

In the

ORIGINAL

Supreme Court of the United States

UNITED STATES,

Petitioner,

JOSEPH J. CLARK ET AL.

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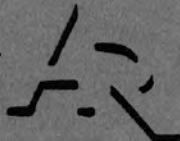
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1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - - :
3 UNITED STATES, :
4 Petitioner, :
5 v. : No. 80-1121
6 JOSEPH J. CLARK ET AL. :
7 - - - - - :

8 Washington, D. C.
9 Tuesday, November 3, 1981

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:01 o'clock a.m.

13 APPEARANCES:

14 ALAN I. HOROWITZ, ESQ., Office of the Solicitor
15 General, Department of Justice, Washington,
16 D. C.; on behalf of the Petitioner
17 JOHN I. HEISE, JR., ESQ., Silver Spring,
18 Maryland; on behalf of the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next
in United States against Clark.

Proceed.

ORAL ARGUMENT OF ALAN I. HOROWITZ, ESQ.,
ON BEHALF OF THE PETITIONER

MR. HOROWITZ: Thank you, Mr. Chief Justice, and
may it please the Court, this case is here on a writ of
certiorari to the United States Court of Claims. It
involves two different pay systems for federal employees,
the prevailing rate system, or WS system, which essentially
covers blue collar workers, and the General Schedule or GS
system which covers white collar workers.

Each pay system contains different grade levels
and different steps within each grade. The steps are
different gradations of pay within the grade.

The Respondents here are six employees of the
Department of the Navy or their representatives who left WS
blue collar jobs to accept white collar jobs covered by the
General Schedule. After an administrative error that had
given five of these employees a one-step pay increase, after
that error was corrected, their starting salaries in their
new GS jobs were correctly established under regulations
promulgated by the Office of Personnel Management, issued
pursuant to 5 USC 5334(a), according to the so-called

1 highest previous rate rule, which places the employee at the
2 nearest step above his old salary.

3 QUESTION: Mr. Horowitz, I want to be certain
4 about one thing. Does the government concede that the
5 transfer here effected a promotion of these employees?

6 MR. HOROWITZ: Well, promotion has been used as a
7 term of art in some ways. There was a promotion under the
8 regulations under the Office of Personnel Management,
9 because such promotion is defined in terms of whether the
10 employee receives an increase in pay when his new salary is
11 established, and that in fact occurred here.

12 As to whether they were promotions in sort of the
13 layman's sense to a position of higher responsibility, that
14 really hasn't been developed that much in the record, but
15 there is no reason for this Court to assume that they were
16 not.

17 QUESTION: That they were not.

18 MR. HOROWITZ: But in our view that makes no
19 difference for purposes of the statute.

20 QUESTION: The Court of Claims did go that far so
21 to describe it, anyway.

22 MR. HOROWITZ: Yes, although the Court of Claims
23 primarily relied on this regulation, 5 CFR 531.202.

24 Now, the question here is whether the OPM
25 regulations that were invoked in this case are contrary to

1 law.

2 QUESTION: Mr. Horowitz, let me just be sure I
3 understand your answer to Justice Blackmun. In the Court of
4 Claims, the opinion states that both parties had termed the
5 actions promotions.

6 MR. HOROWITZ: Right.

7 QUESTION: Have you changed your position? You
8 say it is arguable now whether it was a promotion.

9 MR. HOROWITZ: No, we don't contend that -- they
10 are certainly classified as promotions by the Navy, and that
11 is because of this regulation, which depends on whether they
12 receive a salary increase. They are certainly promotions
13 within the meaning of the regulation. And as to whether
14 they are promotions in a more common sense matter, I don't
15 think that has really been determined, but we don't contest
16 that they are. We have never argued that they are not.

17 QUESTION: But are they then promotions within the
18 meaning of 5334(A) and (B)?

19 MR. HOROWITZ: Yes, they can be. 5334(a) and (b)
20 also refer to transfers in there, so --

21 QUESTION: Well, if that is the case, and I must
22 concede that for a court of supposedly nine generalists,
23 this is a very difficult case, because of the very technical
24 civil service and OPM regulations, didn't the Court of
25 Claims in effect declare invalid one of the regulations

1 promulgated by the OPM?

2 MR. HOROWITZ: That's correct. There was a
3 regulation promulgated by OPM that restricts the
4 applicability of this Section 5334(b) to promotions within
5 the GS system, from one GS position to another, and the
6 Court of Claims declared that that regulation was
7 inconsistent with the language of the statute, and that
8 regulation was declared invalid to that extent.

9 QUESTION: So it gave no deference to the
10 regulatory authority.

11 MR. HOROWITZ: That's correct. Perhaps I should
12 read Section 5334(b), which is the focus of the dispute
13 here. "An employee who is promoted or transferred to a
14 position in a higher grade is entitled to basic pay at the
15 lowest rate of the higher grade which exceeds his existing
16 rate of basic pay by not less than two step increases of the
17 grade from which he is promoted or transferred."

18 In other words, when an employee is subject to
19 this section, you look at his old salary, give him what is
20 called a two-step increase in his old salary, and then
21 transfer that into his new grade and pick the salary that is
22 closest to that and higher.

23 Now, the question here is simply whether this
24 statutory two-step increase applies when an employee moves
25 from the WS system to a position in the GS system, as

1 occurred here, and as the Court of Claims held, or whether
2 the statute applies only to promotions from one GS grade to
3 another, as the government contends.

4 In our view, this question is unequivocally
5 answered by the language of the statute. Under 5 USC
6 5102(a)(5), a definitional section, the term "grade" in
7 Section 5334(b) is defined as a class of positions included,
8 and I quote, "within one range of rates of basic pay in the
9 General Schedule", end quote.

10 Section 5334(b) provides that the increase in
11 salary is to be measured as no less than two step increases
12 of the grade from which the employee is promoted or
13 transferred. Because Respondents were not promoted or
14 transferred from a grade as defined in the statute, that is
15 to say, a grade in the GS system, they do not come within
16 the language of Section 5334(b).

17 QUESTION: Mr. Horowitz, can I stop you right
18 there? I guess the key to it is right in what you are
19 saying now. The definition of grade doesn't purport to be
20 exclusive. It says it includes those in the GS schedule,
21 and you earlier told us, as I understand you, that there are
22 grades in the WS schedule as well. Now, is it perfectly
23 clear that the word "grade" could not apply to a grade in
24 the blue collar schedule?

25 MR. HOROWITZ: Well, I agree that the statute says

1 includes, but I think the only reasonable reading of that is
2 that that is the definition.

3 QUESTION: Well, have you not also admitted, or
4 maybe I am wrong, that if there had been a promotion within
5 the WS schedule, you would have been entitled to have the
6 benefit of the statute.

7 MR. HOROWITZ: No. The statute --

8 QUESTION: The Court of Claims said that, but that
9 is wrong?

10 MR. HOROWITZ: Right. The Court of Claims said
11 that, but that is wrong. A statute clearly cannot apply to
12 a promotion within the WS system, because blue collar
13 workers are completely excluded from Subchapter 3, which
14 contains the statute. This Section 5334(b) applies only to
15 the GS system.

16 Now, the basis that these Respondents have for
17 arguing that it applies to them is that now that they have
18 moved into the GS system, they are technically GS workers,
19 and it is their new salary, but any salary in the WS system
20 would not be set pursuant to this provision.

21 QUESTION: I see.

22 MR. HOROWITZ: There are grades -- just to get
23 back to your question, there are grades in the WS system,
24 although as we pointed out in our reply brief, I think, the
25 term "grade" did not originate in the statute in that

1 context until 1972, 23 years after this statute was enacted.

2 QUESTION: Is it clear that the "General Schedule"
3 referred to in 5102(a)(5) does not include the WS separate
4 schedule?

5 MR. HOROWITZ: That's correct. Those employees
6 are specifically included -- excluded, rather, from the
7 General Schedule. Again, as I said, Justice Stevens, these
8 employees are now in the General Schedule because of their
9 new position.

10 Now, in order to understand the reasoning, I
11 think, behind the restriction of a two step increase to the
12 context of promotions within the GS system, I think it might
13 be helpful to digress into a slightly more detailed
14 discussion of these two pay systems and their differences.

15 The General Schedule is described in Subchapter 3
16 of Chapter 53 in the civil service statute, and as it exists
17 today, it is derived largely from the Classification Act of
18 1949, and it was at that time, in 1949, when Section 5334(b)
19 was first enacted, although it originally provided for only
20 one step increase.

21 The GS system is divided into 18 different grades,
22 most of which are divided -- further subdivided into ten
23 steps. Now, there is an overlap between steps in the GS
24 system. That is, while any higher grade, the same step in
25 any two grades, the higher grade will be a higher salary,

1 for example a Grade 14 Step 1 salary will be higher than a
2 Grade 13 Step 1 salary, at the higher steps of a particular
3 grade, the salary can be higher than a lower step of a
4 higher grade, or to give an example, again, a 13 Step 6
5 employee would be making a higher salary than a 14 Step 1
6 employee.

7 There are two ways in which employees can move to
8 different classifications in the system. First of all, they
9 can be given step increases. The statute defines the
10 waiting period for which an employee must wait to get a step
11 increase. That is between one to three years, depending on
12 the level he is at, but once he satisfisfes that waiting
13 period, he is given a step increase as long as he has
14 performed satisfactorily in his job.

15 Getting a step increase does not mean any increase
16 in responsibility or level of difficulty.

17 QUESTION: If you know, has that been suspended,
18 the in grade movement, suspended by OPM --

19 MR. HOROWITZ: I am not aware that it has.

20 QUESTION: -- for the problems?

21 MR. HOROWITZ: I don't think so.

22 QUESTION: Counsel, can you tell me, please,
23 whether the provisions for grading within the WS system were
24 in effect at the time that the General Schedule statute,
25 Section 5334 was originally adopted?

1 MR. HOROWITZ: Well, in 1949, the only reference
2 to the -- in that 1949 Act to the WS system was a
3 one-sentence exclusion exluding blue collar workers from the
4 operation of the statute, and stating that their salaries
5 are to be determined according to prevailing rates in the
6 industry.

7 Now, that was done administratively by each
8 individual agency. Each agency ran its own WS system, so to
9 speak, conducted its own wage surveys, and determined what
10 the proper salary for a particular position was. The result
11 of this was something of a hodge-podge. But as I understand
12 it, most of the agencies did have a system that included
13 something called grades. The number of grades varied from
14 agency to agency, and a particular job would vary.

15 They did not all have steps in the sense that
16 there is now in the statute. Some of them had three steps
17 within a grade. Some just had grades without steps at all.

18 The other way that a person can move in the GS
19 system is by getting a promotion to a job that entails more
20 responsibility, and in this case he would move up to a
21 higher grade. Now, the operation of Section 5334(b) comes
22 into effect when an employee is promoted from a high step at
23 one grade to the next grade.

24 For example, if an employee were promoted from a
25 Step -- a Grade 13 Step 5 position, if he were simply

1 promoted to the lowest step in the next grade, a 14 Step 1,
2 he would actually get a decrease in salary. So, under
3 Section 5334(b), what is done is, you give him a two step
4 increase. That is, he was a 13 Step 5, you looked at what
5 the dollar figure would be for a 13 Step 7, and that dollar
6 figure is then plugged into the GS 14 levels, and he is
7 given the next highest step. In this example, he would
8 become a 14, Step 2.

9 Now, the Wage System, although it parallels the GS
10 system to some degrees, is quite different. As it exists
11 now, it is set out in Subchapter 4 of Chapter 53. These are
12 amendments that were enacted substantially in 1972. The
13 main difference between the two systems is that the WS
14 system is based on prevailing rates in the industry, and
15 varies widely over geographic areas.

16 An employee performing the same job in Columbus,
17 Georgia, will be making a much lower salary than an employee
18 who is performing the same job in Detroit, Michigan. GS
19 salaries are uniform nationwide.

20 Now, as I mentioned before, at the time the
21 Classification Act was first enacted, there was no
22 coordinated WS system. Each agency ran its own system, and
23 the mechanics of each system varied. Some grades had
24 steps. Some grades did not. In the late 1960s, it was
25 decided that the system should be coordinated, and pursuant

1 to a directive by President Johnson, the agencies got
2 together and developed a coordinated Wage System that
3 extended uniformly throughout all the agencies. Again, this
4 system is not uniform throughout the United States. There
5 are geographical differences.

6 In 1972, the coordinated system was enacted into
7 the statute, with certain changes. One of the changes is
8 that the original coordinated system had only three steps
9 per grade, and now the statute provides for five steps per
10 grade.

11 One other difference between the WS system and the
12 GS system is that the waiting periods for step increases in
13 the Wage System are significantly shorter. Thus, while it
14 would take an employee who starts at a GS Step 1 18 years to
15 become a GS Step 10, in the Wage System it would take only
16 six years to move from the lowest step to the highest step.

17 Now, I think it is the recent development of this
18 formal WS system and its juxtaposition in the statute next
19 to the GS system that has made plausible on a quick glance
20 the Respondent's contention. This is a contention, I think,
21 that could hardly have been suggested by examining the
22 statute as it was first enacted by Congress in 1949, namely,
23 that an employee who moves from a WS grade to a GS grade is
24 entitled to a salary increase of two steps in his old WS
25 grade.

1 To repeat what I said earlier, this contention
2 could not possibly be squared with the express terms of the
3 statute. Section 5334(b) specifies that the salary increase
4 be computed based on the employee's steps in his old grade,
5 and "grade" is defined -- and this definition is expressly
6 incorporated into Subchapter 3, the GS section -- "grade" is
7 defined as a rate of pay in the General Schedule. The
8 Respondents do not have an old grade in this sense on which
9 the salary can be based. They are newcomers to the GS
10 system, and the statute by its terms can only be applied to
11 GS veterans, people who are both promoted from and promoted
12 to a GS position. The only way around this is to rewrite
13 the statute.

14 Now, it is no accident that the statute has this
15 limitation on the two step increase provision. The purposes
16 of the two step increase are directly relevant to this
17 context of promotions within the GS system. Because of the
18 overlap between grades, it is a common problem in promotions
19 within the GS system that an employee would not receive a
20 salary increase without the two step increase provision.

21 QUESTION: When you say the overlap between
22 grades, you refer back to the fact that a GS 13, Step 10,
23 might be receiving more salary than a GS 14, Step 1?

24 MR. HOROWITZ: Right. That's correct. Now, the
25 reason that Congress was concerned about this is that in

1 many cases it would be better without the two step increase
2 for an employee, for his own salary reasons, to stay in his
3 previous job and refuse the promotion, and continue to get
4 step increases in his old job rather than take a promotion
5 and get either a lesser salary or a salary that he would not
6 get as much of an increase in.

7 QUESTION: But when they enter a new grade, at or
8 near the bottom, their step increases become more frequent.

9 MR. HOROWITZ: That is true. The step increases
10 are more frequent at the bottom. Over a long period of
11 time, he might well be better off anyway taking the
12 promotion, but in the short term he would be worse off.

13 Now, because moving from WS to the GS system is
14 really moving into a different job, the same overlap
15 considerations are not present. In particular, it is
16 important to note that an employee who moves from one grade
17 in the GS system to a higher grade is by definition
18 receiving a promotion as we talked about earlier, that is, a
19 promotion in the common sense notion of moving to a position
20 of higher responsibility.

21 This is not necessarily so when you move from the
22 WS system to the GS system. Many of the jobs are simply not
23 comparable. As I said, in this case, we have not contended,
24 it has not really been litigated whether there was an
25 increase in responsibility here, but as far as Congress's

1 intent in passing the statute, there was no need for them to
2 provide an automatic two-step increase.

3 Similarly, looking at the 1949 statute, there is
4 no reason to believe that Congress intended to cover WS
5 employees. Back in 1949, Congress was not focusing at all
6 on the WS system. It merely excluded them from the
7 provisions of the Classification Act. Moreover, because the
8 two step increase depends on the steps in the employee's
9 prior grade, it would have made no sense to apply it to
10 employees coming from the WS system.

11 As I said, the WS system at that time was
12 something of a hodge-podge. Many of the grades did not have
13 steps at all, and if Congress had applied this provision to
14 the WS system, it really would not have known what sort of
15 increases it was guaranteeing to the employees.

16 Even as the system has been refined today, it
17 still makes little sense for this provision to apply to
18 promotions from the WS system. I think the best
19 illustration of how Respondent's contention diverges from
20 Congressional intent is to notice that the steps, the
21 gradations within the grades in the WS system are larger
22 than the gradations within the GS system. The statute sets
23 the steps in the WS system at 4 percent increases, so
24 therefore the Respondents are actually asking for a greater
25 benefit here than would be given to persons who are promoted

1 within the GS system, which is what the statute was directly
2 aimed at.

3 Now, the Court of Claims decision rests simply on
4 its placing undue influence on the one word "promotion" in
5 the statute, but there are several difficulties with the
6 Court's analysis. First and most obvious, of course, is
7 that it omits to read the rest of the statute.

8 More importantly, the Court of Claims itself
9 conceded that promotions are also covered by Section
10 5334(a), the general provision that permits OPM to set the
11 basic rates of pay for employees who move from one job to
12 another. Therefore, the mere fact, the mere
13 characterization of a personnel action as a promotion cannot
14 in and of itself determine whether it is properly considered
15 under 5334(a) or 5334(b).

16 I would like to turn away from the language of the
17 statute now to discuss the consistent administrative
18 construction here, which we think is also dispositive of the
19 issue.

20 In this case, OPM and its predecessor, the Civil
21 Service Commission, has consistently adhered to the position
22 that Section 5334(b) applies only to promotions within the
23 GS system. The regulation was first published in 1950, only
24 one year after the statute was enacted, and it has not been
25 altered since. Congress has apparently --

1 QUESTION: Counsel, let me just interrupt you
2 again. When you say the regulation was first published in
3 1950, does that mean that 531.204(a)(1) as it now reads was
4 in the same form in 1950?

5 MR. HOROWITZ: Well, we have quoted the exact form
6 in our brief. It is slightly different. At that time it
7 said that it applies to -- promotion applies to employees in
8 Classification Act positions, I believe.

9 QUESTION: I see.

10 MR. HOROWITZ: Now, the reason that the language
11 has been changed from employees under the Classification Act
12 to employees in the General Schedule is that in 1949 and for
13 a short period thereafter, the Classification Act actually
14 set up two schedules. There was a separate schedule called
15 a crafts protection schedule, I believe, and Section 5334(b)
16 also applied to employees in that schedule by the terms of
17 the statute.

18 In 1954, Congress decided that there was no need
19 for this second schedule, and all those positions were
20 converted to General Schedule positions. So, today, to talk
21 about employees covered by the Classification Act or
22 employees in the General Schedule, that is synonymous, but
23 in 1950, had the regulation read in the General Schedule,
24 that would not exactly have been accurate. I am not sure if
25 that was clear.

1 The Classification Act has been amended several
2 times since these regulations were promulgated, but Congress
3 has never made any effort to change them. The regulations
4 have been brought to the attention of Congress, as we
5 pointed out in our brief, and have never been --

6 QUESTION: Did you say, Mr. Horowitz, when that
7 regulation at Page 6 of your petition was adopted? The
8 OPM --

9 MR. HOROWITZ: When the exact language?

10 QUESTION: No, when was -- yes, the one that you
11 quoted.

12 MR. HOROWITZ: I think this exact language perhaps
13 dates back to 1965. I am not sure if there have been minor
14 changes since then. I think it goes back no earlier than
15 1965, but the thrust of the regulation has never changed.

16 QUESTION: May I ask one more question about the
17 regulation in its pre-1965 form? Did you tell me that at
18 that time the Classification Act included both the General
19 Schedule people and a special kind of craft people? What
20 were the craft people who were covered?

21 MR. HOROWITZ: Well, they were -- they are all
22 people who are now covered by the General Schedule. They
23 are not these blue collar workers who are covered by the WS
24 system. They were janitors. It was called the crafts
25 protection custodial schedule. So I think custodial

1 workers, guards in federal buildings, and the craft workers,
2 I think, were mechanics who repaired things in federal
3 buildings, things like that.

4 QUESTION: And all of that category is now part of
5 the GS schedule, and none of it is in the WS schedule?

6 MR. HOROWITZ: Right. In 1954 all those positions
7 were converted to GS positions.

8 I think it is particularly significant that
9 Congress made no effort to change the system in 1972, when
10 it focused on the WS employees and enacted special
11 provisions for WS employees. In particular, in 1972,
12 Congress gave WS employees some benefits that had earlier
13 been given to GS employees, such as the retained basic pay
14 provision, which is discussed in our reply brief. Yet it
15 did not enact any provision providing for an automatic
16 increase, both -- either from WS to GS positions or even for
17 promotions within the WS system.

18 Moreover, to the extent that there is any
19 ambiguity in Section 5334(b), this seems to be a classic
20 case of deferring to the agency's interpretation. It is a
21 specialized area where the agency has developed a particular
22 expertise. The regulations are contemporaneous with the
23 enactment of the statute, and are long-standing and
24 consistent. Indeed, the Classification Act of 1949 was
25 based on bills that were submitted by the agency involved

1 here, the Civil Service Commission, and the legislative
2 history reflects the Commission's view that this section was
3 in accord with its views.

4 It is hard to imagine a more well established
5 interpretation. It has never seriously been challenged for
6 30 years, and indeed, even in this litigation, the
7 Respondents did not allege that the two step increase
8 applied to them until some time after their petition in the
9 Court of Claims was filed, because if you examine the
10 petition that is reprinted in the appendix, you will see
11 that they at that time asked only for the one step increases
12 that had mistakenly been given to them by the agency.

13 QUESTION: You don't suggest, do you, that if the
14 court thinks a regulation is contrary to the plain range of
15 the statute, that it must defer to the agency's view that it
16 is not contrary to the plain range --

17 MR. HOROWITZ: No, not at all.

18 QUESTION: Then it is just a question of who is
19 right.

20 MR. HOROWITZ: Well --

21 QUESTION: And you say the Court was wrong and the
22 agency was right.

23 MR. HOROWITZ: No, we say, of course, that the
24 plain language supports our position --

25 QUESTION: Exactly.

1 MR. HOROWITZ: -- but that there are -- there are
2 certainly many statutes that Congress has enacted that are
3 ambiguous and can be read either way.

4 QUESTION: Oh, I understand that. I understand
5 that.

6 MR. HOROWITZ: And in those cases it is
7 appropriate to --

8 QUESTION: I know, but you say that the plain
9 language supports you or at least that it is ambiguous, and
10 you disagree with the Court, but the Court needn't defer to
11 your view.

12 MR. HOROWITZ: No. Only if they find it ambiguous
13 should they be deferring to the agency.

14 QUESTION: Exactly.

15 CHIEF JUSTICE BURGER: Mr. Heise.

16 ORAL ARGUMENT OF JOHN I. HEISE, JR., ESQ.,

17 ON BEHALF OF THE RESPONDENT

18 MR. HEISE: Mr. Chief Justice, and may it please
19 the Court, Respondents do in fact focus upon the plain
20 language of the statute, and we contend that there is in
21 fact no ambiguity whatsoever, that in point of fact
22 employees promoted to a higher grade are entitled to the pay
23 implementation provisions of 5334(b), and so the Court of
24 Claims has found.

25 We suggest that we can focus upon the fact that

1 these people are employees, we can focus upon the fact that
2 they were in fact promoted to a higher grade position, and
3 therefore the pay implementation provisions should follow.

4 Now, it is important to ascertain at the outset
5 that each Respondent here was in fact promoted. The
6 promotion didn't come after the pay. The promotion was in
7 point of fact what took place. That was the event. Now,
8 the Wage System has grades and had grades and had grades way
9 back to immediately post-World War Two period, just as the
10 General Schedule had grades and has had grades for an
11 extensive period of time.

12 In like fashion, the Wage System has steps, and we
13 point out in our briefing and the Court below appropriately
14 found that each of these Respondents was in fact promoted
15 from one position to a higher position. This was conceded
16 below, and the mechanics of going beneath or behind the
17 personnel action of promotion was never raised, nor does the
18 administrative record support any position that it could
19 have been raised, because these were in fact promotions.

20 QUESTION: But the promotions were from one system
21 to another, were they not?

22 MR. HEISE: Yes, the mechanics of the promotion,
23 they were from one system to another, but in point of fact,
24 in examining the administrative record, it is clear that
25 each of these Respondents applied under a merit promotion

1 advertisement program for a position at a higher grade, and
2 each was in fact selected by reason of the qualifications
3 which the employee had demonstrated in the journeyman level
4 as a wage scale employee or Wage System employee at the
5 lower level. So, there was in fact an individualized
6 treatment, if you would, for each of these individuals, and
7 this is the critical part of the case.

8 We must focus upon the fact that the statute
9 refers to two actions, promotions and transfers to a higher
10 grade. Now, transfer, of course, involves moving from one
11 agency to another or from one branch of the government to
12 another, so you would be transferred to a higher grade
13 position, but each of those types of actions which are set
14 forth in the statute concern the individual employee, and it
15 must be contrasted with the mass program of conversion.

16 If a group of jobs or positions are converted from
17 one type to another, the statute would not be applicable,
18 because it does not involve the individualized concept of
19 promotion, and in this case each of these boys did in fact
20 move from the position of ship surveyor in the Wage System
21 up to a position of quality assurance specialist,
22 supervisory production controller, engineering technician,
23 and the like, and each was in fact selected following
24 selective processes which are peculiar to the selection
25 process, in competition with other employees, and that is

1 why in point of fact below there was never any contention as
2 to whether this was in fact a promotion.

3 Now, our position, of course, is that the Civil
4 Service Commission regulation, now the Office of Personnel
5 Management, is contrary to the language and intent in
6 Congress when it limits --

7 QUESTION: Mr. Heise --

8 MR. HEISE: Yes, sir.

9 QUESTION: -- may I interrupt you with a
10 hypothetical question that has troubled me? As I understand
11 it, under the Wage System you can have different rates in
12 different parts of the country, and supposing in one part of
13 the country there was a very low salary scale and in other
14 parts very high, and the same position in those two parts of
15 the country were both transferred into the GS system. For
16 one it meant a reduction in salary; for the other it meant
17 an increase. Would they both be promotions?

18 MR. HEISE: No, they would not be, because the
19 concept that you are referring to, Your Honor, has to do
20 with not being selected as a result of a competitive program
21 or not being selected because of --

22 QUESTION: Well, confining ourselves for the
23 moment to the transfer to a higher grade. Say in both cases
24 they were W system grade something or other, and they had
25 the same title on the grades in both cases, before and

1 after. One would still be a promotion and one would not.

2 MR. HEISE: No, both would -- if they are
3 transferred to a higher grade, that would be a transfer.

4 QUESTION: No, transferred to a different grade
5 with, you know, a new number and a new --

6 MR. HEISE: If it were a promotion, I think what
7 we are getting at --

8 QUESTION: Well, how do I decide whether it is --

9 MR. HEISE: If it were a promotion --

10 QUESTION: Yes.

11 MR. HEISE: -- one employee coming from one area
12 could get a higher rate of pay in the new position than the
13 other, just as if I am a GS 11, Step 2, and I am promoted to
14 a GS 12, and another employee is a GS 11, Step 5, and that
15 employee is promoted to the higher grade, by reason of the
16 fact that the first employee had one -- a lower original
17 grade pay than the other employee, he would in fact receive
18 or she would in fact receive a lower rate upon promotion.

19 It goes back to what you were receiving at the
20 time that you were in fact promoted. Now, this whole
21 concept of moving across the country doesn't apply here and
22 normally wouldn't apply. It normally wouldn't --

23 QUESTION: No, I am not talking about moving
24 across the country, but the GS schedules are uniform across
25 the country --

1 MR. HEISE: This is correct.

2 QUESTION: -- so if a man in Alaska is transferred
3 and a man in Florida is transferred, and both of them had
4 the same job histories but had very dramatically different
5 salaries, so that one would expect to go down and the other
6 go up.

7 MR. HEISE: If it is a transfer to a higher grade,
8 you would not go down. If you are promoted, you would not
9 go down.

10 QUESTION: How do you determine whether it is a
11 transfer to a higher grade when you move from WS to GS?
12 That is my question.

13 MR. HEISE: Well, if it is a promotion, it is
14 going to be --

15 QUESTION: But how do you determine whether it is
16 a promotion?

17 MR. HEISE: Well, the decision of whether it is a
18 promotion or not is made by the selecting official, the
19 operating official in most cases, or the operating --

20 QUESTION: Well, can he call it a promotion or not
21 as he chooses?

22 MR. HEISE: Oh, no. It is clear that if it is a
23 promotion, it is a move to a position of higher
24 responsibility -

25 QUESTION: Well, but my example -- please stick

1 with my example. The same change in responsibility is made
2 in Alaska and in Florida, and in one case it would normally
3 result in a lower salary and in another in a higher salary.
4 Are they both promotions or are neither promotions, or how
5 do I tell?

6 MR. HEISE: Both would be promotions, but the one
7 individual might get a higher salary following 5334(b) than
8 the other by reason of the salary that he started with, but
9 in point of fact both would be promoted, and I gave the
10 indication that this is true in the GS schedule. If one
11 employee is at one GS level --

12 QUESTION: Well, I understand the GS. And what is
13 the reason you call it a promotion?

14 MR. HEISE: Because the individual employee is
15 selected for a position of greater responsibility and
16 greater duties. That is why it is called a promotion.

17 QUESTION: The statute doesn't define promotion in
18 those terms, though.

19 MR. HEISE: The standard --

20 QUESTION: Does it?

21 MR. HEISE: Well, yes, it does, in point of fact.
22 The definition of promotion does in point of fact say --
23 talks not only from one General Schedule grade to a higher
24 General Schedule grade, from one grade to another, but the
25 basic concept of how you get into a promotion is, you are

1 selected, and in point of fact you wouldn't be promoted and
2 go into a lower salary rate. That wouldn't be a promotion.
3 People wouldn't apply for a position to have less pay than
4 they originally received under normal --

5 QUESTION: Well, they might if there were going to
6 be a reduction in force or something. Well, anyway --

7 MR. HEISE: Well, no -- Well, reduction in force,
8 you don't -- you are not promoted under reductions in
9 force. You cannot be.

10 QUESTION: Well, Mr. Heise, do you disagree with
11 the statement in the government's reply brief on Page 1 in
12 the last sentence of the first paragraph where they say,
13 when employees are "promoted" to the GS system from lower
14 paying positions in the wholly separate WS system, there is
15 no comparable inherent increase in responsibility?

16 MR. HEISE: I disagree emphatically on the terms
17 of the case which is here, and under the normal parlance of
18 defining why the employee would be promoted, because, in
19 point of fact, the positions here, they were promoted to
20 positions of greater responsibility and duty, and this is
21 the parlance of promotion. If in point of fact they were
22 moving all the ship surveyors as a class or the position of
23 ship surveyor into the General Schedule, a movement, that
24 might be a conversion, but that would not be a promotion,
25 and you must understand or we must understand in examining

1 this statute the difference between conversion as a class
2 group and promotion or transfer to a higher grade as an
3 individualized treatment.

4 I therefore do take exception with the
5 government's position, trying to equate and call promotion
6 as a change or call promotion as a conversion when in point
7 of fact they are different types of actions.

8 QUESTION: What statutory or administrative
9 definition of promotion do you rely on?

10 MR. HEISE: We rely on the administrative
11 interpretation that in point of fact these employees went
12 through a merit promotion procedure --

13 QUESTION: I mean, is there either a statute or a
14 regulation that defines the term "promotion"?

15 MR. HEISE: There is a regulation that is before
16 the Court which talks about promotion, and that is found in
17 5 CFR 531.202(h)(2), and that, and the Court of Claims
18 referred to it, and said promotion means a change of employ
19 while continuously employed from one General Schedule grade
20 to a higher General Schedule grade, or a lower rate paid
21 under authority other than Subchapter 3 of Chapter 53, which
22 would be a -- of Title 5, which would --

23 QUESTION: But that just uses the word
24 "promotion". It doesn't define it.

25 MR. HEISE: Well, most of the definitions talk

1 about what is the accomplished fact, but in point of fact,
2 as the Congress talked about, promotions being a promotion
3 in duties, and this has been the generally accepted
4 criteria, when you move from one GS grade to another and you
5 are promoted, you get higher duties. When you move from a
6 Wage System grade to a GS system grade by a promotion, your
7 duties are more complex, as they were here. And this is the
8 position in the case, the more complex duties.

9 Now, to focus on any particular definition either
10 in the regulations or in the statute which so defines, the
11 answer is, I cannot per se, however, because most of the
12 regulatory concepts deal with what happens after the
13 selecting official has said you are better qualified.

14 QUESTION: And 5 USC 5102(a)(5), which I take it
15 is the basic statute, simply says that when your
16 responsibility increases, you get more money. It doesn't
17 talk about promotions.

18 MR. HEISE: Well, but in the legislative intent
19 which we have recited in our brief in the Court of Claims,
20 also made reference to back in 1949, Congress said a
21 promotion in pay, and the committee report, should accompany
22 a promotion of duties, and that is the basic concept. You
23 should get more money.

24 QUESTION: Well, an increase in pay, didn't it?

25 MR. HEISE: I think they used promotion, an

1 increase in pay or a promotion in pay, more pay for increase
2 in duties, and that is the concept that is built into this
3 particular statute.

4 Now, if we test the government's case of
5 limitation, we feel that it is conclusive that the statute
6 itself on its face certainly doesn't limit these promotions
7 to only within the General Schedule. As we pointed out, the
8 legislative intent was clear that an increase in pay should
9 accompany a promotion in duty. Under the government's
10 theory in the case, their application of this highest
11 previous rate rule, which is an administrative regulation,
12 you could be promoted under the government's theory and
13 receive no increase in pay whatsoever, because if you
14 annualized, if you would, the Wage System salary and then
15 matched it over under their theory to the General Schedule
16 salary, if they matched exactly, you would get no increase,
17 and in their brief, they even indicate -- the government
18 even indicates that under their theory a person could
19 receive less salary, and certainly Congress never intended
20 that in any stretch of the imagination, and that is what the
21 Court of Claims relied upon, that an increase, a promotion,
22 having been selected for promotion, it necessarily follows
23 that you should receive more pay.

24 QUESTION: Do you agree that the Court of Claims
25 struck down a regulation?

1 MR. HEISE: We do. The Court found it
2 inconsistent with the statute. If there is any question
3 about how this movement back and forth has developed, we
4 suggest that the Court can example the Proto case, which we
5 have cited -- I believe it is at Footnote 12 on Page 13 of
6 our brief. Mr. Proto was one of the Respondents in this
7 case.

8 In 1968, he, as a Wage System employee, was
9 promoted to General Schedule. Then he was changed back to
10 lower grade pursuant to a reduction in force, and at that
11 time they called it a change to lower grade. He moved from
12 a higher grade position in the General Schedule back to the
13 lower grade Wage System position, and the courts -- I mean,
14 and the agency, its own personnel officials, so described it.

15 Then, later on, he moved back up again, and then
16 he was demoted back, and finally the action which is before
17 the Court now, part of it 1973, he was promoted again. So,
18 long before 1972, the agency itself, this very agency was
19 using the grade concept to apply Wage System -- to apply to
20 Wage System employees.

21 Now, the point here is that the discretion isn't
22 in the paying. The discretion occurs in the selecting
23 official. The personnel official and the operating
24 officials who call it a promotion then set up the criteria
25 for the employee to be paid, and this necessarily follows.

1 Now, the point has been made that the 1972
2 legislation impliedly in some way gave rise to an approval
3 of the regulations which the Civil Service Commission had
4 promulgated, and this just isn't so, because if we contrast
5 it with the 1954 legislation, which has been called to the
6 Court's attention, involving the movement of these crafts,
7 protective, and custodial employees into the General
8 Schedule, Congress at that time specifically stated that
9 they would not be involved or would not be construed, or
10 these actions, I should say, this conversion, Congress said
11 specifically shall not be construed to be transfers or
12 promotions within the meaning of 802, which is the
13 predecessor to 5334(b) of the Classification Act.

14 So, Congress, if they meant that here, in the case
15 of the Wage System employees, could have said the same
16 thing, but because they didn't, the obvious intent of
17 Congress, we submit, was in point of fact to include them,
18 and so the Court of Claims found.

19 Now, the point has been made that the Civil
20 Service Commission representative, in making his remarks to
21 the Congress, pointed out that this particular 1949
22 legislation involved the General Schedule, but we contend
23 that this is not controlling because the Congress in its
24 committee report said nothing of the sort. In point of
25 fact, if Congress had intended to exclude this schedule of

1 employees from any of the language of 5334(b), it has had
2 ample opportunity to say so, over a period of time.

3 The 1972 legislation itself dealt with
4 nationalizing, if you would, codifying what had previously
5 been under executive order and previously under
6 administrative rule, a national system of wage board or Wage
7 System employees, so that there would be uniformity in
8 grades, or I should say uniformity in step and uniformity in
9 concept. Not uniformity in rate, because the rate depends
10 on the particular area. But that particular 1972
11 legislation did not in any way, shape, or form address
12 itself to the issue which we have before the Court here,
13 namely, promotions, or namely, the transfer to a higher
14 grade.

15 We feel that in examining the 1950 regulation
16 which has been relied upon by the government in its brief,
17 we at Page -- Footnote 20 of Page 23 of our brief did point
18 out how this particular regulation has vacillated back and
19 forth to recite repromotions, to talk about promotions, and
20 talk about a number of things. Our position, of course, is
21 that there has been an inconsistency in application of this
22 -- of the statute by the agency below, and the inconsistency
23 was highlighted in this very case, because in one instance
24 they applied what they called the highest previous rate
25 rule, and in another instance they applied 5334(b) in

1 essence, and Respondent Libretto, who was the Respondent
2 below that gave rise to the case which finally arose in the
3 Court of Claims, because he said to the agency, I should be
4 getting the benefits of 5334(b), he at all times claimed
5 that he was entitled to the two step increase which the
6 statute provides.

7 So, our position in sum is that the Court of
8 Claims was in fact correct in its analysis of the
9 application of the statute, that the Civil Service
10 regulation, the Office of Personnel Management regulation
11 now, is contrary to the intent of Congress, and we submit
12 that the judgment of the Court of Claims should be
13 affirmed.

14 Thank you.

15 CHIEF JUSTICE BURGER: Do you have anything
16 further, Mr. Horowitz?

17 ORAL STATEMENT OF ALAN I. HOROWITZ, ESQ.,

18 ON BEHALF OF THE PETITIONER - REBUTTAL

19 MR. HOROWITZ: A couple of points, Mr. Chief
20 Justice.

21 I think a critical point here is that there is
22 just no way to decide what a promotion is under the
23 Respondent's contention. To get back to Mr. Justice
24 Stevens' question, promotions in the regulations are defined
25 only in terms of salary levels, and comparisons between

1 grades in the WS system and grades in the GS system are also
2 only in terms of salary level.

3 Thus, in Mr. Justice Stevens' hypothetical, where
4 an employee moved from the same job in Georgia or in Alaska,
5 where in one case he was getting a pay increase and in one
6 case he was getting a pay decrease, it is clear under the
7 regulations that one of those would be characterized as
8 promotion and one would be characterized as a demotion, and
9 the relevant regulation here is 5 CFR 536.201.

10 So, the only way, really, to deal with
11 Respondent's contention is to take a common sense view of
12 the word "promotion", to look at whether the employee has
13 gone to some higher responsibility in his new job, and the
14 difficulty with that is that it leads the Courts down a path
15 of looking at every case, whether there has been a change in
16 responsibility. In many cases, the jobs are pretty
17 difficult to compare.

18 I would also like to correct what I think is a
19 misstatement, and that is that the agency here never applied
20 5334(b). It never gave these employees a two step
21 increase. It gave them a one step increase under a
22 misinterpretation of the regulations, not of the statute,
23 and in fact under the Court of Claims decision, the
24 Respondents here ended up with much higher salary increases
25 than they had even gotten under the original mistake.

1 One other point as far as this conversion in 1954
2 of the crafts protection schedule, as I pointed out earlier,
3 those employees were within the Classification Act, so if
4 Congress had not specified that this mass conversion was
5 excluded from 5334(b), 5334(b) by its terms would have
6 applied to those employees, but as we have argued, by its
7 terms, it does not apply and never has applied to WS
8 employees, and that can just be seen by looking at the
9 definition of the term "grade" as it existed back then, in
10 1954.

11 As far as Mr. Justice Stevens' earlier question to
12 me about the use of the word "includes" in the definition of
13 "grade", upon looking at the definition again, I think the
14 point is that grade includes all the jobs that are
15 classified at that particular grade, and I think the use of
16 the word "includes" makes sense there as being a collection
17 of all the different jobs, but in fact it is clear from the
18 context that it refers only to grades in the General
19 Schedule, there would be no reason for the Court -- for
20 Congress, rather, to have implied the WS system at the same
21 time.

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

24 (Whereupon, at 11:51 o'clock a.m., the case in the
25 above-entitled matter was submitted.)

CERTIFICATION

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UNITED STATES v. JOSEPH J. CLARK, ET AL., No. 80-1121

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BY

Suzanne Young

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