The Burger Court Opinion Writing Database

Codd v. Velger

429 U.S. 624 (1977)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 10, 1977

RE: 75-812 - Codd v. Velger

Dear Bill:

I prefer your "Option I", but would join an "Option II".

Regards,

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 16, 1977

RE: 75-812 - Codd v. Velger

Dear Bill:

This will confirm my join to make five for the first alternative.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

1/25/77

SUPREME COURT OF THE UNITED STATES

No. 75-812

Michael J. Codd, Police Commissioner, City of New York, et al., Petitioners, *v.* Elliott H. Velger.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February —, 1977]

MR. JUSTICE BRENNAN, concurring.

I join the Court's opinion but add these words for emphasis.

As the Court accurately notes, *ante,* at 1, throughout this litigation respondent consistently has prayed for equitable relief and damages for the injury resulting from the dissemination of stigmatizing material that remained in his employment file when his employment was terminated without a hearing as required by *Board of Regents* v. *Roth,* 408 U. S. 564 (1972).[1] Today's holding is that respondent's claim under 42 U. S. C. § 1983 cannot prevail because "at no stage of this litigation,"[2] *ante,* at 5, has he "raise[d] an issue about the

[1] Although the amended complaint altered respondent's substantive theory, he continued to seek reinstatement and damages.

[2] The Court appropriately makes clear that it is not calling for an "overly technical application of the rules of pleading." *Ante,* at 5. Indeed, there may be instances where a plaintiff reasonably cannot be held responsible for failing to *plead* falsity in his complaint. For example, in this instance, respondent cannot be faulted for his failure to plead falsity, since his complaint alleged that he "does not know the contents of his personnel file and has never seen or been advised of any derogatory matter placed in his file." App., 51a. Thus, his undoing occurred, according to the Court, in the later "stage[s] of this litigation," when he learned of the specific contents of the employment file but made little effort "to raise an issue about the substantial accuracy of the report." *Ante,* at 5.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 2, 1977

RE: No. 75-812 Codd v. Velger

Dear Bill:

John's dissent suggests more problems with this case than I had fully appreciated and I am going to do some more thinking about it. At a minimum I think his Part III is well taken. I had not discerned that the Court of Appeals had not passed on the property interest claim. I think John's disposition could be incorporated in your Per Curiam and do it no damage.

I'll be in touch with you again soon.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 9, 1977

RE: No. 75-812 Codd v. Velger

Dear Bill:

I had originally intended to dissent but defected and joined your Per Curiam. That, however, was before John circulated his subversive dissent. You can therefore credit (or blame) him for my defection back to my original decision, reflected in the enclosed.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

WJB
Please join me in your dissent
HAB

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 2/9/77

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-812

Michael J. Codd, Police Commissioner, City of New York, et al., Petitioners, *v.* Elliott H. Velger.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February —, 1977]

MR. JUSTICE BRENNAN, dissenting.

I dissent from today's holding, substantially for the reasons expressed by my Brother STEVENS in Part I of his dissent, despite my belief that the Court's ruling is likely to be of little practical importance.

Respondent alleged that he suffered deprivation of his liberty when petitioner terminated his employment and retained stigmatizing information in his employment file, information later disseminated to a prospective employer. Under *Board of Regents* v. *Roth*, 408 U. S. 564, 573 (1972), respondent therefore was entitled to a timely pretermination hearing. The Court today reaffirms *Roth*, but holds, that respondent's retrospective claim for damages and equitable relief under 42 U. S. C. § 1983 must be denied because "at no stage of this litigation," [1] *ante*, at 5, has he "raise[d] an issue

[1] The Court fortunately makes clear that it is not calling for an "overly technical application of the rules of pleading." *Ante*, at 5. Indeed, there may be instances where a plaintiff reasonably cannot be held responsible for failing to *plead* falsity in his complaint. For example, in this instance, respondent cannot be faulted for his failure to plead falsity, since his complaint alleged that he "does not know the contents of his personnel file and has never seen or been advised of any derogatory matter placed in his file." App., 51a. Thus, his undoing occurred, according to the Court, in the later "stage[s] of this litigation,"

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

3rd DRAFT

Circulated: _____

Recirculated: 2/11/77

SUPREME COURT OF THE UNITED STATES

No. 75-812

Michael J. Codd, Police Commissioner, City of New York, et al., Petitioners, *v.* Elliott H. Velger.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February —, 1977]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

I dissent from today's holding substantially for the reasons expressed by my Brother STEVENS in Part I of his dissent, despite my belief that the Court's ruling is likely to be of little practical importance.

Respondent alleged that he suffered deprivation of his liberty when petitioner terminated his employment and retained stigmatizing information in his employment file, information later disseminated to a prospective employer. Under *Board of Regents* v. *Roth*, 408 U. S. 564, 573 (1972), respondent therefore was entitled to a timely pretermination hearing. The Court today reaffirms *Roth*, but holds that respondent's retrospective claim for damages and equitable relief under 42 U. S. C. § 1983 must be denied because "at no stage of this litigation," [1] *ante*, at 5, has he "raise[d] an issue

[1] The Court fortunately makes clear that it is not calling for an "overly technical application of the rules of pleading." *Ante*, at 5. Indeed, there may be instances where a plaintiff reasonably cannot be held responsible for failing to *plead* falsity in his complaint. For example, in this instance, respondent cannot be faulted for his failure to plead falsity, since his complaint alleged that he "does not know the contents of his personnel file and has never seen or been advised of any derogatory matter placed in his file." App., 51a. Thus, his undoing occurred, according to the Court, in the later "stage[s] of this litigation,"

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 18, 1977

Re: No. 75-812, Codd v. Velger

Dear Bill,

I have been troubled by the same concerns that bothered Thurgood. If, however, you can reserve those puzzling questions along the lines indicated in your letter to Thurgood of today, I shall be glad to join your opinion.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 21, 1977

Re: No. 75-812, Codd v. Velger

Dear Bill,

I would rather prefer that Harry's suggested footnote not be added to this opinion. If it were a full dress, signed opinion, then, in the interest of thoroughness, the thought expressed in the footnote might well be added, possibly along with the discussion of other related thoughts.

It is my view, however, that the function of a Per Curiam is to apply existing and settled law to a specific fact situation, in a straightforward and expeditious way. For that reason, I think the proposed footnote would not be appropriate.

Sincerely yours,

P. S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 3, 1977

75-812 -- Codd v. Velger

Dear Bill,

I strongly prefer the second alternative suggested in your memorandum of today. Adoption of this alternative would, of course, require a modification of the final sentence of the opinion.

Sincerely yours,

P.S.
1.S.

Mr. Justice Rehnquist

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Bla
Mr. Justice P
Mr. Justice R
Mr. Justice S

From: Mr. Justice

Circulated:

Recirculated:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–812

Michael J. Codd, Police Commissioner, City of New York, et al., Petitioners, *v.* Elliott H. Velger.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February —, 1977]

MR. JUSTICE STEWART, dissenting.

Although sharing generally the views expressed in the Court's opinion, I agree with Part III of MR. JUSTICE STEVENS' dissenting opinion, and I would for that reason remand this case to the Court of Appeals for further proceedings.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 7, 1977

Re: No. 75-812 - Codd v. Velger

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Rehnquist

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 15, 1977

Re: No. 75-812 - Codd v. Velger

Dear Bill:

In tardy response to your memorandum of February 3, I would be content with footnote two in the fourth draft.

Sincerely,

Byron

Mr. Justice Rehnquist

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 14, 1977

Re: No. 75-812, Codd v. Velger

Dear Bill:

Your opinion for the Court faithfully reflects the conclusions of the Conference majority, of which I was a part. Seeing it in writing, however, has suggested some problems with which we did not deal.

The basic problem involves the relationship among the burdens of pleading and proof and the nature of the available remedy. The opinion holds, I take it, that a plaintiff seeking a federal court order that he be given a Roth hearing must allege that the stigmatizing information in his file is false or substantially misleading. This requirement is justified because there is no sense in a court ordering a hearing which it has no reason to believe will accomplish anything. On the other hand, if the accuracy of the plaintiff's allegation of falsity is considered at issue before the district court, the court proceeding will cover the same ground as the Roth hearing would cover. Litigating the accuracy of information in order to establish a right to a hearing on the accuracy of that same information makes no sense to me.

These considerations lead me to conclude that when a plaintiff seeks a belated Roth hearing, the burden of pleading discussed in your opinion must carry with it no concomitant burden of production or persuasion. If this conclusion is correct, I think the opinion should say so explicitly since ordinarily a plaintiff must prove what he must plead.

A different conclusion follows in this case since the plaintiff seeks not a hearing but rather damages and injunctive relief under § 1983. (Presumably, the only appropriate equitable relief would be expungement.) Such relief is available because the limited

purpose of the hearing required by the Fourteenth Amendment does not limit the remedies provided by § 1983 to compensate for injuries caused by an earlier denial of that Fourteenth Amendment right. But to prove his claim to that relief, a plaintiff would have to show that the stigmatizing material whose circulation injured him was false or substantially misleading. Otherwise, he would not have suffered injury from denial of the Roth hearing.

If you can accommodate these suggestions, I will be glad to join.

Sincerely,

T. M.

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 3, 1977

Re: No. 75-812 - Codd v. Velger

Dear Bill:

I am about to land somewhere between Brennan and Stevens. Will let you know soon.

Sincerely,

T. M.

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 10, 1977

Re: No. 75-812, Codd v. Velger

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 21, 1977

Re: No. 75-812 - Codd v. Velger

Dear Bill:

Would it be at all possible to persuade you to add the following as a footnote dropped at the end of the paragraph ending at the top of page 4:

> "Nowhere is it suggested that the information, if true, was not information of a kind that might appropriately be disclosed to prospective employers. We are thus not presented with any question as to the limits, if any, on the disclosure of prejudicial, but irrelevant, accurate information."

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

1st DRAFT

From: Mr. Justice Blackmun

SUPREME COURT OF THE UNITED STATES

Circulated: 1/26/77

No. 75-812

Recirculated: _____

Michael J. Codd, Police Commissioner, City of New York, et al., Petitioners, *v.* Elliott H. Velger.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[January —, 1977]

MR. JUSTICE BLACKMUN, concurring.

I join the Court's *per curiam* opinion, but I emphasize that in this case there is no suggestion that the information in the file, if true, was not information of a kind that appropriately might be disclosed to prospective employers. We therefore are not presented with any question as to the limits, if any, on the disclosure of prejudicial, but irrelevant, accurate information.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 7, 1977

Re: No. 75-812 - Codd v. Velger

Dear Bill:

This is in response to your memorandum of February 3. My preference, like yours, is the first alternative. I could, however, go along with the second. I would not go along with the third.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 19, 1977

No. 75-812 Codd v. Velger

Dear Bill:

I will be glad to join your Per Curiam opinion if you make changes along the lines indicated in your letter of January 18 to Thurgood.

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 21, 1977

No. 75-812 Codd v. Velger

Dear Bill:

In view of the changes in your second draft, I am happy to join your Per Curiam.

Sincerely,

L. Lewis

Mr. Justice Rehnquist

Copies to the Conference

LFP/lab

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 8, 1977

No. 75-812 Codd v. Velger

Dear Bill:

This refers to your memorandum of February 3, in which you propose three alternatives.

My first choice is your first alternative; I could join you on the second; but I would part company with you on the third.

Sincerely,

Lewis

Mr. Justice Rehnquist

Copies to the Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–812

Michael J. Codd, Police Commissioner, City of New York, et al., Petitioners, *v.* Elliott H. Velger.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[January —, 1977]

PER CURIAM.

Respondent Velger's action shifted its focus, in a way not uncommon to lawsuits, from the time of the filing of his complaint in the United States District Court for the Southern District of New York to the decision by the Court of Appeals for the Second Circuit which we review here. His original complaint alleged that he had been wrongly dismissed without a hearing or a statement of reasons from his position as a patrolman with the New York City Police Department, and under 42 U. S. C. § 1983, sought reinstatement and damages for the resulting injury to his reputation and future employment prospects. After proceedings in which Judge Gurfein (then of the District Court) ruled that respondent had held a probationary position and therefore had no hearing right based on a property interest in his job, respondent filed an amended complaint. That complaint alleged more specifically than had the previous one that respondent was entitled to a hearing due to the stigmatizing effect of certain material placed by the City Police Department in his personnel file. He alleged that the derogatory material had brought about his subsequent dismissal

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 18, 1977

Re: No. 75-812 - Codd v. Velger

Dear Thurgood:

The problem which you raise with respect to the subject of the draft opinion in this case is a real one, but I am unsure of whether we should deal with it here. As you point out, respondent here sought only damages and reinstatement, and therefore we are not directly presented with the question which would be raised if he had in addition sought a delayed Roth hearing by the employer. The precise disposition of his case, had he sought only that sort of a hearing and neither damages nor reinstatement, is to my mind a cloudy and difficult question; it may be the disposition you propose is right, but while I would be happy to reserve the question I would rather not decide it now.

The notion that allegations can be divorced from proof in a litigated matter is one which itself raises some questions -- most obviously of how the elements of proof of the Roth claim would be apportioned between the federal District Court and the delayed administrative hearing. Suppose, for example, that the discharged employee makes all of the allegations which you hypothesize in your memo of January 14th; non-tenured status, stigmatizing information disseminated in course of termination, and falsity. At

the initial hearing in the federal court, counsel for the respondent files a verified response or answer, in the best tradition of Chitty, denying that the plaintiff was ever an employee, that he was fired, that any information was disseminated, that any information which was disseminated was stigmatizing, and, finally, that the information was false. Surely the federal district judge does not immediately say to the plaintiff: "You have alleged enough for me to require the employer to conduct a delayed Roth hearing, and I am now issuing a mandatory injunction requiring him to do so. If he fails to do so, he will be cited for contempt."

I think the best way to handle the problem which you suggest is to note that it exists, but not suggest any resolution of the difficult issues which it brings with it. I would therefore propose to add the following footnote to the present draft opinion, to be referenced at the end of the second sentence of the present draft:

> "Respondent did not seek a delayed Roth hearing to be conducted by his former employer at which he would have the opportunity to refute the charge in question. Board of Regents v. Roth, 408 U.S. 564, 573. The relief he sought was premised on the assumption that the failure to accord such a hearing when it should have been accorded entitled him to obtain reinstatement and damages resulting from the denial of such hearing. We therefore have no occasion to consider the allocation of the burden of pleading and proof of the necessary issues as between the federal forum and the administrative hearing where such relief is sought."

If I can tailor my suggestion to better satisfy you, let me know. In the course of revising the draft, I also propose to change the first sentence in the first full paragraph on page 4 to read as follows:

> "But the hearing required where a non-tenured employee has been stigmatized in the course of a decision to terminate his employment is solely 'to provide the person an opportunity to clear his name.'"

Sincerely,

WEW

Mr. Justice Marshall

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

2nd DRAFT

JAN

SUPREME COURT OF THE UNITED STATES

No. 75–812

Michael J. Codd, Police Commissioner, City of New York, et al., Petitioners, *v.* Elliott H. Velger.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[January —, 1977]

PER CURIAM.

Respondent Velger's action shifted its focus, in a way not uncommon to lawsuits, from the time of the filing of his complaint in the United States District Court for the Southern District of New York to the decision by the Court of Appeals for the Second Circuit which we review here. His original complaint alleged that he had been wrongly dismissed without a hearing or a statement of reasons from his position as a patrolman with the New York City Police Department, and under 42 U. S. C. § 1983, sought reinstatement and damages for the resulting injury to his reputation and future employment prospects. After proceedings in which Judge Gurfein (then of the District Court) ruled that respondent had held a probationary position and therefore had no hearing right based on a property interest in his job, respondent filed an amended complaint. That complaint alleged more specifically than had the previous one that respondent was entitled to a hearing due to the stigmatizing effect of certain material placed by the City Police Department in his personnel file. He alleged that the derogatory material had brought about his subsequent dismissal

4, 5

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice [illegible]

Circulated: ____

Recirculated: [illegible]

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–812

Michael J. Codd, Police Commissioner, City of New York, et al., Petitioners, *v.* Elliott H. Velger.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[January —, 1977]

PER CURIAM.

Respondent Velger's action shifted its focus, in a way not uncommon to lawsuits, from the time of the filing of his complaint in the United States District Court for the Southern District of New York to the decision by the Court of Appeals for the Second Circuit which we review here. His original complaint alleged that he had been wrongly dismissed without a hearing or a statement of reasons from his position as a patrolman with the New York City Police Department, and under 42 U. S. C. § 1983, sought reinstatement and damages for the resulting injury to his reputation and future employment prospects. After proceedings in which Judge Gurfein (then of the District Court) ruled that respondent had held a probationary position and therefore had no hearing right based on a property interest in his job, respondent filed an amended complaint. That complaint alleged more specifically than had the previous one that respondent was entitled to a hearing due to the stigmatizing effect of certain material placed by the City Police Department in his personnel file. He alleged that the derogatory material had brought about his subsequent dismissal

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: FEB 3 1977

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–812

Michael J. Codd, Police Commissioner, City of New York, et al., Petitioners, *v.* Elliott H. Velger.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February —, 1977]

PER CURIAM.

Respondent Velger's action shifted its focus, in a way not uncommon to lawsuits, from the time of the filing of his complaint in the United States District Court for the Southern District of New York to the decision by the Court of Appeals for the Second Circuit which we review here. His original complaint alleged that he had been wrongly dismissed without a hearing or a statement of reasons from his position as a patrolman with the New York City Police Department, and under 42 U. S. C. § 1983, sought reinstatement and damages for the resulting injury to his reputation and future employment prospects. After proceedings in which Judge Gurfein (then of the District Court) ruled that respondent had held a probationary position and therefore had no hearing right based on a property interest in his job, respondent filed an amended complaint. That complaint alleged more specifically than had the previous one that respondent was entitled to a hearing due to the stigmatizing effect of certain material placed by the City Police Department in his personnel file. He alleged that the derogatory material had brought about his subsequent dismissal

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 3, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 75-812 - Codd v. Velger.

Part III of John's dissent in this case takes the position that since the Court of Appeals did not pass on the issue of whether respondent had a "property interest" in his employment, the judgment of the District Court should not be ordered reinstated but instead the case simply reversed and the Court of Appeals left free to consider that matter if it chooses to do so upon the remand. Bill Brennan has sent around a note indicating his sympathy with John's point of view. It seems to me there are three alternative ways to deal with the question, two of which would be acceptable to me and one of which would not.

(1) The newly added footnote 2 in the fourth draft of the per curiam, circulated February 3rd, sets forth my

reasons for thinking that we are perfectly justified in letting the finding of the District Court on this point remain undisturbed. Judge Gurfein's opinion certainly stated the governing principles of Roth and Perry accurately, and I cannot see why at this late stage of the litigation we would encourage further dispute over what, under Roth and Perry, are interpretations of state law. I am fortified in this conclusion, I think, by the way in which respondent deals in his brief with the cases upon which Judge Gurfein relied; as I read it, he in effect says "that is all well and good, but here we are talking about stigma". But the main body of the per curiam deals with the stigma point, and once that is out of the case on the merits I do not think even respondent seriously quarrels with Judge Gurfein's analysis of the New York law.

(2) Instead of the present content of the newly added footnote 2, it could be replaced by a statement to the

JJ

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 4, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 75-812, Codd v. Velger

I propose to change footnote 1 of the current draft so as to read as follows:

> Respondent's amended complaint did not seek a delayed Roth hearing to be conducted by his former employer at which he would have the opportunity to refute the charge in question. Board of Regents v. Roth, 408 U.S. 564, 573. The oral request for such a hearing by respondent's counsel during a colloquy with the court, noted by Justice Stevens, post, at ____, n.7, was certainly not regarded by Judge Werker as an amendment to the complaint. App., at 110a. See Fed. R. Civ. P. 15(a).
>
> The relief sought in the respondent's complaint was premised on the assumption that the failure to accord such a hearing when it should have been accorded entitled him to obtain reinstatement and damages resulting from the denial of such hearing. We therefore have no occasion to consider the allocation of the burden of pleading and proof of the necessary issues as between the federal forum and the administrative hearing where such relief is sought.

This is in response to the referenced suggestion in John's dissent; I shall wait to tally the votes in response to my memo of February 3 before circulating a final version of footnote 2.

Sincerely,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 16, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 75-812 - Codd v. Velger

Of those who have joined the current circulation, Potter has expressed a strong preference for the second alternative treatment of the "property interest" question now discussed in footnote 2, and Byron, Harry, Lewis, and I have expressed a preference for the first alternative. The Chief has expressed a preference for the first alternative, but has not yet joined the opinion. John has expressed a preference for the second alternative, but has circulated a dissenting opinion.

On the assumption that the Chief joins my present circulation, there will be five "joiners" in favor of the first alternative treatment, and I would then propose to leave footnote 2 in the form in which it appears in the fourth draft circulated February 3rd.

Sincerely,

WHR

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 3, 1977

Memorandum to the Conference

Re: Cases held for No. 75-812 - Codd v. Velger

I am asking that the cases held for Codd v. Velger, listed on the March 4 Conference List, be held over for the Conference of March 18.

Sincerely,

WHR/dba

Linda

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 11, 1977

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 75-812 -- Codd v. Velger

Two cases have been held for Codd v. Velger, No. 75-812, decided February 22, 1977. Both cases present issues not resolved by our decision in Codd.

In University of Missouri v. Horowitz, No. 76-695, the CA 8 ruled that the dismissal of a student from medical school, even absent any publicization of reasons therefor, was sufficiently stigmatizing to entitle the student to a Roth hearing. The apparent reasons for the dismissal are non-specific in nature, apparently relating to clinical performance, patient rapport, erratic attendance, and poor personal hygiene, and the analysis of Codd requiring allegation of falsehood does not appear to be dispositive. I believe that Roth, John's opinion last Term in Bishop v. Wood, and his separate concurrence in Codd, are dispositive, however, in holding that some publication of reasons is an essential prerequisite to a deprivation of liberty by stigmatization. See Roth, 408 U.S. at 575, n.13; Bishop, 426 U.S. at 348-349. My first choice would therefore be to summarily reverse; my second would be to grant plaino.

CA 8 held D/P hearing necessary before a med. student can be dismissed from school

Decision Inclined to Grant

In School Bd. of Brooklyn v. Huntley, No. 76-104, the CA 2 ordered a Roth hearing for an acting principal who was removed on grounds of poor performance, whence a letter stating the reasons for removal was read at a Parent's Association meeting at which supporters of petitioner

Decision If we Grant Horowitz I'd Hold this. Otherwise, I'm inclined to Deny.

Horowitz is imp. because it applies generally to a "flunking-out" of any state school

demanded to hear the charges against him. The reasons for dismissal again are such that the holding of Codd does not seem pertinent. On the merits this seems a tougher case than Horowitz, presenting the questions 1) whether there was sufficient publicization of the reasons, and 2) if so whether, in light of the fact that respondent has already taken another job as a teacher, there was sufficient injury to reputation to amount to constitutional stigmatization. I will vote to grant.

Sincerely,

WHR/dbc.

1.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: FEB 1 1977

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-812

Michael J. Codd, Police Commissioner, City of New York, et al., Petitioners, *v.* Elliott H. Velger.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February —, 1977]

MR. JUSTICE STEVENS, dissenting.

There are three aspects of the Court's disposition of this case with which I disagree. First, I am not persuaded that a person who claims to have been "stigmatized" by the State without being afforded due process need allege that the charge against him was false in order to state a cause of action under 42 U. S. C. § 1983. Second, in my opinion the Court should not assume that this respondent was stigmatized, because the District Court's contrary finding was not clearly erroneous. Third, I would remand the case to the Court of Appeals to consider the claim that respondent had a property interest in his job, since that court did not decide this issue.

I

respondent's

The Court holds that ~~petitioner's~~ failure to allege falsity negates his right to damages for the State's failure to give him a hearing. This holding does not appear to rest on the view that ~~petitioner~~ has no right to a hearing unless the charge against him is false.[1] If it did, it would represent a

a discharged employee

[1] The Court indicates, *ante*, at 2 n.*, that its holding is premised on the form of relief sought. If falsity were a precondition to the existence of a constitutional violation, the form of relief would be irrelevant. For to grant any relief, the federal court would first have to determine that

pp. 3, 5-8

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr Justice Stevens

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

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The Court holds that respondent's failure to allege falsity negates his right to damages for the State's failure to give him a hearing. This holding does not appear to rest on the view that a discharged employee has no right to a hearing unless the charge against him is false.[1] If it did, it would

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 4, 1977

Re: 75-812 - Codd v. Velger

Dear Bill:

Because I really did not intend to indicate an answer to the question raised in Part III of my separate opinion, but merely to suggest that the issue should not be ignored, I agree with Potter that it would be appropriate to follow the second alternative suggested in your recent memorandum. If that course is followed, I would, of course, withdraw Part III of my opinion.

Respectfully,

John

Mr. Justice Rehnquist

Copies to the Conference

pp. 2, 5, 9-10

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

3rd DRAFT

Recirculated: FEB 17 1977

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[1] The Court indicates, *ante*, at 2 n. 1, that its holding is premised on the form of relief sought. If falsity were a precondition to the existence of a constitutional violation, the form of relief would be irrelevant. For to grant any relief, the federal court would first have to determine that