In the

Supreme Court of the United States

United States Of America

Petitioner

v.

Herman R. Testan and
Francis L. Zarrilli,

Respondents.

No. 74-753

Washington, D. C.
November 12, 1975

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HERMAN R. TESTAN and FRANCIS L. ZARRILLI, Respondents.	:	

Washington, D. C.

Wednesday, November 12, 1975

The above-entitled matter came on for argument at 11:45 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:

JOHN P. RUPP, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, for the Petitioner.

EDWIN J. McDERMOTT, ESQ., Bala-Cynwyd, Pennsylvania, for the Respondents.

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 arguments next in United States against Testan and Zarrilli.

Mr. Rupp, you may proceed.

ORAL ARGUMENT OF JOHN P. RUPP, ON BEHALF OF PETITIONER

MR. RUPP: Mr. Chief Justice, and may it please the Court: This case is here on the Government's petition for writ of certiorari to review the decision by the court of claims.

Two questions were presented in the petition. First, whether the Court of Claims had jurisdiction over this case, and, second, whether in determining the correctness of respondents' classifications, the Classification Act requires that their positions be compared with positions held by employees in another Federal agency.

The relevant facts are both few and largely undisputed. Respondents were employed as trial attorneys by the Defense Supply Agency of the Defense Personnel Support Center in Philadelphia. Their positions are subject to the Classification Act, and under that Act they were at all relevant times classified at GS-13.

On December 9, 1969, they submitted requests to their employing agency seeking reclassification to GS-14. In support of those requests, they

argue that they were entitled to reclassification at GS-14 under the general standards promulgated by the Civil Service Commission, and secondly, that their positions were identical to positions occupied by attorneys employed by the Air Force Logistics Command in Dayton, Ohio, positions that were classified one grade higher than their own.

After an audit by a classifications specialist, respondents' employing agency informed them that they were properly classified at GS-13. On appeal, the Civil Service Commission endorsed that conclusion, made the same finding and denied respondents' request for reclassification. The Commission also ruled and informed respondents that the comparisons that they had requested did not constitute a proper method of classification under the Classification Act.

Respondents then filed the present suit in the Court of Claims seeking an order directing their reclassification to GS-14 as of the date of the first administrative denial of their request and back pay accrued from that date. The Court of Claims in a 4-to-3 decision ruled that it had jurisdiction over the case under the Tucker Act, and on the merits that the Civil Service Commission had been arbitrary and capricious in not making the comparisons that respondents had requested. The court therefore remanded the case to the Civil Service Commission with instructions to undertake the requested comparisons and to report the results to the court.

QUESTION: Do you know, by any chance, whether there have been many requests for comparison since the Testan case was decided by the Court of Claims?

MR. RUPP: I know of one.

QUESTION: Just one.

MR. RUPP: I know of one that resulted in a decision. There is a case, I think, decided by the District Court in the District of Columbia, Schacter, in which the court held the comparisons were not required, were not appropriate. I do not know, and I may have misconceived the question initially. I do not know whether many such requests have been made directly to the Civil Service Commission and then have not been pursued after they have been denied. I do know that the Civil Service Commission's policy is uniformly to deny such requests.

As noted in our reply brief, the central, and in our judgment, the dispositive issue presented by this case is whether any Federal statute or statutes gives respondents the substantive right to recover from the United States money damages for the period of a wrongful Civil Service classification. In assuming jurisdiction in this case, the Court of Claims conceded that the classification process involved substantial discretion, a concession which I think flows naturally from this Court's decision in the Ramspeck case. The Court of Claims also conceded that it was without power to

direct respondents' reclassification. The Court reasoned, however, that if respondents were found administratively to be entitled to reclassification, that determination could create a right to money damages or right to reclassification which the Court could then force by way of a money judgment.

While I think it is fair to say that the Court of Claims dealt at best cryptically with the issue of its jurisdiction, the Court appeared to assume first that a substantive right to the recovery of money damages against the United States could appropriately be found by implication and, second, that the history of the relationship between the Federal Government and its employees evidences an intent on Congress' part to permit the recovery of money damages for the period of wrongful Civil Service classification.

We submit that both of these assumptions which are together essential to holding that the Court of Claims had jurisdiction over this case so that a cause of action was stated are incorrect. It is settled, of course, that the jurisdiction of the Court of Claims under the Tucker Act is limited to cases in which the claimants seek actual presently due money damages, claims founded upon the Constitution, any Federal statute, et cetera. To that extent, then, we acknowledge that Congress has waived in the Tucker Act a portion of the sovereign immunity, the historic immunity, of the United States to suit. But it is essential, I think, to recognize

that the Tucker Act does not itself create any substantive rights to the recovery of money damages from the United States. Whether the claimants such as respondents are entitled to the recovery of money damages depends, in our view, upon the existence of the statute or combination of statutes, a substantive provision of some sort in a statute expressly and unequivocally waiving the immunity of the United States to the recovery of money damages from the public treasury.

It is not sufficient for these purposes, in our view, nor, indeed, is it even relevant, that the existence of such a substantive right might be thought responsive to a particular conception of public policy. The settled rule followed in countless cases, many of which are cited in our main brief at pages 6 through 8, prohibits a Court from implying authority to collect upon the public treasury, which is precisely what the Court of Claims did here and what respondents would have them do.

Respondents' contention to the contrary apparently proceeds from their view of the Tucker Act is constituting not only a grant of jurisdiction to the Court of Claims over particular types of cases, that is, those involving claims for money damages, but also is creating substantive rights to money damages whenever the provisions of any Federal statute have been violated.

We submit that those are separate issues and that

they must be analyzed separately. An example: In the Federal Tort Claims Act, it's quite clear that Congress there waived a portion of the historic immunity of the United States to suit. It incorporated the law of the place and gave to private parties the substantive right to proceed against the United States for certain types of tortious activities. It did not, however, waive the immunity of the United States to suits in the Court to such suits in the Court of Claims

Respondents' failure to appreciate the distinction between substantive rights and a grant of jurisdiction leads them to a conclusion that would render meaningless the multitude of Federal statutes in which Congress has expressly created a right to money damages in particular and clearly defined circumstances in favor of private parties. Respondents' view would render the Back Pay Act certainly superfluous, as would it render meaningless a number of other statutory provisions, for example, the provision in the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000(e)(5)(G) --

QUESTION: Of course, if you read the Wickersham case, Mr. Rupp, you wonder if the Back Pay Act wasn't superfluous.

MR. RUPP: Well, the Wickersham case -- it's important to recognize, I think, the context in which the Wickersham case was decided. Prior to the passage of the Civil Service

Act of 1883, this Court held in several cases that Federal employees who were discharged or not promoted stated no cause of action, were not entitled to judicial redress, notwithstanding the cause or reasons, the grounds, for their suspension.

QUESTION: Chyme ..

MR. RUPP: Chyme and Heenan are the principal cases, I suppose.

With the passage of the Civil Service Act of 1883, which was measurably strengthen by the Lloyd-La Follette Act in 1912, this Court, beginning with United States v. Wickersham, and other Courts recognized that Congress intended that Federal employees should not be separated from their positions wrongfully, that they were entitled to the privileges and emoluments of the position to which they were appointed until they were lawfully separated. That's what those statutes meant, separation for cause and not otherwise.

At the same time, however, the Courts have continued to recognize that people were not entitled to receive the salary of a position to which they have never been appointed.

QUESTION: But really all the Back Pay Act does is say that if you are wrongfully denied your emoluments, you are entitled to back pay. And I thought that was established by Wickersham.

MR. RUPP: Well, to some extent it was. It certainly covered some kinds of cases, and maybe the kinds of

cases that will arise in the majority kind of cases, although the Back Pay Act extended protections to classes of employees who had not been theretofore protected by judicial decision.

If you look at the legislative history particularly of the Back Pay Act amendments passed in 1966, Congress thought it was filling in the gaps left by the Back Pay Act of 1948, which the legislative history indicated was tied to section 7101 of the Lloyd-LaFollette Act and judicial decision. At the time they passed those amendments in 1966, they gave rather careful consideration to the cost of the coverage that they were providing for.

Now, if the violation of any Federal statute including the classification Act gave rise to a cause of action for back pay, it would have been a wholly futile act to pass the Back Pay Act or any number of other Federal statutes.

QUESTION: Suppose the Civil Service Commission is in fact paying different wages for the same work. What is the remedy of people such as these respondents?

MR. RUPP: Well, there are two, I suppose, or perhaps more properly stated they are part of the same process. The first thing they may do is file a request for reclassification with their employing agency. A position classification specialist is then obligated to look at their positions to perform an audit of their positions and attempt to determine whether their positions have been properly classified. If the

decision by the employing agency which draws upon the audit is not satisfactory to the employees, they have a right to appeal to the Civil Service Commission.

QUESTION: Totally prospective.

MR. RUPP: Yes. And I want to make that clear. We are not here saying simply that these employees are not entitled to back pay; we are saying as well that they are not entitled to retroactive reclassification.

QUESTION: And what is the second route?

MR. RUPP: Well, again, it is part of the same route. Once the employees have exhausted their administrative remedies, I suppose that there might be cases in which they could file suit in the District Court seeking prospective equitab relief, although I don't see any jurisdictional basis for such a suit other than the Mandamus Act, 28 1361, and I concede as well that the scope of review on mandamus is restricted.

QUESTION: Well, certainly, it doesn't cover discretionary decisions.

MR. RUPP: No, it does not. The claim that --

QUESTION: Maybe there just is no review. I mean, that wouldn't be a terribly earth-shaking --

MR. RUPP: If you have got a case in which the Civil Service Commission says for the future we will not promote anyone with blue eyes or anyone who is black, I have little doubt that the District Court would entertain a suit

under the Mandamus action and would overturn that determination.

QUESTION: There you would have 1331 jurisdiction.

MR. RUPP: And 1331, yes, that's right.

In a case in which a decision within the discretion of the employing agency and the Civil Service Commission going to the duties and responsibilities performed and whether under the relevant standards those duties and responsibilities merited --

MR. CHIEF JUSTICE BURGER: We will resume there at 1 o'clock.

MR. RUPP: Thank you.

[Whereupon, at 12 noon, a luncheon recess was taken, to reconvene at 1 p.m. the same day.]

AFTERNOON SESSION

(1:05 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Rupp, you have about 15 minutes left.

ORAL ARGUMENT OF JOHN P. RUPP, ON BEHALF OF PETITIONER (RESUMED)

MR. RUPP: Mr. Chief Justice, and may it please the Court: The principal point of my argument this morning was that it is inappropriate to imply authority to collect from the public treasury of the United States.

To complete that discussion, let me now make a couple of additional points. The first is that the principles that I discussed this morning do not govern Fifth Amendment taking cases. And the citation by respondents and the amici in this case to those cases appears to us consequently to have been misplaced. The Fifth Amendment by its very terms, as this Court recognized in the Railroad Reorganization Act cases, is a self-executing waiver of sovereign immunity. It would mean nothing if it did not mean that. This Court has recognized that beginning with the Causby case and that view was reaffirmed in the Railroad Reorganization Act cases. The Fifth Amendment is not implicated in this case, and those cases don't govern here.

The second and last point I would like to make in that regard is that neither is this case like Bivens or Bell v.

Hood where the immunity of the United States is not directly implicated. The issue in those cases fundamentally is whether the activities complained of, the basis for the suit in those cases, were acts of the sovereign with respect to which the defendants there were entitled to claim sovereign immunity. Although that issue may not be finally disposed of, it seems relatively clear that if a person, a Federal employee, is acting unconstitutionally or beyond the scope of his or her statutory authority, those allegations are not made here --

QUESTION: Must the United States be the only defendant in the Court of Claims?

MR. RUPP: Yes, this Court has so held.

The importance of the Court of Claims to the Court of Claims' assumption of jurisdiction in this case of its being able to imply a cause of action against the United States stems precisely from the fact that there is no Federal statute expressly and unequivocally waiving or implying a substantive right in favor of individual Federal employees to collect from the public treasury for the period of an assertedly wrongful Civil Service classification. Indeed, the respondents and the amici have appeared to concede that there is no such substantive provision explicitly so providing in the Classification Act. In fact, when the scheme provided for in the Classification Act, the classification process provided for in that Act, is viewed as a whole, it seems to me apparent

that Congress did not intend that classifications would operate either retroactively or that reclassification might provide a predicate for the recovery of back pay. For example, the Classification Act provides in a number of provisions that the classification certificates issued by employing agencies in the first instance and on occasion in the event of review by the Civil Service Commission are to be binding on payroll, certifying, and other officials with authority to disburse monies from the public treasury. There is no provision in the Classification Act warranting either retroactive reclassification or the award of back pay.

Neither, I should note, is there any suggestion, however tenuous, in the legislative history of the Classification Act supporting the claim made by respondents in this case. That omission, it seems to me, is particularly significant in light of the longstanding rule that Federal employees are entitled to receive only the salaries of the positions to which they were appointed, notwithstanding the fact that they may have performed duties of another higher paying position.

Furthermore, although the Classification Act has been in effect for approximately 50 years, although significantly amended in 1948, but in its essentials in effect for over 50 years, we have been able to locate only one other case in which the Court of Claims, or any other Court, we know

of no other Court that has held by implication as the Court of Claims did here. The only other case in which the Court of Claims appeared to assume in dicta, and again without reaching the issue that the Classification Act might provide a warrant for retroactive reclassification or for the award of back pay, is the case Bookman v. United States. Prior to the decision in Bookman, the Court of Claims had consistently and repeatedly held that Federal employees were only entitled to the salaries of the positions to which they were appointed. They so held in cases such as Baehre v. United States, Price v. United States, and Coleman v. United States, and as recently as 1968. None of those cases were cited or discussed in the Court's opinion in this case.

In a series of decisions extending over 40 years, beginning shortly after passage of the Classification Act, the Comptroller General of the United States has taken the same position, that is, that reclassifications may operate prospectively only and that Federal employees may not recover back pay for the period of a wrongful classification. The only exception to this general rule that has been recognized has been for administrative errors attributable to the failure of a subordinate to implement a valid classification decision made by the employing agency or the Civil Service Commission.

QUESTION: It's not often that the Justice Department relies on the Comptroller General to support its views.

MR. RUPP: No, that may be true.

Although the Court of Claims in this case expressly disclaimed -- it's on the Back Pay Act. Let me make a couple of points in that regard.

Again, the Back Pay Act does not explicitly provide for the payment of money damages for the period of a wrongful classification. The Back Pay Act authorizes the award of back pay, and let me quote, "to employees subjected to an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction" of all or part of his compensation. That language does not cover the situation with which we have been presented here which does not involve the withdrawal or the reduction of compensation but an assertedly wrongly failure to increase compensation. If there is any ambiguity in that language, and I think there is none, the legislative history of the Back Pay Act makes unmistakably clear that Congress meant that Act to apply only to wrongful suspensions, demotions, removals, and other unwarranted and unjustified personnel actions resulting from reassignments or a transfer from full or part-time work. The Back Pay Act originally grew out of the Lloyd-La Follette Act of 1912 which governed dismissals and suspensions. As amended in 1948 the Congress filled a number of gaps in the -- excuse me, in 1966 -- Congress filled in a number of the gaps in the Act but did not provide for the recovery of back

pay for persons wrongfully classified.

The Court of Claims prior to this case has held as well that the Back Pay Act does not provide a predicate for recovery by employees of back pay for the period of wrongful classifications. For it to have ruled otherwise, other than it did in this case, then, would have required it to overrule a long line of its own decisions, including Desmond v. United States, Dianish v. United States, and Ganse v. United States.

Even if the substantive right to the recovery of money damages against the United States for the period of a wrongful classification could appropriately be found by implication, and as I have argued this morning and in our briefs that it cannot be, I think that we believe that the Court of Claims would no less assuredly have been without jurisdiction over this case. We discussed in some detail the history of the relationship between the Federal Government and its employees in our briefs, we discussed it a bit further this morning. The fact is that when Congress was considering the Classification Act and the Back Pay Act, the prevailing rule was that wrongfully classified Civil Service employees were not entitled to the recovery of back pay. Congress could have provided in either the Classification Act or the Back Pay Act for such recovery. It did not. It seems to me that that is persuasive evidence of Congress' intent not to permit the recovery of back pay such as that sought by respondents in

this case in the circumstances presented in their complaint.

One final point on the jurisdiction or cause of action aspect of this case. That is the argument made by the amici that our position in this case would leave respondents wholly without remedy for wrongful classifications. As their discussion of the substantive provisions of the Classification Act reveals, I think, Congress created in the Classification Act an elaborate set of administrative safeguards to ensure that the goals of the Act would be met in practice, including the goal of equal pay for substantially equal work.

We have also acknowledged that a suit could be brought in District Court seeking prospective classification, although the scope of that remedy is, of course, a limited one. To the extent that persons wrongfully classified or assertedly wrongfully classified are without back pay for the period of that wrongful classification is a matter, in our view, to be left to Congress. They have resolved this far not to provide back pay under the circumstances.

With respect to the merits of the contention that the Civil Service Commission was arbitrary and capricious in refusing to compare respondents' positions with the positions held by employees in another Federal agency, let me say only that that kind of position comparison was very substantially the kind of classification scheme which Congress rejected in 1923 when it enacted the Classification Act. There are

insuperable, in our view, practical difficulties associated with the suggestion that the Civil Service Commission has a duty to compare positions under any circumstances. The Court of Claims attempted to deal with these difficulties in part by suggesting that its holding was limited to circumstances in which the complaining employee and the employees referred to had a large nexus of duties performed in common.

QUESTION: Do we get to this --

MR. RUPP: No.

QUESTION: If we agree with you in your first point, we don't reach this --

MR. RUPP: That is correct.

QUESTION: But we would have to if we didn't.

MR. RUPP: If you would hold that the Court of Claims had jurisdiction in this case, then we would have to reach point two. We believe the case is over as soon as you have looked at jurisdiction.

The entire thrust of the Classification Act is to require the classification of positions by reference to generally applicable standards. Repeatedly in the Classification Act the Civil Service Commission is required to promulgate generally applicable standards, employing agencies are obligated to look at those classification standards in making classifications. In reviewing the appropriateness of classifications the Civil Service Commission is required again

to scrutinize the classification decisions reached by employing agencies in light of the general classification standards.

One of the great problems that would be presented were the Civil Service Commission to have a duty to perform comparisons of the type requested by respondent is that the employing agency in the first instance would not have access to the kind of information that it would need to make such comparisons. You would then have a classification decision made by an employing agency not taking into account the full range of considerations made appropriate by the Court of Claims' decision in this case. Not only then would Federal Civil Service employees have the prospect of two bites at very largely the same apple, they would also have the prospect of review by a body obligated to take into account considerations that could not have been taken into account by the employing agency. We believe that there is a very great likelihood that that would stimulate appeals in a large number of cases in which appeals were not warranted.

QUESTION: I suppose one of the considerations, among many others, would be the budget, wouldn't it?

MR. RUPP: Well, yes, that's right.

QUESTION: If there were a sudden judicial order somewhere to move all of the class of 13's to Grade 15, you would have quite a problem.

MR. RUPP: That's a problem. There is a further

problem --

QUESTION: There are even more important problems than the budget.

MR. RUPP: There is the problem that you suggest, and we referred to that in our brief. A related problem is that the Civil Service Commission could not necessarily assume that the position pointed to by the complaining employees was properly classified. I suppose it would be entitled to prima facie considerations of proper classification. But to do the kind of job that the Court of Claims appears to require in this case would require the Civil Service Commission not only to make the comparison that had been requested, but to validate the classification of the positions being pointed out. At least in theory that's going to double the work of the Civil Service Commission.

QUESTION: I didn't mean to interrupt. If a plaintiff files a complaint in the Court of Claims and says that the Back Pay Act and the Classification Act together give me a claim for money damages against the United States and goes on to detail particulars, the Court of Claims decides that neither of those Acts does give a claim for money damages against the United States, does the Court of Claims dismiss for want of jurisdiction or for failure to state a claim on which relief can be granted?

MR. RUPP: They do both.

QUESTION: I thought they would have to do one or the other.

MR. RUPP: Well, in theory, of course, they should do one or the other.

QUESTION: I don't mean as a practice, but I mean what should they do, logically, under your argument?

MR. RUPP: Well, there is support for either proposition. I think the proper course would be to dismiss for failure to state a cause of action, although there is support for the contrary, particularly given the implications of sovereign immunity.

QUESTION: If jurisdiction is only to award monetary damages even though another court might have jurisdiction over a cause of action asking for something else, wouldn't a proper dismissal be for want of jurisdiction?

MR. RUPP: Well --

QUESTION: Perhaps it's not worth pursuing.

MR. RUPP: It may not be. I think, Mr. Justice Blackman's opinion in Gnotta would lead to that conclusion. I think a contrary argument could be made with some reasonableness. It's without significance here.

QUESTION: That is a determination that there was no cause of action stated in that court would be essentially the same as a jurisdictional determination, wouldn't it?

MR. RUPP: That is correct, and they would be

obligated to do precisely the same, having reached that conclusion.

MR. CHIEF JUSTICE BURGER: Very well.

QUESTION: Mr. Rupp, before you sit down, I ask this purely out of curiosity. Judge Kunzig didn't sit on the case below, did he? And Senior Judge Laramore did. I just wondered why that juxtaposition, if there is such a word.

It isn't important. I just wondered if you happen to know.

MR. RUPP: I don't know. I am sorry.

MR. CHIEF JUSTICE BURGER: Mr. McDermott.

ORAL ARGUMENT OF EDWIN J. McDERMOTT

ON BEHALF OF RESPONDENTS

MR. McDERMOTT: Mr. Chief Justice, and may it please the Court: The contentions of the petitioner are that the respondents are correctly classified as GS-13. Now, the issue depends upon the Civil Service Commission's general attorney series and upon the equal-pay-for-equal-work statute.

QUESTION: You are starting with their second contention, aren't you? You will come back to jurisdiction at some time I hope.

MR. McDERMOTT: Well, as far as jurisdiction is concerned, the Tucker Act gives the Court jurisdiction, and we submit that it absolutely waives sovereign immunity insofar as it goes. Now, that provides the Court of Claims jurisdiction

to enter judgment upon any claim against the United States founded either upon the Constitution, or any act of Congress, or any regulation of the Executive Department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Now, we submit that our case is based upon, one, the Classification Act, and also upon the Equal Pay for Equal Work Act.

Now, the Court of Claims below in the per curiam opinion in which the Chief Judge and Judges Davis and Kashiwa --

QUESTION: A court of three.

MR. McDERMOTT: A court of three --and Nichols joined -- ruled this. They said this case is peculiar in its facts. Whereas here employees all belong to a small federally manageable cadre, their jobs have a large nexus of duties shared in common, and other employees were specifically pointed out by the complaining employees, we rule the case to be different.

Now, the case on which the Court of Claims depended was the Selman case, Selman v. United States. In that case Navy Captains had been assigned Assistant Judge Advocate Generals of the Navy, and the statute provided that if an officer was assigned to that position, he was entitled to the pay of a Rear Admiral lower half. Nevertheless, he was only

paid at the rate of maybe a Captain's pay.

Now, when it came to the Court of Claims, the Court of Claims ruled that the statute was mandatory and gave them the pay of a Rear Admiral lower half for the period of their service and gave Selman back pay for 44 months.

Now, this case, the plaintiffs are trial attorneys before the Armed Services Board of Contract Appeals. Now, the trial judge pointed out, and he set forth the position descriptions of both the plaintiffs, which are under GS-13, and the Air Force attorneys which are GS-14, and he said there is really no difference between the position descriptions. The duties were the same, they prepare cases, try cases, file post hearing briefs, file pretrial briefs, interview witnesses, secure expert witnesses. They do everything the same job as for both of them.

Now, he said that if you apply the equal pay for equal work statute and if you look at the general attorney series, you come to the inescapable conclusion that the plaintiffs are entitled to be classified as grade GS-14.

QUESTION: You have to make two jumps, though, to have the Selman case control this case, don't you? You have got to show that there is language in either the Back Pay Act or the Classification Act that is equally mandatory, and you have got to show that Selman is right in the light of our decision in the Kane case.

MR. McDERMOTT: Well, Selman is right because it was pursuant to a statute which provided for that pay, the pay of a Rear Admiral lower half for an Assistant Judge Advocate General. It's a provision of the statute.

Now, we say that we are assuming, dependent upon the provisions of a statute, we depend upon the provisions of the general attorney series, and the trial judge -- and he studied this case, I think, very well -- he said this, that the comparison of the position descriptions of the DPSC and the AFLC demonstrate that they are strikingly similar, and he was of the opinion that one classifier, for instance, out at Dayton, would look at the general attorney series and the position description and come to the conclusion that it was properly classified as Grade GS-14, whereas the position classifier at the Defense Personnel Support Center would look at the same position description, the same general attorney series and come to the conclusion it was properly classified at GS-13.

Now, he said that the position descriptions are almost strikingly similar and the duties of the trial attorneys are the same.

Also, Mr. Rupp argued that the Back Pay Act does not cover this situation. Now, in the amicus curiae brief, at page 16, on line 17 there is an analysis of the Back Pay Act. Now, it is submitted that phrase "unjustified or unwarranted

personnel action" within the meaning of the Back Pay Act applies as well to this action wrongly classifying the plaintiffs in this case as it would as if it were a removal or a reduction in rank or a suspension. And it's pointed out that the Congress left that phrase almost open for interpretation and that the Civil Service Commission did the same thing, and that there is no statement in any of the congressional hearings or reports defining what is meant by unjustified or unwarranted personnel action. And that's merely a question of interpretation of the statute and we submit that on that basis we are entitled to recover.

Now, so far as jurisdiction is concerned, we depend on three things -- one, the general attorney series, and the trial judge has found that they are entitled to Grade GS-14 thereunder. There are only two factors that were concerned there, and he went into them quite thoroughly in his opinion.

Now, actually, if you look at this case and you look at the Selman case, and in Selman the court said that they are entitled to the pay of a Rear Admiral lower half because the statute so provided. We say that we are entitled to the grade of GS-14 because the general attorney series so provided and the equal pay for equal work statute so provides.

Now, actually, if you come down to the position of the Civil Service Commission, that says that we disregard the statute which says equal pay for equal work and we look at the

position description of the person only under the series which is applicable to it. Now, the Court of Claims and the trial judge ruled that that was improper and arbitrary and capricious because the Commission actually refused to follow a congressional mandate of equal pay for equal work, and there are many cases in the Court of Claims where that provision has been established and enforced.

Now, we submit also that the trial judge found that there is discrimination in this case, and he specifically found that in his opinion where he said, "On the evidence in this case, it is concluded that the refusal to classify plaintiffs to GS-14 is arbitrary, discriminatory, and is not supported by substantial evidence."

Now, if there be discrimination in this case, then we cite the decision of the Court of Claims in Chambers v. United States. That ruled that a black applicant for a position in the Social Security Administration who had been discriminated against was entitled to back pay. Now, that's a very well-written opinion by Judge Nichols, and I suggest if that opinion be followed and the fact of discrimination be found to have been adopted by the trial judge as a finding based upon his review of the record, then I suggest that we are entitled to relief.

Now, actually, if you look at what's referred to as the remand statute, all that the Court of Claims has done here

has been to follow it. They found that the Civil Service Commission's action was arbitrary and capricious and that the Commission should comply with the mandate of the statute calling for equal pay for equal work. And the Court of Claims ruled that the grades of other lawyers representing other procuring agencies before the Armed Services Board of Contract Appeals provide an essential bench mark and without consideration of them, no confidence could be felt that the statute calling for equal pay for equal work had been obeyed.

Now, the statute, that's 92-415, that's what's referred to in Mr. Rupp's brief as the remand statute, provides that in any case within this jurisdiction, the Court of Claims shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper. And the Senate report pointed out that the Act provides the United States Court of Claims with the necessary means to compel administrative or executive bodies to take further action where it is necessary to make an adequate record.

Now, that's all that the Court of Claims has done here. It said it disagrees with the trial judge that the Court has the right to reclassify people, that that's a job for the Civil Service Commission, and it remanded it back to the Civil Service Commission to take into consideration the equal-pay-for-equal-work statute and to find if plaintiffs,

using as a bench mark the grade applied to the trial attorneys from the Air Force at Dayton, to determine whether or not they were entitled to a Grade GS-14. And that's all that the remand statute does.

So we ask the Court in consideration of this case to find, first of all, that the Court of Claims had jurisdiction to consider this, that it's never necessary for a statute to itself provide that for breach of it a person shall have an action against the United States because that's what the Tucker Act does. The Tucker Act gives jurisdiction to the Court of Claims, and there are many statutes and regulations the breach of which do not spell out the right to sue in the Court of Claims for damages. So we submit that there is, first of all, there is jurisdiction, and that it is a good thing for the practice of law generally to raise the grades of lawyers who appear before the Armed Services Board of Contract Appeals.

Now, we have a letter from the Chairman of the Armed Services Board of Contract Appeals in which he says that generally most of the lawyers who appear before them are Grade GS-14. The only exception appears to be the trial attorneys for the Defense Personnel Support Center. And when they do the same work that other lawyers do before the Armed Services Board of Contract Appeals, then I submit they are entitled to the same pay, because it's equal pay for equal work. That's a statutory definition and mandate, and I submit

that the Court of Claims' judgment should be affirmed.

Thank you.

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

[Whereupon, at 1:36 p.m., oral arguments in the above-entitled matter were concluded.]