In the

Supreme Court of the United States

ARTHUR F. SAMPSON, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, ET AL.,

Petitioners

vs

JEANNE M. MURRAY,

Respondent.

Docket No. 72-403

Washington, D.C.

November 14, 1973

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ARTHUR F. SAMPSON, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, ET AL., Petitioners,	
v.	No. 72-403
JEANNE M. MURRAY, Respondent.	

Washington, D. C.
Wednesday, November 14, 1973

The above-entitled matter came on for argument at 1:50 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BRYON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

KEITH A. JONES, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; for the Petitioners.

THOMAS J. McGREW, 1229 Nineteenth Street, N.W., Washington, D. C., (pro hac vice); for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-403, Arthur F. Sampson, Administrator, General Services Administration, et al., v. Jeanne M. Murray.

Mr. Jones, you may proceed whenever you are ready.

ORAL ARGUMENT OF KEITH A. JONES, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. JONES: Mr. Chief Justice, and may it please the Court:

The issue here is whether in a case involving a routine termination action against a federal probationary employee the federal district court may enjoin the termination pending that employee's appeal to the Civil Service Commission. The facts are as follows:

In 19- -- In January, 1971, the respondent was hired as a program analyst by the General Services Administration at a salary of about $18,000 a year. Four months later, her -- one of her immediate supervisors sent to his supervisor, a Mr. Sanders, a memorandum recommending that her employment be terminated. His recommendation set forth a variety of reasons why her work performance was considered to be unsatisfactory and inadequate. Among these were her failure to follow the instructions of her supervisor, to follow office direction generally, and her inability to get along with her fellow employees.

The memorandum went on, however, to state that she

had experienced similar difficulties with her previous employer, Defense Intelligence Agency.

After studying this recommendation, Mr. Sanders issued to the respondent a notice terminating her employment, effective the next week. The termination notice stated expressly that the reasons for her termination were her failure to abide by office procedure and to accept the direction of her supervisors.

Upon receiving this termination notice, the respondent filed an appeal with the Civil Service Commission, and lodged a complaint in the United States district court for the District of Columbia. In her complaint in the court, she alleged, or she asked for, injunctive relief pending the appeal to the Civil Service Commission, and she alleged that if an injunction would not issue permitting her to stay in employment, she would lose income for the interim period, and unrebutted charges against her would remain in her personnel record. The district court immediately granted a temporary restraining order against her termination and set a hearing for the following week on the merits.

Before describing the events at that hearing, it is helpful to first summarize briefly the civil service regulations pertaining to federal probationary employees, so that the grounds for her appeal to the Civil Service Commission can be better understood.

Under the Lloyd-LaFollette Act, permanent employees in the competitive service, that is, employees who have finished their one year probationary term, may be discharged only for cause. But the Act does not provide similar protections for probationary employees during their first year of service; under the Act, such employees may be terminated at will. Under the regulations, however, of the Civil Service Commission, certain rights are granted to probationary employees. Among these are the rights not to be terminated because of invidious class-based discrimination, marital status, political activities, or improper discrimination because of physical disability.

In addition, although a probationary employee may be terminated upon the discovery of preemployment misconduct, termination on that ground does invoke, under the civil service regulations, certain procedural protections. The employee must be informed of the charges of preemployment misconduct against him, and he must be given an opportunity to respond to those charges in writing, before the termination becomes effective.

Thus, when the respondent appealed to the Civil Service Commission, her claim was that, notwithstanding the fact that the termination notice recited only her poor work performance, she alleged that, in fact, she was being terminated for preemployment misconduct; that is, events that took place at the Defense Intelligence Agency in her previous job.

If she prevailed upon that appeal to the Civil Ser-

vice Commission, it is -- she would be reinstated with back pay. However, at that time, upon her reinstatement, her employer would remain free, under the civil service regulations, to go forward with termination proceedings. All G.S.A. would have to do at that time would be to inform her in writing as to the charges of preemployment misconduct, if any, made against her, and permit her an opportunity to respond to those charges before she was dismissed.

In other words, the respondent had no right to retain her employment under the Constitution or under any statute, or even under the regulations. All she had was a right to certain procedural regularities.

I return to the hearing which was held before the district court on her motion for injunctive relief. At that time the government filed a motion to dismiss for want of equity jurisdiction. The -- this motion was not acted upon by the district court. Instead, the court proceeded to consider the merits of respondent's request for relief. The district court did not determine whether respondent had either alleged or shown that she was in danger of irreparable injury if the injunction would not issue.

Instead, the district court first took up the question whether the respondent would be likely to show before the Civil Service Commission that she in fact was being fired for preemployment misconduct. That was issue which would be tried

by the Commission on the basis of written submissions only. However, the district court was not content to review the case on the basis of written submissions themself. Instead, he requested that Mr. Sandera, the G.S.A. official who had ordered respondent's termination, come to the court and testify as to his real reasons for terminating, or informing respondent that her employment was to be terminated.

Mr. Sanders, at that time, was on vacation in California, and was not available to testify. Therefore, the district court continued the temporary restraining order until he should appear.

The government appealed from that order to the court of appeals for the District of Columbia circuit, and that court affirmed. The case is now here in the government's petition for certiorari, which the respondent did not oppose. In the meantime, the respondent's appeal to the Civil Service Commission has been held, pending the outcome of this suit.

I turn now to the legal issues involved here. Our principal contention is that the general statutory and administrative scheme governing federal employment precludes the exercise of equitable jurisdiction in cases such as this. This scheme, which I will describe in a moment, must be understood in its decisional context. Under the decisions of this Court, a federal employee, in the absence of any protective legislation or regulations, has no right at all to employment -- his

employment may be terminated at will.

Following this general rule, the Court expressly held, in White v. Berry, which we cite in our brief, that the federal courts have no general equity jurisdiction to enjoin the discharge of a probationary -- or of a federal employee, rather. That case involved a discharge which allegedly was in conflict with the pertinent civil service regulations at that time. In short, White v. Berry involves essentially the identical issue here, and this Court could not affirm without overruling that case.

In any event, with that decisional background, Congress, in 1912, decided to extend certain additional protections to certain federal employees. It enacted the Lloyd-LaFollette Act, which, as I have previously stated, affords to nonprobationary employees in the competitive service the protection that they may be discharged only for cause. Subsequent enactments and promulgated regulations have established for such employees the elaborate appeal procedures which are now before this Court in Arnett v. Kennedy, which was argued last week.

However, in enacting the Lloyd-LaFollette Act, the Congress determined that there should be a one year probationary term during which the employee would not be afforded such procedures, could be terminated without a "for cause" termination -- determination.

Q Mr. Jones, if the government loses this case,

could the regulation in question be revoked without any constitutional overtones?

MR. JONES: Yes, I believe it could, Mr. Justice Blackmun. There is nothing in the statute which requires the Civil Service Commission to provide the probationary employees the kind of procedural protections which the respondent here is relying upon.

Q In White v. Berry, of course, you didn't have the claimed violation of the administrative regulation, did you?

MR. JONES: Mr. Justice Rehnquist, I think that there was such a claim. This -- that case, of course, took place before the enactment of the Lloyd-LaFollette Act, but in 1883, Congress had established the Civil Service Commission, and the Commission had promulgated certain regulations. And I think the claim in White v. Berry was that the dismissal was in violation of one of those regulations.

Q Incidentally, just a tag end -- Is the respondent still working with G.S.A.?

MR. JONES: It's my understanding that she is, Mr. Justice Blackmun.

A central feature of this scheme, however, which applies to both probationary and nonprobationary employees alike, is that termination becomes effective prior to appeal to the Civil Service Commission. The employees have certain rights of appeal; as to probationary employees, those rights are lim-

ited. But, nevertheless, there's no statutory or regulatory provision for them to remain in their employment pending the appeal to the Civil Service Commission.

Q As I understand it, Mr. Jones, your -- the government's position is that there's no equity jurisdiction at all in this kind of a case because there is a fully adequate remedy at law in terms of reinstating the employee and giving back pay with interest, and, perhaps, costs --

MR. JONES: Yes --

Q -- if the determination, for any reason, is determined to have been improper.

MR. JONES: That's correct. That involves the Back Pay Act, Mr. Chief Justice, to which I was just coming.

Prior to the enactment of the Back Pay Act, there was an unfortunate gap in the governing legislation. If an employee was terminated and it was subsequently determined that that termination was unlawful, and the employee was reinstated, nevertheless, the employee would have lost pay during the time of the appeal to the Civil Service Commission, and there was no mechanism for the provision of such back pay. And this, of course, was a problem which was aggravated by the fact that the courts would not grant interim equitable relief, because, following this Court's decision in White v. Berry, that kind of relief was deemed unavailable.

Now, confronted with this dilemma, Congress could

have done any combination of three things. It could have provided the Civil Service Commission with authority to grant back pay upon reinstatement. It could have granted the Civil Service Commission the power to stay a termination, pending appeal before the Commission, in appropriate case. Or it could have explicitly granted to the courts the power to provide the kind of interim equitable relief that the district court here thought that it could provide.

The Congress chose only to do the first of these three things: only to provide the Civil Service Commission with the power to award back pay, upon reinstatement. This, we believe, was a deliberate policy choice which was intended to accommodate the respective interests of both the employees and their employing agencies. Under the Back Pay Act, if the employee's discharge was unlawful he's fully compensated upon reinstatement. On the other hand, under the Act, he has no right to remain in employment pending hearing of his appeal by the Civil Service Commission.

We believe that the exercise of equitable jurisdiction, which the district court here engaged in, is disruptive of the balance which Congress was seeking to achieve between the federal employees and the interest of the government in an efficient civil service. The retention of a discharged employee -- an employee who has received his termination notice -- pending review before the Commission, which could take as long as six

months in some cases, would be bad for morale of the agency and bad for discipline within a particular department in which she was located. And if the termination had any basis -- that is, if, in fact, it was for poor performance, then it would be bad for the efficiency of the government of the employing agency as well.

The citizens of this country rely upon the government to provide a wide array of necessary services, from national defense to social welfare. And the ability of the government to provide these services quickly and efficiently shouldn't be interfered with, or hampered by the forced retention of an employee found by his supervisors to be incompetent or unwilling to follow direction, or for some other reason -- unqualified for further service.

Q Would this holding of the court of appeals, as it now stands, apply to, let us say, the air traffic controllers who work for the Commerce Department at airports?

MR. JONES: The exact scope of the ruling -- well, I guess it would, Mr. Chief Justice. The court did not restrict itself to any particular class of employee, and I suppose this would apply to permanent employees as well as probationary employees. And it would apply to --

Q Well, if it applies to probationary it would be a fortiori that it would apply to permanent employees, with their greater degree of protection --

MR. JONES: I would assume so. And, so far as I can tell, it's not limited to any particular group of employees -- it's not limited to employees whose services may not be important to national defense, or any other important government operation. So that, although in a future case the Court might decide not apply that rule in a special case, there is nothing in the Court's language itself which would so limit it.

There isn't --

Q Does the Act expressly forbid the Civil Service Commission from keeping the person on the job, pending appeal?

MR. JONES: I believe there is nothing explicit to that effect, however, there is nothing which grants the Commission power to do that, and the Commission has never viewed itself as having that power.

Q You're relying on the proposition that no equitable remedy is available if there is a remedy at law, in terms of back pay and reinstatement --

MR. JONES: I suppose, in essence, that's our argument, that the remedy -- that Congress has, in fact, provided a general remedy at law, available to all federal employees, and that, therefore, there should not be a case by case determination of the matter of adequacy.

Now, I think it's important to realize that the interests of the employee do not outweigh the cost to the public. If the employee is -- if the employee succeeds upon his appeal

to the Commission, then interim injunctive relief would have provided him with absolutely nothing, because he is reinstated with back pay anyway. On the other hand, if he does not prevail on his appeal to the Civil Service Commission, interim injunctive relief would have simply unjustly enriched him at the expense of the taxpayers and at the expense of the efficiency of the government.

We believe that interim injunctive relief here not only disturbs the balance that Congress meant to achieve between the federal employees, on the one hand, and the needs of the government, on the other, but it would also offend the values furthered by the exhaustion doctrine.

The Congress has left to the Civil Service Commission the responsibility for determining, in the first instance, employee rights, subject only to subsequent judicial review. And, as this Court noted in Arrow Transportation and Wichita Board of Trade cases, a preliminary court ruling on the merits, pending decision by the administrative agency, can be disruptive of that agency's primary jurisdiction. And we believe that would be especially true in a case such as this, where the court undertakes a scope of review which, itself, is far broader than that which would be assumed by the Commission. Here the court was granting a full evidentiary hearing, whereas before the Commission there would merely be a decision upon written test- -- written evidence in affidavits.

Respondent, in her brief, I think, essentially ignores the policy considerations that we've stated here. She relies primarily for her -- almost entirely for equitable relief upon the All Writs Act. It seems clear to us that that Act must be read in light of the pertinent statutory scheme. The Act, itself, requires the issuance of writs to be, and I quote: "agreeable to the usages and principles of law."

And this Court, in Arrow Transportation and other cases, has held that a federal court's equitable powers under the Act, if granted, can be implicitly withdrawn by the pertinent statutory scheme: that is, can be withdrawn by the necessary implication of the statutory scheme. In Arrow Transportation, there was nothing in the Interstate Commerce Act which would have expressly taken away from the district courts the equitable relief they sought there to grant. Nevertheless, the general administrative scheme was such, this Court viewed equitable relief in those circumstances to be inappropriate. We believe a similar result is required here.

We would contend, further, that the All Writs Act does not properly extend to the kind of interim relief respondent seeks here, at all. That Act simply provides that the federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions." This Court has never read that Act as providing a broad power to grant preexhaustion relief in all cases. This Court has permitted preex-

haustion relief of the kind respondent seeks only in cases where it's necessary to right a constitutional wrong, or to preserve the jurisdiction of the Court upon subsequent review; that is, to preserve the possibility of effective judicial relief.

In the context of this case, I think that a reading of the All Writs Act, which is so limited, and respondent concedes in her brief that the All Writs Act is so limited, I think that it practically disposes of this case.

The courts below did not rely upon their power to preserve jurisdiction. They didn't discuss that issue at all. They, instead, asserted a broad power to provide preexhaustion relief whenever and wherever they thought it necessary. The court of appeals explicitly saw its role as that of breathing life into the civil service regulations; that is, of giving preexhaustion equitable enforcement to regulatory rights whenever the likelihood of even a preliminary denial -- not a permanent denial -- but even a preliminary denial of those rights have been shown.

We believe that the All Writs Act does not confer such a broad power.

The respondent seeks to defend the decision below, finally, on the ground that interim injunctive relief here, pending exhaustion of her administrative remedies, may have been necessary to preserve jurisdiction. Respondent, however,

does not suggest how, in this kind of case, interim injunctive relief could be relevant to the subsequent assertion of jurisdiction. The immediate discharge of the respondent from the G.S.A. would in no way limit this Court's reviewing authority over the subsequent appeal from the Civil Service Commission determination. Nor would it prevent the Court from providing the kind of relief, and the only kind of relief, which Congress has made available here: reinstatement with back pay. For that reason, the district court's order was not in aid of its jurisdiction --

Q Do you think the irreparable injuries standard is -- at least, that that would be applicable? I know you believe that the court hasn't any authority at all to issue these orders --

MR. JONES: Well, since we believe the court has no authority at all, we feel that the question of irreparable injury is one which the court should not reach.

Q Let's assume we disagreed with you on the jurisdiction of the court to take any action at all -- Why should the standard be irreparable injury? Is that just normal standard of just -- when you just stay an order pending an appeal?

MR. JONES: Well, what she is seeking is a preliminary injunction against agency action; she's not really seeking the stay of final agency action, pending review by the Court --

Q She's seeking a stay of the suspension order,

though --

MR. JONES: Well, she's seeking a stay of the termination --

Q Yes.

MR. JONES: We feel that where the Court, itself, does not have direct reviewing authority, then the normal standards for preliminary injunctive relief against an agency would apply, and not this --

Q Are there two sets of standards in this area, one relating to agency action in the broad sense of the regulatory agencies -- Federal Communications, Federal Power, Civil Aeronautics Board, and so forth -- and a different standard enunciated by this Court in connection with employment termination. For example, in cafeteria workers, didn't this Court say flatly that an employee may be summarily discharged--

MR. JONES: In that case, the Court recited a long history of the Supreme Court ajudication to that effect. That is correct.

Q But, Mr. Jones, I thought the basic issue with -- before Judge Gasch was the contention that in doing what they did, the agency had not followed its own regulations, because -- and, in other words, as I understood it, dismissal had to depend upon her -- how she had acquitted herself in G.S.A. service, and not as he -- whoever the examiner or investigator was -- on the basis of how she had acquitted herself in pre-

vious employment. And Judge Gasch said, well, if the agency followed its own regulations, then of course, this case should be dismissed. Bring in the man who terminated her and find out; and the government said, no, he's out of town -- we can't bring him in.

And Judge Gasch said, well, let's wait a few days. Then the government comes back and says, we're not going to bring him in. And that's when he issued the -- he issued the interim restraint, wasn't it?

MR. JONES: Our contention is that --

Q No, but isn't -- am I right as to the facts of --

MR. JONES: You are right as to the facts, Mr. Justice Brennan. Our c- --

Q The government's position at that time was, was it not, and in the court of appeals, that the document served on her, giving the reasons for termination, outlined the parameters of any inquiry that can be made at that preliminary stage before it goes to appeal?

MR. JONES: Yes. Our contention is that the determination of whether the employing agency itself followed civil service regulations is one left in the first instance to the Civil Service Commission.

Q Well, in adherence to its own regulations, Mr. Jones. I thought the way Judge Gasch looked at it, it was a G.S.A. -- I don't know what the identification may be with the

civil service regulations -- but the way he handled it was, whether the government followed its own regulations.

MR. JONES: Well, these are civil service regulations--

Q I see.

MR. JONES: -- and not G.S.A. regulations.

Q Well, he wasn't going to, himself, going to determine that. He was just going to try to see if -- to determine --

MR. JONES: Whether she could establish a substantial likelihood of prevailing upon appeal to the Civil Service Commission.

Q -- and apply normal equitable principles --

MR. JONES: That's correct. That's what he sought to apply.

I'd like to reserve my remaining time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. McGrew?

ORAL ARGUMENT OF THOMAS J. MCGREW, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. MCGREW: Mr. Chief Justice, and may it please the Court:

I'd like, if I may, to begin by adding slightly to counsel's statement of facts.

The regulation under which Mrs. Murray complained to the Civil Service Commission protected her against the use of

prior employment "in all or in part."

Q That is, prior employment --

MR. MCGREW: Prior employment --

Q -- however she may have acquitted that was irrelevant?

MR. MCGREW: Exactly, your Honor. Exactly. She was exposed in the three-page memorandum, which went to the boss at this agency, to a page-and-a-half of her alleged conduct at the Defense Intelligence Agency. And it was exactly the sort of thing that this regulation was intended to avoid. It was "what yawners will read it," but it is the sort of thing where it says, "True, her record is excellent; true, she got all these outstanding ratings; but the people who really knew, the people who didn't rate her, say this, or that." That's what they would not offer her --

Q This is the issue you will present to --

MR. MCGREW: That is the issue we presented to the Civil Service Commission.

Q Yes, indeed.

MR. MCGREW: The government conceded, before Judge Gasch, that the offer of that memorandum violated the regulation to the extent that he considered prior conduct. The question was whether the person who signed the attached letter, and the memorandum said, "if you agree with this, sign the attached letter," and there is only one letter there --

Q Let's assume that there's a very good chance of winning before the Civil Service Commission. The issue still remains whether the court had any power to issue --

MR. MCGREW: All right, at that point, your Honor, it seems to me --

Q Or be a power, or whether even normal equitable principles would have permitted it.

MR. MCGREW: Quite right, your Honor. It seems to me that there are two sources of power. One is the All Writs Act, under cases like Dean, and the other is 11(d)of the Administrative Procedure Act.

Q But, may I ask -- you would concede if the Congress had foreclosed this as we thought in Arrow that the Congress had done -- that if Congress had foreclosed it, and that was the scheme of the Act, then there was no power --

MR. MCGREW: I think that is exactly right, Mr. Justice Brennan --

Q -- and it's only when the Congress, I gather your position is, in fact forecloses that the ordinary equitable power -- irreparable injury and all the rest -- is denied the courts, is that -- ?

MR. MCGREW: That's exactly right, your Honor. In fact, Arrow, and Dean, and this case, I think, afford a very instructive example of how one deals with this legislation. In Arrow, the Congress had given the I.C.C. the power to sus-

pend rates. This Court held, and I'm certain it's the law, and I think it's clearly right, that that ousted the courts. In Dean, we had a situation where the Clayton Act gave the Department of Justice the power to go in for interim relief, and was silent on the question of the Federal Trade Commission. There the result was that the Federal Trade Commission could go in. This case, I think, is still the easier case. The statute is completely silent.

Q Well, then, you -- but -- well, I gather that you disagree, then, that as to the authority of the Civil Service Commission to stay this discharge --

MR. MCGREW: Oh, no, no, Mr. Justice White.

Q You mean that under the Act the Congress specifically -- or by -- inferentially, foreclosed the Civil Service Commission from entering this stay, or this injunction?

MR. MCGREW: I guess I'm not being clear, Mr. Justice White. What I meant to say is that in Arrow we had a situation where the statute expressly gave the I.C.C. the authority to suspend. By so doing, it was held, that this ousted the courts.

Q Well, had that --

MR. MCGREW: The Civil Service Commission has no such authority.

Q Yes, and because the Congress didn't intend it to have.

MR. MCGREW: That's right. Well, it seems to me, the

assumption --

Q Well, this didn't intend the Civil Service Commission to have, but you're saying that they intended the courts to have.

MR. MCGREW: I think that -- I think the inference from congressional silence is that Congress did not intend to affect the jurisdiction of the courts one way or the other.

Q Well, now, I suppose you'd agree, Mr. McGrew, that the Back Pay Act was an effort to redress a somewhat inequitable balance that had existed with reference to termination of government employees -- it was a hardship on them.

MR. MCGREW: Exactly right, your Honor.

Q You have in mind what the government relied on in its brief and the dissenting opinion in the court of appeals relied on before --

MR. MCGREW: Senator Langer --

Q Senator Langer was the manager of the bill, and he said that the Act provides that an agency may remove any employee at any time, but that the employee shall then have the right to appeal. Now, that's the appeal to the Civil Service Commission --

MR. MCGREW: Quite right.

Q When he is removed, he is, of course, off the payroll. If he wins the appeal, it is provided that he shall be paid for the time during which he was suspended. That is,

he gets back pay along with his reinstatement.

MR. MCGREW: That's right.

Q That was a remedy that wasn't available before that Act.

MR. MCGREW: And I --

Q Now, isn't that by inference a suggestion that that's the exclusive course? As Justice White has pointed out, the Civil Service Commission was given no power to stay, and Senator Langer's statement sounds as though he was telling the Senate, as manager of this bill, that no one would have the power to stay at that early -- at that first step.

MR. MCGREW: I think in context, Mr. Chief Justice, that it is clear that Senator Langer is not saying that. Senator Langer is stating his understanding of what would happen and what, I submit, would happen in 999 out of 1,000 cases. I don't think he intended that, and I don't think it can be fairly taken in context as a statement on the power of the federal courts, either directly or by inference.

Q Then you're focusing narrowly on this one proposition that the agency was required to -- or that the Court had the power to inquire into the decisional process of the agency at the first stage.

MR. MCGREW: No, no, if I may say so, your Honor, it seems to me that the question here is whether there shall be a per se rule saying under no circumstances can this be done,

or whether the traditional prerequisites of equity jurisdiction will be applied. For example, your Honor raised the situation of air traffic control, or cafeteria workers. It seems to me that is a situation that comes clearly under one of the criteria for equitable jurisdiction, namely, what is the injury to the government?

Q Well, do you go so far as to suggest that unless Congress either expressly or by implication has foreclosed exercise of equitable powers by the Court then those powers are there, and it becomes only a question of the abuse of discretion in their exercise?

MR. MCGREW: I would suggest to your Honor that Dean Food seems very much to suggest that.

Q Of course, we didn't have that in Arrow because we had a whole statutory history which made it clear that the I.C.C. can act for, I've forgotten, a certain number of months, and our conclusion was that they couldn't act after that, and Congress meant, then, neither court nor I.C.C. could act --

MR. MCGREW: In here your Honor has a whole statutory history which says that the sole purpose of the Back Pay Act was not to restrict any existing remedies, not to change any existing remedies, but to create one new one.

Q Well, but doesn't that have to be read along with the provisions of the one year probation, which gives an absolute right of termination during one year without any reason?

MR. MCGREW: It gives, your Honor, correctly. It does give an absolute right as --

Q Isn't that the most plenary power that an employer could have over an employee?

MR. MCGREW: It is, but there are restrictions: race, color, creed, sex, politics and prior conduct. The one right a probationer has, in sum, is to be judged on the basis of his own conduct during the probationary period, and not extraneous factors --

Q In that agency.

MR. MCGREW: In that agency.

Q And that's by regulation and not by statute.

MR. MCGREW: That is by regulation, your Honor.

Q Just what is this right you're talking about that wasn't diminished? This equitable right in the federal court that wasn't diminished by the statute -- what is that right?

MR. MCGREW: The right, if your Honors please, or the power in the district court is to enjoin, subject, of course, to likelihood of success on the merits, subject to finding of irreparable injury, subject to all of the conditions of equitable jurisdiction, to enjoin an agency action pending exhaustion of administrative remedies before an agency -- whatever the agency may be. That --

Q And the case for that is what?

MR. MCGREW: The case for that, in terms of the

relevant reviewing court in this Court is Dean Foods, I would think. There, the court of appeals was the relevant reviewing court of the Federal Trade Commission. The Trade Commission asked for --

Q Well, that doesn't happen in this case. The court of appeals isn't reviewing authority of the discharge of an employee, is it?

MR. MCGREW: No, your Honor. The district court is the reviewing court for discharge --

Q What is your jurisdiction? That's my trouble -- outside of your claim of the All Writs Act, what else do you have?

MR. MCGREW: All right, my jurisdiction, in terms of the right of the district court to review the Civil Service Commission, is 28 U.S.C. 1361, the Mandanus Act. In terms --

Q Mandanus --

MR. MCGREW: Yes, your Honor. In fact, as White and Berry held --

Q Does Mandanus still require a clear legal duty?

MR. MCGREW: It does, your Honor, and we --

Q It does?

MR. MCGREW: -- and I think we clearly showed one.

Q And what's the clear legal duty here to give a hearing?

MR. MCGREW: The clear legal duty is not to terminate

a probationary employee on the basis, in whole or in part, of conduct which occurred prior to the time that person was employed.

Q Cite me the clear legal authority for that statement you just made.

MR. MCGREW: That, your Honor, is in the Code of Federal Regulations. I can --

No, this is the issue we are taking before the --

Q They complied with the regulation which said that they must limit termination to reasons affected -- affect her service with this agency.

MR. MCGREW: Exactly right, your Honor.

Q Is there any case from this Court holding that the discharge of a federal employee in the probationary employer's reviewable by Mandamus after agency action is completed?

MR. MCGREW: Your Honor will find that White v. Berry said exactly that. They said --

Q That wasn't a probationary employee.

MR. MCGREW: That was not a probationary employee. In any case holding a probationary employee's discharge is reviewable even after the discharge process?

Q By Mandamus.

MR. MCGREW: In this case I'm not -- in this Court I'm not aware of any such case.

It seems to me, if I may mention it, the second source of jurisdiction in this respect is 10(d) of the Administrative Procedure Act. This states, "on such conditions as may be required, and to the extent necessary to prevent irreparable injury, the reviewing court may issue all necessary and appropriate process to postpone the effective date of an agency action." Now, --

Q Now, this court -- it's the reviewing court -- doesn't it -- ?

MR. MCGREW: And the district court is the reviewing court.

Q This is in advance of any application to review anything -- is it?

MR. MCGREW: It is in advance of an appli- --

Q Look, doesn't that really refer to the reviewing court reviewing the orders of the Civil Service Commission?

MR. MCGREW: I think if your -- Oh, it is -- it does refer to the reviewing court reviewing the order of the Civil Service Commission. The question is, can they stay agency action?

Q Yes. This being, you think, to protect the jurisdiction to review the agency -- final agency action?

MR. MCGREW: I think, if your Honor please, that that goes directly to the question of irreparable injury. It seems to me that loss of employment can impact very seriously on the

possibility of continuing appeal through the civil service process.

Q I take it the district court just entered an injunction pending its determination of what it thought the other issues were -- the chances of success in the irreparable injury.

MR. MCGREW: The language, your Honor, was exactly this: --

Q Was that vaguely -- correctly -- is that right?

MR. MCGREW: That's right. The hearing was con --

Q So that if the court had any power at all to enter an injunction, given good chances of success, and given irreparable injury, you would think you had power to -- temporarily to enjoin pending those determinations?

MR. MCGREW: Exactly.

Q So that this case really turns, then, -- has to turn on the power.

MR. MCGREW: That's right. There is nothing else in the record.

Q It is the power before the administrative procedures in the Civil Service Commission have been exhausted.

MR. MCGREW: That is exactly right, Mr. Chief Justice.

Q It might be different after the Civil Service Commission had acted than it would be before, wouldn't it?

MR. MCGREW: In that situation, if your Honor please,

the Administrative Procedure Act would clearly apply.

Q Will you give me a case that says that wherein administrative or any other proceedings you get full back pay is not an adequate remedy?

MR. MCGREW: I can give you, if your Honor please, several cases exactly like this one in the lower courts.

Q Well, I hope you'll answer my question. My question was specific: Give me a case -- and I say there is no case --

MR. MCGREW: Drew, in the Fifth Circuit, which was just decided, which held that a private employee's discharge may be enjoined pending completion of E.E.O.C. remedies --

Q On the basis that full back salary and back pay was not adequate?

MR. MCGREW: The court did not --

Q That's the one I'm looking for -- the one where the court did.

MR. MCGREW: The court did not explain its reasons. It simply entered the order in that case. It did not say that this particular remedy was adequate or inadequate.

Q You actually don't have a case that says that if you can get full back pay, plus interest, that that is inadequate.

MR. MCGREW: I do not have such a case.

Q But this circuit case was not under the Lloyd-La-

Follette Act, of course.

MR. MCGREW: That was not, your Honor. Reeber v. Rossell in the Southern District of New York was -- that was a Judge Kaufman's case in the early '50's. Again, in the early '60's, there was Schwartz v. Covington, which involved a military discharge review board. And again the state pending that.

Q Also, not under the Lloyd-LaFollette Act.

MR. MCGREW: Again, not. Quite right, your Honor.

It does seem to me, though, that the extreme uniqueness of this case is pointed out in the series of briefs the government has filed in the docket here. From one court to the next, the argument of the flood of litigation has been made. In the petition foreset before this Court, the government stated the potential volume of new litigation as indicated by the fact that, according to Commission figures, some 16,000 individual adverse actions, and some 22,000 reductions in force were taken against federal employees, in fiscal 1971. Pardon me.

We've now had almost two years' experience with this case in the District of Columbia. The number of employees who have succeeded, under the standards set forth by Judge Wilkey, in the court of appeals opinion, is not in the thousands, it is not in the hundreds, and, as far as I have been able to find out, it is not even one.

Q Has the court of appeals opinion been extant two

years?

MR. MCGREW: Very nearly.

Q I thought it was the district court that was that far back.

MR. MCGREW: The district court is two and a half years, your Honor.

Q Let me go back to one other question. The court of appeals, in its opinion, relied heavily on Virginia Petroleum Jobbers --

MR. MCGREW: It did, indeed, your Honor.

Q A case on which I sat when I was there, as you may recall. But, with that line of cases, they're all dealing with agency -- regulatory agencies where, if the decision is reversed, there is no equivalent of reinstatement with back pay, is there?

MR. MCGREW: That's --

Q Is that not true?

MR. MCGREW: That is exactly right, Mr. Chief Justice.

Q Yes, but the propositions laid down in the Virginia Petroleum Jobbers case are somewhat different from this kind of situation, with respect to the availability of an adequate remedy at law.

MR. MCGREW: It seems to me, your Honor, that money -- back pay -- is not always -- I think in most cases it will be -- in almost every imaginable case it will be an adequate remedy.

But it seems to me that there are situations -- one can think of a situation where a person could not continue their pros- -- continue to prosecute their appeal before the Civil Service Commission. One can think of a situation where the lack of money would impact very severely on the health of one's dependents.

Q Well, whatever that may be, there is nothing in the record in this case that would indicate that you'd be drawn into one of those exceptions, but, going back to Virginia Petroleum Jobbers -- it is quite clear that all the equitable relief given -- interim relief -- was premised on the proposition that there was no remedy available --

MR. MCGREW: That's right, your Honor. And what we have asked for, and what the court of appeals held we were entitled to, is to a continuation of this hearing, so that we can attempt to prove that. Judge Wilkey, writing for the court of appeals, did not say we would win; he said we might well lose, but that that question had still to be made on this record, and was for Judge Gasch in the first instance.

Q Well, I suppose if the official had come into Judge Gasch's court and had testified, "Well, I didn't, in terminating the petitioner, I didn't rely at all on her record with the other agencies; I did this solely on the record with the U.S.A.," this case would never've been here, would it?

MR. MCGREW: Very probably would not. Very probably

would not.

Q Did the district court make any finding at the time it issued the temporary restraining order as to why back pay and reinstatement would be inadequate in the case of this particular respondent?

MR. MCGREW: It did not, your Honor. That point was submitted in argument before the court on the temporary restraining order. The record there is not before this Court. It was not taken up by the government before the court of appeals so I hesitate to quote from it. I can represent to the Court what happened, if you'd like to know.

Q Well, I just wondered if the district court had made a finding or had not.

MR. MCGREW: Decision was made on a legal issue. It was given to the court as a matter of law on the temporary restraining order.

If there are no more questions, I will submit the case at this point.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. McGrew.

Do you have anything further, Mr. Jones?

MR. JONES: I have nothing further, your Honor.

MR. CHIEF JUSTICE BURGER: The case is submitted. Thank you gentlemen.

[Whereupon, at 2:36 o'clock p.m., the case was submitted.]

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