

# The Burger Court Opinion Writing Database

*Vance v. Bradley*

440 U.S. 93 (1979)

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

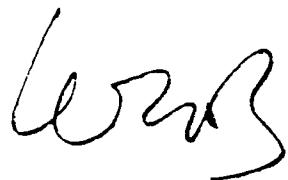
February 1, 1979

Re: 77-1254 - Vance v. Bradley

Dear Byron:

I join and, swiftly (or not at all), I will  
add a brief "snapper".

Regards,



Mr. Justice White

Copies to the Conference

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

From: The Chief Justice

Circulated, FEB 2 1979  
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Recirculated: \_\_\_\_\_

No. 77-1254, Vance v. Bradley

MR. CHIEF JUSTICE BURGER, CONCURRING.

I join the Court's opinion because wise or unwise, sound or spurious, the choice embodied in the Foreign Service Act of 1946 was for Congress. However, I am constrained to note that Congress first provided a mandatory retirement age of 65 for Foreign Service Officers in 1924. It lowered the age limit from 65 to 60 in 1946. Longevity has increased since 1924 and factors peculiar to the Foreign Service, such as conditions of travel and living in remote parts of the world, have become far less rigorous.

It was in response to changed conditions that in 1978 Congress eliminated all age limits for employees subject to the Civil Service Retirement System. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 5(c), 92 Stat. 191. This "trend", however, does not afford a basis for decision here; the choice among rational

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

From: The Chief Justice

Circulated: \_\_\_\_\_

Recirculated: FEB 15 1979

STYLISTIC CHANGES  
*last paragraph omitted*

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 77-1254

Cyrus R. Vance, Secretary of State, et al., Appellants,  
*v.*  
Holbrook Bradley et al. } On Appeal from the United States District Court for the District of Columbia.

[February —, 1979]

MR. CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion because wise or unwise, sound or spurious, the choice embodied in the Foreign Service Act of 1946 was for Congress. However, it is interesting to note that Congress first provided a mandatory retirement age of 65 for Foreign Service Officers in 1924. It lowered the age limit from 65 to 60 in 1946. Longevity has increased since 1924 and some factors peculiar to the Foreign Service, such as the difficulties of travel and living conditions in remote parts of the world, have become far less rigorous.

It was in response to changed conditions that in 1978 Congress eliminated all age limits for employees subject to the Civil Service Retirement System. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 5(e), 92 Stat. 191. This "trend," however, does not afford a basis for decision contrary to what the Court holds today. The choice among rational options is for the political branches. *Massachusetts Board of Retirement v. Murgia*, 427 U. S. 307, 316 (1976).

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

CHAMBERS OF  
THE CHIEF JUSTICE

February 16, 1979

Re: 77-1254 - Vance v. Bradley et al.

Dear Byron:

I am killing my "snapper" since I believe you have  
made the point.

Regards,



Mr. Justice White

Copies to the Conference

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

January 22, 1979

RE: No. 77-1254 Vance v. Bradley

Dear Byron:

I was not certain after our discussion of footnote 1 at conference Friday what you had decided. My own thought was to substitute for everything in the last sentence after "Accordingly, the Court has held that . . ." something like "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." Buckley v. Valeo, 424 U.S. 1, 93 (1976), followed by the citations of the three cases you have there now.

In all other respects I am entirely happy with your opinion and will join it.

Sincerely,

*Wm. J. Brennan, Jr.*

Mr. Justice White

cc: The Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

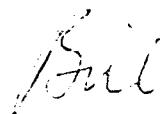
January 23, 1979

RE: No. 77-1254 Vance v. Bradley

Dear Byron:

I agree.

Sincerely,



Mr. Justice White

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

January 15, 1979

Re: No. 77-1254, Vance v. Bradley

Dear Byron,

I am glad to join your opinion for  
the Court.

Sincerely yours,

P.S.  
P.J.

Mr. Justice White

Copies to the Conference

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

From: Mr. Justice White

Circulated: 15 JAN 1973

Recirculated: \_\_\_\_\_

**1st DRAFT**

**SUPREME COURT OF THE UNITED STATES**

No. 77-1254

Cyrus R. Vance, Secretary of State, et al., Appellants,  
 v.  
 Holbrook Bradley et al. } On Appeal from the United States District Court for the District of Columbia.

[January —, 1979]

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue presented is whether Congress violates the equal protection component of the Fifth Amendment's Due Process Clause<sup>1</sup> by requiring retirement at age 60 of federal employees covered by the Foreign Service retirement and disability system but not those covered by the Civil Service retirement and disability system. A three-judge District Court was convened to hear this challenge to the constitutionality of a federal statute by appellees, a group of former and present participants in the Foreign Service retirement system. Treat-

<sup>1</sup> Concern with assuring equal protection was part of the fabric of our Constitution even before the Fourteenth Amendment was ratified to express it most directly. See Cong. Globe, 39th Cong., 1st Sess., 2510 (1866) (Rep. Miller) (all of Section One of the Fourteenth Amendment is already within the spirit of the Declaration of Independence); *id.*, at 2459 (Rep. Stevens) (requirement of equal protection is part of Constitution but is not applicable to the States); *id.*, at 1034 (1865) (Rep. Bingham, speaking of his original proposal for an equal protection clause) ("[e]very word of the proposed amendment is to-day in the Constitution"). Accordingly, the Court has held that the Due Process Clause of the Fifth Amendment imposes restraints on the Federal Government similar to those that the Equal Protection Clause of the Fourteenth Amendment imposes on the States. *E. g.*, *Hampton v. Mow Sun Wong*, 426 U. S. 88, 100 (1976); *Weinberger v. Wiesenfeld*, 420 U. S. 636, 638 n. 2 (1975); *Bolling v. Sharpe*, 347 U. S. 497, 500 (1954).

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

January 22, 1979

Re: No. 77-1254 - Vance v. Bradley

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Dear Bill and John,

I have sent to the printer what I hope is a satisfactorily neutral change in footnote 1. In essence, it will simply state that the Fifth Amendment forbids the Federal Government from denying equal protection of the laws.

Sincerely yours,



Mr. Justice Brennan  
Mr. Justice Stevens

Copies to the Conference

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

Minor and stylistic  
changes throughout.

From: Mr. Justice White

Circulated: \_\_\_\_\_

Recirculated: 23 JAN 1979

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 77-1254

Cyrus R. Vance, Secretary of State, et al., Appellants,  
v.  
Holbrook Bradley et al. } On Appeal from the United States District Court for the District of Columbia.

[February —, 1979]

MR. JUSTICE WHITE delivered the opinion of the Court.

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<sup>1</sup> Concern with assuring equal protection was part of the fabric of our Constitution even before the Fourteenth Amendment expressed it most directly in applying it to the States. See Cong. Globe, 39th Cong., 1st Sess., 2510 (1866) (Rep. Miller) (all of Section One of the Fourteenth Amendment is already within the spirit of the Declaration of Independence); *id.*, at 2459 (Rep. Stevens) (requirement of equal protection is part of Constitution but is not applicable to the States); *id.*, at 1034 (1865) (Rep. Bingham, speaking of his original proposal for an equal protection clause) ("[e]very word of the proposed amendment is to-day in the Constitution"). Accordingly, the Court has held that the Due Process Clause of the Fifth Amendment forbids the Federal Government from denying equal protection of the laws. *E. g., Hampton v. Mow Sun Wong*, 426 U. S. 88, 100 (1976); *Buckley v. Valeo*, 424 U. S. 1, 93 (1976); *Weinberger v. Wiesenfeld*, 420 U. S. 636, 638 n. 2 (1975); *Bolling v. Sharpe*, 347 U. S. 497, 500 (1954).

Mar. 9, 18

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

From: Mr. Justice White

Circulated: \_\_\_\_\_

Recirculated: 1-21-79

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 77-1254

Cyrus R. Vance, Secretary of State, et al., Appellants, } On Appeal from the United States District Court for the District of Columbia.  
v.  
Holbrook Bradley et al.

[February —, 1979]

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue presented is whether Congress violates the equal protection component of the Fifth Amendment's Due Process Clause<sup>1</sup> by requiring retirement at age 60 of federal employees covered by the Foreign Service retirement and disability system but not those covered by the Civil Service retirement and disability system. A three-judge District Court was convened to hear this challenge to the constitutionality of a federal statute by appellees, a group of former and present participants in the Foreign Service retirement system. Treat-

<sup>1</sup> Concern with assuring equal protection was part of the fabric of our Constitution even before the Fourteenth Amendment expressed it most directly in applying it to the States. See Cong. Globe, 39th Cong., 1st Sess., 2510 (1866) (Rep. Miller) (all of Section One of the Fourteenth Amendment is already within the spirit of the Declaration of Independence); *id.*, at 2459 (Rep. Stevens) (requirement of equal protection is part of Constitution but is not applicable to the States); *id.*, at 1034 (1865) (Rep. Brigham, speaking of his original proposal for an equal protection clause) ("[e]very word of the proposed amendment is to-day in the Constitution"). Accordingly, the Court has held that the Due Process Clause of the Fifth Amendment forbids the Federal Government from denying equal protection of the laws. *E. g.*, *Hampton v. Mow Sun Wong*, 426 U. S. 88, 100 (1976); *Bucklew v. Valeo*, 424 U. S. 1, 93 (1976); *Weinberger v. Wiesenfeld*, 420 U. S. 636, 638 n. 2 (1975); *Bolling v. Sharpe*, 347 U. S. 497, 500 (1954).

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

March 1, 1979

MEMORANDUM TO THE CONFERENCE

Cases Held for No. 77-1254: Vance v. Bradley

No. 77-1257: Schmier v. Trustees of Calif. State Univ. and Colleges

This is an appeal from a California Court of Appeals, which held that the State may mandatorily retire university professors at age 67. The court relied on an earlier Ct. App. opinion upholding a similar statute, which found that such statutes allow more people to enjoy governmental employment for a time and permit orderly attrition. Appellant argues that the preamble to the repeal of the statute in question undercuts the rationality of the statute's prior application to him by saying that age is an "obsolete and cruel" indicator of ability and that mandatory retirement is an "undesirable" misuse of resources.

✓ I would DWSFQ. The current statute allows professors to remain past 67 if they are certified as competent by their supervisors, and the legislature's change of policy is, as we indicated in Vance (n. 23), not dispositive of the constitutional rationality of what it had done before.

No. 77-1444: Johnson v. Lefkowitz; and

No. 78-240: Palmer v. Ticciione

These cases are both on cert. to CA2, which upheld the constitutionality of New York statutes requiring the retirement at age 70 of civil service employees (Johnson) and of school teachers (Palmer).

No. 77-1517: Garrison v. Gault

This case is on cert. to CA7, which reversed a DC's dismissal of a challenge to a local school board's requirement

2,8,12

2 FEB 1979

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 77-1254

Cyrus R. Vance, Secretary of State, et al., Appellants,  
v.  
Holbrook Bradley et al. } On Appeal from the United States District Court for the District of Columbia.

[February —, 1979]

MR. JUSTICE MARSHALL, dissenting.

The Court today finds a rational basis for the forced retirement of Foreign Service personnel at age 60, on a record devoid of evidence that persons of that age or older are less capable of performing their jobs than younger employees. I adhere to my view in *Massachusetts Board of Retirement v. Murgia*, 427 U. S. 307, 317-327 (1976) (MARSHALL, J., dissenting), that mandatory retirement provisions warrant more than this minimal level of equal protection review. Because I believe that the statute at issue here cannot withstand closer scrutiny, I respectfully dissent.

I

A person's interest in continued Government employment, although not "fundamental" as the law now stands, certainly ranks among the most important of his personal concerns that Government action would be likely to affect. *Id.*, at 322-323; cf. *Arnett v. Kennedy*, 416 U. S. 134 (1974); *Board of Regents v. Roth*, 408 U. S. 564, 572 (1972); *Smith v. Texas*, 233 U. S. 630, 636, 641 (1914). This interest is of special significance to older employees, because

[o]nce terminated, the elderly cannot readily find alternative employment. The lack of work is not only economically damaging, but emotionally and physically draining. Deprived of his status in the community and

Feb. 15, 1979

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 77-1254

Cyrus R. Vance, Secretary of State, et al., Appellants  
v.  
Holbrook Bradley et al. } On Appeal from the United States District Court for the District of Columbia.

[February —, 1979]

MR. JUSTICE MARSHALL, dissenting.

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¶

A person's interest in continued Government employment, although not "fundamental" as the law now stands, certainly ranks among the most important of his personal concerns that Government action would be likely to affect. *Id.*, at 322-323; cf. *Arnett v. Kennedy*, 416 U. S. 134 (1974); *Board of Regents v. Roth*, 408 U. S. 564, 572 (1972); *Smith v. Texas*, 233 U. S. 630, 636, 641 (1914). This interest is of special significance to older employees, because

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

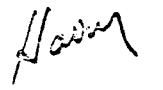
January 16, 1979

Re: No. 77-1254 - Vance v. Bradley

Dear Byron:

Please join me.

Sincerely,



Mr. Justice White

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

January 16, 1979

77-1254 Vance v. Bradley

Dear Byron:

Please join me.

Sincerely,



Mr. Justice White

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

January 16, 1979

Re: No. 77-1254 Vance v. Bradley

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

January 16, 1979

Re: 77-1254 - Cyrus R. Vance v. Bradley

Dear Byron:

Please join me.

Respectfully,



Mr. Justice White

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

January 22, 1979

Re: 77-1254 - Vance v. Bradley

Dear Byron:

Although I may not understand the problem concerning footnote 1 as it is presently drafted, I prefer its present form to the substitute proposed in Bill's note of January 22.

Respectfully,



Mr. Justice White

Copies to the Conference