DISMISSALS OF PUBLIC EMPLOYEES FOR PETITIONING CONGRESS: ADMINISTRATIVE DISCIPLINE AND 5 U.S.C. SECTION 652(d)

A recent per curiam decision by the Court of Appeals for the District of Columbia [1] has focused attention on, but failed to resolve, important questions concerning a seldom-used statute bearing on the relationship between bureaucratic discipline and the first amendment rights of federal employees. The obscure statutory provision involved is 5 U.S.C. section 652(d), which provides that:

> The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any Committee or member thereof, shall not be denied or interfered with.[2]

Turner, an FBI agent with ten years' experience, was dismissed from the Bureau in June, 1961. On appeal to the Civil Service Commission, the FBI advanced a variety of reasons for Turner's dismissal. The Commission, however, relied only upon statements made by Turner in letters to Senators Kefauver and Javits and to Representative Celler in upholding the dismissal.[3] These letters were written after Turner had been placed on indefinite probation and suspended by J. Edgar Hoover for "apparently . . . placing . . . personal preferences and conveniences [with respect to assignments and transfers] above the welfare and needs of the F.B.I."[4] Turner's letters consisted of a refutation of these charges,[5] an affirmative attack on FBI policy

1. Turner v. Kennedy, Civil Action No. 3160-62, D.D.C., October 5, 1962, *aff'd per curiam*, 332 F.2d 304 (D.C. Cir.), *cert. denied*, 33 U.S. L. WEEK 3171 (1964). Apparently certiorari was denied because counsel for Turner filed their petition one day after the statutory allowance had passed. 28 U.S.C. § 2101(c). See Memo for Respondent Against Petition for Certiorari.

2. 62 Stat. 356 (1948).

3. The Civil Service Commission action is recorded in two sections: the Appeals Examining Office Report appears in the document submitted to the United States Court of Appeals for the District of Columbia Circuit entitled "Pertinent Portions of Administrative Record Designated by Appellees" [hereinafter cited as RECORD], pp. 24-41; the opinion of the Board of Appeals and Review is set out at RECORD at 42-44.

The charges made by J. Edgar Hoover included items outside of the letters, but these were not accepted or relied on by the Civil Service Commission in its decisions. Mr. Hoover's charges are reprinted as Exhibit A in Joint Appendix of Brief for Appellant [hereinafter cited as APPENDIX], pp. 10-19, and are also included in RECORD at 1-7.

4. APPENDIX at 11 (referred to in letter from Mr. Hoover to Turner). Turner was notified of the suspension in December, 1960. See his letter to Senator Kefauver of April 30, 1961, RECORD at 9.

5. See, *e.g.*, letter to Sen. Kefauver, RECORD at 8-10; letter to Rep. Celler, RECORD at 14-16.

and morale,[6] and a plea to Congress to take action to reinstate him and to reform FBI personnel practices.[7] The FBI charged that certain statements in Turner's letters were "false, untrue or made irresponsibly."[8] The hearing examiner applied a somewhat different test in upholding the FBI charges: whether Turner's statements were made "without reasonable basis of belief."[9] A second FBI charge — that Turner had demonstrated a lack of loyalty and respect — was sustained on the basis of a statement in one of Turner's letters adverting to the prevalence of the "Hoover myth" and to current criticism of the Bureau.[10] The examiner concluded that Turner had placed himself in a position "where he could no longer effectively serve as a member of the organization."[11]

Affirming this decision, the Board of Appeals and Review of the Civil Service Commission discussed the applicability of 5 U.S.C. section 652(d). The Board held that the statute did not create an absolute right to petition Congress: rather, the statutory right may be lost if:

> (1) the employee's conduct constituted an abuse of the right and went beyond the scope of permissible activity contemplated by the Congress in enacting this legislation, and (2) thereby caused the agency immediate and substantial harm.[12]

While the Board held that Turner had "lost" his right to protection under section 652(d), it is not clear what standard it applied. Language in the opinion indicated that findings of both falsity and irresponsibility were necessary to

6. See, *e.g.*, letter to Sen. Kefauver, RECORD at 10-12; letter to Rep. Celler, RECORD at 16.

7. See *e.g.*, letter to Sen. Kefauver, RECORD at 12; letter to Rep. Celler, RECORD at 17. Specifically, Turner alleged that: (1) retaliation had been taken because of his request for a transfer; (2) the Bureau had failed to make use of his technical qualifications in assigning him to a "permanent road trip"; (3) an inspector had been sent to discredit him rather than to conduct an impartial investigation into his claims; (4) a memorandum relating to his work performance was missing from the files; (5) his supervisor was absent from work; and (6) "morale in the FBI [was] at an all-time low." See letter to Sen. Kefauver, RECORD at 11, 8-10 (other charges) (on morale); letter to Rep. Celler, RECORD at 14-16.

8. RECORD at 32 (Appeals Examining Office opinion).

9. RECORD at 32.

10. The charge appears as number 3, "poor attitude toward the FBI and its Director" in Mr. Hoover's letter. APPENDIX at 15. In his letter to Sen. Kefauver, Mr. Turner wrote: "It would appear that any statement not serving to perpetuate the Hoover myth is therefore an 'unfounded allegation.'" RECORD at 10. The charge was sustained by the Commission, RECORD at 29-30.

11. RECORD at 40. The Examining Office's opinion is ambiguous and confusing. It noted that sanctions were not applied per se for the filing of a protest and that unless slanderous matter, deliberate falsities, or obstinacy through reiteration of a matter finally adjudicated were present, the filing of a grievance did "not constitute an actionable wrong." *Ibid.* But these criteria were not applied — "deliberate falsity" was not found. Instead, the evidence was held to support the charge of making "false, untrue statements" without reference to Turner's knowledge. *Ibid.*

12. *Id.* at 43.

sustain the dismissal.[13] In other parts of the decision, however, the Board implied that a finding of either component would be sufficient; thus the Board upheld the lack of loyalty charge which had not been based on a demonstration of falsity,[14] and the opinion in places referred to the components of falsity and irresponsibility separately.[15]

After the adverse determination before the Board, Turner brought an action in the District Court for the District of Columbia, asking for a declaratory judgment and an order for reinstatement.[16] An important question was clearly presented: what is the extent and content of the right of civil servants to petition Congress assured by section 652(d)? Despite this sharply focused issue and the ambiguities of the Civil Service Commission's standards, both the District Judge — who granted the government's motion for summary judgment — and the Court of Appeals — which affirmed in a three-line curiam opinion — failed to discuss the issue posed.[17] This summary treatment of the statutory interpretation problem is especially surprising in light of the fact that the only relevant decision under section 652(d), *Steck v. Connally*,[18] had reached a result squarely contradicting the Civil Service

13. . . . [W]e are of the opinion that the writing of false *and* irresponsible statements which either demonstrate the employee's unsuitability . . . or cause substantial harm to his agency, deprives him of the statutory protection of 5 USC § 652(d).

RECORD at 44 (emphasis added).

14. RECORD at 43 (Board sustained charge Number 3). The Appeals Examining Office's views upholding the charge of lack of loyalty are at *Id.* at 39. Mr. Hoover's details on the charge are at *Id.* at 4-6. However, only item "C" relating to the "Hoover myth" was sustained. Falsity was not alleged in item "C," only that Turner was "impertinent, immature, indiscreet and . . . undesirab[le] . . . as a Special Agent." *Id.* at 5.

15. The Board noted that if the statements were true, the conclusion would follow that the FBI staff was dishonest and irresponsible; if false, Congress would be grossly deceived; and

> Certainly, statements of this kind, *if false*, are likely to impair the efficiency of the agency. *Moreover, the irresponsibility* of the appellant in making such unjustified statements would render him incapable of performing useful and efficient service for the agency in the future. RECORD, p. 44 (emphasis added).

The Commission may have felt that the deceit of Congress and the impaired efficiency of the agency caused by false statements would be enough to support dismissal without a showing of irresponsibility.

16. The complaint, answer, motions for summary judgment and the order issued by Judge Matthews are set forth in APPENDIX at 1-26.

17. The per curiam treatment creates additional problems. No finding was made by the Appeals Examining Officer that Turner knew that his statements were untrue, and the Board of Appeals and Review appears to have used a standard of "false and irresponsible" statements. See note 13-15 *supra* and accompanying text. Yet the government brief repeatedly stressed that the statements in the petition were *knowingly* false. Brief for Appellees, pp. 16, 29, 30, 35, and 36. Thus, it is impossible to tell what standard was being approved by the summary decisions of the district and circuit courts.

18. 199 F. Supp. 104 (D.D.C. 1961). Other cases concerning rights of public employees were not so clearly applicable as *Steck*. *E.g.*, Eustace v. Day, 198 F. Supp. 233 (D.D.C. 1961), *aff'd per curiam*, 314 F.2d 247 (D.C. Cir. 1962), upheld the dismissal of a federal employee for distributing handbills denouncing his superiors. This was thought

Commission's interpretation of section 652(d) in the *Turner* case. In *Steck*, a 1961 decision, Judge Holtzoff granted summary judgment and ordered reinstatement of a plaintiff civil servant who had been dismissed for circulating a petition to Congress among his fellow employees. Judge Holtzoff held that section 652(d) forbids censoring the contents of employee petitions and dismissals based on false statements contained in the petition. Even though the activity may impair departmental morale, or otherwise interfere with the smooth functioning of the bureaucratic machinery, the right to petition must be upheld since the statutory language contained no limitation.[19]

In the *Turner* case, only Judge Fahy, who dissented from the Court of Appeals' per curiam decision, considered the obvious issues raised. Citing *Steck* with approval, Judge Fahy examined the legislative history of section 652(d) and concluded that it was intended to encompass petitions arising from work grievances.[20] This legislative background, and the relationship of the provision to the first amendment right to petition indicated to Judge Fahy that the exercise of the right to petition could not depend on a "subsequent audit" showing that the statements were true, responsible and justified.[21] He urged that the statute be interpreted to incorporate a standard similar to that established by the Supreme Court in *New York Times Co. v. Sullivan*;[22] the privilege of petitioning would be upheld unless the statements by the civil service employee were made with "actual malice, that is, with knowledge that they were false or with reckless disregard of whether false or not."[23] In his view, the case should have been remanded to the Civil Service Commission for consideration under this standard.

Given the extreme breadth of the statutory language, the obvious starting point of an inquiry into the proper interpretation of Section 652(d) is its legislative history. This section, originally part of the Lloyd-LaFollette Act of 1912,[24] was specifically directed at the infamous "gag rule." As originally instituted through an Executive Order by President Roosevelt in 1902, the

to be "external concerted activities" and not within the protection of § 652(c) Levine v. Farley, 107 F.2d 186 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 622 (1940), noted that § 652 insulated the communications of grievances to public officials, but upheld a removal based on the publication of a grievance in a newspaper. See also Keyton v. Anderson, 229 F.2d 519 (D.C. Cir. 1956) (dismissal for filing defamatory charges with superiors upheld).

19. 199 F. Supp. at 105. Judge Holtzoff indicated that some limitations might be sustained — *e.g.*, to check serious disruption of work by circulation of petitions during working hours.

20. 332 F.2d at 306. In an earlier opinion Judge Fahy had indicated the potential utility of a cognate section, 652(c). Eustace v. Day, 314 F.2d 247, 248 (D.C. Cir. 1962) (concurring opinion).

21. 332 F.2d at 307.

22. 376 U.S. 254, 279 (1964).

23. 332 F.2d at 307.

24. Act of August 24, 1912, 37 Stat. 555 (1912). Other provisions included an eight hour day for postal carriers and the creation of postal savings depositories.

gag rule absolutely barred employees of the executive department from petitioning Congress to remedy job grievances:

> All officers and employees of the United States . . . are hereby forbidden, either directly or indirectly, individually or through associations, to solicit an increase of pay or to influence or attempt to influence in their own interest any other legislation whatever, either before Congress or its Committees, or in any way save through the heads of the Departments in or under which they serve, on penalty of dismissal from the Government service.[25]

In 1909 President Taft issued a similar executive order which, although broadly banning petitions seeking "congressional action of any kind," did permit employees to present petitions with the "consent and knowledge" of their department heads.[26] The rationale of the gag rule was two-fold: it was designed to preserve the executive's administrative prerogative over the federal bureaucracy — in order to promote discipline, efficiency and morale — and to curb the growing political power of the civil servants as a special interest group.[27] The gag rule immediately evoked severe criticism, especially from post office employees, who comprised the largest number of civil servants affected, and against whom the rule was strictly enforced.[28] In the context of these complaints, and of growing legislative dissatisfaction with the gag rule,[29] Congress passed section 6 of the 1912 Act containing the exact language of the present section 652(d).[30]

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25. Exec. Order No. 163, January 31, 1902, reprinted in 48 CONG. REC. 5223 (1912). Exec. Order No. 402, January 25, 1906, reprinted *ibid.*, extended the gag rule's coverage to include employees of "independent government establishments."

26. Exec. Order 1142, November 26, 1909, reprinted *ibid.* The Taft order also provided that no employee shall respond to any request for information from a Congressional Committee or Member. Section 652(d) speaks to this problem as well as the right to petition:

> The right of persons employed in the civil service . . . to furnish information to either House . . . or to any committe or member . . . shall not be denied or interfered with.

For a recent application dealing with confidential information, see N.Y. Times, Nov. 6, 1963, p. 1, col. 8, p. 20, col. 4.

27. See, *e.g.*, 29 U.S. CIVIL SERVICE COMM. ANN. REP. 24 (1913); *cf.* 48 CONG. REC. 5235 (1912) (remarks of Rep. Buchanan).

28. See, *e.g.*, 48 CONG. REC. 5080 (1912) (remarks of Rep. Rouse); *id.* at 4653-54 (remarks of Rep. Calder); *id.* at 5626 (Order of Postmaster General Cortelyou, October 10, 1905).

29. In a last feeble attempt to forestall the anti-gag legislation, President Taft amended the executive order two days before the 1912 bill reached the House floor. This version provided that petitions were to be transmitted through the heads of departments "who shall forward them without delay with such comments as they may deem requisite . . ." to Congress. Exec. Order No. 1514, April 8, 1912, reprinted in 48 CONG. REC. 5223 (1912).

30. See the amendment offered by Sen. Reed extending the anti-gag provision to all civil servants and the debate thereon, 48 CONG. REC. 10672-76 (1912) (especially remarks of Sens. Reed, Bourne, and Warren). The Senate ignored the recommendation of its Committee on the Post Office and Post Roads to reject the House version of Section 6 which insured the right of postal employees to petition Congress. See S. REP. No. 955, 62d Cong., 2d Sess. 21 (1912); note 42 *infra*.

The dominant theme in the House and Senate debates seems to have been that the act was designed to insure that unjust treatment of government employees would promptly and effectively be brought to the attention of Congress.[31] Many Congressmen felt that redress of job grievances could not be satisfactorily obtained by employee appeals to superiors; the gag rule "instead of promoting discipline and efficiency, produces the worst kind of tyranny" by department heads.[32] Moreover, the gag rule led to a general pressure for conformity which sapped morale and resulted in resignations.[33] The most reliable source of information about federal employment problems was being choked off, and personnel difficulties were being hidden from Congressional view.[34]

It is apparent, then, that section 652(d) was intended to encompass job grievance petitions. It also seems clear that Congress meant to prevent the *act* of petitioning from being used as grounds for discipline or dismissal.[35] A more difficult question, and one on which the legislative history is more ambiguous, is whether and to what extent the *contents* of petitions may be used by government departments to demonstrate the employee's unfitness for service.

Although Congress did not direct its attention specifically to the question of the degree to which contents of petitions by public employees would be immunized from executive disciplinary action, the tenor of the debates points toward wide protection of the contents of petitions. The Congressional response to the gag rule was impassioned, and sweeping language was used to

31. See, *e.g.*, 48 CONG. REC. 4653-54 (1912) (remarks of Rep. Calder); *id.* at 10671. (remarks of Sen. Martine); see also *id.* at 5000 (remarks of Rep. Austin).

32. 48 CONG. REC. 5207 (1912) (remarks of Rep. Konop); see also *id.* at 4513 (remarks of Rep. Gregg):

> If he appealed to one of the heads of the department that particular officer sent it back to the postmaster or the head of his division. The result was that forever thereafter this particular employee enjoyed the ill will of his immediate superior . . . . It [the gag rule] is responsible for the discontent that exists among all of the postal employees of the Nation . . . .

See also *id.* at 5223 (remarks of Rep. O'Shaunessy).

33. See, *e.g.*, 48 CONG. REC. 5157 (1912) (remarks of Rep. Evans); *id.* at 5223 (remarks of Rep. O'Shaunessy); *id.* at 4656 (remarks of Rep. Reilly): "[The gag rule] has prevented them [the postal employees] from uttering any word of complaint even against the most outrageous treatment that could be heaped upon them."

34. See 48 CONG. REC. 4653 (1912) (remarks of Rep. Calder):

> . . . I was desirous of learning the needs of the postal service and inquiring into the conditions of the employees. To my surprise I found that under an Executive order these . . . employees could not give me any information and always referred me to the postmaster . . . . [The order] should be abrogated . . . . [S]urely if any man is competent to express an opinion regarding the needs of the postal service it is the men who perform the actual work . . . .

See also *Id.* at 5634 (remarks of Rep. Lloyd, the bill's sponsor); *id.* at 10673 (remarks of Sen. Reed); Appendix to 48 CONG. REC. 140 (1912) (remarks of Rep. Stone).

35. This much appears to have been conceded by the government in Turner. See Brief for Appellees, pp. 20, 33. See also 62 Stat. 356 (1948), 5 U.S.C. § 652(c) (1958): "*the presenting* . . . of any grievance (by postal organization members) . . . shall not constitute or be cause for reduction in rank or compensation or removal . . . . [Emphasis added.]

indicate the scope of employee rights that were to be created by the new statute.[36] Only one speaker during the lengthy debates indicated that the statute might permit any disciplinary action based on the contents of the petitions: Representative Reilly suggested that employees "would have to assume the responsibility for their acts in the event of making false or misleading charges that could not be borne out by evidence on investigation."[37]

Congressional intent to grant the contents of petitions broad protection from executive review may also be indicated by the numerous references made to the statute as restoring the First Amendment rights of speech and petition held by workers before the gag rule,[38] and as placing government employees on equal footing with other citizens in their ability to air their grievances to Congress without fear of reprisal.[39] The legislators' comments on the Constitution are not free from ambiguity, however. Many of these comments can be discounted as rhetorical flag-waving.[40] It is difficult to tell, moreover, whether some remarks were denunciations of the gag rule as unconstitutional or descriptions of rights guaranteed by the new statute.[41] Nor did any of the legislators advert to the applicability of the then prevalent "privilege" doctrine — that since government employment was a mere privilege rather than a right, it might be conditioned in any way, and that employees who asserted their right to petition Congress might be sanctioned by the executive without

36. See, *e.g.*, 48 CONG. REC. 4738 (1912) (remarks of Rep. Blackmon); *id.* at 5223 (remarks of Rep. O'Shaunessy):

> Recognizing the right of every citizen to free speech and to petition Congress, this Democratic House glories in the reiteration of the principle contained in the . . . Constitution . . ., and by this legislation *we strike from the enslaved employees all fetters and restrictions,* thus restoring them to an atmosphere of liberty and freedom and rescuing them from the suffocating confines of departmental despotism. ([Emphasis added.]

See also *id.* at 4513 (remarks of Rep. Gregg); *id.* at 4653-54 (remarks of Rep. Calder); *id.* at 5207 (remarks of Rep. Konop).

37. 48 CONG. REC. 4656 (1912) (remarks of Rep. Reilly). Earlier in the same speech, however, Rep. Reilly had noted: "[I]t is high time that Congress should listen to the appeals of these men and provide a way whereby they can properly present a petition to the Members of Congress for a redress of grievances *without the fear of losing their official positions.*" *Id.* (Emphasis added).

38. See *e.g.*, 48 CONG. REC. 4656-57 (1912) (remarks of Rep. Reilly on restoring "rights . . . taken away"); *id.* at 5201-02 (remarks of Rep. Prouty on "restoring" rights clearly guaranteed by the Constitution); *id.* at 4739 (remarks of Rep. Blackmon); *id.* at 10673 (remarks of Sen. Reed).

39. See, *e.g.*, 48 CONG. REC. 5080 (remarks of Rep. Rouse); *id.* at 10803 (remarks of Sen. Williams).

40. See, *e.g.*, 48 CONG. REC. 5626 (remarks of Rep. Fowler):

> This "gag rule" is a wild onion from the executive department, with the stench of its odor trying to establish itself in the fertile soil of legislative dominion. Let us pull it up by the roots and destroy it in the fire of our zeal and love for the Constitution as it came from the righteous hands of our forefathers.

41. See, *e.g.*, 48 CONG. REC. 5223 (1912) (remarks of Rep. O'Shaunessy); *Id.* at 5501 (remarks of Rep. Finley); Appendix to 48 CONG. REC. 160 (1912) (remarks of Rep. Maguire).

raising a constitutional question.[42] On balance, it is doubtful that these references to the Constitution in the debate meant that Congress intended in any systematic fashion to engraft a first amendment standard on the statute. But they do indicate a concern with the constitutional dimension, and a feeling that the right to petition should be accorded substantial protection. In sum, although the desire of Congress to grant broad protection to government employees is clear, the legislative history does not fill in the exact contents of the statute, leaving to the courts the task of developing the precise measure of the right to petition afforded by section 652(d).

In developing criteria for the application of Section 652(d), a court should be aware of the difficult set of constitutional problems that may be created if the statutory right to petition is construed narrowly. This is not to say that section 652(d), which grants a statutory right to petition and does not purport to be the exclusive source of rights to petition, would be unconstitutional if narrowly construed.[43] If the congressional grant affords less protection

42. The Senate Committee report recommending that the section be scrapped, maintained that the federal employee already had a constitutional right, as did any citizen, to appear before Congress on matters of public concern; but that job grievance petitions were beyond the pale of constitutional protection and undeserving of statutory protection:

> [A]ll citizens have a constitutional right as such to present their grievances to Congress . . . But Governmental employees occupy a position relative to the Government different from that of ordinary citizens. Upon questions of interest to them as citizens, governmental employees have a right to petition Congress direct. A different rule should prevail with regard to their presentation of grievances connected with their relation to the Government as employees. In that respect good discipline and the efficiency of the service require that they present their grievances through the proper administrative channels.

S. REP. No. 955, 62d Cong., 2d Sess. 21 (1912).

The rejection of the Committee's recommendations, combined with the references in debate to the re-establishment of constitutional rights, might be taken as an indication that Congress thought job grievances to be constitutionally protected. That this was Congress's view, however, appears doubtful when the state of constitutional doctrine in 1912 is considered. It had frequently been held that government employees were not free to exercise their constitutional rights without imperilling their positions; government employment, in short, was a "privilege" and not a "right." See, *e.g.*, McAuliffe v. New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892), for Mr. Justice Holmes' (then Judge) famous remark that while the policeman has a right to free speech, he has no right to be a policeman; *Ex parte* Curtis, 106 U.S. 371 (1882) — especially Justice Bradley's dissent, *id.* at 376. The general view of the time may be seen in Catherwood, *Political Activity by Civil Service Employees*, 7 ILL. L. REV. 160 (1912); 29 U.S. CIVIL SERVICE COMM. ANN. REP. 23-24 (1913). See generally, Nelson, *Public Employees and the Right to Engage in Political Activity*, 9 VAND. L. REV. 27, 38-42 (1955). Some legislators may have intended an abandonment of the "privilege" doctrine without referring to it by that name. See, *e.g.*, 48 CONG. REC. 4657 (1912) (remarks of Rep. Reilly):

> Let us lift this ban from around the necks of these men and take the gag out of their mouths and give them the assurance that the fact of their accepting a position in the Government service will not disbar them from presenting their proper petitions to Congress.

See also *id.* at 10803 (remarks of Sen. Williams); *id.* at 5235 (remarks of Rep. Buchanan).

43. The statute, being permissive, might be of little utility if it did not grant at least as much protection as the Constitution, but it would still be constitutional.

to the contents of petitions than does the Constitution, the employee can always fall back upon his first amendment rights. Thus, the more restrictive the reading of section 652(d), the greater the likelihood will be that employees who are unprotected by the statute will claim that the first amendment immunizes them from executive discipline based on the contents of their petitions. A myriad of difficult constitutional questions would then arise: Does the first amendment extend to job grievance petitions by federal employees?[44] Assuming that it does, are petitioners absolutely protected from executive discipline, or is the constitutional right more limited?[45] Does the "privilege" doctrine apply, or is there a "right" to government employment which cannot be jeopardized by exercise of the first amendment right to petition?[46] These intricate constitu-

44. Historically, the right to petition has expanded. At first limited to complaints for redress of grievances, it has grown to encompass petitions on general measures of public policy. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 203-04 (Athenaeum ed. 1963); "Petition," 17 ENCYCLOPEDIA BRITTANNICA 648-49 (1957). It could be argued that job complaints of public employees fall within the realm of "public" matters, and are related to an area over which Congress may legislate and investigate. Thus, job grievance petitions may be within the cognizance of the first amendment.

45. The limits on the constitutional right to petition have never clearly been spelled out. The sparse historical data available indicates that the petitioner was largely immunized from punishment, but not if the statements were made maliciously or contained scurrilous or libellous matter. See 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1895 n. 2 (4th ed. 1873); Thorn v. Blanchard, 5 Johns. R. 508, 526-30 (N.Y. 1809) and note 51 *infra*. See also, COLTON, THE RIGHT TO PETITION (1840), a pamphlet published as a result of the debates on the refusal of the House of Representatives to entertain abolition petitions. Colton points out the difficulties in determining the meaning of "right to petition," deciding that it is an "unalienable and indefeasible" right which existed before the Constitution was adopted:

> It lies further back, has a deeper foundation; and the doctrine of the Constitution would seem to be, that it cannot be abrogated, or impaired by human legislation or authority.

Id. at 3.

As to balances and checks on the right of petition, Colton notes that unrestricted freedom has been the "general practice" concerning petitions, and that the right means "simply, that the petitioners shall not be molested by the Government in their own course of action." *Id.* at 10. "[A] people, in the exercise of political rights, such as the right of petition, cannot be sued at common law, nor arraigned under any code of statutes before a judiciary." *Id.* at 4. Colton thought the chief check on abuse was the political process, not legal remedies. *Id.* at 4. In his view, the discretion and conscience of the authorities addressed would minimize abuses of the right to petition. *Id.* at 4, 8. His conclusion was that Congress had not abridged the right of petition by not receiving the abolition petitions: it was protecting itself against insult, absurd proposals and the unconstitutionality of the action the petitioners proposed. In addition, Congress was insuring its own independence from unruly "popular impulses." *Id.* at 10-12, 14-16. *Cf.* SLADE, SPEECH ON THE RIGHT OF PETITION, 5-7 (1840) (pamphlet of speech in House of Representatives, Jan. 18, 20, 1840).

46. The state of the law on the inter-relationships among the privilege, the Constitution and public employment is confused and unsatisfactory. *Compare* Slochower v. Board of Education, 350 U.S. 551 (1956), *with* Adler v. Board of Education, 342 U.S. 485 (1952), *and* Nelson v. County of Los Angeles, 362 U.S. 1 (1960). See also Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951);

tional questions are made more difficult by the absence of precedent concerning the content and extent of the constitutional right to petition. Because the right has been infrequently asserted in judicial proceedings and because of its diminished importance as a mode of communicating political problems to Congress, courts and commentators have not had the occasion nor felt the need to articulate the principles underlying this right.[47]

A generous interpretation of the *statutory* right to petition would enable a court to avoid this difficult and unwelcome task of defining the content of the *constitutionally* guaranteed right to petition. If the statutory right is interpreted to be coextensive with, or greater than, the first amendment right, it would be unnecessary for the court to face the more delicate problem of articulating constitutional doctrine in this uncharted first amendment area. The doctrine of avoidance of unnecessary constitutional decisions seems particularly appropriate in developing standards under section 652(d). By postponing the constitutional adjudication a court will allow accumulation of knowledge and experience concerning government employees' right to petition which should help to illuminate the ultimate constitutional issue. Moreover, a statutory decision will allow Congress to readjust the relationship between the employee, his executive superiors and Congress itself, whereas a constitutional decision would rigidify the interrelationships and would preclude legislative action responsive to future needs and developments.

In order to develop standards under section 652(d) which will be co-extensive with or greater than the protection which may be afforded by the Constitution, some estimate of the potential constitutional guarantee is necessary. This process is made difficult by the dearth of case material on the constitutional right to petition. However, the recent landmark decision of the Supreme Court in *New York Times Co. v. Sullivan*[48] provides an instructive analogy which may help in the estimation of the constitutional right to petition. In that case the Court held that the first amendment barred a libel suit against a newspaper based on non-malicious criticism of public officials.[49] The relevance of the *New York Times* case to the right of petition stems initially from the fact that job grievance petitions will most often involve criticism of public officials and executive department policy. In addition, the press and other modern communications media have assumed many of the functions historically associated with petitions to the legislature: informing the legislature of abuses

Washington v. Clark, 84 F. Supp. 964 (D.C.C. 1949), *aff'd sub. nom.;* Washington v. McGrath, 182 F.2d 375 (D.C. Cir. 1950), *aff'd by an equally divided Court,* 341 U.S. 923 (1951).

47. Many of the functions served by the right to petition have been taken over by the more modern or efficient modes of communication — the press and broadcasting. 17 ENCYCLOPEDIA BRITTANICA 648-49 (1957); see generally, "Petition," CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 203-04 (Atheneum ed. 1963). Few modern cases involve the right to petition as a central problem, and judicial discussion is general and little-considered. See National Ass'n of Mfrs. v. McGrath, 103 F. Supp. 510, 514 (D.D.C. 1952).

48. 376 U.S. 254 (1964).

49. *Id.* at 279-80, 283.

and mal-administration within the government, airing grievances and alleged injustices associated with the executive department, and recommending remedial measures and policy changes.[50] Most importantly, the substantive rule established in the *New York Times* case — that only malicious statements are actionable — is strikingly similar to the limits found in the few extant cases discussing the right to petition.[51] Although there are only several early state cases on point, and although these cases did not clearly identify the source of the right to petition which they defined — federal constitution, state constitution or common law — these opinions generally held that the public officials criticized in the petitions could maintain a libel or slander action only if the statements were demonstrably malicious.[52]

If section 652(d) is interpreted to protect all but malicious statements, then the statutory right would seemingly be rendered at least co-extensive with the constitutional right to petition. Indeed, the Constitution, in a case involving executive discipline based on the contents of employee petitions, might offer less protection than the malice standard. In the *Times* case the interest in speech was stronger and the interests opposed to speech of less weight than in the *Turner* situation. In *New York Times* the very core of the first amendment right of expression, the right to engage fully in public debate, was at stake;[53] and the interest in protecting public officials from libel involved there would seem entitled to less weight than the administrative and disciplinary

50. See sources cited in notes 45, 47 *supra*. Rep. Slade in 1840 noted that the right to petition possesses a "moral influence," awakens "the consciousness of responsibility . . . in the representative body" and that "it is a standing constitutional medium of communication from the People to their Representatives." SLADE, SPEECH ON THE RIGHT TO PETITION 6 (1840). Similar statements may be made about the role of the press today. For a more balanced approach toward the role of mass communication media see POWELL, PERSONNEL ADMINISTRATION IN GOVERNMENT 62-64 (1956).

51. The standard is variously phrased in these cases. See, *e.g.*, Gray v. Pentland, 2 S. & R. 23 (Pa. 1815), holding statements to be immune if "not in malice, and not without probable cause" (Tilghman, C. J., *id.* at 30) or if not "wanton and malicious, and without probable cause" (Yeates, J. *id.* at 33); Howard v. Thompson, 21 Wend. 319 (N.Y. 1839) holding plaintiff must show both malice and want of probable cause for the statements, to successfully maintain a malicious prosecution action. See also Reid v. Delorme, 2 S.C. (2 Brev.) 76, 79 (1806); Bodwell v. Osgood, 20 Mass. (3 Pick.) 380 (1825).

52. The reasons for the requirement that plaintiff must prove express malice or "that the petition was entirely false, malicious and groundless" were stated in Thorn v. Blanchard, 5 Johns. R. 508, 529-30 (N.Y. 1809):

> The freedom of inquiry, the right of exposing malversation in public men and public institutions to the proper authority, the importance of punishing offences, and the danger of silencing inquiry and of affording impunity to guilt, have all combined to shut the door against prosecutions for libels, in cases of that, or of an analogous nature.

And see Harris v. Huntington, 2 Ver. (2 Tyler) 129, 140 (1802):

> An absolute and unqualified indemnity from all responsibility in the petitioner is indispensable, from the right of petitioning the supreme power for the redress of grievances; for it would be an absurd mockery in a government to hold out this privilege to its subjects, and then punish them for the use of it.

See also O'Donaghue v. McGovern 23 Wend. 26 (N.Y. 1840).

53. 376 U.S. at 292, 269-83. See Kalvin, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUPREME CT. REV. 191, 204-10.

needs of the government in *Turner*. Previous adjudication involving the civil service, exemplified by the Hatch Act cases,[54] indicates that the constitutional balance in the *Turner* situation might swing more strongly against the individual right of expression. Thus the Constitution would probably exact no more — and possibly a good deal less — in *Turner* than it did in *New York Times*, and if section 652(d) is read to embody a malice standard, the constitutional issues potentially involved in the application of the statute would be successfully avoided.

Rather than adopting a test based on malice, the Commission and the courts in *Turner* utilized the standard of "false, untrue or made irresponsibly" or "without reasonable basis of belief."[55] This interpretation of Section 652(d) may not provide enough protection to the right of petition to avoid the constitutional morass. Given the likelihood that the constitutional standard approaches the test of *New York Times*, the Civil Service Commission's narrower reading of section 652(d) may well necessitate difficult adjudication in the constitutional penumbra surrounding the statute. Aside from the failure of the Commission's standard to avoid the potential constitutional issue, its basic flaw is that it does not indicate awareness that in passing section 652(d) Congress deliberately and consciously struck a balance between the competing interests at stake. Section 652(d) clearly favors the interest of government employees in being able to air complaints and to seek remedies for job grievances and the interest of Congress in obtaining first-hand information on personnel problems in the civil service, at the expense of the executive branch's ability to maintain efficiency, discipline and morale by acting on the contents of employee petitions.[56]

54. See, *e.g.*, United Public Workers v. Mitchell, 330 U.S. 75 (1947). The Court in *Mitchell* refrained from talking in terms of "privilege." Instead, it used a balancing test and upheld the Hatch Act prohibition against active partisan political activity by public employees. *Id.* at 96. Mr. Justice Black's dissent argued that the act was unconstitutional because it violated the right to petition, as well as the freedom of speech, press and assembly. *Id.* at 111.

The Hatch Act has been interpreted by the Civil Service Commission to forbid public employees from initiating petitions or canvassing for signatures "if such petitions are identified with political management or political campaigns." This is aimed at partisan, organized political activity along party lines. UNITED STATES CIVIL SERVICE COMMISSION, POLITICAL ACTIVITY AND POLITICAL ASSESSMENTS OF FEDERAL OFFICEHOLDERS AND EMPLOYEES 13 (1944). See also U.S. CIVIL SERVICE COMM'N., HATCH ACT DECISIONS 43 (1949), including the following cases: In Matter of Herbert S. Reed, Fed. Docket No. 1204, at 206-09, Aug. 4, 1947; In Matter of John F. Hahn, Fed. Docket No. 1013, at 86, 89, Oct. 10, 1941; In Matter of Michael LoPresti, Fed. Docket No. 1151, at 216, 219, Jan. 29, 1947. The Hatch Act does not appear to effect the right to petition for redress of job grievances protected by § 652(d), but is limited to organized party-oriented political activities, *e.g.*, nominating petitions. See Wilson v. United States Civil Service Comm'n, 136 F. Supp. 104 (D.D.C. 1955). Problems of interpreting the Hatch Act are examined in Rose, *A Critical Look at the Hatch Act*, 75 HARV. L. REV. 510 (1962).

55. See notes 8-9, 13-15 *supra* and accompanying text.

56. The wisdom of the Congressional balance might be challenged by some commentators in the public personnel administration field who assert that removal powers should be broad and that "open back door firing" should be permitted. Van Riper, *Adapting a British Political Invention to American Needs*, 31 PUBLIC ADMINISTRATION 317 (1953).

The Commission's standard allows removal of an employee on the ground that his statements were "made irresponsibly" or "without reasonable basis of belief," even if upon examination they are demonstrated to be true. If the executive department is thus to judge "irresponsibility" without a truth defense, the right to petition is not accorded substantial protection.[57] As the second charge in *Turner* may illustrate, virtually any criticism of an executive department can be characterized as demonstrating a lack of loyalty or a lack of good judgment and hence as "irresponsible." Secondly, the *Turner* standard can be satisfied merely by a demonstration of the falsity of statements in a petition. This alternative test, too, affords little insulation to the right to petition. Congressional intent to broaden employee rights of speech and to destroy the "gag rule" is inconsistent with a standard which permits removal on the basis of statements which, though later demonstrated to be false, may have been made in good faith and without any intention to mislead. The fear of a "subsequent audit" in which statements made in petitions must be justified against a retrospectively applied truth standard would act as a strong deterrent against exercise of section 652(d) rights; it would, in effect, compel aggrieved employees to engage in a form of self-censorship not as visible as, but perhaps no less constricting than the overt prior censorship authorized by the old gag rule.[58] In view of the traditional judicial reluctance to re-examine administrative dismissal proceedings,[59] the absence of a right to appeal from the agency to the Civil Service Commission and from the Commission directly to the courts,[60]

Under this view, any involvement of Congress creates disturbing effects of "political influence" due to the "tendency of some legislators to meddle in the internal management of executive departments," and the "executive branch, if it is to be held responsible for administration, must alone exercise authority in such matters as discipline, removal and advancement." MOSHER, KINGSLEY & STAHL, PUBLIC PERSONNEL ADMINISTRATION, 58-59 (3d ed. 1950). In practice, the administrator does not possess as much power as these experts would prefer. POWELL, PERSONNEL ADMINISTRATION IN GOVERNMENT, 312-14 (1956). *But see* Hearings, House Committee on the Civil Service 76th Cong., 3d Sess. 59 (1940) testimony of Jacob Baker of United Federal Workers on the need to appeal to Congress); *id.* at 5 (remarks of Rep. Randolph on Congress acting as "board of appeals" for employee grievances.)

57. See note 66 *infra* for a comparison of the malice and the irresponsibility standard with regard to the absence of a truth defense.

58. *Compare* the discussion of self-censorship in the *New York Times* case, 376 U.S. at 278-80. See Kalven, *op. cit. supra* note 53, at 210-13.

59. The extent of court review is usually limited to whether the statutory and regulatory procedures were observed, and whether the challenged action was arbitrary, capricious or was supported by evidence. Pelicone v. Hodges, 320 F.2d 754, 755 (D.C. Cir. 1963); Hargett v. Summerfield, 243 F.2d 29, 32 (D.C. Cir. 1957). See KAPLAN, THE LAW OF CIVIL SERVICE 251-52 (1958) for a strict interpretation of review of Section 652 dismissals.

60. Section 652, governing removal generally from the classified Civil Service for "such cause as will promote the efficiency of such service," does not provide for a right of appeal from the administrator's action to the Commission. The Commission hears appeals of dismissals allegedly based on political reasons or discrimination on account of sex, marital status or physical handicap. See 5 U.S.C. § 633(2)(5,6,9) (1958); 5 C.F.R. §§ 5.4(c), 315.806 (1964). Turner, however, as a veteran, had a right to appeal his dismissal to the Civil Service Commission under section 14 of the Veterans Preference Act. 5 U.S.C. § 863 (1958).

and the expense of pressing separate legal proceedings to vindicate section 652(d) rights, the Civil Service Commission standard would, in effect, leave executive agencies a great and unreviewable range of discretion in disciplinary matters involving the right to petition approaching the discretion enjoyed under the gag rule. This wide discretion magnifies the danger that retaliation might be meted out for the act of petitioning, rather than because of the irresponsibility or falsity of statements contained in the petition.

It might be argued that the Commission's standard, and wide discretion in interpreting and applying it, are necessary to protect the government's interest in maintaining efficiency, morale, loyalty and effective discipline. Thus, the government might argue that the contents of employee petitions are useful in evaluating the temperament, character and job fitness of the petitioner, and that insulating petitions from administrative examination will unduly hamper efforts to remove undesirable personnel. This position, however, is not persuasive in view of the fact that the government still possesses other methods for dealing with incompetent or insubordinate employees — for example, performance ratings and the power to transfer.[61] This is not to say that the executive should be able to utilize other forms of discipline as a guise for punishing those who have petitioned, but that generally troublesome employees who happen to have petitioned will not be immunized from discipline based on other conduct. If the only complaint that can be advanced against an employee is that he wrote a letter to his Congressman which contained statements later said to be false or irresponsible, the government's claim that this act conclusively demonstrates his unfitness appears open to serious doubt. The executive departments might further contend that circulation of, or publicity stemming from, job grievance petitions will undermine morale within the affected executive department. But this argument also fails to take account of several factors. Grievances may exist and be circulated within the department informally even if no petition is drafted. Moreover, inhibiting the airing of complaints may be more harmful to employee attitudes than permitting the circulation of a petition, especially in light of the already extensive limitations on the means of expression available to public employees.[62] Similarly, with respect to discipline and loyalty, the government might argue that going over department heads and utilizing external channels for grieving may impair harmony and efficiency within the department, and that the availability of internal grievance procedures makes external appeals superfluous.[63] On the other hand, the employee's utilization of extra-departmental forums for pressing his complaint may be a last resort indicating that internal grievance procedures

Neither the Veteran's Preference sections nor those applying to the civil service generally provide for appeals to the courts on administrative or civil service commission action. Turner brought his case before the District Court pleading federal question jurisdiction and seeking declaratory judgment. See 5 U.S.C. §§ 1331, 2201 (1958).

61. See generally POWELL, PERSONNEL ADMINISTRATION IN GOVERNMENT 380-90 (1956).

62. On Hatch Act limitations see note 54 *supra*. The Taft-Hartley prohibition against public service employee strikes is also relevant.

63. See POWELL, *op. cit. supra* note 61 at 310-11.

are inadequate or non-existent.[64] Nor does the making of an external appeal necessarily demonstrate an employee's disloyalty to the department; for example, Turner may well have felt that his criticisms would ultimately lead to reforms, otherwise unobtainable, which would improve the FBI. Severely restricting the right to petition granted by section 652(d) may thus foreclose the employee's only effective opportunity to present complaints and to redress grievances. In sum, the government's possible arguments for a narrow construction of section 652(d), while entitled to some consideration, do not appear sufficiently convincing to outweigh the factors which should lead a court to a broad statutory interpretation: the anti-executive tenor of the legislative debates, the apparent failure of the Commission standard to guarantee effective protection to the employee's right to petition[65] and the desire to avoid facing unnecessary constitutional issues.

The malice standard suggested by Judge Fahy in his *Turner* dissent — that the statute protects all statements except those knowingly false or made with "reckless disregard of whether false or not"[66] — represents a better adjustment of the interests at stake, and a more accurate expression of the policies that motivated the enactment of section 652(d). Wide protection is given to employee communication to Congress, and the dangers of executive censorship and retaliation are minimized. Good faith complaints by government employees will not be deterred out of fear that their statements can later be shown to have been false or irresponsible; the malice standard, in effect, eliminates the self-censorship problem. Moreover, the standard does give some recognition to the executive interest in maintaining efficiency, morale and discipline.[67] Deliberate lying and malicious accusations — which represent a distinctly more serious challenge to executive authority than carelessly made or unknowingly false statements — can be punished. Finally, incorporating the malice standard into section 652(d) will sufficiently protect the right to petition so that a court should not have to resort to constitutional exegesis in a virtually unchartered area of first amendment doctrine.

64. *Id.* at 307-10.

65. See note 57-60 *supra* and accompanying text.

66. Properly interpreted, this "reckless disregard" component of the malice standard requires a much greater quantum of proof than the "irresponsible" standard applied by the Civil Service Commission. The distinction is analogous to the familiar tort law distinction between negligence and recklessness, the former being, generally, merely carelessness, and the latter involving a degree of culpability akin to "guilty." The "reckless disregard" standard is simply a shorthand phrase for indicating the requirement that malicious intent be shown adequately by external evidence. The absence of a truth defense is tolerable where positive proof of malicious intent is required; once such a state of mind inconsistent with effective continued employment is shown, the truth of the statement is no longer crucial. Where the government used the "irresponsibility" standard, however, and thus required only a showing of carelessness or thoughtlessness in the making of the statement, the absence of a truth defense meant a curtailment of expression inconsistent with the purposes of § 652(d).

67. The adoption of a more liberal standard does not mean that reasonable regulation of security information could not be enforced. Once the scope of "security" is defined, and it is demonstrated that classified information has been transmitted, removal would clearly be allowed. The problems of security information are beyond the scope of this Note.