Mo. 356, 267 S.W. 922 (1924); Mytton v. Missouri Pacific R.R., 208 Mo. App. 361, 221 S.W. 111 (1919).

45. Order of South Carolina Supreme Court, Re: Rules of Practice, Rule 32, Jan. 29, 1973.

46. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(B). For the Code provision dealing with the rendering of accounts to clients, *see* DR 9-102(B)(3).

47. *See* CANONS cited note 40 *supra*.

occurred in *Sandifer*, it can readily be seen that the *Code* will give clearer guidance to attorneys.

In another disciplinary action, *In re Julian*,[48] the court refused to accept the penalty recommended by the Board of Commissioners on Grievances and Discipline. Of the six charges lodged against the respondent, he was found guilty of four: (1) wrongfully withholding from a client the sum of $100.00 in the disbursement of funds from the settlement of a tort claim; (2) wrongfully refusing to return a client's file; (3) dividing fees with an individual who was not an attorney; and (4) filing suit against a hospital to collect a fee based upon a "totally ridiculous, absurd, and preposterous" bill for services.[49] Although the Board had recommended a public reprimand, the court felt the offenses merited the stronger sanction of indefinite suspension.

III. ELECTION PROCEDURES

South Carolina's beleaguered election laws once again came under attack in *Toporek v. South Carolina State Election Commission*.[50] The controversy in *Toporek* centered around the South Carolina Legislature's attempt to deal with the decision of an earlier case, *United Citizens Party v. South Carolina State Election Commission*.[51] This 1970 case had invalidated Code section 23-264, which provided:

> [A]ny political party nominating candidates for the general election by party convention shall nominate the party candidate and make the nominations public not later than the date and time fixed for the closing of primary entries.[52]

Observing that it is black letter law that "a legislature may not delegate legislative functions to private persons or associations,"[53] the three judge district court held that the statute was "an unconstitutional delegation of power . . . to the established private political parties of South Carolina to fix the specific deadline by which the candidates must be nominated and announced."[54]

48. 260 S.C. 48, 194 S.E.2d 195 (1973).
49. *Id.* at 49, 194 S.E.2d at 196.
50. 362 F. Supp. 613 (D.S.C. 1973).
51. 319 F. Supp. 784 (D.S.C. 1970).
52. No. 995, [1968] S.C. Acts & Jt. Res. 2316.
53. 319 F. Supp. at 787.
54. *Id.* at 786.

In June 1972, the legislature amended section 23-264[55] to provide that parties nominating by party convention must make their nominations public "not later than the time for closing the polls on the date of the primary election."[56] A similar deadline was set for candidates nominated by petition.[57] In *Toporek*, the plaintiffs challenging this new provision had sought to have the names of various potential candidates placed on the general election ballot by both the petition and party convention methods.[58] Upon being notified that their certificates were not timely filed, the candidates brought suit in federal court. The defendants asserted that the 1972 legislation corrected the objectionable feature of the former version 23-264 by establishing the announcement deadline for non-primary candidates as the date of the primary election, rather than the closing date for the filing of primary entries. Thus, it was argued, since the date of the primary election is set by statute,[59] there was no unconstitutional delegation of legislative authority involved.

In rejecting this argument, the court noted that the statute purporting to set the date for primary election merely provided that in the event a party nominates candidates by party primary election, the election is to be held the second Tuesday in June.[60] Thus, the act, as written, does not explicitly set the second Tuesday in June as the announcement date. In the unlikely event that no party should hold a primary in a given year, presumably the June filing date would be nugatory and the only filing requirement remaining would be section 23-400.15, which requires certification to the Election Commission thirty-five days before the general election.[61] This fact, reasoned the court, engendered the same type of equal protection problem found in the *United Citizens Party* case since "it is clear that the *sine qua non* of the plaintiffs' failure to meet the statutory time limit . . . was the

55. S.C. CODE ANN. § 23-264 (Cum. Supp. 1973) (No. 1354, [1972] S.C. Acts & Jt. Res. 2531).

56. *Id.*

57. S.C. CODE ANN. § 23-400.16 (Cum. Supp. 1973) (No. 1354, [1972] S.C. Acts & Jt. Res. 2531).

58. Plaintiff Toporek was a petition candidate for the State Senate in senatorial district 16. Plaintiff John R. Harper represented nominees of the United Citizens Party who had been designated by party convention to run for senate seats in senatorial district 11 and for positions on the Allendale County Board of Commissioners. 362 F. Supp. at 615.

59. S.C. CODE ANN. § 23-396 (Cum. Supp. 1973).

60. *Id.*

61. S.C. CODE ANN. § 23-400.15 (Cum. Supp. 1973).

Democratic Party's decision not to break with precedent and to hold a primary . . . ."[62] Accordingly, the court was compelled to hold, "hopefully for the last time,"[63] that the time limitations of section 23-264 were unconstitutional as applied to non-primary candidates.

The court found an alternative, and perhaps more cogent, reason for invalidating the existing announcement date provisions, at least as applied to petition candidates. Section 23-266 of the Code provides that:

> If a *Party nominee* dies, withdraws, or otherwise becomes disqualified after his nomination, and sufficient time does not remain to hold a convention or a primary . . . , the respective State or county party executive committee may nominate a nominee for such office. . . ."[64]

This section was found to give an unfair advantage to organized political parties. It allows them to nominate a "ghost candidate" prior to the June deadline and later substitute a bona fide candidate, whereas petition candidates may get on the general election ballot only by certifying prior to the June deadline, a full five months in advance.[65] The court found "no valid interest, rational or compelling"[66] in such an arrangement.

Still another constitutional infirmity was found in the treatment of candidates who are unsuccessful in primary elections.[67] Section 23-400.16 provides that defeated candidates are precluded from being placed on the ballot in the subsequent general election "by petition or otherwise."[68] However, as the court pointed out, there is no regulation to prevent a candidate who is defeated in a convention from later offering as a petition candi-

62. 362 F. Supp. at 619, *quoting from* United Citizens Party v. South Carolina State Election Comm'n, 319 F. Supp. 784, 789 (D.S.C. 1970).

63. 362 F. Supp. at 619.

64. S.C. CODE ANN. § 23-266 (Cum. Supp. 1973) (emphasis added).

65. The court also noted an incongruity between section 23-266 and section 23-400.15 of the election laws. The former provision provides that substituted nominees must be certified no later than thirty days prior to the general election, while section 23-400.15 mandates that all candidates be certified at least thirty-five days before the general election. 362 F. Supp. at 620 n.1.

66. 362 F. Supp. at 620.

67. Torporek had been an unsuccessful candidate in the Charleston Democratic Primary (for the State House of Representatives) and was attempting to have his name placed on the general election ballot as a candidate for the State Senate via the petition route. The Chairmen of the State and Charleston County Democratic parties intervened pursuant to S.C. CODE ANN. § 23-400.72 (Cum. Supp. 1973).

68. S.C. CODE ANN. § 23-400.16 (Cum. Supp. 1973).

date or participating in a primary election. The court saw such "irrational treating of like things differently"[69] as a denial of equal protection to primary candidates. Therefore, the court also invalidated this provision of the election laws of South Carolina.

This latter section, in contrast with section 23-264, does appear to have had at least a slight degree of legitimacy. Arguably, candidates who are defeated in a primary election or at a convention and who later offer for the same position in the subsequent general election might tend to confuse voters and undermine the integrity of the election process. It is thus possible that the legislature might once again attempt to place this restriction on candidates. Section 23-400.16 could presumably be resurrected by broadening its scope to include candidates who are defeated in a convention contest.[70]

IV. SEX DISCRIMINATION

In *Eslinger v. Thomas*,[71] a female law student at the University of South Carolina brought a class action suit, alleging that she had been denied employment as a page in the South Carolina Senate solely because of her sex. Several months after initiation of the suit, the South Carolina Senate adopted a resolution[72] similar to one promulgated by the United States Senate,[73] allowing females to be employed as "clerical assistants" or "committee attendants." The resolution would thus allow females to perform most duties of regular senate pages, except certain personal errands for senators. Eslinger also attacked this resolution as being violative of the equal protection clause of the fourteenth amendment, because it still allowed only males to serve as full "senate pages."

69. 362 F. Supp. at 618.

70. Even then, the legislation might be subject to judicial invalidation. Redfearn v. Board of State Canvassers, 234 S.C. 113, 107 S.E.2d 10 (1959) held that a pledge taken by a primary candidate to "abide by the results of said primary and to support in the next general election all candidates nominated in said primary" imposed a moral, and not a legal, obligation on a candidate. The court also indicated that Article 1, Section 10 of the South Carolina Constitution sets the maximum restrictions that can be placed on candidates for elective office. *Id.* at 115-16, 107 S.E.2d at 11. In *Redfearn*, the court did not have to deal squarely with the predecessor of § 23-400.16, since the recalcitrant candidate there waged a write-in campaign and the statutory provision presumably applies only to candidates attempting to have their names printed on the ballot.

71. 476 F.2d 225 (4th Cir. 1973).

72. S.C. Senate Res. 525 (1971).

73. S. Res. 112, 92d Cong., 1st Sess. (1971).

Eslinger urged the district court[74] to designate sex as a "suspect category" and thereby force the defendants to justify their actions on the basis of some "compelling state objective."[75] She urged this test in lieu of the more traditional equal protection test which requires only the showing of a "rational basis"[76] for treating groups of individuals differently. The court refused to abandon the traditional test, stating that the more stringent test was applicable only in a very limited number of areas, primarily those involving racial classification and classifications which restrict the exercise of a constitutionally protected right.[77] The court further found that, while Eslinger had in fact been denied employment "solvely because of her sex," no effective relief could be granted. The Lieutenant Governor and the President Pro Tempore of the Senate were held to be immune from suit under the "speech or debate" clause of the United States Constitution.[78] Although the Clerk of the Senate, was not immune from suit, he nevertheless was not subject to monetary damages because he had been acting in good faith.[79] In addition, the superseding resolution was not found to violate the constitutional right of female citizens.[80]

The Court of Appeals for the Fourth Circuit reversed[81] and held that the plaintiff and the class she represented were entitled to equitable relief. On appeal, Eslinger had renewed her suggestion that sex be designed a "suspect category." The court, however adopted an intermediate approach:

> A classification based on sex is less than suspect; a validating relationship must be more than minimal. What emerges is an "intermediate approach" between rational basis and compelling interest as a test of validity under the equal protection clause.[82]

The court derived its new test from the recent United States Supreme Court case of *Reed v. Reed*,[83] which invalidated an Idaho practice of giving preference to males over females when both qualify equally for appointment as administrator of a dece-

74. Eslinger v. Thomas, 340 F. Supp. 886 (D.S.C. 1972).
75. *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).
76. *E.g.*, Dandridge v. Williams, 397 U.S. 471 (1970).
77. 340 F. Supp. at 896.
78. U.S. CONST. art. I, § 6.
79. 340 F. Supp. at 895.
80. *Id.* at 896-97.
81. 476 F.2d 225 (4th Cir. 1973).
82. *Id.* at 231 (footnote omitted).
83. 404 U.S. 71 (1971).

dent's estate. *Reed* was interpreted as indicating there must be a "fair and substantial" relation between the basis of the classification and the category being classified.[84] In *Eslinger*, the basis of the classification, avoiding the "appearance of impropriety" that would result from female pages performing all the tasks that regular pages perform,[85] did not meet the "fair and substantial" test that the court perceived formulated by the Supreme Court.

Less than two months after the court of appeals decided *Eslinger*, the United States Supreme Court, in *Frontiero v. Richardson*,[86] again dealt with the subject of sex discrimination. This time a plurality of the court held that sex was indeed a suspect category.[87] Justice Brennan, speaking for the four-man plurality, stated that he found "at least implicit support for such an approach in the decision last term in *Reed v. Reed*."[88] Most lower courts[89] that had considered the question subsequent to the *Reed* decision had not found any support, implicit or otherwise, for construing sex to be a suspect category. The *Frontiero* decision, however, probably should be taken as indicating that henceforth sex may join other "inherently suspect" classifications such as those based upon race, alienage, or national origin.[90] While

84. 476 F.2d at 230-31.

85. *E.g.*, running personal errands for senators, driving senators about in their autos, packing their bags in hotel rooms, and cashing personal checks. 476 F.2d at 231.

86. ___ U.S. ___, 93 S.Ct. 1764 (1973).

87. "We can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore by subjected to strict judicial scrutiny. *Id.* at 1771.

88. *Id.* at 1768. Joining in Brennan's opinion were Justices Douglas, White and Marshall. Justices Powell and Blackmun, along with Chief Justice Burger, concurred in the result; however, they would not go so far as to make classification based on sex "inherently suspect." Justice Rehnquist dissented, based on the reasons stated in the lower court opinion. This left Justice Stewart as the crucial "swing man." In his enigmatic one sentence concurrence, he merely stated that "the statutes . . . work an invidious discrimination in violation of the Constitution. Reed v. Reed, 404 U.S. 71" *Id.* at 1772-73.

89. *E.g.*, Green v. Waterford Bd. Educ., 473 F.2d 629 (2nd Cir. 1973); Wark v. Robbins, 458 F.2d 1295 (1st Cir. 1972). However, even some pre-*Reed* cases found sex to be a suspect category. *See, e.g.*, United States *ex rel.* Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968); Sail'er Inn v. Kirby, 5 Cal. 3d 1, 95 Cal Rptr. 329, 485 P.2d 529 (1971).

90. In a recent case, Cleveland Bd. Educ. v. LaFleur, ___ U.S. ___, 94 S.Ct. 791 (1974), the Court was once again urged to designate sex as a suspect category. *La Fleur* was a case challenging the constitutionality of mandatory maternity leaves for public school teachers. The Court held such a practice to be unconstitutional. However, it based its decision on the due process clause of the fourteenth amendment, and chose to ignore the more perplexing question of exactly where classifications based on sex belong on the equal protection spectrum.

such an approach would not have affected the outcome in *Eslinger*, certainly it would be of consequence in deciding close cases.

V. TAXATION

Bob Jones University v. Connally[91] ostensibly involves the construction of section 7421 of the Internal Revenue Code which provides "[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court . . . ."[92] The overall ramifications of the case, however, are far broader than the rather innocent sounding words of section 7421 seem to suggest.

In July of 1970, the Internal Revenue Service announced that private schools with racially discriminatory policies would be denied tax exempt status under section 501(c)(3).[93] In addition, individual contributions to such schools would not be deductible on the contributor's tax return, as provided for in section 170(c).[94]

Bob Jones University is a fundamentalist religious institution which lists among its tenents the belief that "God intended the various races of men to live separate and apart."[95] Accordingly, the University does not admit Black students, a fact which prompted various communications and meetings between the Internal Revenue Service and the University subsequent to the 1970 pronouncement.

These administrative negotiations were broken off in September of 1971 when the University brought suit in the federal district court, seeking to restrain the Service from revoking its tax-exempt status.[96] The district court concluded that the anti-injunction statute, section 7421, was not a bar, since technically, this was not an action to enjoin the "assessment or collection" of a tax.[97] Furthermore, the court reasoned, the underlying purpose of the threatened revocation was

> [T]o compel, through the use or threat to use, [of] taxing powers . . . private educational and religious institutions to

91. 472 F.2d 903 (4th Cir. 1973), *rehearing denied* 476 F.2d 259 (4th Cir. 1973), *cert. granted*, U.S. , 94 S.Ct. 116 (1973).

92. INT. REV. CODE OF 1954, § 7421.

93. *Id.* § 501(c)(3).

94. *Id.* § 170(c)(4).

95. 472 F.2d at 904.

96. 341 F. Supp. 277 (D.S.C. 1971).

97. *Id.* at 282.

> comply with certain political or social guidelines with regard to the question of racial integration.[98]

Accordingly, the court issued an injunction *pendente lite.*

On appeal, the Fourth Circuit Court of Appeals dismissed the complaint, stating that the anti-injunction act was applicable.[99] The court reasoned that a revocation of Bob Jones's tax exempt status would have the twofold effect of making the University taxable on any net income that accrued to it and making contributions from individuals non-deductible. Since either of these would result in an increase in tax revenues, the court concluded that an "assessment or collection" was, in fact, involved.

Having concluded that section 7421 does operate in this area, the court then analyzed the court-made exception to the statutory command. The 1962 Supreme Court case of *Enochs v. Williams Packing Co.*[100] sets up two requirements which must be met before the taxpayer can avoid the statutory roadblock. He must show that: (1) irreparable injury will result if collection is effected, and (2) "under no circumstances could the Government ultimately prevail."[101]

The court of appeals conceded that the first requirement laid down in *Williams Packing* was met. If the University were to have its tax exempt status terminated, one result would surely be a sharp decline in the number of individual contributions. Even if the University were to later win in a trial on the merits and have its privileged status restored, there would be no way to recoup the donations lost in the interim. However, with regard to the second test, the court felt that it was unable to say that "under no circumstances" would the government be successful in its revocation proceeding. The court pointed to *Green v. Connally*,[102] a case involving private schools in Mississippi. After an analysis of the *Green* opinion, the court concluded:

> In light of the Fourteenth Amendment, the decisions of the Supreme Court on the subject of school desegregation and the Civil

98. *Id.* at 284.

99. 472 F.2d 903 (4th Cir. 1973).

100. 370 U.S. 1 (1962).

101. *Id.* at 7.

102. 330 F. Supp. 1150 (D.D.C. 1971), *aff'd per curiam sub nom.* Coit v. Green, 404 U.S. 997 (1971). Green involved a class action by Blacks whose children attended public schools in Mississippi. They were successful in enjoining the Treasury Department from according tax exempt status and deductibility of contributions to private schools practicing racial discrimination.

> Rights Act of 1964, the exemptions and deductions provided for charitable educational institutions are not available for private schools discriminating on the grounds of race.[103]

Thus, section 7421 was a complete bar to the suit by Bob Jones University, because the second test of *William Packing* was not met. In addition, the court dismissed the issue that was seen as controlling by the district court. The contention of Bob Jones that the actual purpose for the threatened revocation was not to collect taxes but to exact compliance with political or social guidelines was said to be "irrelevant to the proper disposition of [the]case."[104]

The Supreme Court has granted certiorari in the *Bob Jones* case,[105] together with a District of Columbia case, *Americans United v. Walters.*[106] *Americans United* involves the revocation of exempt status for lobbying activities. However, the holding there appears to be somewhat inconsistent with *Bob Jones*, since the District of Columbia Court of Appeals held that the taxpayer there was not barred by section 7421. Hopefully, the Supreme Court opinions in these two cases will clarify some of the conflict and confusion in this area. In view of the Court's per curiam affirmance of the *Green* opinion,[107] an upholding of the court of appeals decision in *Bob Jones* would appear to be likely.*

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103. 472 F.2d at 907.

104. *Id.*

105. U.S. , 94 S.Ct. 116 (1973).

106. 477 F.2d 1169 (D.C. Cir. 1973), *cert. granted,* U.S. , 93 S.Ct. 2752 (1973).

107. 404 U.S. 997 (1971).

* [*Editor's Note*: After this issue had gone to press, the Supreme Court handed down decisions in both the *Bob Jones* and *Americans United* cases. In *Bob Jones*, the Court affirmed the decision of the Fourth Circuit Court of Appeals using essentially the same rationale as the lower court. Bob Jones University v. Simon, ___ U.S. ___, 94 S.Ct. 2038 (1974). In the companion case, *Americans United,* the Court reversed, saying that to allow injunctive relief on the facts presented "would render § 7421(a) quite meaningless." Alexander v. "Americans United" Inc., ___ U.S. ___, 94 S.Ct. 2053, 2059 (1974).]