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Operation of the "Escalator Clause" in Fringe Benefit Cases

Jonathan L.F. Silver*

Desire for simple and certain law may tempt judges to take an uncompromising approach in construing a statute, particularly when the broad concern of the legislature is easily understood. Unfortunately, such an approach may interfere with a reasoned application of the statute to the specific problem that the legislature sought to remedy. That problem therefore might remain shrouded until it is illuminated by the factual patterns of many later cases—cases that may, however, sleep fitfully in the procrustean bed that earlier courts have prepared for them. The last decade of judicial construction of the federal statute\(^1\) that grants certain reemployment rights to veterans who return to their civilian jobs after a short period of military service reveals a tension between rigid and flexible responses to the statutory mandate. None of the current approaches to the statute is satisfying or firmly established,\(^2\) and although the Supreme Court has recently spoken to the issue in one context,\(^3\) results under other circumstances remain uncertain.\(^4\) That no approach has yet achieved wide acceptance may be the result of a failure by the judiciary to carefully consider why Congress

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4. See id. at 101 n.9.
elected to require broad restoration of some incidents of employment but was content with a narrow grant of others.

I. REEMPLOYMENT RIGHTS OF VETERANS

When the Government either conscripts an employed man or accepts a jobholder as a volunteer for military service, it necessarily interrupts his civilian employment. And upon his return to civilian status, that person may suffer certain undesirable consequences. For example, a veteran might be denied the opportunity to return to his former job and then encounter difficulty finding another. Even if he is permitted to return to his original job, his employer might treat him as a new employee, returning him to the bottom of both the seniority ladder and pay scale. The employer might also refuse to grant certain “fringe benefits,” such as vacation pay, sick leave, and pension rights, which would have accrued had the veteran not left his job. To ameliorate some of these unfortunate consequences, Congress has provided reemployment rights for qualified returning draftees and short-term enlistees.

These rights, which in their current form were originally mandated in anticipation of World War II, now have been codified in Title 38 of the United States Code by the Vietnam Era Veterans’ Readjustment Assistance Act of 1974. Four relevant obligations have been imposed on both public and private employers. They must restore a qualified employee to his preservice position, or one of “like seniority, status, and pay”; consider a returning veteran “as having been on furlough or

9. Not all private employers are so obliged, however. The statute exempts those whose business circumstances have so changed as to make compliance impossible or unreasonable. 38 U.S.C.A. § 2021(a) (B) (Supp. 1, Feb. 1975).
10. The veteran must be “still qualified to perform the duties” of his former position. Id. §§ 2021 (a) (A) (i), (a) (B) (i).
11. Id.
leave of absence"; restore the employee "without loss of seniority"; and permit him "to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time [the employee] was inducted . . . ." In the 1948 reenactment of the Selective Service Act of 1940 Congress added a subsection to codify the "escalator principle," which the Supreme Court in *Fishgold v. Sullivan Drydock & Repair Corp.* had articulated as the proper construction of the World War II reemployment provisions. That new provision, which remains a part of the current statute, declared that it was the sense of Congress that on return to civilian employment a veteran should be accorded "such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment." *Fishgold,* and hence the present reemployment rights provisions, thus require an employer to credit a returning veteran not only with the seniority that had accrued prior to his induction, but also with the seniority that would have accrued had his employment not been interrupted by his service in the armed forces.

Unfortunately, Congress failed to define "status in employment" and "seniority," and added to the resulting confusion by establishing an undefined category of "other benefits," subject only to nondiscriminatory restoration. This failure has chal-

12. Id. § 2021(b) (1).
13. Id.
14. Id.
16. 328 U.S. 275 (1946) (dictum). In *Fishgold,* a reemployed veteran complained that his employer had violated the statute by laying him off for nine days while allowing nonveterans to continue working. Although he conceded that even under the escalator principle the nonveterans had greater seniority, the veteran argued that the layoff was contrary to the interdiction of section 8(c) of the 1940 Act against dismissal of a returning veteran within one year of his reemployment. The Court ruled against the veteran, holding that the dismissal prohibition did not encompass a temporary layoff necessitated by a decreased workload. Announcement of the escalator principle was thus unnecessary to the decision.
18. Any person . . . shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces . . . .
lenged the courts to define each of these terms and to determine their proper application to contemporary collective bargaining agreements, which commonly govern an extremely broad range of the conditions of an employer-employee relationship. The parties might have agreed, for example, on provisions for fringe benefits such as vacation, sick leave, pension, life insurance, health care, and supplemental unemployment payments. Thus, when denying escalated restoration of such benefits to reem-ployed veterans, employers have asserted that fringe benefits are not perquisites of "seniority," but rather come within the statutory meaning of "other benefits" and hence are not subject to the escalator principle. Veterans, on the other hand, have argued that the particular benefit at issue is an element of statutory "seniority," so that the escalator principle must apply.\(^\text{10}\)

II. JUDICIAL ADHERENCE TO TRADITIONAL NOTIONS OF SENIORITY

The Supreme Court laid the foundation for a narrow perception of the scope of the escalator clause in Aeronautical Industrial District Lodge 727 v. Campbell.\(^\text{20}\) The collective bargaining agreement in Campbell accorded top seniority to union chairmen regardless of the length of their employment. Despite his longer tenure with the company, a veteran who had returned to work was laid off while union chairmen were not. The Court denied the veteran's claim to reinstatement, reasoning that since Congress had not defined "seniority," it must have intended to guarantee the veteran only those rights governed by the seniority system established in the collective bargaining agreement in force


\(^{20}\) 337 U.S. 521 (1949).
at his place of work.\textsuperscript{21} On the theory that even under \textit{Campbell} the statute must require restoration of at least those rights traditionally regarded as elements of seniority, several lower courts adopted a slightly broader approach. They viewed job title, order of promotion, and protection against layoff as subject to restoration, even if a particular collective bargaining agreement did not tie those rights to seniority.\textsuperscript{22} Under either view, however, restoration of fringe benefits, such as paid vacations,\textsuperscript{23} could occur only if the collective bargaining agreement specifically conditioned such benefits on seniority alone.\textsuperscript{24}

These circumscribed constructions of "seniority" led to results that would be disapproved today.\textsuperscript{25} For example, some courts failed to see that vacations, then the most frequently litigated fringe benefit, are comprised of two distinct elements. Collective bargaining agreements often base the \textit{length} of vacation for which an employee may qualify in a given year on the total number of years he has worked for his employer. On the other hand, \textit{receipt} of a \textit{paid} vacation in a given year may be contingent on the number of months or hours he worked during that particular year. A veteran's request for vacation pay for a year, all or part of which he had spent in military service, thus differs from a claim that for purposes of determining the length of a vacation in a later year, the years in military service should count as years employed.

This difference went unnoticed, however, when vacations were simplistically divorced from seniority. In \textit{Brown v. Watt Car & Wheel Co.},\textsuperscript{26} for example, the collective bargaining agreement granted a second week of vacation to employees who had been "continuously in [the company's] employ for a period of five years or more."\textsuperscript{27} The veteran had been employed with the

\begin{thebibliography}{27}
\bibitem{1} \textit{Id.} at 526-29.
\bibitem{4} \textit{See generally} cases cited in note 22 \textit{supra}.
\bibitem{5} Compare, e.g., \textit{Brown v. Watt Car & Wheel Co.}, 182 F.2d 570 (6th Cir.), \textit{cert. denied}, 340 U.S. 875 (1950) ("seniority" does not include vacation length), \textit{with}, e.g., \textit{Foster v. Dravo Corp.}, 420 U.S. 92, 101 n.9 (1975) ("seniority" does include vacation length), \textit{and} Haggard, \textit{supra} note 2, at 578-79.
\bibitem{6} 182 F.2d 570 (6th Cir.), \textit{cert. denied}, 340 U.S. 875 (1950).
\bibitem{7} 182 F.2d at 571.
\end{thebibliography}
company for 21 months before serving three years in the military. For the years following his return to work he claimed eligibility for the extra week of vacation on the ground that time spent in the service should, for that purpose, count as time of continuous employment with the company. The court of appeals could not agree with the contention that "seniority includes vacation with pay." It relied on Siaskievicz v. General Electric Co., a case in which veterans' claims for vacation pay for a year, most of which they had spent in military service, had been rejected. While the question at issue in Brown was not the same as in Siaskievicz, the court nevertheless failed to consider the difference between seniority as a measure of the length of vacation for which an employee is eligible and seniority as a factor on which receipt of vacation pay for a given year is based. The court limited the statutory meaning of "seniority" to its "conventional concept," and thus excluded vacations without regard for whether the purpose of escalated restoration of some employee benefits to returning veterans might encompass restoration of some fringe benefits as well.

In Cushnier v. Ford Motor Co. a district court took a different, but still rigid, approach to the operative terms of the reemployment rights statute. As in Brown, the veterans sought a second week of vacation for years after reemployment. The collective bargaining agreement awarded two weeks vacation to employees with five years seniority if they had also been on the "active rolls" at some time during each of the five years immediately preceding the year for which vacation was requested.

28. Id. at 572.
29. 166 F.2d 463 (2d Cir. 1948).
31. The conventional concept of seniority is that it consists of a relative position among all employees within a specified job group, determined by length of service with the employer, conferring upon those having such seniority certain priorities with respect to jobs, promotions, lay-offs and other such matters as provided by the contract between the employer and the union. 182 F.2d at 572 (emphasis added).
33. The similarity of the vacation provisions in Brown and Cushnier was probably not coincidental, but responsive to War Labor Board policy. See F. WISEBERT, FRINGE BENEFITS 29 (1959) (citing Ford Motor Co., 4 War Labor Reports 33 (1942)) [hereinafter cited as WISEBERT].
Although the veterans had accumulated five years seniority, they had been in military service for all of one or more of the preceding five years, and thus were unable to meet the second requirement for an extra week of vacation. The court reasoned that the contract provision had not been adopted to prejudice the reemployed veterans’ rights, but rather was intended as a bona fide work requirement on which award of the second week of vacation was based. Therefore, the court concluded, the second week of vacation was not purely a right of seniority but, under the collective bargaining agreement, was intended to compensate employees for work they had performed in prior years. Cushnier mirrored Brown in the sense that the court defined seniority without considering why Congress would require anything at all to be restored to the veteran. Instead, drawing on the Supreme Court’s language in Campbell, the court was satisfied to equate the statutory use of the word with its use in the collective bargaining agreement.\footnote{34}

The result in Mentzel v. Diamond\footnote{35} broke the hold that the conventional concept of seniority had on the statute. As in Brown and Cushnier, the collective bargaining agreement allowed for one week of vacation after one year of service, and two weeks after five years of service. Asserting that under the statute his years in the military should count toward the required five years, the veteran sought two weeks vacation for the first full calendar year of his reemployment. Since the agreement used the word “service,” thus not explicitly tying vacation to “seniority,” and since vacation was not generally regarded as a traditional element of seniority, most of the decisions from this era suggest that the veteran should have lost.\footnote{36} But the court ruled for the veteran, reasoning:

[W]hat the Act gives to the veteran is the right not to lose his position or seniority by virtue of his absence in military or naval service. He is protected, while away, to the same extent as if he had been either continuously on the job in the plant or away on furlough or leave of absence . . . .\footnote{37}

The application of this rule in Mentzel, the court said, was simple:

The veteran is to be treated, so far as benefits under the Act are concerned, as though he had worked every day at the

\footnote{34}{89 F. Supp. at 497 (quoting 337 U.S. at 526).}
\footnote{35}{167 F.2d 299 (3d Cir. 1948).}
\footnote{36}{But see Siaskiewicz v. General Elec. Co., 166 F.2d 463, 465 (2d Cir. 1948) (dictum) (vacation length distinguished from vacation pay).}
\footnote{37}{167 F.2d at 301. While merely a restatement of the Fishgold "escalator principle," see text accompanying note 17 supra, this excerpt marks the initial application of the principle to a fringe benefit.}
plant...[H]e is entitled to whatever vacation rights would have accrued to him had he not shouldered a gun and gone off to war. 38

Although the Mentzel court’s view of what must be fully restored to the veteran is much broader than that reflected in other decisions, it is equally ill-conceived. The opinion reads as though every benefit an employee would have received, including wages he would have earned, must be fully restored. 39 Like the other cases, Mentzel proceeds from a formula definition of seniority—a different prescription, but also one that fails to question why Congress would require full restoration of some benefits, but only nondiscriminatory restoration of others. 40

These cases, decided during the late 1940’s and early 1950’s, were attempts to mechanically fit all benefits into two discrete categories, which were distinguished, except in Mentzel, by traditional notions of seniority. A judicious construction of the statute, on the other hand, ought to reflect consideration of whether traditional perceptions of seniority are necessarily congruent with what Congress wanted to provide for those who left secure jobs, 41 irredeemably interrupting the solidification and growth of their economic status, to serve briefly and temporarily 42 in the armed forces.

38. Id.
40. In six other early cases, four circuit courts of appeals denied claims by veterans to vacation pay. The court in Dougherty v. General Motors Corp., 176 F.2d 561 (3d Cir. 1949), cert. denied, 338 U.S. 956 (1950), and MacLaughlin v. Union Switch & Signal Co., 166 F.2d 46 (3d Cir. 1948), did not specifically consider whether vacation pay could be considered an element of seniority under the statute. Its premise, however, that the courts should enforce nondiscriminatory contractual restrictions on vacation rights, implies that it thought of those rights as beyond the meaning of seniority. Accord, Seattle Star v. Randolph, 168 F.2d 274 (9th Cir. 1948) (severance pay). The unreasoned manner in which the court in Siaskiewicz v. General Elec. Co., 166 F.2d 463 (2d Cir. 1948), asserted that the right to vacation pay is not an element of seniority suggests that the court viewed the statutory meaning of seniority as limited to its traditional implications. Alvado v. General Motors Corp., 229 F.2d 408 (2d Cir.), cert. denied, 351 U.S. 983 (1956), reflects an absence of rationale for the same assertion, although the case does include citations to Siaskiewicz and Dwyer v. Crosby Co., 167 F.2d 567 (2d Cir. 1948). Finally, in Foster v. General Motors Corp., 191 F.2d 907 (7th Cir. 1951), cert. denied, 343 U.S. 906 (1952), the court simply quoted at length from prior decisions to sustain the “settled” conclusion that vacation pay need not be restored.
42. Id. § 2024(a).
III. RECOGNITION OF A BROADENED CONSTRUCTION OF SENIORITY: THE BORGES, ACCARDI, AND EAGAR WATERSHED

The supposition that the meaning of seniority in the statute may transcend both traditional usage and the terms of a collective bargaining agreement first appeared in *Borges v. Art Steel Co.* During the absence of the complaining veterans, their employer granted across-the-board wage increases to all employees who had accumulated a specified period of "consecutive working service." The collective bargaining agreement defined that condition as at least 1800 hours per year of actual service, which, under the rules and practices of the employer, employees on leave of absence or furlough could not satisfy. In ruling for the veterans, the court asserted that "the meaning of the word 'seniority' in the statute is not fixed by the local consensus of one union and one employer." The wage increases, reasoned the court, "became a regular part of the jobholder's pay or status, swelling his pay check every week he worked in the future."

To be sure, the benefit at issue in *Borges* did not differ significantly from promotion, which is customarily regarded as an element of seniority. Still, the case stands for the proposi-
tion that a collective bargaining agreement that provides for condi-
tional receipt of a benefit that is not necessarily a traditional ele-
ment of seniority may violate the statute even if the condition ap-
plies to veteran and nonveteran alike.

Seven years later, a district court seized on the slight, halt-
ing step taken in Borges and applied it to severance payments, a
benefit never before treated as one of the traditional elements of
seniority. In Accardi v. Pennsylvania Railroad veterans had
returned after World War II to their positions as firemen on
tugboats owned by the railroad. In 1960, the union and the
railroad agreed to abolish the position of tugboat fireman and
to have the railroad make a lump sum severance payment to
each fireman left without a job. The amount of the payment
was to be based on the number of years of “compensated service,”
which were defined as years in which the employee had worked
for the railroad on at least one day in each of seven months.
Thus, if at least six full months of any year had been spent in
the military or on any other form of leave of absence, it could not
be counted as a year of compensated service. Relying on Borges
and on what it perceived to be the general purpose of the statute,
the court held that the severance pay benefit was an attribute of
“seniority, status, [or] pay.” It failed, however, to explain
exactly how that authority established that severance pay was a
benefit that had to be fully restored.

The court of appeals reversed the judgment, distinguishing
Accardi from Borges on the ground that the wage increases
in Borges were not fringe benefits, but were related to pay or
status and therefore subject to the escalator clause even though
not conditioned entirely on seniority. By contrast, it concluded

46. Cases in which the traditional elements of seniority had been
enumerated include Siaskiewicz v. General Elec. Co., 166 F.2d 463, 465
(2d Cir. 1948); and Brown v. Watt Car & Wheel Co., 162 F.2d 570, 572
(6th Cir.), cert. denied, 340 U.S. 875 (1950). Cf. Seattle Star v. Ran-
dolph, 168 F.2d 274 (9th Cir. 1948) (traditional elements of seniority do
not include severance pay).

47. 229 F. Supp. 193 (S.D.N.Y. 1964), rev'd, 341 F.2d 72 (2d Cir.

48. Firemen with 20 years or more seniority could have elected to
remain with the railroad. Others were discharged involuntarily.

49. The court construed section 459(c) (1) narrowly, 229 F. Supp.
at 196, in response to the employer's second argument that the statute
did not apply because the agreement was conceived more than one
year after the veterans had been restored to their jobs. It addressed
that argument only after determining that the benefit at issue was an
attribute of “seniority, status, [or] pay.”

that severance pay was neither compensation for services rendered, nor a traditional element of seniority, nor as in Barges, related to pay or status. The court did not address the nature of the benefit in terms of why Congress would want to restore some benefits but not others. Rather than piercing the statutory language to discover the underlying policy considerations, it mechanically applied the words "seniority," "pay," and "other benefits" as if they inherently manifested legislative policy.

Reversing the court of appeals, the Supreme Court worked a major change in reemployment rights of veterans—a change attributable to the way in which lower courts, attempting to understand the statute, have seized on particular phrases of the Court's opinion. The Court rejected the mechanical approach to the statute that had prevailed among the lower courts and instead directed its inquiry to the policy that Congress sought to implement. It did not simply focus on the words of the statute, but began its analysis with the statement that Congress desired to provide as nearly as possible that persons called to serve their country in the armed forces should, upon returning to work in civilian life, resume their old employment without any loss because of their service to their country.

Recognizing that Congress chose the term "seniority" as the vehicle for such restoration, and that the lack of a statutory definition for the term meant that its definition must be divined primarily from private agreements, the Court nevertheless declared that such agreements may not ascribe to the term a definition inconsistent with the intent of Congress. Thus, the Court implied that there are benefits outside of the traditional meaning of seniority that must be fully restored even though they may not have been denominated as elements of seniority in the collective bargaining agreement.

With regard to the particular benefit in Accardi, the Court identified "the real nature of [the severance] payments [as] compensation for loss of jobs." Asserting that the loss of rights and benefits accompanying loss of a job is generally related to the seniority that an employee is obliged to forfeit, the Court concluded that the payments were most accurately characterized as compensation for lost seniority. Thus, by attempting to

52. Id. at 228.
53. Id. at 229.
54. Id. at 230.
respond to congressional concern, the Court exhibited a willingness to define seniority without specifically limiting the term to its traditional meaning.\(^5\)

The opinion included two unfortunate statements, however, which some lower courts have insisted on applying as formulae while ignoring the Court's analysis of the statute. First, the Court stated that Congress intended to preserve for veterans "the rights and benefits which would have automatically accrued to them had they remained in private employment."\(^5\) But nothing really accrues automatically. Even the most traditional elements of seniority are normally obtained by showing up for work day after day.\(^5\) Had the veterans done that, however, they also would have received, and with equal automaticity, all fringe benefits, to say nothing of regular wages. Thus, application of the "automatic accrual" test will result in awarding the veteran whatever he asks for, and those courts that have applied such a formula have always ruled for the veteran.\(^5\)

Second, the Court seems to have been reluctant to treat as "seniority" a benefit that is conditioned on work performed.\(^5\) Thus, in attempting to refute the railroad's argument that the payments were based not on seniority but on total service, the Court pointed out that the formula used to compute the payments might inadequately correlate the amount of a payment to the amount of time actually worked. The Court noted that under the formula an employee could be credited with a full year of service if he worked but one day in each of seven months—that is, seven carefully selected days per year. The possibility of such a "bizarre result," it reasoned, established that

\(^{55}\) Cf. cases cited in note 46 supra.

\(^{56}\) 383 U.S. at 229 (emphasis added). Cases in which this generalization has been applied as a formula include Hoffman v. Bethlehem Steel Corp., 477 F.2d 860 (3d Cir. 1973); Locaynia v. American Airlines, Inc., 457 F.2d 1253 (9th Cir.), cert. denied, 409 U.S. 982 (1972); Taylor v. Southern Pac. Co., 308 F. Supp. 606 (N.D. Calif. 1969); accord, Magma Copper Co. v. Eagar, 380 F.2d 318, 322 (9th Cir.) (dissenting opinion), reved per curiam, 389 U.S. 323 (1967).

\(^{57}\) To the extent that such benefits would accrue to employees on furlough or leave of absence, the statute requires restoration anyway. 38 U.S.C.A. § 2021(b) (1) (Supp. 1, Feb. 1975).

\(^{58}\) See, e.g., cases cited in note 56 supra and note 78 infra. In Connett v. Automatic Elec. Co., 323 F. Supp. 1373, 1377 (N.D. Ill. 1971), the court recognized that the logic of the "automatic accrual" test would require an employer to pay back wages to a returning veteran since they, too, would have accrued automatically but for induction. Accord, Foster v. Dravo Corp., 420 U.S. 92 (1975).

the payments were not for time actually worked. But wholly aside from the absence of suggestion that any employee had in fact received credit for a year in which he had worked only seven days,\(^6\) the Court did not merely conclude that whenever it is possible to conceive of such “bizarre results,” the benefit must be deemed one of seniority. Rather, its point was that “the real nature of these payments was compensation for loss of jobs.”\(^6\)

The “bizarre results” language of the opinion—unnecessary, since the Court’s reasoning can stand on its own—has led several lower courts astray\(^6\) and has contributed to the confusion and conflict among the circuits in succeeding years.\(^6\)

The Supreme Court’s next venture into the scope of statutory “seniority” did nothing to help the lower courts apply the statute, and much to inhibit consistency.\(^6\) In *Eagar v. Magma Copper Co.*\(^6\) the collective bargaining agreement imposed two conditions on qualification for vacation pay and two different conditions on eligibility for holiday pay. Vacation pay was available to an employee in any given year as of the anniversary of his first day with the company if during the preceding year he had worked at least 75 percent of all available shifts and had been employed by the company on his employment anniversary date. The agreement specifically disqualified any employee who left the company prior to his anniversary date for any reason other than layoff due to production cutbacks. An employee would receive holiday pay if he had been continuously on the payroll for the preceding three months and if he had worked the regularly scheduled shifts immediately preceding and following the holiday.

Eagar had worked for Magma from March 12, 1958 through March 6, 1959 when he left for the armed forces. He had worked at least 75 percent of the available shifts during that period, but


\(^6\) See text accompanying notes 79-83 infra.


\(^6\) *See Haggard, supra* note 2, at 572-76.

\(^6\) 389 U.S. 323 (1967), rev’d per curiam 380 F.2d 318 (9th Cir. 1966).
was not employed by Magma on March 12, 1959, his anniversary date. He returned to Magma on May 2, 1962 and worked the shifts before and after Memorial Day and Independence Day that year, but had not been on the payroll continuously for three months prior to those two holidays. The district court held that the company had violated the statute by refusing to award Eagar vacation pay for 1958-59 and by refusing to pay him for the two 1962 holidays.66

The court of appeals, deciding the case before the Supreme Court decided Accardi, reversed.67 First, posing the statutory distinction between “seniority” and “other benefits” and quoting from Borges, the court concluded that “other benefits” were simply “fringe benefits.”68 It then asserted that vacation pay was that type of benefit. On the related ground that the collective bargaining agreement conditioned receipt of vacation pay and holiday pay on additional factors, the court rejected the veteran’s argument that those benefits would have accrued from the “mere passage of time” had military service not intervened.69

On petition for rehearing, filed in light of the Accardi decision, the court of appeals, with one dissent, adhered to its position.70 In its brief, two paragraph opinion, the court distinguished Accardi on the ground that the benefit in that case was an element of seniority, not a fringe benefit. Thus, the court failed to address the broader issue with which it was confronted—whether Accardi required that some fringe benefits formerly regarded as “other benefits” be considered elements of “seniority” in order to effectively implement congressional policy. Accardi, after all, involved severance pay, commonly regarded as a fringe benefit rather than as a traditional element of seniority—a fact on which the Accardi court of appeals had relied in ruling against the veteran.71 Thus, the Eagar court simply assumed its answer and never explained how it decided whether to classify a particular benefit as “seniority” or “other.”72

66. The district court opinion is not reported.
67. Magma Copper Co. v. Eagar, 380 F.2d 318 (9th Cir. 1966).
68. Id. at 320-21.
69. Id. at 321.
70. Id.
72. Judge Madden’s dissent is also unsatisfying. He argued that Accardi mandated a ruling for the veterans because the benefits they sought would have automatically accrued to them had they not entered military service. This reasoning is premised on the belief that the veterans would have remained in Magma’s employ. But if that is true, then all benefits conferred by employer on employee would have auto-
The Supreme Court, reversing *Eagar* per curiam,\(^7\) did nothing to ease the task of applying the statute. It merely cited *Accardi* and made no attempt to explain how that case applied to the facts in *Eagar.*\(^4\)

Nevertheless, *Accardi* and *Eagar* at least support the proposition that the statutory definition of seniority is not limited to traditional implications of the term. More significantly, the two cases establish that labor unions and employers are no longer entirely free to draft collective bargaining agreements that preclude escalated restoration of benefits normally outside the scope of seniority. But as a result of the ambiguity in the *Eagar* opinion, the Supreme Court has left lower courts virtually free to define the scope of benefits that must be fully restored. Although *Accardi* could have been read to require consideration of the underlying objectives of Congress, the opinion contained rigid, formula-like language that diverted future decisionmaking from this necessary inquiry. Some lower courts thus have contrived yet another procrustean bed in place of the one discarded in *Accardi* and *Eagar*.

IV. CONFLICTING RESPONSES TO *ACCARDI* AND *EAGAR*

In response to the Supreme Court decisions in *Accardi* and *Eagar*, lower courts have split roughly into two major groups, although a third appears to be emerging. The courts in the first group seem to have read *Eagar* to require award of all fringe benefits that a veteran would have earned had he remained in civilian employment. This position usually has been based on the *Eagar* result and the “automatic accrual” language in *Accardi*. It has also followed, however, from a court's belief that “bizarre results,” akin to those postulated in *Accardi*, might occur under the terms of a particular collective bargaining agreement. Thus, the courts that have hypothesized a construction of the agreement that makes a sham of the work requirement on which a benefit is conditioned have concluded that the benefit therefore must derive from seniority rather than labor.

The courts in the second group generally have examined the particular collective bargaining agreement as a whole to determine whether its work requirement is real or fictional. Rather...
than attempting to imagine a construction that renders the requirement a sham, these courts have held a benefit not to derive from seniority if the agreement can be reasonably construed to condition receipt of the benefit on a bona fide work requirement.

The courts in the third, yet emerging, group have adopted a more sensible approach to reemployment rights. They proceed from an inquiry, as yet not clearly or carefully articulated as the basis for decision, into why Congress would mandate full restoration of a benefit in the first place.75

_Locynia v. American Airlines, Inc._76 represents the group of cases in which the Supreme Court opinions have been read to establish a test of “automatic accrual.” In _Locynia_ the veterans sought full vacation pay for the year of their return and the year following. The employer had made no such payment for the year of return and only partial payment for the year following under an agreement that provided 10 days of paid vacation during a given year unless an employee had been on leave of absence, as had these veterans, for more than 60 days during the prior year.77

The court of appeals reversed a judgment for the employer, but made little attempt to explain the meaning of the statute. It quoted language from _Accardi_ to the effect that seniority must not be given a narrow or technical meaning and that Congress intended to provide a veteran with all benefits that would have accrued to him automatically. The court construed the Supreme Court’s per curiam reversal of _Eagar_, a case from the same circuit, to mean that the right to vacation pay must always come within the statutory meaning of seniority. The majority of the court did not respond to the argument of the dissent that, unlike

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75. Courts in what is perhaps a fourth group have proceeded least sensibly by aimlessly relying in the same opinion on two or three of the other theories, apparently hoping they have adopted the proper approach. See, e.g., _Davis v. Alabama Power Co._, 383 F. Supp. 860 (E.D. Ala. 1974).

76. 457 F.2d 1253 (9th Cir.), _cert. denied_, 409 U.S. 982 (1972). Compare the same court’s opinion in _Austin v. Sears, Roebuck & Co._, 504 F.2d 1033 (9th Cir. 1974). The result in _Locynia_—“automatic accrual” applied to vacation benefits—was rejected in _Foster v. Dravo Corp._, 420 U.S. 92 (1975).

77. As of December 31 of each year, each employee with one to five years of continuous service became entitled to 10 days of paid vacation during the succeeding year, decreased by one day for each 30 days of leave he had taken in excess of 60. Employees with five or more years of service were entitled to longer vacations, subject to proportionally greater diminishment. All the plaintiffs had less than five years of service with the company. 457 F.2d at 1254 n.2, 1255 n.5.
the plaintiffs in Locaynia, the veteran in Eagar had fulfilled the substantive work requirement for vacation pay,\textsuperscript{78} and that cases subsequent to Eagar in which veterans’ claims for vacation benefits had been sustained all involved work requirements that had been satisfied.\textsuperscript{79} Neither did the majority attempt to define “automatic accrual,” nor limit the implications of that concept in any way.

In Hoffman v. Bethlehem Steel Corp.\textsuperscript{80} the court of appeals applied the “bizarre results” language of Accardi as the appropriate test of seniority, but without considering whether it lay at the heart of the Supreme Court’s decision in Accardi. Employees of Bethlehem earned one-half of a supplemental unemployment benefit (SUB) credit for each week in which they had “hours [of] work for the company.”\textsuperscript{81} SUB credits could be exchanged for cash in the event of layoff. Bethlehem had denied the veteran’s claim to SUB credits for the period of his military service. The court posed the traditional compartmentalization of “seniority” and “other benefits.” Categorization of SUB credits, it reasoned, depended on whether the credits accrued merely with the passage of time or whether some further act was required. Although the agreement required “hours work for the company” each

\textsuperscript{78} Although not suggested in the court’s opinion, it is possible to argue that the work requirement in Locaynia was a sham. So much of the contract as was printed in the opinion did not provide that laid-off employees would be denied vacation benefits. If substantial time on layoff status was a real possibility for employees governed by the contract, then the work requirement might be deemed fictional, but not in the theoretical, improbable sense suggested in Accardi. \textit{See} authorities cited in note 60 supra. The result in Austin v. Sears, Roebuck & Co., 504 F.2d 1033 (9th Cir. 1974), may lend support to this reading of Locaynia. The author expresses his gratitude to William Noble, a student at Columbia University School of Law, for this perceptive analysis.


\textsuperscript{80} 477 F.2d 860 (3d Cir. 1973).

\textsuperscript{81} \textit{Id.} at 861. Employees earned one-half of a SUB credit per week even without “hours [of] work for the company” if they had hours of earned vacation, jury duty, union office responsibility, or certain kinds of disability during the week. \textit{Id.} The Hoffman court did not purport to base its decision on these exceptions. \textit{Id.} at 863–64. \textit{But} see Foster v. Dravo Corp., 490 F.2d 55, 59 (3d Cir. 1973), aff’d, 420 U.S. 92 (1975).
week, apparently a condition other than mere passage of time, the court asserted that as in Accardi, such a requirement might produce "bizarre results": "[I]n Bethlehem's plan no distinction is made between an employee who works 1 hour during the week and one who works 40 hours during the week."82 On this basis, the court held that the SUB plan was an element of seniority.53

In applying the "bizarre results" language as the test for seniority, the Hoffman court failed to adequately consider the Supreme Court's emphasis on the "real nature" of a benefit. It also did not consider whether Bethlehem, in fact, would retain an employee who reported for work for but one hour each week. Thus, the court apparently did not care that the perceived bizarre result might never occur.84 The Hoffman opinion is an attempt to fit every case into an easily articulated and applied formula, an approach unsatisfactory for failing to consider congressional purpose and for ignoring the probable meaning of the collective bargaining agreement.

Rejection of the Hoffman assumption that provisions in a collective bargaining agreement can be construed without reference to the probable intent of the parties characterizes the second and largest group of cases decided after Accardi and Eagar. Courts in this group have sought to determine and base their decisions on the most reasonable application of the contractual provisions that condition receipt of particular benefits. In Foster v. Dravo Corp.,85 for example, the agreement stipulated that an employee must receive earnings from the company in at least 25 weeks of a calendar year to qualify for a full paid vacation. The veteran had been inducted after only nine weeks of earnings and resumed his employment only 13 weeks before the end of the following year. Against the veteran's claim to full vacation pay for both years, the court of appeals upheld a judgment for the employer. Since an employee would have received earnings in a week even if he had worked only one hour and thus would have qualified for full

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82. 477 F.2d at 863.
84. Admittedly, the Supreme Court in Accardi did not ask such a question either. It did ask, however, what the real nature of the benefit was. The unfortunate "bizarre results" language was not the Court's test for seniority, but rather was an illustration that the real nature of the severance payments was compensation for loss of employment rights accumulated over time. See notes 60-63 supra and accompanying text.
vacation pay under the literal terms of the agreement, the court acknowledged that the contract would have supported a "bizarre result" finding. It refused, however, to base its decision on an application of contractual language not likely intended by the parties. The court's belief that the parties understood that something approximating a customary workweek was required for a given week to count as one of the 25, and that the contract would be so construed in an arbitration proceeding, formed the rationale for its decision.\textsuperscript{86}

Some courts have adopted a third approach to the statute by focusing on the Supreme Court's concern in Accardi for the "real nature" of employment benefits. These courts have attempted to determine the "real nature" of the particular benefit and whether that nature partakes of seniority. This approach seems to have been first adopted, although not explicitly, in Connett v. Automatic Electric Co.\textsuperscript{87} The collective bargaining agreement in that case provided for paid vacation in a given year for all employees who had one or more years of seniority and who were on the payroll as of December 31 of the preceding year. Three veterans, each of whom had accumulated more than a year of seniority before entering military service, asserted that vacation benefits had accrued during their temporary absence. The employer agreed that for purposes of computing the length of vacation to which an employee would be entitled, a year in the military would count as a year with the company. Basing his decision on the failure of the veterans to comply with the December 31 payroll requirement, however, the employer denied vacation pay for the years spent in the military.

The district court granted the employer's motion for summary judgment on the ground that the veterans had not earned


\textsuperscript{87} 323 F. Supp. 1373 (N.D. Ill. 1971).
vacation pay for the years involved. Although the unfulfilled contractual requirement in *Connett* was identical to the one in *Eagar*, the *Connett* court nevertheless distinguished *Eagar* on the ground that the veteran there had earned a paid vacation because he had worked for nearly the full year. The crucial difference in *Connett* was that the absence of the veterans on December 31 reflected their absence from work all year as well, and hence their failure to earn the claimed benefit.

The theoretical basis of the decision, however, appears in the court's response to the veterans' argument that under the collective bargaining agreement, paid vacation was consideration for merely remaining on the payroll as of December 31, and not for work performed. Although the employer replied that the December 31 requirement was also a minimum work requirement, the court took a different view:

This type of semantic simplicity by both plaintiffs and defendants is dangerous and premised upon an erroneous assumption. Certainly, the intent of Congress cannot be determined on the basis of the language utilized by or the intrinsic guiding intent of negotiation in collective bargaining sessions . . . . Until the Supreme Court or our Court of Appeals informs us to the contrary, we cannot believe that Congress intended returning veterans to receive vacation pay for periods of time in which they did not work a single day, and for which periods they likewise failed to meet the contractual standard of eligibility.8

The court thus rejected the argument that veterans should receive whatever would have accrued automatically, because such a view would have effectively eliminated the "other benefits" clause from the statute by requiring, in addition to other considerations, payment of regular wages.

The *Connett* opinion represents an important step in the direction of proper construction of the statute. Its emphasis on the intent of Congress is refreshing, as is its focus on the nature of the benefit. The court failed to explain, however, why it concluded that Congress did not intend the returning veterans to receive vacation pay. Nor did it offer reasons to support its conclusion that the very nature of vacation pay is such that it rightfully cannot be considered an element of the seniority Congress intended to preserve. But unlike most of its predecessors, *Connett* at least invites such inquiries.

Several courts have recently offered responses to these unanswered questions. In *Palmarozzo v. Coca-Cola Bottling*

88. *Id.* at 1379.
Co. the veteran had served in the military for a six-month period sandwiched between four and a half years of work for his employer. The collective bargaining agreement provided that an employee would become eligible to receive severance pay once he had accumulated five “service credits.” One-fourth of a credit was earned for each 400 hours of regular working time; one credit thus represented roughly a year of work. Since the veteran had accumulated only four and one-half credits during his actual time on the job, his eligibility for severance pay depended on whether the statute required credit for the half year spent in the military. The court of appeals held that the service credits came within the statutory meaning of seniority. While rejecting a bona fide work requirement analysis, the majority of the court embraced neither the sweeping “automatic accrual” test of seniority adopted in Locaynia nor the Hoffman “bizarre results” test. Rather, it relied on Accardi for the proposition that

the “real nature” of severance benefits which accrue with years of service was not compensation no matter how the benefits were calculated, but rather was payment for loss of seniority rights acquired over years of employment.

The court pointed out that a test based on a work requirement could undermine the purpose of the statute, since a collective bargaining agreement might condition receipt of any benefit, even one customarily recognized as an element of seniority, on work performed.

Palmarozzo was the first post-Accardi decision based on an examination of the “real nature” of the benefit at issue. Thus, instead of focusing on whether a work requirement was prescribed in the collective bargaining agreement, the court considered the role of a particular benefit in an employee’s career. The opinion might be analytically vulnerable since it is based on the assumption that Congress intended full restoration of some benefits regardless of the provisions in a particular collective bargaining agreement. That premise, however, had been accepted earlier, at least with regard to the traditional elements of sen-

90. Dissenting, 490 F.2d at 593, Judge Friendly relied on the theory that since the collective bargaining agreement tied the benefit closely to work actually performed, it could not come within the statutory meaning of seniority.
91. 490 F.2d at 589.
92. This appears to be Judge Friendly’s interpretation of the “real nature” language in Accardi. Accord, Litwicki v. Pittsburgh Plate Glass Indus., Inc., 505 F.2d 189 (3d Cir. 1974).
iority,\textsuperscript{93} and in the light of Accardi, might merit broader application.\textsuperscript{94} Regardless, the seminal importance of Palmarozzo is clear. It is the first case in which a decision was firmly grounded on analysis of the generic type of benefit involved, irrespective of the form in which that benefit had been cast under the collective bargaining agreement.\textsuperscript{95}

The Palmarozzo style of inquiry has been applied with interesting results elsewhere. In Litwicki \textit{v. Pittsburgh Plate Glass Industries, Inc.}\textsuperscript{96} the collective bargaining agreement provided that an employee's pension rights would vest on accumulation of at least 10 years of "continuous service." The actual amount of the pension was computed on the basis of the total years of continuous service. Employees earned credit for continuous service in units of twelfths of a year, one for each 125 hours worked. In addition, the agreement required the company to credit time spent in the military, but only during war or pursuant to conscription. The veteran had earned seven and ten-twelfths credits on the job and one credit for wartime military service. He could qualify for a pension only if he received credit for the two and ten-twelfths years he had spent voluntarily in peacetime military service.\textsuperscript{97} The district court ruled for the veteran, peering into an "academic crystal ball"\textsuperscript{98} to distinguish between vesting the employee with pension rights and awarding a pension of a particular amount:

\begin{quote}
We believe that the primary purpose of the retirement benefit is to promote personnel stability by giving the employee an incentive to remain with the company. . . . Thus the vesting of pension rights is dependent upon the length of the relationship rather than the amount of actual work performed. On the other hand the amount of the benefits is properly dependent on the actual work performed as measured by monthly earnings.\textsuperscript{99}
\end{quote}

Litwicki thus stands for the proposition that vesting of

\textsuperscript{93} See cases cited in note 22 supra.

\textsuperscript{94} In Accardi, the Supreme Court did not have to address the issue because there the agreement arguably did not substantially correlate credit for a year with a year of work. In Palmarozzo, such correlation did exist.


\textsuperscript{97} Since the veteran had enlisted, he could not rely on the contract provision that accorded credit for military service pursuant to conscription.

\textsuperscript{98} 386 F. Supp. at 303 (citing \textit{The Supreme Court, 1965 Term}, 80 HARV. L. REV. 91, 148 (1966)).

\textsuperscript{99} Id. at 305.
pension rights is within the statutory meaning of seniority but
that awarding a pension of a particular amount is not. The court,
however, failed to explain why the concept that motivated its
decision as to vesting was not equally applicable to resolving the
amount of the award. Consequently, the opinion is far from a
satisfying answer to the broad question of what Congress in-
tended to include as elements of seniority. Nevertheless, the
court’s treatment of vesting reflects the Palmarozzo concept
that the scope of the statute depends on the role of the benefit
in the broad context of labor-management relations, even if a
collective bargaining agreement ties the benefit to hours of
work.100

Smith v. Industrial Employers & Distributors Associa-
tion101 also evidences sensitivity to the “real nature” line of
inquiry, but a less than full understanding of the concept. The
collective bargaining agreement ties the benefit to hours of
each year on 1730 hours of work during the year. Although
the veteran’s pension rights had vested, the amount of his
monthly check would have been greater if he were credited for
the time he had spent in the military. The district court cited
Accardi and Palmarozzo for the proposition that an employer’s
attempt to define pension rights in terms of hours of work must
fail if the “real nature” of the benefit at issue renders it an ele-
ment of seniority. The amount of the pension award was thus
held to be an element of seniority since, similar to the severance
pay benefits in Accardi, it essentially was compensation for “loss”
of job and concomitant seniority rights. The court asserted,
although without explanation, that such compensation should be
based entirely on years of service.

Notwithstanding this otherwise sensible application of
Accardi and Palmarozzo, the Smith court gratuitously added that
the contract requirement of 1730 hours of work per year, an
average of 33 hours every week, was not a true work require-
ment. Because an employee who worked more than 1730 hours
would receive no more credit than one who worked just 1730
hours, the court reasoned that the requirement was but another

100. The court of appeals construed the agreement to allow vesting
credit for all time spent in the military. 505 F.2d at 193. Thus,
although it rejected the district court’s approach to the definition of
seniority, id. at 193, it affirmed the judgment. The district court had
suggested the construction of the contract on which the court of appeals
based its affirmance, however, 386 F. Supp. at 304, but seems not to
have relied on it.

101. 75 CCH Lab. Cas. ¶ 10,480 (N.D. Calif. 1974).
way of marking time. But 33 hours of work per week is a substantial requirement, and it is hard to characterize a benefit conditioned on such a requirement as one that is unearned.\textsuperscript{102} Hence, \textit{Smith} was wrongly decided if the court believed that a particular benefit could be considered an element of seniority only in the absence of a true work requirement.\textsuperscript{103} The court should have asserted that the "real nature" of the benefit governed, regardless of any true work requirement.\textsuperscript{104}

The decision of the court of appeals in \textit{Foster v. Dravo Corp.},\textsuperscript{105} although turning on the question whether the vacation benefit at issue was contingent on a bona fide work requirement, also reflects a certain responsiveness to the "real nature" type of analysis. And while the court did not adopt this approach, one of the judges seems to have recognized its significance.\textsuperscript{106} In \textit{Foster} the veteran claimed vacation pay for years in which military service had prevented him from satisfying the contractual provision on which the benefit was conditioned. The court of appeals recognized two types of benefits that a person derives from employment. One type, the court reasoned, is long term in nature, such as the job security that comes from the knowledge that the longer a person remains with his employer, the more likely it is that through operation of a seniority system he will continue to have the opportunity to earn a living. The second, short term in nature, includes benefits such as the daily wages a worker earns for his labor. Suggesting that statutory seniority could be defined to include only benefits of a long-term nature, the court observed that the right to paid vacation in a given year "is normally and reasonably considered part of a worker's current or short term" benefits, but did not rest its decision on that observation.\textsuperscript{107}

The Supreme Court reentered the dispute over proper application of the escalator clause when it elected to review the \textit{Foster} decision.\textsuperscript{108} Adopting a rationale similar to the major theory of the court of appeals, a unanimous Court\textsuperscript{109} held that the escalator clause would not entitle a veteran to vacation pay

\textsuperscript{102} Cf. \textit{Foster v. Dravo Corp.}, 420 U.S. 92, 94 (1975).
\textsuperscript{103} Id.
\textsuperscript{104} See text accompanying notes 85-86 \textit{supra}.
\textsuperscript{105} 490 F.2d 55 (3d Cir. 1973), aff'd, 420 U.S. 92 (1975).
\textsuperscript{106} 490 F.2d at 64 (Hastie, J., concurring).
\textsuperscript{107} 490 F.2d at 63.
\textsuperscript{109} Justice Douglas did not participate.
if the collective bargaining agreement reasonably related the benefit to a bona fide work requirement. Although the Court referred to vacation pay as a short-term benefit, it did not develop that concept to reach its decision. Rather, it affirmed the judgment of the court of appeals that the work requirement in the Foster agreement was sufficiently related to the benefit to render the escalator clause inapplicable.

Thus, the Supreme Court resolved the conflict among the "automatic accrual,"110 "bizarre results,"111 and "bona fide work requirement"112 interpretations of Accardi and Eagar in settling the applicability of the escalator clause at least to vacation pay.113 The Court authorized denial of vacation pay to a veteran for a year in which he failed to meet a work requirement, provided that the requirement could be reasonably construed to establish that the parties intended that employees would earn the benefit. The Court tacitly acknowledged that the escalator clause would apply to computation of vacation length in the years following reemployment.114

By failing, however, to develop and explore the long-term/short-term distinction suggested by the court of appeals, the Supreme Court has provided less guidance than it might have to lower courts that must construe the statute in other contexts. Indeed, in light of the "real nature" language in Accardi, the Court's acceptance of a bona fide work requirement as the crucial determinant of statutory effect may produce further confusion and conflict in the lower courts when the escalator clause bears

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110. See cases cited in note 79 supra.
111. See, e.g., Hoffman v. Bethlehem Steel Corp., 477 F.2d 860 (3d Cir. 1973); cf. Akers v. General Motors Corp., 501 F.2d 1042, 1046 (7th Cir. 1974).
112. See cases cited in note 86 supra.
113. 420 U.S. at 101 n.9.
114. Id. The decision, however, seems already to have been misread by at least one court of appeals. In Jackson v. Beech Aircraft Corp., 517 F.2d 1322 (10th Cir. 1975), the court erroneously construed the statutory meaning of seniority by failing to recognize the difference between vacation pay for a year in which the veteran did not fulfill a bona fide work requirement and vacation length in the year following his reemployment. The collective bargaining agreement conditioned the latter on the amount of "work time" that an employee had served and provided that accumulation of "work time" would be interrupted by all leaves of absence, including those for military service, in excess of 30 days. The court read Foster for the proposition that the statute precluded escalated restoration of any benefit conditioned on a bona fide work requirement. Id. at 1326. Such a reading seems inconsistent with footnote 9 of Foster and, at the least, is an unwarranted and indefensible extension of the principles enunciated in the case.
on other benefits. Additionally, its statement that the question before it was limited to vacation benefits, along with its assiduous avoidance of references to fringe benefits generally, suggest that the Court may not have intended to formulate a rule of universal applicability. Furthermore, it declined to review a severance pay case brought before it in the same term, letting stand a result inconsistent with the bona fide work requirement approach. Thus, even though consideration of the intended effect of a bona fide work requirement may have produced an acceptable result in Foster, the Supreme Court's failure to announce a broader principle of construction suggests the need for a fresh approach to determining the proper scope of the escalator clause.

V. DEFINITION OF "SENIORITY" AND "OTHER BENEFITS" IN LIGHT OF CONGRESSIONAL POLICY

The state of the law regarding the proper definition of seniority under the statutory reemployment rights provisions is unsettled and unsatisfying. Yet, one may expect a goodly number of cases requiring application of such a definition to appear on federal court dockets for some time. Although conscription has ended, enlistment has not. And in any event,

115. In both Palmarozzo v. Coca-Cola Bottling Co., 490 F.2d 586 (2d Cir. 1973), cert. denied, 417 U.S. 955 (1974), and Smith v. Industrial Employers & Dist. Ass'n, 75 CCH Lab. Cas. ¶ 10,480 (N.D. Calif. 1974), the courts ruled for the veterans by adhering to Accardi and examining the "real nature" of the benefits at issue. Yet it is clear that despite the attempts by those two courts to discount the significance of the relevant work requirements, 490 F.2d at 591 n.4, 75 CCH Lab. Cas. at 17,665, the "loosely correlated work requirement" test advanced in Foster, if applicable to the benefits at issue in Palmarozzo and Smith, would make both those cases wrongly decided. Furthermore, the Supreme Court's denial of certiorari in Palmarozzo, the case in which Judge Friendly offered his spirited "work requirement test" dissent, and its nearly simultaneous decision to review Foster can only produce additional confusion and uncertainty for lower courts.


117. In Foster v. Dravo Corp., 420 U.S. 92, 93-94 (1975), the Supreme Court decided that the statute does not "[entitle] a veteran to vacation benefits when, because of his departure for military service, he has failed to satisfy a substantial work requirement upon which the vacation benefits are conditioned." It failed, however, to define the range of benefits to which an unfulfilled work requirement may be a bar, and to decide whether vacation benefits not expressly conditioned on a work requirement must be provided to the returning veterans. Cf. Connett v. Automatic Elec. Co., 323 F. Supp. 1373 (N.D. Ill. 1971).
returned veterans of earlier days will likely expand the class
of potential plaintiffs as they approach retirement age. 118

Few, if any, of the courts that have contributed to the present
confusion even considered why a presumptively rational Con-
gress would have mandated escalated restoration of some ben-
efits of employment but not of others. Perhaps such a focus will
direct analysis of the problem to channels not yet adequately
explored and thus lead to a construction of the statute based
on the policy Congress intended to implement.

As other commentators have concluded, 119 the legislative
history sheds little light on what Congress expected the reemp-
loyment rights provisions to accomplish, beyond the gen-
eral goal of “preserv[ing] certain benefits . . . such as seniority
rights and insurance benefits.” 120 The committee reports 121 do
not help to discern the intended scope of the original grant of
reemployment rights contained in the Selective Training and
Service Act of 1940. 122 Some floor remarks, however, suggest
a narrow scope under which an employer would have been
required to restore to the employee only rights and benefits that
had been accumulated up to the date he left civilian employ-
ment. 123 But whatever Congress intended in 1940, its 1948
codification 124 of the “escalator principle,” first enunciated by
the Supreme Court in Fishgold v. Sullivan Drydock & Repair
Co., 125 must guide the present search for the appropriate con-
struction of the statutory provisions.

In Fishgold, the Court stated that the reemployment rights
provisions of the 1940 Act


118. See, e.g., Litwicki v. Pittsburgh Plate Glass Indus., Inc., 386 F.
    Supp. 296 (W.D. Pa.), aff'd on other grounds, 505 F.2d 189 (3d Cir.
    1974).
119. See generally Haggard, supra note 2, at 540-41.
120. S. Rpt. No. 1268, 80th Cong., 2d Sess. 16 (1948). The legislative
    history of the Vietnam Era Veterans' Readjustment Assistance Act of
    1974 is equally unenlightening.
123. See 86 Cong. Rec. 10,095 (1940) (remarks of Senator Sheppard);
    id. at 10,107 (response of Senator Sheppard to question of Senator Don-
    ahue); id. at 10,572 (remarks of Senator Thomas).
125. 328 U.S. 275 (1946) (dictum). For explication of the case see
    note 16 supra.
The report of the Senate Committee accompanying the Selective Service Act of 1948 explained the "escalator clause," as a change in existing law. Unlike the 1940 Act, the new Act contained an expression of congressional intent that restoration to employment should be in such a manner as to accord the veteran the status he would have enjoyed had he remained continuously in his civilian employment during the time of service in the armed forces. Consistent with that intent, the Supreme Court has uniformly construed the escalator clause as a codification of Fishgold. There is little beyond these factors to guide an attempted statement of the benefits to which Congress envisioned the escalator clause to apply. Nevertheless, if the perception of congressional intent expressed in Fishgold and the subsequent statement of congressional intent found in the 1948 Act are considered together with the precise nature of the employment relationship, an explanation can be derived as to why Congress would want to treat a veteran as though he had remained in civilian employment for some purposes, but not for others.

The briefly stated distinction of the court of appeals in Foster v. Dravo Corp. between an employee's short-term and long-term interests in a job is an essential element of this explanation. On the one hand, a job furnishes an employee a day-to-day means of living. The periodic wages received are a means to pay the rent, put food on the table, clothe the body, and meet other immediate expenses. In addition, a collective bargaining agreement may ensure receipt of income during periods of illness or layoff, periodic days of rest in the form of holidays and paid vacations, and perhaps other advantages with the common characteristic that they are provided periodically during the term of employment and are generally consumed quickly. These...
incidents comprise the short-term benefits a person derives from his employment.

Under a seniority system, a job frequently provides certain long-term benefits. A present job is an employee's security for the future as well as his means of livelihood today. Although he will still have to work for a paycheck 10 or 20 years hence, an employee's current work often is a means of "earning" the knowledge that his employer will provide him the opportunity to earn short-term benefits in the future. In addition, he may expect his short-term returns to be increased periodically. Thus, the fact that an hour of labor today may enable an employee to receive a higher wage for an hour of labor 10 years hence is a long-term benefit of his current work. Not all such benefits will be tied to the seniority provisions in a collective bargaining agreement, however, since in many respects such benefits are but a product of daily work.\footnote{132. Suggestions that the long-term nature of a benefit is related to the applicability of the escalator clause appear in Foster v. Dravo Corp., 490 F.2d 55, 62 (3d Cir. 1973), aff'd, 420 U.S. 92 (1975), and Borges v. Art Steel Co., 246 F.2d 735, 738-39 (2d Cir. 1957). See also The Supreme Court, 1965 Term, 80 Harv. L. Rev. 91, 149 (1966). In Foster, both the Supreme Court and the court of appeals hint at a similar standard for short-term benefits. 420 U.S. at 100; 490 F.2d at 63. Judge Hastie, in his concurrence, 490 F.2d at 64, may be suggesting the same considerations.}

When the Government conscripts a worker or accepts him as a volunteer for military service, it necessarily interrupts his former employment. Such service prevents him from earning both short-term and long-term benefits from his regular employer. The military can, however, and to a large extent does, provide a serviceman with the short-term benefits formerly realized from his civilian employer. It pays him, feeds him, clothes him, and provides him some sort of vacation.\footnote{133. See, e.g., Foster v. Dravo Corp., 490 F.2d 55, 56 (3d Cir. 1973), aff'd, 420 U.S. 92 (1975); Austin v. Sears, Roebuck & Co., 504 F.2d 1038, 1039 (9th Cir. 1974).} The military perhaps does not perform these functions as well as a civilian employer, but it does perform them and could easily implement a decision to upgrade its level of performance by, for example, raising pay or increasing annual leave. For its short-term members, however, the military does not satisfy long-term job interests\footnote{134. This factor explains why statutory reemployment rights are available only to veterans who have served a limited number of years in the military. 38 U.S.C.A. \S~2024 (Supp. 1, Feb. 1975). See text accompanying notes 141-42 infra.} and, even if it chose to do so, could not satisfy
most such interests as well as private employers. The essence of Fishgold and the escalator clause is recognition of the unfairness of removing a person from his job, interfering with both his short- and long-term interests, satisfying the former, but doing nothing about the loss of the latter. The statute therefore should be construed to require the veteran's employer to provide long-term benefits as if the veteran had earned them, even though a collective bargaining agreement may have conditioned their receipt on time actually worked.

Such a construction of the statute would unify many previous attempts to determine the intent of Congress. It responds to the statement in Fishgold that the veteran should not "lose ground" \(^{135}\) by reason of his absence from civilian employment. The notion of losing ground points to long-term benefits. A loss of short-term benefits—a vacation in a particular year, for example—does not comport with the "loss of ground" image. Rather, the metaphor suggests that workers, especially younger ones customarily subject to military service, are engaged in building something for the future.\(^{136}\) The "race" in which ground is lost is the attempt to establish a secure future. This secure future is precisely what is meant by long-term benefits.

The long-term/short-term distinction also addresses the concern expressed in the Senate report accompanying the 1948 codification of the escalator principle.\(^{137}\) The statutory phrase, "status in employment," seems to connote something other than seniority as traditionally defined.\(^{138}\) It suggests, rather, something of permanent value or long duration. A worker's employment status probably would not be affected by denial of credit for sick days, but would be reduced by failure to qualify for pension benefits as quickly as other employees.\(^{139}\) The latter is a long-term benefit because although a person works toward it

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135. 328 U.S. at 285.
138. The terms "seniority" and "status" are used in 38 U.S.C.A. § 2021(a) (Supp. 1, 1975). The phrase "status in his employment" is used in the "escalator clause," section 2021(b)(1), although in Fishgold, from which the clause was derived, the word "seniority" was used. Had Congress intended to limit the escalator clause to elements within the traditional definition of seniority, the phrase "seniority in his employment" would have been a more likely choice.
daily, it is enhanced over the years and not realized until a sub-
stantial amount of time has passed.

The suggested framework also implements the guidance in
Accardi to focus on the "real nature" of a benefit.\textsuperscript{140} Sever-
ance pay is a long-term benefit because, as the Supreme Court
there held, it is compensation for forfeiture of a secure job, a
right which the employee has built up over many years.

Furthermore, that the statute applies only to persons in the
service for a short time\textsuperscript{141} supports the advocated construction.
Congress has withheld reemployment rights from persons who
remain in the service so long that it can be inferred that they
have selected military service as a career. For those who choose
a military career, the United States Government should be re-
sponsible for providing long-term benefits. And even if a person
chooses eventually to leave the service, there comes a time when
he ought to be regarded as having chosen to forego the long-
term benefits he had been accumulating during civilian employ-
ment. Such a person voluntarily sacrifices those benefits and is
not deprived of them on account of a military commitment.\textsuperscript{142}

Most importantly, this analysis yields a construction of the
statute that embodies rights responsive to the problem created
when the Government deprives persons temporarily in military
service of working time they could have used to build future
security. The statutory remedy ought to be directed at preclud-
ing, or at least mitigating, that loss. Unlike the approaches that
the courts thus far have formulated, the long-term/short-term
mode of analysis focuses on the precise problem.

\textsuperscript{140} The phrase "real nature of a benefit" admits of more than one
meaning. To ask merely whether a particular benefit is "really" a
vacation or "really" a pension does not appreciably further the inquiry.
And although it has been suggested as the proper inquiry, e.g., Foster v.
Dravo Corp., 420 U.S. 92 (1975); Haggard, supra note 2, at 576-80; to
ask no more than whether a particular benefit is "really" earned is of
little assistance. All benefits, including those within the traditional
meaning of seniority, are earned in the sense that to receive them an
employee generally must show up for work with some regularity. As
used here, the phrase is intended to characterize the role of a par-
ticular benefit in a worker's employment objectives. See text accom-
panying notes 89-94 supra.


\textsuperscript{142} See Smith v. Missouri Pac. Transp. Co., 313 F.2d 676, 681-83
(8th Cir. 1963). The grant of reemployment rights to short-term
enlistees is not inconsistent with such a view. Although enlistees have
voluntarily allowed interference in their effort to build long-term
benefits, the notion abounds that citizens have an "obligation" to their
country that may be discharged by serving briefly in the military.
A variety of examples will serve to illustrate possible applications of the long-term/short-term approach. The suggested analysis will not lead to the mechanical derivation of results produced by the tests that the courts previously have applied. Rather, it will attempt to resolve specific cases by considering their relationship to the need that spawned the legislation.

Award of vacation pay in a given year should be classed as a short-term benefit, for it is transitory, short-lived, and quickly expended. This would be true whether or not the collective bargaining agreement contained an explicit or implicit work requirement. Courts should not search for bizarre results, real or imagined, for purposes of restoring seniority or status. Such a result seems sensible, since the military surely can, and in fact does, provide its members with paid leave. Thus, to grant a returning veteran vacation pay from his employer for time spent in the service would result in a double vacation benefit to such persons. But that unacceptable outcome is simply a reflection of the short-term nature of the benefit, for it is that nature which explains the ability of the military to provide the benefit.

On the other hand, the length of vacation for which an employee may be eligible in years following his return must be considered a long-term benefit. Customarily, vacation length increases with years of employment. This benefit is not realized and expended quickly, but affects an employee's life every year. It is part of the ever present "ground" an employee may lose due to absence from work for a period of time. If two employees begin work on the same date and one subsequently enters military service, failure to count his years in the service toward increased vacation length in later years will leave him always

143. Of course, if under the terms of a collective bargaining agreement such pay was awarded to employees on furlough or leave of absence, the veteran also should receive the award, although not as a restoration of seniority or status. The same result would obtain, and for the same reason, if employees not formally on leave of absence or furlough in fact received vacation pay without working for it. The burden to make such a showing, however, would be on the veteran and the focus of the inquiry would be the practice at the place of employment, not the language of the agreement. Cf. Haggard, supra note 2, at 576-77, 582.

144. See cases cited in note 133 supra. Vacation pay for a prior year, most of which was spent in civilian employment, may raise different considerations, however. In such circumstances, deprivation, rather than duplication, of vacation pay would be at issue, if the military denied a paid vacation to its new member.
worse off—"behind"—the other. This is precisely the type of situation that the statute was designed to correct.145

Pension plan benefits admit of somewhat more complex considerations under the suggested approach. On initial consideration, pension rights seem to come within the notion of long-term benefits. Certainly an employee works for them daily and does not realize them until a considerable number of years have passed. Some questions, however, are raised by the dual nature of many pension plans and by the existence of statutory retirement benefits for veterans.146

It is not uncommon for pension plans to separate an employee's eligibility for benefits from the amount of his monthly pension check. For example, in Litwicki v. Pittsburgh Plate Glass Industries, Inc.147 an employee qualified for payments on accumulation of ten years of credit. The amount of his check, however, was computed in proportion to the total years of work credited. Viewing the opportunity to receive some amount of regular income after retirement as a future reward for current labor, the court there concluded that the eligibility—or vesting—component of a pension plan ought to be regarded as an element of seniority. As with eligibility for longer vacations, failure to credit a veteran's service time toward pension qualification would result in "loss of ground" in his attempt to build security for the future.

Under a "work requirement" approach, the amount of a

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146. It might be argued that Congress has specifically provided for direct benefits to veterans, some of them of the long-term variety, and specifically, some forms of pension. Broadly viewed, this argument is a challenge to the foundation of the statutory construction advocated, because it suggests that Congress can provide, and has to some extent provided, such benefits independently of the veteran's former employer. The difficulty with this reasoning is that it seems fairly clear that Congress could not provide an equitable, independent means of restoring to the veteran the traditional elements of seniority. The variety of private pension plans makes doubtful the ability of Congress to duplicate for each veteran the pension benefits he would receive privately. The conditions for qualification and the methods of computing the amounts to be paid may vary significantly from plan to plan. Thus, the effect of one veteran's service time on his private pension rights may be wholly different from the effect of another's. The pension benefits that Congress has in fact provided clearly are not intended as replacements for those which might have been earned from private employment, since they are generally available only to war veterans and the disabled. 38 U.S.C. § 101 et seq. (1970). See id. §§ 502, 521(a). They are not general retirement pensions.

pension would almost always be computed without credit for time spent in military service, since most plans condition employer contributions to the pension fund on hours worked by each employee.\textsuperscript{148} The suggested analysis, however, probably would result in crediting such years. Notwithstanding a bona fide work requirement, the amount of a pension check is nonetheless a long-term benefit. Failure to credit the veteran for service years will damage him irrevocably vis-à-vis his fellow employees who did not serve in the military. The underlying premise of the long-term/short term approach is that Congress intended to preclude all such damage that might result from an interruption of employment due to brief military service.\textsuperscript{149}

Another benefit that has given rise to litigation under the statutory reemployment provisions is supplemental unemployment benefits (SUBs).\textsuperscript{150} SUBs are designed to furnish financial relief in periods of temporary layoff in addition to that provided under state unemployment compensation laws. SUB plans generally provide that an employer must grant his employees SUB credit for the work performed in any given week. Such credit frequently is subject to a maximum accumulation, however.\textsuperscript{151} In periods of layoff, the employee exchanges the accumulated SUB credit for a check from his employer. Both the specific details of a particular SUB plan and company layoff experience are relevant to the proper treatment of a particular plan under the statute. Because credits will be earned, expended, and earned again, the suggested analysis probably would result in classifying as short-term benefits SUB credits subject to such expiration and maximum accumulation, where layoff is a fairly frequent fact of employment. In such a context, SUBs would be a substitute for periodic wages, which are short-term benefits. On the other hand, where layoffs are rare or where no maximum applies, an employee may accumulate SUB credits and use them at a future date. In such a case, SUB credits arguably must be treated as a substitute for the advantages of seniority, such as preference in layoff order, which go far to ensure an em-

\begin{itemize}
\item \textsuperscript{148} See, e.g., id.
\item \textsuperscript{149} But see note 146 supra.
\item \textsuperscript{150} See Akers v. General Motors Corp., 501 F.2d 1042 (7th Cir. 1974); Hoffman v. Bethlehem Steel Corp., 477 F.2d 860 (3d Cir. 1973).
\item \textsuperscript{151} Appellee’s Appendix on Appeal at 97, Hoffman v. Bethlehem Steel Corp., 477 F.2d 860 (3d Cir. 1973). See Akers v. General Motors Corp., 501 F.2d 1042 (7th Cir. 1974). For a general history of the development of SUB plans through 1959, see WiSTERT, supra note 33, at 102-24, 150-51.
\end{itemize}
The nature of this benefit thus may vary from case to case depending on the maximum accumulation provisions of particular collective bargaining agreements and on the layoff frequency in particular businesses. Nevertheless, the long-term/short-term principle offers a sensible means for deciding whether a returning veteran should receive SUB credit for the time he spent in military service.

Accardi v. Pennsylvania Railroad Co. illustrates application of the suggested principle to severance benefits, the remaining frequently litigated benefit requiring courts to define statutory seniority. Severance pay, the Supreme Court said, is "compensation for loss of job." It meant that the employer was depriving employees of the security of an available job for which they had worked for nearly 20 years. Thus the court correctly held that this long-term interest was within the scope of the class of benefits that Congress intended to fully restore.

VI. CONCLUSION

There doubtless exist forms of employee benefits that have not been treated in this Article. Some of them may not admit of an easy application of the long-term/short-term approach as a means of determining proper application of the escalator clause. But as the historical treatment of that clause illustrates, ease and convenience of application do not promise a result that is responsive to the problem that Congress sought to remedy. Despite this expected difficulty, courts probably could apply the suggested principle, with a significant degree of success, to almost all types of employee benefits. They need not lay each benefit in one procrustean bed or another, straining to apply mechanical tests not tailored to congressional concern. Rather, the likelihood of correctly responding to the problem that Congress sought to remedy will increase if courts determine precisely how loss of a particular benefit would disadvantage a returning veteran relative to other civilian employees.

154. See generally WESTERT, supra note 33.