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Due Process: Constitutional Guarantee, Not Legislative Grace

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DUE PROCESS:—CONSTITUTIONAL GUARANTEE, NOT LEGISLATIVE GRACE—A state statute which creates a property interest in public employment by providing that discharge shall only be for cause entitles the employee to a pretermination hearing; and such property interest is not conditioned by the procedures outlined by the statute for its termination.

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

This is a consolidation of two cases.

James Loudermill was hired in 1979 by the Cleveland Board of Education to work as a security guard.[1] According to section 124.11 of the Ohio Revised Code he was a "classified civil servant"[2]: to be discharged only for cause; and to be provided with administrative review if terminated.[3] In 1980, Loudermill received notice of his discharge on the grounds of dishonesty in answering his job application.[4] The Board officially approved the action without affording Loudermill an opportunity to respond to the charge or challenge his termination.[5]

Loudermill appealed to the Cleveland Civil Service Commission for a review under section 124.34.[6] The Commission appointed a

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1. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 535 (1985).

2. *Id.* OHIO REV. CODE ANN. § 124.11(B) (Page 1985) states in pertinent part: "The classified service shall comprise all persons in the employ of the state and the several counties, cities, . . . and city school districts thereof, not specifically included in the unclassified service." *Id.* Unclassified civil servants generally include elected or appointed officials, military personnel in service to the state, court officers, and student employees of normal schools, colleges or universities—to name a few examples. *Id.*

3. 470 U.S. at 535. OHIO REV. CODE ANN. § 124.34 (Page 1985) in part states that no classified civil servant may be discharged except "for incompetency, inefficiency, dishonesty, drunkeness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office." *Id.*

4. 470 U.S. at 535. Respondent Loudermill had been convicted in 1968 of a felony (grand larceny). He argued that he believed the conviction was for a misdemeanor since he had received a sentence of six months probation. He therefore answered negatively when asked if he had ever been convicted of a felony. *Id.*

5. *Id.*

6. *Id.* OHIO REV. CODE ANN. § 124.34 (Page 1985) states in part:

> In any case of reduction, suspension of more than three working days, or removal, the appointing authority shall furnish such employee with a copy of the order . . . which shall state the reasons therefore . . . Within ten days following the filing of such order, the employee may file an appeal, in writing, with the state personnel board of

referee who held a hearing and recommended reinstatement.[7] The full Commission then heard argument and voted to affirm the Board's decision.[8]

Loudermill brought an action in the Federal District Court for the Northern District of Ohio alleging that section 124.34 was unconstitutional as it failed to provide a hearing to employees prior to discharge and thereby worked to deprive such employees of property without due process of law.[9] Loudermill also claimed that the delay in providing the post-termination hearing worked as an unconstitutional application of the statute.[10] Finally, the complaint alleged a deprivation of Loudermill's liberty interest "because of the accusation of dishonesty" he faced throughout the administrative proceedings.[11]

The district court dismissed the complaint by granting a FRCP 12(b)(6) motion.[12] The district court acknowledged Loudermill's property interest in continued employment but concluded that: he had received all the process due him since the procedures outlined in the statute had been followed;[13] the post-termination hearing was adequate to protect his liberty interest; and due to the crowded docket, the commission's delay in reviewing Loudermill's appeal was constitutionally permissible.[14]

The second case involved Richard Donnelly, a school bus mechanic employed by the Parma Board of Education, who was fired without a prior hearing after failing an eye exam.[15] Donnelly also appealed to the Civil Service Commission and was reinstated, although without backpay.[16] In an appeal from the Commission's decision, Donnelly challenged the constitutionality of section 124.34.[17] The district court dismissed for failure to state a claim,

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review or the commission. . . .

Id. An appeal of the questions of law and fact may be had from the decision of the municipal or township civil service commission to the court of common pleas. *Id.*

7. 470 U.S. at 535.

8. *Id.* at 536.

9. *Id.*

10. *Id.*

11. *Id.* at 547 n.13.

12. *Id.* at 536. FED. R. CIV. P. 12 (b)(6), "failure to state a claim on which relief can be granted."

13. 470 U.S. at 536.

14. *Id.*

15. *Id.*

16. *Id.* at 537.

17. *Id.*

noting that under the *Mathews v. Eldridge*[18] test, Donnelly had received all the process which was due.[19]

The two cases were consolidated for appeal before the Court of Appeals for the Sixth Circuit.[20] The Sixth Circuit held that both Loudermill and Donnelly had been deprived of due process.[21] The court reasoned that the private interest in employment, coupled with the value of allowing the evidence to be heard before a dismissal, outweighed the additional burden placed on the administrative body by a pretermination hearing.[22] The Sixth Circuit, with one dissent,[23] affirmed the district court's finding of no constitutional violation of Loudermill's liberty interest, and affirmed the finding of no unconstitutional deprivation in the nine month delay awaiting administrative review.[24] Both Boards of Education petitioned for writ of certiorari. Loudermill cross-petitioned, seeking review of the decisions adverse to him.[25] The Supreme Court granted certiorari,[26] and affirmed the result rendered by the Sixth Circuit.[27]

Initially, the Supreme Court reasoned, in order for Loudermill and Donnelly to have federal constitutional claims to due process they must have a property right in their continued employment.[28] The Court postulated that the requisite property interest was created by the Ohio Rev. Code section 124.34, as that section provided that a classified civil servant could be discharged only for cause.[29] As such, the Court explained that a property right is not

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18. 424 U.S. 319 (1976). In determining how much process is due an individual once a property or liberty interest is recognized, the Court must balance the individual interest, the risk of erroneous deprivation and the benefit of an increase in procedures against the government's interest in expeditious proceedings. *Id.* at 335.

19. 470 U.S. at 537.

20. *Id.* Loudermill v. Cleveland Board of Education, 721 F.2d 550 (6th Cir. 1983).

21. *Id.* at 552.

22. *Id.* at 562.

23. *Id.* at 565. The dissenting judge concluded that Loudermill's and Donnelly's property interests were limited by the procedures accompanying the grant of the interest which would be found in the Ohio statute. In this, he was relying on Arnett v. Kennedy, 416 U.S. 134 (1974), which stated in pertinent part: "[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet." *Id.* at 153-54.

24. 470 U.S. at 537.

25. *Id.* at 538.

26. 467 U.S. 1204, 104 S. Ct. 2384, 81 L. Ed.2d 343 (1984).

27. 470 U.S. at 538.

28. *Id.*

29. *Id.* at 538-39.

conditioned on the procedures outlined by the legislature when it created the interest,[30] since "the right to due process is conferred not by legislative grace, but by constitutional guarantee."[31]

After determining that both Loudermill and Donnelly (hereafter respondents) had a property interest in their employment, the Court examined the nature of the process which was due to protect such interest.[32] Following the holding in *Mathews v. Eldridge* and balancing the competing interests at stake, i.e., the respondents' interests in retaining employment; the Boards' interests in discharging unsatisfactory employees expeditiously; and the risk of erroneous dismissal, the Court determined the need for some form of pretermination hearing.[33]

While examining the nature of respondents' interests, Justice White, writing for the Court, noted that an individual's concern with retaining employment cannot be taken lightly.[34] Understandably, considerable hardship is placed upon an individual when deprived of the means of support.[35]

In addition to the individual's interest in retaining employment, another reason supporting the necessity for a pretermination hearing is the agency's or government's interest in reaching an appropriate decision since dismissals for cause often involve a dispute in the facts.[36] Yet, even if no factual dispute is evident, a pretermination hearing may show that a discharge is unnecessary if the individual can produce evidence as to why it would be inappropriate in his case.[37] Balancing the factors, the Court concluded that those interests outweighed each Board's interest in an immediate discharge.[38]

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30. *Id.* at 541.

31. *Id.* J. White quoting from J. Powell's concurring opinion in Arnett v. Kennedy, 416 U.S. at 167.

32. 470 U.S. at 542.

33. *Id. See supra* note 18 for an explanation of the *Mathews* holding.

34. *Id.* at 543. *See* Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); *and* Fusari v. Steinberg, 419 U.S. 379 (1975).

35. 470 U.S. at 543.

36. *Id.*

37. *Id. See also* J. Stevens' dissent in Codd v. Velger, 429 U.S. 624 (1977). "If the charge, whether true or false, involves a deprivation of liberty, due process must accompany the deprivation." *Id.* at 633.

This is Loudermill's argument for the need of a pretermination hearing. *See supra* note 4. Taking as truth Loudermill's belief that his conviction was for a misdemeanor, very understandable in view of the light sentence, a pretermination hearing would have afforded Loudermill "an opportunity to show that he hadn't knowingly lied." Joint Response Brief of the Respondents Loudermill and Donnelly at 13; 470 U.S. at 535.

38. *Id.* at 544.

The pretermination hearing found to be necessary to satisfy due process need not be the full, elaborate evidentiary type seen in judicial review.[39] Significantly, only in *Goldberg v. Kelly*[40] did the Court require a full adversarial hearing before an administrative agency could terminate welfare benefits, while notice and an opportunity to respond were all that was required by the Sixth Circuit in the principal case.[41] Therefore, the Court concluded, an individual with a property interest in government employment is entitled to oral or written notice from his employer of the charges, a description of the evidence unfavorable to him, and the opportunity to give an explanation of his side of the story.[42] To require more than this would interfere substantially with the government's interest in the expeditious removal of an "unsatisfactory employee."[43]

The Court's holding was premised partly on the recognition of the provisions in the Ohio statute for a full post-termination hearing.[44] Yet, as part of Loudermill's cross-petition, he alleged that the length of time before the final administrative decision was too long, and that that in itself was a violation of due process.[45] The Court acknowledged that there would be some point at which delay in a post-termination hearing would constitute a deprivation without due process; however, in the principal case, the mere claim that a nine month wait is too long did not give rise to a claim of constitutional deprivation.[46] Since the process which was due Loudermill and Donnelly was the opportunity to respond prior to termination, as well as a full post-termination hearing, the Court held that the district court had erred in granting the FRCP 12(b)(6) motion, and ordered the case remanded.[47]

In his concurring opinion, Justice Marshall agreed with the majority's "express rejection" of the theory behind *Arnett v. Ken-*

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39. *Id.* at 545.

40. 397 U.S. 254 (1970). In the *Goldberg* case, the Court required that recipients be permitted to appear personally, to give evidence orally, to confront or cross-examine witnesses, to retain counsel if so desired and that the final decision of the examiner was to be made based solely on the evidence presented in the record. *Id.* at 266-72.

41. 470 U.S. at 546.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id. See* Brief for the Cross-Petitioner, Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

46. *Id.* at 547 n.12.

47. *Id.* at 548. (At the time of this writing, the case on remand is still pending.)

nedy,[48] and also agreed that the respondents were entitled to all the process they had requested in their claims.[49] However, he noted, public employees who may have their employment terminated only for cause are entitled to more process than that for which respondents asked.[50] Justice Marshall reasoned, as he did in *Arnett v. Kennedy*,[51] that an employee must have the opportunity to test the strength of any evidence before a decision is made to terminate his employment.[52] Something more is needed than mere notice and an opportunity to be heard.[53] Because the loss of wages can have a devastating effect upon the employee facing discharge, additional pretermination procedures are necessary to reduce the risk of an erroneous decision.[54] Thus, Justice Marshall concluded that more emphasis should be placed on pretermination procedures to reduce the risk of error, rather than on post-termination procedures which potentially force discharged employees to wait a substantial period of time before vindication or reinstatement.[55]

Justice Brennan concurred with the majority's holding with respect to a public employee's right to a hearing before discharge as a matter of constitutional guarantee.[56] Justice Brennan would have extended the constitutional requirement of a predischarge hearing, which affords an employee fair opportunity to produce evidence contrary to an employer's charges, to include the confrontation of an accusor if necessary.[57] However, Justice Brennan dissented from the majority with regard to the issue of the delay in Loudermill's post-discharge hearing.[58] Although the majority noted that there would be some point at which delay in the post-deprivation hearing would become a constitutional violation,[59] the majority nevertheless held Loudermill had failed to allege facts sufficient to support his claim.[60] Because Loudermill's record with regard to the

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48. 416 U.S. 134 (1974) ("bitter with the sweet"). *See supra* note 23, *infra* note 63.
49. 470 U.S. at 548.
50. *Id.*
51. 416 U.S. at 206. In *Arnett*, J. Marshall argued that "a tenured government employee must be afforded an *evidentiary* hearing prior to dismissal for cause." *Id.* (emphasis added).
52. 470 U.S. at 548.
53. *Id.*
54. *Id.* at 549.
55. *Id.*
56. *Id.* at 552.
57. *Id.* at 553.
58. *Id.*
59. *Id.* at 547.
60. *Id.*

claim of delay was insufficient, Justice Brennan would have had the issue remanded to the district court for further development.[61]

Justice Rehnquist, sole dissenter from the entire opinion as well as the Court's decision, based his opinion on the holding of *Arnett v. Kennedy*,[62] wherein the Court held that a public employee could be discharged for misconduct without being afforded a full pretermination hearing,[63] and that the procedure which Congress provided in the statute creating the employment interest in *Arnett* was all the process which was due to such individual.[64] Applying this same rationale to the Ohio statute, Justice Rehnquist concluded that both Loudermill and Donnelly had received all the process due them since the provisions of the statute had been followed.[65] As property rights are created and defined by sources of

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61. *Id.* at 558.

62. *Id.* at 559. The plurality opinion in Arnett v. Kennedy, 416 U.S. 134 (1974), held that due process did not require a nonprobationary (capable of being discharged only for cause) employee be given a pretermination hearing, but was limited to those procedures outlined in the statute creating the employment. *Id.* at 163.

63. *Loudermill*, 470 U.S. at 559. In Arnett v. Kennedy, a case involving a discharge of a federal employee for making statements to the press concerning his department and superior, six Justices agreed that a full pretermination hearing was unnecessary; three agreed that the property interest in employment was conditioned on the provisions of the statute. 416 U.S. at 163.

Justice Blackmun and Justice Powell concurred, agreeing that no pretermination hearing was necessary due to the availability of a post-termination hearing. *Id.* at 170. Justice Powell came to this conclusion after balancing the interests, i.e., the individual's interest in employment, the government's interest in discharging an unsatisfactory employee, and the risk of error. *Id.* at 168-70. Justice Powell did not conclude that the property interest in employment was limited by the procedures in the statute creating it; on the contrary, he stated "that right [to due process] is conferred not by legislative grace but by constitutional guarantee." *Id.* at 167.

Justice White agreed that the pretermination procedures in the statute were adequate to satisfy due process in light of the post-termination procedures. *Id.* at 178. He disagreed with the plurality's view that the employment interest was conditioned by the provisions of the statute. *Id.* at 177.

Justice Douglas dissented, arguing twofold: a pretermination hearing was required by due process, and the appellee's first amendment rights had been infringed. *Id.* at 203-04.

Justice Marshall, with whom Justice Brennan and Justice Douglas joined, dissented, taking the view that such an important right as a person's livelihood emphasized the need for an evidentiary hearing prior to termination. *Id.* at 216.

64. 470 U.S. at 559. Arnett v. Kennedy, *supra*, in part states:

> [T]he very section of the statute which granted him that right, a right which had previously existed only by virtue of administrative regulation, expressly provided also for the procedure by which 'cause' was to be determined, and expressly omitted the procedural guarantees which appellee [Kennedy] insists are mandated by the Constitution.

416 U.S. at 152. The statute provides for written notice of the charges and an opportunity to respond in writing prior to discharge. *Id.* at 140.

65. *Loudermill*, 470 U.S. at 560-61.

state law rather than the Constitution, Justice Rehnquist argued that the Court should recognize the "totality of the State's definition" of the interest at issue,[66] which includes its limitations as defined by the statutory procedural provisions.[67]

Fundamentally, the Constitution provides that "no person shall be deprived of life, liberty, or property without due process of law."[68] The more important the interest at stake, the more elaborate are the procedures needed for affecting the interest.[69] To be sure, the procedures and the formality of the hearing will depend upon the nature of the interests involved and the thoroughness or existence of subsequent proceedings.[70] In *Carey v. Piphus*, the Court reasoned that "procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty or property."[71] In *Mullane v. Central Hanover Bank and Trust Co.*, the Court noted the difficulty which exists in trying to define "due process":

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.[72]

Generally, a procedural hearing occurs prior to the deprivation of an interest. However, there are instances where the governmental interest in seizing property or in depriving an individual of his liberty is greater than a particular private interest.[73] In *North American Cold Storage Co. v. Chicago*,[74] the Court held that no hearing was required before health officials could seize tainted

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66. *Id.*at 561.

67. *Id.*

68. U.S. Const. amend. V. *See also* amend. XIV, § 1.

69. Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123 (1951) (when the government's actions operate to bestow a badge of infamy or disloyalty, due process requires an opportunity to be heard).

70. Boddie v. Connecticut, 401 U.S. 371, 378 (1971) (Harlan, J., majority opinion) (a state denies due process to indigents by requiring them to pay court costs and fees before permitting them to bring divorce actions, thereby foreclosing an opportunity to be heard).

71. Carey v. Piphus, 435 U.S. 247, 259 (1978) (it was a violation of due process to suspend high school students without affording them an opportunity to answer the charges even if the suspensions were justified).

72. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (proceedings for the settlement of accounts of a trust company must conform with constitutional notions of due process, including notice and an opportunity to be heard).

73. Annot., 69 L. Ed.2d 1044 (1982).

74. North American Cold Storage v. Chicago, 211 U.S. 306 (1908).

meat belonging to petitioners because the seizure was based upon the right and duty of the state to protect the health and welfare of its citizens.[75] But if an individual is not afforded a hearing in advance of the deprivation, he must be granted one afterward.[76] Other instances in which the Court has upheld summary governmental or administrative proceedings in light of the importance of the government's interest include: a Massachusetts statute promoting highway safety that provided a maximum of 90 days suspension of a driver's license for refusal to take a breathanalysis test;[77] the Surface Mining Control and Reclamation Act § 521(a), 30 U.S.C.S. § 1271(a) (1977), which permitted the Secretary of the Interior to issue immediate cessation orders when he determined that a mining operation was in violation of the Act and continuation could cause harm to the public health and safety;[78] and agency action involving the seizure of misleadingly labeled merchandise.[79]

There may be instances in which a predeprivation hearing may be impractical[80] or may render the action meaningless. This was the rationale in *Ingraham v. Wright*, where the Court upheld corporal punishment in public schools.[81] Reasoning that the common law remedies in tort for excessive punishment assured due process, and the school administration's interest in maintaining discipline could best be underscored by prompt punishment of the offender, the Court concluded that due process did not require a prior hearing.[82] In *Loudermill*, the Court recognized that there may be emergency situations in which a pretermination hearing would be impractical, but concluded that no such condition existed in the cases before them.[83]

Whether a predeprivation or post-deprivation hearing is appropriate is only relevant if a life, liberty or property interest is involved, as the requirements of constitutionally adequate proce-

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75. *Id.* at 315.

76. *Id.* at 316.

77. Mackey v. Montrym, 443 U.S. 1 (1979).

78. Hodel v. Virginia Surface Mining, 452 U.S. 264 (1981).

79. Ewing v. Mytinger & Casselberry, 339 U.S. 594, *reh'g denied*, 340 U.S. 857 (1950).

80. Parratt v. Taylor, 451 U.S. 527 (1981) (while loss of prisoner's hobby kit by prison officials was a deprivation of property, it did not rise to a constitutional deprivation, especially when there was a lack of intent on the part of the officials) (Powell, J., concurring, 451 U.S. at 552-53).

81. Ingraham v. Wright, 430 U.S. 651 (1977).

82. *Id.* at 672-82.

83. 470 U.S. at 545 n.10. J. White suggested that "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." *Id.* at 544-45.

dures only refer to the deprivation of those interests encompassed by the fourteenth amendment's due process clause protection of life, liberty and property.[84] The terms "liberty" and "property" are broad and sweeping.[85] They defy rigid or wooden definitions and gather meaning from experience.[86] Although the Court has never exactly defined "liberty," in order to give the fourteenth amendment due process clause meaning, it has summarized a variety of interests encompassed in the term, recognizing, however, that such interests are subject to reasonable government intervention.[87] The Court described these interests in *Meyer v. Nebraska*:

> Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[88]

Included within the term is the individual's interest in his reputation and standing within the community.[89] Therefore, the Court held in *Wisconsin v. Constantineau,* when governmental action has placed a person's name and reputation at issue, "notice and an opportunity to be heard" are of paramount importance.[90] The language of *Constantineau* was narrowly construed in *Paul v. Davis*, a decision which indicated that the individual's interest in his reputation, standing alone, was neither "liberty" nor "property" as protected by the fourteenth amendment.[91] In *Davis*, Justice Rehn-

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84. Board of Regents v. Roth, 408 U.S. 564, 569 (1972).

85. *Id.* at 571.

86. *Id.* at 571-72.

87. *Annot.*, 47 L.Ed.2d 975 (1977).

88. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

89. 408 U.S. at 573.

90. Wisconsin v. Constantineau, 400 U.S. 433 (1971). A Wisconsin statute permitted the "posting" of a list of names of individuals to whom it was forbidden to sell or give alcohol for one year. The statute was declared unconstitutional by a three judge district court, Constantineau v. Graeger, 302 F. Supp. 861 (1969). The Supreme Court granted certiorari and affirmed. "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." 400 U.S. at 437.

91. In Paul v. Davis, 424 U.S. 693 (1976), petitioners, police chiefs, circulated a flyer during the Christmas shopping season to warn merchants of active shoplifters. Respondent Davis had been arrested for shoplifting and the charges were later dismissed, yet his picture was included in the flyer. *Id.* at 696. Davis brought an action in the district court under 42 U.S.C. § 1983, alleging that petitioners had deprived him of a right secured under the Constitution. *Id.* at 696-97.

Noting that the petitioners' actions raised a classic case of defamation in tort, Justice

quist, writing for the majority, limited the due process protection to the variety of interests which attain "constitutional status" because they have been recognized by state law.[92]

In *Loudermill*, the Court rejected Loudermill's claim of violation of his liberty interest caused by the accusation of dishonesty.[93] The basis for this conclusion was the decision in *Bishop v. Wood*,[94] where the Court held that in order for an individual to raise an issue of violation of liberty by reason of stigmatization, the person must show that the statement was published, i.e., made known to others in a means separate from the judicial proceedings; that the statement contained substantial falsity; and that the publication resulted in alteration of the individual's employment status.[95] Loudermill's liberty claim failed because the accusation by the Board was not published.[96]

In determining the existence of protected property interests, the Court has often noted that such interests are created and defined by those existing rules and understandings which come from independent sources, such as state law; they are not created by the Constitution.[97] To have a property interest in employment or some benefit offered by the state, an individual must have more than a need, desire or expectation; an individual must have a "legitimate

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Rehnquist, writing for the majority, disagreed with respondent's contention that the fact that the action was taken by public officials raised it to a § 1983 action. *Id.* at 698, 711-12.

Dissenting, Justices Brennan, Marshall and White pointed out that it is the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Id.* at 717, quoting United States v. Classic, 313 U.S. 299, 326 (1941). It was this "abuse of his offic[e]" for which Congress intended § 1983 to provide a remedy. 424 U.S. at 717.

92. *Id.* at 710.

93. *Loudermill*, 470 U.S. at 547 n.13. Yet, the court of appeals noted he was stigmatized as dishonest because of the discharge. 721 F.2d at 561.

As eloquently stated by counsel: "[O]nce government places a cloud on someone's good name, reputation and character, there simultaneously occurs a governmental impairment of that person's liberty interest, preventing him or her from being unbiasedly judged in the marketplace, and that cloud progressively darkens as a full evidentiary hearing is delayed." Brief for Cross-Petitioner at 6.

94. Bishop v. Wood, 426 U.S. 341 (1976). The case involved a municipal police officer who was discharged from his job without a hearing. The district court had determined that the municipal ordinance creating the job did not create a property interest in employment since it only provided at-will employment. *Id.* With regard to the officer's liberty interest in his reputation, the Supreme Court determined that there could be no damage to his reputation if there had been no publication of the reasons for his discharge. *Id.* at 348-49.

95. *Id.*

96. *Loudermill*, 470 U.S. at 547 n.13.

97. *Roth*, 408 U.S. at 577.

claim of entitlement" to it.[98]

In *Board of Regents v. Roth,* the Court held it was not a denial of due process to refuse to grant a hearing to a non-tenured instructor when the college decided not to renew his one year contract.[99] Justice Stewart, writing for the majority, explained that Roth did not have a property interest sufficient to require a hearing since the terms of the expired contract secured no interest in employment.[100] Juxtaposed with *Roth* is *Perry v. Sindermann,*[101] where a teacher in a state college alleged the existence of a *de facto* tenure system.[102] This showed the existence of an implied understanding, fostered by state officials, which could justify a claim of entitlement to a contract renewal absent "sufficient cause."[103] Therefore, a property interest in employment can be secured by either an express or an implied contract.[104] It can also be created by statute,[105] where the state or federal government grants a right to continued employment severable only for cause.[106] While the plurality decision in *Arnett v. Kennedy* would limit this interest to the nature of the procedures provided in the statute, eight Justices rejected this rationale in *Loudermill.*[107]

Once the property or liberty interest is identified or recognized as one falling within fourteenth (and fifth) amendment protection, the question then becomes: how much process is due? The very essence of due process prohibits any notion of "inflexible procedures universally applicable" to every factual situation.[108] At a minimum, due process requires that the deprivation of a life, liberty or property interest by adjudication be accompanied by notice and the opportunity to be heard at proceedings suitable to the nature of the case.[109] The opportunity for a hearing is one which must come at an appropriate time, and it must be held in an effec-

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98. *Id.*
99. *Id.*
100. *Id.*
101. 408 U.S. 593 (1972).
102. *Id.* at 601.
103. *Id.*
104. Annot., 48 L. Ed.2d 996 (1977).
105. *Id.*
106. *Arnett,* 416 U.S. at 140.
107. *Loudermill,* 470 U.S. at 535-58.
108. Cafeteria Workers v. McElroy, 380 U.S. 545, 552 (1961) (petitioner, a civilian employee at a naval installation, was not deprived of due process when discharged from employment without a hearing in light of the appointing officer's proprietary interest in the installation's operations).
109. *Mullane,* 339 U.S. at 313. *See supra* note 72.

tive manner.[110]

In recent years, the Supreme Court has determined the nature and extent of the process due an individual facing the deprivation of a property interest under the balancing test of *Mathews v. Eldridge*.[111] That case involved the question of whether due process was violated by the termination of social security disability payments prior to an evidentiary hearing.[112] Justice Powell, writing for the majority, explained the factors involved in the "test" as follows:

> [F]irst, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[113]

While examining the first factor, the nature of the interest involved, Justice Powell noted that the eligibility of disability payment recipients was not based on financial need.[114] Since it did not take into consideration any other sources of recipient's income,[115] the potential hardship arising from erroneous deprivation was less than that in the case of welfare recipients.[116] Considering the second factor, the risk of error, Justice Powell observed that because the termination of benefits was based on medical assessment of the recipient's condition, it was a readily documented determination.[117] When compared with the termination of welfare benefits which often required the decisionmaker to assess the credibility of witnesses,[118] the reliability of medically acceptable diagnoses af-

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110. Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (due process requires that a divorced father be given notice of the adoption proceedings involving his child).

111. *See* Ingraham v. Wright, 430 U.S. 651, 675 (1977); Dixon v. Love, 431 U.S. 105, 112-15 (1977); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 17 (1978); Vitek v. Jones, 445 U.S. 480, 499 (1980) (Powell, J., concurring); Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982); Santosky v. Kramer, 455 U.S. 745, 758-68 (1982); Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983) (O'Connor, J., dissenting); Davis v. Scherer, 82 L. Ed.2d 139, 155 (1984).

112. *Mathews*, 424 U.S. at 323.

113. *Id.* at 335.

114. *Id.* at 340.

115. *Id.* at 341. The income sources not considered could include "workman's compensation awards, tort claims awards, savings, private insurance, public or private pensions, veterans' benefits, food stamps [or] public assistance." *Id.*

116. *Id.*

117. *Id.* at 343.

118. *Goldberg*, 397 U.S. at 269.

forded a greater protection from erroneous deprivation.[119] Thus in *Mathews*, the existing procedural safeguard, coupled with the government's interest in fiscal integrity, i.e., not paying benefits to unqualified persons, was determined to outweigh the individual's interest in a pretermination hearing.[120]

Applying the *Mathews* test to *Loudermill*, the first step in determining how much process is due a government employee facing discharge is to look at the nature of the private interest involved.[121] For some, the interest in government employment is close to being a necessity.[122] The deprivation of such property may impose tremendous hardship on the wage earner and may drive him below the poverty level.[123] As Justice Marshall noted in *Loudermill*, the disruption caused by the deprivation of employment can have a devastating effect on an employee.[124] The majority of the Court has recognized that an individual's interest in retaining employment is significant.[125]

The second factor of the *Mathews* test, the risk of erroneous deprivation,[126] can be of paramount importance in a case involving factual disputes. It is not enough to be notified of a dismissal and to have the reasons for such dismissal be given in writing. What is needed is an opportunity to respond to the reasons. An individual must be given the opportunity to answer in writing those charges made as well as given the opportunity to respond orally to the decisionmaker assigned with the task of making a determination with respect to such individual's property rights.[127] Yet, even when

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119. *Mathews*, 424 U.S. at 343.

120. *Id.* at 347-49. While the recipient had no pretermination 'hearing', he did have the right to access the file upon which the state agency based its decision, and could challenge the information contained therein. Also, the agency kept "open files," which meant that the individual could submit relevant information at any time in order to have a reassessment of his case. *Id.* at 346-47.

121. *Id.* at 335.

122. Brief for Respondent at 9.

123. Sniadach v. Family Finance Corp., 395 U.S. 337, 340 (1969)(Wisconsin procedures for summary garnishment of employee's wages prior to a hearing on the debt owed violated due process, and often left the wage earner with insufficient funds for self-support).

124. *Loudermill*, 470 U.S. at 549.

125. *Id.* at 543.

126. *Mathews*, 424 U.S. at 335.

127. Thurston v. Dekle, 531 F.2d 1264 (5th Cir. 1976). The case involved the question of whether the Jacksonville Civil Service Rules and Regulations provided constitutionally adequate pretermination procedures. *Id.* at 1266. After determining that plaintiffs had a property interest in city employment, *id.* at 1272, the court of appeals held that some form of pretermination hearing was necessary. *Id.* at 1274. In light of the post-termination evidentiary hearing, what was required was written notice of the reasons for the discharge and

the facts appear to be certain, the action proposed may be unnecessary or inappropriate.[128] A pretermination or deprivation hearing may facilitate the decision of whether or not to commence with the proposed action, thereby reducing the risk of error.[129] Since neither Loudermill nor Donnelly had the opportunity to confront their respective employers prior to discharge, the risk of an erroneous decision was greatly increased.[130] The fact that the Commission voted to reinstate Donnelly suggested that the error could have been avoided had he been afforded the opportunity to give a defense at a pretermination hearing.[131] With respect to Loudermill, the accusation made by the Cleveland Board that he knowingly falsified his responses on his job application could have been countered by a showing that Loudermill believed his conviction had been for a misdemeanor, not a felony.[132] The value of affording a pretermination hearing in these two cases is obvious. A hearing probably would have resulted in Donnelly not being discharged at all, while in view of the conflicting results reached by the referee and the Commission, a hearing for Loudermill would have assured that the Board achieved a more balanced, informed decision. After all, the right to a hearing does not depend on a showing that an individual will succeed in his claim.[133]

With respect to the third factor of the *Mathews* test, the governmental interests present in *Loudermill*, including the increased costs resulting from the implementation of additional procedures,[134] would not suffer from the imposition of "significant administrative burdens nor the creation of intolerable delays."[135] While there would be some point at which the implementation of additional procedural safeguards that protect an individual and

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"an effective opportunity to rebut those reasons. Effective rebuttal must give the employee the right to respond in writing to the charges made and to respond orally before the official charged with the responsibility of making the termination decision." *Id.* at 1273.

128. *Loudermill*, 470 U.S. at 545-46.

129. *Id.* at 543 n.8. *See also* Morrissey v. Brewer, 408 U.S. 471 (1972) and Gagnon v. Scarpelli, 411 U.S. 778 (1973) (parolees and probationers entitled to informal hearing to determine whether revocation is the appropriate action).

130. 470 U.S. at 544.

131. *Id.* The defense given was the fact that "another favored employee couldn't pass the eye test, either, and he was not terminated." Brief For Respondents at 15.

132. 470 U.S. at 544 n.9. *See* Brief for Respondents at 13. The Court noted that the termination of Loudermill's employment was based on the "presumed misrepresentation on the employment form, not the felony conviction." 470 U.S. at 545 n.10.

133. *Id.* at 544.

134. *Mathews*, 424 U.S. at 335.

135. 470 U.S. at 544.

make certain that an action is just would be outweighed by the added costs,[136] this can hardly be the case in *Loudermill*, where the respondents were given no hearing prior to termination.[137] Furthermore, the government has an interest in avoiding the erroneous discharge of its employees. It is less costly to retain an experienced individual than to train a new one, and it is counterproductive to erroneously discharge an employee and necessitate his addition to the welfare rolls.[138] Therefore, the *Loudermill* Court concluded that the government's interest in an expeditious discharge did not outweigh the respondents' interest in continued employment.[139] After weighing the three factors as set forth in *Mathews*, a predischarge hearing was determined to be necessary.[140]

Under Ohio law, respondents were entitled to a full administrative hearing after termination of employment and, ultimately, judicial review.[141] If a post-termination hearing was available, what type of pretermination procedures were necessary to satisfy due process? What was needed was not a formal hearing to totally resolve the issue, but rather an initial check against error.[142] Therefore, due process required that the respondents be given a chance to present reasons why the proposed action should not be taken.[143] Thus, the essential, minimal due process requirements were "notice and an opportunity to respond."[144]

It is suggested that one purpose of procedural due process is to give the individual the sense that he has been dealt with fairly.[145] Counsel referred to the action taken by the Board as one placing a cloud on Loudermill's name and reputation, with the cloud darkening as the evidentiary hearing was delayed.[146] Furthermore, "[j]ustice delayed is justice denied."[147]

The Court recognized in *North American Cold Storage* that even where an emergency situation exists which permits the deprivation of property prior to a hearing, a post-deprivation hearing

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136. 424 U.S. at 348.
137. 470 U.S. 535-36.
138. *Id.* at 544.
139. *Id.*
140. *Id.* at 545.
141. OHIO REV. CODE ANN. § 124.34 (Page 1985). *See supra* note 6.
142. 470 U.S. at 545.
143. *Id.* at 546.
144. *Id.*
145. *Carey*, 435 U.S. at 262.
146. Brief For Cross-Petitioner at 6. *See supra* note 93.
147. Brief For Cross-Petitioner at 6.

must be afforded.[148] As Justice Powell observed, the speed of administrative review can be significant in measuring the overall sufficiency of the process.[149]

Determination of whether a delay in a post-deprivation hearing becomes a constitutional violation often involves the consideration of whether the inquiry is comparatively similar to traditional adjudication.[150] For example, in *Goldberg* the Court concluded that a pretermination hearing was necessary in view of the possibility that a proposed termination of benefits might occur from a misapplication of current rules or policies or from a misunderstanding of the given facts.[151] In *Mathews*, however, the Court concluded that a pretermination hearing was not required where the decision maker's finding was premised on standard, unbiased and routine medical records.[152] Thus, in *Goldberg*, due process principles required a welfare recipient to be given the opportunity to defend the adverse action,[153] while the *Mathews* Court concluded that the imposition of additional procedures would not significantly reduce the risk of erroneous deprivation but would act merely to increase the administrative burden and accompanying costs.[154] Similarly, the factual disputes in *Loudermill*, involving the question of knowing falsity, are readily distinguishable from the routine medical decisions reached in *Mathews* which did not require a prompt post-termination hearing.[155]

In *Loudermill* the Court recognized that there are situations in which a delay in a post-termination hearing would be constitutionally violative,[156] since it is often the existence of these procedures which determines the scope of the pretermination procedures.[157] Even so, Loudermill's claim of unconstitutional delay failed for

148. North American Cold Storage v. Chicago, 211 U.S. 306, 316 (1908).

149. Fusari v. Steinberg, 419 U.S. 379, 389 (1975). The case involved the sufficiency of the Connecticut procedures for assessing the recipient's continued eligibility for unemployment compensation. An intervening change in the law between the time the district court found it in violation of the fourteenth amendment and the decision given by the Supreme Court essentially rendered the question moot. Observing that it was too soon to tell whether the new procedures would pass constitutional muster, Justice Powell did note that "Connecticut's previous system often failed to deliver benefits in a timely manner." *Id.* at 388.

150. Brief For Cross-Petitioner at 10.

151. *Goldberg*, 397 U.S. at 268.

152. *Mathews*, 424 U.S. at 343.

153. 397 U.S. at 368.

154. 424 U.S. at 348.

155. Brief For Cross-Petitioner at 10.

156. *Loudermill*, 470 U.S. at 547.

157. *Id.* at 547 n.12.

lack of sufficient evidence, although the claim was theoretically recognized as meritorious.[158]

The decision in *Loudermill* rejected the "bitter with the sweet"[159] approach to procedural due process and laid to rest the notion that property rights are defined by the procedures provided for their deprivation. Undoubtedly, the premise explained so thoroughly by Justice Rehnquist in *Arnett v. Kennedy* was an attempt to contain the due process explosion created by the holdings in *Goldberg*, *Roth* and *Sindermann*. Once the Court recognized that property interests were created and defined by existing rules such as state law,[160] and rejected the previous "privilege vs. right" argument,[161] anyone with a legitimate claim of entitlement was to be afforded some kind of hearing to protect that interest in the event of a proposed deprivation.[162] Perhaps fearing a deluge of claims based on a violation of procedural due process, Justice Rehnquist argued in *Arnett* that due process was limited to those procedures provided in the statute which created the interest.[163] If the Court recognized the property interest created by the state, it should also recognize the totality of the interest including those limitations placed on it.[164] However, Justice Rehnquist's eloquent explanation of the "bitter with the sweet" rule failed to understand the basis of procedural due process. Granted, the state does not have to create the property interest at issue. But once a state does create a property interest, subsequent deprivation of that interest requires constitutionally valid procedures.[165]

Although Justice Rehnquist denounced the tortured means used by the majority in *Loudermill* to determine how much process was due to the respondents and found the opinion devoid of principles which will instruct or endure, he overlooked the fact that the Court has for quite some time used a balancing approach when defining what can best be described as amorphous, intangible concepts. The right to justice, to a feeling that one has been handled fairly, is not a precise list of rights and duties. The approach sug-

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158. *Id.* at 547.

159. *Arnett*, 416 U.S. at 154.

160. *Roth*, 408 U.S. at 577.

161. *Goldberg*, 397 U.S. at 263.

162. 408 U.S. at 577.

163. 416 U.S. at 152-54. (This is the old argument that he who creates the right owns it.)

164. *Loudermill*, 470 U.S. at 561.

165. 416 U.S. at 167. *Cf.* Slochower v. Board of Educ. of N.Y., 350 U.S. 551 (1955); *and Roth*, 408 U.S. at 579 (Douglas, J., dissenting).

gested by Justice Powell in his concurring opinion in *Arnett*,[166] which was later to become the basis of the *Mathews* decision,[167] affords the strongest guidelines for balancing an individual's interest in being dealt with fairly with the government's interest in seeing that justice is done.

Certainly it is not easy for the Court to establish broad principles which require an application to each factual situation, yet that difficulty is the very essence of adjudication. The "tortured process" adopted in *Loudermill* which provides an individual with the right to notice and an opportunity to be heard is infinitely superior to the supplantation of constitutionally protected procedural rights.

A.M. Gulas

166. 416 U.S. at 168-71.
167. 424 U.S. at 335.