In the

Supreme Court of the United States

ALVIN J. ARNETT, DIRECTOR, OFFICE OF ECONOMIC OPPURTUNITY, ET AL.,	)	
Appellants	)	Docket No. 72-1118
vs.	)	
WAYNE KENNEDY, ETC., ET AL.,	)	
Appellees.	)	

Washington, D.C.

November 7, 1973

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ALVIN J. ARNETT, DIRECTOR, OFFICE OF ECONOMIC OPPORTUNITY, ET AL., Appellants v. WAYNE KENNEDY, ETC., ET AL., Appellees.	No. 72-1118

Washington, D. C.

Wednesday, November 7, 1973

The above-entitled matter came on for argument at 11:56 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

DANIEL M. FRIEDMAN, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530, for the Appellants

CHARLES BARNHILL, JR., ESQ., Davis, Miner, Barnhill & Bronner, 22 East Huron Street, Chicago, Illinois 60611, for the Appellees.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 72-1118, Arnett against Kennedy.

Mr. Friedman, you may proceed.

ORAL ARGUMENT OF DANIEL M. FRIEDMAN

ON BEHALF OF THE APPELLANTS

MR. FRIEDMAN: Mr. Chief Justice, and may it please the Court, this is a direct appeal from a judgment of a three-judge district court in the Northern District of Illinois, holding unconstitutional certain provisions of the Lloyd-LaFollette Act governing the discipline primarily to discharge of nonprobationary Federal employees.

The case brings before the Court two constitutional questions, one relating to the procedures followed in terminating such employees, and the other relating to the validity of the standards for their termination.

Under the statute and the implementing regulations of the Civil Service Commission, a nonprobationary Federal employee may be removed from office after being given a written statement of charges, an opportunity to reply in writing or orally, and to submit affidavits, and the receipt of a written decision by the officer effecting the termination.

The statute,however, explicitly provides that a hearing prior to termination is not required. Under the Civil Service Commission's regulations, however, the employee following

such termination has the right to a hearing either before the agency or before the Civil Service Commission.

The first question presented is whether this statutory practice which in effect defers the evidentiary hearing to an appeal following the termination satisfies the due process standards of the Fifth Amendment.

The statute itself provides that a Federal employee may be removed only for such cause as will promote the efficiency of the service. Again, the Civil Service Commission has implemented this rather general standard through some regulations which I will come to shortly.

The substantive question in the case is whether it is a violation of the First Amendment when this provision is applied to terminate the service of a nonprobationary Government employee because of statements he has made,public statements, accusing his superiors of misfeasance and criminal activity and which, in the judgment of his superiors, effectively undermines the ability of the agency to perform its services.

Now, the court in this case invalidated the statute on its face on the basis of granting summary judgment for the appellees, and under civil practices, the validity of that action is to be tested on the basis of the facts most strongly supporting the Government. And accordingly, I shall state the facts of this case on that basis.

QUESTION: Mr. Friedman, I read through the record

in the case, the appendix, and I notice that Government supplied a number of affidavits and the like in connection with motion to dismiss. And then looking through the docket entries in the district court, it wasn't clear to me, since there are none included in the appendix, whether the Government had those same affidavits carry over for consideration on a motion for summary judgment.

MR. FRIEDMAN: It isn't explicit. I would assume, Mr. Justice, they were before the court on the motion for summary judgment. But summary judgment was granted against us, and it seems to me that in considering the propriety of that action, we can properly look to the evidence that would support our case, not the evidence that would support their case.

QUESTION: It would have been evidence that was before the court.

MR.FRIEDMAN: Oh, yes. Oh, yes. Yes. But the evidence before the court included much of the material that was the basis for the discharge of Mr. Kennedy.

Now, I would like to say one other thing. In their brief, the appellees, at pages 2 and 3, have stated that much of what the Government has set forth as its statement of the case is not supported by the record. We disagree with that, and accordingly in my presentation, whenever we get to any controverted materials, I will give record references to the

appendix which support the statements I am making.

The appellee, Mr. Kennedy, at the time of these events was a field representative in the Chicago Office of the Office of Economic Opportunity. He was a fairly important man there; he had a Government grade of GS-12 which is in the intermediate range and paid at that time $16,000.

As explained in the instructions that OEO puts out to its field representatives which are quoted in the record in the affidavit of the Regional Director, the field representative was a particularly crucial person in the operation of OEO. OEO, of course, its basic function is to channel funds to various community groups to enable them to improve their lot economically. And his job was to have contact with the community action groups, to talk to them, to explain to the community action groups what OEO was doing, what its policies were, and to be sure that these policies were being carried out in the implementation of the program by the community action groups.

As OEO stated itself, this man as a practical matter was viewed by the community group as OEO. His job, as I said, was to explain these policy decisions.

That material is set forth at pages 24 and 25 of the appendix.

Now, Mr. Kennedy has twice been subjected to disciplinary action in this situation. In the first instance, in November of 1971, he was charged by the Regional Director

with various acts of misconduct. He replied in writing a lengthy reply which is not included in the appendix. He had an oral presentation before the Regional Director. And following this, in January 1972, the Regional Director concluded that only one of the several charges made against him were sustained by the evidence, and instead of terminating his services as he had originally proposed, instead he suspended him for 60 days.

I just mention in passing, because I think this is an indication of what is involved in this case, the appellees say that this was outrageous because he was suspended for 60 days on the basis of a single telephone conversation that took place eleven months before.

Well, the reason for the eleven months before is that the charges against him which led to the suspension covered a period of almost a year, and this was the only one of the charges that was sustained.

But the single telephone conversation was a phone conversation he made to officials of one of these community action groups in which he told them they should get rid of the existing board of directors and get themselves a new board of directors which they could control. He did this in spite of the fact that therewere specific instructions from OEO,set forth at pages 38 to 40 of the appendix,that field representatives were to keep their hands off the internal operations of these community action groups. They were to allow them to make their

own decisions even though they seemed wrong, to maintain an arms-length posture, and even though he had previously been warned against such activities when he had a previous situation.

I just may say one thing more. I think this illustrates very dramatically the kind of disruptive effect this sort of conduct would have.

MR. CHIEF JUSTICE BURGER: We will resume there after lunch.

(Whereupon, at 12 o'clock noon, a luncheon recess was taken, to reconvene at 1 p.m. the same day.)

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Friedman, you may continue.

MR. FRIEDMAN: Mr. Chief Justice, and may it please the Court.

I would now like to come to the second set of charges on the basis of which Mr. Kennedy was discharged from Federal service. These were served upon him in February 1972, approximately three weeks after the previous notice of his suspension. Basically these charges related to two different activities.

One related to certain statements he made with relation to a problem that had arisen in Chicago relating to the Indians in Chicago.

QUESTION: May I interrupt you for a moment?

MR. FRIEDMAN: Yes.

QUESTION: I don't want to stop you from discussing what the reasons were, but are they particularly relevant? Is the case going to turn on what the reasons are?

MR. FRIEDMAN: I think, Mr. Chief Justice, the reasons are important --

QUESTION: I can understand your illustrating the need for expeditious action, but otherwise it isn't relevant, is it?

MR. FRIEDMAN: I think it is relevant to this extent, Mr. Chief Justice: One of the claims here is that a hearing was required in advance of termination. Under the statutory provisions, this man is given an opportunity to be told what the charges are against him, has the opportunity to respond both orally and in writing,and to submit affidavits. And then if he is discharged, he has a right to a full hearing with the complete panoply of procedures after that discharge.

In this case he was given very specific charges of certain improprieties, and he did not submit any material at all. So to that extent we think the facts are significant.

In addition it seems to me that these facts are quite significant in evaluating his claim that the statute is unconstitutional as an infringement of his First Amendment rights, because our basic position on that is that a conscientious Government employee could really have no doubt that the kind of things he is alleged to have done would be detrimental to the efficiency of the service.

That is the reason I am stressing these facts, because I think the case has to be brought into the proper posture.

Now, the allegations with respect --

QUESTION: He is working in a very controversial field here, isn't he?

MR. FRIEDMAN: He is working in a controversial field.

QUESTION: As controversial as the Interstate Commerce

Commission was in 1887 perhaps.

MR. FRIEDMAN: Certainly it is controversial. But, Mr. Justice, his role was supporting OEO in this controversy. His job was to represent OEO and to explain to the community what OEO was doing and to try to persuade the community that it should accept OEO's treatment of this problem.

What he did, instead of doing that, he turned around and made a number of very serious, and we think unjustified, attacks on OEO and on his superiors, attacks which according to the affidavit of the --

QUESTION: Maybe he was just trying to save OEO.

MR. FRIEDMAN: With all due respect, Mr. Justice, I don't think that was his function as an employee of OEO. If he had complaints about OEO, about the way the program was being administered, it was his obligation, we think, to make those complaints through channels, not to make statements to the press, not to make public at public meetings, at union meetings.

Let me tell you what he did, for example. He said --

QUESTION: This is quite different from the Department of Justice?

MR. FRIEDMAN: I think in terms of what happened, most assuredly, Mr. Justice.

Let me tell you exactly what were the charges against him. First of all, he said that the Regional Director and his

executive assistant had either bribed or attempted to bribe one of the leaders of the Indian community in Chicago by offering this man a grant of $100,000 if this man in turn would make a statement, give a written statement, against Mr. Kennedy and another employee who was active in the union. He made this charge at a union meeting, and this charge was repeated in a newspaper report of the meeting.

QUESTION: Was it true?

MR. FRIEDMAN: This is true according to the -- no, no. I am sorry. He claims it's true. The Regional Director found it was not true.

Now, in addition to that, he conducted a press conference in the lobby of the building where OEO is. He conducted it in the lobby because he had been refused permission after his suspension to hold the press conference in the OEO offices where he wanted. And he handed out a press release, set forth at pages 44 and 45 of the record, in which he accused the Regional Director of breaking treaties with the Indians. There was a newspaper story covering that.

In addition to that, he made an accusation against an OEO official that they had violated the OEO conflict of interest standards by entering into an insurance contract with a company with which the husband of this woman was connected.

Now, as I have indicated, he was told in this notice of charges that he could submit either written answers with

affidavits or an oral hearing. He did neither. All he did was file an answer which is set forth at page 62 of the record in which he said he wanted a hearing before an impartial hearing officer, and he said that applying this statute to punish him, to discharge him on the basis of statements, speech he had made, violated his rights under the First Amendment.

Following the receipt of this, he did not submit anything further than that.

The Regional Director informed Mr. Kennedy in writing that the charges against him were sustained, directed his removal, and informed Mr. Kennedy that he had a right to appeal that either to the Agency within the Agency itself or to the Civil Service Commission. He elected to appeal to the Civil Service Commission.

I would just like briefly to refer to the affidavit that the Regional Director submitted in the district court in opposition to their motion for a stay which would have the effect of keeping Mr. Kennedy at work. And he explained in considerable detail what had led to Mr. Kennedy's discharge. And then at the bottom of page 32 and the top of page 33, after first pointing out that he recognized the importance of free and open discussion within the Agency, he also recognized the importance of constructive criticism within the Agency. But he said, "However, when the criticisms take the form of malicious personal attacks made publicly by a Field Representa-

tive who is viewed as 'OEO' by the community at large, when the criticisms result in a breakdown in the necessary maintenance of discipline, produce serious disharmony among coworkers and loss of morale, and destroy ongoing efforts of this office to serve the poor and the disadvantaged, then the efficiency of Government is dealt a severe blow."

QUESTION: What page are you reading from?

MR. FRIEDMAN: This is the bottom of page 32.

QUESTION: Thank you.

MR. FRIEDMAN: He also pointed out at the top of the page that prior to the issuance of Mr. Kennedy's press release, the Office had been attempting to put together a coalition among the Indians of Chicago that would create an organization that was able to receive and handle a substantial grant. But after Mr. Kennedy's attack on OEO, as he put it, the coalition fell apart. And as of the time of the filing of the affidavit, he said they had not been able to put together another coalition and process the grant.

In the district court, as I have indicated, the court first held that the statute was a violation of procedural due process because of its failure under the statute and the procedures to give Mr. Kennedy an adversary full hearing before his termination, and on the basis of that conclusion directed that Mr. Kennedy be reinstated. And he has been reinstated.

The court also said that although it recognized that

the conduct, the speech, which was the basis for Mr. Kennedy's discharge did provide a basis for disciplinary action, nevertheless the statute, it held, was unconstitutional on its face because it said this vague language is likely to have a chilling effect upon other employees in the exercise of their First Amendment rights and enjoined the enforcement of the statute and regulations -- this is the language from 7-A of our jurisdictional statement, the opinion -- insofar as they are construed to regulate the speech of competitive service employees, a very broad injunction.

Now, coming to the merits of the case, the statutory argument, first as with respect to the procedural due process issue.

The Lloyd-LaFollette Act of 1912 was enacted to provide substantial protections for Federal employees. Prior to that time Federal employees had virtually no job protection at all. They were subject almost to dismissal at the whim, the caprice of their superiors. And what Congress did in the Lloyd-LaFollette Act, key provisions of which in their present form are set forth at page 37 of the brief, was to do three things -- really two things.

The first was it provides in the first sentence that an individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service.

For the first time it wrote into law a job protection for Federal employees. They could only be dismissed for cause and only such cause as would promote the efficiency of the service.

Then it provided certain procedural protections. The employee was to get notice of the charges, had a reasonable time to file a written answer to the charges and affidavits, and was entitled to a written decision.

And then it goes on to say, "Examination of witnesses, trial, or hearing is not required but may be provided in the discretion of the individual directing the removal or suspension without pay."

And what Congress has done has been to leave it to the individual agency to decide whether or not in following its discharge procedures it gives the man a hearing prior to his termination.

At the present time eight agencies do provide for such pretermination hearings. They employ approximately 10 percent of the Federal work force, but the statistics that we have from the Civil Service Commission indicate that's a much smaller percentage of disciplinary proceedings. The vast bulk of government agencies in number covering the vast bulk of Federal employees do not provide for any predischarge hearing. What they do provide for is, under the regulations of the Civil Service Commission, a 30-day notice of charges,

full statement of the charges, an opportunity either to apply in writing or orally,to submit affidavits, the opportunity of the man to examine the Civil Service files containing the information on which the charges are based, and a written report.

QUESTION: Not to confront any witnesses.

MR. FRIEDMAN: Not at that stage, Mr. Justice. Not at that stage. But after, if he is discharged, he has a full hearing with a complete right to confront all the witnesses, a transcript is taken, produce his own witnesses , appear by counsel -- and if as a result of that hearing, which as I have indicated may be either before the agency or the Civil Service Commission, if as a result of that hearing he is ordered to be reinstated, if his discharge is set aside, he gets full back pay under the statute for the period he was out of work.

Now, this Court has recognized over the years and most recently in the Cafeteria Workers case, that without legislation, unless there is some specific legislative provision, a Government employee may be summarily discharged.

Here we do have a statute. We have a statute which provides that before he can be discharged, it has to be for cause and after certain provisions specified by the statute. Procedural due process, as this Court has many times stated, is a flexible concept. You don't have fixed rules. You have got to weigh competing interests in this situation. Here we have two competing interests. On the one hand is the obvious

interest of a Government employee not to have his Federal employment finally terminated without procedures in which he can fairly present his case. On the other hand there is a very strong Government interest of removing incompetent and unsuitable employees from the public payroll so that the Government can proceed with its business effectively and expeditiously. And obviously, if a pretermination hearing is required in every case, this is inevitably bound to delay the proceedings. It seems to me it is self-evident that if in every case an employee has the option for a hearing, many employees, knowing of the delay, are just going to request a hearing.

There are some statistics referred to in an article by Professor Merrill -- it's quoted in our opponents' brief -- in 59 University of Virginia Law Review, points out that a relatively small percentage of Government disciplinary actions are taken to hearing. The figures we have, it's something like maybe 10 percent, something in that range. And inevitably this would lead to a proliferation of these hearings to delay in discharging incompetent or unsuitable Government employees.

Now, we think that the due process requires no more in this situation than is done. That is, the employee has -- this is not a case where someone is cut off with a letter saying, "You are terminated today." The employee has the opportunity to present, informally to be sure, but has the opportunity to

present to his agency any facts that he believes mitigate against the proposal or show that it is unsound. For example, he can show that perhaps the whole thing rests on a mistake. Maybe the facts are wrong.

QUESTION: Mr. Friedman, I suppose you would be making the same argument if the statute simply said in order to fire an employee the Government must write him a letter and give him a reason, but that is all that the Government has to do, that defines his entire right.

MR. FRIEDMAN: I would be making the same argument, Mr. Justice, but I don't have to make that argument because --

QUESTION: You would say in that event there would be no denial of procedure of due process if that is all the Government did.

MR. FRIEDMAN: If that's all the Government did. That is correct. But here --

QUESTION: Here they do give them more, but you say they don't need to do any more than the statute provides.

MR. FRIEDMAN: That is precisely correct.

QUESTION: You say the extent, the contours, the meets and bounds of his tenure are contained in this statute.

MR. FRIEDMAN: That's right.

QUESTION: And the meets and bounds of his tenure would be contained in the kind of a statute that my Brother White is suggesting. That's your point, isn't it?

MR. FRIEDMAN: Yes.

QUESTION: But you are also saying, aren't you, that that's only against the background of an ultimate full-trial type hearing on appeal.

MR. FRIEDMAN: What I am saying, Mr. Justice, is that I would be prepared to defend the narrower statute, but in this case, certainly under this procedure --

QUESTION: Would you defend it if there were not this de novo proceeding on appeal?

MR. FRIEDMAN: I would defend it, Mr. Justice.

QUESTION: You would have to; your position entails that, doesn't it?

MR. FRIEDMAN: I would defend it, but I don't have to attempt to justify that position here because here we do have the complete de novo hearing.

If I may point out, Mr. Justice, this is not just an idle thing, his ability to respond at the administrative level. In this very case, at the previous disciplinary proceeding which resulted in the suspension initially, initially two or three charges were made against him, and what was proposed was that he be discharged. But as a result of his lengthy submission, the Regional Director concluded that only one of the charges was sustained, and instead of discharging him, he only suspended him for 60 days.

So we think that the result could well have been

different in this case if he had submitted to the Regional Director, which we think was his obligation, all of the material on which he now relies contained in this appendix which was submitted for the first time in the district court.

QUESTION: After he was allowed to confront his accusers.

MR. FRIEDMAN: He could have confronted his accusers, Mr. Justice, at the hearing that he would have been given before the Civil Service Commission.

QUESTION: He could have ?

MR. FRIEDMAN: Oh, yes.

QUESTION: I didn't hear you say that.

MR. FRIEDMAN: Oh, yes, Mr. Justice.

QUESTION: I understood that he could file something in writing and he could say something orally, period.

MR. FRIEDMAN: That is before his agency. But if the agency discharges him and he then exercises his right to appeal either at a higher level of agency --

QUESTION: I am talking about that original hearing.

MR. FRIEDMAN: At the original hearing, he does not have the right to confront his accusers.

QUESTION: It's not a hearing.

MR. FRIEDMAN: It's not a hearing; it's an informal proceeding. I mean, it can be an oral submission. But he does have the full right to confront his accusers if --

QUESTION: After he is discharged.

MR. FRIEDMAN: After he is discharged, and if, as a result of that hearing --

QUESTION: And you say that he doesn't even need that, but Congress just gave him that.

MR. FRIEDMAN: The Civil Service Commission has given it to him. I say that I would be prepared to defend the procedure even if that wasn't in it, but that is in it. And I think at least without getting to the more difficult question of whether or not the statute would be valid without it, here he has it. Here he has it. He gets a full hearing. He can cross-examine, be confronted by us afterwards. And if he prevails in that hearing, he is not only reinstated, but gets his back pay.

Now, I would like to turn to the other question --

QUESTION: What do you do with the Pickering case?

MR. FRIEDMAN: Pardon?

QUESTION: What do you do with the Pickering case?

MR. FRIEDMAN: The Pickering case, Mr. Justice, it seems to me -- in the Pickering case this Court recognized that speech may be a basis for a discharge of a Government employee. It held in the particular facts of that case what the man did, which was writing this letter to the newspaper, that that itself was not sufficient in that case, but the Court recognized that there may be incidents of speech which

justify the discharge of a Government employee. Indeed, in this very case, the district court recognized that speech may be a ground for discharging a Government employee.

QUESTION: Let's suppose the statute says a Government employee may be discharged at any time for drunkenness. All you have to do is write him a letter and say, "You are discharged because you are a drunk." And you would say that if that is the standard, nevertheless the Government is free, as far as the due process clause is concerned, to write him a letter and say he is a drunk and he can be fired just by that letter. You have to take that position.

MR. FRIEDMAN: As a matter of constitutional law, yes.

QUESTION: Even though that's the standard for discharge, drunkenness, his right to contest it can be completely denied by writing him a letter.

MR. FRIEDMAN: I would think as a matter of constitutional law, Mr. Justice. But that's not the practice. That's not what happens.

QUESTION: I know, but if you are wrong on this, you are in a little bit of trouble, aren't you?

MR. FRIEDMAN: Yes.

QUESTION: Well, suppose he said in a public handout to the press that, "My boss was sober yesterday." Would that be the same one?

MR. FRIEDMAN: I couldn't say that. I think that might be, under the present statute, detrimental to the efficiency of the service.

QUESTION: To say that his boss was sober yesterday.

MR. FRIEDMAN: Well, that again, it seems to me, Mr. Justice -- these are all questions, these are all questions which have to be battled out, first at the administrative level, and then at a hearing. If he were discharged for making that single statement, it may be that ultimately the Civil Service Commission would hold that that was not enough to constitute conduct detrimental to the efficiency of the service. It would depend on the context in which it was said. I mean, if what he said at a public meeting of all the employees is, "Surprise, surprise, my boss was sober yesterday," it seems to me that may be a different thing.

I think this goes to the essence, this goes to the essence of the prohibitions dealing with the speech --

QUESTION: You don't see any chilling effect on the employees in that particular outfit, do you?

MR. FRIEDMAN: Well, I think, Mr. Justice, speaking in terms of chilling effect, there has got to be something specific, and I don't think --

QUESTION: Like being fired.

MR. FRIEDMAN: No. In terms of the precise conduct involved. I don't really think that any employee, Government

employee, any responsible Government employee, can fairly contend that the exercise of his First Amendment rights are chilled because Mr. Kennedy is fired for making these kinds of statements against his superior. That's the issue, it seems to me, and this Court in the Pickering case recognized that it's impossible to specify in detail exactly what every particular situation might be. Speech is difficult to predict. And all you can do is apply it in the particular circumstances. If the application is an improper one, there is always a way of correction through the appeals with a de novo hearing that is provided under the procedural system.

MR. CHIEF JUSTICE BURGER: Mr. Barnhill.

ORAL ARGUMENT OF CHARLES BARNHILL, JR.

ON BEHALF OF THE APPELLEES

MR. BARNHILL: Mr. Chief Justice, and may it please the Court, the Government has gone to great lengths to paint Mr. Kennedy in the most despicable posture. I think it important to clarify some of the factual errors that have been made in the recitation. I will do so very briefly.

First, Mr. Kennedy's record with the Government is one to be respected, not castigated. He served with the Government for seven years prior to this incident, received five promotions and several commendations. After he was restored to his duties by order of the lower court and after OEO had submitted an affidavit which stated that his restoration

would cause them irreparable harm, Mr. Kennedy was given a raise, a complimentary evaluation, and specifically complimented --

QUESTION: Where do we find that in the record?

MR. BARNHILL: That is in the appendix to our brief, your Honor. We asked the Government to include that in the joint appendix, and they refused to do so.

QUESTION: Are these events occurring since the --

MR. BARNHILL: They are indeed, sir. They are, indeed.

Secondly, what the Government states as its facts in the case are mere charges, not facts. There was no hearing on whether Mr. Kennedy did or did not say what he is purported to have said.

Actually, we responded to these charges by a series of affidavits on the basis of support for our contention in a now defunct second count which we have dropped. But the facts are the facts in the affidavits, not in the charges. We answered those charges, and those affidavits were never denied.

QUESTION: Mr. Barnhill, maybe you can try to answer the same question I asked Mr. Friedman. You won on a motion for summary judgment, so I take it it's conceded that as to any material fact that is in dispute, if there was one version by the Government and one by your client, you have to take the Government's version.

MR. BARNHILL: Right.

QUESTION: Were all of the submissions of the

Government filed originally with its motion to dismiss before the court on motion for summary judgment?

MR. BARNHILL: Well, to be perfectly honest, it's not wholly clear. What did happen in this instance was that the lower court deemed all the charges irrelevant to the proceedings. We filed on a count two which we earlier filed, a series of affidavits stating that his speech was protected. That was dismissed. We amended and then charged the statute was vague and overbroad at that point.

At that point the charges became irrelevant. I am not sure whether the affidavits were forwarded to them or not, to tell you the truth.

QUESTION: Well, I suppose if you take the lower court's view, neither side would be entitled to state any facts since the factual background was irrelevant. But since we might take a different view, I suppose we have got to take the view that what facts we conceive to be material we would have to buy the Government's version since you won on a summary judgment.

MR. BARNHILL: I think, like I say, the matter is irrelevant, the factual charges are irrelevant. And, second of all, we contradict each of those facts via affidavit.

QUESTION: Did you contradict them in the administrative process?

MR. BARNHILL: We did when we filed an answer to the charges asking for an impartial hearing examiner and asking for

a hearing. Although it is not clearly stated, we state it in our answer that the facts were set forth inaccurately with respect to the conversation --

QUESTION: You mean, you did that in a written answer under section 3 of the --

MR. BARNHILL: That's right. We said that the facts were stated --

QUESTION: And you just added that you wanted a hearing.

MR. BARNHILL: That's correct. Well, it really was vice versa. Most of the answer took place in asking for a hearing, and we answered also that the facts weren't accurately stated.

QUESTION: And by affidavit?

MR. BARNHILL: No, we did not file an affidavit at that point in time. We were waiting for a hearing.

Mr. Friedman has told you part of the story on the suspension. He didn't tell you all the story, and I believe it important to tell you that story.

At a later hearing, after Mr. Kennedy was suspended, the Government capitulated, gave Mr. Kennedy all his money back and supposedly expunged that matter from the record, that 60-day suspension that they held.

Furthermore, one of the charges which was not sustained in that suspension was the charge of leafleting with

the press out in the lobby. That charge was not sustained in the suspension. It was later resuscitated and used as a basis for his discharge.

With respect to the actual charges relating to the discharge, I think I can say this: Mr. Kennedy -- the facts show that Mr. Kennedy did participate in a press conference. He participated as a union representative with four other unions. He was the only one, to my knowledge, who was punished for that press conference. As I also noted, that charge was not sustained in the suspension, but later brought back in the discharge.

Second, Mr. Kennedy was accosted by a man named James White Eagle Stewart, an Indian who had negotiations going on with OEO. Mr. Stewart stated to Mr. Kennedy that Mr. Verdine, the Regional Director, had said he would give him a $100,000 grant if Mr. Kennedy would be implicated in some actions which would lead to his firing.

Mr. Stewart said this not only to Mr. Kennedy, but to Mrs. Laura Rockwell, to four other employees, and to the entire union at a union meeting. It was not Mr. Kennedy who said this at the union meeting; it was Mr. Stewart himself.

Mr. Kennedy did the following things with this information. First, he sent a night letter to Mr. Verdine's superior. He did not charge bribery; he simply alluded to the events as he had been told.

Second, when a reporter called him, he mentioned the story to the reporter, but the reporter called him first,and asked that the reporter check with the source of the story before doing anything about it and help him with the investigation.

Third, he had the man who made the charges go over to Senator Stevenson's office and fill out an affidavit.

In view of the unique situation where a supervisor, at least the employee has reasonable cause to believe the supervisor is out to get him, I think Mr. Kennedy acted with remarkable restraint in his approach.

QUESTION: Now, I take it from your presentation of these facts that you intend that we should give them some weight. Did you not have an opportunity before the Civil Service Commission to test these out in a full adversary process?

MR. BARNHILL: To be perfectly honest, your Honor, I don't intend them to be given any weight, and I hope the Government's facts, as they state them, are not given any weight. I think they are irrelevant. I only wanted to insure that the fundamental --

QUESTION: My question to you is a different one. Did you not have an opportunity to explore all of these facts that you are discussing, the pro and the con, who was telling the truth and who wasn't telling the truth, in an adversary

proceeding before the Civil Service Commission?

MR. BARNHILL: We have not been granted that hearing, your Honor. It is still pending.

QUESTION: You have not had that opportunity?

MR. BARNHILL: We asked for it, but we have not been given it. Since this case has started, we have not been provided with the Civil Service Commission hearing we asked for. That is over 15 months ago.

QUESTION: In the Civil Service Commission itself?

MR. BARNHILL: In the Civil Service Commission itself.

QUESTION: Is the explanation for that the pendency of this litigation?

MR. BARNHILL: I have no idea of the explanation of that, your Honor. Some cases take this long to process, and that is a fact which we reported in our brief. The Government states in their brief that the appeal is still pending. I know no explanation for that.

QUESTION: Then in terms of the timing, the Civil Service Commission procedure allows you to test out all of these allegations pro and con in that process, does it not?

MR. BARNHILL: Many months after a person is discharged, your Honor. In this instance, by the time he was restored nine months after he had been fired, he still had not been provided a hearing, and he is still not provided with a hearing. So it seems to me that that kind of post hoc relief

becomes irrelevant when a person is out of his job for a year marked with discharge.

QUESTION: What is at issue here then?

MR. BARNHILL: The issue is whether --

QUESTION: If your client wins, what does he get?

MR. BARNHILL: He will get the incremental costs or the incremental procedural benefits imposed on the already existing system which are:resort to a neutral official prior to being discharged, the opportunity to confront and cross-examine his accusers, the opportunity --

QUESTION: And some back pay?

MR. BARNHILL: And some back pay.

QUESTION: But if he wins, he still must face the merits of whether he should be discharged or not?

MR. BARNHILL: In this instance, yes. That's correct. The merits are still provable.

QUESTION: I gather basically he would be reinstated to his job with back pay, whatever all this comes to, and he continues in this job, I gather your submission is, until he has been accorded the kind of hearing you say he should have.

MR. BARNHILL: That's correct.

QUESTION: And can't be discharged, nor may his salary be suspended until he is actually found to have committed the offenses he is charged with.

MR. BARNHILL: That is correct.

QUESTION: And then discharged.

MR. BARNHILL: That's correct.

QUESTION: But he is now on the job, he's been reinstated.

MR.BARNHILL : By the lower court. His pay is actually held up as a bond for the appeal.

I would like to tell you the Government's contention now, if I may, with respect --

QUESTION: Are you asking for any more of a trial type hearing than in Goldberg v. Kelly or Bell v. Burson?

MR. BARNHILL: Not at all. Precisely the same.

QUESTION: And what were the elements of that type hearing?

MR. BARNHILL: Resort to I believe an independent official, the right to confront and cross-examine your accusers, the right to present witnesses, the right to have a brief record made of the proceedings, and the right to a decision based on the evidence adduced. That's what we contend that we are entitled to.

QUESTION: Was Bell v. Burson provided that much from the suspension --

MR. BARNHILL: Bell v. Burson, to my knowledge, did not precisely spell out the elements of the hearing.

QUESTION: This is really what Goldberg said as to the elements of the welfare benefit.

MR.BARNHILL: That is correct.

QUESTION: Do you think you are entitled before suspension to any more than a finding of probable cause to believe that these acts have been committed?

MR. BARNHILL: I really have not --

QUESTION: It's rather important, isn't it?

MR. BARNHILL: I think that is an important issue, and I think that's what the hearing does.

QUESTION: Did Goldberg give any more than following ...

MR. BARNHILL: I think that's all that Goldberg gave.

QUESTION: And Bell against Burson.

MR.BARNHILL: And Bell against Burson, correct.

When we are asking for an ability to prove that there is no probable cause, it's through the use of the rudimentary elements of due process.

QUESTION: Don't you think it really makes a difference to what due process requires if your object of the procedure is to determine probable cause rather than the actual fact?

MR. BARNHILL: I think any kind of procedure has to be calculated to be fair to achieve the truthful result. You can't achieve the truthful result if you have a system which allows a person who is complaining witness, prosecutor and judge to make the decision.

QUESTION: Due process permits people to be arrested and put in jail on probable cause established by hearsay even.

MR. BARNHILL: I understand that, your Honor. I think there is a difference between a man who might commit murder and a man who is in Government service for many years.

QUESTION: Let's reduce it down to a man engaged in a disorderly kind of conduct on the street or drunk on the street. He is picked up by the police and taken to the station. You have the accuser and the prosecutor in the terms you are talking about all engaged at that stage, but he goes into custody, doesn't he?

MR. BARNHILL: He has a right to bail, your Honor. Our client has no right to bail.

QUESTION: That is another question.

MR. BARNHILL: But I think that makes a significant difference whether one can maintain his freedom and the status quo in the interim. Our client has no such alternative.

QUESTION: There is no freedom question here. You are analogizing freedom to continue employment.

MR. BARNHILL: That's correct, just for a very short time and for a very rudimentary expeditious hearing.

Professor Merrill who reported to the Administrative Conference stated that almost every hearing on discharge cases takes less than a day to adjudicate. We don't ask for any enlargement of the time it takes to fire a Federal

employee. We ask merely that in the 30-day period which they already have, he be given his rudimentary rights.

QUESTION: But you are saying that this probable cause to believe the charges cannot be carried out without a full adversary hearing.

MR. BARNHILL: Without the minimal requisite set forth in Goldberg v. Kelly. I think no amount of process or procedural ceremony can cure the fact that the official is biased against you. And this system has no guarantee of apparent impartiality. Here in this instance the man who fired him was also the man who felt himself aggrieved by the charges and the man who marshaled the evidence against him. No system can work if the man who is biased against the person views the procedure with a jaundiced eye.

Additionally, we know of no other reliable way of proving the truth in conflicting facts or to even get a probable cause estimation except by cross-examination.

QUESTION: Mr. Barnhill, under the district court's opinion, supposing the Secretary of the Treasury wanted to fire a scheduled employee. Would any employee in the Treasury Department be a possible neutral adjudicator, or would you have to go outside the Treasury Department?

MR. BARNHILL: No, you can stay within the Treasury Department, as I read the opinion.

QUESTION: Even though the Secretary initiated the

charges, the subordinate of the Secretary could hear them?

MR. BARNHILL: Well, I don't think that situation has been faced and was not considered by the lower court.

QUESTION: How would you interpret the district court's opinion in that hypothesis?

MR. BARNHILL: I interpret it to be someone not connected with the initial decision to discharge the person may hear the case.

QUESTION: Even though it's a subordinate?

MR. BARNHILL: Well, it depends on how closely the subordinate worked with the man, I suspect. It would be a case-by-case analysis in something as unique as that.

QUESTION: Mr. Barnhill, in Bell v. Burson, what we said was the"inquiry into fault or liability requisite to afford the licensee due process need not take the form of a full adjudication of the question of liability." And I gather you say here also, this need not take the form of full adjudication of the merits of the charges.

MR. BARNHILL: I agree.

QUESTION: "That adjudication can only be made in litigation between the parties involved in the accident. The only purpose of the provision is to obtain security from which to pay any judgments against the licensee resulting from the accident. We hold that procedural due process will be satisfied by an inquiry limited to the determination of

whether there is a reasonable possibility of judgments in the amount claimed." I take it, you would say here whether there is a reasonable possibility of determination that the charges are true.

MR. BARNHILL: That is correct, your Honor.

QUESTION: And you would surround that with a hearing before an independent examiner.

MR. BARNHILL: Correct.

QUESTION: And right to confront witnesses.

MR. BARNHILL: Correct.

QUESTION: What else?

MR. BARNHILL: The right to present your own witnesses, and the right to a brief record of the proceedings.

QUESTION: And a statement of reasons.

MR. BARNHILL: That's right. And finally a decision based on the evidence adduced. I might point out the latter, there is no requirement that the decision be based on the evidence adduced.

QUESTION: It seems to me you haven't yet, unless I missed it, addressed the Government's basic argument which, as I understand it, is this: In order for the demands of procedural due process to become applicable, there has to be a deprivation of liberty or property. I suppose you would concede that if an employment of an employee were clearly and concededly an employment at will and it was understood when he

took the job that he could be fired on a moment's notice for any reason however arbitrary, that if he were fired at will, there would be no deprivation of his property. Would that be correct?

MR. BARNHILL: That's correct.

QUESTION: He has no expectancy.

MR. BARNHILL: Absolutely, your Honor.

QUESTION: And the Government's argument, as I understand it, is that the property interest as far as there was one involved in this Government job was measured by the provisions of the Lloyd-LaFollette Act.

MR. BARNHILL: That is correct.

QUESTION: And that when the provisions of that Act were complied with, that was the extent of his property interest and that was all to which he was entitled. Those were the meets and bounds, as I say, of his tenure so to speak. Now, you have just proceeded on the assumption, I think, that this was a property interest that was protected by some other provisions, and I don't quite think that you, as I say, have addressed yourself to what I understand to be the Government's argument.

MR. BARNHILL: I will be delighted to do so right now, your Honor.

QUESTION: Before you get to that, I would like to pursue one question on Bell v. Burson that Justice Brennan

was asking about, Mr. Barnhill.

Now, in Bell v. Burson we were dealing with the license to drive an automobile.

MR. BARNHILL: That's correct.

QUESTION: I suppose you would agree that every person in the United States who meets the age qualifications and so forth is entitled absolutely to receive a driver's license.

MR. BARNHILL: If he passed certain tests.

QUESTION: Now, is every person in the United States who meets the qualifications .. entitled to have Government employment?

MR. BARNHILL: No, he has got to pass certain tests here, too. He has got to be hired, he has to pass a probationary period.

QUESTION: There is a difference. You can't refuse the automobile license if you pass the test, but you aren't automatically given government employment because you pass certain tests and meet the age requirements, are you?

MR. BARNHILL: That's correct. I think that dovetails with Mr. Justice Stewart's comment, and I would like to turn to that right now.

The question of whether or not you have a right to public employment in the abstract is not the question we have here. The question we have here is whether or not a person

may be fired for cause. 5 U.S.C. 7501 states that an employee may only be fired for cause. I believe that that is the statutory entitlement to which this Court has indicated its approval that a hearing is required in the Roth and Sindermann cases.

I also believe, and I note the Government ignored the fact, that a host of other statutory benefits and entitlements are given Federal employees once they earn them by passing the probationary period.

QUESTION: But doesn't the one have to be read together with the procedural provisions of the Lloyd-LaFollette Act?

MR. BARNHILL: No, I do not believe so. I don't believe it has ever been this Court's disposition to measure property interests by the procedural protections accorded. For example, in Goldberg v. Kelly the --

QUESTION: Before you get off on that, take Roth and Perry, which was decided just two years ago. As I recall, Justice Stewart writing for the Court in that case said that your claim, your property claim, has to be founded on some provision of State law.

MR. BARNHILL: That's correct.

QUESTION: Some understanding as a result of State law. So I would think that the analogous situation here is that your claim has to be founded on what the Lloyd-LaFollette

Act leads you to think your rights to be.

MR. BARNHILL: Well, I think that's correct. I do not disagree with that. And it seems to me that the provision in the Lloyd-LaFollette Act which says you may only be fired for cause leads both the employee in the abstract at least and the Government to believe that no one will be fired except for cause.

Now, if those provisions, those procedural protections are insufficient to show cause, then the procedural protections seem to me to fall, because it's --

QUESTION: Even though they are part of the same Act.

MR. BARNHILL: I understand that. But that does not mean that they are indivisible. For example, it seems to me that the purpose of the Lloyd-LaFollette Act was to protect Government employees from being fired arbitrarily. If the procedure which is kind of the tail of that Act does not assure that fact, and there is no evidence to the contrary, this does not assure that an employee will not be fired for cause, then the procedure is defective.

QUESTION: But the Civil Service obviously thought the procedures were ample.

MR. BARNHILL: That's correct, but the procedures are not ample.

QUESTION: Well, if the Act said that a Government employee may not be fired for cause as determined by the

superior writing him a letter, and that's the end of it, if the statute defined the property interest to that extent, would you be making the same argument? I suppose you would.

MR. BARNHILL: Absolutely.

QUESTION: But it might be more difficult.

MR. BARNHILL: Well, I think the for cause limitation is a true representation of Congress' intent that people be fired only for cause. If the procedures are defective and they don't produce that result, then they must fall, it seems to me.

QUESTION: Why don't you just say that may define the property, but it doesn't define the liberty interest, that the Government is arbitrarily purporting to fire him by a finding of incompetence or --

MR. BARNHILL: Dishonesty.

QUESTION: -- or some other reason that will infringe his right to get another job.

MR. BARNHILL: I think both interests are implicated here. I think the property interest provided by the statute and the other entitlements given by statute and Executive Order and Mr. Kennedy's liberty. If the Government takes its charges as seriously as it states it does, then Mr. Kennedy has most certainly been stigmatized in both his pursuit of other jobs and in his standing in the community.

I think his affidavit, which is uncontradicted, which states that that kind of discharge is a firm bar to

employment is in fact the result of the Government's firing for the reasons it states.

And I would briefly allude that I think the entitlement is there. I think the Government's argument is very dangerous. For example, there is no question that States or municipalities may take property through their urban renewal projects, anything else, and if the legislature were allowed to condition the taking of this kind of property on the basis of inadequate procedural safeguards and that somehow composed the right of those persons, any property could be taken without due process. The only result is that the property interest has to be evaluated apart from and not together with the procedures, and the procedures, if the property interest is established, were next evaluated.

As I noted, in this particular case the procedures are notably defective in that they do not require an impartial examiner and they do not require cross-examination or confrontation of your accusers. In fact, the procedures do not work. Twenty-four percent of those fired who appeal to the Civil Service Commission are reinstated by a subsequent hearing. Thus 24 percent are improperly terminated under the present procedures. And that is a result which comes from, I believe, the lack of procedural rudimentary due process.

The Government has their interest in the system as it stands now. Seven or eight Federal agencies have another

system similar to what we request. No evidence was introduced, although the Government, I assume they had the opportunity to introduce evidence that this new proceeding would somehow hamper it or burden it. No evidence at all was --

QUESTION: You wouldn't suggest, would you, Mr. Barnhill, that the Government is somehow penalized because it tries in certain areas to grant more rights than the Constitution would necessarily demand? You wouldn't want that kind of experimentation to stop, would you?

MR. BARNHILL: Absolutely not. But I do not think --

QUESTION: That's implicit in your suggestion that they should give as much as eight of the agencies find they can live with.

MR. BARNHILL: No, I certainly didn't mean to make that suggestion. My suggestion is only that that kind of procedure shows that it works, the kind of system we want works. It's a simply a fact in the proof of our case. There is no such implication as broad as that.

QUESTION: I don't quite see the difference between your statement and my suggestion.

MR. BARNHILL: But I agree with you, your Honor, that the privileges granted some Government employees beyond what the Constitution requires may not always have to be granted other employees. That is not the thrust of our case, though. Our case is briefly that the present procedures to place in

the Government would cost the Government very little.

Now, I would like to turn briefly to count two which is the free speech count. Our contention is very briefly that 5 U.S.C. 7501 which states that a person may be fired for any statement which interferes with the efficiency of the Government is vague and overbroad. As I read the statute and the legislative history, this was never Congress' intent. The Lloyd-LaFollette Act never meant to license the Civil Service Commission to punish persons because of their off-duty speech. Rather, the history of the Lloyd-LaFollette Act is that the Congress meant to stop an executive branch intrusion into the Civil Service Employees' speech. The fact is it was a reaction to guiderules which punished Federal employees for criticizing their superiors. This is precisely the case here. This is precisely what the Lloyd-LaFollette Act was meant to stop, not to start.

QUESTION: Mr. Barnhill, if it will help you any, we will add a few minutes. We have taken a lot of your time and Mr. Friedman's with questions. We will add a few minutes to your argument.

MR. BARNHILL: Thank you, your Honor.

QUESTION: Six or seven, eight minutes more.

MR. BARNHILL: Thank you.

QUESTION: Of course, the claim that the discharge violated the Lloyd-LaFollette Act isn't one that you can

raise before the three-judge district court, is it? Don't you have to pursue that through the Civil Service Commission and then appeal from the Civil Service Commission?

MR. BARNHILL: That is correct, but I believe it is the rule of this Court that a person who is potentially affected or affected by a statute or regulation which regulates speech is free to bring that matter to the Court before any adjudication of the facts of what he actually said. And that's exactly what happened here. Mr. Kennedy and a number of other OEO employees brought this case to the Court's attention after Mr. Kennedy was fired on the basis of this vague and overbroad statute.

I might add that the Civil Service Commission in reading the Lloyd-LaFollette Act to proscribe off-duty speech has not only worked at cross-purposes to Congress' original intention; it has also ignored relevant judicial admonitions. In 1968 in the case of Meehan v. Macy, the Court stated that the Civil Service Commission should go back to drawing boards and come up with some narrow and precise regulations. That invitation was never accepted, and we are left with the statute as it stands now.

With respect to its vagueness, I can only say that the three judges below had no difficulty in finding it an unreliable guide to regulate speech. Chief Judge Reynolds in the Eastern District of Wisconsin also when faced with a

similar efficiency standard on a State level, had no difficulty in finding it vague and unreliable.

Finally, the Administrative Conference of the United States has termed it an open invitation to arbitrary action.

It seems to me that these judgments cannot be ignored and they certainly go against the Government's contention this standard is somehow a reliable guide to the ordinary civil servant.

QUESTION: Mr. Barnhill, are there any limits to the argument you are now making? Let's assume, for the moment that an employee did charge his superior falsely with accepting a bribe. Let's assume further, since you mentioned off-duty, that this was done off-duty. Would that justify the discharge, or do you consider his right of free speech would entitle him to do that?

MR. BARNHILL: Well, your Honor, I am not here concerned with what is the line-drawing element, what is the borderline element. What I am saying is if that kind of somebody knowingly states a false fact serious enough about his superior, he probably could be fired if there is a statute of regulations narrow enough which told them that kind of conduct would be proscribed. You have to have some kind of rule so an employee knows what he can say.

QUESTION: Do you suggest that Government employees now under the present Act and regulations do not understand

that they can't charge their superiors in that way?

MR. BARNHILL: Cannot knowingly charge their superiors falsely? That is not the facts of this case, your Honor. The facts are to the contrary.

QUESTION: I gather what you are arguing, Mr. Barnhill, is whatever may be the reach of a properly drawn statute to reach the conduct of this fellow or someone in the hypothetical Mr. Justice promulgated, following the Gooding? analysis, he has standing because this reaches more than that kind of speech.

MR. BARNHILL: That is correct, irrespective of what he said. I understand that that rule has not been retreated from. The two cases cited by the Government in their brief dealt with conduct not speech.

QUESTION: Gooding was not a Government employee, was he?

MR. BARNHILL: No, your Honor, he was not. I do not believe there is any distinction, though, in the standing of a person to raise the case depending upon whether or not they are a Government employee. There are, of course, other restrictions. I do not read that to be one of them.

QUESTION: We are talking in this case now about the procedures which lead to this interim suspension on discharge.

MR. BARNHILL: Right. That's one of the issues, yes.

QUESTION: That's quite a different context from the Gooding case, isn't it?

MR. BARNHILL: That's correct. But that solely relating to the vagueness of the statute, which is count two in our complaint, I think the analysis remains the same as in Gooding.

QUESTION: More accurately the argument based on overbreadth.

MR. BARNHILL: That is correct. Like I said, almost everybody who has had an occasion to analyze it in any detail has said that it is an invitation to arbitrary action. And as I read the Government's position in this instance, the Government says that any speech which interferes with efficiency in the Government is proscribed under the present statute. That seems to sweep within it truthful criticism that may impede the Government's processes.

I do not believe that to be the opinion of this Court. I do not believe that efficiency overrides truth and free speech. I do not believe there is any such thing.

Finally, as I understand the Government's attack on our speech argument, it is that Mr. Kennedy somehow is a hard-core violator in the terms of this Court in the Broadrick case. The Broadrick case was concerned with conduct, not speech.

Additionally, there is no hard core in this statute

to violate. The statute is one vague anomalous statute. There is no series or full system of regulations which implement this statute. In fact, it is fair to say that there is not one regulation that was in effect in OEO at the time this statute was in being which implemented this statute with respect to free speech.

The Government's assertions that there were such regulations depend upon the purpose clause of certain OEO regulations and depend upon a regulation which is labeled conduct, not speech. And I believe it is the Government's failure to determine the difference between conduct and speech which causes this problem. There is a difference, and I believe it has been apparent in this case.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Barnhill.

You have about three minutes, Mr. Friedman.

REBUTTAL ORAL ARGUMENT OF DANIEL M. FRIEDMAN

ON BEHALF OF THE APPELLANTS

MR. FRIEDMAN: Thank you, Mr. Chief Justice.

The specific OEO regulation which we have quoted at pages 42 and 43 of our brief states that employees should avoid any action which might result in or give the appearance of -- and I quote -- "Affecting adversely the confidence of the public in the integrity of OEO and the Government."

While the regulation does not in terms refer to speech, it seems to us that"action"is a broad enough phrase and certainly I find it rather amazing, the suggestion there is an absolute immunity, a Government employee can say anything he pleases under this statute because his speech is somehow not subject to discipline.

That is what the district court has held in this case.

Now, the suggestion was made by Mr. Justice White that perhaps this thing involves the denial of liberty as distinguished from property. I think the answer -- any liberty here is the fact that he is branded, if you want to call that, as a man who has done bad things and it may be difficult for him to find a job. He can fully protect himself on that aspect of the case, certainly, through the hearing that will subsequently be conducted before the Civil Service Commission --

QUESTION: Why has the hearing been delayed?

MR. FRIEDMAN: The hearing, Mr. Justice, has been delayed because of the pendency of this case. Now, I could say that I understand, I had this morning checked with the Chicago office of the Civil Service Commission where the hearing would be held, and I was told that in fact the hearing has been terminated because of the fact that Mr. Kennedy is now back on the payroll. But the hearing was delayed, but if

things had proceeded normally, if things had proceeded normally, the hearing would have been held and Mr. Kennedy would have had an opportunity to try out before the Civil Service Commission all of these defenses which he now asserts exist to the charges made against him.

I would just like to respond,the contention was made that in the answer Mr. Kennedy filed to the proposed discharge that he denied all of these facts. That is set forth at page 62 of the appendix, and there is no denial of the facts. The only statement is that Mr. Kennedy is entitled to a fair and impartial hearing prior to any adverse action being taken against him. The thing then summarizes what Mr. Kennedy believes the hearing should consist of and then says, "The present adverse action procedure fails in substantial ways to provide all of these rudimentary elements required for a due process hearing," that therefore this proceeding is invalid, null and void.

This is not a denial. This is not --

QUESTION: It does say the fourth line from the bottom that the conversations for which he is being punished are inaccurately set forth in the adverse action.

MR. FRIEDMAN: But that, Mr. Justice, is with respect to the second set of charges. That, it seems to me, is in response to the contention that this is a denial of his rights of free speech.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:01 p.m., the oral argument in the above-entitled matter was concluded.)