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Congress has authorized the President to:

> (1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;
>
> (2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought . . . .[1]

Furthermore, Congress has provided that no civil servant may be discharged unless his removal is for "such cause as will promote the efficiency of the service."[2]

The task of implementing the directives of Congress and the President has been delegated to the United States Civil Service Commission.[3] In line with its mission under this delegation, the Commission has provided for the disqualification of applicants[4] and the removal of employees[5] because of "[c]riminal, infamous, dishonest, immoral, or notoriously disgraceful conduct."[6]

Although homosexual conduct is not specifically mentioned in the regulations, there is little doubt as to the Commission's position on this subject. In a recent policy statement, the Commission stated: "Persons about whom there is evidence that they have engaged in or solicited others to engage in homosexual or sexually perverted acts with them, without evidence of rehabilitation, are not suitable for Federal employment."[7] The Commission justifies its exclusionary policy by noting that homosexual conduct is a crime in every jurisdiction of the United States except Illinois, and that it is contrary to the prevailing mores of our society.[8] Furthermore, the Commission states that such conduct may lead to service inefficiency for any one of the follow-

1. 5 U.S.C. § 3301 (Supp. IV, 1969).
2. *Id.* §§ 7501(a), 7512(a).
3. Exec. Order No. 10,577, 3 C.F.R. 218, 5 U.S.C. § 631 (1964).
4. 5 C.F.R. § 731.201 (1968).
5. *Id.* § 752.104.
6. *Id.* § 731.201(b).
7. Letter from John W. Macy, Jr., Chairman, United States Civil Service Commission, to The Mattachine Society of Washington, Feb. 25, 1966. The Mattachine Society is composed of avowed homosexuals and others who advocate the repeal of sodomy laws and restrictive employment practices which discriminate against homosexuals.
8. *Id.*

ing reasons: (1) the revulsion of fellow employees and their apprehension of homosexual advances; (2) the erotic stimulation of the homosexual through use of common toilet, etc.; (3) the hazard that homosexual activity will be fostered, particularly among the youthful employees; and (4) the offense to members of the public who must transact business with the Government.[9] The Commission's position appears to reflect the sentiments of Congress for, as the Subcommittee on Investigations of the Senate Committee on Expenditures in the Executive Departments has stated, "homosexuals and other sex perverts are not proper persons to be employed in Government for two reasons; first, they are generally unsuitable, and second, they constitute security risks."[10]

Judicial review of the Commission's policy has been infrequent. The notion that government employment is a privilege, not a right, and the popular tradition of judicial noninterference with the executive branch have been the bases on which most courts support their refusal to interfere.[11] Because of the concentration of federal employees in the District of Columbia and the fact that, until 1962, only the United States District Court for the District of Columbia—through exercise of its power to issue original writs of mandamus—had the power to give the proper relief,[12] *i.e.*, reinstatement, to an illegally removed federal employee, most of the judicial opinions concerning the Commission's removal policy derive from the federal courts in the District of Columbia. Since the basis of the Commission's removal policy is the congressional mandate that no one shall be discharged except to promote service efficiency, the United States Court of Appeals for the District of Columbia Circuit—through its unique position—can exert profound influence upon the employment practices of the Commission through its interpretation of that mandate. Recently, in *Norton v. Macy*[13] the D.C. Circuit exerted such an influence upon the Commission's policy regarding the suitability of homosexuals for federal employment.

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9. *Id.*

10. EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT, S. Doc. No. 241, 81st Cong., 2d Sess. 3 (1950). The Subcommittee stated that homosexuals were unsuitable for the following reasons: (1) homosexual acts are criminal; (2) such acts are contrary to accepted norms; (3) such acts evidence emotional instability; (4) indulgence in such acts weakens the moral fiber of the individual; (5) homosexuals have a corrosive influence on fellow employees; and (6) homosexuals in positions of responsibility tend to place other homosexuals in government jobs. The Subcommittee's sentiments were crystallized when it concluded that one homosexual can pollute a whole government office. *Id.* at 3, 4.

11. *See generally* Chaturvedi, *Legal Protection Available to Federal Employees Against Wrongful Dismissal*, 63 NW. U.L. REV. 287 (1968).

12. *See* 28 U.S.C. § 1361 (1964); *cf.* Blackmar v. Guerre, 342 U.S. 512, 516 (1952).

13. 417 F.2d 1161 (D.C. Cir. 1969).

Norton v. Macy

At about 2:00 a.m. on October 22, 1963, Clifford L. Norton, a GS-14 budget analyst for the National Aeronautics and Space Administration (NASA), drove to Lafayette Square in Washington, D.C. He stopped his car and invited one Procter, who was standing on the curb, to get in. Then Norton circled the block, stopped his car and dropped off his passenger. Procter walked to his own car, got in, and followed Norton to Norton's apartment. Upon reaching the parking lot at Norton's residence, the two men were approached by two Morals Squad officers of the Washington, D.C. Metropolitan Police Department who had observed the above sequence of events and had followed the pair—at speeds exceeding the legal limit—to the parking lot. During questioning by the police, Procter told them that while driving around Lafayette Square, Norton had caressed his leg and invited him up to his apartment. The police arrested the men for speeding and brought them to the Morals Office in order to issue traffic citations.

Once at the station, the police questioned the pair for about two hours concerning the events of the evening and their prior sexual histories. Norton continously denied that he had made a homosexual advance to Procter. Because Norton was a NASA employee, a NASA security officer was called to the station and permitted to monitor the interrogation. At the conclusion of the questioning, Norton and Procter were issued traffic citations and released.

At this time the NASA security officer identified himself and asked Norton to follow him to the security office at NASA for further discussion. During the course of this discussion—which lasted until 6:30 a.m.—Norton related his sexual history to the security officer and his assistant. He revealed that he had engaged in mutual masturbation in high school and college. He also related that he sometimes experienced homosexual desires while drinking, and that on two recent occasions, after drinking, he had blacked out temporarily. Norton suspected that he might have engaged in homosexual activity during these blackouts. When asked what had transpired while he was driving Procter around Lafayette Square, Norton said he had experienced a blackout, recovered, and asked Procter up to his apartment for a drink.

About three weeks later, Procter confirmed the story he had given the police in a letter written to NASA. He concluded that "from [Norton's] actions and conversation it would take an idiot not to be able to figure that he wanted to have sex act on me."[14] Norton, in written reply to a notice of

14. Brief for Appellant at JA 111-12, *id.*

proposed dismissal by NASA, again denied making a homosexual overture to Procter. While admitting incidents of mutual masturbation which he attributed to normal adolescent sexual curiosity, he strongly denied that he was a homosexual, had homosexual tendencies, or had committed homosexual acts.[15] He claimed that any statements that he may have made to the contrary during his discussion with NASA security officials were due to "[a] combination of official badgering, wheedling and cajolery . . . directed against a tired, sick and frightened victim . . . ."[16]

After considering Norton's letter, NASA discharged him on the grounds that his immoral conduct and his personality traits rendered him unsuitable for government employment. The Civil Service Commission Board of Appeals and Review sustained his removal as being "for such cause as will promote the efficiency of the service."[17] Norton brought an action for reinstatement in the district court and, after summary judgment was granted to the Government, he appealed to the United States Court of Appeals for the District of Columbia Circuit.

The primary questions presented for review by the appellant were whether he was afforded procedural fairness, and whether the evidence was sufficient to sustain the agency's charges.[18] The appellant also questioned the inference that his removal would promote the efficiency of the service.[19] The court ignored the appellant's primary questions and concerned itself with the issue of whether the appellant's presumed homosexual advance and personality traits constituted such cause for removal as would promote the efficiency of the service.[20] So construed, the case would seem to be governed by *Dew v. Halaby*[21] and the Fifth Circuit's recent opinion in *Anonymous v. Macy*.[22]

In the *Dew* case, the District of Columbia Circuit refused to overturn a Federal Aviation Agency (FAA) determination that an air traffic controller's

15. *Id.* at JA 102.
16. *Id.* at JA 101.
17. *Id.* at JA 121.
18. *Id.* at 10. The appellant argued that he was arrested without sufficient probable cause and illegally interrogated; that the tainted fruit of such arrest and interrogation should not have been admitted as evidence at the Commission's hearing; and that he was deprived of the opportunity to answer or rebut Procter and the arresting officers since they did not appear as witnesses at the hearing. *Id.* at 11, 12, 18.
19. *Id.* at 14-16.
20. 417 F.2d at 1162. In order to shape the case in this manner, Chief Judge Bazelon asserted that the court was convinced that Norton had made the alleged homosexual advance, since Norton did not strenuously deny the sufficiency of the evidence against him. Further, the Chief Judge ignored the main thrust of Norton's brief, see note 18 *supra*, and some two-thirds of the Government's reply. *See* Brief for Appellee at 11-26, Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969).
21. 317 F.2d 582 (D.C. Cir. 1963), *cert. granted*, 376 U.S. 904, *cert. dismissed*, 379 U.S. 951 (1964).
22. 398 F.2d 317 (1968).

pre-employment homosexual acts constituted sufficient cause for removal. Dew had committed several isolated homosexual acts while in college—six years prior to his appointment. He had been on the job for twenty months and had received a satisfactory performance rating. Moreover, the record contained an uncontradicted psychiatric report finding that Dew was a well-adjusted family man, temperamentally suited for his current position.[23] Despite these facts, the court, concerned with the demanding nature of the position, deferred to the Agency's judgment and declared:

> The judiciary has a very limited scope of review where removal of a civil servant is challenged on its merits, rather than on procedural grounds. We certainly are in no position to say that retention of the appellant, demonstrated to have evidenced a lack of good character in the past, would promote, or would not have a derogatory effect on, the efficiency of the service. The choice of personnel to direct the Nation's air traffic is for the Federal Aviation Agency, and not the courts.[24]

Anonymous v. Macy concerned a postal employee who was discharged for committing homosexual acts.[25] In a per curiam opinion the Fifth Circuit declared:

> Counsel for appellant . . . argue at great length, and with considerable ability, that homosexual acts constitute private acts upon the part of such employees, that they do not affect the efficiency of the service, and should not be the basis of discharge. That contention is not accepted by this Court.[26]

After shaping the *Norton* case to fit these precedents, Judge Bazelon proceeded to distinguish them. He discounted *Anonymous v. Macy* as the result of the Fifth Circuit's belief that it had no right to review the merits of the Commission's determination of unfitness.[27] He distinguished *Dew v. Halaby* on the grounds that it was a narrow holding involving a new employee in a job with special responsibilities. Moreover, he noted that the Supreme Court

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23. 317 F.2d at 583 n.3. The psychiatrist indicated that Dew did not have a homosexual personality disorder. In his opinion, the early isolated incidents of homosexual conduct were the result of normal sexual investigation. *Id.*

24. *Id.* at 589.

25. 398 F.2d at 318. The defendant did not deny the alleged homosexual activity.

26. *Id.* The court was concerned solely with defendant's objection to the introduction of an affidavit at his hearing. The court held that the defendant had waived any objection to its introduction.

27. 417 F.2d at 1163, 1164. In *Anonymous v. Macy*, the Fifth Circuit had cited a District of Columbia Circuit opinion, Hargett v. Summerfield, 243 F.2d 29, *cert. denied*, 353 U.S. 970 (1957), as its primary authority for this position. 398 F.2d at 318. In *Norton*, Chief Judge Bazelon admitted that *Hargett* appears to bar review of the merits of a removal but neither overruled nor distinguished the case. 417 F.2d at 1163, 1164 n.5.

granted certiorari in *Dew*, and subsequently dismissed the writ when the FAA reinstated the employee and granted him his back pay.[28]

Precedents aside, the Chief Judge then turned to the question which he had formulated, *i.e.*, whether off-duty homosexual conduct is sufficient cause for dismissal on the grounds that termination will foster service efficiency. He noted that the Commission has been afforded much discretion in its determination of the reasons which will justify removal of a federal employee, but added that the Commission's discretion is not unlimited. The requirements of due process forbid arbitrary and capricious removals, and seemingly the need for due process is even greater where dismissal imposes a "badge of infamy" or "the stigma of an official defamation of character" upon the dismissed employee.[29] The Commission's discretion may be further limited where removal involves a possible intrusion upon "that ill-defined area of privacy which is increasingly if indistinctly recognized as a foundation of several specific constitutional protections."[30]

In addition to due process limitations, the statutory mandate limits the Commission by requiring that a removal promote the efficiency of the service.[31] In the instant case, Norton's supervisor testified at the Commission's hearing that Norton was "competent" and his work "very good."[32] He ruled out any "real security problems,"[33] and stated that fellow employees were not informed of the incident.[34] Since the record before the court did not substantiate any conclusion that Norton's conduct had any injurious effect on the efficiency of the service, the court found the removal unwarranted and reversed the decision of the district court.[35]

In a dissenting opinion, Judge Tamm asserted that the majority was meddling in the area of administrative discretion and declared that appellant's removal would clearly serve the interests of service efficiency, since retention in his present position might subject him to private extortion and his employer to public reproach.[36]

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28. 417 F.2d at 1166.
29. *Id.* at 1164. *See also* Local 473, Cafeteria Workers v. McElroy, 367 U.S. 886, 898 (1961); Wieman v. Updegraff, 344 U.S. 183, 190-91 (1952).
30. 417 F.2d at 1164. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557 (1969); Warden v. Hayden, 387 U.S. 294, 301 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965).
31. 5 U.S.C. §§ 7501(a), 7512(a) (Supp. IV, 1969).
32. Brief for Appellant at JA 28, Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969).
33. *Id.* at JA 23.
34. *Id.* at JA 26.
35. 417 F.2d at 1168. The appellee claimed that possible embarrassment to NASA might interfere with the agency's performance. The court rejected this argument as being a possible smokescreen shielding personal antipathies and moral judgments on the part of NASA officials. *Id.* at 1167.
36. *Id.* at 1168, 1169.

The Significance of Norton

The number of homosexuals in the United States varies according to definition and source of the data. The Kinsey report,[37] the most widely accepted study of American sexual practices, estimates that at least 37 percent of American males have had at least one homosexual experience during their lifetime,[38] and that 25 percent of American males have had continued homosexual experiences over a three-year period sometime between the ages of 16 and 55.[39] Various homosexual societies have estimated that their numbers swell above 15 million in the United States.[40] The statistical variances are probably due to differing characterizations of the term "homosexual" and the behavior which it encompasses.

According to a recently released National Institute of Mental Health report,[41] the range of sexual behavior stretched from the exclusively heterosexual to the exclusively homosexual.[42] However, between these extremes exists the predominantly heterosexual individual who may engage in sporadic homosexual conduct and the homosexual who seeks occasional heterosexual experiences.[43] The report notes that homosexuals are quite heterogeneous, varying widely in their emotional adjustment and behavior patterns.[44]

However defined and counted, homosexuals are directly affected by the *Norton* decision because of its effect upon the restrictive employment prac-

37. A. KINSEY, W. POMEROY & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948).

38. *Id.* at 623.

39. *Id.* at 650-51.

40. *See* N.Y. Times, Aug. 19, 1968, at 29, col. 1; *id.* April 17, 1966, at 12, col. 1.

41. FINAL REPORT OF THE TASK FORCE ON HOMOSEXUALITY (1969). In September 1967, a 15-member Task Force on Homosexuality was appointed by the Director of the National Institute of Mental Health. The group was composed of behavioral, medical, social, and legal scientists and was asked to review the current state of knowledge regarding homosexuality and to make recommendations for Institute programming in this area. One of the Task Force members was Chief Judge Bazelon, who resigned from the group on June 3, 1969, less than one month before he handed down the *Norton* decision. *Id.* at 23.

42. *Id.* at 3.

43. *Id.*

44. *Id.* at 3, 4. The report notes that present employment policies deal with the homosexual as if all homosexual behavior were a specific category of behavior, despite the variation in such individuals. *Id.* at 20. Considering the collective research and clinical experience in this area, the report states that most professionals working in the subject "are strongly convinced that the extreme opprobrium that our society has attached to homosexual behavior, by way of criminal statutes and restrictive employment practices, has done more social harm than good and goes beyond what is necessary for the maintenance of public order and human decency." *Id.* at 17. The Task Force recommends the removal of legal penalties for private homosexual conduct among consenting adults, and maintains that such a change in the law would "encourage revisions in certain governmental regulations which now make homosexual acts a bar to employment or a cause for dismissal." *Id.* at 19. Three members of the Task Force expressed reservations with respect to these suggestions on the grounds that the present scientific

tices of the federal government. Millions of homosexuals who, individually or in groups, have been urging the abolishment of the blanket exclusion policies of federal,[45] state,[46] municipal,[47] and private employers,[48] will no longer be barred from federal employment simply because their conduct does not conform to the conventional norm.

The *Norton* case is significant because it is the first time that a circuit court has squarely faced a direct challenge to the Commission's policy of excluding homosexuals from federal employment.[49] With *Norton*, the Dis-

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data is insufficient to support such policy decisions. *Id.* at 2. Although the report notes Chief Judge Bazelon's resignation, it does not indicate whether he took part in or gave his support to these legal recommendations.

45. *See* note 49 *infra*. *See also* N.Y. Times, Aug. 19, 1968, at 29, col. 1; *id.* May 30, 1965, at 42, col. 6. *See generally* R. MASTERS, THE HOMOSEXUAL REVOLUTION 130-71 (1962), wherein the author sets out the Homosexual Bill of Rights which includes: (1) freedom to serve in the Armed Forces; (2) freedom to secure government employment; (3) freedom to "marry," adopt children, own property jointly, and take advantage of tax breaks; (4) freedom to wear whatever clothing desired; (5) freedom of the press; and (6) freedom to perform homosexual acts between consenting adults.

46. Many state codes provide that applicants may be excluded because of their immoral, infamous, or notoriously disgraceful conduct. *See, e.g.*, ILL. REV. STAT. ch. 127, § 63b108b.4 (1967); MINN. STAT. § 43.14 (1967); N.Y. CIV. SERV. LAW § 50 (4)(d) (McKinney 1959); WIS. STAT. § 16.13 (1967). Others provide that permanent employees may be disciplined or removed for such conduct. *See, e.g.*, CAL. GOV'T CODE § 19572 (West 1963); OHIO REV. CODE ANN. § 143.27 (Page 1969).

47. *See, e.g.*, Brass v. Hoberman, 295 F. Supp. 358 (S.D.N.Y. 1968), where the court was asked to review the New York City Civil Service Commission's policy of excluding homosexuals as a class from a few selected positions, such as caseworkers. The city did not contest the plaintiff's proposition that blanket exclusion of homosexuals from all city employment would be arbitrary, capricious, and hence unconstitutional. Plaintiff went further, however, and argued that even a policy of exclusion from selected positions was unduly discriminatory. The city claimed that its policy was based on consideration of job requirements and sound medical and psychiatric opinion finding homosexuals unsuitable for such positions. The court was unable to decide the issue due to the conflicting medical and psychiatric testimony proffered. Although denying the injunctive relief sought by the plaintiff, the court ordered a full-scale inquiry to find any statistical or other scientifically valid basis for exclusion.

48. *See* D. CORY, THE HOMOSEXUAL IN AMERICA 39 (1951), wherein the author asserts that summary dismissal is not an uncommon fate befalling the discovered homosexual in private employment.

49. There have been challenges but the courts have not faced them. *E.g.*, Scott v. Macy, 402 F.2d 644 (D.C. Cir. 1968); Anonymous v. Macy, 398 F.2d 317 (5th Cir. 1968); Scott v. Macy, 349 F.2d 182 (D.C. Cir. 1965); Dew v. Halaby, 317 F.2d 582 (D.C. Cir. 1963). Thus the general policy of excluding homosexuals from federal employment has been excluded from judicial review. *See* 82 HARV. L. REV. 1738, 1748 (1969). The most recent pre-*Norton* case, *Scott v. Macy*, developed when Scott, an applicant who had successfully appealed a previous bar from federal employment on grounds of immoral conduct, was again disqualified. In both appeals, Scott attempted to force the court to review the Commission's policy of disqualifying homosexuals as being unfit for service. The court ducked the issue in both cases, but overturned the Commission's findings on procedural grounds. Dissenting in both opinions, Judge Burger sternly criticized the majority, which included Chief Judge Bazelon, for failing to face the issues. *See* Scott v. Macy, 402 F.2d 644, 649 (D.C. Cir. 1968); Scott v. Macy, 349 F.2d 182, 187 (D.C. Cir. 1965).

trict of Columbia Circuit firmly established as precedent a narrow interpretation of the phrase, "such cause as will promote the efficiency of the service."[50] Although these words might be used as the basis for almost any discharge,[51] the Commission has failed to narrow the phrase in applying the statute. On the contrary, through its suitability standards, the Commission has sought to expand its statutory authority.[52] Now, with the advent of *Norton*, the Commission's removal authority has been strictly curtailed, and the Commission will have to adjust its suitability requirements accordingly.

In the past, the Commission has enjoyed great latitude in its policy determinations, and noting that homosexual conduct is contrary to the laws and mores of our society, the Commission determined that homosexuals are not suitable for federal employment. After *Norton*, the Commission may not justify the exclusion of homosexuals on the ground that such conduct is contrary to the dominant conventional norms. Instead, there must be a showing that the individual's conduct has an ascertainable deleterious effect on the efficiency of the service. If *Norton* stands, the following seems clear: (1) the Commission may not sustain the removal of a federal employee who confines his homosexual conduct to off-duty hours, unless he occupies a particularly sensitive position, and (2) the Commission may not exclude every homosexual application from all federal positions.

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50. 5 U.S.C. §§ 7501(a), 7512(a) (Supp. IV, 1969). *See, e.g.*, Leonard v. Douglas, 321 F.2d 749 (D.C. Cir. 1963); Eustace v. Day, 314 F.2d 247 (D.C. Cir. 1962).

51. *See* Butler v. White, 83 F. 578, 585 (4th Cir. 1897), *rev'd*, 171 U.S. 379 (1898), where the Fourth Circuit declared that a similar phrase, "for the good of the public service," was "a reason that was employed by the officers of the government, when they desired to remove any one that was obnoxious to them, long prior to the passage of the civil service act. It is too general, vague, and indefinite to authorize . . . removal . . . ."

52. 5 C.F.R. § 731.201 (1968) provides that a person may be excluded from federal employment for any of the following reasons: ". . . (b) Criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct; (c) Intentional false statement or deception or fraud in examination or appointment; (d) Refusal to furnish testimony as required by § 5.3 of this chapter; (e) Habitual use of intoxicating beverages to excess; (f) Reasonable doubt as to the loyalty of the person involved to the Government of the United States; or (g) Any legal or other disqualification which makes the individual unfit for the service."