ORIGINAL

In the

Supreme Court of the United States

United States, Petitioner, v. Alice R. Hopkins, Respondent.	)	No. 75-246

Washington, D. C.
April 19, 1976
April 20, 1976

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HOOVER REPORTING COMPANY, INC.
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Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Petitioner,	:	
v.	:	No. 75-246
ALICE R. HOPKINS, Respondent.	:	

Washington, D. C.,

Monday, April 19, 1976.

The above-entitled matter came on for argument at 2:34 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ROBERT B. REICH, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of Petitioner.

THOMAS H. McGRAIL, ESQ., 810 American Security Building, 730 Fifteenth Street, N. W., Washington, D. C.; on behalf of Respondent.

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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 75-246, United States v. Hopkins.

Mr. Reich, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT B. REICH, ESQ.,

ON BEHALF OF PETITIONER

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

This case is here on writ of certiorari to the Court of Claims. After the government's petition was filed in this case, by leave of this Court, the claimant's widow was substituted as respondent before this Court and, for simplicity sake, when I refer to respondent, I shall be referring to the claimant.

The respondent was discharged from his position of civilian employment with the Army and Air Force Exchange Service for alleged acts of misconduct incompatible with his continued employment. That discharge was sustained on administrative appeal.

The respondent then commenced this suit against the United States in the Court of Claims, alleging that the discharge and the subsequent administrative appeal violated applicable exchange service regulations then in effect, that it was also a breach of his contract of employment with the exchange

service, and that he was also thereby denied due process.

He sought back pay and allowances and he asserted jurisdiction under the Tucker Act. The Court of Claims denied the government's motion to dismiss for lack of jurisdiction. The court acknowledged that prior to 1970 it had no jurisdiction over such claims, but the court held that the 1970 amendment to the Tucker Act, which provides that a contract, express or implied, with the exchange service shall be deemed a contract with the United States, conferred such jurisdiction, and the court reasoned that exchange service employees have a contractual relationship with the exchange service.

Now, we submit that the Court of Claims was correct only insofar as it acknowledged that it had no jurisdiction over respondent's non-contractual claims. Congress does not appropriate money to support the exchange service, and there is no statute or constitutional provision that can fairly be interpreted as mandating compensation for the damage sustained. That is a prerequisite for jurisdiction under the Tucker Act for non-contractual claims, as this Court recently acknowledged and held in United States v. Testan and Zarrilli.

But we submit that the Court of Claims misconstrued the 1970 amendment to the Tucker Act to encompass within its provisions a claim by an exchange service employee to back pay for unlawful discharge. First, such claims are not derived from contract. The terms and conditions of employment in the

exchange service derive entirely from regulations duly promulgated under the authority of the Secretaries of the Army and Air Force. Indeed, the very terms and conditions that the respondent alleged were violated in this case were derived solely from those regulations.

Now, the respondent asserts in his brief before this Court that those regulations in effect constitute a contract of employment. But those regulations can be and have been unilaterally changed by the exchange service, by the Secretaries of the Army and Air Force as the needs of the Army and Air Force require. Indeed, they were changed and modified during the course of the respondent's employment, and they continue to be subject to periodic change and modification. And a long line of cases, beginning with Butler v. Pennsylvania, this Court has held that government employment that is based upon regulations or statutes which unilaterally must be capable of change as public needs require, does not give rise to contractual rights.

Accordingly, the exchange service employees, like other federal employees, do not have contractual rights against the United States. This conclusion --

QUESTION: Is there a certain inconsistency in your argument, Mr. Reich? I think there probably is in your opponent's, too. You have to argue that they aren't government employees for one purpose and yet they are for another,

and he has to take just the converse of it.

MR. REICH: Well, we submit that the term "government or federal employees" has no real talesmatic significance in this case. Exchange service employees certainly are federal employees, for many purposes. As we pointed out in our brief, Congress has expressly included them within the definition of federal employee for the purposes of the Dual Compensation Act and the Federal Employees Compensation Act. They are federal employees under the Federal Tort Claims Act, and many of the rules and regulations are exactly the same as those governing other federal employees.

The point is -- and I think this is the point that the Court of Claims misconstrued -- that the terms and conditions of employment, because they derive entirely from regulations duly authorized and promulgated under the authority of the Secretaries of the Army and Air Force, and because they can be and must be capable of unilateral change, indeed they were capable and they were changed in this case, simply do not give rise to contractual rights, whether you term these people federal employees or something else.

In terms of the relationship of their employment, it is not contractual.

QUESTION: Mr. Reich, can I test that with you for just a moment?

MR. REICH: Certainly.

QUESTION: Supposing a person is drafted into the service under the Selective Service law, and he has to serve according to rules and regulations in effect from time to time. Is his legal relationship to his employer the same as the legal relationship of this employee to his employer?

MR. REICH: We submit --

QUESTION: The terms could be set unilaterally by the United States --

MR. REICH: We submit, Your Honor, that if employment is governed by terms and conditions which unilaterally must be subject to change, and there is no suggestion in this case that those terms and conditions could not be changed, then there is no contractual relationship. Now, I am informed that there is a conflict among the circuits at this particular time with regard to enlistees who actually sign --

QUESTION: No, I am not talking about an enlistee. Perhaps you did not hear my question. The question is whether there is a distinction between the legal relationship of a draftee and a person who voluntarily says to the government "I will work on these termd and conditions and such changes as you may make by regulation, although I may quit if I don't like the change." Is that the same relationship that a draftee undertakes?

MR. REICH: Your Honor, I'm not --

QUESTION: Let me put it just a little differently.

Isn't it an essential ingredient of the relationship between the employer and the employee, that the employee has voluntarily agreed to work for the government on those terms, and isn't that the traditional hallmark of a contractual relationship?

MR. REICH: The traditional hallmark of a contractual relationship is an agreement to be bound by whatever terms and conditions --

QUESTION: Well, cannot a contract be terminable at will?

MR. REICH: A contract presumably could be, Your Honor, but if one party to a contract -- and this is established contract law -- if one party to the contract may unilaterally change whatever terms and conditions that are part of that agreement, then it is not deemed a contract or an implied contract. Even an implied contract would not stand up under scrutiny if one of the parties could unilaterally at any time change the terms and conditions. It is not nearly enough --

QUESTION: Whenever he makes the change, he runs the risk that the employee may say, well, the bargain is no longer attractive to me, so I will now terminate?

MR. REICH: Well, we would not, Your Honor, call that a contract and --

QUESTION: What is it, then, if it is not a contract, what is it?

MR. REICH: This would be precisely the same type of

employment relationship that all federal employees, as this Court has time and again held, to which they are subject, and that is the rights and obligations of employment derive entirely from rules and regulations and statutes. It is not contractual --

QUESTION: Isn't it also always an element of the relationship that the employee agrees to accept that --

MR. REICH: That agreement presumably would be an element of the relationship, but that would not be enough to --

QUESTION: Then why is it not a contract?

MR. REICH: It is not a contract because, as this Court has held -- well, for instance, Butler v. Pennsylvania was one of the first times that this Court actually faced the issue of a government employee asserting that he had contractual rights to whatever agreement he had entered into with the government, and at that time this Court said contractual rights are to be distinguished from engagements adopted by the government for the benefit of all, which are to be varied or discontinued as the public good shall require. And then this Court went on to say the establishment of contracts would arrest necessarily everything like progress or improvement in the government.

Now, I don't know what label it is convenient to put upon these government employee relationships, but this Court has held -- and we think wisely -- that the Appalachian contract

simply is inappropriate.

Now, the legislative history of the 1970 amendment to the Tucker Act confirms that Congress did not intend to affect the substantive rights of exchange service employees. Exchange service employees are nowhere specifically mentioned in any of the legislative history, any of the reports or debates or hearings preceding enactment. The entire focus of congressional concern in 1970 was upon independent third-party contractors and --

QUESTION: Suppliers?

MR. REICH: Suppliers of goods and services who -- and there is a repeated cadence in the legislative history, a need to put these third-party suppliers upon an equal footing with those who contracted for goods and services with the rest of the federal government and over whose contractual claims the Court of Claims did have jurisdiction.

The absence of any express reference to exchange service employees in the legislative history is particularly indicative in light of the fact that there are 100,000 exchange service employees, and had Congress intended in 1970 to expose the federal Treasury to the indeterminately large liabilities that might be represented by the back pay claims of this sizable group, presumably Congress would have addressed the issue directly, but it did not do so.

Indeed, whenever prior to 1970 Congress had legislated

with respect to the rights or obligations of exchange service employees, it had done so expressly and directly. For instance, it expressly included exchange service employees within the definition of federal employees that I mentioned a moment ago. It expressly excluded exchange service employees from the definition of federal employees for the purposes of laws administered by the Civil Service Commission, including, I might add, the Back Pay Act.

Now, in 1970, had Congress intended to give exchange service employees a back pay remedy, presumably not only would it have addressed the issue directly in the legislative history, but presumably it would have done it directly by merely amending the Back Pay Act to encompass such claims.

QUESTION: Mr. Reich, am I right in thinking that prior to the enactment of the Back Pay Act an admitted government employee had no money remedy against the government for claimed violation of his tenure?

MR. REICH: Well, that is not entirely correct, Mr. Justice Rehnquist, because there were a series of cases, beginning I believe with United States v. Wickersham, under which an employee whose emoluments were actually enacted in appropriations by Congress might have an entitlement to back pay under the theory that he had never been lawfully discharged from his employment. But we would point out that in those cases Congress had waived sovereign immunity at least to the

extent of creating a substantive right to money. The public Treasury was exposed by the very nature of the appropriation. But with regard to exchange service employees, where Congress has not appropriated any money to support the exchange services, that kind of logic obviously would not be sufficient to create a waiver of sovereign immunity.

QUESTION: But hasn't it appropriated money here to pay judgments that are rendered by the Court of Claims at the behest of third-party contractors under the --

MR. REICH: Yes. Yes, the 1970 amendment does concern itself with third-party contractors with the exchange service, however -- I'm sorry.

QUESTION: Well, if your opponent is right, presumably Congress is likewise prepared to appropriate money to pay judgments for people such as the respondent in this case and then seek reimbursement from the exchange service.

MR. REICH: But Congress presumably would have said so had it so intended. Our point is that, first of all, these are not contractual relationships, and, secondly, Congress did not indicate any intention at all within the hearings, debates or reports preceding enactment to bring within the ambit of the term "contract" or "contractual relationships" the claims of exchange service employees. Congressional silence, both in the legislative history and also in the language of the resulting enactment, can only be taken as an indication that Congress

simply did not intend to embrace or encompass exchange service employees claims to back pay for unlawful discharge.

As this Court has repeatedly said, particularly within the context of Court of Claims, a waiver of sovereign immunity cannot be implied but must be unequivocally stated, there has been no such unequivocal statement here.

Now, if there are no further questions, I will --

QUESTION: Well, just one question. I think you say the Congress was silent about the problem of the employee of the exchange, but did they not cite the Keetz case during the legislative history?

MR. REICH: The Keetz case was one of four cases, Your Honor, that were cited in the legislative history, all merely for the proposition or merely as instances where sovereign immunity had barred access to the Court of Claims. Three of the cases -- not the Keetz case but the other three cases -- involved express contracts for the supply of goods or services. Keetz, you correctly point out, did involve the claim to back pay by an exchange service employee. However, none of these cases was cited on its facts or discussed on its facts. They were merely cited in the legislative history as four instances where sovereign immunity had barred access to the Court of Claims.

The Court of Claims in the instant case focused upon the Keetz case in discerning a congressional intent to bring

exchange service employees within the ambit of the 1970 amendment. But we think that the mere citation of Keetz, without any discussion whatsoever, is not sufficient indication that Congress unequivocally intended to waive the sovereign immunity of the United States and to expose the public Treasury to the claims of exchange service employees.

QUESTION: Don't we have the same problem with the legislative history that we do with the statute itself, that the word "contract" is perhaps ambiguous -- I understand your position to the contrary -- and if the word "contract" is construed to include the employee-employer relationship, then all the references to "contract" in the legislative history are equally ambiguous, are they not?

MR. REICH: But, again, Your Honor, we --

QUESTION: Including citing cases in a group, one of which is an employee case and the other three are third-party cases.

MR. REICH: Well, again, I would have to point out that the fact that there are 100,000 exchange service employees-- the fact that Congress had expressly legislated with respect to them three or four times prior to 1970 and had expressly excluded them from coverage of laws administered by the Civil Service Commission, including the Back Pay Act, would indicate that Congress simply did not intend or focus upon or consider the inclusion of exchange service employees within the waiver

of sovereign immunity represented by the 1970 amendment.

And, again, one cornerstone of our argument must be, as this Court has repeatedly emphasized, such waivers of sovereign immunity, exposure of the public Treasury to claims within the Court of Claims simply cannot be implied but must be unequivocally stated somewhere.

If there are no further questions, I will reserve the remainder of my time.

MR. CHIEF JUSTICE BURGER: Counsel, you may proceed whenever you are ready.

ORAL ARGUMENT OF THOMAS H. McGRAIL, ESQ.

ON BEHALF OF RESPONDENT

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

The brief by the respondent contains three arguments: The first argument is that the respondent had a contractual relationship with the exchange service, that the respondent is not within the ambit of the Butler case, that the history of the exchange services show that the respondent and other exchange service employees are contractual and not federal employees, and that will be the argument I will present today.

In my brief, however, there were two other arguments, arguments two and three, in which I raised issues similar to the issues raised by the employee in Testan. The Testan decision by this Court last month rejected those contentions,

and therefore my arguments two and three are now moot.

However, I would like to emphasize that the Testan case does not detract from the first argument, which is a contractual argument, and, as I will later point out, actually strengthens it.

I also would like to mention that my arguments two and three do contain some development of the background of the exchange services, which development is pertinent to my argument one, and therefore I submit respectfully that the Court may wish to review arguments two and three for the purposes of the background facts, as I will not be able to cover them all in oral argument.

The ultimate issue here is not necessarily whether this employee and other exchange service employees are in some vague way federal. The question is whether the Butler principle should be extended to exchange service employees.

Butler was decided by this Court in 1850. Of course, it held that the government has to be at liberty to change the agents which carry out its function whenever there has been a change of policy or change of administration or whatever. I submit that Butler is obsolete, that that is not the policy now. We now have stability in the Executive Branch. I am not asking the Court to renounce Butler. I am just asking the Court not to extend it to exchange service employees.

QUESTION: Do you agree, Mr. McGrail, that the

Congress has always tended to treat the employees of the exchanges as a separate category?

MR. McGRAIL: Yes, Your Honor. It begins with the Constitution, Article II, section 2, it gives the Congress the power -- directs that Congress -- or, rather, gives Congress the power to delegate to the Executive the employment of federal employees. And Congress has done that by statute, section 3101, Title 5, of the U.S. Code, and it has done it very broadly in one sentence, section 3101: "Each executive agency, military department and the Government of the District of Columbia may employ such number of employees of the various classes recognized by Chapter 51 of this title as Congress may appropriate for from year to year." That is the delegation to the Executive to employ federal employees, whether they are called federal employees, public officials or inferior officers, as they are referred to in the Constitution, in Article II, section 2. That is the delegation --

QUESTION: My question, Mr. McGrail, went to what I thought was a trend of Congress to deal with exchange employees in a way different from and separately from civil servants generally.

MR. McGRAIL: Yes, and I am saying, Your Honor, in response to that that the basic statute in which Congress does that is the one I just cited, because that statute says that federal employees are paid out of appropriated funds, and

exchange service employees are not paid out of appropriated funds, and, Mr. Chief Justice, that is confirmed in Chapter 51, which this general authority to employ, the section I just quoted, cites as another limitation, and there that Chapter 51 covers all civilian employees, all civilian positions, employees in the Executive Branch of the government. And it says "this chapter does not apply to employees whose pay is not wholly from appropriated funds of the United States," so there again the Congress has said that federal employees are that only if they are paid from appropriated funds, and the exchange service employees are not paid from appropriated funds.

The government counters this with a reference to section 3105(c), and that was a section in which the definition of employee in Title 5, Congress in that section said that exchange service employees will not be federal employees for the purpose of the civil service laws. And then it mentioned one or two exceptions, and then, as counsel for the government has stated a moment ago, it has on some other occasions passed statutes whereby certain provisions which govern federal employees are extended to the exchange service employees.

I wish to emphasize that whenever that was done, it was done expressly and explicitly by Congress, it was Congress extending the antidiscrimination laws, the safety program laws, or whatever may have been involved -- there were not too many -- but it was Congress extending those to exchange service

employees, it was not bringing exchange service employees within the ambit of federal employees.

So, Mr. Chief Justice, I believe it is correct that Congress has always treated exchange service employees differently from federal employees, and therefore they would not be within the Butler concept.

MR. CHIEF JUSTICE BURGER: We will resume there at 10:00 o'clock in the morning, Mr. McGrail.

[Whereupon, at 3:00 o'clock p.m., argument in the above-entitled matter was recessed, to reconvene on Tuesday, April 20, 1976, at 10:00 a.m.]

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Petitioner,	:	
v.	:	No. 75-246
ALICE R. HOPKINS, Respondent.	:	

Washington, D. C.,

Tuesday, April 20, 1976.

The above-entitled matter came on for further argument at 10:08 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ROBERT B. REICH, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of Petitioner.

THOMAS H. McGRAIL, ESQ., 810 American Security Building, 730 Fifteenth Street, N. W., Washington, D. C.; on behalf of Respondent.

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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 resume arguments in United States v. Hopkins.

Mr. McGrail, you may proceed whenever you are ready.

ORAL ARGUMENT OF THOMAS H. McGRAIL, ESQ.,

ON BEHALF OF RESPONDENT -- RESUMED

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

Yesterday, during my argument, I had pointed out that the fountainhead of federal employees is Article II, section 2 of the Constitution, although there are two types of employees referred to, and the two together cover all federal employees. One is those officers who are confirmed by the Senate and the other consist of all the remaining officers or officials or employees of the federal government, and that constitutional provision authorizes Congress to delegate the power of employing those individuals to the Executive, and Congress did that in section 3101 and, in doing so, limited those employees to persons who are paid out of appropriated funds and, of course, the exchange service employees are not.

QUESTION: Mr. McGrail, you are not suggesting that the only categories of people who can find employment with the federal government are those who are appointed and confirmed in the appointments clause, are you?

MR. McGRAIL: I am arguing that only those who fall

within that clause are properly in the category of federal employees or officials or inferior officers, yes, I am, Your Honor.

QUESTION: Well, certainly that is true, but when you go from inferior officers to just employees, there are a couple old cases from this Court that talk about one man who was appointed by an assistant surgeon or something like that, and they say he is just an employee, he is not under the appointments clause at all.

MR. McGRAIL: I am not familiar with that case, Your Honor, and it would appear to be in conflict with the Article II, section 2. And the Butler case, which we are now contending with, the limitations imposed by Butler I submit are directed only to the Article II, section 2 employees.

The government argues that section 2105(c) indicates that Congress has extended the concept of federal employees to the exchange service, and I pointed out yesterday that, in addition to being contrary to Article II, section 2, that that statutory provision does not do so, although it does in that provision and several others apply certain principles which are generally applied to federal employees --

QUESTION: That is all you really need to argue, is just the statutory -- if you win on that, you need not --

MR. McGRAIL: That is correct, Mr. Justice White. If the respondent prevails on that, it ends the case.

QUESTION: Only because then for purposes of the issue in this case these people would not be employees.

MR. McGRAIL: I'm sorry, Mr. Justice White, I am not--

QUESTION: Well, why would it end the case?

MR. McGRAIL: It would end the case because -- the only reason why these employees would not have an enforceable contract of employment is because Butler said inferior officers or public officials do not have it. So if the exchange service employees are not in the category contemplated by Butler, then there is a contract of employment which can be enforced, and the 1970 amendment to the Tucker Act would clearly apply.

QUESTION: So there are cases which say that employees of the United States do not operate -- they are not under a contract, there is not a contractual arrangement? If you are not an employee of the United States, the usual jurisprudence is that it is a contractual arrangement?

MR. McGRAIL: Yes, Your Honor.

QUESTION: And that is what you are arguing?

MR. McGRAIL: That is correct, Your Honor.

QUESTION: Well, isn't the other and very important question in this case whether the 1970 amendment granted rights with respect to employees or, to put it broadly, people who are working for the government or whether it was intended to be limited to contractors with the government, suppliers? Isn't that really a fulcrum of this case?

MR. McGRAIL: Yes, it is. Also the contention by the government that the amendment was intended to apply only to suppliers is not supported by the legislative history. The government says there is no reference to PX legislative employees in the legislative history. It so happens that there is. There is no reference, however, in the Senate report or the House report or the debate to supply contractors, although the PX's deal with millions of dollars a year in supplies which they sell at retail, there is no reference to suppliers in the legislative history.

Now, the reference to the employees in the legislative history is the Keetz case, which is a very significant case, and the Borden case, not just one employee case but two of them. Congress in both reports say there is a gap or a loophole in the court's jurisdiction formed by Borden, Keetz, Pulaski and Kyer. Two were employee cases, two were personal service cases. The government suggests that Congress did not understand what those cases were about. I submit that it is elemental in statutory construction that we assume Congress knew what it was doing, and these bills came out of the Judiciary Committee, composed of lawyers.

And, furthermore, trial Judge Spector, of the Court of Claims, was a witness before the committee on behalf of the American Bar Association. Mr. Spector was formerly Chairman of Armed Services Board of Contract Appeals, and is recognized as

one of the leading authorities of federal contract and employee law, and he did refer to in his statement presented to the committee, he did refer to the employee situation. As a matter of fact, he pointed out there is a difference between PX employees who have a contract and regular federal employees.

At the March 4, 1969 hearings, at page 10, he stated, "Regular civilian employees of the government, unlike those of non-appropriated fund activities, are not employed by contract." Thus, he is saying to the committee, PX employees have a contract, federal employees do not. And he cited the Bouchea case, which unfortunately is not cited in the briefs, but is cited at page 10 of those hearings, which as an employee of a PX who was fired or demoted, and he went to the Armed Services Board of Contract Appeals, and they did not turn him down because he did not have a contract relationship, they turned him down because their jurisdiction is limited to contracts where there is a standard government disputes clause. Everyone recognized that there was a contract relationship.

In the Keetz case, which is one of the four cases that the Congress relied on in passing this legislation, the government took the very strong position that exchange service employees have contracts. They argued, and I quote, "It is patently not true that the claim is not founded on contract. It is patently not true," the government said at that time, that the exchange service employees relationship is not founded

in contract.

The Court of Claims picked that case up in this case, the Hopkins case below, and referred to the fact that the government has previously taken the position that they have contracts of employment, and stated, "We find it a bit ironic that in the instant case, the government argues just the opposite. We can only assume that this inconsistency has occurred because the enactment of Public Law 91-350 now grants jurisdiction for exchange contract employees. We" -- the Court of Claims speaking -- "in this case, we hold the government's contract theory in Keetz to be correct and see no reason to change it in the instant case."

Why did Congress pass the 1970 amendment? Because the Court of Claims, in Borden, in Keetz, and in Kyer, said there is a harsh result here, these people have no court to go to, and the Senate and the House both said that is why we are passing this legislation.

QUESTION: Those statements of the Court of Claims aren't entirely consistent with what the sponsor of the bill said, in describing it -- Senator Tydings' statement, I am referring to, where he said that this amendment will provide the contractors, that is the people who are selling goods and services to non-appropriated fund agencies, with a means of suit and remedy on omission. The sponsor of the bill didn't say anything about employees, did he?

MR. McGRAIL: No, he did not. The reference to employees is through the Keetz case and the Borden case and through Mr. Spector's statements. But I think Mr. Justice Stevens, in his comment yesterday, may have pointed to the answer, that Congress was aware that these employees had contracts, was aware that there were personal service contracts with the exchange service, and obviously was aware that there were millions of dollars of supply contracts. It did not isolate in its reports supply contracts, it just referred to contracts and contractors.

QUESTION: Well, do we ordinarily speak of employees as having contracts, Mr. McGrail?

MR. McGRAIL: Not in respect to federal employees. But I think in respect to non-federal employees, it is recognized or understood, the language may not be contractual, legal contractual language, but I think that it is recognized, at least by lawyers, that the employer and employee relationships are contractual. What else can it be?

QUESTION: If your position is sutained here, Mr. McGrail, mechanically, I take it, the Court of Claims would render a judgment, the Treasury would pay the judgment and then seek reimbursement from the exchange, just as it would with a third-party contractor?

MR. McGRAIL: That is correct. That is what the 1970 amendment directs in respect to all contracts.

QUESTION: Mr. McGrail, I don't seem to be able to find the complaint in front of me. Does your complaint allege that there was a contract between your client or the decedent and the exchanges?

MR. McGRAIL: Definitely it does, Your Honor.

QUESTION: And does it allege a breach of that contract?

MR. McGRAIL: It alleges a breach of the contract, and in the alternative it alleged breach of the regulations. Of course, it was filed before Testan, so there were alternatives here. One of --

QUESTION: And you began, then, in effect the regulation theory, you are just relying on the contract theory now?

MR. McGRAIL: That is correct.

QUESTION: Now, the case was dismissed for lack of jurisdiction, rather than for failure to state claim, is that correct?

MR. McGRAIL: That is correct, Your Honor.

QUESTION: And in the dismissal did the court rely at all on anything outside the complaint? Did it rely on an affidavit by somebody in the record, I believe? What is the record before us? I just want to be sure that I know --

MR. McGRAIL: There was no affidavit filed and, of course, no discovery, and there was no record before the court other than the fact that the government did submit what they

have attached to their brief in this case, a government paper that shows the positions held by the respondent at various times, and the government submits that for the proposition that the respondent was "appointed to his position," ergo he was a federal employee. There was nothing else in the record for the court to rely on.

QUESTION: Do you describe the contract in any detail other than simply saying there was a contract? Is it oral or written, or what is the character of the contract? Can we tell from the complaint?

MR. McGRAIL: No, the contract, I contend, is not a document that states "contract of employment." The contract would be formed by the appointment papers which the employee, the respondent, would have signed. The exchange service have superimposed on themselves the same format that the Civil Service uses in respect to employees, so the same type of documents would exist, and I state those documents would constitute the written contract.

QUESTION: Well, what is the substance of the contract that you allege? Is it terminable at will or is it for a fixed term, or what is it? What do you claim the contract is?

MR. McGRAIL: It is a contract whereby the government agreed to pay this individual, permit him to work, and not fire him except for cause, disability and inefficiency. And the employee agreed to work, comply with the regulations and to do

his job.

He, I will concede, had the prerogative to withdraw at any time, which is not untypical of contracts which exist between management and labor and which are enforceable.

QUESTION: What are the papers which describe the government's contractual obligations? Are they the regulations that --

MR. McGRAIL: These would be the regulations and circulars, primarily the regulations plus the appointment, to use that term, the government uses it, the appointment papers.

QUESTION: If there should be a hearing and the District Court should conclude, after looking at all of these papers, that they do not constitute a contract, then I take it you would lose, assuming that is correct?

MR. McGRAIL: Yes, but that would be a very unusual result, because either this individual had a contract or he was a federal employee. I see no possible alternative.

QUESTION: You think, in other words, that any and every employee, except for a federal employee, has a contract with his employer?

MR. McGRAIL: Yes, Your Honor.

QUESTION: In private employment and in this sort of base exchange employment?

MR. McGRAIL: Yes, sir, unless it is in the government Butler-type situation, I see no alternative but a

contractual relationship.

QUESTION: Private industry?

MR. McGRAIL: Yes, sir.

QUESTION: Well, why do you need unions?

MR. McGRAIL: Well, the unions, of course, provide a much greater force than the individual employee in contracting with the employer.

QUESTION: And the union negotiates a certain thing that is called a contract.

MR. McGRAIL: That's right, Your Honor.

QUESTION: But the individual doesn't.

MR. McGRAIL: Oh, the individual, I submit, Your Honor, does negotiate when he asks for a job, even a very simple job. If a secretary goes in and asks for a job --

QUESTION: Well, in the non-union shop, everybody that is working has a contract?

MR. McGRAIL: Yes, Your Honor.

QUESTION: That is enforceable?

MR. McGRAIL: Beg pardon?

QUESTION: And it is enforceable in courts? I would like to know of a case.

MR. McGRAIL: Well, Your Honor, if there are terms to the contract, specific performance is not available frequently, if not always, in respect to personal service contracts, but the contracts can be enforced if there is a breach by the

employer.

QUESTION: This man is working as a bricklayer in building a building, now where is his contract? It is not in writing. Where does --

MR. McGRAIL: If the contractor says to a bricklayer, "I have a job out here that is going to take one week, and I agree that you can work for the full week and do that entire job for one week, and if you do it properly, you have a guarantee that you will work for one week, and" --

QUESTION: Well, mine is the man says, "I want to hire you as a bricklayer," period, "and I will pay you $8.50 an hour," period, that's all. Now, what are the terms of that contract?

MR. McGRAIL: The terms you just stated, and that is all it is, Your Honor, and there is nothing to enforce that.

QUESTION: So he can fire him the next minute?

MR. McGRAIL: That is right, Your Honor.

QUESTION: It is terminable at will?

MR. McGRAIL: It is terminable at will, Your Honor, that contract, but we don't have a terminable at will contract here.

QUESTION: Why not?

MR. McGRAIL: Because the exchange service has said we will not fire you unless you are inefficient, unless you are disabled or unless we have cause, and the various causes are as

follows, otherwise we will not fire you. That is enforceable.

QUESTION: Well, I am still quarreling about words. A contract at will is just not a contract.

MR. McGRAIL: Well, it is not --

QUESTION: It is a play on words, that is what it is. It is a play on words.

MR. McGRAIL: But we don't have a contract at will here.

QUESTION: If I may suggest in this question, if the bricklayer case, if he does do an hour's work of bricklaying, he is entitled under that oral contract to $8.50, if it is a satisfactory job of bricklaying, and it is a contract to that extent, isn't it?

MR. McGRAIL: Yes, it is, Your Honor.

QUESTION: Even though the employer might fire him after one hour --

MR. McGRAIL: That's correct, Your Honor.

QUESTION: -- terminate the contract after an hour.

MR. McGRAIL: Yes, sir.

QUESTION: But if he fires him before he starts working, he doesn't get the hour?

QUESTION: The other problem is whether the 1970 amendment gave a right to sue under the Tucker Act. Even if you were correct on your proposition about the contract, if the 1970 amendment did not apply to employees, then that would be

the end of the case, too, wouldn't it?

MR. McGRAIL: Yes, it would, Your Honor. But, you see, Congress was fully aware of the employee situation here when it passed this bill, and it stated "there is one little loophole, we want to close it." I say if there is any doubt as to whether these exchange service employees had a contractual basis, Congress here mandated that they did by treating them as they have over the years, the federal government and the courts have treated these employees as contractual. Congress was fully aware of that when it passed this bill.

QUESTION: Suppose there was jurisdiction, I suppose you would argue you stated a course of action, too?

MR. McGRAIL: Yes, I am aware of Judge Skelton's dissent and --

QUESTION: Well, Judge Skelton went to great length to demonstrate to his satisfaction that once the exchange service terminated his employment, which it had a right to do without liability, all of his contract rights were also terminated.

MR. McGRAIL: Yes, because Judge Skelton thought that it was terminable at will, and I respectfully believe that that is incorrect.

QUESTION: Well, let's assume it was terminable at will, let's just assume that for the moment. Would the jurisdictional holding here be correct?

MR. McGRAIL: No, I would say it would not be correct, but when the case went back to the Court of Claims, the Court of Claims would dismiss it because there was no contract to be enforced, terminable at will.

QUESTION: Well, you would say that the jurisdictional holding was that it was correct, that it was correct?

MR. McGRAIL: I say that --

QUESTION: I mean, do you still think it is a contract claim within the jurisdiction of the Court of Claims, it is a contract that was terminable at will?

MR. McGRAIL: That is correct.

QUESTION: And the claim was asserting something in futuro?

MR. McGRAIL: Yes, Your Honor, I have no problem with that at all.

QUESTION: And the terms of the contract are something to be decided on the trial and on the merits?

MR. McGRAIL: Yes, Your Honor.

QUESTION: And as my Brother White's question suggests, Judge Skelton's dissent was really directed more to the merits, wasn't it?

MR. McGRAIL: That is correct, Your Honor.

QUESTION: Let me pursue that thought with one other question. I assume Mr. Justice Stewart asked about the bricklayer on a terminable at will situation, assume that your man

had a terminable at will contract but didn't get paid for the last week of his work. If there is no jurisdiction, he would have no way of getting his back pay, would he?

MR. McGRAIL: That is correct, Your Honor.

QUESTION: Unless by administrative process they gave it to him. Assume they denied it, found that he had not in fact worked as much as he claimed, you would say, as a matter of contract law, he is entitled to be paid and there is jurisdiction in the Court of Claims to award back pay?

MR. McGRAIL: There is jurisdiction in the Court of Claims.

QUESTION: The government's position is that there is no jurisdiction, you are just out of luck.

MR. McGRAIL: Yes, because they say that Butler applies and the exchange service employees are federal employees, contrary to statute and contrary to the fact that throughout the history, until this amendment, the government and the courts have treated these employees as contract employees and not federal. And Congress was aware of this and recognized this when it passed the 1970 amendment and stated its strong position that it wanted to close this gap formed by Keetz as completely as possible, so there will be no opportunity -- and I now quote from the Senate report -- "which would ultimately serve to create additional loopholes through which clever defendants may ultimately retreat into the anachronism of

governmental immunity that the bill seeks to eradicate."

The Congress was aware of the status of these employees as contractual and that is why -- and was aware of the supply contracts, personal service contractors also, and just referred generally to the contracts and contractors, and made no specific mention to any of them and, as I said before, there is nothing in the legislative history which addresses itself to the major contractors of these exchanges, the supply contractors.

Thank you, Mr. Chief Justice.

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

Do you have anything further, Mr. Reich?

ORAL ARGUMENT OF ROBERT B. REICH, ESQ.,

ON BEHALF OF PETITIONER -- REBUTTAL

MR. REICH: Just two points, may it please the Court:

The respondent tells us that the terms and conditions of his employment in the exchange service derived from contract but when asked to provide the basis for the contract or to provide the terms or any duration for the contract, he turns inevitably to the regulations governing employment in the exchange service.

I would point out that these regulations not only were unilaterally changed during the course of respondent's employment, but the very terms and conditions, the very regulations that respondent in his complaint before the Court of Claims asserted were violated or were breached were not in force and

effect at the commencement of his employment in 1958 with the exchange service.

Therefore, the employment status of this employee, like other exchange service employees, really turns within or comes within the Butler principle, and that principle does not turn upon labels as to who is or who is not a federal employee, because we know that for certain purposes exchange service employees are deemed federal employees. I pointed out yesterday that there are statutes in which Congress has expressly brought them within that definition; for other purposes, they are outside that definition of federal employee.

The term "federal employee" is not the touchstone. The question, rather, is whether, under the Butler principle, the employment relationship with the government is derived entirely, as here, from regulations or statutes which must be capable of uniform or unilateral change as public policy requires. In traditional contract terminology, there would be no contract, simply because there is no mutual obligation to be bound. In fact, even as between private parties an agreement such as this or such as respondent wants to create would --

QUESTION: Well, what if there was simply a claim in the Court of Claims that the plaintiff had worked for an exchange and hadn't been paid?

MR. REICH: That retroactive, that claim for money due --

QUESTION: For back pay, he says you owe me some money for some work I did for you, is that a contractual claim?

MR. REICH: We would contend that that would not be. That would be exactly the same, Mr. Justice White, as any other employee of the government, again whether he is termed a federal employee or not, who merely asserted that he was entitled to backpay, and if there is an express waiver of sovereign immunity, then he is entitled to back pay, whereas the Back Pay Act applies.

QUESTION: Well, it is not back pay, it is just pay, pay for work done for which he hasn't been paid. That is Mr. Justice White's question.

MR. REICH: But if --

QUESTION: That is a contract claim, isn't it?

MR. REICH: It would be a contract claim if this were between private parties, that is absolutely correct.

QUESTION: So you agree -- does this gentleman prevail if we were to conclude that exchange employees are not employees of the United States?

MR. REICH: If you were to conclude that their employment relationship was not of the sort that would come under Butler, but --

QUESTION: Well, isn't that what the Court of Claims decided?

MR. REICH: The Court of Claims merely went by labels,

Mr. Justice, they --

QUESTION: Well, I know, but it decided that they weren't employees of the United States.

MR. REICH: They said that they were not "federal" employees, but they did not analyze, and what we emphasize they should have done --

QUESTION: Well, suppose we apply the same label, with analysis or without?

MR. REICH: Okay. With analysis, if you decided that they were not government employees, then the next question would be whether in 1970 Congress gave any express indication that it desired to expose the public Treasury to the claims of these exchange service employees, because what we are trying to construe --

QUESTION: Well, they said that -- they gave an indication that any contract claims with exchanges could be sued on, that is what they said. And if you agree that a non-federal employee has a contract claim, why doesn't it cover it?

MR. REICH: Because there are 100,000 -- there are two reasons, Mr. Justice -- first, there are 100,000 exchange service empoloyees. Whenever Congress has legislated with them in the past, they have done so directly. Secondly, because these employees are federal employees for certain purposes and are not for other purposes, because there is at the very least that conclusion --

QUESTION: They aren't even employees for purposes of civil service.

MR. REICH: No, but as I pointed out yesterday, the Congress expressly included them in the definition of federal employees for the Dual Compensation Act, with prevailing wage rates, the Federal Employees Compensation Act, they are federal employees for the purposes of the Federal Claims Act --

QUESTION: Do you say that the amendment should have -- would have to indicate a congressional intention to include them much more clearly than it does?

MR. REICH: Certainly. The waiver of sovereign immunity cannot be implied, as this Court has repeatedly stated.

QUESTION: You are not suggesting that the employee, an employee or a person engaged in that activity has no remedy if they don't give him his paycheck at the end of the pay period? But you say he doesn't have aremedy under the Tucker Act, as I --

MR. REICH: He simply doesn't have a remedy under the Tucker Act for access to the Court of Claims --

QUESTION: What remedy does he have?

MR. REICH: -- since there must be --

QUESTION: What is it?

MR. REICH: Well, his remedy -- he perhaps might have remedy, and again, let -- he might have a remedy, if his allegation is that the government has not subscribed properly to

the regulations governing employment, he might have a remedy under mandamus in the District Courts, or perhaps he would have a remedy under 1631.

QUESTION: Suppose he says I was not paid for my work for five days, period, that's all?

MR. REICH: Well, in that case you might have an allegation under the Tucker Act, not as a contract but any federal employee, any person employed by the government might have a just compensation claim --

QUESTION: Let me put it this way: If you work for me for five days and I don't pay you, you have a clear-cut right of action against me.

MR. REICH: That's right, if we are private parties.

QUESTION: Well, exactly the same situation, except one party is not a private, then what remedy does he have?

MR. REICH: If one party is the government, Mr. Justice --

QUESTION: Right.

MR. REICH: -- the remedy for everyone who has an employment relationship with the government and who has not been paid by the government, I presume that the remedy would be under the Tucker Act and the allegation would be something akin to an unjust taking, a lack of just compensation under the Fifth Amendment, or perhaps an illegal extraction.

QUESTION: Well, if the government --

MR. REICH: But my point is that that would not create a contract right. If I, for instance, were not paid by the government, I might have access to the Court of Claims under one of those theories, perhaps --

QUESTION: You have access through the Back Pay Act, don't you?

MR. REICH: I would also have access under the Back Pay Act.

QUESTION: And that's the difference between you and the respondent here, is that he doesn't have access under the Back Pay Act.

MR. REICH: That is absolutely correct, he would not have access under the Back Pay Act.

QUESTION: If you are right, he has no access to the courts?

MR. REICH: He would have absolutely no forum for the back pay --

QUESTION: Yes.

MR. REICH: -- that he claims was is entitled to. He might have before --

QUESTION: He might be able to get mandamus for reinstatement.

MR. REICH: He might have a forum for reinstatement, that's correct.

QUESTION: Mr. Reich, could I ask one other question.

There has been a lot of reference to the Butler case, which is a case that held, as I understand it, that canal commissioners appointed by the State of Pennsylvania didn't have a contract within the meaning of the contracts clause of the Constitution. What is the federal case that you rely on to describe this concept of a federal employee who has no contractual rights? It isn't the Butler case, surely.

MR. REICH: Well, following Butler there were many cases concerned not with high-level appointees but concerned with all kinds of individuals who had employment relationships.

QUESTION: Which is the leading case that says they can't possibly have contractual rights?

MR. REICH: Well, for instance, United States v. Hartwell, 73 U.S., that we cited in our brief, I believe is concerned with a minor official who does not come under the appointments clause but where the government simply relied upon the Butler principle and held that because his employment relationship derives from regulations that must be capable of change as public policy requires, therefore he does not have contractual rights, there is no vesting of any right against the government. And, again, the Butler logic would apply with equal force to all employees --

QUESTION: Well, there are two separate theories. One might say that the contract is one terminable at will to retain the sovereign's ability to change personnel and the like. That

is not necessarily inconsistent with saying that the relationship is nevertheless fundamentally contractual, so that the man could sue for back pay and the like on a contract theory. They are not necessarily inconsistent. But you say this line of cases -- the only one I have looked at is Butler -- these cases say that they definitely establish the proposition that the relationship is non-contractual?

MR. REICH: Is non-contractual.

QUESTION: -- not that the contract is one that does not give a remedy?

MR. REICH: Not that the contract is one that is terminable at will or that there are any vested contractual rights at all. The simple holding is that there is no contract to begin with.

QUESTION: Mr. Reich, if government employment of the kind that you have and that I have is a contract, I suppose that there would have been no necessity for the Back Pay Act, since either one of us could have sued under the Tucker Act in the Court of Claims?

MR. REICH: Your Honor, that is correct except insofar as you and I are paid from appropriated funds, so at the very least, even if there were not a Tucker Act, again referring to the case I cited yesterday, Wickersham, there is a line of cases holding that even prior to the Back Pay Act, if there has been a waiver of sovereign immunity represented by a mere appropriation,

the government has in effect opened up the public Treasury and exposed it to that kind of a back pay claim. That is not the case here.

Thank you.

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

[Whereupon, at 10:42 o'clock p.m., the above-entitled case was submitted.]

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